

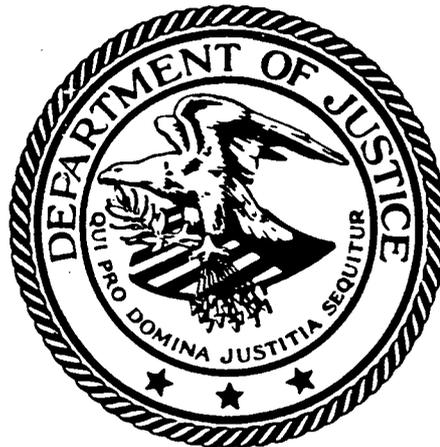
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No. 11



**UNITED STATES ATTORNEYS**  
**BULLETIN**

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# 307

# UNITED STATES ATTORNEYS BULLETIN

Vol. 5

May 24, 1957

No. 11

## DISTRICTS IN CURRENT STATUS

As of March 31, 1957, the three-quarter mark in the fiscal year, the following districts were in a current status:

### CASES

#### Criminal

Ala., M.	Colo.	Iowa, N.	Mo., W.	Pa., W.	Va., E.
Ala., S.	Conn.	Iowa, S.	Nev.	P. R.	Wash., E.
Alaska #1	→ D. of Col.	Kan.	N. M.	R. I.	W.Va., N.
Alaska #2	Fla., N.	Ky., W.	N.Y., W.	S. D.	W.Va., S.
Alaska #3	Ga., S.	La., W.	N.C., M.	Tenn., E.	Wis., W.
Ariz.	Hawaii	Mass.	Okla., N.	Tenn., W.	Wyo.
Ark., E.	Idaho	Mich., W.	Okla., W.	Tex., E.	C. Z.
Ark., W.	Ill., E.	Miss., N.	Ore.	Tex., S.	Guam
Calif., N.	Ind., S.	Mo., E.	Pa., E.	Utah	

#### Civil

Ala., N.	D. of Col.	Ky., E.	N.C., M.	Tenn., W.	W.Va., S.
Ala., M.	Fla., N.	La., E.	N.C., W.	Tex., N.	Wis., E.
Ala., S.	Ga., N.	La., W.	N.D.	Tex., E.	Wyo.
Alaska #1	Ga., M.	Md.	Ohio, N.	Tex., S.	C. Z.
Alaska #2	Hawaii	Mass.	Okla., N.	Tex., W.	Guam
Ariz.	Idaho	Minn.	Okla., E.	Utah	V. I.
Ark., E.	Ill., S.	Miss., N.	Okla., W.	Vt.	
Ark., W.	Ill., N.	Mo., E.	P. R.	Va., E.	
Calif., N.	Ind., N.	Neb.	R. I.	Wash., E.	
Calif., S.	Iowa, S.	N. H.	S.C., W.	Wash., W.	
Colo.	Kan.	N. M.	Tenn., E.	W.Va., N.	

### MATTERS

#### Criminal

Ala., N.	Ga., M.	Md.	N. C., M.	R. I.	W.Va., N.
Ala., S.	Ga., S.	Mich., W.	N. C., W.	S. D.	W.Va., S.
Alaska #1	Ill., E.	Miss., N.	Ohio, N.	Tenn., M.	Wis., E.
Alaska #2	Ind., N.	Miss., S.	Ohio, S.	Tenn., W.	Wyo.
Alaska #3	Ind., S.	Mo., E.	Okla., N.	Tex., E.	C. Z.
Alaska #4	Iowa, S.	Mo., W.	Okla., E.	Tex., W.	Guam
Ariz.	Kan.	Mont.	Okla., W.	Utah	V. I.
Ark., E.	Ky., E.	Neb.	Ore.	Va., E.	
Ark., W.	Ky., W.	N. H.	Pa., E.	Va., W.	
Calif., N.	La., W.	N. Y., N.	Pa., W.	Wash., E.	
Conn.	Me.	N. C., E.	P. R.	Wash., W.	

MATTERSCivil

Ala., N.	Fla., N.	La., E.	N. H.	Okla., E.	Utah
Ala., M.	Ga., M.	La., W.	N. J.	Okla., W.	Va., E.
Alaska #1	Ga., S.	Me.	N. M.	Pa., E.	Va., W.
Alaska #2	Hawaii	Md.	N. Y., N.	Pa., W.	Wash., E.
Alaska #4	Idaho	Mass.	N. Y., E.	R. I.	Wash., W.
Ariz.	Ill., N.	Mich., W.	N. Y., W.	S. C., E.	W. Va., N.
Ark., E.	Ill., E.	Miss., N.	N. C., E.	Tenn., E.	Wis., E.
Ark., W.	Ill., S.	Miss., S.	N. C., M.	Tenn., M.	Wis., W.
Calif., N.	Ind., N.	Mo., E.	N. C., W.	Tenn., W.	Wyo.
Calif., S.	Iowa, N.	Mo., W.	N. D.	Tex., N.	C. Z.
Colo.	Iowa, S.	Mont.	Ohio, N.	Tex., E.	Guam
Conn.	Ky., E.	Neb.	Ohio, S.	Tex., S.	V. I.
D. of Col.	Ky., W.	Nev.	Okla., N.	Tex., W.	

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CRIMINAL TAX CASES

Criminal tax cases are not included in the computations which determine whether or not any office is in a current status. It appears that, for this reason, some offices are neglecting their criminal tax cases. This category of cases should be given close attention and every effort should be made to dispose of them as rapidly as possible, consistent with the best interests of the Government and the proper administration of justice. The fact that pending criminal tax cases are not counted against the current status of an office should not be construed to mean they can be let slide or their disposition delayed. The Department considers such cases as among the more important classes of litigation handled by the United States Attorneys.

\* \* \*

JOB WELL DONE

In a recent procurement fraud case brought to a successful conclusion by Assistant United States Attorneys Arthur H. Christy and Fioravante G. Perrotta, Southern District of New York, the presiding judge commented that Mr. Christy and Mr. Perrotta had presented their case well and, above all, fairly. In addition, both Mr. Christy and Mr. Perrotta received letters of commendation from Director J. Edgar Hoover for the manner in which they handled the case.

The Solicitor, Department of Labor, has commended United States Attorney James M. Baley, Jr., Western District of North Carolina, and his staff, particularly Assistant United States Attorney Hugh E. Monteith, for their successful prosecution of a recent Fair Labor Standards case in which the defendants were fined and ordered to make full restitution of all underpayments to employees.

The work of Assistant United States Attorney Horace J. Rodgers, Eastern District of Michigan, in a recent Civil Aeronautics Administration case has been commended by the Regional Attorney of the C.A.A., who stated that the C.A.A. representatives present at the trial were most impressed by the thoroughness of Mr. Rodgers' preparation and his grasp of the technical complexities which characterize cases involving air traffic control problems.

The Warden of the Terminal Island Federal Correctional Institution, California has expressed appreciation for the assistance rendered by Assistant United States Attorney Bruce A. Bevan, Jr., Southern District of California, in a recent appeal by a prisoner from a decision of removal. The letter stated that Mr. Bevan was very capable and represented the Government's interests very ably.

The Chief of Enforcement, Foreign Assets Control, Treasury Department, has expressed appreciation for the patience, skill and effectiveness with which United States Attorney Julian T. Gaskill, Eastern District of North Carolina, handled a recent highly technical case.

In expressing his appreciation for the fine cooperation and very able service rendered by Assistant United States Attorney Sidney L. Farr, Southern District of Texas, in a recent case, the Assistant General Counsel, Department of Agriculture, stated that in the early emergency stages of the litigation Mr. Farr spent much of his own time working with an Agriculture Department attorney to prevent interference with the decision in the administrative hearing. He further stated that in the later stages of the case, Mr. Farr very ably briefed and presented the complex matter to the court, securing dismissal of the case and an opinion which should be most helpful in litigation of this nature.

United States Attorney Hartwell Davis, Middle District of Alabama, has received a letter from the Solicitor for the Labor Department commending his efforts and those of Assistant United States Attorney Robert E. Varner in successfully concluding a criminal contempt action in that district resulting in the imposition of a fine upon the defendant. In addition, a civil contempt action was concluded against this same defendant with payment of \$4,958.02 in underpayments for the employees involved. The Solicitor has expressed his appreciation for the cooperation of Mr. Davis and his staff in achieving these excellent results.

In expressing appreciation for the efficient and courteous manner in which Assistant United States Attorney Clayton Bray, Northern District of Texas, handled a recent case, the Regional Attorney, Department of Labor, stated that Mr. Bray's attitude was one of complete cooperation throughout the case, and that Labor Department representatives present at the trial have been unstinting in their praise of Mr. Bray's conduct of the trial.

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INTERNAL SECURITY DIVISION

Assistant Attorney General William F. Tompkins

SUBVERSIVE ACTIVITIES

False Statement. United States v. Arthur J. Bonner, Jr. (N.D. Calif.). On October 31, 1956, an indictment was returned against Arthur J. Bonner, Jr. by a Federal grand jury in San Francisco, California. The indictment was in two counts charging him with a violation of 18 U.S.C. 1001 based upon false statements concerning his military service which he made in two applications for Government employment. On November 21, 1956, Bonner entered a plea of guilty as to count one and was placed on probation for five years. Thereafter, count two was dismissed.

Staff: Assistant United States Attorney Donald B. Constine  
(N.D. Calif.)

False Statement; National Labor Relations Board; Affidavit of Non-communist Union Officer. United States v. Bruno Maze (E.D. Mich.). On May 13, 1957, Bruno Maze pleaded guilty to the second count of a six-count indictment charging him with a violation of 18 U.S.C. 1001 based on his false denials of membership in and affiliation with the Communist Party in an Affidavit of Noncommunist Union Officer filed with the National Labor Relations Board on August 4, 1952. The Government's motion to dismiss the remaining counts was held in abeyance pending sentencing.

Staff: Assistant United States Attorney George E. Wood, Jr.  
(E.D. Mich); William W. Greenhalgh (Internal Security  
Division)

Foreign Agents Registration Act of 1938, as Amended. United States v. John Joseph Frank (D.D.C.). On May 13, 1957, a Federal grand jury returned a four-count indictment charging John Joseph Frank, alias John Kane, with acting within the United States as an agent of the Dominican Republic and as the agent of Generalissimo Rafael Leonidas Trujillo without having filed with the Attorney General a registration statement, in violation of the Foreign Agents Registration Act (22 U.S.C. 612, 618). Judge Laws fixed June 24, 1957, as the date for trial.

Staff: Assistant Attorney General William F. Tompkins;  
Nathan B. Lenvin and Plato C. Cacheris (Internal  
Security Division)

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

SUPREME COURT:CANAL ZONE CODE

Stay of Mandate in Determination of Tolls of Panama Canal. Panama Canal Company v. Grace Line, Inc., et al. (Harlan, J., May 7, 1957). For the details of the litigation and the decision of the Court of Appeals see United States Attorneys' Bulletin, Vol. 5, No. 10, pp. 283-284. After the United States Court of Appeals for the Second Circuit had denied a motion for a stay of mandate, the Panama Canal Company applied to the Supreme Court for a stay pending review on certiorari. The Court, per Harlan, J., granted the stay. He stated that "it cannot be said that it is unlikely that certiorari will be granted." Furthermore, he accepted the Panama Canal Company's position that it should not be compelled to revamp its entire toll structure until its duty to do so, and the principles on which it should proceed, are finally adjudicated, particularly in view of the possible embarrassment of our relations with foreign governments if the Canal Company were required to take any action before the final disposition of the litigation. In contrast to the position taken by the Court of Appeals, Mr. Justice Harlan stressed the fact that the Panama Canal Company is a government or political instrumentality and not a mere commercial corporation.

Staff: Assistant Attorney General George Cochran Doub;  
Paul A. Sweeney, Leavenworth Colby, Herman Marcuse  
(Civil Division)

COURT OF APPEALS:ADMIRALTY

Charter Party; Recovery Denied Under Language of Agreement and War Conditions. Western Canada Steamship Co., Ltd. v. United States (C.A. 9, April 24, 1957). The United States chartered a vessel from plaintiff for a period of "about 120 days . . . or to the termination of the voyage current at the termination date". Plaintiff sued to recover additional compensation alleging that use over 120 days had been caused by unnecessary delays in loading and unloading. The trial court held that employing the vessel until the end of the last voyage, a period of 192 days, did not entail unnecessary delay since the ship was chartered to carry ammunition to Japan during the Korean conflict. In affirming, the Court of Appeals held that the awareness of both parties of possible delays caused by conditions of war accounted for the alternative duration terms of the charter party, the "voyage current" clause covering this anticipated situation. Moreover, the evidence substantially supported the findings below that the alleged delays were the result of loading and unloading under these conditions. Finally, it should have been

evident to the company on the basis of the extended duration of the first voyage that the second could not be completed within 120 days. While the company at that point could have applied for renegotiation of the charter under the agreement, it failed to do so, indicating its acceptance of the delays under the duration language of the agreement.

Staff: Graydon S. Staring (Civil Division)

AUTHORITY OF GOVERNMENT OFFICIALS

Action of United States Attorney in Approving Extension of Time for Note Payment Held Beyond His Statutory Powers and Not Binding on Government of Virgin Islands. Government of Virgin Islands v. Roy P. Gordon, et al. (C.A. 3, May 7, 1957). The Government of the Virgin Islands brought action against the indorsers on a promissory note who had waived presentment, demand, and notice of protest at maturity. The maker defaulted in payments and signed an agreement, which was approved by an Assistant United States Attorney, promising to pay the full amount and accrued interest. When the maker failed to comply with this supplemental agreement, the Government sought and obtained summary judgment against the maker and indorsers.

On appeal, the indorsers contended that under the pertinent provisions of the Negotiable Instruments Law, persons secondarily liable were discharged by the agreement to extend the time of payment. Affirming the trial court, the Court of Appeals held that the plaintiff Government of the Virgin Islands was not bound by the action of the Assistant United States Attorney clearly beyond his authority as defined in the Organic Act of the Virgin Islands, citing Utah Power & Light Co. v. United States, 243 U.S. 389; Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380.

Staff: United States Attorney Leon P. Miller (Virgin Islands)

DEFAMATION

Absolute Immunity of Government Officials for Defamation in Press Release. Barr v. Matteo & Madigan (C.A.D.C., May 2, 1957). In a split opinion, the Court of Appeals affirmed jury verdicts for libel against the appellant who, while Acting Director of ORS, issued a press release announcing the proposed suspension of two ORS employees for formulating and participating in a plan whereby employees of OHE (the predecessor of ORS) had in 1950 received payments for accumulated annual leave without severing government employment. The press release was issued following severe criticism of the 1950 plan on the floor of the Senate. On appeal, it was contended error had been committed in denying motions to dismiss and for a directed verdict insofar as based on the defense of absolute immunity. The majority held that absolute immunity in the field of press releases was restricted to cabinet officers relying on its prior decision in Colpoys v. Gates, 118 F. 2d 16 (C.A.D.C.) where a United States Marshal was held to be liable for libel when he announced to the

press his reasons for dismissing subordinates. Because of the importance of the issue in the field of absolute immunity and the desirability of an informed public as well as a conflict with the rationale of cases recognizing absolute immunity, a petition for rehearing in banc is being filed.

Staff: Paul A. Sweeney and Joseph Langbart (Civil Division)

#### FALSE CLAIMS ACT

False Claims Submitted to Commodity Credit Corporation Constitute Claims "Against the Government of the United States" Within Meaning of the False Claims Act. United States v. R. S. Rainwater, et al., and United States v. Citizen's National Bank (C.A. 8, May 3, 1957). The Government brought suit under the Civil False Claims Act, 31 U.S.C. 231-233, to recover damages for false cotton loan claims filed by defendants with Commodity Credit Corporation under the 1949 cotton price support program. Among several defenses raised in their motion to dismiss the consolidated cases, was the contention that claims against the Commodity Credit Corporation were not claims "against the Government of the United States or any department or office thereof", as required by the Act. The district court dismissed both actions without setting forth its reasons. On appeal, the parties' arguments and the Eighth Circuit's concern were directed to the question of statutory coverage since the Court of Appeals for the Fourth Circuit had recently ruled that claims against government owned corporations (including Commodity) were not claims "against the Government of the United States", under the Civil False Claims Act. United States v. McNinch, et al. (C.A. 4, February 28, 1957).

The Court of Appeals reversed the dismissal judgments of the district court, expressly declining to follow the Fourth Circuit's decision as to statutory coverage. The Eighth Circuit, relying on United States ex rel Marcus v. Hess, 317 U.S. 537 held that it is the federal source of the funds against which false claims are made, rather than the form of the disbursing agency, that is critical in determining coverage. In that light, the Court found no distinction between claims against a wholly-owned government corporation and claims against the Government itself -- the source of the funds in both cases being the Federal Treasury. The Court of Appeals also noted that the present-day approach of the Supreme Court with respect to wholly-owned government corporations is one which disregards the corporate form when realities dictate a holding that it is the Government itself that is acting.

The Solicitor General has authorized the filing of a petition for a writ of certiorari in United States v. McNinch, et al., supra.

Staff: Marcus A. Rowden (Civil Division)

False Claims Against Federal Corporations Not Cognizable Under False Claims Act. United States v. McNinch, No. 7224; United States v. Toepelman, No. 7321; Cato Bros, Inc. v. United States, No. 7333 (C.A. 4, February 28, 1957). These cases were decided in a single opinion. McNinch involved substantially the question in United States v. Tieger (234 F. 2d 589 (C.A. 3), certiorari denied, 352 U.S. 941), whether a false claim for a FHA loan guarantee is subject to the False Claims Act (31 U.S.C. 231). Cato and Toepelman involved false claims for direct government loans (not guarantees) against Commodity Credit Corporation. The Fourth Circuit rejected the Government's claim for damages in all three cases under the False Claims Act on the ground that the Act is inapplicable to a wholly-owned federal corporation, despite the fact that in McNinch, the claims were against FHA, an unincorporated federal agency. (The Court also affirmed in McNinch on the basis of the Tieger holding.) In reaching this conclusion, the Fourth Circuit rested largely on the fact that Congress had amended the language of the criminal False Claims Act (R.S. 5438) in 1918 to expressly include government corporations, while the same language in the Civil Act had not been amended. The Eighth Circuit in United States v. Rainwater has, subsequent to the decision herein, reached a contrary result, expressly refusing to follow the Fourth Circuit's decision. A petition for a writ of certiorari to review the decision in the present three cases will be filed. If review is granted, the Government intends to raise the issue involved in United States v. Tieger, as well as urging the applicability of the Act to government corporations.

Staff: William W. Ross (Civil Division)

#### FEDERAL TORT CLAIMS ACT

Attractive Nuisance; Child Injured by Falling Mailbox; Indemnity. United States v. H. W. Bernhardt, et al. and the City of Beaumont (C.A. 5, May 3, 1957). Suit was brought for the injuries sustained by a 5 year old child, incurred when a curb pick-up (snorkel) mailbox fell on him as he clung to the chute with both hands. The United States filed a third party complaint against the City of Beaumont for indemnity in the event that the Government was held liable in the principal suit. This was on the ground that the City had refused the local Postmaster permission to fasten mailboxes to the ground since a City ordinance forbade doing so. The District Court found for the plaintiffs in the principal suit and denied recovery on the indemnity claim. The Court of Appeals for the Fifth Circuit here affirmed the District Court on both counts. As to the principal suit, it held that injury was reasonably foreseeable on the facts and circumstances, citing the rule in Banker v. McLaughlin, 146 Tex. 434, 208 S.W. 2d 843, a leading Texas case on attractive nuisance, as controlling. It concluded that the trial court's finding that a reasonably prudent person would have fastened or weighted the mailbox was not clearly erroneous. On the indemnity question, the Court held that the failure to weight the mailbox down was not in any manner attributable to the City.

Staff: Joseph Langbart (Civil Division)

Negligent Operation of Rail Motor Car on Government Railway Held to Be That of Employee of Independent Contractor. Dushon, et al. v. United States (C.A. 9, April 23, 1957). Appellants here sued below for injuries sustained because of the negligent operation of a rail motor car on the Alaska Railroad, an agency of the United States. Both appellants and the operator were employees of a contractor who, by agreement with the railroad, had obtained right of access for repair work on the road. This was accomplished by the contractor's providing for rail motor cars and hiring operators for the cars. These operators were required to pass a qualification examination given by the railroad and to conform to its operating procedures. Operators' salaries were paid by the contractor who furnished all directions and orders to perform work. The district court denied recovery holding that the negligent operator was an employee of the contractor and not of the United States.

The Court of Appeals affirmed, holding that compliance with the safety regulations of the railroad did not obviate the other factors indicating complete control of the operator's employment by the contractor. No exception to the control rule was created by an attempted analogy with cases involving leases by private railroad companies to subsidiaries. Moreover, since a railroad was not a dangerous instrumentality, it could not be said that the Government was shielding itself from liability by employment of an independent contractor. Nothing in Rayonier v. United States, 352 U.S. 315, was found to affect the basic principle applicable here.

Staff: United States Attorney William T. Plummer and Assistant  
United States Attorney Donald A. Burr (D. of Alaska)

#### GOVERNMENT CLAIMS

Credits in Actions by United States; Prior Disallowance by GAO Necessary. United States v. David Center, et al. (C.A. 5, May 1, 1957). The Government sued for the recovery of a balance allegedly due from the sale of aluminum products by the War Assets Administration. Defendants claimed damages resulting from alleged breaches of various sale contracts as set-offs. The district court allowed a reduction in the amount of the Government's recovery by reason of two of the alleged breaches. On cross-appeals, the Court of Appeals reversed, holding that the Government was entitled to its full claim since defendants could not set off against the admitted purchase price a claim which had not previously been presented to and disallowed by the General Accounting Office. 28 U.S.C. 2406. The filing of a claim with the War Assets Administration in reliance upon Section 204 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 485(d) and (g) did not satisfy the presentation requirement where the set-off was based on claims for damages for lost profits for a breach of contract.

Staff: United States Attorney James W. Dorsey and Assistant  
United States Attorney Charles D. Read, Jr. (N.D. Ga.)

GOVERNMENT CONTRACTS

Government Held Not Liable Under Contract for Undiminished Overhead Expenses Where Building Projects Canceled. United States v. E. C. Nickel (C.A. 10, April 26, 1957). The United States brought suit against the defendant contractor for excess payments under a cost-plus-fixed-fee construction contract. The contractor had commenced work on 14 construction projects, but when funds were exhausted, five of the projects were canceled and one partially canceled for the convenience of the Government. The contractor counterclaimed for the amount of the entire overhead provided in the contract for full performance. The trial court held, as a matter of law, that the Government had agreed to pay undiminished overhead on all units covered by the contract whether completed or not.

On appeal, the Court of Appeals reversed holding that as a matter of law, the contract could only reasonably be construed to provide for overhead expenses based upon the percentage of physical completion of the units. The Court found nothing in the contract providing for the payment of the full amount of the overhead in the event of cancellation. Rather, it concluded that the total import of the agreement indicated that the Government was only obligated to make the contractor whole by paying earned overhead expenses plus an adjusted fee.

Staff: United States Attorney John F. Raper, Jr. and Assistant  
United States Attorney William G. Walton (D. Wyo.)

MORTGAGES

United States Subrogated to Lien Position of Prior Mortgagee by Payment and Discharge of Prior Mortgage. United States v. Gregory-Beaumont Equipment Co. (C.A. 8, May 3, 1957). The proceeds of a Commodity Credit Corporation price support loan were paid to the Farmers Home Administration in discharge of an FHA lien. At the time payment was made, there was outstanding a private lien on the commodity subsequent and subject to the FHA lien. CCC agents failed to discover the intervening private lien, a matter of public record, and accepted a new mortgage as security for the price support loan. Reversing a foreclosure decree of the District Court, the Court of Appeals held that payment of the prior lien by CCC, upon the mortgagor's representation that there were no other outstanding liens on the commodity, entitled CCC, on foreclosure, to be subrogated to the prior lien position of the FHA. This result was reached by an application of state law in accordance with the court's decision in United States v. Kramel, 234 F. 2d 577 where the United States unsuccessfully urged that federal law is determinative of the rights of the United States as a mortgagee.

Staff: John G. Laughlin (Civil Division)

SURPLUS PROPERTY ACT

Multiple Damages; United States Entitled to Statutory Damages of \$2,000 for Each Fraudulent Purchase of Surplus Property. United States v. Max Rubin (C.A. 7, April 30, 1957). The Government sought damages under Section 26(b) of the Surplus Property Act of 1944 for each of 22 purchases made by defendant with priority certificates which he fraudulently obtained in the names of seven veterans. The district court found for the Government as to 14 purchases made with three of the certificates, but held that all of the purchases under each certificate constituted a single violation and accordingly awarded the statutory sum of \$2,000 for only three violations, or total damages of \$6,000.

On the Government's appeal, the Court of Appeals held that the statutory sum was properly assessable for each fraudulent use of the certificates and accordingly modified the judgment to provide for damages for 14 violations or a total of \$28,000. The Government contended also that the district court erred in failing to assess damages for the use of a fourth certificate, pointing out that defendant had pleaded guilty to a criminal indictment charging him with fraudulently procuring that certificate and that on the basis of this plea and the Government's evidence as to the continuance of the fraudulent conspiracy, defendant should have been found liable for these purchases as well. The Court of Appeals, while accepting the Government's contention that the defendant's plea of guilty to the criminal indictment was conclusive as to the fraudulent procurement of that certificate, held that as a matter of fact the Government had failed to establish that the purchases made therewith were likewise fraudulent.

Staff: Melvin Richter, Robert S. Green (Civil Division)

DISTRICT COURT:ADMIRALTY

Admiralty Jurisdiction Over Action for Damage to Government Range Light Upheld; Depreciation of Such Structure Reflected in Judgment. United States v. E. B. Pinckney, Sam Adler and Liberty Plumbing Supply and Salvage Co., Inc. (S.D. Ga., April 5, 1957). The Government filed a libel of information in admiralty for destruction by respondents' barge of a government-owned range light in the Savannah River. Respondents countered with exceptions questioning admiralty jurisdiction over such structures and filed answers denying the allegations of the libel. After hearing and trial, the Court overruled the exceptions, finding them to be without merit and citing 1 Benedict, Admiralty (5th ed.), p. 200, for the proposition that government aids to navigation are maritime structures within the admiralty jurisdiction. The Court also found for the Government on the merits but made an allowance for depreciation in arriving at the damages sustained by the light.

Staff: United States Attorney William C. Calhoun and  
Assistant United States Attorney Joseph B. Bergen  
(S.D. Ga.)

Government's Right to Claim Forfeiture of Wages of Alleged Deserting Seaman and to File Interrogatories Sustained. In the Matter of Michael S. Bedzik (D. Md., April 11, 1957). Although logged as a deserter, the seaman-petitioner alleged that after receiving shore leave in Baltimore, he drove to Pittsburgh, became intoxicated and was unable to join his ship before she sailed. Denying desertion, petitioner sought recovery of his wages and effects which had been placed in the registry of the Court. The United States filed an answer, alleging desertion, a claim for forfeiture and interrogatories. Petitioner's motion to strike, challenging the right of the United States to appear and to file interrogatories, was denied. The Court sustained the right of the United States to appear as an interested party and claim forfeiture because of its interest, as parens patriae, in having the money eventually paid into the Treasury for the relief of destitute seamen in the event it was not awarded to the alleged deserter (46 U.S.C. 628); and because of its interest in preventing desertions and its duty to enforce forfeitures. The shipowner generally is not a necessary party. The Court further sustained the right of the United States to serve interrogatories relating to the alleged desertion.

Staff: Leavenworth Colby and George Jaffin (Civil Division)

#### EMERGENCY PRICE CONTROL ACT

Subsidies; Offer to Consider Further Evidence Supporting Original Subsidy Claims Does Not Affect Finality of Administrative Order. United States v. Blunk, et al., (D. Ore., April 10, 1957). In a suit to recover livestock slaughter subsidies paid during World War II, the Government relied upon the finality of a series of letter-orders of Reconstruction Finance Corporation, the subsidy administrator. Claim receivable forms accompanied the letters. The letter-orders explained that the monthly subsidy claims, which had been paid upon preliminary approval, were reprocessed upon the applicant's supporting records, resulting in the claim against his account. In the same letter, RFC stated that it would consider any additional records that the applicant might submit in support of the original claims. The Court entered summary judgment for the Government and rejected the defense that the letter-order was not a final determination.

Staff: Assistant United States Attorney Thomas B. Brand (D. Ore.); Maurice S. Meyer (Civil Division)

#### GOVERNMENT CONTRACTS

Purchaser's Warranty in Government Sales Contract Authorizes Recovery by Government from Purchaser of Amount Paid to Attorney as Contingent Fee for Securing Contract. United States v. J. D. Streett & Co., Inc. (E.D. Mo., April 10, 1957). Defendant was negotiating to acquire certain government surplus buildings by November 1, 1949. It was informed that it would never succeed in acquiring the property from

the United States unless it hired one Waechter, an attorney with supposed political connections. Defendant hired Waechter agreeing to pay him a fee of \$25,000 if the property was acquired by defendant by November 1, 1949. Prior to that date and without any improper solicitation or in fact without any appreciable services at all having been rendered by Waechter in the matter, General Services Administration contracted to sell the buildings to defendant at a price fixed by the Government, whereupon defendant paid Waechter the agreed fee of \$25,000. The sales contract contained a "covenant against contingent fees", reciting that the "successful bidder warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract or at its option to recover from the successful bidder the amount of such commission herewith set forth". [The warranty expressly excepted from its scope commissions paid to licensed real estate brokers and other bona fide established commercial agencies maintained by the successful bidder for the purpose of doing business.] Exercising the latter option, the United States sued defendant for \$25,000, equivalent to the amount of the fee paid by defendant to Waechter. The Court after trial rendered judgment for the United States, ruling inter alia that (1) it is immaterial that the Government sustained no actual damage in the particular circumstances, (2) the contract provision is enforceable as one for liquidated damages as distinguished from one for a penalty, and (3) the executive orders directing the inclusion in contracts of appropriate "covenants against contingent fees" authorize their inclusion in governmental sales of property as well as in contracts for government procurement notwithstanding that the basic executive order appears in terms to be limited to government procurement.

Staff: Assistant United States Attorney Robert E. Brauer  
(E.D. Mo.); Jess H. Rosenberg (Civil Division)

MANDAMUS

Suit Against Federal Officials; Mandamus Will Not Lie Against Maritime Administrator in Dispute Arising Out of Steamship Company's Subsidy Contract if Adequate Remedies at Law Exist. New York and Cuba Mail Steamship Co. v. Weeks, et al. (D.C.D.C., April 19, 1957). During the period when it had an operating-differential subsidy contract with the Maritime Administration, plaintiff company acquired title to two vessels from Agwilines, a non-subsidized operator. Both plaintiff and Agwilines were cosubsidiaries of a parent corporation, Atlantic Gulf and West Indies Steamship Company. Agwilines had expended a large sum of money in reconstructing these vessels. Cuba Mail obtained them from Agwilines by an inter-corporate stock transfer. Cuba Mail contended that the Merchant Marine Act of 1936, providing for subsidies, required that the amount of money spent by Agwilines be deemed the legal

equivalent of money spent by Cuba Mail from a reserve fund it was required to maintain as a subsidized operator. After a refusal by the Maritime Administrator to recognize this theory, plaintiff brought an action for declaratory judgment and mandamus against him, the Secretary of Commerce, and other government officials. Upon a showing by defendants that the plaintiff's request had as its sole motive the reduction of the company's federal tax liability as a subsidized operator, the District Court dismissed the action for lack of jurisdiction. The Court held that even if the Maritime Administrator had lacked discretion in the matter, the purely legal question involved could be resolved in an appropriate action at law on plaintiff's tax liability.

Staff: Charles S. Haight, Jr. (Civil Division)

#### SOCIAL SECURITY ACT

A Husband Under Sentence of Death and Having Exhausted All Means of Appeal Is Not Member of Same Household With Wife and Therefore She is not Entitled to Widow's Insurance Benefits. Eileen Burdette v. Marion B. Folsom (S.D. W. Va., April 15, 1957). Plaintiff sued to recover widow's benefits under the Social Security Act, which provides that "a widow shall be deemed to have been living with her husband at the time of his death if they were both members of the same household at the date of his death". Section 404.1111 of the Social Security Administration Regulations provides that a husband and wife who customarily lived together in the same place of abode but who were not actually doing so at the time of the husband's death may nevertheless be members of the same household if they were apart only temporarily and intended to resume living together in the same place of abode.

Plaintiff's husband was executed upon conviction of murder. From the time of his arrest until his execution he was confined in penal institutions. The Social Security Administration denied plaintiff widow's insurance benefits on the ground she and her husband had not been living together at the time of his death. The District Court affirmed, holding that where a husband is under sentence of death and has exhausted all means of appeal from that sentence, he could not be considered a member of the same household with his wife within the meaning of the applicable regulation as under these circumstances separation is no longer temporary nor can there be reasonable intention on the part of the husband to return to his former place of abode.

Staff: United States Attorney Duncan W. Dougherty and Assistant United States Attorney Percy H. Brown (S.D. W. Va.)

#### SURPLUS PROPERTY ACT

Government Entitled to Double the Amount of Consideration Paid in Addition to Regular Purchase Price, for Violation of Act; Resale by Veteran-Dealer (Priority Purchaser) at Nominal Price Held Violation

of Act and Fraudulent. United States v. Bernstein Bros., et al. (D. Colo. February 20, 1957). One Bensik, a veteran who was engaged legitimately as a dealer or wholesaler in the mail order business, purchased certain surplus property from WAA for \$19,956 upon certification that the property was to be used in the regular course of business for purposes of re-sale. Upon acquisition from WAA he resold 85 percent of the property to defendants, Bernstein Bros., at a nominal mark-up, despite the fact that he could have sold the property in his regular trade at a much more substantial profit. It appeared also that an informal agreement to resell the property to the Bernsteins had been entered into even before he applied to WAA for a priority certificate, and that the Bernsteins had advanced the purchase price to Bensik in the form of a loan in order to permit the latter to complete the purchase from WAA. The Court after trial rendered judgment for the United States holding that (1) the resale to the Bernsteins was violative of the terms and conditions of his veterans priority certificate, and fraudulent, and (2) the United States was entitled by way of liquidated damages to "a sum equal to twice the consideration agreed to be given by such person to the United States," as provided by Section 26(b)(2) of the Surplus Property Act, or a total sum of \$39,912.00. The latter recovery was to be in addition to the \$19,956.00 purchase price which had already been paid to WAA for the property.

Staff: Assistant United States Attorney Herbert M. Boyle  
(D. Colo.); E. Leo Backus, Frederick L. Smith  
(Civil Division)

COURT OF CLAIMS:

GOVERNMENT CONTRACTS

Liability of Prime Contractor to Subcontractor a Prerequisite to Prime's Suit Against Government. Donovan Construction Company and James Construction Company, d/b/a Donovan-James Company v. United States (C. Cls., April 3, 1957). A prime contractor on a government construction project sued on behalf of a subcontractor to recover an amount expended by the subcontractor in connection with alleged extra work. The Government defended on the ground that the prime contractor failed to show that it was liable to the sub for the amount in question. Severin v. United States, 99 C. Cls. 435, cert. den. 322 U.S. 733. Under the contractual arrangements between the prime and the sub, on claims for extra work, the prime obligated itself to proceed against the Government on behalf of the sub, but the prime's liability to the sub was conditioned on whether it succeeded in receiving payment from the Government. The Court held that these contractual arrangements between the prime and the sub were sufficient to bring the case outside of the rule of the Severin case where there was an express negation of liability by the prime to the sub. The Court observed that the arrangement herein involved "is not an unusual or unreasonable one, and as a practical matter is perhaps the best that a subcontractor could hope to obtain from the

prime contractor." Although the Court thus gave standing to the prime to sue, it decided in favor of the Government on the merits, and dismissed the petition.

Staff: John R. Franklin (Civil Division)

GOVERNMENT EMPLOYEES

Employee Must Promptly Exhaust Administrative Remedies With Civil Service Commission Despite Pendency of Similar Case in Courts. William A. McDougall v. United States (C. Cls., April 3, 1957). Claimant was discharged from the Internal Revenue Service and promptly filed an appeal with the Civil Service Commission. However, because a similar case was proceeding through the courts, claimant did not perfect his appeal, preferring to await the outcome of the test case. After two years, the courts finally decided the test case in the employee's favor. Claimant then asked the Commission to reopen the matter, and upon the Commission's refusal, sued for back pay, seeking to obtain the benefit of the test case. The Court dismissed the petition for failure to exhaust administrative remedies. It stated that if claimant wanted his case held in abeyance until after the pending court case, he should have first secured the consent of the Commission. Since he did not do so, the Commission was justified in not reopening the case, and claimant is now barred from resorting to court action, even though there may have been a procedural defect in effecting his discharge, as the Court in the test case held.

Staff: Francis P. Borden (Civil Division)

Government Employment is Not a Contract; Termination of Apprenticeship Programs. Turner T. Barnes, et al. v. United States (C. Cls., April 3, 1957). A group of Bureau of Engraving and Printing employees accepted demotions to enter a four-year apprenticeship program for plate printers. Subsequently, the Bureau was able to purchase new labor saving machinery which permitted a substantial reduction in its staff of plate printers. Accordingly, the apprenticeship program was discontinued and claimants were reinstated in their former jobs. The Court dismissed their petitions, rejecting their contention that the Bureau had in effect contracted to give them a full four-year training program. It held that "the nature of plaintiffs' employment as apprentice plate printers was that of any other civil service employee serving in a position for which he has qualified and to which he has been properly appointed. The employee is free to leave such a position at any time and the Government-employer is free to dispense with his services at any time provided the procedural requirements relative to his removal are complied with. Inasmuch as we hold that no contracts of employment arose in this case, there can have been no breach."

Staff: Sondra K. Slade (Civil Division)

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C R I M I N A L   D I V I S I O N

Assistant Attorney General Warren Olney III

DEPORTATION

Supervision of Aliens Ordered Deported; Extent of Authority Under Section 242(d) of Immigration and Nationality Act of 1952. United States v. Witkovich (United States Supreme Court, April 29, 1957). Appellee is an alien who was ordered deported because of Communist activity. The deportation order has been unexecuted and outstanding more than six months. Under such circumstances, Section 242(d) authorizes supervision, pending eventual deportation, under regulations requiring the alien "(1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." Appellee was placed under an order of supervision. Examined by an immigration officer, he refused to answer questions as to whether he subscribed to the Daily Worker, visited the offices of certain Communist publications, knew certain individuals, attended certain meetings, lectures, movies, etc. He was indicted under Section 242(d) for wilfully failing to give the information required. The district court dismissed the indictment (140 F. Supp. 815).

On appeal, the Supreme Court affirmed, two Justices dissenting. Conceding that clause (3), if read literally, appeared to confer on the Attorney General unbounded authority to require whatever information he deems desirable of aliens under these circumstances, the Court concluded nevertheless that the clause must be read more restrictively to avoid serious constitutional doubts. Tracing the provision's legislative history and considering the fact that Section 242(d) concerned itself essentially with the alien's availability for deportation, the Court found it appropriate to construe the statute as authorizing only those questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue.

Staff: John F. Davis (Solicitor General's Office);  
Beatrice Rosenberg and J. F. Bishop (Criminal Division).

CHINESE PASSPORT FRAUDS

United States v. Eng Wing On (S.D. N.Y.) On April 10, 1957, after two days of trial, defendant pleaded guilty to a conspiracy count and a substantive count of a five-count indictment arising out of his activities in assisting Chinese to obtain American passports fraudulently. He was sentenced to imprisonment for a year and a day and

fined \$1,000. Defendant is believed to be the second largest East Coast "immigration broker" -- person arranging to bring to this country Chinese fraudulently as United States citizens through false claims to having been born in China of United States-citizen fathers. The practice of such fraudulent claimants to United States citizenship attempting to come to this country has been wide-spread and of long duration, and the business of "immigration broker" has been very lucrative. The man believed to be the largest "broker" on the East Coast, Sing Key, was also convicted in the same Court on similar charges some time ago, and his appeal from the conviction is presently pending in the Second Circuit.

Staff: Assistant United States Attorneys Morton S. Robson  
and Gerard L. Goettel (S.D. N.Y.).

#### FOOD AND DRUG

Criminal Contempt. United States v. Etowah Poultry Company, Inc., and W. B. Anderson, an individual (N.D. Ga.). On November 23, 1955, the District Court issued a temporary injunction against the defendants under the provisions of section 302 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 332. The decree enjoined them from introducing or delivering for introduction or causing the introduction or delivery for introduction into interstate commerce in violation of 21 U.S.C. 331(a) any dressed, drawn or cut-up poultry or any other such article of food which was adulterated within the meaning of 21 U.S.C. 342(a)(4) in that it had been prepared, packed or held under insanitary conditions.

On October 26, 1956, a Petition for Order to Show Cause was filed and the Court signed an Order requiring defendants to show cause on November 9, 1956, why they should not be adjudged in criminal contempt. The case was eventually set for trial on March 11, 1957, at which time defendants' offers of pleas of nolo contendere were accepted by Judge Hooper who thereupon fined each defendant \$250 on each count, a total of \$1,000 for both defendants.

Staff: United States Attorney James W. Dorsey; Assistant United States Attorney Charles D. Read, Jr. (ND. Ga.).

#### FAIR LABOR STANDARDS ACT

Failure to Pay Proper Overtime; Falsification of Time Records; Testimony as to Exact Dates of Offenses Not Necessary for Conviction. United States v. Lieberman-Koren Corp. and Sylvia Kapner (E.D. N.Y.). (Previously reported in United States Attorneys Bulletin dated December 23, 1955, Volume 3, No. 26, p. 9.) Defendants, who were convicted after trial, appealed. The main contention on appeal was that as none of the government witnesses (defendants' employees) had been able to testify as to any specific dates on which they worked overtime

the evidence was too indefinite to sustain a conviction. The Court of Appeals for the Second Circuit affirmed holding that testimony that they had worked overtime and had not been paid time and one-half was adequate. Similarly, the Court's charge that "the government need not prove specific dates or hours worked by employees" was approved.

Staff: United States Attorney Leonard P. Moore;  
Assistant United States Attorney John W. Wylder  
(E.D. N.Y.).

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS  
Appellate Decision

Time for Taking Appeal from District Court to Court of Appeals; Rules 54(a), 58, 73(a) and 79(a), Federal Rules of Civil Procedure. United States v. F. & M. Schaefer Brewing Co., 236 F. 2d 889 (C.A. 2). The Supreme Court granted the Government's petition for certiorari in the above case, previously reported in Vol. 4 of the Bulletin, No. 20, pp. 653-655. The question presented is whether, under the Federal Rules of Civil Procedure, the time for taking an appeal runs (a) from the date of a District Court's memorandum decision and of the docket entry which stated that taxpayer's motion for summary judgment had been granted, or (b) from a later date when the formal judgment was signed and the docket entry made stating "Judgment filed and docketed" and giving the amount of the judgment. The Court of Appeals held that the "Judgment" was the memorandum decision of the district judge granting taxpayer's motion for summary judgment, rather than the formal judgment which the judge signed at a later date, and that the clerk's notation of the memorandum decision, rather than his notation of the later judgment, was the entry of judgment which determined the period within which notice of appeal must be filed.

Recent cases cited in the petition as conflicting with the decision below on the issue of what constitutes a final judgment and a direction to the clerk to enter judgment for purposes of appeal are: United States v. Higginson, 238 F. 2d 439 (C.A. 1); Cedar Creek Oil and Gas Co. v. Fidelity Gas Co., 238 F. 2d 298 (C.A. 9); and Papanikolau v. Atlantic Freighters, 232 F. 2d 663 (C.A. 4). See United States v. Hark, 320 U.S. 531, rehearing denied, 321 U.S. 802. Other recent decisions are Randall Foundation, Inc. v. Riddell, decided January 8, 1957 (C.A. 9) (1957 C.C.H. par. 9352); Reynolds v. Wade, 241 F. 2d 208 (C.A. 9). Cf. Matteson v. United States, 240 F. 2d 517 (C.A. 2) and Edwards v. Doctors Hospital, Inc., et al., decided April 1, 1957 (C.A. 2).

On the issue as to whether the entry of judgment was an effective entry under Rule 79(a) to start the appeal period, i.e., whether the notation in the civil docket showed "the substance of each order or judgment of the court \* \* \*", the decision cited to be in conflict with the decision below is United States v. Cooke, 215 F. 2d 528 (C.A. 9). Other recent decisions on this issue are United States v. Higginson, *supra*, p. 443; Brown v. United States, 225 F. 2d 861 (C.A. 8); and Kam Koon Wan v. E. E. Black, Limited, 182 F. 2d 146 (C.A. 9). Cf. Matteson v. United States, *supra*.

Staff: Karl Schmeidler (Tax Division)

District Court Decisions

Tax Benefit Rule Applied to Reimbursement of Embezzled Prior Years' Income. Keystone National Bank in Pittsburgh v. United States (W.D. Pa., March 27, 1957). An accrual basis taxpayer (the bank) was reimbursed by a bonding company in 1949 for income embezzled in the years 1939 through 1949. Since the monies embezzled were income, taxpayer's returns for those years had understated its income and its taxes. Taxpayer contended that the reimbursement should be prorated back to increase its income for each of the years of the embezzlements (most of which were closed by the statute of limitations). The Government contended that the reimbursement was income in 1949 because of the tax benefit rule.

Ordinarily, if a taxpayer discovers embezzlements and is reimbursed for its losses in the year of discovery, the reimbursement is prorated back to each of the years in which the embezzlements occurred. Similarly, if the taxpayer discovers embezzlements which took place in prior years but does not receive reimbursements, the income tax returns for those years are amended to show the embezzlement losses sustained in each year. However, if the prior years are barred by the statute of limitations or if the taxpayer cannot determine how much was embezzled in each of the years, the loss is deductible in the year of discovery of the embezzlement. Alison v. United States, 344 U.S. 167, 1953-2 Cum. Bull. 143.

In deciding for the Government on a motion for judgment on the pleadings, the Court ruled that the entire reimbursement was income to the taxpayer in 1949 because of the tax benefit rule. The rule is that when a taxpayer is reimbursed for a loss or expense for which it received a tax benefit in prior years, the reimbursement is income to the taxpayer in the year of receipt. Security Flour Mills Co. v. Commissioner, 321 U.S. 281; Rothensies v. Electric Battery Co., 329 U.S. 296, 298; Freihofer Baking Co. v. Commissioner, 151 F. 2d 383, 386 (C.A. 3). In this case, because of the unusual fact that the money embezzled was income which consequently was not reported, a tax benefit occurred. By not reporting the embezzled income, taxpayer is in the same position as if it had reported its correct income in each year and then taken a deduction for the amount embezzled from it in that year. In consequence, having in effect received a tax benefit in the prior years, the reimbursement was held to be income to it in 1949, the year of receipt.

Staff: United States Attorney D. Malcolm Anderson;  
Assistant U. S. Attorney Thomas J. Shannon (W.D. Pa.)  
Victor A. Altman (Tax Division)

Income Taxes; Joint Returns; Taxpayers Must Have Identical Tax Periods. James M. Wolf, et ux. v. United States (D.C. Neb.). Taxpayers were married on November 26, 1949. Prior to the marriage husband filed income tax returns on a calendar year basis, while wife filed her returns on a fiscal year basis. In 1950 wife made application for permission to change her accounting period to a calendar year.

Permission for such change was granted by letter from the Deputy Commissioner, dated October 19, 1950. She filed a Form 1040 income tax return for the fiscal year ending August 31, 1950, and paid the tax thereon shown to be due. Instead of filing a separate return for the short period September 1, 1950, to December 31, 1950, she joined with her husband and filed a joint income tax return for the calendar year 1950. On this return husband reported his income for the calendar year 1950 and his wife reported only income received during the period September 1, 1950, to December 31, 1950. On the return an attempt was made to "annualize" the wife's income for the short period.

The Court determined that a joint return is not allowed if the tax year of either spouse is a fractional part of a year. In effect, the Court said that a husband and wife must have identical tax periods in order to file a joint return and that the only exception to this rule is in the case of the death of one spouse.

Staff: Wm. A. Miner (Tax Division)

CRIMINAL TAX MATTERS  
Appellate Decision

Income Tax Evasion; Bills of Particulars; Admissibility of Evidence. Blackwell v. United States (C.A. 8, May 7, 1957.)  
Appellant, convicted on four counts of wilfully attempting to evade his income taxes in violation of Section 145(b) of the 1939 Code, argued on appeal that the trial court had erred in overruling his motion for a bill of particulars and in admitting into evidence the Government's summaries of his net worth and alleged unreported income. In response to the appellant's request for particulars, the Government stated that the additional income in each year would be proved by the net worth method. The Court of Appeals held that the trial court did not abuse its discretion in refusing to require the Government to supply further details: "We are not persuaded that the defendant was seriously handicapped in his defense by such ruling. The principal issue was whether the defendant was entitled to have his opening net worth increased by the amount of cash which he claimed he had accumulated and hoarded prior to the years here involved. Defendant was fully informed that the Government was proceeding on the net worth theory. \*\*\* His information as to the nature of his assets during the indictment years was at least equal to that of the Government."

The Court found no error in the admission into evidence of a chart approximately eight feet high and six feet wide entitled "Summary of Net Worth Increases." Appellant argued that the chart was inaccurate and incomplete and was prejudicial because of its size and constant display in the court room. The Court held, however, that sufficient cautionary instructions had been given to assure that the jury could not have been misled into thinking it must accept the figures as correct, distinguishing Lloyd v. United States, 226 F. 2d 9 (C.A. 5).

Staff: United States Attorney Edward L. Scheufler and Assistant  
United States Attorney William O. Russell (W.D. Mo.)

ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT

Indictment and Complaint Filed; Violation of Sections 1 and 3. United States v. Parke, Davis & Company, et al., (Dist. of Col.). On May 2, 1957, a Federal Grand Jury returned a three-count indictment charging Parke, Davis & Company of Detroit, Michigan, and two of its officers with price-fixing and boycotting, in violation of Sections 1 and 3 of the Sherman Act.

In the first count of the indictment Parke, Davis, its Vice President, G. L. Walker, and its Baltimore Branch manager, S. M. Dripps, are charged with conspiring with various wholesale and retail drug concerns to fix the prices at which its products will be sold in the District of Columbia; that Parke, Davis and the wholesaler co-conspirators agreed that they would refuse to sell Parke, Davis products to retailers who do not agree to adhere to the resale prices fixed by Parke, Davis; that the retailer co-conspirators agreed not to advertise Parke, Davis products at prices lower than those fixed by defendant; that any retailer who did advertise at lower prices would not be sold Parke, Davis products by either that company or the wholesale co-conspirators; and that defendants and the wholesaler co-conspirators agreed to sell Parke, Davis products only to retailers licensed to fill or dispense prescriptions.

The second count of the indictment named as defendants Parke, Davis and S. M. Dripps, and charges that Parke, Davis agreed with a co-conspirator, Washington Wholesale Drug Exchange, Inc., that the co-conspirator would discontinue granting discounts or dividends to retailers on their purchases from the co-conspirator of pharmaceutical products manufactured by Parke, Davis.

The third count of the indictment is similar to the first count except that the area involved is Richmond, Virginia. Parke, Davis and S. M. Dripps are named as defendants.

At the same time that the indictment was returned, a civil case was filed in the United States District Court in the District of Columbia containing substantially the same allegations against Parke, Davis as are found in the indictment. This case asks for injunctions against further price-fixing and boycotting by Parke, Davis and its officers and employees.

Both the indictment and complaint state that the effects of the alleged offenses have been to force consumers to pay higher prices for pharmaceutical products and to prevent retailers from filling prescriptions for pharmaceutical products manufactured by Parke, Davis.

Staff: Edward R. Kenney, Herbert F. Peters, Jr., Marshal C. Gardner and Richard C. Shadyac. (Antitrust Division)

C I V I L   A E R O N A U T I C S   B O A R D

Enforcement of CAB Subpoenas. Civil Aeronautics Board v. Hermann (Sup. Ct., May 6, 1957). In an administrative enforcement proceeding, the Civil Aeronautics Board issued a number of subpoenas duces tecum calling for the production of categories of documents. Upon respondents' failure to comply, the Board sought enforcement in the district court. After an inspection order by the court had proved abortive, the court enforced the subpoenas, but staggered their return dates "so that the respondents will not be deprived of all of their books and records at the same time." The court found that it could not say that any of the documents called for were "immaterial or irrelevant" to the Board proceedings, without examining each of the items ordered produced.

The Court of Appeals for the Ninth Circuit reversed. It held that, in order to obtain enforcement, the Board must show that each of the documents subpoenaed is relevant and material to the inquiry, and is in the possession of the person to whom the subpoena is directed.

On May 6, 1957 the Supreme Court reversed and remanded to the district court with instructions to reinstate its enforcement order. In a per curiam opinion, the Court held that the district court's order "duly enforced the Board's right to call for documents, relevant to the issues of the Board's complaint, with appropriate provisions for assuring the minimum interference with the conduct of the business of respondents." The Court pointed out that the enforcement order left open to the respondents "ample opportunities for objecting on relevant grounds, to the admissibility into evidence of any particular document."

Staff: Daniel M. Friedman (Antitrust Division)

I N T E R S T A T E   C O M M E R C E   C O M M I S S I O N

Order Holding Minimum Weight in Classification Applicable on Shipments Rated Under Commodity Tariff. General Motors v. United States, et al., (E.D. Michigan). General Motors Corporation sued to set aside an order of the Interstate Commerce Commission denying reparations.

The plaintiff made three shipments of automobile parts weighing 16,330, 4,961 and 6,141 pounds, which moved in four cars, the first shipment being divided equally into two cars. The commodity tariff made no reference to carload shipments, but provided that it is governed by the Official Express Classification. The Classification provided carload rates subject to a minimum of 12,000 pounds. Charges were assessed on the basis of the lower commodity rates but on the basis of 12,000 pounds for each carload. General Motors challenged the charges on that basis. In order to toll the statute of limitations, Railway Express sued in the Municipal Court, New York, N.Y., for undercharges computed on the basis of 12,000 pounds. That case is in abeyance until final decision in this action.

On March 27, 1957, judgment was entered sustaining the Commission's order that charges should be on the basis of 12,000 pounds for each car-load. Plaintiff moved to amend the findings of fact and judgment entered by the Court on the grounds they were contrary to and unsupported by the evidence and were contrary to the Commission's findings.

The Commission found that General Motors had requested the carrier to furnish cars for its exclusive use; that the shipments moved in exclusive-use cars under separate waybills; but that there was no evidence that the request for exclusive-use cars was verbal or in writing.

On April 30, the Court denied the motion to amend its findings and judgment.

Staff: Colin A. Smith (Antitrust Division)

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LANDS DIVISION

Assistant Attorney General Perry W. Morton

CONDEMNATION

Rule 71A(h); Limitation Upon Appointment of Commissioners; Authority of Court to Set Aside Findings of Commissioners; Necessity of Detailed Findings to Support Compensation Awards; Valuation of Buildings Removed by Condemnee. United States v. Bobinski (C.A. 2). The question as to compensation to be paid in this proceeding to condemn some 4,400 acres of farm land on Long Island, New York, was referred to a commission of two lawyers and a real estate man under Rule 71A(h), F.R.C.P., in 1952. Here concerned are the first 12 out of many parcels upon which they filed a report in 1955. The court required that a revised report with more specific findings be filed. When this was done the court set aside the findings as to six parcels, substituting its own awards, and, as to certain buildings, found that they were not taken because they had been removed by the owners.

The judgments were vacated and the case remanded pursuant to an opinion by Chief Judge Clark, who was a member of the advisory committee on the federal rules. First, the court, sua sponte, raises a question as to the appointment of commissioners. Trial to the court is, the opinion states, "the usual method" of setting values subject to the right of either party to make timely demand for a jury and that reference to commissioners "is to be an exception for special situations." No such situation appeared here, the court concluded, saying: "Unwarranted use of commissioners, like similar use of masters, is an 'effective way of putting a case to sleep for an indefinite period.' LaBuy v. Howes Leather Co., 352 U.S. 249, 253, note 5, quoting Chief Justice Vanderbilt." The Court stated, however, that this was merely error, and not a jurisdictional defect which the Court should notice even though it was not raised by the parties.

The opinion then held that the Court was justified in holding that the commissioners' findings were clearly erroneous and that, under the circumstances, he was justified in entering findings of his own. The appellate court held, however, that the trial court's findings were not sufficiently detailed and remanded the case for the making of such findings.

As to one parcel the owners had been permitted to remove buildings after the proceedings had been commenced. The commissioners fixed their value before removal at \$33,500 and their value removed for use elsewhere at \$5,350. The district court rejected the commissioners' award of the difference. The appellate court disagreed. It held that the owner was entitled to the value of the land with the building, less the building value to one who must remove it.

Staff: Harry T. Dolan, Special Assistant to the  
Attorney General, Brooklyn, New York.

Just Compensation; Market Value; Owner's Investment in Property.  
Riley v. D. C. Redevelopment Land Agency (App. D.C.). This is a condemnation proceeding to acquire several slum houses in connection with the District of Columbia Redevelopment program. Appeal was taken as to one of the more than 15 parcels tried at the same time. The owner had paid \$300 in cash and had undertaken to pay three notes secured by trusts for a total face amount of some \$9,655. She also had made improvements costing \$877. The jury verdict was \$7,000.

A three-judge bench in a divided decision reversed the judgment. The majority opinion attacked the Agency's evidence on various grounds and, while recognizing that the purchase price computed according to the face amount of the notes was not just compensation as a matter of law, came close to a practical result to that effect. See 4 U.S. Attys Bulletin, pp. 409,636.

The case was heard by the full bench of the District of Columbia Circuit on rehearing. After the argument two local practitioners were appointed amici curiae and they, together with the parties, were requested to brief six questions. The result was judgment setting aside the verdict and remanding the case for a new trial. The grounds were, however, entirely different from those of the original majority opinion. Three opinions were filed, all of which agreed with our fundamental position as to the measure of compensation, which is market value in cash or its equivalent. Judge Fahy, writing for the majority, ruled that, even though no objection had been taken thereto, the charge to the jury was inadequate, in the particular circumstances of this case, in simply telling them that fair market value meant what the property would sell for in cash or terms equivalent to cash. The meaning of equivalent of cash should, the Court held, be explained to the jury. Judge Washington filed a concurring opinion in which Chief Judge Edgerton and Judge Bazelon joined. He spelled out what he understood the jury should be told, saying that, while dissenting from the original opinion, he joined in the present reversal "since no change in the substantive law of eminent domain is being effected \* \* \*." Judges Burger and Bastian dissented on the ground that no ground for reversal was present, the charge being "the conventional, traditional and correct charge which has been approved over the years."

Staff: Roger P. Marquis (Lands Division)

Airspace; Difference Between Clearance Easement and Flight Easement;  
Lack of Authority of Court to Review Estate Taken. United States v.  
64.88 Acres of Land, Situate in Allegheny County (C.A. 3). Complaint and declaration of taking were filed to condemn a clearance easement. The trial court dismissed the complaint and set aside the declaration of taking. The Court of Appeals reversed. It first held that a clearance easement was sufficiently described. This did not include, the Court held, a flight easement, reiterating the rule that, absent bad faith, the Government's determination of the nature and extent of the estate to be taken are not

judicially reviewable. Examining the statutes, the Court then held that Congress had authorized the taking of such easements in conjunction with the Greater Pittsburgh Airport.

Staff: S. Billingsley Hill (Lands Division)

Authority to Take Fee Title of Housing Project Built Under Temporary Taking for Purposes of Economic Disposal; Evidence as to Purchase Price of Large Tract Including Land Taken. Arp v. United States (C.A. 10). In 1943 land was condemned on a year-to-year leasehold for a site for Lanham Act temporary housing. A tender of rent for the year 1954-1955 was refused by the Arps who filed a motion to terminate the taking. The United States filed a supplemental complaint in the same proceeding to take fee title under a statute permitting the Administration to determine that taking of such interest was necessary to protect the Government's interest, or to maintain the improvements or that the cost of restoration would equal or exceed the cost of acquiring fee title. The owners' objections to the taking were overruled and a verdict was returned after trial for \$75,000.

The Court of Appeals affirmed. Agreeing with the owners that the leasehold taking judgment was a consent, it held that it did not preclude taking of fee title. On the same ground, it rejected the argument that the leasehold judgment was res judicata. Overruling the owners' claim of abuse, the Court held that the trial court had discretion to permit the Government to proceed in the same case by supplemental complaint.

Denying the owners' claim of lack of authority for the taking, the Court said that: "The Government was free to adopt the method it considered best suited to protect and save the investment it had in this project and appellants had no complaint so long as they received just compensation for their property." Admission of evidence of the price paid three years earlier for a 667-acre tract, including the 30 acres condemned, was not error, the Court held, in view of the instructions to the jury.

Staff: Roger P. Marquis (Lands Division)

Government Mortgage Liens; Priority over Local Tax Lien. United States v. Ringwood Iron Mines, Inc., et al. (D. N.J.). The United States, acting through G.S.A., conveyed to Ringwood Iron Mines, Inc., mining properties which had been declared surplus. The company paid a relatively small amount in cash and executed a promissory note for \$1,400,000 and a mortgage to secure the remainder of the purchase price. The mortgage was duly recorded.

The company subsequently defaulted in interest and amortization payments. In the meantime, real estate taxes fell in arrears for part of 1953 and all of 1954 and 1955. The collector of taxes of the Borough of Ringwood advertised the property for sale and, on December 30, 1955, sold the property at public auction to the Borough, subject to the equity of redemption. The certificate of sale for the unpaid taxes was issued to the Borough.

The Government brought this action to foreclose the mortgage because of the defendant's default. Judgment of foreclosure was entered July 2, 1956. The property was sold in foreclosure and purchased by the United States for the amount of the indebtedness. The New Jersey statute provided that a municipal tax lien was a first lien and paramount to all prior or subsequent encumbrances. The Borough of Ringwood contended that it was entitled to payment or a lien for the taxes which were in arrears. The Government contended that the lien of the mortgage was prior to the lien for taxes and that the lien for taxes was cut off by the foreclosure sale.

The Court held in favor of the United States and followed the decisions in New Brunswick v. United States, 276 U.S. 547, and United States v. City of New Britain, 347 U.S. 81. In its decision the Court said that the controlling fact is that the federal law "does not grant permission to the states to interfere with a lien of the Federal Government by subsequent exercise of their taxing powers," citing United States v. City of Greenville, 118 F. 2d 963 (C.A. 4, 1941); New Brunswick v. United States, *supra*, 555-556.

Staff: United States Attorney Raymond Del Tufo, Jr., and  
Assistant United States Attorney Eugene M. Friedman (D. N.J.)

#### PUBLIC LANDS

Taylor Grazing Act; Secretary of Interior is Indispensable Party to Action to Enjoin Enforcement of Order Reducing Grazing Privileges on Public Domain. Bedke, et al. v. Nelson, Area Administrator (D. Utah). Plaintiffs held permits issued under the Taylor Grazing Act (43 U.S.C. secs. 315 et seq.) to graze cattle on certain public lands in Idaho. In the spring of 1957 the Range Manager issued an order reducing the use which plaintiffs were entitled to make of the range. Plaintiffs sued the Area Administrator to enjoin the enforcement of the order. An application for a preliminary injunction was made. The Government resisted on various grounds which, if sustained, would defeat the entire action. The Court held that the Secretary of the Interior is an indispensable party and that, since that holding would require dismissal of the action, the preliminary injunction would be denied. The apparent basis of the Court's holding was that since the power to regulate grazing on the public domain is vested by the statute in the Secretary he is an indispensable party to an action, the effect of which, if successful, would be to interfere with the exercise of that power.

Staff: Assistant United States Attorney Llewellyn O. Thomas (D. Utah)

Res Judicata Intermittent Flooding as Taking by Eminent Domain; When Plaintiff Sued as for Taking Under Fifth Amendment Following Flooding of its Power Plant Allegedly Caused by Operation of Government Dam and Judgment was Entered for Defendant, Later Flooding Did Not Constitute New Cause of Action. North Counties Hydro-Electric Company v. United States (C.Cls.). In 1925 plaintiff built a hydro-electric plant on the

Fox River in Illinois. Thereafter, it operated its plant without difficulties caused by ice jams in the Fox River. In 1933 the United States built the Starved Rock Dam in the Illinois River below its confluence with the Fox. In 1943 a large ice gorge formed in the Fox River downstream from the plaintiff's plant and flooded it. Plaintiff brought suit in the Court of Claims to recover just compensation, contending that the ice jam had been caused by the construction and operation of Starved Rock Dam and that the continued operation of Starved Rock Dam would inevitably cause recurrent flooding. The Court of Claims held that the plaintiff failed to prove either that the ice jam had been caused by the Starved Rock Dam or that Starved Rock Dam would cause recurrent flooding. Accordingly, it dismissed the petition (108 C.Cls. 470).

In 1952 another large ice jam formed in the Fox River and again plaintiff's plant was flooded. Plaintiff again sued for just compensation because of all floodings. The Government answered, pleading res judicata, limitations and defenses on the merits.

The Commissioner found as facts that ice jams which damaged the plaintiff's plant had formed in 1943, 1946 and 1952; that those ice jams had been caused by the operation of Starved Rock Dam; and that the operation of Starved Rock Dam would inevitably cause recurrence of damaging ice jams in the Fox River. The Court had directed him to propose conclusions of law, in addition to his findings of fact, and to write an opinion. Accordingly, he proposed conclusions of law to the effect that the Government was liable and he wrote an opinion in which he sustained the plaintiff's contention that the first suit was dismissed for prematurity and that the formation of the second ice jam in 1952 completed a cause of action which did not exist when the first suit was brought.

On May 8, 1957, the Court of Claims rejected the Commissioner's conclusions and the reasoning in his opinion. It held that the first case had been dismissed on the merits and not as premature and that the facts which plaintiff was required to establish to sustain its claim in the second case were exactly the same as those which it had tried and failed to establish in the first case. It held that "an insufficiency of evidence to prove a material issue in the former litigation does not permit litigating the same issue in another action on the same cause of action against the same defendant." Accordingly, it sustained the defense of res judicata and dismissed the petition.

Staff: Ralph S. Boyd (Lands Division)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Physical Persecution; Stay of Deportation; Authority to Make Decision; Review. Feng Yeat Chow v. Shaughnessy and Tsai Lin Lin v. Shaughnessy (S.D.N.Y., May 7, 1957). Action to review deportation orders and to stay enforcement of deportation to Formosa.

These aliens, concededly deportable, are natives and citizens of China who were admitted as seamen and failed to depart in accordance with the terms of their admission. After denial of relief under the Refugee Relief Act of 1953, they were also refused relief under section 243(h) of the Immigration and Nationality Act on the ground that they would be physically persecuted if they were deported to Formosa.

They contended as legal matters that the refusal to grant a stay of deportation was an abuse of discretion, arbitrary and capricious and constituted denial of a fair hearing; that the Regional Commissioner who affirmed the decision was "without authorization" to make a determination on the question of physical persecution, and that the authority to make such a determination could not be delegated by the Attorney General. They also alleged as matters of fact that the Government of China in Formosa had not expressed willingness to receive them; that they would be subjected to physical persecution if deported there, and that the decision to deport them to that country was "discriminatory".

The Court rejected all of these contentions. Neither the administrative record nor anything outside of that record was offered to rebut the presumption of regularity and fairness that is accorded the administrative proceedings. Further, in the absence of some evidence to the contrary, it will be presumed that the order of the Regional Commissioner was intended to be made in the exercise of powers delegated by that officer's superiors. The Court also cited Dolenz v. Shaughnessy, 206 F. 2d 392, 394, to support the view that the Attorney General could delegate his authority to make decisions under section 243(h).

As to the factual allegations, there were presented to the Court documents permitting entry into Formosa issued by the Chinese Consul General at New York. The Court further said it could not re-examine the question of whether petitioners will suffer physical persecution in Formosa which the Attorney General through his delegate, after a fair hearing and after weighing the evidence, has resolved against the petitioners. Finally, as to the contention that the decision was "discriminatory", the Court said the very use of that word showed that the Attorney General's delegate was intended to "discriminate" between those deportees who would and those who would not be subject to physical persecution. Nothing before the Court indicated that the aliens intended to

offer any evidence outside the record tending to show any impropriety in the exercise of the discretion which controls that discrimination and such impropriety would not be presumed.

Staff: United States Attorney Paul W. Williams (S.D.N.Y.)  
(Roy Babitt, Special Assistant United States Attorney  
and General Attorney, Immigration and Naturalization  
Service, of Counsel).

Inferences from Silence in Deportation Cases; Effect of Invoking Fifth Amendment; Evidence. *Vlisidis v. Holland* and *Mavrelos v. Holland* (E.D. Pa., April 18, 1957). Action to review validity of deportation orders against alien plaintiffs.

In these cases the aliens stood mute at the deportation proceedings and invoked the Fifth Amendment on the ground that if they admitted, as the Government established by other evidence, that they were alien seamen who had overstayed the period for which they were admitted to this country, such conduct would subject them to criminal liability. Among the items of evidence received at the hearing by the Government were landing permits, seaman's papers and a passport as well as records of voluntary sworn statements made before immigration officers prior to the institution of the deportation proceedings in which the contentions of the Government were admitted by the aliens. The aliens contended that since the officers who interviewed them preliminarily were not present at the deportation hearing there was no identification of the parties or the exhibits at the hearing. They urged that they had been denied due process of law because the officers who conducted the preliminary interviews were not produced at the deportation hearing and that the Government had not proved that the documents and exhibits related to them. The Court rejected this contention.

The Court also rejected their claim of unfair hearing based upon the contention that in view of their Fifth Amendment claim the Government could not draw inferences from their silence at the deportation hearing.

The deportation orders were upheld in all respects. The Court filed with its rather lengthy opinion an appendix and extensive discussion on (1) the civil nature of deportation proceedings; (2) adverse inference from silence; (3) proof of official records; (4) inference from silence permissible even in criminal prosecutions; (5) inapplicability of the Slochower case (350 U.S. 551); (6) scope of judicial review in deportation cases, and (7) a detailed history of the instant cases.

Suspension of Deportation; Eligibility for Consideration Under More Than One Provision of Statute. *Sevitt v. Del Guercio* (S.D. Calif., March 26, 1957). Action to review refusal to grant suspension of deportation.

The alien in this case entered the United States as a visitor on March 18, 1947. He was ordered deported on the ground that he had failed

to comply with the conditions of his visitor's status and on the further ground that he had failed to furnish information concerning his address as required by law and that such failure was wilful and not excusable. The latter ground for deportation is specifically mentioned in paragraph (5) of section 244(a) of the Immigration and Nationality Act as one of the classes of aliens whose deportation can be suspended under that clause. The paragraph requires, however, that aliens within its purview must have been in the United States for at least ten years after committing the act which makes them deportable. The Board of Immigration Appeals refused suspension of deportation under this paragraph since ten years had not elapsed following the commission of the act of failing to report the alien's address which made him deportable. The Government contended that if a case is specifically mentioned in paragraph (5) of the section, deportation cannot be suspended under the more lenient provisions of paragraph (1) even though the alien also might appear to fall within the terms of the latter paragraph.

The Court held that the refusal to consider granting suspension under paragraph (1) was erroneous since each of the five numbered paragraphs in section 244(a) are in the disjunctive and it is clear that Congress intended to present a choice dependent only upon the alien meeting the standards as required in the particular paragraph of which he seeks to avail himself. The deportation order was therefore ordered held in abeyance until the Attorney General, acting through his subordinates, had exercised his discretion concerning the granting of suspension of deportation under section 244(a)(1).

#### NATURALIZATION

Absence from United States; Necessity for Compliance With Statutory Requirements. Petition of Mewse (S.D.N.Y., April 25, 1957). Petition for naturalization under general provisions of Immigration and Nationality Act.

Petitioner was absent from the United States from March 20, 1954 to April 19, 1955. The Court pointed out that under the statute absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship breaks the continuity of such residence, with certain exceptions not applicable to this case.

The Court observed that the extension of permission to the alien to reenter the United States was obtained for purposes other than naturalization and did not constitute any compliance with the statutory requirements of continuous presence even if he relied upon the statement of the United States Vice Consul in London that the extension would entitle him to naturalization immediately upon his return to the United States. Neither the Vice Consul nor any other officer, employee or agency of the Government, unless authorized by law to do so, can modify or waive any of the requirements established by Congress for the naturalization of aliens.

Petition was denied.

OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Divested Enemy Nationals Not Necessary or Proper Parties to Proceeding for Judicial Settlement of Fiduciary's Account; Attorney General's Findings of Enemy Status Embodied in Vesting Order Conclusive in Suit in Surrogate's Court to Reduce Vested Interests to Possession. Estate of Minna Frenzel, deceased, Surrogate's Court, New York County (Mr. Surrogate Di Falco, N.Y.L.J., May 10, 1957, p. 7). Minna Frenzel was a naturalized citizen of the United States who returned to Germany some time in 1933 where she died, intestate, on or about October 18, 1945. On January 2, 1947, the Attorney General received a report from the Central Savings Bank of New York City, dated December 30, 1946, that it carried a savings account for Minna Frenzel whose last known place of residence as of December 24, 1946, was Leipzig, Germany. A vesting order, which found that Minna Frenzel was a resident and national of Germany, and that the bank account was enemy owned property, was issued on February 11, 1947; and the proceeds of the account were thereafter paid to the Attorney General pursuant to a turnover directive served on the bank. At the time this res vesting order was issued it was not known Minna Frenzel had died more than a year before.

On April 3, 1953, letters of administration were granted on the estate of Minna Frenzel by the Surrogate of New York County. It appeared that in addition to the aforesaid savings bank account, Minna Frenzel had other personal property in the United States. Among her distributees was her nephew, Walter Frenzel, a resident and national of Germany; and on April 14, 1953, upon a finding that he was a resident and national of an enemy country, a vesting order was issued seizing his interest (one-third) in the estate.

The administratrix sought to make Walter Frenzel's distributees (he having died in 1954 after the issuance of the vesting order) parties to the accounting proceeding and to offset against Walter's distributive share of the estate, the proceeds of the bank account previously seized under the res vesting order. Objections were filed to the account and on the hearing of the objections before Surrogate Di Falco on May 6, 1957, the Attorney General contended that his findings of enemy nationality of the person and enemy ownership of the bank account were conclusive on the Surrogate; that the bank account after vesting was the property of the United States and formed no part of the estate of Minna Frenzel; that to grant the offset would result in circumventing the return provisions of the Trading with the Enemy Act, as amended, and that the Surrogate lacked jurisdiction to grant such relief; and finally that Walter's interest in the estate having passed to the United States in 1953, he possessed no interest therein at his death in 1954 and his heirs or distributees were not necessary or proper parties to or required to be cited on the application for final judicial settlement of the account.

The objections were sustained in all respects, the Surrogate saying: "This Court is without jurisdiction, no matter what the equities may be, to inquire into the determination of the Attorney General that the decedent was a national and resident of an enemy country. Any rights which the distributees or legatees of the decedent may have to secure restitution must be enforced by appropriate application to the federal authorities or through action in the federal courts . . . . Nor was it necessary to have cited in this proceeding the distributees of the nephew of the decedent whose share was also vested by the Attorney General. The vesting order works a statutory substitution of parties and renders unnecessary the citing or further presence in a proceeding of the person whose interest is completely vested."

Staff: The case was argued by David Moses (Alien Property).  
With him was Assistant United States Attorney  
Milton E. Lacina (S.D. N.Y.)

Denial of Preliminary Injunction Not Abuse of Discretion; Denial of Summary Judgment Not Deemed Appealable Interlocutory Order Refusing Injunction Without Clear Showing That Denial Was Based on Consideration of Merits. Ercona Camera Corp., et al. v. Brownell, et al., (C.A.D.C. May 16, 1957). Plaintiffs, importers of cameras and similar goods from East Germany bearing the trade-mark "Zeiss", brought suit in the District Court against the Attorney General, the Secretary of the Treasury, and the Commissioner of Customs for a decree declaring that the Attorney General, who claimed ownership of the trade-mark as seized enemy property, has no right to the exclusive use of the trade-mark and enjoining the defendants from interfering with plaintiffs' importation of the goods in question. Plaintiffs moved for summary judgment and for a preliminary injunction. Both were denied, and plaintiffs appealed.

In a per curiam opinion the Court of Appeals affirmed without reaching the merits of the case. As to the denial of the summary judgment, the Court, citing Division 689 v. Capital Transit Co., 97 U.S. App. D.C. 4, 5, 227 F. 2d 19, 20, stated "there was nothing in the record to indicate that the equity powers of the District Court were invoked on the motion for summary judgment" and "at least without a clear showing that the court considered the merits of a plea to its equitable jurisdiction, the denial of summary judgment cannot be deemed an [appealable] 'interlocutory order . . . refusing' an injunction under §1292(1) [of Title 28, U.S.C.]." As to the denial of the motion for a preliminary injunction, the Court was of the opinion "that the ruling of the District Court was a proper exercise of its discretion".

Staff: The appeal was argued by George B. Searls. With him on the brief were Assistant Attorney General Dallas S. Townsend, James D. Hill, and Marbeth A. Miller (Alien Property).

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