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BULLETIN

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PERFORMANCE OF DUTY

At the request of the United States Attorney's office, District of New Jersey, Assistant United States Attorney Richard H. Pennington, Southern District of Ohio, was assigned to attend certain depositions held in Cincinnati. In thanking United States Attorney Hugh K. Martin and Mr. Pennington for the assistance which they rendered in this matter, Assistant United States Attorney Harold Weideli, Jr., District of New Jersey, stated that the depositions were attended and the interests of the United States were well represented by Mr. Pennington who conducted himself with a great deal of skill as an attorney who is a credit to his office.

JOB WELL DONE

The Chief Project Appraiser, Savannah District, Army Engineer Corps, has commended Assistant United States Attorney John C. Bracy, Middle District of Georgia, on his efforts and the presentation which he made in several trials of lands matters relating to Hartwell Dam. The Chief Appraiser stated that everyone in the district office has a high regard for the job which Mr. Bracy did.

United States Attorney Fred Elledge, Jr., and Assistant United States Attorney Rondal B. Cole, Middle District of Tennessee, have been congratulated by the Chief Postal Inspector for bringing a most difficult case to a successful conclusion. The Chief Inspector stated that the defendant had been one of the most persistent offenders against the Postal Obscenity Statute, and that in the past twelve years the Post Office Department had received thousands of complaints from persons throughout the country who had received salacious advertisement mailed by him. The letter stated that the jury conviction is considered to be a major victory since it covered not only the offense of mailing but also an indictment returned in Florida, under the new venue provisions of 18 U.S.C. 1461, which had been consolidated with the prior Tennessee indictment.

The Acting Attorney in Charge, Office of General Counsel, Department of Agriculture, has commended Assistant United States Attorney Frank M. McCann, Western District of Virginia, for his handling of a recent lands matter. The letter stated that the way in which Mr. McCann handled the case is sincerely appreciated, that the method of approach he followed was highly proper and resulted in fair and just compensation for the parties, and that his spirit and technique in bringing the case to a successful conclusion were commendable.

The District Group Supervisor, Intelligence Division, IRS, has expressed appreciation for the assistance and advice rendered by Assistant United States Attorneys Truett Smith and Earle B. May, Jr., Middle District of Georgia, in a recent Internal Revenue matter. The letter

stated that both Assistants rendered valuable service, that it was through their efforts that one of the principal witnesses was induced to give her testimony, that Mr. Smith spent an entire day preparing the necessary papers, etc. for the court's order, and that Mr. May made a special trip from Macon to Americus to represent the particular Internal Revenue agent in this matter.

United States Attorney M. Hepburn Many, Eastern District of Louisiana, has been highly commended by a private attorney of New Orleans on the extremely informative and very clear analysis of a leading civil rights decision, which Mr. Many recently presented on TV. The letter stated that Mr. Many appeared to be a sincere and dedicated public servant with a complete understanding of the objectives inherent in his job as United States Attorney, that the district is fortunate in having Mr. Many as its United States Attorney, and that in his presentation he brought credit on the Department of Justice and confidence in public officials.

The Swedish Ambassador has written to the Attorney General expressing his admiration for the efficient, skillful, and tactful way in which Assistant United States Attorney Edward P. Troxell, District of Columbia, conducted a recent trial involving a former employee of the Embassy. The Ambassador also stated he appreciated highly the understanding and unfailing courtesy Mr. Troxell and his associates showed to all of the witnesses. The Ambassador further observed that it was a most interesting and edifying opportunity for him to follow closely the workings of American justice.

In a recent press release, the Director of the Michigan Highway Department, Right of Way Division praised United States Attorney Wendell A. Miles, Western District of Michigan, for his outstanding presentation of a lands case which was one of the longest and complicated cases in highway department history. The release stated that Mr. Miles did an excellent job of presenting the case and convinced the jury that the original appraisal and offer were good ones, and that the demands of the land holders were unreasonable. The Director stated that highway department officials throughout the country had followed the case with interest because it was one of the first times the federal condemnation process was used to acquire land for an interstate highway project.

The Chief Inspector, Post Office Department has expressed to the Assistant Attorney General, Criminal Division, his appreciation for the successful prosecution by United States Attorney Edward G. Minor and Assistant United States Attorney Matthew M. Corry, Eastern District of Wisconsin, of three mail fraud cases in which the victims lost approximately $400,000. Several of the seventeen defendants in these vending machine and knitting machine promotions were named in more than one of the three indictments; fourteen have already entered pleas. The Chief Inspector observed that the success achieved will be of considerable importance in the curbing of mail frauds of this character.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

LOCAL SERVICES AND REPAIRS

The General Services Administration has regional contracts for local services such as laundry and cleaning, reporting service, rubber stamps, typewriter and office machine repair, furniture repair, automotive repair, fuel oil deliveries, etc.

Offices requiring local services of any type, particularly on typewriter and office machine repairs, should contact the nearest General Services Administration representative for information.

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 11, Vol. 8, dated May 20, 1960.

MEMO	DATED	DISTRIBUTION	SUBJECT
272 S-2	6-15-60	U.S. Attys and Marshals	Report of Outstanding Obligations
274 S-2	5-19-60	U.S. Marshals (information copies to U.S. Attorneys)	Federal Employees Health Benefits Program
278	6-24-60	U.S. Attorneys	Handling of actions under the Social Security Act
279	6-28-60	U.S. Attys and Marshals	Use of Certified Mail for Transmission or Service of Matter Required by Federal Laws

ORDER	DATED	DISTRIBUTION	SUBJECT
205-60	7-18-60	U.S. Attys and Marshals	Placing Robert A. Bicks in charge of the Antitrust Division
206-60	7-18-60	U.S. Attys and Marshals	Placing Harold R. Tyler, Jr. in charge of the Civil Rights Division.

MEMO	DATED	DISTRIBUTION	SUBJECT
214 S-4	7-11-60	U.S. Attys and Marshals	Merit Promotion Plan

* * *

ANTITRUST DIVISION

Assistant Attorney General Robert A. Bicks

CLAYTON ACT - SHERMAN ACT

Consent decree in Section 7 of Clayton Act and Section 1 of Sherman Act case: United States of America v. Gamble-Skogmo, Inc., Western Auto Supply Company and Bertin C. Gamble, (W.D. of Mo.). The complaint in this action alleged that the defendants had engaged in acts and conduct over a span of several years the purpose of which was to eliminate competition between them and to ultimately merge or unify said defendants. These acts and conduct were brought to fruition in 1958 when the defendants Gamble-Skogmo, Inc. and its President, Bertin C. Gamble acquired a controlling stock interest in defendant Western Auto. It was alleged that these acts constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act and may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act.

