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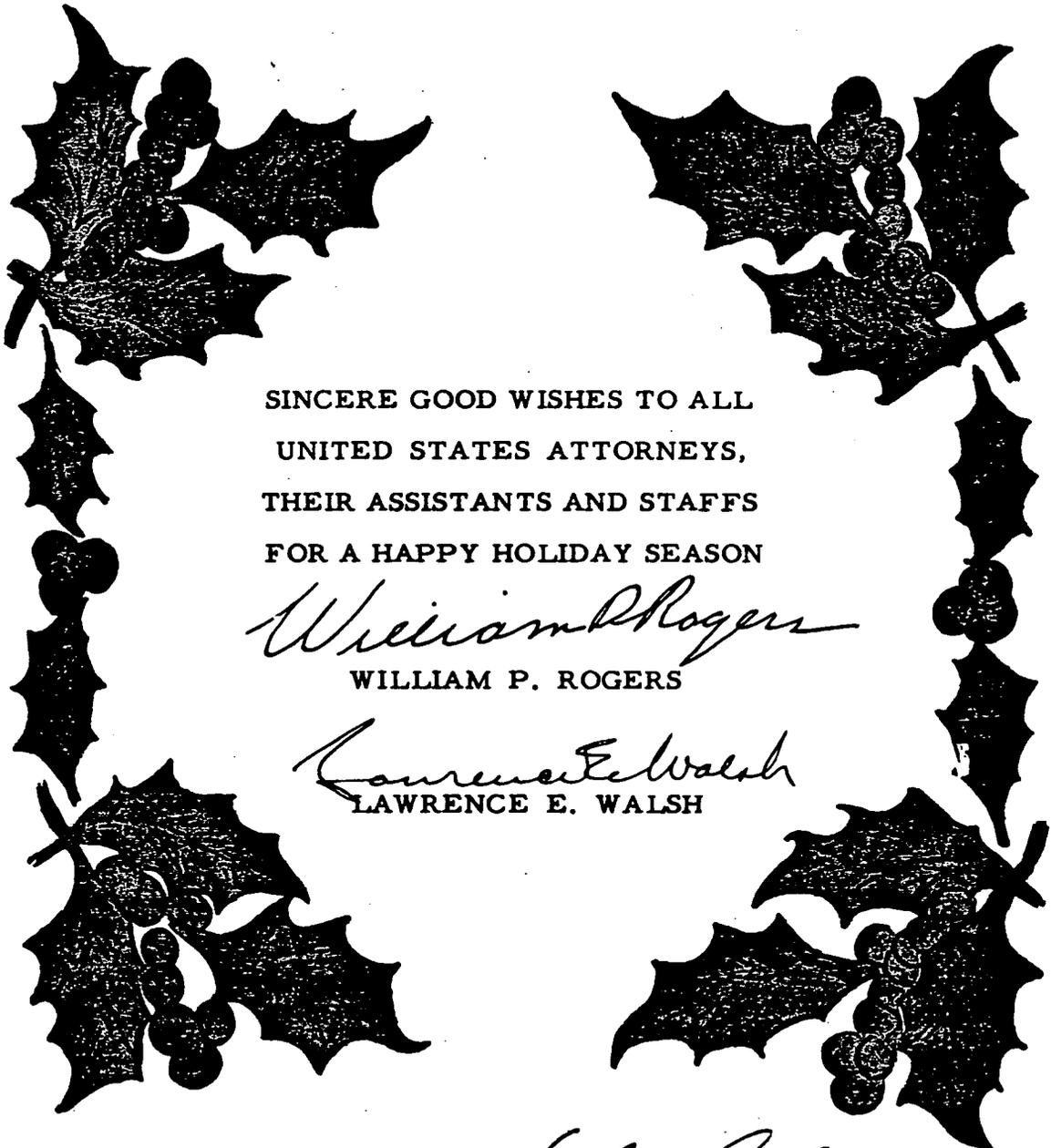
UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 6

December 19, 1958

No. 26



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

William P. Rogers

WILLIAM P. ROGERS

Lawrence E. Walsh

LAWRENCE E. WALSH

W. Hayden Rawford
Chief, Executive Office for
United States Attorneys

DISTRICTS IN CURRENT STATUS

As of October 31, 1958 the total number of districts meeting the standards of currency were:

<u>CASES</u>				<u>MAITERS</u>			
<u>Criminal</u>		<u>Civil</u>		<u>Criminal</u>		<u>Civil</u>	
Change from <u>9/30/58</u>		Change from <u>9/30/58</u>		Change from <u>9/30/58</u>		Change from <u>9/30/58</u>	
79	↑ 5	64	-	57	↑ 7	78	↑ 7
84.0%	↑ 5.3%	68.0%	-	60.6%	↑ 7.5%	82.9%	↑ 7.4%

The number of districts current as of October 30, 1958 showed a very encouraging increase in every category except that of civil cases where the number current remained the same. The category in which the smallest number of districts is current continues to be that of criminal matters. However, during the past month the number current in this category showed a substantial rise of 7.5 per cent.

MONTHLY TOTALS

The totals for cases and matters pending in United States Attorneys' offices as of October 31, 1958 reflect a most encouraging downward trend. Totals in every single category without exception were down. If this downward trend could be maintained consistently during the remaining eight months of the fiscal year the total reduction for fiscal 1959 would establish new records and would be far in excess of that achieved in fiscal 1958 or 1957. The figures set out below show the decrease from September 30 and the increase or decrease from June 30, the end of the last fiscal year.

<u>Category</u>	<u>Number</u>	<u>Change from 9/30</u>	<u>Change from 6/30</u>
Triable Criminal	7,166	- 205	↑ 1,445
Civil Inc. Civ. Tax Less Tax Lien & Cond.	14,594	- 149	↑ 486
Total	21,760	- 354	↑ 1,931
All Criminal	8,945	- 167	↑ 1,368
Civil Inc. Civ. Tax & Cond. Less Tax Lien	17,078	- 176	↑ 457
Criminal Matters	11,241	- 423	↑ 505
Civil Matters	14,274	- 69	- 154
Total Cases and Matters	51,538	- 835	↑ 2,176

While the increase in the caseload over the June 30 total appears substantial, nevertheless, it is down appreciably from the preceding month. The only category in which the October 31 total is actually less than that

of June 30 is civil matters. The overall reduction in cases and matters pending since June 30 is 835 items, not a tremendous decrease but a very encouraging trend.

During October collections aggregated \$2,270,131 or \$272,306 less than was collected during the month of September. The total of \$8,895,595 collected so far is \$987,893 less than the total collected during the first four months of the previous fiscal year. However, we have closed the gap somewhat in regard to collections, for whereas aggregate recoveries last month were 14.9 less than for the similar period of the preceding year, the aggregate as of October 31 is only 9.9 less than for the similar period of fiscal 1958. It is hoped that this unfavorable rate of comparison will continue to decrease and that before long collections will be materially higher than they were last year.

EMPLOYEE SUGGESTION PROGRAM

The Committee on Awards wishes to thank all employees of United States Attorneys' offices who have submitted suggestions during the past year. The number of such suggestions received demonstrates a very commendable interest in improvement of office practices and procedures. The Committee extends to all employees an invitation to submit during the coming year whatever ideas they may have with regard to increasing the efficiency of the Department's operations.

JOB WELL DONE

Much favorable publicity and editorial comment in the Pittsburgh papers has been received by United States Attorney Hubert I. Teitelbaum and his staff, Western District of Pennsylvania, for their success in forcing the closing of a so-called "Cancer Clinic" which had been preying upon the victims of this disease for years. After a three-year fight, the operators of the clinic, who had been enjoined from false labeling and from treating out-of-state cancer patients in violation of the interstate commerce laws, finally agreed to close the clinic rather than face Federal contempt proceedings.

The Regional Attorney, Wage and Hour Division, Department of Labor, has expressed appreciation for the manner in which Assistant United States Attorney Thomas Stueve, Southern District of Ohio, handled a recent criminal case.

The Agent in Charge, Bureau of Narcotics, has commended Assistant United States Attorney Franklin Blackstone, Jr., Western District of Pennsylvania, for his orderly presentation of evidence, questioning of the witnesses and his excellent summations in the recent narcotic cases he prosecuted.

Assistant United States Attorneys Warner Hodges and Edward N. Vaden, Western District of Tennessee, have been commended by the Acting Regional Commissioner, Internal Revenue Service, for their very able handling of a large liquor conspiracy case involving several major and important violators who were operating stills.

