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UNITED STATES ATTORNEYS

BULLETIN

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Vol. 7 October 9, 1959 No. 21

MANUAL CORRECTION SHEETS

As a result of typographical errors by the printers, the status of some United States Attorneys has been incorrectly printed in the listing on pages 4.2-4.4 of Title 1. In addition, recent appointments by the courts, as well as confirmations by the Senate, make certain changes necessary. Accordingly, the following corrections should be made in pen and ink:

	District	Delete	Insert
Page 4.2	- Calif., N.	Asterisks	
	- Colo.	Robert S. Wham	Donald G. Brotzman - Ct. Appointment
	- Conn.	Asterisks	
	- Ga., N.	(Acting)	
	- Idaho	Ben Peterson	Kenneth G. Bergquist - Ct. Appointment
	- Ky., E.	Asterisks	
	- Mass.	Anthony Julian	Elliot L. Richardson
Page 4.3	- Ohio, N.	Asterisks	
	- Pa., E.	Harold K. Wood	Joseph L. McGlynn - Ct. Appointment
	- Puerto Rico	Asterisks	
	- Tenn., M.	Asterisks	
	- Tex., N.	Asterisks	
	- Tex., E.	William M. Steger	Paul N. Brown - Ct. Appointment
Page 4.4	- Va., E.	John M. Hollis Norfolk	Joseph S. Bambacus Richmond

* * *

JOB WELL DONE

The Executive Director of the McComb City Housing Authority in Mississippi, who was a member of a recent grand jury which sat in the Southern District of Mississippi, has congratulated United States Attorney Robert E. Hauberg of that District on the most efficient way in which he prepared the documents and cases for presentation to the grand jury, which returned a total of 90 true bills.

Counsel for the defense in a recent tax evasion case has written to the Attorney General commending Assistant United States Attorney Floyd Buford, Middle District of Georgia, for his work in the preparation and presentation of the Government's case.

The Chief Postal Inspector has commended Former United States Attorney John M. Hollis and Former Assistant United States Attorney Joseph S. Bambacus, Eastern District of Virginia, for the prompt, vigorous, and successful prosecution of a recent mail fraud case. The case was presented and successfully tried within less than a month, and was the third such case of its kind resulting in conviction.

Former United States Attorney John M. Hollis and Assistant United States Attorney Henry St. John FitzGerald, Eastern District of Virginia, have been commended by the Regional Counsel, Internal Revenue Service, for their very fine cooperation and the excellent job done in a recent alcohol and tobacco tax case in which the constitutionality of the applicable regulations was attacked.

The Chief Attorney, Regional Office, Veterans Administration, has commended Assistant United States Attorney Donald A. Fareed, Southern District of California, for the highly competent way in which he has handled all of the Veterans Administration matters referred to him. In addition to complimenting Mr. Fareed on his skillful preparation and trial of such cases, the letter stated that in two recent cases which involved unusually difficult and vexing questions of fact and law, Mr.Fareed displayed the highest professional attainment.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

TRAVEL OF TWENTY-FOUR HOURS OR LESS

Section 6.11, Standardized Government Travel Regulations, has again been changed, effective September 3, 1959, to read as follows:

> "For continuous travel of 24 hours or less, the travel period will be regarded as commencing with the beginning of the travel and ending with its completion, and for each 6-hour portion of the period, or fraction of such portion, one-fourth of the per diem for a calendar day will be allowed: Provided, That no per diem will be allowed when the travel period is 10 hours or less during the same calendar day, except when the travel period is 6 hours or more and begins before 6:00 a.m. or terminates after 8:00 p.m."

Examples:

Leave 2:00 p.m. return 8:30 p.m. -- 1/2 p.d. - $4 (with adequate explanation)*

Leave 12:00 Noon - return 8:45 p.m. -- 1/2 p.d. - $4

Leave 11:30 a.m. - return 6:30 p.m. next day -- 1-3/4 p.d. - $21 (with adequate explanation)*

Leave 8:00 p.m. - return 10:00 a.m. next day -- 3/4 p.d. - $9

Leave 6:00 a.m. - return 1:00 p.m. same day -- No p.d.

Leave 5:30 a.m. - return 2:00 p.m. -- 1/2 p.d. - $4 (with adequate explanation)*

Leave 5:00 a.m. - return 2:00 p.m. -- 1/2 p.d. - $4

* Note the rule in 6.9c Standardized Government Travel Regulations re explanations of the 30-minute departure and return times when using private or Government-owned conveyance. If not adequately explained, payment will be reduced by 1/4 p.d. for either, or both, early departure or late return.

ORDERS AND MEMOS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 20, Vol. 7 dated September 25, 1959.

ORDER	DATED	DISTRIBUTION	SUBJECT
190-59	9-15-59	U.S. Attys	Authorizing and Empowering the Deputy Attorney General to appoint Assistant United States Attorneys and other Attorneys to assist United States Attorneys, and to fix their salaries.

MEMO	DATED	DISTRIBUTION	SUBJECT
173-10	9-11-59	U.S. Attys & Marshals	Amendments to Standardized Government Travel Regulations.

* * *

ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Final Judgment Entered in Action Where FCC Had Previously Approved Transaction Constituting Part of Alleged Offense. United States v. Radio Corporation of America, et al., (E.D. Pa.). On September 22, 1959, a final judgment was entered by Judge William H. Kirkpatrick terminating this action.

The complaint which was filed December 4, 1956, charged that RCA and NBC had combined and conspired to obtain VHF television ownership for NBC in five of the eight largest markets in the United States by using NBC's power as a network to grant or to withhold NBC network affiliation unlawfully in violation of Section 1 of the Sherman Act. This plan necessarily involved disposing of NBC's stations in two smaller markets (Cleveland and Washington) and inducing television station owners in two of the larger cities (Philadelphia, Detroit, Boston, San Francisco or Pittsburgh) to exchange their stations for either NBC's Cleveland station or its Washington station, or both.

The complaint further charged that the contract through which NBC acquired Westinghouse Broadcasting Company's Philadelphia television and radio stations (WPTZ and KYW) in exchange for NBC's Cleveland television and radio stations (WNBK and WTAM-AM and FM) plus $3,000,000 in partial effectuation of the conspiracy, was itself an illegal contract in unreasonable restraint of trade in violation of Section 1.

It was also alleged that the illegal activities of NBC and RCA had resulted, inter alia, in (1) elimination of competition among independent station representatives for representation of WPTZ, which thereafter was represented by NBC itself, and (2) reduction of Westinghouse Electric Corporation's ability to compete against RCA in the sale of consumer goods, including television and radio sets, because of the displacement of the Westinghouse name by the RCA name in the call letters and continuous station identification announcements on a leading television and leading radio station in the Philadelphia market.

Defendants' answer contested the Court's jurisdiction on the ground that the Federal Communications Commission had licensed the exchange transaction between NBC and Westinghouse. After a preliminary hearing under Rule 12(d) (FRCP), the District Court held that the affirmative defenses were "valid and constitute a bar to prosecution of this suit" and dismissed the action, upholding defendants' contention that the only way in which an FCC order might be reviewed by the courts was through appeal to the Court of Appeals for the District of Columbia. (158 F. Supp. 333). The Supreme Court on appeal reversed, holding that the FCC had not been authorized by Congress to decide antitrust questions and

that Commission action was not intended to prevent enforcement of the antitrust laws in the federal courts. (358 U.S. 334).

The final judgment requires the defendants on or before December 31, 1962, to dispose of the Philadelphia television and radio stations which had been acquired from Westinghouse, and prohibits them from acquiring another television station in Philadelphia until after termination of the judgment, which will occur nine years after divestiture of the Philadelphia stations is completed. Defendants may not acquire a radio station in Philadelphia for five years. Before defendants may dispose of the stations, the Department must be given 30 days' notice and it may, if the proposed disposal involves an exchange of stations, ask for a court determination whether the other station owner's consent was induced by coercive use of NBC's power of affiliation, or by activities constituting an unreasonable restraint of trade. The defendants may not acquire substantial ownership interest in any television station in the seven largest markets other than Philadelphia without providing, as a prerequisite to the acquisition, a 30 day period in which the Department may request a court determination (1) that no coercion has been exerted through use of NBC's network affiliation power, and (2) that no conduct has been engaged in which unreasonably restrains trade. Similarly, the defendants may not assume national spot representation for any television station not now represented by NBC without providing an opportunity for the Department to seek a court determination whether NBC's appointment as spot representative was not obtained by coercive use of its network power to control affiliation. Finally, NBC and RCA are prohibited from using NBC's network power of affiliation in the future to acquire any broadcasting station by coercion.

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

Indictment Filed Under Section 1 of the Sherman Act and Section 3 of the Robinson-Patman Act. United States v. National Dairy Products Corporation, et al., (W.D. Mo.). A Federal Grand Jury in Kansas City, Missouri, returned an indictment on September 16, 1959 against National Dairy Products Corporation and Raymond J. Wise, its vice president. The indictment contains fifteen counts. In addition to eight counts under section 1 of the Sherman Act charging National Dairy with having entered into a series of price-fixing agreements with its distributors and other dairies located throughout the Kansas-Missouri area, the defendants are charged in seven counts with violating Section 3 of the Robinson-Patman Act by selling milk at unreasonably low prices for the purpose of destroying competition. The price fixing agreements, it is charged, had the effect of eliminating or restricting the sale of milk in glass gallon containers. It is further alleged that, as a result of defendants' activities, small dairies in the area have suffered severe financial losses.

The indictment charges that defendant National is the largest dairy corporation in the world and in the year 1958 its sales in the

United States totaled $1,500,000,000. The indictment further alleges that National uses its great financial resources to support price wars in the various markets named above by selling milk below its cost for extended periods of time, in order to restrict or eliminate the sale of milk in glass containers and to injure small dairies competing with National and its distributors.

Staff: Earl A. Jinkinson, James E. Mann and Robert L. Eisen (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEAL

GOLD REGULATIONS

Treasury Department's Regulations Setting Price for Gold Upheld. Laycock v. Kenney (C.A. 9, September 1, 1959). Plaintiff, owner of a gold mine, sued the United States for damages, claiming that the price of $35.00 per ounce set for gold set by Treasury Department regulations was too low to permit profitable operation of her mine. The district court's dismissal of the suit for damages was affirmed by the Ninth Circuit on the ground that the United States' immunity from a suit for damages of this character had not been waived. See Laycock v. United States, 230 F. 2d 848, certiorari denied, 351 U.S. 964. She then brought this action for declaratory relief and an injunction to restrain defendant, a Treasury agent, from enforcing the regulations. The district court found the regulations valid and dismissed the action.

On appeal, the Court of Appeals rejected the government's argument that the United States and the Secretary of the Treasury were indispensable parties, and held that the court had jurisdiction to entertain this new action. On the merits, however, the Court affirmed the dismissal of the action. The Court held that the Gold Reserve Act, authorizing the Secretary of the Treasury to "* * * prescribe the condition under which gold may be acquired and held * * *" and to "purchase and sell gold in any amounts at home or abroad, in such manner and at such rates and upon such conditions as he may deem most advantageous to the public interest." (48 Stat. 340, 341, 31 U.S.C. 442, 733, 734), contained authorization to set a price at which the government would buy and sell gold and to regulate transactions in the metal. The Court then held that the Gold Reserve Act (1) was within the Constitutional grant of power to Congress "to coin money, regulate the value thereof, and of foreign coins." Art. I, Sec. 8, cl. 5, (2) did not violate due process, and (3) contained a Constitutional delegation of power to the Treasury Department.

Staff: United States Attorney C. E. Luckey
Assistant United States Attorney Robert R. Carney
(D. Ore.)

MILITARY DISCHARGES

Secretary of Navy Held Authorized to Issue Discharge Under Honorable Conditions, Rather Than Honorable Discharge, to Service Personnel Failing to Meet Proficiency Requirements. Ives v. Franke (C.A. D.C. September 17, 1959). Plaintiff, who had been hospitalized for a psychiatric disorder, was given a general discharge under honorable conditions from the Marine

Corps. She was denied an honorable discharge because her proficiency rating did not reach the minimum required by Corps regulations, though her conduct rating did meet the requirements. She sued the Secretary of the Navy seeking a mandatory injunction to compel the issuance of an honorable discharge. The District Court granted summary judgment to the Secretary, and the Court of Appeals for the District of Columbia affirmed. The Court found authority for the Secretary to provide by regulation for various forms of discharge in 31 U.S.C. 1051, which provides, that the Secretary may terminate enlistments of women in the Marine Corps "under such regulations as he may prescribe." The Court saw no reason why the Secretary could not condition the granting of an honorable discharge on the attainment of a minimum proficiency rating in addition to good conduct. In the Court's view, plaintiff's discharge contained no connotation of dishonor since it expressly recited that it was "under honorable conditions." The Court also rejected plaintiff's argument that she had been denied equal protection because the discharge regulations of the Army and Air Force are more lenient than the Marine Corps. In this connection, the Court declined "to order the branches of our armed services to be integrated" to the extent of having one set of regulations on discharges "regardless of any variation in the conditions and circumstances * * * in the various services."

Judge Bazelon, dissenting, emphasized that plaintiff's failure to obtain the required proficiency ruling was due to her psychiatric condition, rather than lack of effort. He acknowledged that the Secretary had statutory authority to provide regulations for discharges, but contended that "limits upon the exercise of that discretion are imposed by historic precedent." Judge Bazelon pointed out that, historically, good conduct was the only requirement for an honorable discharge.

Staff: United States Attorney Oliver Gasch
Assistant United States Attorneys Edgar T. Bellinger and Carl W. Belcher (D. D.C.)

DISTRICT COURTS

VETERANS PREFERENCE ACT

Veterans Preference Act Held Inapplicable to Employee With Foreign Service Staff Limited Indefinite Appointment. Dr. Lester K. Born v. George Allen (D.C. D.C., September 15, 1959). Plaintiff had a Foreign Service Staff limited indefinite appointment with the United States Information Agency. The appointment was "limited to four years or need for employee's services, whichever is less" and was subject to a probationary period of two years. Eighteen months after his appointment, plaintiff was separated as a result of reduction in the Agency's appropriation for the 1958 fiscal year. He appealed to the Civil Service Commission, contending that Section 14 of the Veterans Preference Act had been violated. The Commission ordered the Agency to reinstate him,

but the Agency declined on the ground that the Veterans Preference Act was inapplicable to the Foreign Service.

Plaintiff sued for reinstatement. District Judge Holtzoff awarded the Government summary judgment. In Judge Holtzoff's view the Veterans Preference Act did not apply to plaintiff, since he was not a permanent employee because of the limited indefinite nature of his status. In so ruling, Judge Holtzoff declared that he was still of the opinion, which he had expressed in Casman v. Dulles (129 F. Supp. 428) that the Veterans Preference Act does apply to the Foreign Service.

Staff: United States Attorney Oliver Gasch
Assistant United States Attorney Robert J. Asman
Donald B. MacGuineas and Andrew P. Vance
(Civil Division)

* * *

CRIMINAL DIVISION

Acting Assistant Attorney General William E. Foley

MAIL FRAUD

"Advance Fee" Real Estate Scheme. United States v. Shotland, et al. (E.D. Va.). The defendant, John E. Shotland, alias Calvin Todd, alias John B. Cobb, was sentenced to two years in prison after pleading guilty to mail fraud charges involving an "advance fee" real estate scheme. Operating as the J. E. Shotland Company, Shotland received a $100 advance fee from scores of businessmen in Virginia, North Carolina, and Maryland by misrepresenting himself as a real estate salesman with close connections in some of the leading chain stores and restaurant chains of the country. For the $100 the victims were assured a quick sale at a high price, or the advance fee would be returned. Indicative of the size of Shotland's operation were the mailings of some 40,000 cards to persons and business concerns. The names were taken from telephone directories and those who answered the cards, which asked if they were interested in selling their businesses, were contacted by Shotland and promised the sale in return for the $100. Not one sale resulted nor was any money returned.

In reporting the case Chief Inspector David H. Stephens related "this is the 14th promotor of an 'advance fee' racket to be successfully prosecuted since the Department of Justice and the Post Office Department joined forces last fall in a concerted effort to suppress these vicious schemes. This particular case was noteworthy for the prompt and vigorous attention given the matter by the United States Attorney, resulting in successful prosecution within less than a month. The speed and success in this case was also a tribute to the conclusiveness of the evidence presented by the Postal Inspector to the United States Attorney."

Staff: United States Attorney John M. Hollis (E.D. Va.)

CRIME ON GOVERNMENT RESERVATION

Jurisdiction of Federal Government; Failure to Raise Question at Trial; Judicial Notice. John Franklin Schoppel v. United States (C.A. 4, September 9, 1959). Appellant and another had been convicted of murdering a guard at a federal reformatory. On appeal the appellant contended, inter alia, that the government had failed to establish that the crime was committed "on land acquired for use of the United States and within its concurrent jurisdiction." Although the point was not raised at the trial level, the government in the course of the trial presented testimony of the superintendent of the reformatory that he had held that position for thirty-two years and two months, that the reformatory was located on a federal reservation, that it was operated by the District of Columbia government, and that the crime alleged occurred at a place within the limits of the reservation. The Court of Appeals in affirming the decision stated, that where the fact of jurisdiction was in no way

controverted at the trial, the testimony of the superintendent was adequate to prove the court's jurisdiction over the situs of the offense, "if indeed the matter was not one for judicial notice." The Court adopted the view of Mr. Justice Holmes when the identical point was raised in Holt v. United States, 218 U.S. 245, 252 (1910), namely that the United States is not called upon to try title in a murder case. Of significance was the clear intimation by the Fourth Circuit that in a proper case a district court might take judicial notice of federal territorial jurisdiction over tracts of land within its district.

Staff: United States Attorney John M. Hollis; Assistant United States Attorneys A. Andrew Giangreco and Henry St. J. FitzGerald (E.D. Va.)

NARCOTICS

Prosecution. United States v. Lee Edgar Sartain (D. Hawaii). Defendant Sartain was convicted of four counts charging violations of the narcotic laws in a case involving the largest single seizure of heroin in the history of Hawaii. He was sentenced to a total of 20 years' imprisonment and a fine of $20,000.

Defendant advanced one ounce of heroin to a special employee of the Bureau of Narcotics as a sample in contemplation of a sale of a much larger amount. Before the delivery of the larger amount, however, defendant became wary and refused to complete the transaction. Two days later he was arrested on a warrant charging him with the delivery of the sample. Upon reading the newspaper accounts of the arrest, the housekeeper of a wealthy friend of Sartain's, who was not otherwise involved, remembered a brief case Sartain had left in her kitchen. She called her employer who directed her to deliver the brief case to an attorney he thought to be representing Sartain. When the attorney received the brief case, he immediately called the police and the narcotic agent. When the brief case was opened, it was found to contain over two pounds of pure heroin. Before she was to testify at the trial, the housekeeper was hospitalized due to an accident and the court convened at the hospital in order to take her testimony.

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

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

NATURALIZATION

Residence Sufficient to Preserve Right to Naturalization Under 1940 Act. Notwithstanding Its Repeal by Act of 1952; Effect of Savings Clause of 1952 Act; Right of Appeal After Certificate of Citizenship issued. United States v. George M. C. Wolff, (C.A. 3, September 16, 1959). Appellee, a native of Germany, filed a declaration of intention to become a citizen on September 17, 1948 pursuant to Section 331 of the Nationality Act of 1940, 8 U.S.C. 731 (1946 ed.). That statute required that the declaration of intention must not have been filed more than seven years previous to the filing of a petition for naturalization. Appellee did not file a petition for naturalization until July 16, 1958. Meanwhile, the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 et seq., had repealed the Nationality Act of 1940, and Section 334(f) of the later Act, 8 U.S.C. 1445(f), had dispensed with the requirement of a declaration of intention as a prerequisite to naturalization.

Moreover, the 1952 Act required in appellee's case that at least one half of the five years residence in the United States prior to filing his petition must have been spent as physical presence here, whereas the prior law did not contain the physical presence requirement. This condition the appellee could not meet since he had been physically present in the United States only about nine months of the five-year period. For this reason the government opposed his naturalization for lack of qualification under the statute. The district court overruled the government's objection and directed his admission to citizenship. The United States appealed.

Appellee contended in the Court of Appeals that his qualification for naturalization so far as residence was concerned was to be determined by the Nationality Act of 1940 because of the provisions of Section 405(a) of the 1952 Act, 8 U.S.C. 1101, historical note, known as the "savings clause." By virtue of that provision he urged that he had acquired a "status," a "condition" or a "right in process of acquisition", which entitled him to citizenship under the prior law. In support of his contention appellee relied on United States v. Menasche, 348 U.S. 528, 536 (1955) and particularly the language therein reading: "It could be argued in the present case that it was Menasche's residence, rather than his filing of the declaration, which gave rise to his rights under Section 405(a). And this approach would have the virtue of eliminating the inequitable treatment envisaged by the Government as regards those special groups of aliens who did not have to file declarations as a prerequisite to citizenship. But while our decision could be rested on this ground, it is sufficient here merely to refer to the provisions in Section 405(a), derived verbatim from Section 347(a) of the 1940 Act, preserving the 'validity' of declarations of intention 'valid at the time this Act shall take effect.'"

As viewed by the Court of Appeals, the argument advanced by appellee was that Menasche was admitted for permanent residence in the United States on March 7, 1948, and the following month filed his declaration to become a citizen. He was absent an aggregate of some forty-four months during the five years residence period required for naturalization but he did not at any time abandon his residence. Under the Nationality Act of 1940 he could be naturalized upon completing five years residence but before that period elapsed the Immigration and Nationality Act, effective December 24, 1952, replaced the 1940 Act. If the 1952 Act applied to Menasche he could not have been naturalized for want of his one half period of physical presence in the United States required by that Act, while if the 1940 Act were applicable, he was eligible for citizenship. The Supreme Court had stated categorically, albeit by way of dictum, that a decision in Menasche's favor could have been rested on residence rather than the filing of a declaration of intention. Appellee therefore asserted that despite the fact that he could not meet the physical presence requirement of the 1952 Act and did not file his petition for naturalization within seven years required by the 1940 Act, he nevertheless was entitled to naturalization because Section 405(a) of the 1952 Act had preserved that right to him as one having a status, a right of citizenship in process of acquisition, that is, residence, and that under Menasche that is what counts.

The United States countered with the argument that while Section 405(a) did preserve status for citizenship and rights in process of acquisition under the prior 1940 Act, appellee's rights had been lost because he failed to file his application within the time limit allowed by that Act or within seven years from the date of his declaration of intention. Hence it was argued that appellee did not meet the requirements of the 1940 Act and hence must proceed under the 1952 Act under which, concededly, he could not qualify.

The Court of Appeals, in affirming the lower court, said the Supreme Court in Menasche seems to require a result different than that contended for by the United States. The Court said that if it correctly construed the dictum in Menasche it would mean that residence alone must be deemed to be a status, an essential part of a right to citizenship in process of acquisition, and that anyone who had acquired residence under the 1940 Act may proceed under that statute to citizenship. Since appellee possessed the residence status under the 1940 Act, the court was of the opinion that he was entitled to citizenship.

The Court conceded that the result it had reached is somewhat anomalous and that it could be argued that the court was giving to appellee the benefits of those provisions of both the 1940 and the 1952 Acts which serve his purpose in acquiring citizenship despite the fact that he was unable literally to comply with those Acts but the Court thought the result is compelled by Menasche.

An incidental question was whether the United States was entitled to maintain its appeal after a certificate of citizenship had been

issued on behalf of the appellee. The court felt the right of appeal to be so well established that no extensive citations of authorities were required to support the proposition.

The judgment of the lower court was affirmed.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

False Statement. United States v. Billy Maurice Ogden (S.D. Calif.) On September 9, 1959 a federal grand jury in Los Angeles, California returned a two count indictment charging Billy Maurice Ogden with a violation of 18, U.S.C. 1001. The indictment alleges that Ogden falsely denied membership in and affiliation and association with the Communist Party in a Certificate of Non-Affiliation with Certain Organizations which he caused to be filed with the Department of the Air Force under the Industrial Personnel Security Program in connection with securing a clearance for access to classified information. This is the first case of this type brought by the government subsequent to the decision of the Supreme Court on June 29, 1959 in the case of Greene v. McElroy, et al, 360 U.S. 474. While in the Greene case the Court found that the Secretary of Defense could not, in the absence of authorizing legislation or presidential mandate, deprive an individual of his employment by revoking his security clearance in a proceeding where the rights of confrontation and cross examination were not afforded, the decision did not invalidate the government's Industrial Personnel Security Program in its entirety so as to preclude undertaking criminal prosecutions based on false statements by individuals in connection with the program.

Staff: Assistant United States Attorney Thomas R. Sheridan (S.D. Calif.)

Suits Against the Government; Passport Regulations; Area Restrictions. Charles O. Porter v. Christian A. Herter (D.C.) Plaintiff, a United States Congressman, filed suit for a declaratory judgment and injunction seeking an order requiring the Secretary of State to validate his passport for travel to Communist China. Plaintiff contended that the Secretary's refusal violated his constitutional right to travel and, further, unlawfully interfered with the separation of powers doctrine in that it prevented him, as a member of Congress, from exercising his right and duty to travel anywhere in the world, except in time of war or emergency, to acquire the first-hand information necessary for him to properly legislate. The Court granted defendant's cross-motion for summary judgment and dismissed the complaint on the grounds that were it to grant the relief requested, it would be directly interfering with the Executive prerogative of conducting the foreign affairs of the United States; that plaintiff, though a Congressman, was an ordinary citizen, and thus his right to travel to that area was governed by Worthy v. Herter (D.C. Circuit, July 6, 1959), wherein the Court affirmed the power of the Secretary of State to proscribe travel of United States citizens to certain designated areas of the world, including Communist China, as a means of implementing United States foreign policy.

Staff: Oran H. Waterman, Anthony F. Cafferky and Herbert E. Bates (Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

WHERRY HOUSING

Admissibility of Reproduction Evidence and Appropriate Charge to Jury; Rent Control Evidence, Cross-examination and Charge to Jury. The Department has just filed in the United States Court of Appeals for the Fifth Circuit an appellate brief in a Wherry housing case dealing with the admissibility and use made of reproduction evidence, with the proper treatment of the rent control feature, and similar matters. Extra copies of the brief are available and anyone interested is invited to request a copy by writing to Mr. Roger P. Marquis, Chief, Appellate Section, Lands Division.

* * *

TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decision

Actions to Enjoin Collection of F.I.C.A. Taxes. U. S. Mutual Benefit Ass'n v. Welch; U. S. Insurance Agency Co. v. Welch (C.A. 6). Each of the taxpayers filed a complaint for injunction to restrain the collection of social security taxes for the years 1951, 1952 and 1953. The complaints alleged that taxpayers were not liable for the taxes because they were imposed upon amounts paid persons who were independent contractors rather than employees for the purposes of the F.I.C.A. and F.U.T.A. taxes. They alleged that the Bureau of Internal Revenue had so ruled in 1939 and 1942. In addition, it was alleged that taxpayers were unable to pay the taxes without liquidation of their businesses and that such facts constituted exceptional and extraordinary circumstances sufficient to except the case from the prohibition against tax injunctions contained in Section 7421(a) of the 1954 Code. The District Director moved to dismiss each of the complaints, and these motions were granted by the district court without a hearing on the merits. Upon taxpayers' appeals, the Sixth Circuit reversed, holding that the taxpayers should be given a hearing in the trial court on the facts alleged in their complaints.

It has long been recognized that Section 7421(a), which prohibits suits to restrain the assessment or collection of federal taxes, is subject to court discovered exceptions. Thus, where the taxes are illegally assessed and exceptional and extraordinary circumstances exist, the courts will grant injunctive relief. Miller v. Standard Nut Margarine Co., 284 U.S. 498. These actions, along with a companion case involving wagering taxes, Lassoff, et al. v. Gray (C.A. 6), 266 F. 2d 745, illustrate the pitfalls inherent in filing motions to dismiss injunction actions. The Sixth Circuit in effect has held that such motions admit not only the general conclusionary allegation that the taxes were illegally assessed, but also the allegation that exceptional and extraordinary circumstances exist.

Staff: Helen A. Buckley (Tax Division)

District Court Decisions

Liens; Padlocking of Leased Premises Pursuant to Levy Under Tax Lien Does Not Give Rise to Contract Implied in Fact Which Obligates United States Under Tucker Act to Pay Lessor Rent for Use and Occupation. Roxfort Holding Co. v. United States (D. N.J., Sept. 21, 1959). This was a suit under the Tucker Act, 28 U.S.C. 1346(a)(2), instituted by a lessor to recover for use and occupation by the government from October 1-26, 1954, which was occasioned by the government's having padlocked the

premises following a levy on the chattels of the lessee, a delinquent taxpayer. The lease was in force during the period and no evidence was introduced to establish that the lessor had undertaken to terminate the tenancy which expired on December 31, 1955.

The Court held that when the premises were padlocked there was interference only with the tenant-taxpayer's possession; there was no taking or interference with any of the plaintiff's property rights which would warrant the award of compensation under the Fifth Amendment of the Constitution. Turning to the Tucker Act, the Court pointed out that recovery under an implied contract is limited to contracts implied in fact as distinguished from a contract implied in law, the former containing the element of mutual assent and the latter being imposed irrespective of the assent of the parties. Having thus stated the law, the Court held that plaintiff's theory that the government became a tenant at sufferance does not bring the case within the purview of the Tucker Act because the tenancy connoted by this theory is not one created by an agreement implied in fact but is one imposed by law. Plaintiff introduced evidence that the Collection Officer had assured him that he would be paid for use and occupation; the Government introduced evidence tending to discredit the fact of such assurances and to establish that the assurances, if made, were unauthorized. Because the plaintiff conceded on argument that the Collection Office had no authority to bind the government, the Court found it unnecessary to decide whether the assurances of payment were in fact made and held that plaintiff had established neither an express agreement nor an agreement implied in fact. Plaintiff then turned to the tort of deceit as the basis of his claim. The Court, however, held that the elements of actionable deceit were absent and further held that under the express terms of the Tucker Act the plaintiff could not recover on a theory of tortious conduct by the government nor could he recover under the Tort Claims Act, 28 U.S.C. 1346(b), 2671, 2674 and 2680(h) on the basis of a claimed tortious interference by the government with a prospective economic advantage to the plaintiff.

In accord with the decision of the instant case are the recent decisions in Hirsch v. United States, 170 F. Supp. 229 (E.D. N.Y., 1959) and Patterson Strange Mills v. United States (D. N.J., Sept. 22, 1959).

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Liens; Chattel Mortgage, Recordation of Which Under State Law Had Expired When Federal Tax Liens Arose and Notices of Liens Were Filed, Was Entitled to Priority Over Tax Liens. United States v. William F. Eagle, et al. (E.D. S.C. July 25, 1959). This action was brought by the United States to enforce federal tax liens against proceeds from the foreclosure sale of taxpayer's property subject to a chattel mortgage. The mortgage was executed by taxpayer on December 23, 1947 and was recorded on December 31, 1947. Under the state law the recordation of a chattel mortgage expires in three years but may be extended by filing of affidavit.

The recordation thus expired on December 31, 1950 and an affidavit for extension was not filed until March 3, 1953. In this interval between December 31, 1950 and March 3, 1953, a number of tax liens arose against mortgagor and notices thereof were filed. The Court held that the mortgagee was entitled to priority out of the proceeds of the foreclosure sale over the tax liens.

The Court concluded that the liability of the mortgagor to the government arose out of statute and not out of contract, that the government suffered no loss by reason of the failure of the mortgagee to file timely affidavit of extension and that the government's contention that the tax lien is superior to the mortgagee is not sustained by the rules of common law, the Recording Act of South Carolina, or any equitable principle. The Court stated that the dissenting opinion in United States v. B. F. Ball Construction Co., 355 U.S. 587 and the decisions of the court of appeals and the district court in that case support the Court's holding in the instant case. It pointed out that since the majority opinion in the Ball case held that there was not a valid mortgage, it thus did not reach the question of whether a valid but unrecorded mortgage is entitled to priority over a subsequently arising tax lien notice of which is subsequently filed.

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Liens--Levy Made by Government Prior to Taxpayer's Receivership Upon Indebtedness Owing to Taxpayer Transferred to Government Right to Receive Payment of Indebtedness. United States v. Nationwide General Engineering Associates, Inc., et al (N.D. Ind., CCH 59-2 U.S.T.C. ¶ 9659). This action was filed under Section 7403, Internal Revenue Code of 1954, for the foreclosure of tax liens against the taxpayer. The main issue before the Court involved the right of the government, as against the right of the receiver of the taxpayer, to receive certain funds. To enforce its tax liens against the taxpayer, the government levied, pursuant to Section 6331, Internal Revenue Code 1954, upon an indebtedness due taxpayer. Subsequent to the levy, taxpayer went into state receivership. The receiver claimed priority for the said indebtedness ahead of the United States primarily on the ground that notice of the tax liens was recorded subsequent to the receivership.

Held, the receiver took the assets of the taxpayer subject to all obligations and liens. The Court relied upon the decision in United States v. Eiland, 223 F. 2d 118 (C.A. 4), which involved bankruptcy, and which held that the proper way to assert the government's lien was by levy served upon the bankrupt's debtor, the effect of which was to transfer to the government the right to receive payment of the indebtedness up to the amount of the tax. The receiver has taken no appeal in this case.

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