

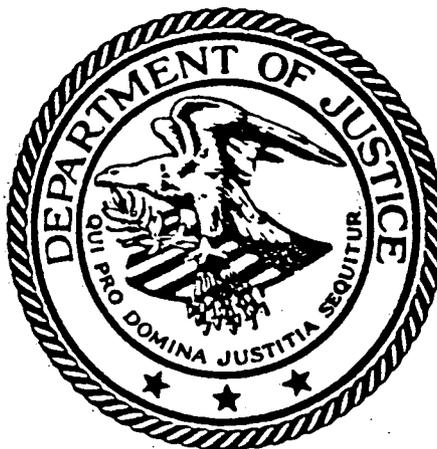
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UNITED STATES ATTORNEYS
BULLETIN

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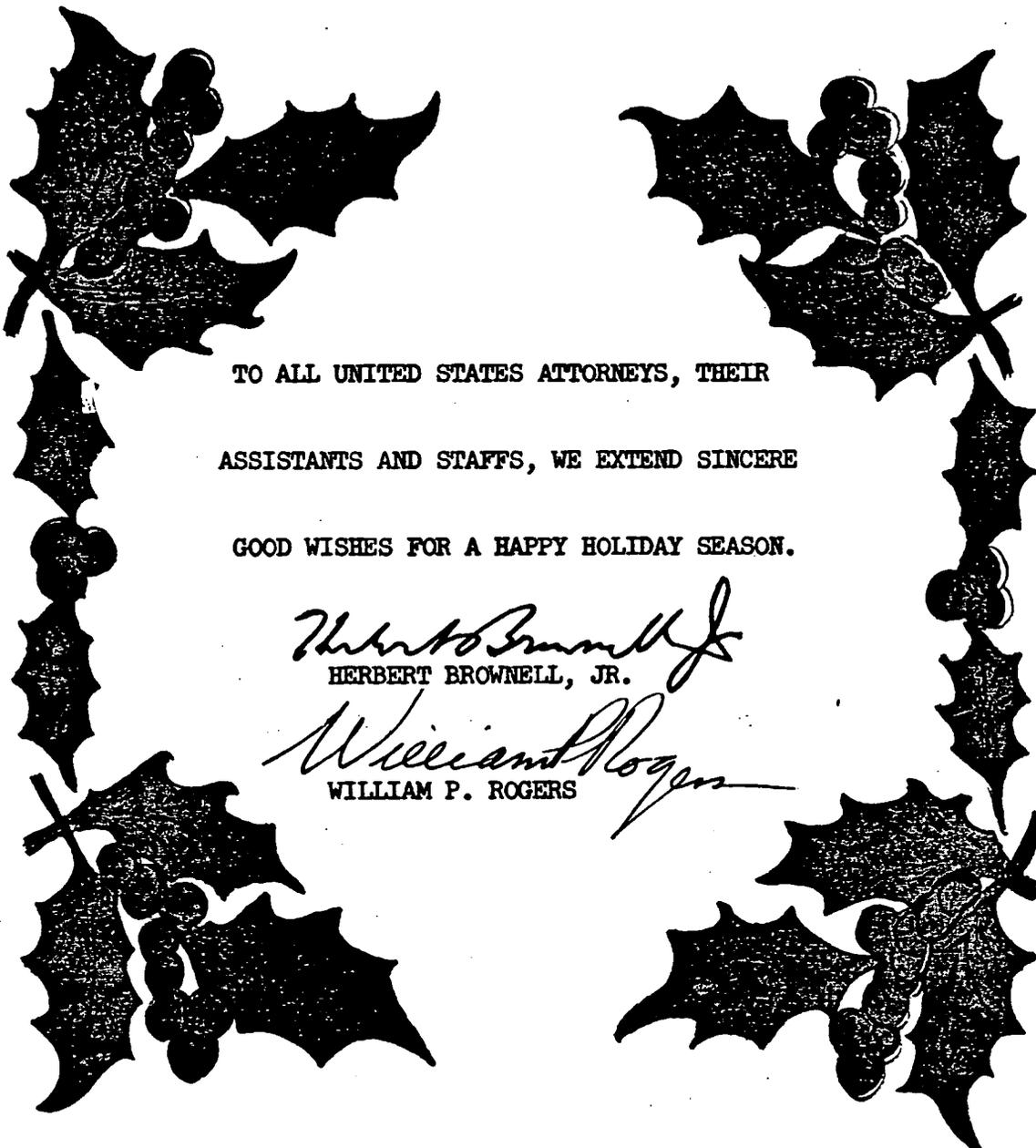
DEPARTMENT OF JUSTICE PERSONNEL

UNITED STATES ATTORNEYS BULLETIN

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TO ALL UNITED STATES ATTORNEYS, THEIR
ASSISTANTS AND STAFFS, WE EXTEND SINCERE
GOOD WISHES FOR A HAPPY HOLIDAY SEASON.

Herbert Brownell, Jr.
HERBERT BROWNELL, JR.

William P. Rogers
WILLIAM P. ROGERS

VISITS TO UNITED STATES ATTORNEYS' OFFICES

The Executive Office for United States Attorneys is responsible for the supervision of the operations of the United States Attorneys' offices. This supervision includes periodic visits to United States Attorneys' offices by Administrative Attorneys of the Executive Office for the purpose of assisting the United States Attorneys to improve procedures and to help in any other way possible. With the exception of routine examinations of leave and general expense and allotment records by examiners of the Administrative Division, there is no authority for general examination of United States Attorneys' offices by personnel other than those of the Executive Office for United States Attorneys. United States Attorneys who have management problems or questions relating to the operation of their offices should request assistance in the solution of such problems from the Executive Office which has sole jurisdiction over this function.

* * *

JUDGMENT-DEBTOR INDEX

Page 15 of the United States Attorneys Docket and Reporting System Manual states that a Debtor Index and Payment Record (Form USA-117) is to be prepared in each case in which money is due the United States. Paragraph 8 of Department Memo No. 207 also instructs that prescribed collection records covering outstanding claims and uncollected judgments must be maintained in each United States Attorney's office, and directs attention to the required use of Form No. USA-117.

The foregoing instructions are official Departmental procedure for collection matters and are applicable to all United States Attorneys' offices without exception. Where, for any reason, a Debtor Index and Payment Record system has not been established in any district, written explanation therefor should be forwarded to the Executive Office for United States Attorneys. Uniformity and efficiency of office operation require that all United States Attorneys follow the procedures prescribed by the Department in all aspects of their work.

* * *

JOB WELL DONE

An outstanding and highly commendable example of diligence in the interests of the Government occurred in the office of United States Attorney Hartwell Davis, Middle District of Alabama, when, through the alertness of Miss Lola Cain, a clerk in that office for many years, the Government succeeded in collecting \$4,755.07, representing the full amount of a judgment with interest, and \$37.00 in court costs. In 1954,

the judgment had been declared uncollectible after a financial investigation by the Department of Agriculture had failed to disclose any assets owned by the debtor. In view of this, the Department of Justice had authorized Mr. Davis to close the file. Neither this Department nor Mr. Davis had any knowledge of the debtor's whereabouts or of any property owned by him. Recently, however, Miss Cain noticed that the debtor had bought a farm and cattle in the County. She brought this information to the attention of Mr. Davis and full recovery of the Government's debt was achieved promptly. The Department commends Miss Cain upon this accomplishment which is in the best tradition of the Federal service.

The Postal Inspector in Charge, St. Paul, Minnesota, has written to United States Attorney Robert Vogel, District of North Dakota, expressing appreciation for the excellent manner in which Mr. Vogel handled a recent group of mail fraud cases and extending congratulations upon their successful conclusion. The letter stated that the results achieved should be of great significance to companies operating what are commonly known as "seed peddler organizations."

Upon his transfer to the Washington, D. C. office, the Regional Attorney, Interstate Commerce Commission, wrote to United States Attorney N. Welch Morrisette, Jr., Eastern District of South Carolina, expressing sincere appreciation for his very courteous and wonderful cooperation in the handling of Interstate Commerce Commission cases and stating that it has been a pleasure to work with Mr. Morrisette and his Assistants.

The FBI Special Agent in Charge, Dallas, Texas, has written to United States Attorney Heard L. Floore, Northern District of Texas, commending the persevering, thorough and impressive manner in which Assistant United States Attorney Cavett Binion prepared and presented a recent Dwyer Act case which was successfully concluded with a finding of guilty and imposition of sentence. The letter stated that the trial of the case was rendered more difficult by the fact that efforts to apprehend the defendant had extended over a period of five years and that many of the original witnesses were no longer available.

Opposing counsel in a recent case handled by Assistant United States Attorneys Volney V. Brown, Jr. and Robert J. Jensen, Southern District of California, has written to compliment Mr. Brown and Mr. Jensen on the thorough manner in which they prepared the case and upon their excellent presentation in Court. The letter observed that both Mr. Brown and Mr. Jensen were fair and acted as gentlemen throughout the proceeding.

The Commanding General, Southern California Sub-District and Fort MacArthur, has written to United States Attorney Laughlin E. Waters, Southern District of California, commending Assistant United States Attorney Edwin H. Armstrong for his competent handling of law suits involving Fort MacArthur personnel. The letter stated that Mr. Armstrong's spirit of cooperation and professional competence have resulted in the saving of a great deal of time and money and have helped to establish a fine working relationship between the Department of Justice and the Army in Southern California.