Defendant Western Auto did not file an answer to the complaint but moved, instead, to dismiss the complaint as to it, to have it dropped as a party defendant, or, in the event that these motions were denied by the court, to strike a particular paragraph of the complaint. Western Auto also requested that it be granted an opportunity to present an oral argument on behalf of its motion.

The grounds upon which defendant Western Auto based its motion were that the complaint did not state any claim against defendant Western Auto upon which relief could be granted contending that: (1) defendant Western Auto was not charged with a violation of Section 7 of the Clayton Act and no relief was sought against defendant Western Auto with respect to said Section 7; and (2) the complaint did not allege any facts showing or from which it could be inferred that defendant Western Auto was or has been a party to any contract, combination or conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. The motion to strike the particular paragraph of the complaint in the event that the court denied the foregoing motions was on the grounds that said paragraph alleged facts which were irrelevant and immaterial to the issues in the proceeding and the retention of the paragraph would prejudice the defendants.

The Government filed a brief in opposition to the motion.

On June 29, the court denied all of the above motions of Western Auto without hearing any oral arguments from the parties.

Gamble-Skogmo and Bertin C. Gamble sold their Western Auto stock on July 11, 1960. This secured the major objective of the Government's action.

In the complaint, the Government asked as relief the sale of all common stock in Western Auto held by the defendants Gamble-Skogmo and Bertin C. Gamble, and a number of related injunctive provisions.

Entry of the judgment on July 18 at Kansas City was based in part on representations by Gamble-Skogmo and Bertin C. Gamble that all financial or stock interests, direct or indirect, which they held in Western Auto, had been sold.

The judgment provided further that the defendants Gamble-Skogmo and Bertin C. Gamble are perpetually prohibited from future acquisition of any direct or indirect interest in the business, assets or share capital of Western Auto. This provision also applied to officers and directors of Gamble-Skogmo.

The defendants were also enjoined from exchanging information or trade secrets which are not made available to competitors of these companies.

Staff: Bill G. Andrews, John B. Walsh and Julius H. Tolton. (Antitrust Division)

State Supreme Court holds that State Commission does not have power to regulate rates for movement of household goods: United States v. Carter et al. as Constituting Florida Railroad and Public Utilities Commission, (Supreme Court of Florida). In 1957 the Supreme Court in Public Utilities Commission of California v. United States, 335 U.S. 534, held that a California statute which empowered the Public Utilities Commission of California to regulate the rates for the shipment of the property of the United States between points in California was unconstitutional, primarily on the ground that it constituted an unreasonable burden on the United States in the discharge of its constitutional responsibility to provide for the common defense. After this decision a number of the State Commissions took the position that the rationale of the case did not apply to the movement of household effects of United States personnel, and various commissions continued to regulate rates for intrastate shipments of this type. The issue was presented to the Florida Railroad and Public Utilities Commission, which held that it had power to regulate the rates for intrastate shipments of household effects of military personnel. Upon review of the Commission's order by the Florida Supreme Court, it unanimously held that the Florida statutes did not authorize regulation of shipments made by the United States, including shipments of the household effects of United States personnel. The Court stated that any other interpretation would render the statute unconstitutional.

The Department of Defense has estimated that the California Public Utilities decision resulted in savings to the Defense Department of $10,000,000 a year, and that extension of the rule of this decision to household effects will result in additional savings of approximately $1,000,000 a year.

Staff: Wilfred C. Varn, United States Attorney, Tallahassee, Florida, E. Riggs McConnell, Department of Justice, Washington, D. C.

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

SUPREME COURT

COURTS

Only Active Circuit Judges May Participate in En Banc Decisions of Their Circuits Under 28 U.S.C. 46(c). United States of America v. American-Foreign Steamship Corp., et al. (No. 138, October Term 1959, decided June 20, 1960). These actions were brought in the Southern District of New York by various shipowners to recover amounts of allegedly excessive charter hire charged by the Government. The district court dismissed the actions as time-barred. On appeal, the Second Circuit, in a panel consisting of Judges Hincks, Medina and District Judge Leibell, affirmed. The shipowners' subsequent petition for rehearing en banc by the Second Circuit was granted. Subsequent to the rehearing of the case but prior to decision by the Court of Appeals, Judge Medina retired from active service. Nonetheless, he participated in the en banc decision, and his vote was determinative in reversing for the shipowners by a 3-2 count.

The Government's petition for certiorari raised the question whether Judge Medina was precluded from participating in the en banc decision by the provisions of 28 U.S.C. 46(c) governing hearings and rehearings en banc. That statute provides that in the United States Courts of Appeals "[c]ases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in active service". It further provides that "[a] court en banc shall consist of all active circuit judges of the circuit".

The Supreme Court, in a 6-3 decision, reversed, agreeing with the Government that under the plain meaning of 28 U.S.C. 46(c) Judge Medina was precluded from participating in the en banc decision because of his retirement from active service prior to rendition of the en banc determination. Aside from the wording of the statute itself, the majority believed that Congress intended that only active judges of a circuit take part in en banc decisions which resolve issues of overriding importance and avoid conflicts of panels in the circuit. While the majority noted that an exception might be made for circuit judges, like Judge Medina here, who retire shortly before en banc determinations, it considered that Congress should provide for such an exception by appropriate amendment to 28 U.S.C. 46(c). Hence, it vacated the en banc decision and remanded the case to the Second Circuit for proceedings in conformity with the provisions of 28 U.S.C. 46(c).

In a dissenting opinion in which Justices Frankfurter and Brennan joined, Justice Harlan took the view that the literal language of 28 U.S.C. 46(c) did not require the result reached by the majority since it only demanded that the "court en banc consist of all active circuit judges of the circuit". The term "consist" referred only to the composition of the court at the time of convening after granting rehearing en banc. Justice Harlan also stated that, even if the majority's view of 28 U.S.C. 46(c) were accepted, Judge Medina was, in effect, a de facto judge whose retirement did not affect his power to vote in the en banc determination.

Staff: Philip Elman, Assistant to the Solicitor General
Herbert E. Morris (Civil Division)

COURTS OF APPEALS

AGRICULTURAL MARKETING PENALTIES

Summary Judgment for Government Granted in Suit to Recover Agricultural Penalty Where Defendant Failed to Exhaust Administrative Remedies. William Corbin, et al. v. United States (C.A. 6, June 14, 1960). The United States brought suit pursuant to 7 U.S.C. 1340, to recover a penalty attributable to defendant's excess marketing of wheat in 1954. The district court granted the Government's motion for summary judgment. Defendant appealed, asserting that substantial questions of fact existed which entitled him to a jury trial.

The court of appeals affirmed the decision for the Government on the basis of the concession of defendant's counsel that the administrative remedies provided for by statute and regulation had not been exhausted by defendant. The court relied on Donaldson v. United States, 258 F. 2d 581 (C.A. 6), and Miller v. United States, 242 F. 2d 392 (C.A. 6).

Staff: United States Attorney Hugh K. Martin and
Assistant United States Attorneys Thomas
Stueve, James E. Applegate (S.D. Ohio)

CIVIL SERVICE

Removal of Temporary Employee Sustained Where He Was Accorded All Procedural Rights. Kemeny v. Brucker, etc., et al. (C.A.D.C., June 23, 1960). Plaintiff received a temporary appointment, under the terms of 5 C.F.R. 2.302 (1960 Supp.), as an astronomer in the Army Map Service. He was subject to 5 C.F.R. 2.107(a)(1960 Supp.), which provides for an "investigation * * * to establish the appointee's qualifications and suitability for employment in the competitive service." Less than six months later plaintiff was advised that the appointing authority proposed to effectuate his removal. The charges against him were set out

in detail and he filed a reply thereto, but the removal proposal was adhered to. Subsequently, plaintiff presented an oral statement before the Commanding Officer and the Civilian Personnel Officer of the Army Map Service and submitted a written memorandum, three character affidavits and a statement from his psychiatrist. The agency sustained the removal.

Plaintiff brought suit against the Secretary of the Army and others, seeking a mandatory injunction commanding his reinstatement. The district court granted the defendants' motion for summary judgment. The court of appeals affirmed, pointing out that plaintiff had not been entitled to a hearing under army regulations, and that 5 C.F.R. 9.104 (1960 Supp.) provides merely that, "[a]n employee serving under a temporary appointment may be separated at any time upon notice in writing from the appointing officer." The court stated that, "[w]e are satisfied that the latter accorded to the appellant all procedural prerogatives required to be extended in the case of temporary appointees, and that valid regulations of the Civil Service Commission authorized appellant's separation from the service."

Staff: United States Attorney Oliver Gasch and Assistant United States Attorneys Daniel J. McTague, Carl W. Belcher, and Doris H. Spangenburg (D. D.C.)

INTERSTATE COMMERCE COMMISSION

Commission's Interpretation of Own Ruling as Directing Percentage Tariff Increases on the Basis of Freight Rates as Computed Before Deduction of "Compression" Allowance Upheld. Benson, et al. v. United States. Boswell and Co., et al. v. United States. (C.A.D.C., June 10, 1960). The Interstate Commerce Commission entered a ruling permitting numerous railroad companies to carry baled cotton with an increase in the applicable tariffs, the percentage increases to be made on the "basic freight" rates and charges of the railroads." It was the practice of the railroads to permit the cotton shippers an allowance when the cotton was compressed for transportation. The shippers urged that, under the Commission's ruling, the allowance for compression should be deducted before the allowed percentage increase was calculated, but the railroads computed the permitted increase on the basis of the freight charges before deduction of the compression allowance. In reparations proceedings, the Commission construed the language of its ruling in favor of the railroads.

The Secretary of Agriculture, acting under the Agricultural Adjustment Act of 1938, 7 U.S.C. 1291, and cotton shippers brought suit against the Commission and many intervening carriers to set aside the denial of the reparations. The district court granted the defendants' motion for summary judgment. The court of appeals affirmed, holding that the Commission had

properly interpreted its own language. The court noted that, "courts will be slow to adopt any other meaning than the gloss put upon the phrases by the Commission, its author." It added, "[t]he Commission ruling upon that question is not only within its power to determine rate increases but seems to us to be a reasonable method of separating basic rates or line-haul rates from charges assumed by railroads that are, like compression, incidental to their services but beyond the carrier's power to control as to cost or method of operation."

Staff: Donald A. Campbell (Department of Agriculture)

MANDAMUS

Petition for Mandamus Denied Where Government Alleged District Judge's Refusal to Transfer a Lawsuit, Pursuant to 28 U.S.C. 1404(a), Was Based on Inappropriate Considerations and Constituted An Abuse of Discretion. United States v. Honorable Caleb M. Wright, etc. (C.A. 3, June 15, 1960). As a result of the 1958 mid-air collision between an Air Force plane and a United Air Lines passenger plane in the vicinity of Las Vegas, Nevada, approximately 35 suits have been brought against the United States under the Tort Claims Act. The instant case was brought by, United, itself, in the District of Delaware for approximately $3,500,000, and the United States counterclaimed for approximately $6,000,000. The Government moved, pursuant to 28 U.S.C. 1404(a), to transfer the action to the District of Nevada, pointing out, in particular, that the vast majority of the 120 or so prospective witnesses reside in the West and Southwest, and that the suit has no practical connection with the Delaware forum.

The district court denied the motion for transfer. It emphasized that a transfer might cause related suits, involving "non-corporate plaintiffs, many of whom * * * have limited financial resources" to be transferred to Nevada from other parts of the country. The United States filed a petition for mandamus in the Third Circuit, urging that the district judge had considered inappropriate criteria in denying the transfer (citing All States Freight, Inc. v. Modarelli, 196 F. 2d 1010 (C.A. 3)), and that the refusal to order the transfer had been an abuse of discretion (citing La Buy v. Howes Leather Co., 352 U.S. 249). The Third Circuit denied the petition, without a hearing and without opinion. A petition for rehearing was subsequently denied by the full bench of the court with an opinion, Chief Judge Biggs dissenting. The court's opinion stated, "[t]hough we are satisfied to the contrary, assuming the district judge failed to apply the standards set forth in 28 U.S.C.A. §1404(a) we are without knowledge that he would have granted the transfer even if he had followed §1404." The court indicated further that it did not believe that the district court had abused its discretion in denying the transfer.

Staff: Mark R. Joelson (Civil Division)

NATIONAL BANKS

Preliminary Injunction in Advance of Administrative Decision Upheld -- State Banks Have no Adequate Remedy Once Comptroller Issues Certificate Authorizing Establishment and Operation of a Branch of a National Bank -- State Banks Have Standing to Maintain Suit to Obtain Judicial Review of Anticipated Administrative Action by the Comptroller. Gidney v. State Bank of Roseville, et al. (C.A.D.C., decided May 12, 1960, rehearing denied, June 3, 1960). At the instance of two state banks, the district court issued a preliminary injunction restraining the Comptroller of the Currency from issuing to a national bank a certificate authorizing it to establish and operate a branch bank in the state of Michigan. At the time plaintiffs' suit was instituted and their motion for preliminary injunction granted, the Comptroller had on file an application by the national bank to establish a branch, but the Comptroller had given no consideration to the application.

The district court, in an opinion reported at 174 F. Supp. 770, rejected the Government's arguments that plaintiffs' suit was premature since administrative action on the application was not final; that, under Michigan law which is determinative of the right of the national bank to establish the branch (12 U.S.C. 36(c)), there was no reasonable probability that plaintiffs, on the merits, could demonstrate the illegality of the proposed branch; that plaintiffs had an adequate remedy in the form of a suit for a declaratory judgment and injunction if and when the Comptroller acted upon the application and decided to issue a certificate evidencing his approval of the application; and, that the plaintiffs, complaining only of a possible anticipatory economic injury from the possible presence of a competing branch of a national bank in their vicinity, had no standing to sue. On appeal the court of appeals stated that it was "in general" agreement with the opinion of the district court and in a per curiam opinion affirmed on the basis of that court's opinion.

Staff: John G. Laughlin (Civil Division)

POST OFFICE DEPARTMENT

Applicant for Second-Class Entry Excused from Exhausting Administrative Remedies Where Post Office Failed to Pass Upon Application for 15 Months -- Second-Class Entry Ordered by the Court. Sunshine Publishing Co. v. Summerfield (D. D.C., June 8, 1960). Plaintiff, the publisher of the nudist publications "Sunshine and Health" and "Sun" magazines had filed an application for second-class rates with the Post Office Department on January 16, 1958, three days after the Supreme Court, in Sunshine Book Company v. Summerfield, 355 U.S. 372, held that the magazines were not prohibited from the mails by 18 U.S.C. 1461. Between that date and the filing of this suit on April 23, 1959, the Post Office Department made a number of requests for information, some of which items plaintiff furnished

and some of which were never supplied. There were also a number of meetings between plaintiff's counsel and representatives of the Post Office and numerous requests by the plaintiff for action on its applications. On June 1, 1959, some six weeks after the filing of this suit, plaintiff's applications were denied on three grounds: (1) The publications do not satisfy the requirements of 39 U.S.C. 226; (2) the publications were primarily designed to advertise businesses owned by plaintiff, its stockholders, and advertisers; and (3) the publications were not mailable under 18 U.S.C. 1461. The decision of June 1 became final, pursuant to the Post Office's revised rules issued on May 5, 1959, on June 22, 1959, upon plaintiff's failure to take an administrative appeal.

Both plaintiff and the Government moved for summary judgment. The Government did not argue that the magazines were not mailable. It relied primarily on the exhaustion argument -- supported by affidavits from Post Office officials explaining the delay -- and urged that the court should not, in any event, grant summary judgment for plaintiff upon the issue of eligibility for second-class rates because there were genuine issues of material facts. The district court held (1) that plaintiff was excused from exhausting its administrative remedies because the Post Office Department's failure to pass upon its application for 15 months constituted "gingerly restraint amounting to outright reluctance" which, in effect, rendered said remedies "inadequate or unavailable"; (2) that "having filed its suit, it was not required to abandon that suit and resume the administrative procedure"; (3) plaintiff's magazines qualified for second-class mail rates under 39 U.S.C. 226.

Staff: United States Attorney Oliver Gasch and Assistant United States Attorney Harold D. Rhynedance (D. D.C.); Donald B. MacGuineas and Andrew P. Vance (Civil Division)

DISTRICT COURTS

GOVERNMENT CONTRACTS

Non-applicability of Federal and State Statutes of Limitation to Government Transportation Claims; Primary Jurisdiction of Interstate Commerce Commission Not to Be Invoked on Question of Application of Tariff to Agreed Facts; Notice of Bankruptcy to Treasury Department Not Notice to General Accounting Office Within Provisions of 11 U.S.C. 35. United States v. Yale Transport Corp. (S.D. N.Y., June 8, 1960). The United States brought this action to recover claims asserted against the carrier by the General Accounting Office for overpayments made during the period August 6, 1943 to September 9, 1953, and the value of certain property lost in transit during said period. The defendant, without giving notice to the General Accounting Office or scheduling any part of the Government's debt, had been reorganized under a plan of arrangement pursuant to Chapter XI of the Bankruptcy Act.

The defendant filed a motion for summary judgment on the grounds (1) that all claims subsequent to June 29, 1949, the date of enactment of 49 U.S.C. 304a, were barred by the two year limitation provided therein; (2) that all claims prior to August 14, 1951 were released by the discharge in bankruptcy entered that day, notice of the proceedings having been given to the Secretary of the Treasury and to the Collector of Internal Revenue; (3) that those claims that accrued prior to June 29, 1949, to the extent not barred by the discharge, were time barred by the six-year statutes of limitation of New York and New Jersey; (4) that, under the terms of the Government bills of lading, the Government had agreed to subject itself to limitations applicable to and set forth in commercial carriers' bills of lading; (5) that the district court did not have jurisdiction because determination of the action involved construction of tariffs and, accordingly, primary jurisdiction was in the Interstate Commerce Commission.

The district court, in denying the defendant's motion, held (a) neither the limitations of 49 U.S.C. 304a, in effect at the time of the transactions, nor the state statutes of limitation applied to the Government, citing United States v. De Queen and Eastern Railroad, 271 F. 2d 597 (C.A. 8); (b) limitations noted by commercial bills of lading did not apply to shipments made under Government bills of lading; (c) the discharge in bankruptcy did not operate to release the transportation claims under the provisions of 11 U.S.C. 35, since they were not scheduled and notice to the Treasury Department, an executive branch of the Government, was not notice to the General Accounting Office; the court stated, "* * * notice of bankruptcy proceedings should be reasonably calculated to come to the attention of that branch of the Government familiar with the claims involved and which exercises functions with respect thereto -- in this instance, the GAO."; (d) since the contested claims "revolved" about what was actually contained in the shipments and appeared to require only the application of the tariff to the facts as ascertained, the question was one solely of construction and preliminary resort to the Interstate Commerce Commission, was therefore unnecessary. However, the Court reserved the defendant's right to advance the point if it should later be shown that the issues relate to technical matters requiring the "expertise" of the Commission.

Staff: United States Attorney S. Hazard Gillespie and Assistant United States Attorneys Sherman J. Saxl and Robert E. Scher (S.D. N.Y.); Preston L. Campbell (Civil Division)

TORT CLAIMS ACT

United States Not Entitled to Dismiss Third-Party Action For Contribution on Ground Accident Happened More Than Two Years Prior to Filing Since Claim for Contribution Does Not Accrue Until Joint Tortfeasor Pays More Than His Share. William Globig, Jr. v. Greene & Gust Co., etc., et al. (E.D. Wisc., June 20, 1960). In 1953, plaintiff,

an insulator, was injured while working on a housing project at a Department of the Army installation in Wisconsin. On July 24, 1959, he filed suit in the Eastern District of Wisconsin against two foreign corporations, who had contracted with the United States for the performance of the work, alleging that they were responsible for control of the premises where the accident occurred, and that his injuries were caused by their failure to comply with the Wisconsin Safe Place Statute. One of the co-defendants, on April 21, 1960 filed a third-party complaint against the United States, the owner of the premises, contending that, under the terms of the Wisconsin Safe Place Statute, in the event plaintiff should recover a judgment against the third-party plaintiff, the latter would be entitled to contribution from the United States for one-half of the amount awarded to the plaintiff. The United States moved to dismiss the third-party complaint on the ground that the third-party plaintiff's claim was barred by the two year statute of limitations of the Tort Claims Act, 28 U.S.C. 2401(b).

The court dismissed the Government's motion, holding that the third-party plaintiff's claim for contribution against the United States would not accrue until the former paid more than its share of the judgment, and that therefore it was not barred by the statute of limitations. The court then added that, "under the practice, both Federal and State, it (the United States) can be joined for the purpose of contribution before trial to avoid the circuity of action". The court cited with approval the recent decision in Keleket X-Ray Corporation v. United States, 275 F. 2d 167 (C.A.D.C.), and also the decision in Chicago, Rock Island & Pacific Ry. Co. v. United States, 220 F. 2d 939 (C.A. 7), stating with respect to the latter decision that there is no difference in principle whether the claim is for indemnification or contribution.

The court also held that the right to contribution from a joint tortfeasor is a right in law which may properly be enforced against the United States in a suit under the Tort Claims Act; and that the United States, as a third-party defendant, was not entitled to a dismissal on the ground of improper venue in the absence of an allegation that inconvenience or prejudice would result to the Government by reason of the venue.

Staff: United States Attorney Edward C. Minor and Assistant United States Attorney Howard C. Equity (E.D. Wisc.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Harold R. Tyler, Jr.

Civil Rights Act of 1960; Title III - Production of Records. In re Henry Earl Palmer, Sundry No. 10 (E.D. La.).

In the first court challenge of the constitutionality of Title III of the Civil Rights Act of 1960, the District Court for the Eastern District of Louisiana has upheld the validity of that section. Title III requires state custodians of voter registration records to preserve such records for 22 months following a federal election, and to make the records available to the Attorney General upon written demand.

One of the twelve demands for production of voting records which the Government has thus far made under Title III was directed to the registrar of East Feliciana Parish, Louisiana, Mr. Henry Earl Palmer, in May 1960. Only 76 negroes out of some 6000 of voting age are registered in that Parish, which was subjected to a "purge" by the White Citizens Council in 1958. Due to non-compliance with the demand letter, an enforcement application was filed against Mr. Palmer on June 10, 1960. A hearing was held on June 29, 1960, on the Government's application, the registrar's motion to stay proceedings (pending the decision in United States v. Association of Citizens Councils of Louisiana, et al., in which he had intervened, discussed in Bulletin for July 15, 1960), the registrar's answer and counterclaim (which attacked the constitutionality of Titles III and VI of the Civil Rights Act of 1960 and sought an injunction against the enforcement of those Titles and the convening of a three-judge court), and the Government's motion to strike the counterclaim. On July 18, 1960, Judge Skelly Wright entered an order and per curiam opinion requiring production of the records. Implicitly rejecting the claim that Title VI was in issue (the title authorizing a federal district court under certain conditions to appoint federal voting referees), Judge Wright stated with respect to Title III:

> Congress, through Title III of the Civil Rights Act of 1960, has sought to protect this right [to vote]. There can be no doubt that Title III is appropriate legislation under the fifteenth Amendment of the Constitution. (citations omitted)

Staff: United States Attorney M. Hepburn Many (E.D. La.); Harold H. Greene, D. Robert Owen (Civil Rights Division)

Courts Split on Right of Prisoner to Have Counsel Present at Parole Revocation Hearing.

The right of a parole or mandatory release violator to have legal counsel present at the revocation hearing conducted pursuant to 18 U.S.C.

4207 recently has been the subject of a series of law suits. The decisions rendered in this litigation have caused considerable uncertainty as to the requirements of the law.

On one hand, the Court of Appeals for the District of Columbia, in reviewing a suit for a declaratory judgment brought by a violator who was confined in the U.S. Penitentiary, Atlanta, Georgia, concluded that a prisoner has the right to counsel in such proceedings. Robbins v. Reed, 269 F. 2d 242. This view was followed by the District Court for the Eastern District of Michigan, Cannon v. Stucker, et al., Civil Action No. 19822, decided June 16, 1960.

On the other hand, the District Courts for the Northern District of California, (Lopez v. Madigan, 174 F. Supp. 919, 921, 922); the Middle District of Pennsylvania, (Hock v. Hagan, H.C. No. 363, decided March 28, 1960; Washington v. Hagan, H.C. No. 368, decided March 25, 1960); and the District of Connecticut, (United States, ex rel., McCreary v. Kenton, Civil No. 8312, decided June 27, 1960) have held that a prisoner does not have the right to counsel at such hearing. The Hock case is presently pending before the Court of Appeals for the Third Circuit.

In districts where this question is being considered for the first time, it is suggested that the Government take the position that there is no right to counsel at revocation hearings. In this connection, this Division is ready to provide you with material to assist you in defending such actions.

Juvenile Delinquents Should Not be Sentenced Under the Provisions of the Youth Corrections Act.

Recently several instances have come to our attention where courts have committed juveniles found to be delinquent under the provisions of the Youth Corrections Act.

In our view, this is improper since a commitment under the Youth Corrections Act is predicated upon conviction of a criminal offense whereas a juvenile delinquent is not "convicted of any crime." Further, a commitment under the Youth Corrections Act is not limited by the age of the offender and thus can extend past the minority of the person committed. A commitment under the Youth Corrections Act may result in confinement for a longer period than that provided by the substantive statute violated, Cunningham v. United States, 256 F. 2d 467, whereas a juvenile commitment may not exceed the penalty provisions of the substantive statute. 18 U.S.C. 5034.

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

MAIL FRAUD

Credit Card Prosecutions; Impact of Parr Decision; Procedure. In Parr v. United States, decided June 13, 1960, the Supreme Court reversed the conviction for mail fraud, 18 U.S.C. 1341, on the grounds that the mailings in question were not unlawful steps in the scheme and artifice to defraud. While the narrowness of the holding must be evaluated in the light of the peculiar facts of the case, there is for consideration by United States Attorneys in future mail fraud cases the question whether the mailings were essential steps in consummation of the scheme as distinguished from incidental use of the mails. And where, as in Parr, the prosecution under 18 U.S.C. 1341 is with reference to an official of a statutory or governmental body the government must allege in the indictment, prove and request instructions pointing out the way in which the particulars of the scheme differed from the normal revenue collection or disbursement process. Where United States Attorneys have questions based on a particular case and desire our views as to the application of Parr, please communicate with the Fraud Section.

In Parr, two counts charged that in violation of 18 U.S.C. 1341 the defendants wrongfully used a credit card, and obtained merchandise for their own use and benefit, the issuer of the card mailing statements for collection to the party to whom the card was issued. The Supreme Court read these counts to charge mailings after the fruits of the scheme had been obtained. Kann v. United States, 323 U.S. 88. In view of the possible impact of the Parr ruling on our Credit Card Programs, we make the following comments.

In any mail fraud prosecution, credit card or otherwise, the mailing must have been before the scheme ended. This is the clear holding of Kann v. United States. But where the scheme is a continuing one, Kann recognizes that the mail fraud statute is of application. See Kuiken v. United States, 101 F. Supp. 929, affd. 196 F. 2d 223, cert. den. 344 U.S. 867; Bauman v. United States, 156 F. 2d 534. As stated in the majority opinion in Parr:

> Counts 17, 18, and 19 of the indictment relate to a different subject. They charged, and there was evidence tending to show, that petitioners Oscar Carrillio, Sr. and Garza fraudulently obtained gasoline and other filling station products and services for themselves upon the credit card and at the expense of the District knowing, or charged with knowledge, that the oil company would use the mails in billing the District for those things. The mailings complained of in those counts were two invoices, said to contain amounts for items so procured by Carrillio and Garza, mailed by the oil company, at Houston, to the District, at Benavides, and the District's check mailed to the oil company, at

> Houston, in payment of the latter invoice. We think these counts are ruled by Kann v. United States, supra. Here, as in Kann "[t]he scheme in each case had reached fruition" when Carrillio and Garza received the goods and services complained of. "The persons intended to receive the [goods and services] had received [them] irrevocably. It was immaterial to them, or to any consummation of the scheme, how the [oil company] . . . would collect from the [District]. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires." 323 U.S., at 94.

It is not our conclusion that Parr, where the indictment shows clearly on its face a continuing scheme, would foreclose prosecution in credit card cases. Accordingly, in any credit card case, before declining prosecution on the basis of Parr, the Criminal Division would appreciate the opportunity to review the matter. And, in any credit card cases where prosecution is to be initiated, it is requested that we be furnished with a copy of the indictment before it is returned for our consideration and comments.

MAIL FRAUD

Securities Law Violations in Sales of Stocks in Investment Company and Scholarships in Business School (18 U.S.C. 1341; 15 U.S.C. 77q(a)). United States v. Proffer, et al. (N.D. Texas). In the Northern District of Texas a former President of the Texas State Teachers Association and an attorney associated with him have been convicted by jury verdict of mail fraud and securities law violations in sales of stock in Teachers-Professional Investment Co., Inc., and sales of "scholarships" in Professional Business University, Inc., a business school organized as a subsidiary of the former corporation. Four other defendants had previously entered pleas of guilty to certain counts of the indictment.

Purchasers of the investment company stock were told that their monies were to be used for loans to Texas school teachers, though not more than seven such loans were ever granted, with a large part of the $100,000 collected from this phase of the promotion being siphoned off to defendants by way of loans, commissions, expense accounts and salaries. In the prospectus prominent Texas educators were named as directors without their consent; a misleading balance sheet added to the lure of the prospectus. The sales of "scholarships" in the business school promotion were accomplished by blatant misrepresentation of the facilities available for the prospective students.

All six defendants were sentenced to five year prison terms. The trial judge indicated that he would consider probation for the four defendants who entered guilty pleas if restitution were accomplished.

Staff: United States Attorney William B. West III; Assistant United States Attorney William N. Hamilton (N.D. Texas).

NATIONAL STOLEN PROPERTY ACT
18 U.S.C. 2314

Meaning of Word "Stolen". Gideon Pelores Lyda v. United States (C.A. 5, decided June 15, 1960). Lyda and his co-defendant Malone were convicted of transporting stolen pecans in interstate commerce knowing them to have been stolen and conspiring so to do. They were sentenced to 10 years. Lyda appealed.

The record disclosed that Lyda, a truck driver, and Malone, who owned a tractor-trailer, operated as a free lance, unregulated interstate motor carrier, sharing profits from net freight charges after deducting operating expenses. Using a fictitious name, Lyda loaded a cargo of pecans at Natchitoches, La., consigned to Waycross, Ga., signed the shipping documents and departed. Sixty miles away, at Alexandria, La., Lyda telephoned Malone in Texas and they agreed to transport the pecans to Texas where they sold them for $10,000.

The basic issue raised on appeal was whether the word "stolen" as used in the statute (18 U.S.C. 2314) comprehends more than common law larceny. Lyda argued the misappropriation constituted embezzlement and not larceny. The Court stated that assuming there was no intent to appropriate the goods when initially received and that the intent to appropriate was subsequently formed at Alexandria, such embezzlement by one having lawful custody made the goods "stolen" at and before the interstate transportation to Texas. The opinion discusses numerous cases holding that "stolen" is not limited to common law larceny.

Staff: United States Attorney Russell B. Wine (W.D. Texas).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Crewman - acceptance as deportee by country of which he is not a national; Ling Ah Tay v. Esperdy, (S.D. N.Y., July 5, 1960).

Plaintiff, a native born Chinese and an adherent of the Republic of China, instituted a declaratory judgment action seeking to bar his deporation to the Netherlands on the grounds that such deportation is illegal unless that country furnishes a travel document showing that it is willing to accept him into its territory.

He entered this country in 1956 as a crewman on a Netherlands vessel and conceded his deportability for overstaying his period of admission. The Republic of China declined to accept him as a deportee to Taiwan. The Consul General of the Netherlands (N.Y.C.) informed the Service that Chinese deserters of Netherlands ships whose names appear on crew lists visaed by the Alien Department will be accepted in the Netherlands, and that the plaintiff was in that category. Under section 243(a)(7) of the 1952 Act (8 U.S.C. 1253(a)(7)) the Service designated the Netherlands as the country of deportation.

The court failed to see what more was necessary for the defendant to do in order to show "acceptability" which is all that he was required to do by statute (U.S. ex rel., Tie Sing Eng v. Murff, 165 F. Supp. 633 (S.D., N.Y., 1958), aff'd. 266 F. 2d 957, cert. den., 361 U.S. 840, rehearing den., 361 U.S. 904(1959)). The court added that what the Netherlands may do after accepting plaintiff is of no consequence under the statute and that there was no claim of persecution as defined under section 243(h), 1952 Act (8 U.S.C. 1253(h)).

Defendant's motion for summary judgment granted and temporary injunction vacated.

Habeas Corpus - review of refusal to grant discretionary relief from deportation; Mena y Campos de Jerez v. Esperdy, (C.A. 2, July 1, 1960).

Deportable alien appealed from dismissal of a writ of habeas corpus by which she sought relief from deportation by the grant of an advance waiver of excludability because of her 1958 conviction in New York City of a crime involving moral turpitude under section 5, Act of September 11, 1957 (8 U.S.C. 1182(b)).

The Court of Appeals held that the district court had correctly applied the law as enacted and that the relief sought was unavailable

since she was not an excludable alien seeking admission to the United States.

Dismissal of the writ affirmed.

Declaratory judgment - review of deportation proceedings for fairness, of denial of voluntary departure, and of fairness of immigration laws; scope of review; Prassinos v. District Director, (N.D. Ohio, June 6, 1960).

Plaintiff, an alien crewman, was removed from an out-bound ship by the Coast Guard for hospitalization in a U. S. Public Health Hospital, and was admitted under the immigration law as an alien crewman. On his discharge from the hospital arrangements were made for his departure from the United States on October 6, 1956 at his employer's expense but he absconded and remained at large until May 10, 1957.

In a deportation hearing on May 21, 1957 he was found deportable as having remained in the United States for a longer time than permitted under the law but, at his request, was granted the privilege of voluntary departure in lieu of deportation. Subsequently he was convicted of a violation of 8 U.S.C. 1282(c). This conviction was affirmed (257 F. 2d 64) and the Supreme Court denied certiorari (358 U.S. 925). In April 1959 he was paroled for deportation and again granted voluntary departure which he declined, claiming that he needed time to press a claim against a Chicago employee before the Illinois Industrial Commission. He was granted a stay of deportation (ultimately until September 1, 1959) for that purpose and he received an acceptable settlement of his claim.

On September 17, 1959 he surrendered for deportation but, a day prior to his scheduled departure, filed an application for a writ of habeas corpus in New York. That application was withdrawn and the plaintiff returned to the jurisdiction of the district court (Ohio) upon the order of the Court of Appeals (C.A. 6, October 21, 1959) temporarily staying the execution of the order of deportation, and directing a hearing on his petition for declaratory judgment in the Ohio district court.

Numerous issues (many of them ancillary) were raised by that petition which the court discussed at length. He could not comprehend plaintiff's claim that his flight suddenly transformed what would have been illegal without flight into a justifiable extension of the privilege of temporary entry. It was manifest to the court that Prassinos was ordered deported only after he was afforded all the safeguards in section 242 of the 1952 Act (8 U.S.C. 1252) and although he did not have counsel at that time, it was because he specifically indicated that he did not desire counsel. The court also pointed out that, while declaratory judgment is a proper method of seeking judicial review of a deportation order, the court has no authority to try the case de novo (citations).

A deportable alien has no right to voluntary departure, a discretionary form of relief, and the Special Inquiry Officer's order granting

it, in view of plaintiff's prior illegal flight, was an act of administrative largess. A second grant of that privilege plus a stay of deportation with two extensions led the court to conclude that he had been "most kindly treated."

The court summarily disposed of plaintiff's counsel's argument directed to the inherent unfairness of the immigration law by reminding him that such unsolicited and unwarranted attacks on duly enacted legislation have no proper place before a court of law, and that regardless of the equity of the law its "application in this case was over-abundantly fair."

Defendant's motion for summary judgment and dismissal of the action granted.

Declaratory judgment - proper party defendant; withholding of deportation; depositions; refugee-escapees; Dombrovskis et al. v. Esperdy (S.D. N.Y., June 29, 1960).

Plaintiffs, admittedly deportable as illegal alien crewmen, filed applications for adjustment of their status to that of permanent residents (Sec. 245, 1952 Act; 8 U.S.C. 1255). The applications were denied because of the unavailability of immigrant visas (plaintiffs' being nationals of Yugoslavia or Latvia whose quotas continue to be oversubscribed). Thereupon, they filed with the defendant for transmittal to the Office of Refugee and Migration Affairs (ORMA), Department of State, applications for the issuance of "refugee-escapee" visas under section 15, Act of September 11, 1957 (P.L. 85-316) - (50 U.S.C. App. 1971a (note)).

Because the regulation then in effect (8 CFR 245.1) provided that only a nonimmigrant who was admitted as a visitor or student would be eligible for a special visa under section 15 supra the defendant did not then transmit the applications to ORMA, but did so after the phrase "visitor or student" was deleted from the regulation on May 1, 1959. The applications of three of the plaintiffs were granted by ORMA and the others were denied.

Declaratory judgment action was instituted to establish that defendant's denial of the plaintiffs' right to apply for refugee-escapee visas was illegal and unconstitutional. Their motion for an injunction staying deportation pendente lite was granted on consent of defendant.

The court held that the defendant has no power to issue "refugee-escapee" visas - that is in the hands of the Department of State - and, instead of attacking the State Department's refusal of the visas directly, the plaintiffs ask for a declaration that certain alleged action of the Attorney General was the real basis for the State Department's refusal; that it is doubtful whether such a declaration made in a suit where the only party defendant is a subordinate of the Attorney General would bind the Attorney General, but it is certain that it would not bind the Secretary of State, and it would be a useless thing.

Plaintiffs further alleged that applications to withhold their deportation because they feared physical persecution (sec. 243(h), 1952 Act; 8 U.S.C. 1253(h)) were denied because they were crewmen and not on their merits, and offered to present evidence in support of that allegation if they were permitted to take the depositions of the defendant and other Service officials.

While the court found that the administrative records had a clear tendency to show that the applications were determined on their merits, because knowledge of the facts may be exclusively or largely under the control of the defendant and/or others associated with him, plaintiffs' cross-motion (Fed. R. Civ. P. 56(f)) to take such depositions was granted.

The court added that the sanction of the rule (Fed. R. Civ. P. 56(g) and 28 U.S.C. 1927) are available to defendant without assistance from the court, but whether they should be applied later (not being persuaded that they should be applied presently) must abide the event.

Constitutionality of deportation statute; alienage; res judicata; Wolf v. Boyd and Rogers, (W.D., Wash., June 1, 1960).

In 1951 petitioner, a native of Canada, was ordered deported on the grounds that, in 1938 and 1939, she was a member of an organization which advocated the overthrow of the Government of the United States by force and violence, and that after her entry into the United States she was an alien, who was, in 1938 and 1939, a member of the Communist Party of the United States. Following dismissal of her administrative appeals her case reached the Supreme Court on three occasions:

(1) Wolf v. Boyd, 215 F. 2d 377, cert. den., 348 U.S. 951 (1954);
(2) Wolf v. Boyd, 238 F. 2d 249, cert. den., 353 U.S. 936 (1956);
(3) Wolf v. Boyd, 253 F. 2d 141, cert. den., 357 U.S. 942 (1957).

Petitioners moved the district court for a Temporary Restraining Order against deportation and for convocation of a Three Judge Court pursuant to 28 U.S.C. 2282, 2284, to pass upon the constitutionality of 8 U.S.C. 1253(a)(7). She alleged that she is, by birth in Canada to a United States citizen mother, a citizen of the United States, and also that the respondent's intention to deport her to England, under the purported authority of 8 U.S.C. 1253(a)(7), is repugnant to the Constitution.

The court held that petitioner's claim to United States citizenship was put in issue, fully litigated, and disallowed in her third action to prevent her deportation (253 F. 2d 141 and 357 U.S. 942 (1957)) and further consideration of that claim is barred by reason of res judicata.

Since petitioner had presented no substantial Federal constitutional issue to warrant convocation of a Three Judge Court, or to grant injunctive relief restraining the enforcement, operation, or execution of the Act of Congress involved, respondents were entitled to judgment as a matter of law.

Respondent's motion for summary judgment granted and petitioner's motion for a stay of deportation pending appeal denied.

NATURALIZATION

Good moral character - crime committed while insane; Petition of Upham, (C.C. Clatsop Co. Ore., June 20, 1960).

Within the statutory period during which good moral character must be established (8 U.S.C. 1427) the petitioner killed her two children. A grand jury considered a first degree murder charge but declined to indict by reason of her insanity.

She was committed to a state hospital as afflicted with schizophrenic reaction and a year and nine months later was discharged and released from parole as competent. Six months later she filed a petition for naturalization.

The court held that acts committed by one who is insane and not capable of exercising judgment cannot be used to show that the petitioner lacks good moral character.

Petition granted.

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Taxation, Immunity of Federal Property from Local Levy; Estoppel Against the United States; Standing to Sue. United States v. County of Lawrence, et al., C.A. 3, No. 13058, July 1, 1960. This suit was instituted by the United States to remove outstanding tax liens imposed upon real property of the United States by local taxing authorities for the year 1954. The property involved was an industrial plant, formerly owned by the Reconstruction Finance Corporation, but declared surplus and transferred to the War Assets Administration in 1947. In 1950 a quitclaim deed was executed by the RFC to the United States. Prior to 1954 the plant was leased to a private lessee who was required to pay all taxes. The RFC Act provided that property in the hands of the RFC was subject to local taxation. Following the decision in Board of County Commissioners of Sedgewick County v. United States, 105 F. Supp. 955 (C.Cls. 1952), the tax provision was stricken from the lease, and the 1954 taxes were not paid. Subsequent legislation removed the taxes for the following years from issue. While suit was pending in the district court, the United States conveyed away the property by deed without warranty, while simultaneously executing a side agreement obligating the United States to remove the tax liens or assume liability therefor.

On this statement of the facts the district court dismissed the Government's complaint on the grounds that the Sedgewick County case was distinguishable on the facts; the Government's tax immunity had been waived; the Government was estopped from claiming its sovereign immunity; and that it had no justiciable interest in the property. 173 F. Supp. 307 (Pa. 1959). The court of appeals reversed the district court on each of these grounds, relying primarily on the recent opinion in Rohr Aircraft Corp. v. County of San Diego, 28 Law Week 4331, decided by the Supreme Court, May 23, 1960. On facts identical to those herein save that title had not passed to the United States from the RFC, the court upheld the tax immunity of the plant involved. The fact that the property was leased for private purposes had no effect on the tax immunity. The court clearly distinguished the instant case from the so-called "Michigan cases" on the ground that in none of those cases was there a tax on federal property, but it was on the user thereof. Prior waiver of immunity furnished no basis for estopping the Government from later claiming its immunity, since the activities involved were governmental in nature. Finally, although the deed conveying the property from the United States was without warranty, the court held that the side agreement was tantamount to a warranty to remove the tax liens.

Staff: Robert S. Griswold, Jr. (Lands Division)

Suits Against the United States; Jurisdiction Under the Declaratory Judgment Act and the Tucker Act; Judicial Review of Administrative Action. Wells v. United States, C.A. 9, No. 16660, July 1, 1960. This was an

action seeking an injunction and declaratory judgment determinative of plaintiff's rights under the Atomic Energy Community Act of 1955, as amended, 69 Stat. 47, which provides for disposal of AEC property and for "improvement credits" to be deducted from the purchase price under certain circumstances. Plaintiff claimed improvement credits greater than those allowed by administrative decision based on a hearing before the AEC. He instituted this suit against the United States alleging jurisdiction in the district court under the Declaratory Judgment Act and the Tucker Act. The action was dismissed because it was an action against the United States to which it had not consented. The judgment was affirmed on appeal, the court holding that the Declaratory Judgment Act "does not of itself create jurisdiction; it merely adds an additional remedy," where the district court already has jurisdiction. The Tucker Act "does not give consent to suits where only declaratory or other equitable relief is sought." Finally, the court held that the favorable terms of purchase were a "bounty" and Congress could limit the remedy thereon as it saw fit. Since there was no provision in the Act for judicial review, the hearing before the Commission had exhausted plaintiff's remedies.

Staff: Robert S. Griswold, Jr. (Lands Division)

Mineral Leasing Act of 1920; Executive Petroleum Withdrawal of Land Within an Executive Order Indian Reservation; Effect of Congressional Withdrawal of Public Lands on Applications to Lease Such Lands Under Mineral Leasing Act; Secretary of the Interior's Discretion to Determine What Public Lands to Lease Under Mineral Leasing Act. Haley v. