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UNITED STATES ATTORNEYS
BULLETIN

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Vol. 8 May 20, 1960 No. 11

IMPORTANT NOTICE

On May 17, Acting Assistant Attorney General Joseph M. F. Ryan, Jr., in charge of the Civil Rights Division sent to all United States Attorneys a memorandum setting forth policy and procedure to be followed in administering the provisions of the Civil Rights Act of 1960. The Act was signed into law by the President on May 6, 1960, and imposes important new responsibilities upon the Department and upon United States Attorneys. The Act amends the Civil Rights Act of 1957 by giving the court new and important means of implementing its orders designed to prevent racial discrimination in voting. These new means include the power to appoint a "Voting Referee" to determine the qualifications of prospective voters who are members of the group that has been the subject of the discrimination. Another provision requires local officials to preserve certain records relating to registration and voting for federal candidates and requires that they make such records available for inspection and copying by representatives of the Attorney General. The Act also includes three provisions intended to deal with the recent rash of church and school bombings. The first punishes interstate transportation to avoid prosecution for having damaged property by fire or explosive; the second punishes interstate transportation of explosives for certain purposes, and the third punishes the use of the mails or instrumentalities of interstate commerce to convey any threat or false information concerning an attempt to damage property.

The United States Attorneys are particularly urged to familiarize themselves with the Civil Rights Act of 1960 and with the memorandum of May 17 setting forth policy and procedure to be followed in administering the Act.

MONTHLY TOTALS

During the month of March, totals in all categories of the workload showed reductions. In some cases the reduction was very slight, as in pending triable criminal cases where the total decrease was 19 cases. However, the total reduction in all pending cases and matters was 1,134 items. This brings the total pending workload figure of 48,730 items to within 2,000 items of the record-breaking total of 46,730 items established on June 30, 1959. Should the present trend continue there is no doubt that the end of fiscal 1960 will reflect a new low in the total work load pending. A reduction of 2,001 items in the last three months of the fiscal year will break the record for 1959, and this can easily be done since it averages out to approximately 22 cases and matters per each district, per each of the three months. The following comparison shows the workload pending on March 31 and at the end of the preceding month:

	February 29, 1960	March 31, 1960	
Triable Criminal	7,141	7,122	- 19
Civil Cases Inc. Civil Tax Less Tax Lien & Cond.	14,240	14,080	- 160
Total	21,381	21,202	- 179
All Criminal	8,772	8,739	- 33
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	16,901	16,758	- 143
Criminal Matters	10,947	10,494	- 453
Civil Matters	13,244	12,739	- 505
Total Cases & Matters	49,864	48,730	-1,134

Collections for the first nine months of the fiscal year continue to be below those for the prior year. The gap, however, has been narrowed from last month's 10.8 per cent to this month's 9.9 per cent. During the month of March 1960, United States Attorneys reported collections of $3,504,533. This brings aggregate collections for the first nine months of fiscal 1960 to $22,948,904. This is a decrease of $2,526,349, or 9.9 per cent from the $25,475,251 collected in the first nine months of fiscal 1959. To surpass the aggregate collections reported for fiscal 1959, the United States Attorneys would have to recover $12,250,662 in the three months remaining of fiscal 1960. This would require a monthly recovery of $4,000,000 which is an unusually high figure compared to the usual average monthly collections. Accordingly, the present rate of collections projected to the end of the year indicates that aggregate recoveries for fiscal 1960 will fall behind those for fiscal 1959.

DISTRICTS IN CURRENT STATUS

As of March 31, 1960, the districts meeting the standards of currency were:

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Idaho	Mich., W.	Ohio, N.	Tex., E.
Ala., M.	Ind., N.	Minn.	Okla., E.	Tex., S.
Ala., S.	Ind., S.	Miss., N.	Okla., N.	Utah
Ariz.	Iowa, N.	Miss., S.	Okla., W.	Wash., W.
Ark., E.	Iowa, S.	Mont.	Pa., E.	W.Va., S.
Ark., W.	Ky., E.	N.J.	Pa., W.	Wis., E.
Calif., N.	Ky., W.	N.Mex.	P.R.	Wyo.
Calif., S.	La., W.	N.Y., E.	R.I.	C.Z.
Colo.	Me.	N.C., E.	S.D.	Guam
Conn.	Md.	N.C., M.	Tenn., W.	V.I.
Ga., S.	Mass.	N.C., W.		
Hawaii	Mich., E.	N.D.		

Civil

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

JOB WELL DONE

Assistant United States Attorney William C. Martin, Eastern District of Missouri, has been commended by the Chief Postal Inspector for his splendid work and vigorous prosecution of a recent mail fraud case. The defendants were fined and sentenced to prison. The Chief Postal Inspector observed that the sentences imposed will be of material assistance in helping to eliminate this type of fraud (sales of radio and TV tube testing devices) which is currently so prevalent over much of the country.

The State Director, Selective Service Board, has expressed his admiration and thanks for the way in which United States Attorney William B. Jones, Western District of Kentucky, handled a recent habeas corpus hearing on a prominent inductee who was "reluctant" to assume his military duty. The Director stated that Mr. Jones and his staff deserve much credit for the tactful and commendable manner in which the entire affair was handled.

The General Counsel, Securities and Exchange Commission, commended Assistant United States Attorney James B. Schnake, Northern District of California, for his effective presentation and handling of a recent case, and stated that the sentences imposed give real meaning to the enforcement program against securities violators.

United States Attorney William B. Jones and Assistant United States Attorney Charles E. Payton, Western District of Kentucky, have been congratulated by the Acting Chief, Seed Branch, Department of Agriculture, on the successful conclusion of a recent case which was bitterly contested by the defendant, and in which the pleadings were unusually lengthy.

The FBI Special Agent in Charge has expressed appreciation for the outstanding cooperative efforts of Assistant United States Attorney Conrad K. Cyr, District of Maine, in a recent criminal case. The Special Agent further stated that it is spirited cooperation such as that extended by Mr. Cyr which is the source of inspiration and encouragement to the agents in shouldering their responsibilities.

A private concern has extended its thanks for the kindness and courtesy shown by United States Attorney Daniel H. Jenkins and Assistant United States Attorney James S. Palerma, Middle District of Pennsylvania, and further stated that it is pleasant to encounter such courtesy from people in the service of the Government.

The District Supervisor, Bureau of Narcotics, has expressed admiration for the expert manner in which Assistant United States Attorney Robert Kreindler, Eastern District of New York handled a recent conspiracy case. The District Supervisor stated that during the three weeks of preparation for trial and the three weeks, the trial lasted, he became aware of Mr. Kriendler's exactness and the efforts he made to obtain a conviction, and that he was also instrumental in the just and severe sentences imposed on the defendants in this case.

Assistant United States Attorney Elliott Kahaner, Eastern District of New York, has been commended by the FBI Special Agent in Charge for the excellent manner in which he handled a recent criminal case. The Special Agent stated that Mr. Kahaner's accurate analysis of the facts has enabled the Government to bring this case to a logical conclusion in a most efficient and noteworthy manner, and that a large measure of the Government's success in obtaining guilty pleas from the defendants was a direct result of the tenacity and perserverance with which Mr. Kahaner pursued the case.

The Director, Federal Bureau of Investigation, has extended heartiest congratulation to Assistant United States Attorney Hyam Segell, District of Minnesota, for his outstanding work in connection with the prosecution of a difficult criminal case. Stating that he had been advised of the thorough preparation for trial and exhaustive efforts put into the case by Mr. Segell, the Director expressed deep appreciation for the fine cooperation afforded the Minneapolis office of the FBI in its investigation of this matter which was a most important one.

Assistant United States Attorney C. W. Eggart, Jr., Northern District of Florida, recently spoke to the law enforcement conference held by the FBI at Pensacola, on the subject of interstate transportation of stolen automobiles. United States Attorney Wilfred C. Varn also spoke on the same subject as a panelist at the Tallahassee conference. Mr. Eggart also addressed the Pensacola police school on the subject of "Federal Laws", emphasizing those offenses with which city police officers encounter frequently, such as impersonation of armed forces personnel, illegal wearing of the uniform, ITSMV, White Slave Traffic Act and ITSP, particularly fraudulent checks.

The FBI Special Agent in Charge has commended Assistant United States Attorney John B. McFaddin, Northern District of Illinois, for the excellent manner in which he handled a recent case which involved theft from interstate transportation. Immediately after denial of motions to suppress the evidence, the presiding judge requested Mr. McFaddin to be ready for trial in two hours. Working under extreme pressure, Mr. McFaddin prepared the matter for trial in a convincing manner. The bench trial was concluded on the second day and after hearings on further motions the defendant was found guilty. The Special Agent in Charge stated that Mr. McFaddin's arguments on the legality of the search and seizures were vigorously presented and revealed a thorough knowledge of the law in this respect.

Assistant United States Attorney Fred L. Woodlock, Northern District of Texas, has been commended by the presiding judge on his handling of a complicated condemnation suit involving property needed for a Nike installation. Two attorneys who observed a part of the trial and a newspaper reporter who was present also commended Mr. Woodlick's handling of the case.

Editorials in two daily newspapers commented favorably on the convictions obtained by United States Attorney Hubert I. Teitelbaum and Assistant United States Attorney Daniel J. Snyder, Jr., Western District of Pennsylvania, in a recent case involving the smuggling of arms to Cuba. One editorial stated that the case presented a masterful piece of prosecution and that both Mr. Teitelbaum and Mr. Snyder deserved the thanks of the public for their fine work.

The Chief Postal Inspector has commended United States Attorney Oliver Gasch and Assistant United States Attorney Frederick W.Smithson, District of Columbia, for their effective work in bringing to a successful conclusion a difficult obscenity case involving an educator and erstwhile professor at a number of colleges. The Chief Postal Inspector stated that this was a landmark case and the results achieved bear eloquent testimony to the fine work of Mr. Gasch and Mr. Smithson. The letter further stated that Mr. Smithson not only prepared brilliantly for the trial but his demeanor during the proceedings was outstanding.

The presiding judge in a recent case in which Assistant United States Attorney Robert B. Fiske, Jr., Southern District of New York, represented the Government commended both Government and defense counsel for the great ability they displayed in advancing the interests of their respective clients, and for the essential fairness of their summations. The judge stated that facts were recognized and dealt with directly, that there was no attempt to distort the factual picture, and that it was most refreshing to have such a candid presentation by counsel in urging their contentions upon the Court.

A former Assistant United States Attorney in writing to United States Attorney Fallon Kelly, District of Minnesota, stated that it was impressive to see an office that was more than considerably behind in its work, shape up firmly to a current status without an attendant decline in the quality of work, that in fact the quality of the work was greatly increased in the process, and that morale and esprit de corps rose also. The letter stated that the most distinctly noticeable acclaim for the present administration of the United States Attorney's office is the renewed respect, spirit of cooperation, and friendliness accorded the office and its personnel by the clerks, marshals, investigative agents, private attorneys and the general public, and that he had received many comments praising the work of United States Attorney Kelly.

The Assistant General Counsel, Food and Drug Division, has written to United States Attorney Donald G. Brotzman, District of Colorado stating that Mr. Brotzman's hard work and that of his Assistant United States Attorney Charles M. Stoddard made a great contribution to the successful conclusion of a recent case. The Assistant General Counsel further stated that he had always found Mr. Brotzman most cooperative and his office to be one of the most outstanding United States Attorneys offices in the country.

United States Attorney Wilfred C. Varn, Northern District of Florida, has been commended by the Acting Regional Director, Fish and Wildlife Service, for his effective cooperation in completing acquisition of submerged land needed for construction of a headquarters. The letter stated that Mr. Varn's assistance made it possible to accept a very favorable construction bid which will result in a substantial saving of money for the United States.

The FBI Special Agent in Charge has expressed deep appreciation for the invaluable assistance rendered by Assistant United States Attorney Robert E. Cahill, District of Maryland at the automobile theft conference recently held in Baltimore. The Special Agent stated that all who attended were very much impressed by the effective manner in which Mr. Cahill discussed his assigned subject matter.

Assistant United States Attorney John F. Grady, Northern District of Illinois, has prepared an article entitled "Discovery in Criminal Cases" which has been published in the University of Illinois Law Forum. The article has received widespread favorable comment.

The District Director, Internal Revenue Service, has commended United States Attorney Hubert I. Teitelbaum, Western District of Pennsylvania, for the outstanding assistance and invaluable counsel and kindness he rendered in connection with a recent big raid. The District Director observed that the wholehearted spirit of cooperation evidenced in this matter was typical of that which Mr. Teitelbaum and his staff have constantly given the Intelligence Division.

Assistant United States Attorney Charles M. Stoddard, and Miss Helen Bartha, stenographer, District of Colorado, have been commended by the Associate Medical Director, Food and Drug Administration, for the extremely capable and dilligent manner in which a recent case was prepared and presented. The letter stated that Mr. Stoddard's excellent grasp of the medical facts freatly facilitated assembling the necessary medical evidence, and that Miss Bartha's quick and able clerical and stenographic handling of complex technical matters under pressure was extremely helpful.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

Status Inquiries

At the recent United States Attorneys' Conference, several expressed concern over the number of "case status" inquiries received from the Department.

The Statistical and Machine Services Section in answering numerous inquiries frequently discovered that the D. J. File number and/or the Civil Division Section code were not reported by the United States Attorney on either the snap-out copy of the docket card or the "mark-sense" cards, thus making it very difficult or impossible to locate and furnish the information.

This situation may be corrected by providing the Machine Services Section with adequate information to answer these inquiries. Therefore, you are requested to:

> Compare case files with docket and mark-sense cards to make sure that the following information appears on the proper cards:
>
> > The D. J. File Number for all cases supervised by the Legal Divisions of the Department, and the Civil Division Code for cases supervised by the Civil Division.

If it is found that this information has been omitted please submit corrected mark-sense cards.

By exercising greater care in the future in reporting this information, docket clerks can contribute to a reduction in the volume of status letters.

MEMOS AND ORDERS

The following Memorandum applicable to United States Attorneys Offices has been issued since the list published in Bulletin No. 10 Vol. 8 dated May 6, 1960.

MEMO	DATED	DISTRIBUTION	SUBJECT
272-1	4-25-60	U.S. Attys and Marshals	Control and Reporting of Obligations and Disbursements

OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Application of "clearly erroneous" Doctrine to Administrative Findings of Fact by Attorney General; Affirmance of "judgment day rule" in Converting into Dollars a Foreign Currency Debt Claim Created by Foreign Law. Max Reissner v. William P. Rogers, et ano.; William P. Rogers, et ano. v. Max Reissner, on cross appeals (C.A.D.C., March 10, 1960). Reissner filed a debt claim under the Trading with the Enemy Act growing out of the forced sale of his pharmaceutical company in Germany to Schering-Kahlbaum, A.G., in 1937 for reichsmarks (RM) 153,300. After a hearing before a Hearing Examiner and reviews by the Deputy Director and the Attorney General, an administrative decision was issued finding that the debt due Reissner was RM 273,507 with interest at 4% from March 1, 1937; that said amount should be converted under the German Conversion Law of 1948 into one deutschemark for each ten reichsmarks, and that the rate of exchange between German and American currency should be the rate prevailing at the time of allowance of the claim under the "judgment day rule."

Reissner filed a complaint for review in the district court under Section 34 of the Act, asserting that the amount of indebtedness as of March 1, 1937, was RM 651,331; that the debt was not subject to the German Currency Conversion Law; and that the pre-war rate of exchange should apply. Both parties moved for summary judgment. The district court sustained the administrative decision that the reichsmark debt was 273,507; held that the German Currency Conversion Law was inapplicable; and entered judgment on the basis of RM 3.33 per dollar, the rate prevailing when the claim was filed in 1948.

On cross-appeals the Court of Appeals held that the findings of the Attorney General of the value of the property sold, and consequently the amount of the debt in 1937, as well as his determination that under the German Currency Conversion Law Reissner's claim was a debt claim subject to conversion at the 10 to 1 rate, were findings of fact which were not clearly erroneous on the record before him and therefore should not be set aside on review. On this point, the Court noted that no evidence was offered in the district court other than that contained in the record certified by the Office of Alien Property.

In determining the appropriate date that the conversion of Reissner's claim in reichsmarks to American dollars should be made, the Court held that the "judgment day rule" was applicable by the settled law on the subject, and fixed the judgment day for that purpose as the day on which the Attorney General approved the decision of the Deputy Director, which constituted the final administrative decision in the case. Thus, the Court of Appeals upheld

the decision of the Department. The judgment of the district court was accordingly affirmed in part, reversed in part, and the cause remanded.

Staff: George B. Searls; Max Wilfand (Office of Alien Property).

* * *

ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT - CLAYTON ACT

Supreme Court Clarifies Antitrust Immunity of Cooperatives. Maryland and Virginia Milk Producers Association v. U.S., United States v. Maryland and Virginia Milk Producers Association. On May 2, 1960, the Supreme Court (per Justice Black) unanimously upheld the Government's position respecting the antitrust liability of the Maryland & Virginia Milk Producers Association. In the complaint filed in this case the Association, an agricultural cooperative having about 2,000 dairy farmer members and supplying about 86% of the milk sold by dealers in the Washington, D. C., metropolitan area, had been charged with violating Sections 2 and 3 of the Sherman Act and Section 7 of the Clayton Act. The district court held that such a cooperative is wholly exempt from the antitrust laws except where it combines or conspires with persons not producers of agricultural products. It concluded that, under this test, the Sherman Act Section 3 restraint of trade charge was valid but the Sherman Act Section 2 monopolization charge was not. It also upheld the validity of the charge that the Association's purchase of the assets of Embassy Dairy, the most important milk dealer in the Washington area which did not procure its milk from Association members, violated Section 7 of the Clayton Act. After trial, the court found for the Government on the Clayton Act and Sherman Act Section 3 charges. The Association's appeal sought reversal of the judgments against it on these charges. The Government's appeal asked reversal of the dismissal of the Sherman Act Section 2 charge, and also asked certain additional relief with reference to undoing the Embassy acquisition.

The Supreme Court approved and reaffirmed its holding in United States v. Borden, 308 U.S. 188, that Section 2 of the Capper-Volstead Act does not give the Secretary of Agriculture primary jurisdiction of Sherman Act violations by cooperatives, and therefore does not bar prosecution of such violations. It also held that the reasons underlying its decision in Borden that neither Section 1 of the Capper-Volstead Act nor Section 6 of the Clayton Act immunizes cooperatives from prosecution for trade-restraining combinations violative of Section 1 of the Sherman Act apply equally to monopolizations of trade (banned by Section 2 of the Act) achieved by predatory practices directed against independent producers, processors or dealers. It held that even though the Capper-Volstead Act may authorize a cooperative to acquire a dealer if the purpose is merely to expand the cooperative's "permissible processing and marketing business", it does not sanction an acquisition, such as that of Embassy, having as its purpose use of the acquired company "as a weapon to restrain and suppress competitors and competition".

As to Section 7 of the Clayton Act, the Court held that the district court's findings established a violation of the Section, and that the case

was not within any exception from its prohibitions given by the last paragraph of Section 7 because no statute conferred upon the Secretary of Agriculture authority to approve the Embassy acquisition. Finally, the Court concluded that, in view of the district court's reservation of jurisdiction to implement its judgment by further orders and its expressed purpose to grant any such implementation later found to be appropriate, it had not exceeded the discretion vested in it with respect to requisite relief.

The case was argued for the Government by Mr. Elman of the Solicitor General's office.

Staff: Charles H. Weston, Irwin A. Seibel, Joseph J. Saunders, and Richard H. Stern (Antitrust Division)

SHERMAN ACT

Price Fixing - Printing Machinery, Equipment and Supplies; Complaint and Consent Filed Under Section 1. United States v. Western Newspaper Union, (S.D. N.Y.). On May 4, 1960, a civil complaint was filed, charging Western Newspaper Union, of New York City, with violating Section 1 of the Sherman Act in connection with the manufacture and sale of printing machinery, equipment and supplies. At the same time a consent judgment was entered successfully terminating the case.

Western Newspaper Union, which maintains numerous branch offices in the United States, is one of the largest distributors and retailers of printing machinery, equipment and supplies, which are used by commercial printers, publishers of newspapers, books and magazines, greeting card manufacturers and others in the graphic arts, container and publishing industries. Printing machinery, equipment and supplies are also used by schools, and business offices as well as departments and agencies of federal, state and local governments.

The complaint named as co-conspirators, but not as defendants, ten manufacturers who sell printing machinery, equipment and supplies to Western Newspaper Union for resale to the ultimate consumer. The complaint alleged that defendant had combined and conspired with each of the co-conspirators to fix, maintain and stabilize prices for printing machinery, equipment and supplies. The total industry sales of printing machinery, equipment and supplies for the year 1957 affected by the various conspiracies alleged were well in excess of $11,000,000.