The District Postal Inspector, Seattle, Washington, has written to the Attorney General, expressing appreciation for the excellent manner in which United States Attorney William B. Bantz and Assistant United States Attorney William M. Tugman handled two recent mail fraud cases. The letter stated that both cases were of unusual difficulty and involved lengthy trials with consideration of hundreds of exhibits and the correlation of the testimony of many witnesses. The letter stated that the work of Mr. Bantz and Mr. Tugman in the cases was outstanding, a tribute to their ability and a credit to the Department of Justice.

Opposing counsel in a case handled by Assistant United States Attorney Theodore G. Gilinsky, Northern District of Iowa, has written to Mr. Gilinsky, congratulating him upon his ingenious brief and presentation of a recent case. The letter stated that Mr. Gilinsky's work was very much better than the case he had and that it is the mark of a good lawyer to make his case seem so without being in any way unfair. The letter also stated that Mr. Gilinsky's brevity was a real gift. In commenting on this letter, United States Attorney F. E. Van Alstine has observed that the writer of the letter is one of the ablest lawyers in the Northern District of Iowa.

The Assistant General Counsel, Food and Drug Division, Department of Health, Education and Welfare, has written to United States Attorney D. Malcolm Anderson, Western District of Pennsylvania, expressing deep appreciation for the very fine performance of Assistant United States Attorney John A. DeMay, Jr. in a recent case in which judgment was obtained for the Government. The letter observed that Mr. DeMay's great energy and drive made it possible for the Government to be fully prepared with its many witnesses and that his cross-examination of the defendants was perfectly executed and lacked nothing to be desired.

Assistant United States Attorney Loren E. Van Brocklin (N.D. Ohio), who will resign from the Federal service in the near future to assume office as County Prosecutor of Mahoning County, Ohio, has received a letter from the Postal Inspector in Charge expressing appreciation for the splendid cooperation and assistance rendered by Mr. Van Brocklin to the Postal Inspection Service for many years. The letter observed that the knowledge that he had served the Government in an efficient and conscientious manner should be a source of personal satisfaction to Mr. Van Brocklin.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General William F. Tompkins

SUBVERSIVE ACTIVITIES

Unlawful Exportation of Firearms. United States v. Juan Maria Issa (S.D. Fla.). On September 27, 1956, Juan Maria Issa was indicted by a federal grand jury for wilfully engaging in the business of exporting firearms from the United States to El Salvador without having first registered with the Department of State in violation of 22 U.S.C. 1934. Trial commenced on December 3, 1956, and the jury returned a verdict of guilty on December 4, 1956. The trial judge has referred the matter to the probation officer for presentence investigation; no date has been set for sentencing.

Staff: United States Attorney James L. Gullmartin and
Assistant United States Attorney E. David Rosen (S.D. Fla.)

False Statement - National Labor Relations Board - Affidavit of Noncommunist Union Officer. United States v. Hugh Bryson (N.D. Calif.) Bryson, who was President of the now defunct International Union of Marine Cooks and Stewards, was indicted by a Federal grand jury on October 12, 1953 for falsely denying his membership in and affiliation with the Communist Party in an Affidavit of Noncommunist Union Officer which he filed with the National Labor Relations Board. Trial was held in San Francisco, California and on May 25, 1955, the petit jury found him guilty of denying affiliation and not guilty as to denying membership. The conviction was affirmed by the Circuit Court of Appeals for the Ninth Circuit on November 30, 1956.

Staff: United States Attorney Lloyd H. Burke and
Assistant United States Attorney Robert H.
Schnacke (N.D. Calif.)

* * *

C I V I L D I V I S I O N

Assistant Attorney General George C. Doub

S U P R E M E C O U R TT R A N S P O R T A T I O N

Primary Jurisdiction Rule—Referral of Administrative Questions to ICC Despite Expiration of Two-Year Statutory Limitation Period—Availability of Estoppel Defense to Government as Shipper. United States v. Western Pacific Railroad Co. et al. (Supreme Court, December 3, 1956). During World War II and the Korean conflict, the Army shipped by rail huge quantities of steel bomb cases filled with napalm gel, which is gasoline thickened or gelatinized by the addition of soap powder. As shipped, without any explosive or incendiary element, the goods were relatively safe and furnished even less of a transportation hazard than liquid gasoline. The Government contended that the fifth-class rates for gasoline should apply to the shipments. The Court of Claims, however, relied on its earlier holding (Union Pacific Railroad v. United States, 125 C.Cls. 390) that the high first-class, "explosive or incendiary bomb" rates applied. In addition, the Court of Claims, in awarding summary judgment to the railroads, denied the Government's motion to suspend proceedings and refer the matter to the Interstate Commerce Commission. The Supreme Court reversed. It held (1) that the lower court violated the primary jurisdiction rule in failing to suspend and refer. Whether viewed as an issue of tariff construction or reasonableness, the identical cost allocation factors are determinative. Proper evaluation of these factors calls for specialized knowledge of "intricate aspects of transportation." Hence, the referral sought by the Government should have been granted. The Supreme Court further ruled (2) that the expiration of the two-year period of limitation in Section 16(3) of the Interstate Commerce Act in no way bars such a referral. The Court rejected the railroads' argument that the Government could have protected itself against the running of the two-year period by filing an affirmative reparation claim with the Commission within the two-year period. Section 322 of the Transportation Act must be construed as having "relieved the Government from filing such anticipatory suits by expressly authorizing the General Accounting Office to deduct overpayments from subsequent bills of the carrier if, on post-audit, it finds that the United States has been overcharged." The Government, by using its post-audit and deduction rights under Section 322, does not forfeit any of its rights or defenses in suits filed by the railroads after the two-year period has run. On this phase of the case, the Court expressly reserved decision on the question whether the carriers, in filing suit against the United States, are limited by the two-year period of Section 16(3) of the Interstate Commerce Act instead of the six-year period afforded in the Tucker Act, 28 U.S.C. 2501. This reservation casts considerable doubt on consistent holdings for the past 30 years to the effect that carriers may ignore the two-year period and take advantage of the longer six-year period. Deciding still another issue of far-reaching importance, the Court held (3) that while the defense of estoppel is concededly unavailable to "a private shipper" when

sued by a railroad, it is fully available to the Government. The Court of Claims was therefore directed to give the Government an opportunity to prove that the railroads were estopped, by virtue of earlier quotations of lower rates through the Official Classification Committee, from claiming the higher, first-class rate. Mr. Justice Douglas dissented from a reference of any of the questions to the Interstate Commerce Commission. The Court's opinion is reported at 25 U.S. Law Week 4028. See also the Court's opinion in United States v. Chesapeake and Ohio Railway (No. 19, December 3, 1956, 25 U.S. Law Week 4033), a companion case involving related problems.

Staff: Morton Hollander (Civil Division)

COURT OF APPEALS

DEFENSE PRODUCTION ACT

Price Regulations Violated by Failure to Maintain Consistent Price Pattern of Pre-control Period. Phillips Chemical Company v. United States (C.A. 10, October 12, 1956). The United States brought suit in the District Court for the Northern District of Oklahoma based on Phillips' discontinuance of freight allowances granted during the pre-control base period on shipments to a few destinations in a well-defined area. The trial court entered judgment for plaintiff in the sum of \$131,362.22. On appeal Phillips argued that the regulation fixed the ceiling at the "highest" base period price, irrespective of any base period price concession therefrom. The Tenth Circuit rejected this contention and affirmed the judgment stating that freight differentials, whether or not called a discount, became an inseparable part of the base period price and to drop or limit them on future sales would violate the spirit and letter of the applicable regulations.

Staff: Katherine H. Johnson (Civil Division)

FEDERAL TORT CLAIMS ACT

Non-Liability of Government to Insurer for Property Damage Sustained by Military Personnel Incident to Service. United States v. United Services Automobile Association, a Reciprocal Insurance Association (C.A.8, November 29, 1956). A private automobile owned by a naval officer and parked on a lot within a naval air base was destroyed when a plane from the base crashed. Plaintiff insurance company, after paying the naval officer for his loss, filed this subrogation action under the Federal Tort Claims Act, alleging that the crash was caused by negligent operation and maintenance of the Navy plane. The district court entered judgment in favor of the insurer and against the United States for the value of the car. The Eighth Circuit, in a well considered opinion, reversed. The Court held that the various "reasons which led the Supreme Court to refuse an active serviceman relief under the Federal Tort Claims Act for personal injury, as set out in Feres v. United States, 340 U.S. 135, appear to be equally persuasive as to service-incident property damage." In addition, the Court, adopting each of the Government's contentions, held that the property damage here

was "service-incident" even though (1) the naval officer kept the car on the base for his personal convenience and pleasure, (2) the car was neither required nor used by him in performing his military duties, and (3) those duties in no way involved the maintenance or operation of the plane which crashed. Since any direct action by the insured service-man on this service-incident claim under the Federal Tort Claims Act would have been barred, the Court held that the subrogation action by the plaintiff insurer was also barred even though the insurer, by Navy Department regulation, was barred from any administrative benefits otherwise available under the Military Personnel Claims Act.