The Regional Attorney, Wage and Hour and Public Contracts Division, Department of Labor, has expressed appreciation for the excellent handling of a recent criminal case by Assistant United States Attorneys George Morrison and William O'Neil, Northern District of Ohio.

Assistant United States Attorney John F. Grady, Northern District of Illinois, has been commended by the District Supervisor, Bureau of Narcotics, for his recent successful prosecution of an unusually difficult criminal case.

* * *

ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT

Guilty Pleas by Automobile Dealers. United States v. Greater Washington Chevrolet Dealers Association Cooperative, et al., (Dist. of Columbia). On December 8, 1958 counsel for the Greater Washington Chevrolet Dealers Association Cooperative and the 14 Chevrolet dealer defendants withdrew their pleas of not guilty and entered pleas of guilty to both counts of the indictment. Count one of the indictment in the case charged a combination and conspiracy "to raise, fix and stabilize the retail prices of Chevrolet automobiles and accessories in the Washington metropolitan area" and count two charged a combination and conspiracy "to raise, fix and stabilize the hourly labor rates charged by defendant dealers for the repair and servicing of automobiles in the Washington metropolitan area".

The Court had set December 8, 1958 as the date for argument on defendants' motions to dismiss count one of the indictment and on their motions for bills of particulars. Prior to pleading guilty, counsel for defendants withdrew these motions and as a result, of course, no argument was held. In explaining the decision of their clients to plead guilty, counsel stated that although they thought there might be some question about the legal sufficiency of count one of the indictment, after having read the government's brief they had advised their clients that the Court might very well not agree with them and consequently deny the motion to dismiss.

The Court accepted the guilty pleas and imposed sentences immediately thereafter. Total fines of \$2,000 were imposed on each dealer defendant except Eaton Chevrolet, which was fined a total of \$1,000 (Eaton Chevrolet having only started in business in November of 1957). The Association was fined a total of \$5,000, making the total amount of fines imposed in the case \$32,000.

Defendants had previously been advised that the Department would vigorously oppose any motion to change their plea from not guilty to nolo contendere.

Staff: Paul A. Owens, Jennie M. Crowley, Norman H. Seidler
and John C. Fricano (Antitrust Division).

SHERMAN ACT - CLAYTON ACT

Complaint Filed Under Section 3 of Clayton Act and Section 1 of Sherman Act. United States v. Standard Oil Company (New Jersey, et al., (W.D. Ky.)). A civil antitrust suit was filed on December 2, 1958, in Louisville, Kentucky, against Standard Oil Company (New Jersey), Esso

Standard Oil Company, and Standard Oil Company (Kentucky) charging violations of Section 3 of the Clayton Act and Section 1 of the Sherman Act.

According to the complaint Standard of New Jersey (Jersey) is a holding company which controls and coordinates the activities of its subsidiaries and affiliates engaged in all levels of the petroleum industry throughout the United States. Esso is alleged to be a wholly-owned subsidiary of Jersey engaged in refining crude oil and in marketing petroleum products in eighteen states ranging from Maine to Louisiana. The complaint states that it is the principal marketer of automotive gasoline in ten states as well as in the District of Columbia. Kyso is alleged to be engaged in marketing petroleum products in five southeastern states, and is the principal marketer of automotive gasoline in each of those states.

The complaint alleges that defendants have been engaged for many years in a combination and conspiracy pursuant to which Jersey, Esso, and other subsidiaries and affiliates of Jersey refrained from marketing petroleum products in Kentucky, Mississippi, Alabama, Georgia and Florida, while Kyso refrained from marketing outside of those five states and purchased most of its requirements of such products from Jersey, Esso or other subsidiaries or affiliates of Jersey.

The complaint also alleges that in July 1956 Esso and Kyso entered into a contract which requires Kyso for an indefinite period to purchase 80% of its requirements of automotive gasoline, kerosine, diesel fuel and No. 2 heating oil from Esso. In 1956, Kyso sold over 900 million gallons of automotive gasoline and very large quantities of other petroleum products. The requirements contract is attacked as a violation of both Section 3 of the Clayton Act and Section 1 of the Sherman Act.

The prayer for relief requests the court, among other things, to enjoin Jersey and Esso from selling refined petroleum products to Kyso and to enjoin Kyso from purchasing such products from Jersey, Esso or any other subsidiary or affiliate of Jersey for such time as the court may deem necessary to dissipate the effects of the alleged conspiracy.

Staff: Joseph E. McDowell, Gordon B. Spivack, Harry W. Cladouhos,
John E. McDermott, Theodore F. Craver and Melvin J.
Duvall, Jr.

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

SUPREME COURTHOUSING

1954 Amendment to National Housing Act Prohibiting Transient Rentals in Federally Insured Housing Applied to Projects Insured Prior to 1954. Federal Housing Administration v. The Darlington, Inc., November 24, 1958. In 1949 the appellee, Darlington, Inc., constructed an apartment house and obtained FHA mortgage insurance under Section 608 of the National Housing Act (12 U.S.C. 1743), as amended by Section 10 of the Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 214). At that time neither the National Housing Act nor the FHA regulations contained an express prohibition against transient rentals in Section 608 projects. In 1951, however, the FHA announced that no Section 608 insurance applications would be approved if transient occupancies were anticipated.

In 1954 Congress amended the National Housing Act by adding Section 513, which formally declared that it had always been the intent of Congress that housing insured under the Act be used solely for permanent occupancy and expressly prohibited transient rentals in such housing. The appellee, which since 1951 had been renting a number of its apartments on a transient basis, then brought this suit seeking a declaration that it might continue to rent apartments to transients so long as those apartments would not otherwise be occupied by long-term tenants. A three-judge district court gave the appellee substantially the relief which it demanded, holding that the 1954 amendment as applied to projects insured prior to the date of its enactment was unconstitutional.

On direct appeal the Supreme Court reversed (per Justice Douglas). It held that, even prior to the 1954 enactment, the Act did not give Section 608 mortgagors the right to rent to transients. The Court found that, although there was no express prohibition, the limitation could be "fairly implied" in view of the use of the words "housing", in the Act, and "dwelling", in the regulations, which connote an element of permanency. The Court also relied upon (1) the requirement in the appellee's corporate charter that average monthly rentals were to be approved by the FHA, (2) the FHA mortgage insurance application form which required the appellee to approximate its anticipated operating expenses but did not list expenses normally encountered in a transient operation, e.g., linen supplies and cleaning expenses, (3) the FHA's construction of the Act prior to the 1954 amendment, and (4) the congressional declaration in 1954 that the Act never had permitted transient rentals.

In addition, the Court stated that, in any event, the alleged right to rent to transients was not vested and constitutionally protected. At best, appellee's right was "unclear" and the result of "subtle and involved reasoning," while due process protection attaches only to "practical,

substantial rights." Moreover, the Court observed that those who do business in a regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.

Justices Harlan, Frankfurter, and Whittaker dissented on the ground that the determinative issue was not whether, prior to 1954, the appellee had a right to rent to transients, but rather whether it had been prohibited from doing so. In view of the fact that there was no express prohibition against transient rentals at the time that the appellee obtained its mortgage insurance, the dissenters reasoned that the practice was not then forbidden. And, relying principally upon Lynch v. United States, 292 U. S. 571, they concluded that Congress could not impose any new restriction upon the appellee after the mortgage was insured.

Staff: Alan S. Rosenthal; Seth H. Dubin (Civil Division)

COURTS OF APPEAL

CONVERSION

Federal Law Governs Right of United States to Maintain Action Against Alleged Converter of Commodity Credit Corporation Grain; Inapplicability of State Statute Purporting to Extinguish that Right. United States v. The McCabe Company (C.A. 8, November 26, 1958.) Under the provisions of a Uniform Grain Storage Agreement, a substantial quantity of grain owned by Commodity Credit Corporation was stored in North Dakota elevators of the McDonald Grain and Seed Company. In July 1954, it was discovered that McDonald did not have sufficient grain in storage to cover outstanding warehouse receipts. Pursuant to the provisions of the North Dakota insolvent warehouseman statute (N.D. Rev. Code (1934), Chapter 60-04), the North Dakota Public Service Commission immediately instituted proceedings in a state court which culminated in its appointment as trustee of McDonald. Shortly thereafter the United States brought this action in federal district court against, among others, McDonald and McCabe. The complaint alleged that McCabe had converted to its own use more than \$100,000 worth of Commodity grain stored in McDonald elevators. On McDonald's motion, the district court dismissed the complaint as to it. 154 F. Supp. 329. It held (1) that state law governed on the question as to whether Commodity had a cause of action in conversion; and (2) that, under the state insolvency statute, all causes of action possessed by individual receipt holders against alleged converters are transferred to the Public Service Commission upon the Commission's appointment as trustee of the warehouseman. The Court of Appeals reversed. It pointed to the consistent holdings of the Supreme Court that when the United States, acting pursuant to constitutional acts of Congress, enters into large scale transactions requiring uniform administration, questions of rights and liabilities must be uniformly determined by federal law. See, e.g., Clearfield Trust Co. v. United States, 318 U. S. 363; United States v. Allegheny County, 322 U. S. 174. It noted that this principle is fully applicable to Commodity, which is an instrumentality of the United States designed to carry out governmental functions through the use of public funds.

Rainwater v. United States, 356 U. S. 590, 591-592. The Court then concluded that federal law governed here and that the state statute was inapplicable. While recognizing that state law sometimes may be adopted as the governing federal rule, the Court determined that Congress did not intend to make the rights of Commodity subservient to local statutes of the type here involved. United States v. Kramel, 234 F. 2d 577 (C.A. 8), upon which the district court had relied, was distinguished on the ground that it involved the question of whether state law may be invoked in deciding the substantive liability of an alleged converter of government property. The Court noted that, in the present posture of this case, McCabe's substantive liability for its alleged conversion is not in issue. Rather, the single issue before it was whether state law may take away the government's title to a recognized cause of action and place it in a state regulatory agency.

Staff: Alan S. Rosenthal (Civil Division)

FEDERAL CROP INSURANCE

FCIC Officials' Denial of Insurance Claim Does Not Constitute Waiver of Requirement for Proofs of Loss. Harold Roberts, et al. v. Federal Crop Insurance Corporation (C.A. 9, November 19, 1958.) Appellants, whose FCIC insured wheat crops were destroyed by winter-kill, alleged that FCIC's state director informed them that none of their claims would be paid. None of the appellants submitted proofs of loss although some filed claims. FCIC regulations require proofs of loss to be submitted within sixty days of loss. The district court granted FCIC's motion for summary judgment on the ground that the alleged denial by the state FCIC director did not constitute a waiver by FCIC of the requirement for submitting timely proofs of loss. It recognized that a private insurer who, during the period in which proofs of loss are to be made, denies liability waives its right to demand proofs. It held, however, that the United States cannot be estopped by the actions of its agents, citing Federal Crop Insurance Corp. v. Merrill, 322 U. S. 380. On appeal, the Ninth Circuit affirmed on the opinion below.

Staff: United States Attorney Dale M. Green; Assistant United States Attorney Robert L. Fraser (E.D. Wash.)

GOVERNMENT EMPLOYEES

Census Bureau and National Production Authority, Though Within Commerce Department, Are Separate Agencies for Purposes of Reductions in Force. Ritter v. Lewis L. Strauss, Secretary of Commerce, et al. (C.A. D.C.), December 4, 1958. Ritter and Bloom were both GS-11's in the Census Bureau, a branch of the Department of Commerce. Bloom had ten days seniority over Ritter. In 1951 Bloom received a position in the National Production Authority, another branch of the Department of Commerce. In March, 1953, Bloom was reduced in force from the Authority and requested reinstatement in his old job in the Bureau of the Census. He

was reinstated and Ritter was separated by reduction in force. Ritter then instituted this action claiming that there was no genuine reduction in force in the Census Bureau because there was the same number of employees in the Census Bureau after Bloom's reinstatement and Ritter's separation as before. The Government contended that Bloom's reemployment was simply a reassignment within the same agency within the meaning of Section 8.108 of the Civil Service Regulations, which delegates authority to agencies to reassign permanent employees with competitive status and serving in competitive positions. The Court of Appeals at first affirmed the district court's judgment for the government (6 United States Attorneys Bulletin 380). On rehearing, however, the court reversed on the ground that (1) the Census Bureau and the National Production Authority are separate agencies for application of Civil Service regulations, and therefore Bloom's reemployment was not a "reassignment" within the same "agency", and (2) Ritter's separation was not caused by lack of work or funds, reorganization, exercise of regulatory reassignment or exercise of reemployment rights, and consequently it was not a reduction in force.

Staff: Hershel Shanks (Civil Division)

HOUSING

FHA Obligation on Insured Notes Constitutes Collateral Security Within Meaning of Maryland Retail Installment Sales Act. United States v. William E. Bland and Katherine Bland (C.A. 4, November 13, 1958.)
 Bland bought storm windows and doors from Tri-Tilt which, without recourse, assigned Bland's FHA insured note to Loan Association. After default, FHA paid the balance due and received an assignment of the note. The government then sued Bland. Concededly, Tri-Tilt did not comply with the Maryland Retail Installment Sales Act, Annotated Code of Maryland, 1958 ed., Art. 83, Secs. 128-153. If the transaction came within the scope of the Act, the installment contract and the note were voidable and, therefore, Bland had a defense against Tri-Tilt which could also be asserted against assignees. The government contended that the Act, by its terms, was inapplicable because the seller had neither retained a security interest in the goods nor taken collateral security for the buyer's obligation. The district court entered judgment for Bland. It held that the government's insurance obligation constituted a guarantee and, since the Act defines "collateral security" to include the undertaking by a surety or guarantor for the buyer, the contract and note were within the scope of the Act. However, the court went on to observe that since Loan Association gave a warranty to the government that the note qualified for insurance, the government might have a right to recover its loss from Loan Association though not from Bland. On appeal, the judgment was affirmed on the opinion below.

Staff: United States Attorney Leon A. H. Pierson; Assistant United States Attorney John Gordon Underwood (D. Md.)

DISTRICT COURTSADMIRALTY

Limitation of Liability; Former Owner of Vessel Can Petition for Limitation When Sued for Acts Allegedly Done During Period When It Was Owner. Petition of United States of America for Exoneration from or Limitation of Liability and Petition of Sheffield Tankers Corporation for Exoneration from or Limitation of Liability (N.D. Cal., October 24, 1958.)

The tanker JEANNY was forfeited to the United States for a violation of the Shipping Act and, after preparation by Todd Shipyard, was placed by the Maritime Administration in a Reserve Fleet in 1955. Thereafter Maritime sold the vessel to Sheffield Tanker Corporation which placed it in Todd Shipyard for repairs to prepare her for operation. While she lay in the yard, an explosion and fire occurred with great loss of life and injuries and property damage. The explosion apparently started in a tank of fuel oil which had been aboard since before the forfeiture to the United States. Todd, sued by others, in turn sued the United States claiming that the oil sold with the vessel was misrepresented, contaminated, and of too low a flash point. The United States filed a petition for limitation of liability and, after claim and answer by Todd, filed a cross libel against Todd for improper performance by Todd of its contract with the United States prior to lay-up of the vessel in 1955. Todd moved to dismiss the limitation petition for lack of jurisdiction, relying upon (1) the fact that the United States was no longer the owner, (2) the Supreme Court's decision in American Car and Foundry Co. v. Brassert, 289 U. S. 261, which held that a manufacturer-vendor of a defective vessel could not limit its liability for injuries caused by the defects. The Court denied the motion to dismiss, holding that with respect to acts alleged to have been done during its ownership, the owner must still be regarded as owner for the purpose of limitation after its sale of the vessel in order "to effectuate the purposes of the Act" for "to hold otherwise would subject a person to greater liability after a sale than existed before a sale." The Court distinguished the American Car and Foundry case as dealing only with manufacturer's liability of an owner who had never before sale been entitled to limitation and rejected the idea that "the availability of limitation proceedings could be avoided merely by the form of the pleadings or the theory of the claim asserted."

In the related case of Sheffield's petition for limitation, as present owners, in which both the United States and Todd are claimants, the United States moved to implead Todd, stating the same claim as in the government's cross libel in its own limitation proceeding. Against Todd's contention that impleader should not be allowed since the claim of the United States was a claim over for matters arising outside this proceeding and depending on a different contract, the Court granted the government's motion. It ruled that the "same matter" referred to in Admiralty Rule 56 is the accident for which Sheffield seeks limitation.

Staff: Graydon S. Staring (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General W. Wilson White

Police Brutality. United States v. Overdeer. The victim was arrested by subject for allegedly driving while drunk. While being escorted to the local jail, the subject obtained a revolver from his automobile and fired a bullet into the ground at victim's feet. The victim stated that inside the jail he was beaten about the head and body with a stove poker without justification. Victim required nineteen stitches in his scalp and two on back of left hand. Incidents occurred in Buena Vista, Colorado. The complete investigation undertaken by the Federal Bureau of Investigation disclosed that the subject had mistreated three other persons while he had been Marshal of Dillon, Colorado.

The grand jury returned a four-count indictment against Overdeer on November 7, 1958. Although the defendant is now a fugitive, the Federal Bureau of Investigation expects to capture him in the very near future.

Staff: United States Attorney Donald E. Kelley (D. Col.)

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CRIMINAL DIVISION

Assistant Attorney General Malcolm Anderson

FRAUD

False Statements to Veterans Administration. United States v. John Joseph Quirk II (E.D. Pa.). Defendant, who was convicted under 18 U.S.C. 1001 of causing a lending institution to submit to the Veterans Administration false statements of a veteran's employment and earnings in an application for mortgage insurance, filed post trial motions in arrest of judgment and for judgment of acquittal, which were denied in an opinion by Judge Kraft on October 29, 1958.

In support of his motion in arrest of judgment, defendant claimed that the indictment should have been drawn under 38 U.S.C. 715 (now repealed but still in effect at the time of the alleged acts) which deals specifically with false statements in claims for veterans' benefits, rather than under 18 U.S.C. 1001, the general false statement statute. Noting that 18 U.S.C. 1001 requires proof of willfulness, while 38 U.S.C. 715 does not, the Court held that prosecution under the general statute was proper where the defendant's acts were willful.

The motion for judgment of acquittal was based on the contention that the false statements lacked materiality. The defense argued that inasmuch as favorable action on the application was impossible (since the amount requested was greater than the veteran's remaining entitlement), the statements were incapable of influencing the Veterans Administration and therefore not material. This argument was rejected. The Court stated that a false statement is material if it is intrinsically capable of inducing agency action, irrespective of whether favorable action is, for other reasons, incapable of attainment. Applying this test, the Court found the false statements in the insurance application to be material. The defense argument presupposed that the second clause of 18 U.S.C. 1001 requires that the false statement be material. There is sharp conflict of authority on this issue, and the instant court expressly refrained from deciding it, having found that materiality was established.

Staff: United States Attorney Harold K. Wood
(E.D. Pa.)

BANKS AND BANKING

Embezzlement; Proof Consisted Principally of Testimony of Handwriting Expert. United States v. Annamaria Christine Fairbanks (D. Conn.). Defendant, aged 19, was employed by the Hartford National Bank and Trust Company, Hartford, Connecticut in the bank's Proof Department. On May 9, 1958 a deposit of a United States Treasury Refund Check in the amount of \$169 was made by a depositor for which she held a passbook receipt but which was not credited to her account. The Treasury Department reported this check had been paid, a copy of which indicated it was cashed at the bank's Farmington Ave. office on May 12, 1958. A second depositor reported a similar complaint about a check she mailed to the bank on May 23, 1958. A third complaint was made by a depositor concerning a \$96 check she deposited on the same day. Investigation was immediately commenced by the FBI and thereafter one mail deposit totaling \$127.27 consisting of two checks, one for \$107.25 and one for \$20.02 was acknowledged as received by the bank on August 7, 1958, but were not credited to the proper account. It was found that on the same day, August 7, 1958, the \$20.02 check was deposited in a branch office of the Connecticut Bank and Trust Company in the name of the original payee who had no account at the bank; but the \$107.25 check was cashed. In cashing that check, the bank teller required it to be re-endorsed. By the handwritten endorsements, a handwriting expert was able to trace embezzlement of these two checks to defendant Fairbanks. She was indicted in two counts charged with violating 18 U.S.C. 656. Trial was had on November 20 and 21, 1958, the government's principal evidence being testimony of the handwriting expert. This was the first case in more than four years in this district which rested largely on handwriting. After one hour's deliberation, the jury convicted on both counts.

Staff: United States Attorney Harry W. Hultgren, Jr.
(D. Conn.)

NARCOTICS

Illegal Sale of Narcotics; Sentence Imposed. James Beacher George v. United States (CA 9, November 14, 1958). Defendant, who was convicted on five counts of an indictment charging illegal sale of narcotics, was sentenced to concurrent terms of 20 years each on the first and second counts, and to 20 years each on counts 3, 4 and 5 to run consecutively to each other and to the time imposed on the first two counts, a total of 80 years' imprisonment. A fine of \$5,000 was also imposed on count 1. In affirming the judgment of conviction the Court of Appeals in a per curiam opinion held that the matter of sentencing is within the discretion of the trial court and will not be reviewed by an appellate court so long as the sentence is within the limits prescribed by statute.

Staff: United States Attorney Laughlin E. Waters;
Assistant United States Attorneys Robert
John Jensen and Leila F. Bulgrin
(S.D. Calif.)

LIQUOR REVENUE

Forfeiture; Right to Property Used in Violation of Internal Revenue Laws Vests in United States Immediately Although Title Is Not Perfected Until Judicial Condemnation. United States v. One 1957 Model Tudor Ford (E. D. S. C. , November 28, 1958). The Government filed a libel seeking forfeiture of the subject automobile which was used in violation of the internal revenue laws. Prior to seizure of the vehicle by the government but subsequent to its illegal use, claimant sustained personal injuries when the vehicle collided with the automobile in which he was riding. It was conceded that the collision was due to the negligent operation of the subject vehicle. By virtue of Section 45-551, Code of Laws of South Carolina, 1952, the claimant acquired a lien upon the automobile by attaching it as provided by the law of South Carolina.

Claimant contended that the libel should be dismissed since his lien attached prior to the seizure and took precedence over the attempted forfeiture. The Court overruled this contention and directed forfeiture of the vehicle. In doing so the Court (C. C. Wyche, J., sitting by designation) pointed out that while the lien came into existence and attached to the vehicle at the moment the injury was inflicted, the forfeiture took place upon the commission of the forbidden act, and the statute operated to transfer the title at once to the government, citing United States v. 1960 Bags of Coffee, 12 U.S. 398; Caldwell v. United States 48 U.S. 366; Henderson's Distilled Spirits, 81 U.S. 44. Citing United States v. Stowell, 133 U.S. 559, the Court pointed out that "Whenever a statute enacts that upon the commission of a certain act specific property used in or connected with the act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed, and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith."

Staff: United States Attorney N. Welch Morrisette, Jr.
and Assistant United States Attorney George E.
Lewis (E.D. S.C.)

CITIZENSHIP

Rebuttal of Prima Facie Case; Burden of Proof. Lee Hon Lung v. Dulles (C.A. 9, November 10, 1958). Plaintiff claims United States citizenship by birth in Hawaii in 1899 and that he was taken to China when 7 months old. In 1924, a Board of Special Inquiry of the Immigration and Naturalization Service admitted him at Honolulu as a Hawaiian-born citizen, and he has resided there since. In 1957, the State Department denied his passport application on the ground that he was not a citizen and he brought this action for a declaratory judgment of citizenship under Section 360(a) of the Immigration and Nationality Act of 1952. The government denied that he was in fact born in the Hawaiian Islands, notwithstanding the Board's 1924 decision. At trial, the government offered evidence to rebut the prima facie case made out by the Board's order. The district court found this equally as persuasive as the plaintiff's evidence and, without holding the government to any special standard of proof, gave judgment for the defendant.

The Court of Appeals reversed and remanded for a new trial. It held that plaintiff initially had the burden of proving he is an American citizen by a fair preponderance of the evidence. He established a prima facie case by showing his 1924 admission by the Board as an American citizen. This administrative determination was not res judicata, but could be overcome by showing that it had been obtained by fraud or error. Conceding that its prior decisions did not fix the government's burden on such a showing, the Court drew an analogy to the government's heavy burden of proof in denaturalization cases, where citizenship previously conferred would not be disturbed in the absence of clear, convincing and unequivocal evidence. "For the reasons stated, we hold that where one has, over a long period of years, acted in reliance upon a decision of a board of special inquiry admitting him as a citizen of the United States, the fraud or error which will warrant disregard of such decision must be established by evidence which is clear, unequivocal and convincing."