The judgment entered enjoins defendant from entering into resale price maintenance contracts with the co-conspirators for a period of ten years; from requiring any manufacturer, distributor, or dealer to adhere to any fixed, suggested or specified price at which printing machinery, equipment or supplies are sold to third persons; and from allocating or dividing territories, markets or customers for the manufacture, sale or distribution of such products.

The consent judgment also vacated a final judgment entered against Western Newspaper Union in the Southern District of New York on August 18, 1953, in a civil antitrust civil case entitled United States v. Western Newspaper Union, et al. Civil No. 87-60. The substantive provisions of the vacated judgment were incorporated in the present judgment.

Staff: Philip L. Roache, Jr., Charles F. B. McAleer, Joseph J. O'Malley, Robert J. Ludwig, and Allan J. Reniche (Antitrust Division)

CLAYTON ACT

Motions for Summary Judgments of Dismissal Denied in Section 7 Case. United States v. Pabst Brewing Company, et al, (E.D. Wisc.). On April 7, 1960, Judge Tehan handed down a decision denying the motions of defendants Schenley Industries, Inc., and The Val Corporation for summary judgments of dismissal as to them.

The complaint, filed on October 1, 1959, against the defendants, Pabst Brewing Company, Schenley Industries, Inc., and The Val Corporation, alleged that the acquisition by Pabst on or about July 30, 1958, of all the assets and business of Val, formerly Blatz Brewing Company, a wholly-owned subsidiary of Schenley, was violative of Section 7 of the Clayton Act. Under the terms of the agreement of sale which gave rise to the proceeding, Pabst purchased the assets and business of Blatz for $11,000,000 in cash, $3,500,000 in debentures, 200,000 shares of Pabst common stock and a stock purchase warrant for 350,000 shares of Pabst common stock. After the sale, Blatz changed its name to The Val Corporation and was thereafter dissolved under the laws of Wisconsin, effective on or about September 2, 1958. Its net assets, including most, if not all, of the consideration received by it from Pabst, were distributed to its sole stockholder, Schenley. Schenley has no interest in Pabst except as holder of the stock and stock purchase warrant received by Blatz as partial consideration for the sale to Pabst and subsequently distributed to Schenley upon the dissolution of Val.

The movants argued, first that their joinder as parties defendant was improper since the complaint charges no violation by them of Section 7 and, second, that they are not proper parties because should the Court find that the acquisition of Blatz by Pabst was unlawful, no conceivable relief could be granted against them. The Government conceded that the movants had been charged with no offense, but contended that they were proper parties to the proceeding for purposes of relief.

With respect to the movants' first contention the Court said: "In a proceeding under Section 7 of the Clayton Act, the court has authority to grant relief not only against parties who are found to have violated that section, but also against other parties if such relief is necessary to eliminate the effects of an acquisition offensive to the statute. United

States v. E. I. du Pont de Nemours and Company (1959) (N.D. Ill., E.D.) 177 F. Supp. 1. All parties against whom relief may be granted may properly be joined as parties defendant."

With respect to movants' second contention the Court stated: "We believe that that argument is premature at this stage of the proceeding, and that the question of whether any effective relief can be granted against the movants must await the determination of the substantive issues."

The Court noted that the movants were "not strangers to the transaction which gave rise to the proceeding," being parties to the agreement of sale, and that "both proceeded to a consummation of the sale with full knowledge of the fact that the Antitrust Division of the Department of Justice proposed to make a study of whether the transaction involved any violation of the antitrust laws."

Staff: Earl A. Jinkinson, Dorothy M. Hunt, and Francis C. Hoyt (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

SUPREME COURT

INTERSTATE COMMERCE

Carrier's Intentional Delay of Shipments for Shipper's Convenience Without Tariff Provision Violates Interstate Commerce Act; Suit for Injunction Under Elkins Act Does Not Invade Primary Jurisdiction of Interstate Commerce Commission. Union Pacific R. Co. v. United States (S. Ct., April 4, 1960). The United States, at the instance of the Interstate Commerce Commission, sought and obtained under the Elkins Act (49 U.S.C. 43) an injunction restraining the Union Pacific from rendering an intentionally delayed service on lumber shipments from the West Coast to mid-western markets. The service was offered in order that the shipper could have additional time to find buyers for the lumber while it was in transit. Union Pacific's published tariffs did not provide for the delayed service and no charge for the service was exacted from the shipper. The Supreme Court, on the carrier's direct appeal, affirmed. In a per curiam opinion, the Court held that the intentionally delayed service, resulting in increased operational costs to the carrier, constitutes the furnishing of "privileges and facilities" within the meaning of Section 6(1) and 6(7) of the Interstate Commerce Act (49 U.S.C. 6(1), 6(7)). Since there was no tariff provision for the service, the Court, agreeing with the district court, held that the delayed service violated Section 6(7) of the Act requiring that a carrier's tariff include all privileges and facilities offered to shippers. The Court, in addition, rejected the carrier's argument that the proceeding in the district court invaded the "primary jurisdiction" of the Interstate Commerce Commission which is presently considering the reasonableness of a delayed lumber service offered, with tariff provision, by six carriers other than the Union Pacific.

Staff: John G. Laughlin (Civil Division)

COURTS OF APPEALS

ATOMIC ENERGY

Complaint to Enjoin Nuclear Testing Dismissed Since Plaintiffs Had No Standing to Sue and No Justiciable Controversy Presented. Linus C. Pauling, et al. v. Neil H. McElroy, et al.; Dwight Heine, et al. v. Neil H. McElroy, et al. (C.A.D.C., April 12, 1960). Plaintiffs, 39 individuals, sought an injunction to restrain the Secretary of Defense, the Atomic Energy Commission and others from detonating any nuclear weapons, in testing areas or elsewhere, which might produce

radiation or radioactive nuclei. They also sought declaratory judgments that nuclear weapons tests are illegal. The complaints alleged that nuclear tests "will cause world-wide fallout of radioactive debris, * * * and will increase the radioactive strontium content of the soil and the amount of contamination of the food supply of the world and of the bones of human beings." They also alleged that the Atomic Energy Act of 1954 (42 U.S.C. 2011, et seq.) is unconstitutional, and that in any event nuclear testing is not authorized by that Act. The district court dismissed the complaints on the grounds that plaintiffs lacked standing to sue, and that they had not presented a justiciable controversy.

The Court of Appeals affirmed. It held, first, that plaintiffs had no standing to sue because "[t]hey do not allege a specific threatened injury to themselves, apart from others, but rather set themselves up as protestants, on behalf of all mankind, against the risks of nuclear contamination in common with people generally. Standing to sue, even as to the citizen of the United States, does not arise out of such general and indefinite allegations of injury." Second, it agreed with the district court that no justiciable controversy was presented, since the issues raised, i.e., "[t]he power of Congress to provide for the common defense, and the duty of the Executive to see to it that the laws are faithfully executed, like the exclusive power of the Executive relating to foreign policy, are within the historic areas of political power in which actions of the Executive and Legislative Branches are supreme and beyond judicial review." Judge Bazelon dissented in part, on the ground that the action should have been dismissed as moot in view of the Government's self-imposed moratorium on nuclear tests.

Staff: Donald B. MacGuineas (Civil Division)

FEDERAL AVIATION ACT OF 1958

Regulation Barring Service by Commercial Air Carrier Pilots Over 60 Years Old Held Valid Promulgation; Individual Hearings Not Necessary. Air Line Pilots Association, International, et al. v. Quesada (C.A. 2, April 21, 1960). Plaintiffs brought this suit against the Administrator of the Federal Aviation Agency, seeking to have declared invalid a regulation promulgated by the Administrator which prohibits an individual who has reached his 60th birthday from serving as a pilot on any aircraft while engaged in air carrier operations. 14 C.F.R. §§ 40.260(b).

The district court denied plaintiffs' motion for a preliminary injunction against the application of the regulation, but reserved judgment on the Administrator's cross motion for summary judgment. Plaintiffs took an appeal under 28 U.S.C. 1292(a)(1).

The Court of Appeals affirmed the denial of the preliminary injunction, holding that the regulation in question was a reasonable one and that it was a valid promulgation made pursuant to the authority granted the Administrator by the Federal Aviation Act of 1958

(49 U.S.C. 1421) to provide adequately for safety in air commerce. The Court held that the issuance of the regulation was a rule-making action, and that, thus, neither due process of law, nor the Administrative Procedure Act (5 U.S.C. 1001, et seq.) nor the Federal Aviation Act, required the Administrator to hold an adjudicative hearing for each airman to be affected by the regulation.

Staff: United States Attorney S. Hazard Gillespie, Jr. (S.D. N.Y.)

FEDERAL TORT CLAIMS ACT

Government Held Liable for Tort Committed by Civilian Employee of Navy Officers' Mess, a Nonappropriated Fund Instrumentality of United States. United States v. Holcombe (C.A. 4, April 18, 1960). Plaintiff was the civilian manager of a Commissioned Officers' Mess at a United States naval base. He brought suit against the United States under the Tort Claims Act to recover for damage sustained when another employee of the Mess, to whom the plaintiff had loaned his automobile to perform an errand, negligently drove the automobile off the road, destroying it.

At the first trial of the cause, the district court dismissed the complaint on the ground that the tortfeasor's operation of the plaintiff's automobile had not been within the scope of her employment for the United States. On plaintiff's appeal, the Court of Appeals reversed and remanded the case since the Government conceded that the issue of scope of employment had been improperly decided.

On remand, the district court rejected all of the Government's defenses and entered judgment for the plaintiff. The Government appealed, raising as its sole contention the argument that the Tort Claims Act does not subject the United States to liability for the torts of civilian employees of nonappropriated fund instrumentalities of the United States, like the Navy Officers' Mess involved here. Such agencies are not operated on funds derived from the United States Treasury, but sustain themselves by employing the funds which their activities produce.

The Court of Appeals affirmed. It held that, as the Officers' Mess was an integral part of the United States naval establishment, its employees were employees of a federal agency within the meaning of the Tort Claims Act. The Court stated that neither the language nor the policy of the Act supported the distinction between appropriated and nonappropriated fund activities urged by the Government.

Staff: Mark R. Joelson (Civil Division)

FRAUDULENT CONVEYANCES

Burden of Proof on Transferor Resisting Government Creditor's Bill Where Government's Evidence Raised Presumption of Fraud. United States v. Kaplan, et al. (C.A. 5, April 18, 1960). In 1954 the

United States obtained a judgment against Celina Kaplan and others in the amount of approximately three-quarters of a million dollars. (United States v. American Packing Corp., 125 F. Supp. 788 (D.C. N.J.)). In 1957 the United States filed a creditor's bill in the United States District Court for the Southern District of Florida, seeking to set aside a conveyance of certain shares of stock made by Celina Kaplan to her son, Donald, after the Government's initial action had been filed, but prior to the judgment in that action.

At trial, the United States proved that the debt owing it had been incurred by Celina prior to her conveyance of the stock, and that the conveyance had been made voluntarily at a time when Celina was insolvent. Celina testified that the conveyance had been made pursuant to an oral trust which she had set up in favor of her son in 1945. The district court dismissed the Government's bill, finding (1) that the Government had not proven the conveyance to be fraudulent, and (2) on the uncorroborated testimony of Celina Kaplan, that the conveyance had been made pursuant to an oral trust established in 1945.

On the Government's appeal, the Court of Appeals held that proof, by a creditor whose debt existed at the time of the conveyance, that the conveyance was voluntary, and was made while the debtor was insolvent, raises a presumption that the conveyance was fraudulent. The Court ruled that in the face of the presumption provided by the proof of such "badges of fraud" in the case at bar, the burden had shifted to the defendants to prove clearly and unequivocally that what was apparently Celina Kaplan's property was, in reality, not hers because of the existence of an oral trust. The case was remanded to the district court to provide defendants with the opportunity to present such evidence respecting the existence of the alleged trust.

Staff: Anthony L. Mondello (Civil Division)

GOVERNMENT CLAIMS

Purchaser of Milk from Commodity Credit Corporation Liable, Pursuant to Contract, for Additional Sums Where It Utilized Milk in Violation of Use Restrictions In Contract; Use Restriction and Price Adjustment Provisions of Contract Held Valid. Kirkland Distributing Co. v. United States (C.A. 4, March 14, 1960). By the terms of a contract with the Commodity Credit Corporation, defendant agreed to utilize nonfat dry milk solids purchased from CCC only for certain uses in connection with the making of animal and poultry mixed feeds. It was also provided that, if the purchaser utilized any of the milk otherwise than as agreed, it would pay, with respect to such milk, additional sums so as to make the sales price equal to the CCC price for milk sold for unrestricted use.

Defendant violated all of the various use restrictions in the contract in disposing of the milk, and the United States, on behalf of CCC, brought suit to recover the additional payments provided for. The district court concluded that the Government could recover the adjusted price only for such milk as had been sold by defendant to others and had been used by the latter for purposes other than as an ingredient of feed. Both parties appealed.

The Court of Appeals reversed and remanded the cause with directions to enter judgment in the full amount sued for. The Court pointed out that the adjusted sales price was, by the terms of the contract, applicable to milk sold in violation of any of the use restrictions. It also ruled that these restrictions were valid and that the price adjustment provisions constituted a reasonable measure of damages, not a penalty.

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

SERVICEMEN'S READJUSTMENT ACT OF 1944

Home Loan Guarantee; Applicability of State Law Deficiency Judgment Act to Indemnity Suit Against Veteran Based on Loss Suffered by VA. United States v. Shimer (C.A. 3, April 8, 1960). This case involves the typical home loan guarantee situation whereby the Veterans Administration guarantees the lender against loss due to a veteran's default in payment of a mortgage loan. The veteran in this case defaulted on his $13,000 loan within several months after the VA had guaranteed the lender against loss up to the amount of $4,000. The lender sued the veteran in a foreclosure action and obtained judgment thereon. A sheriff's sale followed, at which the property was purchased by the lender for $250. The lender thereupon filed a claim with the VA for payment of the $4,000 loan guarantee. The VA paid this amount about a month after the lender had sold the property to third parties for $10,500. It was stipulated that the lender did not comply with the provisions of the Pennsylvania Deficiency Judgment Act.

The Pennsylvania Deficiency Judgment Act permits a party who purchases property at a judicial sale to file a petition to fix the fair market value of the property within six months after the sale. If no petition is filed within that time, the statute has the effect of completely discharging the debtor from payment of any balance of the judgment. Since under this Act the lender here would have been precluded by state law from proceeding against the veteran further, the United States, as subrogee to the lender's rights, would similarly have been precluded. While initially the United States claimed entitlement to judgment against the veteran as subrogee, it abandoned this position on appeal. In the district court and in the Court of Appeals, the United States insisted, however, that it was entitled to indemnity from the veteran for the amount of the guarantee it had

paid out on account of his liability; and it relied for this result on the administrator's regulations, issued and enforced with full Congressional awareness, and which rendered such a payment a debt of the veteran to the United States (38 C.F.R. (1949 Ed.) 36.4323(e)). These regulations were by reference included in the veteran's application to the Government for the loan guarantee. While the Court of Appeals agreed with the Government that an indemnity relationship existed between the veteran and the United States which was independent of the veteran's mortgage relationship with the lender, it ruled that payment of the guarantee could properly be made only if there was at the time of such payment a subsisting liability of the veteran to the lender. The Court of Appeals read the regulation's reference to the "liabilities of any veteran" (38 C.F.R. (1949 Ed.) Section 36.4323(e)) as constituting a federal law requirement of referral to state law to resolve the extent of the veteran's liability. Then, treating Section 36.4321(a) of the regulations as an entitlement to the veteran for set-offs or credits applicable against his indebtedness in the computation of the amount to be paid on the VA guarantee, it held that the Pennsylvania Deficiency Judgment Act gave the veteran, as of the date of the decree of foreclosure, a set-off or credit in the full amount of the judgment. It accordingly affirmed the district court's summary judgment for the veteran.

Staff: Anthony L. Mondello (Civil Division)

SOCIAL SECURITY ACT

Court Finds Substantial Evidence to Support Agency Determination That Claimant Failed to Establish Entitlement to Disability Benefits Under Social Security Act. Arthur S. Adams v. Arthur S. Flemming (C.A. 2, April 8, 1960). Claimant sought to establish that he was entitled to disability benefits, under 42 U.S.C. 416(i) and 423, by reason of a severe sinusitis condition and a perforated nasal septum. He had retired at the age of 47 as the manager of an insurance company department on a company disability pension and had undertaken no employment thereafter. The agency concluded that he had not met the burden of proving, as he had to, that by reason of his impairments, he was unable "[t]o engage in any substantial gainful activity" and, consequently, denied him a disability freeze and disability insurance payments.

Claimant then brought action in the district court, and that court reversed the agency determination, holding that it was unsupported by substantial evidence. (173 F. Supp. 873 (D. Vt.)) The district court considered the company disability retirement as crucial and disregarded the lack of medical evidence indicating inability to engage in any other activity. The court also expressed its belief that the referee was applying a standard of disability requiring a showing of complete helplessness.

On appeal by the Government, the Second Circuit reversed, holding that the record furnished ample justification for the agency decision. Noting that the referee had not applied the standard suggested by the district court, the Court of Appeals held that in view of the medical evidence adduced and the claimant's background, claimant clearly had not met the burden of proving inability to engage in any substantial gainful activity. The Court observed, in this respect, that the statute required a showing of inability to engage in any job -- not simply the job previously held. While claimant was not "required to sell apples or to start his own business" (Hallard v. Flemming, 167 F. Supp. 207, 209 (W.D. Ark.), he had to show some effort to secure some sort of gainful employment.

Staff: Herbert E. Morris (Civil Division)

SOIL BANK ACT

Substantiality of Alleged Willful Violation of "No-grazing" Provision of Soil Bank Act. United States v. Maxwell (C.A. 8, April 12, 1960). The Soil Bank Act (7 U.S.C. 1801, et seq.) provides for payments to farmers who withhold portions of their land from production of certain basic commodities which constitute the Government's major agricultural surpluses. Such lands are usually conserved by the planting of a cover crop, and the Act prohibits grazing or harvesting from these reserve lands. Maxwell knew of the prohibitions of the Act, but, in 1957 he permitted a small number of horses to range his whole farm of about 175 acres, which included approximately 90 acres in "conservation" and "acreage" reserves with an alfalfa cover crop.

After hearings before county and state committees, as required by the Act, the state committee determined (1) that Maxwell had knowingly and willfully violated both the conservation and acreage reserve programs; (2) that he must forfeit all of the compensation payable to him for the year; and (3) that the 50% penalty provisions of 7 U.S.C. 1811 for knowing and willful grazing were applicable.

Pursuant to the Act (7 U.S.C. 1831(d)), Maxwell sought review in the district court of the question "whether there has been a violation which would warrant termination of the /reserve/ contract." The Act, which permits de novo review of this question by the district court, also provides that a contract shall not be terminated "unless the nature of the violation is such as to defeat or substantially impair the purposes of the contract." (7 U.S.C. 1821(a)(1), 1831(d)). The district court held that the violations had been inconsequential and did not warrant the termination of the contracts. It also dismissed the Government's counterclaim for the penalty.

The Court of Appeals affirmed this result. Noting the small number of animals involved, the extensiveness of the reserved acreage, the availability of non-reserved pasture land close by where the animals were penned, the immature growth of the alfalfa crop at the

time, and Maxwell's absence from his farm during a substantial part of the period when the violation took place, the Court ruled that there was no substantial evidence of unlawful grazing or of willfulness. It accordingly refused to disturb the district court finding that the violations were not substantial. It also held that only substantial violations could support the imposition of the willfulness penalty of 5 U.S.C. 1811, and ruled that only the district court, and not the state committee, could assess the penalty under the statute. But the Court held further that the district court had exceeded its jurisdiction in ordering the United States to make payments to the farmer, since all the Act permitted it to do was determine whether the violation warranted termination of the contract.

Staff: Anthony L. Mondello (Civil Division)

DISTRICT COURTS

FEDERAL TORT CLAIMS ACT

Claims Based on Award of Government Contract for Manufacture and Supply of Explosive Device Without Requiring Safety Devices or Procedures, and Without Providing Government Supervision Held Barred by 28 U.S.C. 2680(a). Galbraith v. United States; Ash v. United States; Collier v. United States; Powell v. United States (W.D. N.Y., March 31, 1960). These cases sought recovery of damages for death and injuries resulting from three separate explosions at the plant of a private manufacturer who had contracted to produce, pursuant to Army specifications, an explosive ordnance device. The Government was charged with negligence in selecting an incompetent contractor and in failing to require the manufacturer, by contract or otherwise, to take necessary safety precautions.

The District Court found that the explosions were attributable to the contractor's negligent failure to provide its employees with safety devices and competent supervision. It found that the steps taken by the Army before awarding the contract were not negligent. It held, however (relying heavily upon Dalehite v. United States, 346 U.S. 15), that even if such negligence had been found, the claim was barred by the discretionary functions exception in 28 U.S.C. 2680(a). "The procurement of explosives for the armed forces involves what items shall be procured, how they shall be constituted, whether the government itself shall manufacture them or whether the manufacture shall be entrusted to independent contractors, and if by the latter, the selection of contractors deemed to be capable * * * All of these considerations * * * required discretionary decision before the operational level was reached."

The plaintiffs also contended that because the work was "inherently dangerous," the Government had a non-delegable duty under the applicable local law to supervise the contractor's work so as to assure reasonable safety measures. The District Court found it unnecessary to reach this question because the nature and extent of government supervision of the contractor's work was also a matter of administrative discretion of

"precisely" the kind that was "intended to be excluded by Section 2680(a). The law of New York does not nullify the exception provided by Section 2680(a) * * *."

Staff: Acting United States Attorney Neil R. Farmelo and Special Assistant United States Attorney Donald F. Potter (W.D. N.Y.); Harry N. Stein (Civil Division)

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CIVIL RIGHTS DIVISION

Acting Assistant Attorney General Joseph M. F. Ryan, Jr.

Voting and Elections; Civil Rights Act of 1957. United States v. Fayette County Democratic Executive Committee, et al., (W.D. Tenn.). The complaint in this case, the fourth brought under the Civil Rights Act of 1957, charged the defendant Committee and others with excluding qualified Negro voters from participation in a primary election conducted to select candidates to run for local office. The complaint sought a declaration that this practice violated the Civil Rights Act of 1957 and the Fifteenth Amendment and prayed for an injunction against this "white primary." (See the Bulletin of December 31, 1959.)

On April 25, 1960, the parties agreed to, and the Court approved, a consent judgment. The decree substantially embodies the relief sought, in that the defendants have conceded the illegality of "white primary" elections and have agreed that, in the future, qualified voters shall not be excluded from participation in elections on account of race or color. The Court has retained jurisdiction of the case for such further orders as may be necessary.

Staff: United States Attorney Warner Hodges (W.D. Tenn.)
Henry Putzel, Jr., David L. Norman and J. Harold Flannery (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

MAIL FRAUD

Advance Fee Scheme. United States v. Lenders Service Corporation, et al. (N.D. Ga.). An indictment containing 43 counts charging mail fraud violations (18 U.S.C. 1341) and one count charging conspiracy (18 U.S.C. 371) was returned against Lenders Service Corporation, and 23 of its officers and salesmen, on April 29, 1960. This is another one of the series of prosecutions which has been initiated throughout the country, aimed to put an end to this type of swindle.

The indictment grew out of the activities of the defendants in the operation of advance fee schemes whereby businessmen were induced to apply for loans through Lenders Service Corporation, or to sell their businesses through Business Mart of America, paying advance fees for the purported services upon the assurances that the loans could be obtained or the sales made. The investigations showed that loans were actually received or sales made in less than 1% of the transactions. It was estimated that approximately 13,000 businessmen were defrauded of about $10,000,000 by the defendants in their operations.

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

MAIL FRAUD

Coupon Book Fraud. Jack A. Lemon and Martin DeBruin v. United States. (C.A. 9, March 30, 1960). The facts of this case resulting in the trial and conviction of the appellants on each count of a five count indictment returned in Hawaii under 18 U.S.C. 1341 in connection with a coupon book fraud were reported at length in the January 2, 1959, issue of the United States Attorneys' Bulletin, Vol. 7, No. 1, pp. 13 and 14. Both defendants were sentenced to three months' imprisonment and ordered to pay a $500 fine for each offense, the sentences to run concurrently and the payment of the fines in Count I to constitute payment on each of the remaining counts. Although it was contended on appeal that the evidence was insufficient to support a jury verdict, the Court concluded that, if the evidence would sustain conviction on any count, the judgment must then be affirmed.

Consistent with the factual allegations of Count III, one J. Nozawa, an addressee of matter mailed in execution of appellants' plan, was telephonically contacted, the caller following substantially a written set of instructions. Mrs. Nozawa agreed to pay the C.O.D. charge for the coupon booklet which entitled her to the services and articles mentioned by the caller but conditions which had not been mentioned in the telephone

conversation were attached to some of the items. Certain other articles would have been available free of charge without need of a coupon. Mrs. Nozawa testified that the caller led her to believe that there were many other gifts which she had won in addition to those specifically named. However, the printed matter received in the mail referred to both articles and services to which no charge, condition or consequence was attached as well as others available only if another purchase was made, or as a discount or upon some other condition not mentioned in the telephone call.

After discussing the essential elements of mail fraud, the Court dismissed appellants' argument that the technique in soliciting Mrs. Nozawa's order did not involve false or fraudulent pretenses, representations or promises since only the most gullible could be deceived. It concluded this was immaterial since 18 U.S.C. 1341 protects the naive as well as the worldly-wise (citing cases). The jury could find an intent to deceive by the described ruse or they would not have used it and there was no requirement that the government prove the scheme was successful. Finally, the Court observed that, in addition to evidence indicating formation of a scheme intended to deceive, two actual misrepresentations were involved. They were the representation that the charge for the coupon book was to defray expenses, when most of this went to appellants, and the studied withholding of information concerning conditions attached to many of the coupons since the full value represented could not be obtained except upon unmentioned terms and conditions unfavorable to the person solicited.

Staff: United States Attorney Louis B. Blissard (Dist. of Hawaii)

FRAUD

Fraud by Wire; Interstate Transportation of Stolen Property; Antique Automobile Scheme. United States v. Frank Wolfe (S.D. Tex.). Wolfe, 20 years old, entered a plea of guilty to one count of an information charging a violation of 18 U.S.C. 2314 and was sentenced to 6 months at the Springfield, Missouri, Federal Correctional Institute and Hospital.

Wolfe had been engaging in activities involving collect telephone calls to persons who were interested in antique automobiles. He would offer to sell the cars at low prices and transport them to the purchasers, if part payment was immediately wired to him through the facilities of Western Union. Leads to the interested purchasers were obtained by means of telephone calls to various automobile dealers.

In other instances, Wolfe represented himself as the buyer of airplanes and collected money for expenses for travel to inspect the airplanes. It is estimated that he collected $1,100 in a 3-month period in connection with these schemes.

Staff: United States Attorney William B. Butler (S.D. Texas)

THEFT OF GOVERNMENT PROPERTY (18 U.S.C. 641)

Pyramiding of Sentences for Larceny of Property and for Receiving of Same Property Held to Be Prohibited. Mike Milanovich and Virginia Milanovich v. United States (C.A. 4, March 8, 1960). Virginia Minalovich was convicted of larceny and of receiving the same stolen goods, and was sentenced to 10 years for the larceny and concurrently to 5 years for the receiving. The Fourth Circuit affirmed the judgment of commitment which was supported by proper conviction on the larceny count, notwithstanding that a concurrent sentence was held improperly imposed on the receiving count.

Defendants and three accomplices planned to burglarize a commissary store at the U. S. Naval Amphibious Base at Little Creek, Virginia. The Milanovichs drove their accomplices to the Base and the accomplices actually broke into the store. Because the theft took longer than anticipated, the Milanovichs left the Base and did not wait for their confederates. The accomplices hid the loot of about $15,000 in a nearby woods and proceeded to a prearranged meeting with Virginia Milanovich. It did not appear who actually retrieved the money, but there was testimony that approximately two weeks after the theft, Virginia Milanovich assisted in counting it, and a suitcase containing $500, allegedly part of the loot, was found at the Milanovich home.

The Court vacated the sentence imposed on the receiving count, recognizing that at common law and under federal statutes, the settled rule is that a person cannot be convicted for stealing goods and receiving them also. The opinion also recognized the existence of an exception to this rule where an accessory before the fact, not participating in the actual theft, may be convicted of both larceny and receiving. However, the Court thought that Heflin v. United States, 358 U.S. 415, indicated the Supreme Court's general view that, in the absence of a contrary indication by Congress, a defendant charged with offenses under statutes of this character may not be punished for stealing and also for receiving the same goods. The opinion noted that the Heflin decision was not based upon a constitutional ground, but on the view that Congress through the receiving offense intended to reach a distinct group of persons other than those committing the robbery. The Fourth Circuit perceived no substantial differences in this regard between 18 U.S.C. 2113 involved in Heflin, and 18 U.S.C. 641, and held that the proliferation of sentences required vacation of the sentence for receiving but did not affect the larceny sentence.

Staff: United States Attorney Joseph S. Bambacus; Assistant United States Attorney Henry St. J. FitzGerald (E.D. Va.)

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Substantial Sentence Imposed Upon Itinerant Drug Peddler. United States v. Thomas R. Barnes (W.D. N.Y.). A two-count information was filed earlier this year against defendant Barnes charging him with having illegally sold a number of tablets of dl-amphetamine sulfate tablets without prescriptions therefor from a practitioner licensed by law to administer the drug. Following his plea of guilty, defendant was sentenced on April 4th to serve one year on each of the two counts, the sentences to be served consecutively. The Court, through the probation officer, was made fully aware of the defendant's background and activities, which involved urging purchases by and making large sales of amphetamines ("bennies", "goof-balls", etc.) to numerous truck stops in the Buffalo and Albany, New York areas and the Erie, Pennsylvania area. This case reflects a well-defined trend toward more severe sentences in matters of this kind. A first offense in these cases is a misdemeanor punishable by imprisonment for not more than one year, or a fine of not more than $1,000 or both, 21 U.S.C. 333(a). Barnes received the maximum prison sentence on each count.

Staff: United States Attorney Neil R. Farmelo (W.D. N.Y.)

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Preliminary Injunction to Stop Distribution of Drug Represented as Weight Reducer Sustained by Court of Appeals; Misbranding of Drug. United States v. Wilson Williams, Inc. and Jack Elliott (C.A. 2). On April 27, 1960, the Court of Appeals affirmed an order of the District Court for the Southern District of New York enjoining, pendente lite, the defendants from distributing in interstate commerce "RX-120", a drug which was represented as being capable of causing loss of weight without special diet. The complaint, filed under 21 U.S.C. 332(a), charged that defendants were distributing in interstate commerce RX-120 which was misbranded because the literature (labels) accompanying the drug contained statements false, misleading, and contrary to fact concerning its efficacy as a weight reducer. Particularly, it was alleged and proved that, contrary to defendants' claims, the drug had not been released as safe by the Government, that the drug is not a new wonder drug which has received extensive clinical testing, and that it does not depress the appetite and decrease the desire for food. The Court of Appeals held that the affidavits of the Government's medical experts and the other evidence before it was more than sufficient to warrant the District Court's conclusion that there was every probability that the Government would prevail at the trial. Since it also appeared that the defendants had limited resources and might not be in a position to refund $14 to each purchaser as promised if the drug did not accomplish the advertised weight loss, the Court held that "it cannot seriously be questioned that it was a proper exercise of discretion for the district court to enjoin the defendants prior to a plenary trial of the issues".

Staff: Assistant United States Attorney Myron J. Weiss (S.D. N.Y.)

WHITE SLAVE TRAFFIC ACT

Substantial Prison Sentences Imposed in Aggravated Mann Act Case. United States v. Johnson, et al. (N.D. Ga.). Following a trial that lasted three days, the jury returned verdicts of guilty as to all three defendants who were charged with several violations of the White Slave Traffic Act (18 U.S.C. 2421) and conspiracy (18 U.S.C. 371). The trial brought out a sordid story of flagrant violations involving numerous instances of interstate transportation of many different women for the proscribed purposes, prostitution, procurement, and semi-slavery, all of which was done by the three defendants acting in concert although under the primary direction and control of defendant Wallace John Johnson. This defendant was sentenced to serve a total of eight years in custody; his wife, Donna Jean Johnson, eighteen months; and defendant Robert Dean Dailey, five years.

Staff: United States Attorney Charles D. Read, Jr.; Assistant United States Attorney E. Ralph Ivey (M.D. Ga.)

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

CITIZENSHIP

Birth Abroad to Citizen Mother and Alien Father. Montana v. Rogers, (C.A. 7, April 29, 1960). Declaratory judgment pursuant to Section 360 of Immigration and Nationality Act, 8 U.S.C. 1503. This appeal was taken from judgment for defendant. Affirmed.

Appellant was born in Italy in 1906 to an alien father and a citizen mother. His mother had testified that prior to the birth of appellant she had proceeded to the American Consulate to secure a passport for return to the United States; that the Consul, observing her condition, had told her she could not return until after her baby was born. After the baby's birth, the Consul issued her a passport and, according to her testimony, informed her that she did not need a passport for her baby, the appellant, as he was included in her passport.

The official records of the Immigration Service showed that appellant (then three months old) was admitted to this country as a citizen, accompanied by his citizen mother. Appellant continued to live in the United States. At no time did he seek naturalization.

In January, 1958, he was served with an order to show cause why he should not be deported. As a result of the proceedings thus instituted, an order directing his deportation became final on August 29, 1958. This suit was filed in the district court on September 3, 1958, seeking declaratory judgment that he was a citizen and that the order for his deportation was null and void.

After trial before the district court, judgment was rendered for defendant and appellant's complaint was dismissed.

Appellant offered several theories in support of his claim to citizenship. He claimed citizenship at birth by operation of Section 2172 of the Revised Statutes of the United States. For the Attorney General it was contended that only Section 1993 of the Revised Statutes controls the case and that citizenship under that section could be conferred upon a child only if the father were a citizen.

The Court pointed out that Section 2172 was substantially identical to Section 4 of the Act of 1802, 2 Stat. 155, and that that provision had been authoritatively interpreted as having application only to persons born prior to its enactment. By Act of 1855, 10 Stat. 604, Congress had remedied the defect of the Act of 1802. U.S. v. Wong Kim Ark, 169 U.S. 649, 665, 673, 674 (1898); Weedin v. Chin Bow, 274 U.S. 657, 663, 664, (1927). Section 1993 reenacted the Citizenship Act of 1855 by providing that persons

"heretofore or hereafter" born abroad of citizen fathers who had previously resided in the United States were to be citizens of the United States. It was this provision that operated retrospectively as well as prospectively.

Appellant contended that since Section 2172 had been reenacted concurrently with Section 1993, the former section operated prospectively and is the basis for declaring his citizenship. Observing that Section 2172 was not expressly limited to factual situations prior to 1802, the Court referred to several possibilities as to why it was reenacted and continued in force. The Court said that considering both sections relied upon by the parties respectively, it would hold that Section 1993 applied exclusively to the case at bar and that since appellant's father was not a citizen of the United States at the time of appellant's birth, no rights of citizenship descended to him.

Other bases for his claim to citizenship were rejected summarily by the Court.

The novel constitutional argument advanced by appellant, that by virtue of the Fourteenth Amendment his rights of citizenship attached at the moment of conception and that since he was conceived in the United States he is a citizen, was rejected because it was clear that the Fourteenth Amendment applied only to persons "born" in the United States.

The action of the American Consul, if the testimony of the appellant's mother is fully believed, in refusing a passport is not sufficient to grant citizenship to appellant. Cases relied upon by appellant relate to native-born citizens and the issues concerned voluntary expatriation. Such holdings did not control the situation before the Court.

Finally, even if the action of immigration officials in admitting appellant as a citizen were sufficient to establish a prima facie case of his citizenship, it was rebutted convincingly by the showing that the immigration officers committed legal error in designating appellant a citizen at the time of his entry.

EXCLUSION

Medical Certificate of Tuberculosis Conclusive for Exclusion. Soto v. Esperdy, (C.A. 2, April 27, 1960). Appeal from order of district court dismissing writ of habeas corpus. Appellant, a native and citizen of Peru, was excluded under Section 212(a)(6) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(6), as one afflicted with tuberculosis.

In habeas corpus proceedings the lower court found the order of exclusion by a Special Inquiry Officer was based upon a Class A medical certificate of the United States Public Health Service. No administrative appeal lies from a determination based upon such a certificate. Section 236(d), 8 U.S.C. 1226(d).

Appellant contended that both the Special Inquiry Officer and the district court mistakenly interpreted Section 236(d) as requiring conclusive effect of the medical certificate. She argued that the statute should be construed to make the certificate conclusive only if not rebutted by contradictory evidence and that she should have been afforded opportunity to examine the medical record upon which the certificate was based and to introduce expert testimony to rebut the finding of the Public Health Service that she had tuberculosis. Otherwise, she contended, the statute denied her due process of law.

The Court of Appeals found the language of the statute opposed to the construction urged by appellant. The Court referred to similar prior provisions in the Immigration Act of 1917 and the conclusive effect given to a medical certificate under that statute by the Supreme Court in United States ex rel. Johnson v. Shaughnessy, 336 U.S. 806 (1949). The Court found the present Act of 1952 to provide even more clearly that the exclusion decision is to be based "solely" upon a medical certificate.

The rights of aliens seeking admission to the United States are limited and Congress has exceedingly broad discretion in determining what procedures shall be followed. Knauff v. Shaughnessy, 338 U.S. 537; Shaughnessy v. Mezei, 345 U.S. 206 (1953). It was well within the constitutional power of Congress to give conclusive effect to a medical certificate after examination by doctors of Public Health Service.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy; Unauthorized Exportation of Munitions. U. S. v. Manuel Calixto Rojas y Diaz et al. (S.D. Fla.). On July 30, 1959, officers of the United States Border Patrol arrested three individuals at Key Largo, Florida, and seized a quantity of arms and ammunition. On February 17, 1960, an indictment was returned charging Rojas, Robert O. Fuller and Antonio Anthony Zarba with conspiring to violate 22 U.S.C. 1934 (exportation of munitions without a license as required under 22 C.F.R. 121 et seq.). All of the defendants were found guilty. However, on April 8, 1960, the Court entered an order vacating and setting aside the jury's verdict of guilty and granting the defense motion for judgment of acquittal on the ground of insufficiency of the evidence. The Court's opinion pointed out that the Government's proof failed to establish that the defendants had not procured a license from the Secretary of State, an essential element of the offense.

Staff: United States Attorney E. Coleman Madsen and Assistant United States Attorney Paul Gifford (S.D. Fla.)

Conspiracy; Unauthorized Exportation of Munitions. U. S. v. Manuel Calixto Rojas y Diaz and Orlando Izquierdo y Ramirez. (S.D. Fla.) On August 2, 1959, agents of the Bureau of Customs arrested two individuals at Grassy Key, Florida, and seized an airplane loaded with arms and munitions. In February 1960, an indictment was returned charging Rojas and Izquierdo with conspiring to violate 22 U.S.C. 1934 (exportation of munitions without a license as required under 22 C.F.R. 121 et seq.)

Staff: United States Attorney E. Coleman Madsen and Assistant United States Attorney Robert Rust (S.D. Fla.)

Foreign Agents Registration Act. United States v. William J. Shergalis and Hector Garcia Soto; United States v. William J. Shergalis and Howard L. Rundquist. (S. D. Fla.) On May 3, 1960, returned two indictments charging violations of the Foreign Agents Registration Act and the Federal Aviation Act, arising out of the incident of the two American pilots, William J. Shergalis and Howard L. Rundquist, who were shot down over Cuba on March 21, 1960. The indictments, which were sealed by the Court, were unsealed the following day, May 4, 1960, after the arrest of one of the defendants, Hector Garcia Soto.

One of the indictments charged Shergalis and Hector Garcia Soto, a representative of the Cuban Air Attache's Office in Miami, in separate counts with acting as agents of a foreign principal, to wit, the Government of Cuba, in violation of the requirements of the Foreign Agents

Registration Act of 1938, as amended, 22 U.S.C. 612, 618. Shergalis and Garcia are charged with collecting information for and reporting information to the Cuban Government, including information regarding the activities of persons opposed to the present government of Cuba. The indictment also charges that Shergalis and Garcia acted under the direction of the Cuban Government in arranging for an airplane flight beginning on or about March 20, 1960 at Fort Lauderdale, Florida and ending on about March 21, 1960 in Cuba.

The second indictment charged Shergalis and Rundquist with a conspiracy under 18 U.S.C. 371 to violate regulations promulgated under the Federal Aviation Act of 1958. This count alleges that Shergalis and Rundquist operated a civil aircraft through an Air Defense Identification Zone without filing a flight plan with an appropriate aeronautical facility. They are also charged in this count with conspiring to operate a civil aircraft for flight over and landing within Cuba without the pilot in command filing a flight plan or a written statement with the Immigration and Naturalization Service. Counts two and three of this indictment are substantive counts against Rundquist charging him as the pilot in command with operating a civil aircraft for flight over and landing within Cuba without filing a flight plan with an appropriate aeronautical facility or a written statement with the Immigration and Naturalization Service in violation of 49 U. S. C. 1523.

Rundquist and Shergalis are still in the custody of Cuban authorities in Havana.

Staff: United States Attorney E. Coleman Madsen (S.D. Fla.); William S. Kenney, Roger P. Bernique and Alta M. Beatty (Internal Security Division)

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Breach of Contract to Remove Temporary Housing from Lands Over Which United States Had Condemned Exclusive Temporary Use. Century Investment Corporation, et al. v. United States (C.A. 9). The factual situation and prior rulings of the Court of Appeals in an earlier aspect of this case are set out in 5 United States Attorneys Bulletin, No. 24, pp. 714-715. Briefly, the Government had brought this action following the breach of the express terms of a removal and site clearance contract which had been executed in order to comply with the mandatory requirements of the Lanham Act that such temporary housing be removed. After initially finding facts and reaching conclusions warranting specific performance, the district court later abrogated its earlier position as the result of an erroneous view of the effect of the non-payment of real estate taxes. The Government did not prosecute an appeal from the monetary judgment rendered following the first trial. However, both the corporate and the individual defendants did prosecute appeals. On that occasion the Court of Appeals concluded that the measure of damages adopted by the district court was erroneous and, accordingly, remanded the case. On remand, the district court ordered dismissal of the individual defendants; allocated the cost of a special master's fee, three-fourths to be paid by the various defendants and one-fourth to be paid by the Government; and entered a monetary judgment against the corporate defendant in favor of the United States. All parties appealed.

The Government prevailed on its appeal that the district court erred in ordering the dismissal of the individual defendants. A retrial as to them has been directed. In this connection, the Court of Appeals made clear that the non-payment of the taxes did not affect the right of possession condemned by the United States. The individual defendants prevailed on their appeal with respect to the allocation of part of the special master's fees to them. Without acknowledging that there are authorities from which a contrary conclusion would be reached (Dyker Bldg. Co. v. United States, 182 F.2d 85, 89 (C.A. D.C. 1950); Aycrigg v. United States, 124 F. Supp. 416, 419 (N.D. Calif. 1954); Mallonee v. Fahey, 122 F. Supp. 472, 475 (S.D. Calif. 1954)), the Court of Appeals stated inter alia, "Nor do we, under the circumstances of this case, regard the fees and expenses of the special master as 'fees and costs' within the meaning of 28 U.S.C.A. Sec. 2412(a)." Rather inexplicably, in view of its reference to the "established breach of contract" on the part of the corporate defendant, the Court of Appeals reversed the judgment as to that defendant. In doing so, the Court of Appeals expressed the view that the Government had failed to produce evidence which would warrant an award against the corporate defendant of substantial damages. In reversing, it refused to permit further proof as to damages because the Government had already had two chances and, in any event, the corporate defendant was insolvent and could not respond to a substantial judgment. It is expected that the individual defendants will seek Supreme Court review.

Staff: Harold S. Harrison (Lands Division)

Federal Servitude on Navigable Stream; Valuation of Flowage Easement. Augusta Power Company v. United States (and reverse title) (C.A. 5). The United States condemned the fee of tracts of land riparian to an interstate navigable stream over which the Augusta Power Company held long dormant and, in fact, unusable flowage easements. Just compensation for the fee interests were otherwise determined so that the sole issue for determination was the just compensation, if any, to be paid for the flowage easements. The Power Company conceded that "the only use of these flowage easements by anybody would be in connection with and based upon the development of a dam for water power purposes in the Savannah River." The District Court adopted awards by commissioners appointed under Rule 71A(h), F.R.Civ.P., which were based upon 70% and 75% (depending upon whether the lands were taken in 1947 or 1950) of the fee value of the land. Both sides appealed.

The commissioners and the district court had followed the so-called "Vepco" or "Halifax County" case in the Fourth Circuit (United States v. 2,979.72 Acres of Land, Etc., 235 F.2d 327, 237 F.2d 165, 270 F.2d 707). In reversing and remanding the instant case, the Fifth Circuit expressly disagreed with the holding of the Fourth Circuit "that the compensation to be paid is not the value of the easement to its holder 'but the difference in the value of the land with and without the flowage easement, not considering its value for water power purposes.'" However, the Fifth Circuit noted its agreement with the Fourth Circuit view that United States v. Twin City Power Co., 350 U.S. 222 (1956) "does not preclude the payment of substantial compensation for flowage easements over fast lands adjoining a navigable stream". In expressing such view, the Fifth Circuit set up conditions for proving value which, as a practicable matter, would be impossible to prove and which, in any event, seem to be in conflict with the statement by the Supreme Court in the Twin City case that "What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys." (350 U.S. at p. 228).

As was indicated in 7 U.S. Attorneys Bulletin, No. 23 at p. 656, may be the case, a petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit was filed in the Vepco case. Thus Supreme Court review of the matter of valuing flowage easements over tracts riparian to an interstate navigable stream may be forthcoming.

Staff: Harold S. Harrison (Lands Division)

Condemnation; Estimated Compensation Has No Real Bearing Upon Amount of Just Compensation Which Ultimately May Be Determined. Tidewater Development and Sales Corporation, et al. v. United States, (C.A. 4, March 23, 1960). The United States condemned the fee title to 3.78 acres and a clearance easement to 3.74 acres of land in Hampton, Virginia, for use in connection with Langley Air Force Base. $56,100 was deposited as estimated compensation with the filing of the declaration of taking. About a year prior thereto, Tidewater Development and Sales Corporation purchased 14 houses located on Langley Field for $255 each. The houses had been

built in 1920 for airmen's families and were in very poor condition. Tidewater purchased the subject property for the purpose of removing the houses to it. Some exterior repairs were made and some of the houses were painted, but it was the opinion of the Government's witnesses that it was a "cover up" job to get a high appraisal by the Government's experts, as it was general knowledge before the houses were purchased that the runways at Langley Field were to be extended, and this property was at the end of the existing runway. At the trial, the Government's appraiser valued the property at $11,735. The landowner's testimony was that the houses should sell for $7,500 to $8,500 each, and that $75,000 had been expended on the property. One of the landowner's witnesses, Rue, testified that he was in the mortgage lending business and that his company had made a loan on this property. The trial court refused to allow him to state the amount of the loan, but it was his opinion that the property had a value of $91,180 on the date of taking. The jury returned a verdict of $21,100. Counsel for the landowner immediately moved orally for a new trial. Ten months later Rue, as Trustee under the trust deeds securing the loan, and the noteholders, filed a motion to intervene and for a new trial on the ground that they were necessary parties, and that they had relied upon the deposit of $56,100. They charged the Government with being unfair in not producing the appraiser at the trial who made that valuation. They stated that they had advanced $60,000.

The court denied the motions for new trial, and in a memorandum decision held that the trustee and noteholders were not necessary parties that Rue had been present at the trial as a witness and knew of the pending proceeding prior to the trial. It held that the motion to intervene was properly filed for the sole purpose of protecting the noteholders in the distribution of the $21,100. In regard to the deposit of $56,100 the court stated:

"This information was not presented to the jury, and counsel obviously recognized that such evidence of 'estimated compensation' was not admissible as no effort was made to submit such evidence.

Generally, the presentation of such a figure of 'estimated compensation' would be prejudicial to the condemnee as it is usually the practice of the acquiring agency to pay into Court a lesser sum than what the evidence upon trial discloses to be a fair market value. The payment of 'estimated compensation' into the registry of the Court is nothing more than a compliance with the constitutional rights of the landowner. It has no real bearing upon the amount of just compensation which may ultimately be determined. * * * In the usual haste of acquiring property, the Government undoubtedly pays 'estimated compensation' into court which is not comparable to the just compensation provided by law. But, in the absence of bad faith, the court has nothing to do with the amount of 'estimated compensation.' * * *

The view expressed by this court is that where an award returned by the jury is within the permissible limits of the evidence, the amount of 'estimated compensation' paid into court by the acquiring agency should

not be considered on a motion to set aside the award of the jury. Other than for the consideration of interest on the verdict, the 'estimated compensation,' if paid in good faith, must be totally disregarded.1/"

The Court of Appeals affirmed per curiam, stating that in denying the motion for new trial, "the District Court filed an opinion in which it considered the contentions advanced here. That opinion sufficiently shows that there was no abuse of discretion in the denial of the motion."

Staff: Elizabeth Dudley (Lands Division)

Immunity of Government from State Property Taxes; Wherry Housing Project; Jurisdiction of District Court to Enjoin State Taxation. United States v. Katherine M. Dughi, Treasurer of Orange County in the State of New York, et al., (S.D. N.Y.). The United States brought an action against the Treasurer of Orange County in New York State and other local taxing authorities to enjoin a sale of its land for unpaid taxes and for a declaration that the taxes assessed by the defendants are null and void.

The property, situated on a military reservation known as Stewart Air Force Base in the Town of New Windsor, County of Orange, New York, is devoted to a Wherry military housing project (Title VIII of the National Housing Act, 12 U.S.C. 1748-1748h; Military Leasing Act of 1947, 10 U.S.C. 2667), and was leased for a term of 75 years by the Secretary of the Air Force to the Dayton Development Corporation. Under the lease, 284 apartments were to be constructed and, as each building was completed, title passed to the Government although it remained under lease to Dayton Development Corporation. Construction of the buildings was completed in 1955. The interest of the Dayton Development Corporation existed until October 29, 1957, when Dayton assigned its interest to the Zuckerman Brothers who, on the following day, assigned the lease to the Government. In the latter part of 1956, the Town of New Windsor placed the property upon the assessment rolls for $750,000 under the name of the Dayton Development Corporation and the Board of Supervisors of Orange County levied state, county and town taxes based on the assessment. The levy was against the buildings in the housing project. The taxes were not paid and the County Treasurer gave notice of tax sale.

1/ This decision will be reported in Fed. Supp. sub nom. United States v. 9.85 Acres of Land, More or Less, in the City of Hampton, Virginia, and Tidewater Development and Sales Corp. et al.

The Court granted a preliminary injunction (United States v. Dally, 165 F.Supp. 194 (1958)) and the Government's motion for summary judgment. It held that the interest of the Dayton Development Corporation, as lessee, was personal property and that New York has no personal property tax. For that reason the defendants' reliance on Offutt Housing Company v. County of Sarpy, 351 U.S. 253, was misplaced. The Court also rejected defendants' arguments (1) that the Government had only a paper title because the useful life of the buildings is less than the term of the lease, and (2) that 28 U.S.C. 1341 withdrew jurisdiction from the District Court.

Staff: United States Attorney S. Hazard Gillespie, Jr.; former Assistant United States Attorneys John W. Hasson and William Stackpole (S.D. N.Y.).

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decisions

Summary Proceedings: No Federal Jurisdiction to Quash Levy in Summary Proceedings on Short Notice, Without Formal Pleadings and on Affidavits or Ex Parte. New Hampshire Fire Insurance Co. v. Scanlon, District Director of Internal Revenue (Supreme Court, April 25, 1960). The District Director served notices of levy on the City of New York demanding that it pay over to the Director moneys alleged to be due from the City to a delinquent taxpayer, Acme Cassa, under a contract for the construction of school playgrounds. The New Hampshire Fire Insurance Company, the surety on the contract, filed a sworn petition and an annexed order to show cause in the United States District Court for the Southern District of New York alleging that any moneys due under the contracts belonged to it, not the taxpayer, because it had been compelled to complete the contract when the taxpayer defaulted on the job. The petition prayed that the Court quash the levy or in the alternative determine the amounts due under the contract to the taxpayer subject to the levy, and the amounts due to it as completing surety. The order to show cause issued on the petition directed the District Director to show cause at Motion Term six days later why the relief prayed for should not be granted.

A continuance was apparently secured and the United States Attorney filed an affidavit opposing the motion on the ground that no civil action in compliance with the Federal Rules of Civil Procedure had been instituted and the Court did not have the jurisdiction to grant summary relief. The District Court agreed and dismissed the petition stating that the completing surety could bring a plenary suit for recovery of the amounts it claimed were due to it from the City.

The Second Circuit Court of Appeals affirmed the decision per curiam, 267 F. 2d 941, and the Supreme Court granted certiorari because of a conflict with the decisions of the Third Circuit. Ersa v. Dudley, 234 F. 2d 178, 180; Raffaele v. Granger, 196 F 2d 620. In its decision, the Supreme Court affirmed the Second Circuit and held that a federal district court has no jurisdiction to enjoin or quash a levy in summary proceedings, but that such suits must be brought by plenary actions in accordance with the Federal Rules of Civil Procedure.

The Court emphasized that summary proceedings, which may be conducted without formal pleadings, on short notice, generally on affidavits and sometimes even ex parte, would enable a plaintiff to dispense with the procedure, set forth in the Rules, for the normal course for beginning, conducting and determining controversies, and would render unnecessary the provisions of Rule 56 for expeditious motion procedure for summary judgment in an ordinary plenary civil action. Such exceptional procedures, the Court held, were neither justified nor authorized for the benefit of any party.

The surety claimed that 28 U. S. C. 2463 provided express authority for summary proceedings on the ground that Section 2463 places levied property in the custody of the court and that as a general rule, a court has power summarily to dispose of the issue of the ownership of property in its custody. Section 2463 reads as follows:

> All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

The Court first held that the Section was not intended to place property in the custody of the Court, but was rather intended to protect the custody of federal revenue officers, by granting exclusive federal jurisdiction over levied property to the federal courts. Further, the Court held, even if the levied property could be deemed to be in judicial custody by virtue of Section 2463, it did not follow that cases and controversies involving ownership of that property could be tried in a summary fashion. Motions for the return of property to its owner have been allowed in certain ancillary proceedings and to control officers of the court, who have wrongfully seized the property. The instant case was not such a case, but an ordinary dispute over who owns the right to collect a debt, properly to be determined in regular, normal, court proceedings.

Staff: Wayne G. Barnett, Assistant to the Solicitor General; Richard M. Roberts and Joseph Kovner (Tax Division).

Assessment and Collection: Transferred Assets; Limitation on. United States v. Sybil Mae Floersch, etc. (C. A. 10, March 21, 1960). Mrs. Floersch, formerly the wife of William E. Benton, deceased, brought this action to recover an amount assessed against and collected from her as a transferee of the Estate of William E. Benton. The liability in issue was based upon a joint return of husband and wife filed by the decedent and plaintiff for the year 1950, reporting a gross income of $21,338.21, and resulted from the addition by the Commissioner of $91,628.18 to income of the decedent for that year. The joint return was filed March 15, 1951. Benton died May 12, 1953, and Mrs. Floersch had received as beneficiary of his estate property of a value in excess of the liability redetermined by the Commissioner, which rendered the estate insolvent.

By reason of the substantial omission of income from the return the Commissioner had five years under Sec. 275(c) of the 1939 Code or until March 15, 1956, within which to assess any deficiency in tax. The notice of transferee liability was mailed to Mrs. Floersch on March 14, 1957. The District Court held that since Mrs. Floersch was jointly and severally liable as a taxpayer for any deficiency assessed on the joint return for 1950 the Commissioner's assessment of a transferee liability against her after expiration of the five year period was barred. In reversing, the

Court of Appeals held that as beneficiary of the decedent's estate the taxpayer was liable as a transferee, and that the additional one-year period allowed by Sec. 311(b) for assessment of the transferee liability was applicable, notwithstanding the fact the plaintiff also was jointly and severally liable as a taxpayer.

Staff: Fred E. Youngman (Tax Division)

District Court Decision

Penalty Liability: As Defendant Corporation Was Actually Insolvent at the Time of Levy, and as Individual Defendant Caused Corporation to Pay to Government, Pursuant to Its Levy, Cash Far Exceeding Amount of Cash Corporation Had on Hand at Time of Levy, no Personal Liability Against Either Defendant. United States v. American Textile Machine Corp., Paul Kent (M. D. Tenn.). The Government brought penalty action under Section 3710, Internal Revenue Code of 1939 against the corporation and Paul Kent, its president for failure to honor a levy. A levy was served upon the corporation, Kent accepting it for the corporation, for all property or rights to property (a debt was due the taxpayer) in its possession belonging to the taxpayer-Hold Stitch Machine Co., which was indebted for taxes. The levy was for the amount of $19,820.93. Sometime after the levy, Kent caused the corporation to pay over to the Government cash in the amount of approximately $16,000.

The Government in attempting to show that the corporation had property belonging to the taxpayer at the time of the levy was unable to prove the corporation solvent at the time of the levy. From this the Court concluded that the corporation had no funds with which to honor the levy hence there could be no penalty liability. The Court pointed out that the corporation could not transfer property other than money and thereby be relieved of its liability to the taxpayer.

In further denying any penalty liability against Kent, the corporation's president, the Court stated that since Kent, subsequent to the levy, caused the corporation to pay to the Government cash far exceeding the amount of cash which the corporation had on hand at the time of the levy there would be no personal liability against Kent, or his estate, Kent having died.

Staff: United States Attorney Fred Elledge, Jr. and Assistant United States Attorney R. Hunter Cagle (M.D. Tenn.); Stanley F. Krysa (Tax Division)

State Court Decision

Lien Priority; Priority of Federal Tax Lien, Filed Subsequent to Service of Subpoena in Supplementary Proceedings on Third Party by

Judgment Creditor of Taxpayer. (N.Y. C.P.A. §779). In the Matter of Supplementary Proceedings, Ryan Ready Mixed Concrete, Judgment Creditor v. Tallini Constr. Corp., Judgment Debtor (Supreme Court, Nassau County New York.) A creditor of the taxpayer obtained a judgment against him on September 10, 1959, and on September 18, 1959, served a third party with a subpoena in supplementary proceedings pursuant to Section 779 of the New York Civil Practice Act. The District Director served a notice of levy on the third party on October 6, 1959 and filed notice of the tax lien on November 9, 1959. In directing the third party to pay over to the judgment creditor the amount of the debt owed by the third party to the taxpayer, the Court relied upon a series of lower court New York decisions wherein third party subpoenas had been upheld against a claim of priority by the United States for federal tax liens. The Court disposed of the Government's contention that service of a third party subpoena in supplementary proceedings does not perfect the judgment lien by calling attention to Revenue Ruling 54-125, 1954-1 Cum. Bull. 282 which reads: "In the State of New York a judgment creditor acquires a lien against the funds of the judgment debtor in the hands of a third party upon service of a subpoena and restraining order in supplementary proceedings under the New York Civil Practice Act. In re: Airmount Knitting & Undergarment Co., Inc., 182 Fed. (2d) 740." The Solicitor General did not authorize appeal.

Staff: United States Attorney Cornelius W. Wickersham, Jr. and Assistant United States Attorney Irving L. Innerfield; (E.D. N.Y.); Edward A. Bogdan, Jr., (Tax Division)

CRIMINAL TAX MATTERS
Appellate Decision

Privilege Against Self-Incrimination Impropriety of Bringing to Jury's Attention Fact of Prior Invocation by Defendant. Harold Gross v. United States (C.A. 2, April 6, 1960.) Gross was convicted on six counts of wilful attempted evasion of his individual income taxes. The proof showed that he had received $4,000 of unreported income each year for his activities in preventing stoppages of delivery of certain newspapers in New York City in connection with a feud between two rival labor unions. The same alleged payments had been inquired into by the McClellan "Select Committee on Improper Activities in the Labor or Management Field", before which defendant had testified and claimed his Fifth Amendment privilege against self-incrimination. During the trial the defense brought out that the Government witnesses who claimed to have made the payments had been examined extensively before the McClellan Committee, but did not bring out that the defendant had testified before that Committee. During the cross-examination of defendant he was required to answer, over objection, the following question put to him by the prosecutor:

> Q. Prior to your coming to court yesterday did you ever tell any Government investigator, or the McClellan Committee, that you did not receive these payments?

A. No, I did not.

Two variations of the same question were also put to defendant, and he answered each--over objection--in the negative.

The Second Circuit reversed the conviction on the ground that this testimony is equivalent to that in Grunewald v. United States, 353 U. S. 391, 415-424, in that it constitutes improper comment on defendant's earlier invocation of the Fifth Amendment privilege. The Court concluded that the prosecutor had (perhaps unwittingly) done by indirection that which he was forbidden to do directly, viz., to get before the jury the fact that on a previous occasion the defendant--when asked about the money in question here--had refused to answer on self-incrimination grounds. The Court reasoned that the jury must have known that if the defendant had admitted receipt of the money the Government would have adduced evidence of that admission and hence the objectionable testimony could point only to the conclusion that he had claimed the privilege. The Court held that under the principles laid down in Grunewald there was no basis for admitting the testimony, it was not probative on the issue of defendant's credibility, and "the dangers of impermissible use of this evidence far outweighed whatever advantage the government might have derived from it if properly used".

Staff: United States Attorney S. Hazard Gillespie and Assistant United States Attorneys John A. Guzzetta and David R. Hyde (S.D. N.Y.)

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