Staff: Morton Hollander (Civil Division)

VETERANS ADMINISTRATION

Administrative Decision Final as Between Two Beneficiaries of Serviceman's Indemnity Insurance — Gratuitous Indemnity Termed Pension for Purposes of Review. Turner v. United States, (C.A. 8, November 1, 1956). Plaintiff, mother of a deceased serviceman insured in the principal sum of \$10,000 under the Serviceman's Indemnity Act of 1951, disputed the award of insurance by the Administrator of Government Affairs to an aunt and uncle of the deceased who claimed as persons in loco parentis to the dead serviceman. The district court sustained the Government's motion to dismiss for lack of jurisdiction on the basis of 28 U.S.C. § 1346 which provides that district courts shall not have jurisdiction in "(1) any civil action or claim for a pension." Plaintiff contended that the phraseology normally associated with these payments -- "indemnity", "beneficiaries", "insured ... against death" -- signifies a contract of insurance. The Court of Appeals held however, that this "insurance" was a gratuitous indemnity — hence a pension — and that in such cases the administrative decision is final and non-reviewable.

Staff: United States Attorney Osro Cobb and
Assistant United States Attorney Walter G. Riddick
(E.D. Ark.)

Insured's Failure to Make Application for Waiver not Excused by Circumstances beyond His Control unless He Was Mentally Incapable of Making Application — Beneficiary's Rights Defined — Implied Notice-Effect of Stipulation. United States v. William H. Sinor (C.A. 5, November 14, 1956). In this beneficiary's suit to recover the proceeds of NSLI policies which had lapsed for non-payment of premiums, the district court entered judgment for plaintiff on stipulated facts. It ruled that the insured had been entitled to waiver of premiums due to his 100% total disability rating for compensation purposes from the date of lapse to his death from leukemia; that the evidence did not support the Government's assertion that the insured was not prevented from making application for waiver due to circumstances beyond his control; and that under the regulations (38 CFR 8.40) the beneficiary was not required to make the same showing with respect to entitlement to

waiver that the insured would have had to make at the time of his death. On appeal, the Court of Appeals for the Fifth Circuit reversed. The Court held that at the time of his death the insured had no right to waiver unless his failure to make timely application for waiver was due to circumstances beyond his control, and that the beneficiary's rights were no greater than the insured's; further, that the burden of proof on the question of the existence of circumstances beyond the insured's control rested on the claimant, not the Government, and that the record failed to disclose such circumstances. The Court reiterated its prior rulings "that where health is claimed as a circumstance beyond the control of the insured it must be shown that he was mentally incapable of making the application for the premium waiver". It also ruled that the compensation service's knowledge of the disability did not constitute notice to the insurance service. Finally, the Court rejected plaintiff's efforts to repudiate the stipulation of facts on appeal and held the stipulation binding. Rives, J., dissented, citing a more liberal construction of the term "circumstances beyond control" prevailing in other jurisdictions. A motion for rehearing has been filed.

Staff: B. Jenkins Middleton and Lionel Kestenbaum
(Civil Division)

DISTRICT COURT

ADMIRALTY

Tucker Act - Suits in Admiralty Act - Shipping. Liberty Mutual Insurance Company v. United States (S.D. N.Y., November 15, 1956). This was an action to enforce a lien by the compensation carrier of the Jarka Corporation, a stevedore firm under contract with the Government. One Elias, an employee of Jarka, was injured aboard a Government vessel and instituted suit against the United States. Liberty asserted a lien by force of the provisions of the Longshoremen's and Harbor Workers' Compensation Act. A compromise in the amount of \$11,170.10 was agreed upon by Elias and the Government under the terms of which the Government paid \$8,500 to Elias and retained the sum of \$2,670.10, the amount of the alleged lien. Liberty was informed of the arrangement before compromise and invited to intervene in the Elias suit but the invitation was declined. Approximately four years thereafter Liberty brought the above action alleging jurisdiction under the Tucker Act. Both parties moved for summary judgment. The Court held that jurisdiction was solely in admiralty and dismissed the complaint because of the two year time bar of the Suits in Admiralty Act, 46 U.S.C. 745.

Staff: Howard F. Fanning (Civil Division)

TUCKER ACT

Tucker Act Does not Confer Jurisdiction for Action in Quasi Contract — Actions for Property Stolen During Customs Inspection not Barred by Limitations of Tort Claims Act. Alliance Assurance Co., Ltd. v. United States (S.D.N.Y. November 15, 1956). Plaintiff, insurer on

imported woolen products, sued the United States for the value of certain goods which disappeared while in possession of the Appraiser of Merchandise for the Bureau of Customs. Two theories were advanced, one for breach of an implied contract of bailment, and a second for negligence. On the first, the Court found that the Tucker Act (28 U.S.C. 1346) which permits actions, inter alia, "upon any express or implied contract with the United States", does not constitute a grant of jurisdiction to the district courts to hear claims founded on contracts implied in law. Such quasi contracts are based upon equitable considerations and the Tucker Act has been held not to encompass such claims. As to the cause of action based on the negligence of the customs officials, it is not barred by Section 2680(c) of the Tort Claims Act which excepts from the coverage of the Act, "Any claim arising in respect of . . . the detention of any goods or merchandise by any office of customs . . .", since in the instant case, the loss to the importer did not arise because of the detention of the goods but because the items were stolen while being processed. In any event, recovery was still denied plaintiff because he did not succeed in establishing negligence on the part of the customs official to the satisfaction of the court.

Staff: United States Attorney Paul W. Williams and
Assistant United States Attorney Foster Bam
(S.D.N.Y.);
Irvin M. Gottlieb (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Warren Olney III

PROSECUTION FOR CENSUS VIOLATIONS

The Bureau of the Census of the Department of Commerce conducts censuses and annual surveys of population, agriculture, manufactures, business, and other subjects at various intervals. The censuses are taken pursuant to the Act of August 31, 1954, 68 Stat. 1012, which codified Title 13, United States Code. The annual surveys are authorized by Section 181 of Title 13.

The authority of Congress to enact legislation providing for the collection of data of the types mentioned and of other types called for by the Bureau's schedules of inquiries has been upheld by the courts in United States v. Moriarity, 106 Fed. 886 (S.D. N.Y. 1901), and in United States v. Sarle, 45 Fed. 191 (D.R.I. 1891).

Violations may arise from the refusal of individuals or businesses to respond to questionnaires or to furnish census enumerators with information pertaining to the censuses and surveys. The penalty provisions for violations by respondents are contained in Sections 221 through 225 of Title 13. Section 241 states what shall constitute prima facie evidence of an official request for information in any prosecution under Section 224.

Whenever the Department of Commerce feels that the facts surrounding a refusal to furnish desired census information justify prosecution, the file in each case will be forwarded by the Department of Commerce to the appropriate United States Attorney. However, in all instances of refusal to answer census questionnaires affecting companies, businesses, religious bodies, and other organizations, the United States Attorney should make certain that efforts have been made to persuade the delinquent to comply with the Census Bureau's request. The United States Attorney should initiate prosecution under 13 U.S.C. 224 only if the delinquent persists in refusal to supply the required census data.

Experience indicates that injunctions may be sought to prevent the Bureau of the Census from requiring answers to one or more of the questions on the schedules of inquiries. In all such instances, the necessary facts will be submitted to the appropriate United States Attorney by the Department of Commerce.

This instruction amends Circular No. 4117 of March 27, 1950.

FORFEITURES

Remission of Forfeiture - Requests from Finance Companies for Postponement of Libel Proceedings. Recently the Department has received a

number of letters from nation-wide finance companies, copies of which were forwarded to the appropriate United States Attorneys, requesting that proceedings to forfeit seized vehicles held under the provisions of the internal revenue liquor laws, the Contraband Transportation Act, or the customs laws be deferred for a reasonable period in order to afford them an opportunity to file a petition for administrative relief.

Upon receipt of such requests, and unless the interests of the government would be jeopardized, it is suggested to all United States Attorneys that action to forfeit the seized property be deferred, or if a libel has been filed further proceedings therein be withheld for a reasonable time, pending the submission and consideration of the proposed petition.

If and when such a petition is received it should, of course, be transmitted to the Department pursuant to the procedure set forth in Title 2 of the United States Attorneys' Manual, pages 54.1 to 57 inclusive.

In view of the frequency with which such requests are being received, the Department will no longer forward a separate letter but will assume, unless advice to the contrary is received, that the United States Attorney will comply with the petitioner's request.

CONSPIRACY

Sentence Where Offenses Which Are Object of Conspiracy Are Both Felonies and Misdemeanors. Williams v. United States (C.A. 5, November 6, 1956). Defendant was convicted and sentenced to three years on a conspiracy count alleging the object of the conspiracy to be the violation of seven provisions of the liquor laws, of which, as substantive offenses, six would be felonies and one a misdemeanor. The case was submitted to the jury on the general charge that all the overt acts need not be proved, it being sufficient that one such act is proved to have taken place pursuant to the unlawful agreement. The jury returned a general verdict of guilty. At no time during the course of the trial did defendant question the indictment, object to the charge to the jury, request a special verdict or a verdict indicating the degree of the offense under Rule 31(c) F.R. Cr. P., or move for a new trial. On appeal defendant contended that since the jury's verdict may have been based upon the misdemeanor only, the sentence imposed was excessive. However, the Court concluded that such relief was not appropriate noting that the verdict must be read as "guilty as charged in the indictment" and pointed out that there is no power in the trial or appellate courts to speculate on what grounds the jury might have based its verdict. Nonetheless, the opinion indicates that had the indictment been questioned or had specific charges been requested and refused which would have acquainted the jury with the necessity for specificity, or had the defendant moved for a new trial, the case would have been returned to the Trial Court for a new trial with instructions to submit the matter to the jury upon a charge which would point up the varied nature of the objects of the conspiracy and the varying degrees of punishment.

Therefore, in order to avoid reversal on this point it seems advisable, as suggested by the Court, to list all felony and all misdemeanor objects of a conspiracy in separate counts to avoid the complications that gave rise to this case.

Staff: United States Attorney James W. Dorsey;
Assistant United States Attorney John W. Stokes, Jr.
(N.D. Ga.).

CUSTOMS

Forfeiture under Customs Laws for Failure to Declare Imported Articles (19 U.S.C. 1497). In United States v. 532.33 Carats . . . Diamonds (D. Mass., 137 F. Supp. 527, discussed in Vol. 4, No. 5, p. 142 of Bulletin), the District Court held that claimant's failure to declare the diamonds brought by him from Europe subjected them to forfeiture, although his arrival in this country at Boston was due to the fact that the plane on which he was a passenger was compelled to by-pass Gander, Newfoundland, where he was scheduled to disembark, and proceed to its next scheduled stop, Boston, and irrespective of whether he had any intent to import the diamonds into the United States. The Court also held that forfeiture proceedings were not barred by Leiser's previous acquittal on charges of unlawful importation brought under 18 U.S.C. 545.

The Court of Appeals affirmed sub-nomine Leiser v. United States (C.A. 1, 234, F. 2d 648, discussed in Vol. 4, No. 15, p. 505 of Bulletin). On November 5, 1956, the Supreme Court denied the claimant's petition for certiorari.

The Bureau of Customs considers this case of importance in that it sustains its long standing position that all persons arriving in the United States from abroad, no matter whether voluntarily or involuntarily, are required to declare any goods brought with them, and any goods not declared are subject to forfeiture. It is also another instance where the courts have distinguished the basis of the forfeiture action from that of the criminal action in which there has been a prior acquittal, and thus avoided application of the ruling in Coffey v. United States, 116 U.S. 436.

WAGERING TAX ACT

Forfeiture of Vehicle Used without Payment of Tax. United States v. General Motors Acceptance Corporation, Claimant of One 1954 Chevrolet Pick-Up Truck, Motor No. 0004727F54X (C.A. 5, November 30, 1956). The Government filed a libel for the forfeiture of a vehicle used by one engaged in the business of wagering without having registered and paid the tax imposed by 26 U.S.C. 3290, 3291, I.R.C. 1939, Sections 4411, 4412, I.R.C. of 1954. The district court sustained a motion to dismiss the libel on the grounds that the statute did not apply to vehicles so used. On appeal, the Court of Appeals reversed, holding that the plain language of Section 7302 of the I.R.C. of 1954 covers a vehicle used and intended for

use in violating the wagering tax laws. In so holding, the Court rejected claimant's contentions that only the specific penalties provided for violation of the Wagering Tax Act should apply; that the forfeiture statute should be strictly construed; that the truck could not be said to have violated the law because the gist of the offense is the failure to pay the tax and that the application of the forfeiture statute should be limited to cases involving a commodity upon which a tax is imposed.

Staff: United States Attorney James L. Guillmartin;
Assistant United States Attorneys E. Coleman Madsen
and Edith House (S.D. Florida).

DENATURALIZATION

Defendant Held in Contempt for Refusal to be Sworn at Taking of Oral Deposition. United States v. James J. Matles (E.D. N.Y., November 13, 1956). Defendant moved to dismiss the denaturalization complaint on the ground that it was not commenced by an affidavit of good cause as required by the statute. Judge Galston denied the motion. Defendant was then served with a notice to appear for the taking of his testimony by deposition. His motion to vacate the notice was denied by Judge Rayfiel, who ordered that the deposition proceed. Defendant appeared at the time and place designated but refused to be sworn. On October 22, 1956 an order was entered by Judge Abruzzo, directing the defendant to be sworn, but he refused. The Government moved to have him held in contempt. In opposing the motion, defendant contended (1) that the court lacks jurisdiction because of the absence of the statutory affidavit of good cause when the complaint was filed; and (2) that a denaturalization proceeding is a criminal case within the meaning of the Fifth Amendment, so that a defendant cannot be compelled to be a witness against himself.

Judge Abruzzo overruled both objections. With respect to the jurisdictional question, he felt that he could not act as an appellate court and overrule Judge Galston's decision. On the Fifth Amendment contention, the Court pointed out that a denaturalization suit is a civil proceeding, so that defendant can be compelled to testify. "Any constitutional grounds which he has of self-incrimination can properly be raised when the questions are put, and the propriety of such a question and the right of the defendant to make a self-incrimination claim is for the court to determine". By refusing to be sworn, the defendant blocked any attempt to make such an inquiry. The defendant was accordingly held in contempt.

Staff: United States Attorney Leonard P. Moore;
Assistant United States Attorney Howard B. Gliedman
(E.D. N.Y.).

Affidavit Showing Good Cause for Denaturalization - Sufficiency. Nowak et al. v. United States (C.A. 6, November 26, 1956). On appeal from denaturalization judgments, defendants contended, among other things,

that the court below lacked jurisdiction because the statutory affidavits showing good cause for revocation were insufficient as based on hearsay. They argued that the affidavits did not meet the requirement laid down in United States v. Zucca, 351 U.S. 91 (1956), that the affidavit must be set forth "evidentiary matters".

In affirming, the Court of Appeals held that the affidavits, executed by an attorney of the Immigration and Naturalization Service and reciting facts appearing in the official records of the Service, adequately complied with the statutory requirements. The Court stated, in part, "It would be too stringent a requirement to hold that the good cause affidavit need embrace testimony of prospective witnesses. The affidavits in issue gave fair and sufficient notice of the facts charged as a basis for cancellation of citizenship of the appellants as to apprise them properly of the facts and reasons upon which their citizenship was sought to be revoked. Appellants were thus sufficiently apprised of the charges as to be prepared to meet the proof thereof, if they had been able to do so."

Staff: United States Attorney Frederick W. Kaess;
Assistant United States Attorney Dwight K. Hamborsky
(E.D. Mich.).

CITIZENSHIP

Sufficiency of Evidence to Prove Birth in United States - Declaratory Judgment of American Nationality. Louie Hoy Gay v. Dulles (D. Ore., September 26, 1956). To prove his father was born in the United States plaintiff placed great reliance on a delayed decree for registration of birth issued to the father on February 8, 1945, showing he was born on August 10, 1884. This decree, entered ex parte, was issued pursuant to Oregon Revised Statutes 432.280 making a certified copy of the decree prima facie evidence in "all courts and places of the facts stated." The Court held that neither the Secretary of State nor the United States was bound by the decree, citing Ex parte Lee Fong Fook, 74 F. Supp. 68; United States v. Casares-Moreno, 122 F. Supp. 375. The Court also held that the granting of a passport to plaintiff's father is not conclusive or even evidence that the father is a citizen of the United States. Miller v. Sinjen, 289 Fed. 388, 394 (C.A. 8, 1923).

Judgment was for defendant and plaintiff has appealed.

Staff: United States Attorney C. E. Luckey;
Assistant United States Attorney Victor E. Harr (D. Ore.).

FOOD AND DRUG

Misbranded Food and Drugs. United States v. V. E. Irons, Inc., a corporation, and V. E. Irons, an individual (D. Mass.). Defendants were charged in a six-count information filed on December 9, 1954, with causing

the introduction into interstate commerce of certain quantities of vitamin and mineral preparations designated as Vit-Ra-Tox No. 21 and No. 16 which were misbranded in violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301 et seq. The information specifically alleged that the article of food involved was misbranded within the meaning of 21 U.S.C. 343(j) in that it was represented as a food for special dietary uses, and its label failed to bear the information concerning its vitamin and mineral properties which had been prescribed by regulation. It was charged that the articles of drugs involved were misbranded within the meaning of 21 U.S.C. 352(a) by reason of false and misleading therapeutic and nutritional claims; and within the meaning of 21 U.S.C. 352(f)(1) by reason of the failure of the labeling to bear adequate directions for use.

The case was tried to a jury from September 18th to October 2d on which day the jury brought in a verdict of guilty against both defendants. On October 22d the court imposed a maximum fine of \$6,000 against the corporation and sentenced the individual defendant to the maximum of one year on each of the six counts to run concurrently.

The case presented many technical problems involving physiology, pharmacology and clinical medicine. A number of expert witnesses were presented both by the Government and the defense and much preparation was required for their examination and cross-examination. Because of the nature of the case the Department of Health, Education and Welfare considered this a significant victory.

Staff: United States Attorney Anthony Julian;
Assistant United States Attorney George H. Lewald
(D. Mass.).

POSTAL OFFENSES

Interception of Letter Carried in United States Mails Before Delivery to Addressee. United States v. Shirley Ann Maxwell (W.D. Mo.). The Supreme Court on October 10, 1956, denied certiorari in this case. As reported in Vol. 4, No. 3, United States Attorneys Bulletin, p. 66, the District Court on December 16, 1955 held that it was the legislative intent of Congress in 18 U.S.C. 1702, to extend protection to mail until it reaches the manual possession of the person to whom it was addressed. The District Court opinion is reported in 137 F. Supp. 288. The opinion of the Court of Appeals for the Eighth Circuit affirming the judgment of the District Court is reported in 235 F. 2d 930.

STATUTE LIST

Attached to this issue of the Bulletin is an index of statutes administered by the Criminal Division and assigned to the various enforcement sections of the Division. This index may be of assistance in quickly locating a statutory reference for a particular offense. It may also facilitate telephone calls and other communications with the Criminal Division if used in conjunction with the list of the key personnel which appears in Title I, page 3 of the United States Attorneys Manual. Additional copies of the index of statutes will be furnished upon request.