Staff: United States Attorney Louis B. Blissard and
Assistant United States Attorney Charles B.
Dwight III (D. Hawaii).

DENATURALIZATION

Judgment; Reopening after Expiration of Appeal Time. United States v. Guss Polites (E.D. Mich., November 19, 1958). Defendant was naturalized in 1942. Denaturalization proceedings were instituted in 1952, based on his admitted Communist Party membership from 1931 to 1938, and after trial judgment was entered against him, 127 F. Supp. 768. He appealed but later abandoned the appeal because of the then controlling judicial decisions. He was subsequently ordered deported and is now contesting the deportation order in another suit. Meanwhile, he now moves under Rule 60(b)(5) and (6) of the Federal Rules of Civil Procedure for relief from the denaturalization judgment, claiming that the Supreme Court's recent decisions in Nowak v. United States and Maisenberg v. United States, 356 U.S. 660 and 670 (1958) are controlling.

The district court denied the motion. It pointed out that this case differed factually and in legal principle from Nowak and Maisenberg, since the instant defendant had been naturalized under the Nationality Act of 1940, which contained stricter debarment provisions than the 1906 Act involved in Nowak and Maisenberg. Moreover, even if Nowak and Maisenberg represent a change in the decisional law, the district court felt itself bound by the Sixth Circuit's holding in another case that, "It appears to be the settled rule that a change in the judicial view of the applicable law, after a final judgment, is not a basis for vacating a judgment entered before announcement of the change." (For a more detailed description of this case, see the Immigration and Naturalization section of this Bulletin.)

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DENATURALIZATION

Motion to Vacate Prior Judgment; Applicability of Rule 60(b) of Federal Civil Rules. United States v. Polites (E.D. Mich., November 19, 1958). Motion under Federal Rules of Civil Procedure to set aside denaturalization decree.

Polites was naturalized in 1942 and his citizenship was cancelled in 1953 because of his subversive activities. Appeal was commenced, but was dismissed by stipulation of counsel. The present motion was based on Rule 60(b), urging inter alia that the denaturalization judgment be set aside on the ground that it was no longer equitable that it should have prospective application. Polites argued that the motion should be granted on the basis of the decisions of the Supreme Court in Nowak v. United States, 356 U.S. 660, and Maisenberg v. United States, 356 U.S. 670.

The Court stated that recent decisions would not usually control unless the facts and law were the same as confronted the court in the denaturalization proceedings, and there were factual and legal differences present here. Both Nowak and Maisenberg were naturalized under a 1906 statute while Polites was naturalized under the Nationality Act of 1940. The question concerning subversive activities asked in the Nowak and Maisenberg cases was different from questions asked of Polites when he was naturalized. The Supreme Court decisions therefore do not clearly control the instant case, if for no other reason than that the question asked in those cases and construed by the Supreme Court was entirely different in form and content, the applicable acts differ, and the 1940 act, unlike the 1906 act, did contain a specific provision against the naturalization of a person who was a member of or affiliated with an organization which believes in and advocates the overthrow by force or violence of the government of the United States or of all forms of law. No actual knowledge of such belief or advocacy by the petitioner for naturalization was necessary under the 1940 Act.

In other proceedings in the same Court at the time this motion was heard, Polites was contesting an order of deportation, and he emphasized here that deportation embodies harsh punitive measures. The Court said, however, that his deportation is being considered elsewhere while in this action the Court is concerned solely with his naturalization, a privilege and obligation sought by him and bestowed by the sovereign only upon the conditions it selects.

The Court cited Ackerman v. United States, 340 U.S. 193, to the effect that neither the circumstances of the petitioner nor his excuse for not appealing were so extraordinary as to bring him within Rule 60(b).

Polites abandoned his appeal "because of the controlling decisions". There was present no element of "excusable neglect". The Court held, therefore, that it felt obliged to follow Ackerman, coupled with the decision of the Court of Appeals for the Sixth Circuit in Berryhill v. United States, 199 F. 2d 217, that it is "the settled rule that a change in the judicial view of the applicable law, after a final judgment, is not a basis for vacating a judgment entered before announcement of the change."

The motion was denied.

NATURALIZATION

Good Moral character; Contempt of Court; Impossibility of Compliance With Orders Concerning Payment of Alimony and Child Support. Petition of Schindler (D. Nev., November 19, 1958). Petition for naturalization opposed by government on ground that petitioner had failed to establish good moral character during necessary five-year period prior to filing petition.

The government's adverse recommendation in this case was not based on any personal immorality of the petitioner but upon the ground that he had twice been before a Nevada court to show cause why he should not be held in contempt for failure to comply with the support and alimony provisions of a decree granting him a divorce. The Court observed that the sole question to be determined was whether or not the conduct of the petitioner, which brought about the issuance of the two show cause orders in the divorce matter, negatived his otherwise good moral character. The Court held that the conduct in question did not have that result. It pointed out that as an alien the petitioner was not eligible to work in any of the several manufacturing activities conducted in Nevada, the major portion of which are engaged in the manufacture of some commodity used in national defense activities. In addition an immigrant, speaking only a foreign language, would not be any more successful in obtaining temporary or transient employment, of which there is little in Nevada.

The Court said that if the failure of the petitioner to comply with the divorce decree in relation to alimony and child support payments had been based on his refusal to comply with the orders or on a contemptuous attitude toward the court and its orders, the government's adverse recommendation would have been approved. However, the Court held that in each instance of failure to comply there was, so far as petitioner was concerned, an impossibility of performance. At such time as the petitioner had employment he did, to the best of his ability, comply with the court's orders.

Petition granted.

* * *

INTERNAL SECURITY DIVISION

Acting Assistant Attorney General J. Walter Yeagley

Foreign Agents Registration Act of 1938, as amended. United States v. Arnaldo G. Barron. (D. D.C.) On November 17, 1958 a federal grand jury returned a one count indictment against Arnaldo G. Barron, charging that Barron has acted within the United States as an agent of a foreign principal without having registered with the Attorney General as required by the Foreign Agents Registration Act of 1938, as amended. The indictment states that Barron became an agent of the July 26 revolutionary movement of Cuba in October of 1955 and has engaged in activities in New York and Texas, and elsewhere within the United States on behalf of the July 26 Movement (including Fidel Castro and other leaders of the Movement), including soliciting and collecting funds, disseminating political propaganda, offering and attempting to purchase guns and armaments and other activities. Defendant has been arrested in New York City and released on bail pending removal proceedings to the District of Columbia.

Staff: Thomas B. DeWolf and James L. Weldon
(Internal Security Division)

Suits Against the Government. David Allison, Jr. v. Arthur E. Summerfield (D. D.C.) The complaint in this case which was served on the Attorney General on March 10, 1958, alleges that plaintiff was illegally discharged on August 5, 1954, from his position as a letter carrier in violation of Section 14 of the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U.S.C. 863 and Section 6 of the Lloyd-LaFollette Act, 37 Stat. 555, as amended, 5 U.S.C. 652, and that his suspension and removal were not authorized by the Act of August 26, 1950, nor were they valid under Executive Order 10450. Plaintiff seeks to have his discharge declared null and void, to have the Post Office records expunged of any reference to plaintiff as a security risk, to be reinstated to his former position or one of like grade, with all the rights he would have had had he not been discharged, and to have all agencies and departments of the government notified thereof. The cause was heard on plaintiff's and defendant's motion to dismiss on September 25, 1958. The Court (Curran, J.) entered an Order on the docket on December 3, 1958, denying plaintiff's motion, granting defendant's motion for summary judgment on the grounds of laches, and dismissing the complaint with costs to the defendant.

Staff: James T. Devine and Benjamin C. Flannagan
(Internal Security Division)

Suits Against the Government. Neil F. Davis v. Wilbur M. Brucker (D. D.C.) The complaint in this case was filed on November 24, 1958 and alleges that plaintiff served in the regular U. S. Army for two years, was honorably separated therefrom in September 1952, and in

accordance with the provisions of the Universal Military Training and Service Act was assigned to the Ready Reserve of the United States Army Reserve. On May 4, 1956 the Secretary of the Army initiated certain proceedings under Army Regulation 604-10 that resulted in plaintiff receiving an undesirable discharge on April 2, 1957. On May 17, 1957 plaintiff filed an application for review of this discharge before the Army Discharge Review Board and on January 14, 1958, the Board granted plaintiff a discharge under honorable conditions (general) for his period of reserve service. On February 6, 1958 plaintiff filed an application with the Army Board for Correction of Military Records requesting that an honorable discharge be issued to him. On October 17, 1958 plaintiff's application was denied. The complaint alleges that the proceedings taken by defendant were in excess of his authority and violated the First, Fifth, and Sixth Amendment rights of the plaintiff and the issuance to him of a discharge less than honorable constitutes an illegal and unconstitutional act.

Staff: Oran H. Waterman and Samuel L. Strother
(Internal Security Division)

Suits Against the Government. Waldo Frank v. John Foster Dulles (D. D.C.) The complaint filed on November 12, 1958 alleges that the plaintiff is a writer, journalist and lecturer; that he was issued a passport containing restrictions on travel to Communist China, among other places; that plaintiff has received invitations to travel to Communist China but that defendant has refused plaintiff's request for permission to use his passport for travel there and that defendant's refusal is arbitrary and discriminating. Plaintiff prays for (among other things) a judgment decreeing that he be allowed to travel to Communist China and that defendant be enjoined from taking any adverse action against plaintiff by reason of his travel there.

Staff: F. Kirk Maddrix and Samuel L. Strother
(Internal Security Division)

Suits Against the Government. Monte M. Olenick v. Wilbur M. Brucker (D. D.C.) The complaint filed in this case on November 28, 1958 alleges that plaintiff served in the United States Army for twenty-two months, was honorably separated therefrom in December, 1954 and was transferred to the U. S. Army Reserves; that on January 12, 1956 defendant initiated certain proceedings which resulted in plaintiff's discharge from the Army Reserves under other than honorable conditions; that plaintiff on August 27, 1957 filed with the Army Discharge Review Board an application for review of his discharge which was denied; that plaintiff on July 20, 1958 filed a further application for review of his discharge with the Army Board for the Correction of Military Records which was also denied. Plaintiff prays that the action of the defendant in discharging plaintiff

from the U. S. Army Reserves with an undesirable discharge be declared null and void and that defendant be directed to rescind plaintiff's undesirable discharge and to issue an honorable discharge.

Staff: Oran H. Waterman, Leo J. Michaloski and
Raymond A. Westcott (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Perry W. Morton

Condemnation; Authority to Acquire Indian Tribal Lands. Seneca Nation of Indians v. Brucker, (C.A. D.C. November 25, 1958). The Seneca Indian Nation sought to enjoin the Secretary of the Army from constructing a dam and reservoir project which would flood a substantial amount of the Tribe's lands. It claimed that such flooding, in violation of a 1794 Treaty with the United States, was not authorized. Affirming the district court's dismissal of the complaint, the Court of Appeals held, in a per curiam opinion, that it was undisputed that Congress could authorize the taking of the Tribe's lands and that under the legislation authorizing the project and appropriating funds for its execution it had done so.

Staff: Roger P. Marquis (Lands Division)

Condemnation; Valuation; Inadmissibility of Evidence of Tax Assessments. United States v. Certain Parcels of Land in County of Arlington, (C.A. 4, November 29, 1958.) The United States condemned a strip of land along the Potomac River above Washington for extension of the George Washington Memorial Parkway which for land acquisition is financed partly by the United States and partly by Virginia and Arlington County. At the jury trial to determine compensation the court admitted evidence offered by the owner as to the amount the property was assessed for taxation. Also admitted was the testimony of a member of the Board of Assessors, but not the one who had assessed this property, that the Board's policy was to appraise property at its fair market value and assess it at 40% thereof. The court charged the jury that it could consider the assessed value in arriving at fair market value. The court reasoned that tax assessments were inadmissible when offered by the condemnor but admissible when offered by the landowner.

The Court of Appeals reversed, holding that tax assessments are inadmissible when offered by either party. The only exception is when the value is fixed by the owner himself in a tax return and that evidence is offered against him to discredit a present claim of a higher value. After noting the authorities - texts and federal and state decisions - in some detail, the Court said the reason for the exclusion is that such evidence represents the opinion of persons not called as witnesses and not subject to cross-examination. The Court rejected the argument, supported by some state authorities, that the assessment is an admission against interest when the taxing authority is condemning and here Arlington County, is, in effect, one of the condemnors on the ground that what the taxing officials do in performance of their duties should not prejudice the public interests in unrelated areas of public activity. In this connection, the opinion emphasized the fact that the

taxing officials' prime concern is that values should be relatively equal so as to equitably spread the tax burden rather than an absolute indication of market value. The error, the Court held, was prejudicial because the jury would be inclined to give weight to the impartial valuation of public officials when the partisan appraisers for the two parties differed widely in their valuations.

Staff: Roger P. Marquis (Lands Division)

* * *

OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Scope of Review With Respect to Custodian's Determinations in Debt Claims Proceedings Under Section 34 of Trading with the Enemy Act; Findings of Custodian Stand Unless Clearly Erroneous; Rate of Exchange Between Japanese Yen and American Dollar; Where No Rate of Exchange Existed Under Applicable Breach Date Rule Because of War, Rate in Existence When Trade Resumed After War Used Despite Resulting Loss to Creditor Because of Depreciation of Japanese Currency. International Silk Guild, Inc. v. Rogers (C.A.D.C., November 26, 1958).

The Custodian, in a proceeding instituted in accordance with Section 34 of the Act, disallowed a \$65,326.39 debt claim asserted by International Silk Guild, Inc., against Asahi Silk Company, Ltd., a Japanese corporation whose assets in the United States had been vested by him. The Guild's claim was predicated on the theory of breach of a tripartite oral contract allegedly executed between American importers of silk, Japanese exporters of silk, including Asahi Japan, and the Guild. Under the alleged contract the importers agreed to pay an assessment of 5 yen on each bale of silk imported into the United States, the exporters agreed to collect such assessment from the importers and to remit the same to the Guild, and the Guild in turn agreed to use the funds so remitted to promote the use of silk in the United States. It was claimed that Asahi Japan had failed to remit to the Guild \$65,326.39 in assessment funds collected from the importers.

The record made before the Custodian showed that the 5 yen assessment was levied by the Central Raw Silk Association of Japan (CRSA), a Japanese entity composed of associations representing all segments of the silk industry, including the Exporters Associations of Yokohama and Kobe. The assessments were paid by the exporters of silk, including Asahi Japan, to the Exporters Associations which in turn paid the assessments to the CRSA. To the extent that Japanese law permitted and in accord with its policy the CRSA remitted to the Guild assessment funds which were used in its promotional campaigns. The assessments levied on the exporters were passed on to the importers when they purchased raw silk. In the fall of 1942, after war broke out between Japan and the United States, ¥80,223.09 of unused assessment funds were returned to Asahi Japan by the Central Raw Silk Association through the Exporters Associations of Yokohama and Kobe.

The Custodian found that there was no evidence of any tripartite oral contract as asserted by the Guild and, therefore, concluded that the Guild could not recover on its theory of breach of an oral contract. In addition the Custodian concluded that though Asahi Japan was unjustly enriched by retaining the ¥80,000 returned to it in the fall of 1942, that unjust enrichment was not necessarily at the expense of the Guild, but might have been at the expense of other organizations which were

also the beneficiaries of the assessment funds. Accordingly, the claim was disallowed in whole.

The district court, in reviewing the Custodian's determination, agreed with his findings that the Guild could not recover on the theory of breach of an oral contract. However, the district court concluded that the ¥80,000 by which Asahi Japan was unjustly enriched belonged to the Guild and to that extent the claim was allowable. It converted the yen obligation into dollars at the rate of 360 yen to the dollar, the first official postwar rate established in 1949. Judgment for the Guild in the amount of \$222.16 was entered. Cross-appeals were taken.

The Court of Appeals affirmed the district court. It agreed with the Custodian that on review his findings should not be set aside unless clearly erroneous and that its function in considering the cross-appeals was the same as that performed by the district court. Applying this standard of review, the Court accepted the findings of the Custodian and the district court against the existence of a contractual obligation on the part of Asahi Japan despite what it characterized as "evidence that no doubt is susceptible in some degree to an interpretation favorable to the contract theory." It agreed with the district court that the Custodian was clearly wrong in finding that the ¥80,000 unjust enrichment was not at the Guild's expense in light of the conduct of the parties in causing assessment funds to be remitted to the Guild and the "nebulous and uncertain" possibility that any other organization had a claim to such funds.

On the rate of exchange issue the Court pointed out that since Asahi Japan's obligation was payable in the United States, the Japanese currency should be converted into dollars at the rate of exchange in existence on the date the obligation arose in the fall of 1942, citing Hicks v. Guinness, 269 U.S. 71. But because of the war, there was then no rate of exchange. And when the first official postwar rate of ¥360 to \$1 was established in 1949, that rate represented a sharp depreciation in the prewar value of the yen. Despite this depreciation, the Court pointed out that on the basis of the principles set forth in Sutherland v. Mayer, 271 U.S. 272, it would not be inequitable in the circumstances to require the Guild to bear the risk of loss occasioned by the depreciation of the yen. It accordingly held that the conversion should be effected at the rate in effect when trade with Japan could be resumed [January 1947], a rate which, on the basis of the record evidence, was no less favorable than the first official postwar rate of ¥360 to \$1 applied by the district court.

STAFF: The case was argued by Max Wilfand (Office of Alien Property). With him on the brief were George B. Searls and Irwin A. Seibel (Office of Alien Property).

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T A X D I V I S I O N

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decision

Collection of Taxes: Bankruptcy Court's Allowance of Tax Claim of United States Is Not Personal Judgment Against Taxpayer - Bankrupt Enforceable Without Limitation as to Time. Jack J. Walley, Executor of Estate of Murrey London, Deceased v. United States (C. A. 9, October 2, 1958). Decedent filed a voluntary petition in bankruptcy. The bankruptcy court allowed, without contest, the claim of the United States for insurance contribution, unemployment, and withholding taxes. Except for a small dividend, paid in partial satisfaction of the allowed claim, nothing was realized from the bankrupt estate.

After decedent's death, the United States filed an action against his executor for the unpaid balance of the tax claim. That action was commenced in 1957, more than six years after assessment of the taxes in 1948. Section 3312(d) of the Internal Revenue Code of 1939 provides that proceedings in court to collect taxes must be commenced within six years after assessment. In contrast to Section 6503(b) of the Internal Revenue Code of 1954, there was no applicable provision under the 1939 Code providing for the suspension of the statute of limitations as to the type of taxes here involved during the period the assets of the taxpayer were under the jurisdiction of a court. However, the probate action was based upon the contention that the allowance in the bankruptcy proceeding amounted to a judgment in favor of the United States, enforceable without limitation as to time. The district court held that the tax claim had in effect been reduced to judgment within the limitation period by virtue of the allowance by the Bankruptcy Court, and since the action was based on that allowance, it was timely.

The Court of Appeals reversed, holding that under Section 2 a (2) of the Bankruptcy Act, 11 U. S. C. 11(a)(2), the bankruptcy court had jurisdiction only over the estate in bankruptcy and did not have in personam jurisdiction over the taxpayer. The Court of Appeals distinguished the cases relied upon by the United States, United States v. Coast Wineries, 131 F. 2d 643 (C. A. 9); United States v. American Surety Co. of New York, 56 F. 2d 734 (C. A. 2), drawing a distinction between the estoppel or res judicata effects of a judgment and the in personam effects of a judgment. Even though the Court granted that the allowance in question probably would be a judgment for res judicata purposes, it could not be considered a judgment enforceable without limitation as to time since it was not a personal judgment against the bankrupt.

Staff: Meyer Rothwacks, John J. Pajak (Tax Division)

District Court Decisions

Taxpayer's Motion to Dismiss Upon Grounds That Government May Seek to Collect Taxes Administratively by Filing Liens or by Action at Law, But Not Both, Denied. United States v. Norman R. Baker, (D. Md.) An action was brought on behalf of the United States to reduce to judgment unpaid assessments of income and excise wagering taxes. Notice of liens for the taxes due were filed in the proper office of taxpayer's domicile.

Taxpayer filed a motion to dismiss on the grounds that in seeking collection of assessed taxes the government may either file notice of liens or file an action at law, but not both, and the government having filed notices of liens had elected its method of collection hence the instant action is barred.

The Court (Judge Thomsen) denied the motion and succinctly stated that taxpayer's contention was supported neither by reason nor authority.

The Court quoted United States v. Havner, 21 F. Supp. 985, 988 stating, "Under the general taxation statutes the Commissioner of Internal Revenue had several weapons that might be used by him in attempting to enforce the collection of taxes and the fact that he had used some of them lends no support to a reasoning that he was deprived from using other lawful means for the collection." The Court pointed out that a similar argument was denied in United States v. Plisco F. Supp. (D.C. Dist. Col.)

Staff: United States Attorney Leon H. A. Pierson and
Assistant United States Attorney Robert E. Cahill
(D. Md.) Stanley F. Krysa (Tax Division)

Government's Motion to Dismiss Action to Restrain Collection of Excise Wagering Assessment on Grounds of No Jurisdiction Granted Where Plaintiffs' Complaint Alleged Facts Tending to Show Illegality of Taxes Assessed and Inability to Pay or to Acquire Funds to Pay Assessment. Benjamin Lassoff and Irene Lassoff v. William M. Gray (W.D. Ky.) Taxpayer and his wife brought an action to restrain collection of an excise wagering tax assessment totalling \$300,264.46. A motion to dismiss on the ground that suits to restrain collection of any federal taxes are prohibited by Section 7421, Internal Revenue Code of 1954 was filed.

The complaint alleged that the assessment of wagering taxes was illegal because (1) taxpayer was not in the business of accepting wagers, nor did he conduct a wagering pool or lottery, or accept any wagers, nor hold a special occupational stamp to engage in such business, (2) the assessment was made without previous discussion with taxpayer or his representatives, (3) the assessment was not based on any competent evidence except notes, memoranda, and materials unlawfully seized by agents of the Revenue Service which had been suppressed by the District Court for the Eastern District of Kentucky and (4) that similar assessment in like amounts for the same period were made against Myron Deckelbaum, Simon Klayman, and Robert Lassoff.

The complaint further alleged taxpayer did not have and could not acquire funds or credit sufficient to pay the assessment and sue for refund, and that publicity from the assessment had caused him and his family to be held in ridicule and scorn and that his business reputation had practically been destroyed, and that the filing of liens had prevented him from utilizing his property and left him unable to pursue a gainful occupation.

The Court (Judge Shelbourne) stated that Miller v. Nut Margarine Co., 284 U.S. 498 was not applicable and relied on Dyer v. Gallagher, 203 F. 2d 477; Jewel Shop of Abbeville, South Carolina v. Pitts, 218 F. 2d 692; and Long v. Gray, 130 F. Supp. 194, in holding that mere illegality of the tax and hardship on the taxpayer in paying and suing for refund were insufficient to justify a district court assuming jurisdiction.

In granting the government's motion to dismiss, the Court also relied upon Reams v. Vrooman-Fehn Printing Co., 140 F. 2d 237 and pointed out that Tovar v. Jarecki, 173 F. 2d 449, involving an assessment based upon unlawfully obtained evidence, relied on by plaintiffs, had been overruled by United States v. Sanchez, 340 U.S. 42.

In accordance with agreed orders in the case of Myron Deckelbaum and Dorothy Deckelbaum v. William M. Gray and Robert Lassoff v. William M. Gray, suits to enjoin collection of excise wagering taxes in the same amounts and for the same periods, the Court's decision in the Lassoff case controlled the latter two cases. Orders were entered dismissing all three complaints. (Notices of appeal to the Sixth Circuit have been filed in each case).

Staff: United States Attorney J. Leonard Walker and
Assistant United States Attorney Charles M. Allen
(W.D. Ky.) Stanley F. Krysa (Tax Division)

Federal Income Tax; Civil Fraud Penalties; Application of Net Worth Method in Reconstructing Income. Conway v. United States (D. Mass., October 17, 1958). The issues presented in this suit were (1) whether the admitted understatement of income for the years 1939 through 1948 was coupled with a fraudulent intent to avoid taxation and (2) whether it was proper for the Commissioner to reconstruct income by application of the net worth method. Taxpayer had been engaged in the practice of dentistry for more than thirty years. Reconstruction of his income for the period involved resulted in a determination of a tax deficiency of more than \$115,000. This amount, together with approximately \$58,000 in fraud penalties, was assessed, and although payments by taxpayer reduced this liability to about \$77,000, the deficiency for no one year was entirely satisfied by those payments. Suit was instituted for the recovery of \$48,111.94 which plaintiff claimed represented the excessive portion of the deficiency and the fraud penalties; the government counter-claimed for the unpaid balance.

Taxpayer took the position that his understatement was not fraud tainted; that the Commissioner erroneously attributed \$55,000 to income from professional activities, whereas, in reality, said amount was a cash hoard on hand at the opening of the net worth period; and that it was improper for the examining agents to reconstruct income without having first thoroughly examined certain daybooks which he claimed reflected the total income from his profession.

The government contended that the lengthy history of understatement commencing in 1934, and the failure to file prior to that date, gave rise to a strong inference of fraud, especially since there admittedly was substantial income in all of those years; that the uncorroborated allegation that there was a \$55,000 cash hoard on hand in 1939 was a mere fabrication; and that it was entirely proper to apply the net worth method when the books of taxpayer did not reflect various income from sources other than taxpayer's profession and when those books did not reflect the expenses attributable to taxpayer's profession. The Government also raised the jurisdictional question of partial payment. Flora v. United States, 357 U. S. 63.

In its memorandum opinion, the Court concurred in the position taken by the government and ordered that the complaint be dismissed and that judgment be awarded for the government on its counterclaim.

Staff: Assistant United States Attorney Andrew A. Caffrey (D. Mass.)
Walter B. Langley and Richard T. Mulcahey (Tax Division)

CRIMINAL TAX MATTERS
DISTRICT COURT DECISIONS

Defendant's Pretrial Motion for Production of Books, Records, and Transcripts of Statements to Government Agents Denied and Subpoena Duces Tecum Quashed. United States v. Duncan, P-H Fed. Tax Rep., par. 58-5324 (S.D. N.Y.) Defendants, six tugboat pilots, charged in individual indictments with evading taxes, moved under F.R.C.P. 16 and 17(c) and served a subpoena duces tecum upon the government seeking the pretrial production of certain documents, books and papers obtained by the government voluntarily or by solicitation from the Dalzell Towing Company and the distributing agent for the pool of tugboat pilots, as well as the transcripts of statements made by defendants to government agents. The Court denied the motions entirely and quashed the subpoena, holding that (1) the records and the transcripts were not within the ambit of Rule 16 because the records were plainly not documents "obtained from or belonging to the defendant or obtained from others by seizure or process," and further the transcripts of statements were not signed by defendants and therefore are not to be considered "tangible objects belonging to the defendants" and thus obtainable under cases construing Rule 16; and (2) Rule 17(c) was never intended to and cannot be used as a discovery device, but rather to allow defendants, after "a showing of good cause," to obtain evidence to be introduced by them at trial. Since it appeared

that all the records sought would be obtainable from defendants' employers by the exercise of due diligence, although not actually obtainable because defendants had no way to determine just what documents the government had and intended to introduce at the trial, the request was felt by the Court to represent the "natural desire of any careful attorney to know what is going on at the other table," and was therefore "plain discovery" of the government's case. As for the transcripts of defendants' own statements, these were said to have evidentiary value to them only to impeach the credibility of government witnesses testifying as to these same statements. Since the transcripts were short, the Court indicated that, if the government should introduce testimony concerning them at trial, they could be made available to the defendants by the trial court with no resulting hardship or undue delay.

Staff: United States Attorney Arthur H. Christy and
Assistant United States Attorney Robert W. Bjork
(S.D. N.Y.)

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I N D E X

<u>Subject</u>	<u>Case</u>	<u>Vol</u>	<u>Page</u>
<u>A</u>			
ADMIRALTY			
Limitation of Liability	Petition of U. S. of America for Exoneration From or Limitation of Liability and Petition of Sheffield Tankers Corp. for Exoneration From or Limitation of Liability	6	744
ALIEN PROPERTY MATTERS			
Trading With the Enemy Act Scope of Review With Respect to Custodian's Determinations in Debt Claims Proceedings Under Sec. 34 of Act; Findings of Custodian Stand Unless Clearly Erroneous; Rate of Exchange Between Japanese Yen and American Dollar; Where No Rate of Exchange Existed Under Applicable Breach Date Rule Because of War, Rate in Existence When Trade Resumed After War Used Despite Resulting Loss to Creditor Because of Depreciation of Japanese Currency	International Silk Guild, Inc. v. Rogers	6	758
ANTITRUST MATTERS			
Clayton Act Complaint Filed Under Sec. 3	U. S. v. Standard Oil Co. N. J., et al.	6	738
Sherman Act Complaint Filed Under Sec. 1	U.S. v. Standard Oil Co. N. J., et al.	6	738
Guilty Pleas by Automobile Dealers	U. S. v. Greater Washington Chevrolet Dealers Asso. Cooperative, et al.	6	738
<u>B</u>			
BACKLOG REDUCTION			
Districts in Current Status as of 10/31/58		6	735
Monthly Totals re Pending Cases and Matters in U. S. Attorneys' Offices As of 10/31/58		6	735

<u>Subject</u>	<u>Case</u>	<u>Vol</u>	<u>Page</u>
(Contd.) <u>B</u>			
BANKS AND BANKING			
Embezzlement; Proof Consisted Principally of Testimony of Handwriting Expert	U. S. v. Fairbanks	6	747
<u>C</u>			
CITIZENSHIP			
Rebuttal of Prima Facie Case; Burden of Proof	Lee Hon Lung v. Dulles	6	749
CIVIL RIGHTS			
Police Brutality	U. S. v. Overdeer	6	745
CONVERSION			
Choice of Law	U. S. v. The McCabe Co.	6	741
<u>D</u>			
DENATURALIZATION			
Judgment; Reopening After Expiration of Appeal Time	U. S. v. Guss Polites	6	750
Motion to Vacate Prior Judgment; Applicability of Rule 60(b) of Federal Civil Rules	U. S. v. Polites	6	751
<u>E</u>			
EMPLOYEE SUGGESTION PROGRAM			
<u>F</u>			
FEDERAL CROP INSURANCE			
Proofs of Loss	Roberts, et al. v. Federal Crop Insurance Corp.	6	742
FRAUD			
False Statements to Veterans Administration	U. S. v. Quirk, II	6	746
<u>G</u>			
GOVERNMENT EMPLOYEES			
Reductions in Force	Ritter v. Strauss, et al.	6	742

<u>Subject</u>	<u>Case</u>	<u>Vol</u>	<u>Page</u>
<u>H</u>			
HOUSING			
Application of State Install- ment Sales Statute	U. S. v. W. E. Bland & K. Bland	6	743
Transient Rentals	FHA v. The Darlington, Inc.	6	740
<u>L</u>			
LANDS MATTERS			
Condemnation			
Authority to Acquire Indian Tribal Lands	Seneca Nation of Indians v. Brucker	6	756
Valuation; Inadmissibility of Evidence of Tax Assessments	U. S. v. Certain Parcels of Land in County of Arlington	6	756
LIQUOR REVENUE			
Forfeiture; Right to Property Used in Violation of Inter- nal Revenue Laws Vests in U. S. Immediately Although Title Is Not Perfected Until Judicial Condemnation	U. S. v. One 1957 Model Tudor Ford	6	748
<u>N</u>			
NARCOTICS			
Illegal Sale of Narcotics; Sentence Imposed	George v. U. S.	6	747
NATURALIZATION			
Good Moral Character; Contempt of Court; Impossibility of Compliance With Orders Con- cerning Payment of Alimony and Child Support	Petition of Schindler	6	752
<u>S</u>			
SUBVERSIVE ACTIVITIES			
Foreign Agents Registration Act of 1938 As Amended	U. S. v. Barron	6	753
Suits Against the Government	Allison v. Summerfield	6	753
Suits Against the Government	Davis v. Brucker	6	753
Suits Against the Government	Frank v. Dulles	6	754
Suits Against the Government	Olenick v. Brucker	6	754

<u>Subject</u>	<u>Case</u>	<u>Vol</u>	<u>Page</u>
<u>T</u>			
TAX MATTERS			
Administrative Collection of Taxes	U. S. v. Baker	6	761
Collection of Taxes: Bank- ruptcy Court's Allowance of Tax Claim of U. S. is Not a Judgment Enforceable Without Limitation As to Time	Walley, Exr. Est. of London v. U. S.	6	760
Excise Wagering Assessment; Government's Motion to Restrain Collection of Income Tax; Civil Fraud Penalties: Application of Net Worth Method	Lassoff v. Gray	6	761
Pretrial Motion for Produc- tion of Books, etc., to Government Agents Denied	Conway v. U. S.	6	762
	U. S. v. Duncan	6	763