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T A X D I V I S I O N

Assistant Attorney General Charles K. Rice

Litigation Control Unit

During November, the Division established a unit under the supervision of the Executive Assistant to review the status of civil and criminal work in all Sections and to expedite the progress of cases through the courts, on a continuing basis. The personnel of the unit will work with the Internal Revenue Service and the United States Attorneys in the common endeavor to further the Attorney General's program to relieve congestion in court dockets. Procedural and other problems will be considered and solved, to the end that cases can be tried or settled as speedily as possible, and closed on district records, as well as those of the Division, quickly and properly. Any problems or suggestions in this area should be addressed to the Division, attention Litigation Control Unit.

CIVIL TAX MATTERS
Appellate Decisions

Loss Deduction by Guarantor Held Nonbusiness Bad Debt Loss Rather than Ordinary Nonbusiness Loss. Putnam v. Commissioner (S. Ct., December 3, 1956.) Resolving a conflict among the circuits, the Supreme Court in this case upheld the Commissioner's position that a stockholder who guarantees repayment of a loan to his corporation and is required to make good on his guarantee does not realize an ordinary nonbusiness loss (deductible in full under 1939 Code Section 23(e)(2)) but sustains a non-business bad debt loss (deductible only as a short-term capital loss under Section 23(k)(4)). The Court held that it is not enough for the taxpayer to bring himself within the general provisions of Section 23(e)(2), authorizing deduction of losses incurred in a "transaction entered into for profit"; he must also show that the loss falls outside the special capital loss limitation provisions of Section 23(k)(4), i.e., that the loss was not one resulting from a bad debt. A guarantor's loss is essentially one arising from a bad debt, the Court reasoned, since under settled principles of subrogation the guarantor, upon being required to make payment under his guarantee contract, acquires the rights and stands in the shoes of the creditor; only to the extent that he is unable to obtain reimbursement from the principal debtor does he sustain a loss. And since both the existence and extent of the loss are dependent upon the worthlessness of the debt owing by the principal debtor, the Court concluded that the loss, if it occurs, is necessarily attributable to the worthlessness of that debt and must therefore be considered a "bad debt" loss.

The nonbusiness bad debt provisions of Section 23(k)(4) were added to the 1939 Code by the 1942 Revenue Act. Prior to the Supreme Court's decision in this case considerable doubt existed as to whether the loss deduction provisions of Section 23(e) or the bad debt deduction provisions

of Section 23(k)(4) were applicable in the case of a guarantor's loss. In holding that Section 23(k)(4) governed, the Court in effect reaffirmed and brought up to date a pre-1942 ruling (Spring City Co. v. Commissioner, 292 U.S. 182) that the specific bad debt loss provisions rather than the general loss provisions of the taxing statute are controlling where the loss stems from a bad debt. The decision also has the effect of according to losses sustained by a stockholder, as guarantor of a loan to an unsuccessful corporate venture, the same capital loss treatment as losses suffered from the nonrepayment of direct loans or of capital contributions to the corporation. While this case involved the provisions of the 1939 Code, the decision should furnish helpful guides for application of the provisions of the 1954 Code (Sections 165 and 166) relating to deductions for bad debts.

Staff: Philip Elman (Solicitor General's Office);
Joseph F. Goetten (Tax Division).

Charitable Foundations - Retroactive Revocation of Exemption Ruling under Section 101(6), Internal Revenue Code of 1939, Held Arbitrary and Invalid. The Lesavoy Foundation v. Commissioner (C.A. 3, November 12, 1956.) In 1945, the Commissioner ruled that taxpayer (organized in 1944 for charitable, religious, educational and scientific purposes) was exempt under Section 101(6) of the 1939 Code. In 1946, taxpayer acquired and thereafter operated a cotton mill. In 1951, the Commissioner determined taxpayer was not being operated exclusively for exempt purposes and revoking his earlier ruling asserted deficiencies in income tax and additions to tax for 1946, 1947, 1948 and 1950. The Tax Court upheld the Commissioner's action holding that the cotton mill had been acquired and operated primarily to benefit taxpayer's founder and his relatives in the operation of their private textile businesses by furnishing them with a source of supply of cotton yarn, which would otherwise not have been available. It also held that the Commissioner's retroactive revocation of his earlier ruling was reasonable since taxpayer's purposes changed substantially in 1946, when it acquired the cotton mill and that taxpayer did not comply with the condition of the 1945 ruling that the Collector be promptly notified of any change in the Foundation's character, activities or purposes.

The Court of Appeals reversed. It at first reaffirmed its prior decision in C. F. Mueller Co. v. Commissioner, 190 F. 2d 120, to the effect that the operation of a commercial business for profit did not of itself prevent an organization, otherwise qualified, from being exempt under Section 101(6). It did not decide, however, whether the evidence supported the Tax Court's finding that the Foundation was operated with a substantial purpose to benefit private interests and whether the existence of such a purpose would result in the denial of an exemption from tax. The Court rested its decision on the ground that the Commissioner's retroactive revocation of his 1945 ruling was arbitrary and therefore invalid. Although the Court recognized the Commissioner's discretion to revoke a ruling retroactively under Section 3791(b) of the 1939 Code, it held that he had exceeded the bounds of permissible discretion in this case. It characterized the result of the Commissioner's action (which it was claimed would result in the foundation's bankruptcy) as "harsh," and decided that the taxpayer had sufficiently disclosed its 1946 acquisition of the cotton mill on the information returns filed by it. The issue of the Commissioner's

power to give retroactive effect to a ruling revoking the tax exemption of an organization is presently pending before the Supreme Court in Automobile Club of Mich. v. Commissioner, 230 F.2d 585 (C.A.6), certiorari granted October 8, 1956.

Staff: Marvin W. Weinstein (Tax Division)

District Court Decisions

Liens - Tax Lien Recorded in County Other Than Where Real Property Located Takes Priority Over Rights of Vendee with Knowledge of Lien - Statute of Limitations - Waiver Contained in Compromise Offer on Form 656 Sufficient to Extend Statutory Collection Period. United States v. J. Robert D. Smith and Betty Newland Smith (N. D. Ohio). This action (instituted immediately prior to expiration of the collection period as extended by a waiver contained in an offer in compromise) was for collection of income taxes outstanding against J. Robert D. Smith, and for enforcement of the tax lien against certain real property inherited by taxpayer after the taxes were assessed. Immediately after acquiring the property from his mother's estate, taxpayer conveyed it to his wife, allegedly for a valuable consideration.

Taxpayer contended (1) that the waiver was not effective to extend the collection period, and therefore the action was not timely filed; and (2) that the conveyance of the real property to taxpayer's wife was not made subject to the tax lien since it was not until after the conveyance that notice of the tax lien was recorded in the County in which the property was located. (Prior to the conveyance, notice of the lien had been recorded in the County in which taxpayer and his wife resided.)

The waiver was contained in a compromise offer on Form 656, which provided for suspension of the limitation on the statutory collection period during the time the offer was pending and for one year thereafter. The offer was rejected three months and seven days after it was filed. A few days after the offer was filed, taxpayer was indicted for tax evasion and subsequently for perjury, convicted and served sentence. On the basis of the indictment following immediately after filing of the offer, taxpayer contended that it was not received and considered by the Government as a real offer. The Court, supporting the Government's position, held that the criminal prosecution was a matter separate and apart from the civil tax liability, and that the waiver contained in the offer was effective to suspend the running of the statute for the period therein provided.

The consideration for the conveyance of the real property to taxpayer's wife was an alleged debt due her from his mother's estate. Taxpayer was sole heir and also executor of the estate. He obtained an order from the probate court to the effect that \$11,400, out of currency of about \$15,000 found in a safe deposit box, belonged to taxpayer's wife and that the funds had been delivered by her, in April, 1943, to taxpayer's mother for safekeeping. This "debt" was the alleged consideration for the conveyance, which was made to taxpayer's wife two days after the property was transferred to him from the estate. The deed was not recorded

for about two years, and not until a few weeks after notice of the tax lien had been recorded in the County of their residence.

Prior to the conveyance the taxes had been assessed and notice of lien recorded in the County in which the property was located; taxpayer had been convicted and served sentence for tax evasion, and all available property had been levied upon and sold by the Internal Revenue Service for the tax liabilities. It was the Government's position that taxpayer's wife had actual knowledge of the tax lien at the time of the conveyance, and that the tax lien on the property was prior to her rights under the conveyance. The Court held that the tax lien was a first and prior lien on the property and that the Government was entitled to have its lien enforced.

Staff: Assistant United States Attorney, Clarence M. Condon (N. D. Ohio)
Mamie S. Price (Tax Division)

Income Taxes - Deductions - Spouse of Taxpayer not "Dependent" for Tax Purposes under Internal Revenue Code of 1954. Joe A. Dewsbury v. United States. (C. Cls., December 5, 1956.) The question in this case was whether in determining his individual income tax liability for the calendar year 1954, taxpayer, in addition to claiming a personal exemption of \$600 for his wife as being his "spouse", could also claim a personal exemption of \$600 for her as a "dependent".

Taxpayer filed a separate income tax return, as distinguished from a joint return, for the calendar year 1954, claiming thereon five personal exemptions, i. e., one for himself, one for each of his two children, and two for his wife. One exemption for his wife was claimed under the provisions of Sec. 151 (b) of the Internal Revenue Code of 1954, entitling a taxpayer to claim a personal exemption for a spouse if (a) the taxpayer files a separate return, (b) the spouse has no gross income during the year, and (c) the spouse was not the dependent of another taxpayer during the year. All of these requirements being met in the instant case, taxpayer properly claimed and was allowed this exemption. The second exemption for his wife was claimed under Section 151 (e) on the ground that she was a dependent according to the provisions of Sec. 152(a)(9), which defines a dependent, inter alia, as an individual who has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household. The Commissioner of Internal Revenue disallowed this dependency exemption and taxpayer brought suit for the tax paid.

In computing taxable income under both the 1939 and 1954 Codes, taxpayers are entitled to deductions of \$600 for personal exemptions. Personal exemptions are permitted for the following: (a) the taxpayer, (b) the spouse of the taxpayer, under the aforementioned conditions, (c) age 65 or over of taxpayer or spouse, (d) blindness upon the part of the taxpayer or spouse, and (e) dependents of the taxpayer. In enacting the 1954 Code, Congress broadened the Statutory definition of a dependent so as to include therein the following category of persons who were ineligible to qualify as dependents under the Internal Revenue Code of 1939:

Sec. 152 (a) (9) -- An individual who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household.

Taxpayer contended that by so broadening the statutory definition of a dependent, Congress entitled him to claim a personal exemption for his wife as a dependent, as well as to claim her regular exemption under Sec. 151 (b) as a spouse.

Crediting the taxpayer with an "ingenious argument," the Court construed Sec. 152 (a) (9) as being part and parcel of a larger and more comprehensive code which included other provisions, and that when all of the provisions were construed together, as they had to be in order to arrive at the legislative intent, it became clear that the taxpayer's exemption for his spouse was taken care of by Sec. 151 (b) and that he was not entitled to an additional exemption on the ground of dependency. Citing as authority Helvering v. New York Trust Co., Trustee, 292 U. S. 455, the Court examined the various provisions of the 1954 Code and the legislative history of Sec. 152 (a) (9), in order to ascertain and give effect to the intent of the Congress in enacting this new provision into the revenue laws. Finding nothing in the various provisions of the 1954 Code or in the legislative history to clearly indicate that Congress intended to permit a double deduction for a spouse under the provisions of Secs. 151 (b) and 152 (a) (9), the Court granted the Government's motion for summary judgment and dismissed the petition.

Staff: Leo M. McCormack (Tax Division)

Liens - Tax Lien Has Priority Over Insured Taxpayer and Beneficiary to Cash Surrender Value of Annuity Policy. United States v. Archie Bellin, et al., (D. R. I.). The Government commenced a civil action to enforce a tax lien on property and rights to property belonging to a delinquent taxpayer, Archie Bellin. The lien was filed with the Recorder of Deeds, Providence, Rhode Island, on July 11, 1952. Taxpayer had purchased an annuity insurance policy on October 13, 1943, naming his wife as the contingent (revocable) beneficiary in the event taxpayer should pre-decease her before the date of the first income payment. Both the wife and the insurance company were named defendants in the suit. The Government prayed, inter alia, that the court order the insurance company to pay over the cash surrender value of the policy in partial satisfaction of the tax lien.

On the Government's motion for judgment on the pleadings the Court ordered taxpayer and his wife to apply to the insurance company, upon the appropriate company form for payment of the cash surrender value. The Court further ordered the insurance company to make its check payable to the taxpayer and the United States, and upon receipt, taxpayer to endorse the check in blank and deliver it to the United States, and surrender the original policy to the insurance company.

The arrangement was worked out with the cooperation of the insurance company which computed the cash surrender value with interest to the date of the exchange of the check and the original policy.

Judgment was entered for the full amount of the Government's lien, plus interest to the date of judgment, undiminished by the amount of the check. Following receipt of the check, the Government entered a partial satisfaction of judgment.

Staff: United States Attorney Joseph Mainelli and
Assistant United States Attorney Samuel S. Tanzi (D. R. I.);
H. Eugene Heine, Jr. (Tax Division)

CRIMINAL TAX MATTERS
Appellate Decision

Wilfulness-Instructions to Jury in Income Tax Evasion Case. The Solicitor General has decided against filing a petition for certiorari in the case of Forster v. United States, decided October 19, 1956. The Court of Appeals for the Ninth Circuit reversed the conviction for income tax evasion (see Bulletin, November 23, 1956, pp. 765-766) on the ground that the trial judge had committed prejudicial error in a supplemental instruction on the subject of wilfulness. The instruction, based upon language used by the Supreme Court in Murdock v. United States, 290 U.S. 389, 394, was as follows:

When used in a criminal statute--that is, the word "wilful" or "willfully"--when used in a criminal statute it generally means an act done with a bad purpose, without justifiable excuse, stubbornly, obstinately, perversely.

The word is also characterized--employed to characterize a thing done without ground for believing it lawful, or conduct marked by reckless disregard whether or not one has the right so to act.

The Court of Appeals stated:

Apparently on the theory that the Supreme Court said it, and that is it, the particular language has found itself into many personal instruction trial handbooks of judges. It has been repeated time and again. But if one studies Murdock, one finds, when he wrote the now disputed language, Mr. Justice Roberts was compiling a list of various definitions of wilfulness, no more. ***

In some income tax cases the instruction is harmless. Such is the type of case where the main issue is not wilfulness. Also, in the melange of complete instructions the one instruction may fade into inconsequence. And, even after Herzog and Bloch, whether exception was made may be something of a factor

to be considered.

Reluctantly this court has concluded, principally on the authority of *Spies v. United States*, 317 U.S. 492, that the case must be reversed because of the second part of the instruction. It is a close decision. But the instruction with its variegated alternatives of wilfulness here occurred at too critical a time. In the posture it entered it came into too bright a light. It did not run in a long chorus line. Here to let it stand would be to endorse the doubtful proposition that jurors disregard instructions anyway.

All United States Attorneys are cautioned to be on the alert for the use of this instruction in income tax evasion cases. Whenever it is used the court's attention should be called to the instant case and *Bloch v. United States*, 221 F. 2d 786, 789-790 (C.A. 9), rehearing denied, 223 F. 2d 297. We are of the opinion, however, that the instruction is a proper one in a misdemeanor case, e.g., a failure to file case. See the Tax Division's Manual, The Trial of Criminal Income Tax Cases, pp. 173-174.

Staff: United States Attorney Charles P. Moriarty (W.D. Wash.)

* * *

ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT

Antitrust Suit Filed against Television Network. United States v. Radio Corporation of America and National Broadcasting Company, Inc., (E.D. Pa.). On December 4, 1956 a civil antitrust action, which charges RCA and its subsidiary, NBC, with violations of Section 1 of the Sherman Act, was filed in the District Court at Philadelphia.

The complaint alleges that defendants unlawfully combined or conspired to obtain VHF (very high frequency) television station ownership for NBC in five of the eight largest markets of the United States by the unlawful use of NBC's power as a network to grant or to withhold NBC network affiliation from non-network station owners. In March 1954, the approximate date when the conspiracy is alleged to have begun, NBC owned and operated VHF television stations in New York, Chicago, Los Angeles, Cleveland and Washington.

The complaint also alleges that the conspiracy was carried out, in part, by NBC's acquisition in Philadelphia (the nation's fourth market) of television and radio stations (WPTZ and KYW) formerly belonging to the Westinghouse Broadcasting Company (WBC); that this acquisition was accomplished by threats that, if WBC would not agree, it would lose its NBC affiliation in Boston and Philadelphia, would not be granted NBC affiliation for a station which it was acquiring in Pittsburgh, and would not obtain NBC affiliation for any future television stations when acquired; that the contract of May 16, 1955, by which WBC agreed to exchange its Philadelphia stations for NBC's Cleveland television and radio stations (WNBK and WTAM-AM and -FM) and \$3,000,000 was itself in unreasonable restraint of trade and therefore violated the Sherman Act; and that the illegal activities of NBC and RCA have reduced WBC's ability to compete with NBC and other station owners in the sale of advertising, have eliminated competition among independent station representatives for representation of the acquired television station in Philadelphia, have precluded competition among station owners in Philadelphia for NBC network affiliation, and have reduced the competitive ability of WBC's parent company, Westinghouse Electric Corporation, against RCA and others in the sale of equipment for the transmission and reception of radio and television signals.

The complaint requests the court to declare the combination or conspiracy between RCA and NBC, and the contract between NBC and WBC, to have been unlawful, and requests such divestiture of NBC's assets as the court may deem necessary and appropriate under the Sherman Act and Section 313 of the Communications Act.

Staff: Bernard M. Hollander and Raymond M. Carlson
(Antitrust Division)

Antitrust Suit in Electrical Alloy Resistance Wire Field. United States v. Driver-Harris Company, et al., (D. N.J.). On December 5, 1956, a civil antitrust action was filed charging five manufacturers of electrical resistance alloys and alloy products with violations of Sections 1 and 2 of the Sherman Act.

These companies are alleged to manufacture over 75% of the total annual domestic production of electrical resistance alloys and most of the alloy products made in the United States. The resistance alloy products manufactured by defendants, primarily in the form of wire, ribbon, rod and strip, are used for heating elements in various electrical devices, including home appliances and welding rods. They are also used in radio, television, electrical furnaces and other electrical contrivances.

The offenses charged in the complaint include the fixing and maintaining of prices and processing charges, the exclusion from the industry of prospective competitors, the imposition of sales and production restrictions upon and among the companies involved, and the limitation to themselves of alleged patent rights by these companies. These offenses have been carried out primarily through a series of licensing agreements whereby Driver-Harris has licensed to the other defendants patents allegedly covering electrical resistance alloys and alloy products.

The complaint seeks injunctive relief against these practices and requests the court to enter such orders relating to the defendants' patents as it deems necessary to dissipate the effects of the alleged unlawful activities.

Staff: Philip Marcus and Robert Hammond (Antitrust Division)

CLAYTON ACT

Government Files Third Merger Complaint in Container Field. United States v. Owens-Illinois Glass Company, (N.D. Ohio). On December 4, 1956, a civil complaint was filed against Owens-Illinois Glass Company charging a violation of Section 7 of the Clayton Act by its recent acquisition of National Container Corporation.

Owens-Illinois is alleged to be the nation's largest manufacturer of glass containers, accounting for approximately 34% of all the glass containers produced in the United States. Owens-Illinois is also alleged to be one of the nation's largest producers and users of corrugated shipping containers, the packaging medium most widely used in the transportation and shipment of glass containers. Prior to the merger Owens-Illinois produced for its own use, shipping containers from containerboard which it purchased from others. The cost of shipping containers used for the packaging of glass containers makes up a substantial portion of the total cost of the packaged container. In 1955 sales of Owens-Illinois totaled over \$370 million and of this total about 70% was realized from the sale of glass containers.

National Container was the nation's third largest manufacturer and seller of corrugated and solid fibre shipping containers as well as a significant producer of containerboard from which such containers are produced. National Container's operation was completely integrated from the growth of timber to the finished shipping container. Of total sales of \$95 million made by National Container in the year 1955, containerboard and shipping container sales totaled \$28 and \$61 million respectively.

The complaint alleges that the combination of these companies resulted in Owens-Illinois becoming one of the nation's largest if not the largest producer of shipping containers and one of two glass container manufacturers with completely integrated facilities for the production of shipping containers; and that the effect of this acquisition may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of glass containers, shipping containers and containers generally. It requests that the court declare the merger in violation of Section 7 of the Clayton Act and that Owens-Illinois be required to divest itself of the properties and assets of National Container.

Staff: Donald F. Melchior and Joe E. Waters (Antitrust Division)

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

Travel Agencies

The General Accounting Office again has called attention to violation of the regulations against the use of transportation requests in obtaining transportation from travel agencies. Transportation requests may not be used to secure passenger transportation within the United States or between the United States and its possessions. Under certain conditions the services of travel agencies may be utilized to obtain transportation within or between foreign countries.

Please refer to a similar admonition and more lengthy explanation on page 30 of Volume 2, Issue 26, of the United States Bulletin dated December 24, 1954.

Leave Reminder

The 1956 leave year does not end until January 12, 1957. Any leave earned during the current leave year must be taken by that time or be forfeited if the individual already had more than 240 hours to his credit at the beginning of the 1956 leave year. Leave Period No. 1 for 1957 begins January 13, 1957. See the chart on page 156.1, Title 8, of the Manual.

Holiday on December 24, 1956.

December 24 having been declared a holiday, any employee who separated on or after November 23, 1956 is entitled to have December 24 excluded from the computation of his leave. If his separation became effective prior to November 23, 1956, he does not get the benefit of the December 24 holiday. See 34 Comptroller General 254.

DEPARTMENTAL ORDERS AND MEMOS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 25, Vol. 4 of December 7, 1956.

<u>MEMOS</u>	<u>DATED</u>	<u>DISTRIBUTION</u>	<u>SUBJECT</u>
122 Supp. 2	11-29-56	U.S. Attys. & Marshals	Performance Rating Plan
55 Supp. 1	12-4-56	U.S. Attys. & Marshals	Christmas Leave

* * *

OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Dismissal of Civil Action under Rules 37 and 41 for Failure to Produce Documents. von der Heydt v. Brownell, (B.C. D.C., December 5, 1956). During the war the Alien Property Custodian vested cash, securities and a collection of art objects valued at approximately \$500,000 upon a finding that the owner, Baron Eduard von der Heydt, of Ascona, Switzerland, was an enemy. Baron von der Heydt, a former German officer, diplomat and banker, and former member of the Nazi Party, had become a citizen and resident of Switzerland in 1937, and brought the above suit for a return on the ground that he had been a neutral at all times during the war and was not an enemy. The government contended that von der Heydt had been a banker for the intelligence service of the German High Command in Switzerland and in that capacity held large sums of money, totalling several millions of dollars, in various currencies, that upon instructions from the German Intelligence Service he remitted sums to German espionage agents in various countries of the world including the United States, and that ransom moneys paid by Jews for their safe deliverance from the Germans were also collected by von der Heydt for the German government.

An order was entered before trial requiring von der Heydt to make available for inspection by the government various documents from his personal files and from the files of a bank owned by him in The Netherlands. Although some documents were made available, various books of account, correspondence and other papers covering the war years were withheld. The government accordingly moved to dismiss the suit for failure to comply with the court's order. Plaintiff denied that further documents existed and the court set the matter down for the taking of evidence on this point. After nine days of hearing, at which von der Heydt, his secretary, and his attorney testified for the plaintiff, and a Department of Justice investigator testified for the defendant, the court upheld the government's contention and on December 5 directed a dismissal of the case with prejudice.

Staff: James D. Hill, Myron C. Baum, Albion W. Fenderson
(Office of Alien Property).

Alien Property Custodian Empowered to Vest Contingent Future Interest in Property. Estate of Berta Zuber, deceased. (Dist. Ct. of Appeal, Calif. December 4, 1956). Decedent died in 1944 leaving a will executed in 1940. She provided that the residue of her estate, valued at almost \$100,000, be paid to two German nationals "if they both survive distribution". In the event the executor did not liquidate the residue during pendency of the probate proceeding the residue was then to be given to a trustee who would have three further years in which to sell and to distribute to the beneficiaries. In 1945 the Alien Property Custodian, acting under the Trading with the Enemy Act, issued an order seizing the interests of the two German beneficiaries. In 1955 the Superior Court, acting on petitions for distribution filed by the Attorney General and the German beneficiaries,

held the Custodian's seizure to be ineffective saying that since the will provided that the shares of the enemies could only be paid to them if they survived distribution, they had no property interest subject to seizure in 1945, and ordered the property delivered to the trustee for payment to the German nationals or their heirs.

On December 4 the District Court of Appeal reversed, saying that immediately upon decedent's death the German nationals took a defeasible fee, subject to a conditional limitation and that the condition of survival until distribution was a condition subsequent rather than a condition precedent. The Court added "it makes little difference, however whether the condition in this case is precedent or subsequent. Contingent future interests are recognized as estates by statute in California". The Court concluded that the beneficial interests of the beneficiaries were subject to seizure under the Trading with the Enemy Act, and that the condition of the bequests having been fulfilled and the estate having ripened into a vested interest, distribution must now be made to the Attorney General.

Staff: James D. Hill, Irwin A. Seibel (Office of Alien Property);
Assistant United States Attorneys Arline Martin and
Mary Eschweiler (S.D. Calif.)

Alien Property Custodian Empowered to Vest Contingent Future Interests in Property. Estate of Charles W. Neumeister, deceased. (Dist. Ct. of Appeal, Calif., November 27, 1956). Decedent died in 1944 leaving a will executed in 1942 in which he created a trust of one-half of the residue of his estate, approximately \$9,000, to last for ten years and with income of \$300 per year to be paid to various American citizens. However, if at any time within the ten year period German nationals "shall not be prohibited by the laws of the United States of America and the laws of the State of California from becoming beneficiaries under this will and under the trust intended to be created herein," the corpus of the trust was then to be paid out, in installments, to certain German beneficiaries. In 1946 the Alien Property Custodian issued an order vesting the interests of the German beneficiaries and, in the same year, the Superior Court entered an order reciting that, because of the vesting order, the German beneficiaries were not legally eligible to receive distribution of the trust funds and the trustee should therefore make payments to the American beneficiaries. In 1954 the trustee filed a petition for instructions reciting that the ten-year period of the trust had been completed. Both the Attorney General, as successor to the Alien Property Custodian, and the German beneficiaries appeared. After trial the Superior Court held that the Custodian had acquired no interest in the trust estate under his vesting order since Germans were then not legally entitled to inherit property in California but that because of the end of the war there was now no bar to their inheritance and that the trust corpus should now be paid to them.

On November 27 the District Court of Appeal reversed, holding that under the will the Germans became contingent beneficiaries of the trust estate, that under the Trading with the Enemy Act the Custodian is empowered to seize contingent future interests in property, that by his vesting order the Custodian had succeeded to all the rights of the German

beneficiaries, that all conditions imposed by the testator on the gift had now been fulfilled and that the Attorney General, as successor to the interests of the German nationals, is now entitled to the distribution of the trust assets. The court relied on its own prior opinion in *Estate of Louise Schneider*, 140 Cal. App. 2d 710 (U.S. Attorneys Bulletin Vol. 4, No. 9, p. 310).

Staff: James D. Hill, Irwin A. Seibel (Office of Alien Property)
Assistant United States Attorneys Arline Martin and
Mary Eschweiler (S.D. Calif.)

Attorney General Authorized, under Trading with Enemy Act, to Sell Seized Enemy Property Subject to Unpaid Taxes and Assessments. Epstein and Malman v. Brownell (E.D. N.Y., December 5, 1956). During World War II the Alien Property Custodian vested all of the stock of Ultra Corporation, an enemy owned, and installed directors of his selection. Thereafter, the Attorney General, who succeeded to the functions of the Custodian, ordered the directors to pay all taxes owing by the corporation and then to dissolve it and transfer its assets to the Attorney General. The directors conveyed certain real property owned by the corporation to the Attorney General without paying taxes which had accrued against it.

Plaintiffs submitted a written offer to purchase the property for \$17,500, "subject to all unpaid taxes and assessments, if any, which have accrued against the property". Defendant accepted the offer and conveyed the property to plaintiffs by a quitclaim deed which recited the absence of covenants or "warranties of any kind" or "representations or implied warranties". Plaintiffs then paid the accrued taxes of approximately \$20,000, and brought the instant suit against the Attorney General to recover the amount paid. Plaintiffs claimed that the contract of sale was subject to the Dissolution Order and to Section 36(b) of the Trading with the Enemy Act which states, "The Alien Property Custodian . . . shall . . . pay any tax incident to any such property."

Both parties moved for summary judgment. On December 5 the Court handed down a decision granting the Attorney General's motion and denying that of plaintiffs. The Court held that "shall" as used in Section 36 should be construed as permissive rather than mandatory, and that, in any event, title to vested enemy property could be conveyed by the Attorney General to a purchaser "subject to taxes" and that it would not rewrite the contract to grant the relief requested.

Staff: James D. Hill, Samuel Z. Gordon, Phillip W. Knight
(Office of Alien Property)

Right of Trustee for Bondholders to Recover Property Vested under Trading with Enemy Act. Royal Exchange Assurance v. Brownell (S.D. N.Y., November 21, 1956). The German Potash Syndicate, a corporation created by governmental decree in 1916, had a monopoly of the sale of all potash produced in Germany. All German producers were required to be members of

the Syndicate which sold the product in domestic and foreign markets. In 1925, 1926 and 1929 the Syndicate floated bond issues totaling £ 15,000,000. The trust indentures, in which plaintiff, a British corporation, was named trustee, provided for a mortgage on the real property of every potash producing mine in Germany and also provided that all the proceeds from the sale of potash throughout the world would be paid to a British receiving bank or sub-receiving banks appointed by it. The bank deducted therefrom each month one-twelfth of the annual loan service requirements for the loan, and the remainder was held at the disposal of the Syndicate. Upon the outbreak of war in 1939 a Dutch bank which was one of the sub-receiving banks had on deposit in banks in the United States approximately \$16,000,000 representing an accumulation of many years of surplus sales proceeds over and above the loan service requirements. Before the imposition of freezing controls to Dutch funds in this country on May 10, 1940, all but approximately \$6,200,000 of these funds were withdrawn by the Syndicate. The remaining funds were first frozen and later seized by the Attorney General under the Trading with the Enemy Act as property of the Syndicate.

Royal Exchange Assurance, the trustee under the trust indentures, instituted suit against the Attorney General in the District Court for the Southern District of New York for the recovery of the seized property, contending that under the provisions of the indentures, surplus funds in the hands of the receiving banks remained subject to a charge in favor of the bondholders for the monthly service requirements. The plaintiff also contended that a default in the servicing of the bond issue had occurred prior to May 10, 1940, when United States freezing controls were imposed on the funds, and that the occurrence of such default had the effect of transferring title to such funds as might be in the hands of the receiving bank or of any sub-receiving bank, to the plaintiff as trustee for the benefit of bondholders.

At the trial, both parties introduced the testimony of English barristers as to the construction of the trust indentures under English law. In a decision handed down on November 21, 1956, the Court held that whatever interest plaintiff had in the vested property must derive from the trust indentures which secured the bond issue, and that the indentures, by their terms, were required to be construed under English law, the place where the contracts were made and the bond issue floated. In construing the indentures, the Court concluded that the clear import of their provisions was that funds over and above those necessary for the monthly loan service requirements became the property of the Syndicate and that to thereafter impress upon such funds a charge in favor of the bondholders would require the addition of language to the agreement.

The Court also held that a default had not occurred prior to May 10, 1940, because after the outbreak of war in 1939 the Potash Syndicate had made monthly payments to Dutch sub-receiving banks and that this was known to and ratified by the plaintiff. Furthermore, the trustee had never declared a default. Accordingly, the plaintiff did not establish an interest, right or title in the vested property sufficient to entitle it to a return under the Trading with the Enemy Act.

Staff: James D. Hill, Irving Jaffe and Max Wilfand
(Office of Alien Property).

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Judicial Review-Suspension of Deportation-Communist Party Membership. Wolf v. Boyd (C.A. 9, October 24, 1956). Judicial review of Board of Immigration Appeals' denial of motion to reopen for purpose of applying for suspension of deportation under Immigration and Nationality Act.

Appellant was found deportable in 1956 for membership in the Communist Party and subversive activities under the Act of October 16, 1918. She was not eligible under existing law for discretionary relief. In judicial review proceedings, she unsuccessfully challenged the validity of the deportation order. (215 F. 2d 377) Certiorari was denied by the Supreme Court in 1955. (348 U.S. 951)

While this litigation was in progress, the Immigration and Nationality Act became effective on December 24, 1952. Early in 1956, appellant filed a motion before the Board of Immigration Appeals to reopen the deportation proceedings so that she might apply for suspension of deportation under section 244(a)(5) of the 1952 Act, although that statute, by its express terms, referred only to aliens found deportable under the 1952 Act. No regulations existed for the filing of applications for discretionary relief by persons found deportable under prior-existing statutes, whether or not they were otherwise eligible under the 1952 Act. Current regulations required that applications for suspension had to be filed during the deportation hearing.

Nevertheless, the Board of Immigration Appeals reviewed the entire case, noting that appellant had declined in proper proceedings to testify as to the nature and extent of her activities in the Communist Party, and further, had failed to file with her motion an affidavit setting forth this information together with a statement whether she was the subject of, or amenable to, criminal prosecution, both requirements of existing regulations. The Board denied the motion, stating that the facts asserted in the motion were not persuasive that the case merited the exercise of the discretionary authority to suspend deportation.

Appellant sought judicial review of the Board's action. The district court dismissed her complaint holding that while she was entitled to invoke the Attorney General's discretionary powers, she was not entitled as a matter of right to an administrative hearing on her application for such relief in the absence of regulations so providing. She had in fact received consideration on her application for suspension of deportation the court said, by way of her motion to reopen, and that the adverse decision thereon was reached by an overall evaluation of the facts and circumstances of the case, including those contained in the record of earlier administrative proceedings.

The Court of Appeals for the Ninth Circuit, noting that judicial review was available only if there had been a clear abuse of, or a failure to exercise, discretion, affirmed the decision of the district court, holding (1) that there had been an actual exercise of discretion by the Board of Immigration Appeals and (2) that the exercise was not arbitrary. It was not material to this case, the Appellate Court said, whether allegedly similar cases had received favorable consideration.

Judicial Review of Deportation Order-Effect of Judicial Denaturalization. U. S. ex rel Brancato v. Lehman (C.A. 6, November 21, 1956). Appellant was naturalized in 1929. Two weeks later he departed on a three months' trip abroad and was re-admitted March 1, 1930 as a United States citizen. In 1932 he was convicted of perjury and sentenced to imprisonment, from which he was released in 1936. In 1939, pursuant to a stipulation between the United States Attorney and appellant that appellant's petition for naturalization had not been verified by two credible witnesses as required by statute, the district court ordered that the 1929 order admitting appellant to citizenship be vacated and annulled and appellant's citizenship cancelled; and that appellant be enjoined "from setting up or claiming any right or privilege, benefits or advantages whatsoever by virtue of said (1929) order....."

In 1953, after lengthy administrative proceedings appellant was found deportable under section 19(a) of the Immigration Act of 1917, as amended, on the ground that he had been sentenced to imprisonment for a term of one year or more for conviction in the United States of a crime involving moral turpitude, to wit: perjury, committed within five years after his entry of March 1, 1930. Suspension of deportation was denied.

When taken into custody for deportation, appellant applied for a writ of habeas corpus challenging the validity of both the order of deportation and the denial of suspension of deportation. The deportation order was invalid, he alleged, because he re-entered the United States as a citizen in 1930, and hence was not within the purview of the deportation statute. He based this allegation on the theory that his naturalization had not been revoked for fraud and hence had not been revoked ab initio but rather from the date of the order of denaturalization, which was nine years after his 1930 re-entry. Thus he claimed he had been a United States citizen at all times from 1929 to 1939.

The district court sustained the deportation order and denied the application for a writ holding that appellant's failure to comply with the statutory requirements for naturalization was fatal to the validity of his admission to citizenship and that the judgment of denaturalization annulled such citizenship from its inception so that he had "never been a citizen of the United States".

The appellate court on November 21, 1956, reversed the district court and remanded the case with instructions to grant the writ. While agreeing with the district court that a judgment revoking naturalization should be given a retroactive effect, whether or not based upon fraud, the appellate

court held that of itself the application of this principle did not convert appellant's 1930 entry into the entry of an alien for purposes of the deportation statute; that could be done only by giving the deportation statute itself a "relation-back construction" and the deportation statute did not so provide. Furthermore, the appellate court said, to do so would be "a legal fiction which is in direct conflict with the actualities of the situation."

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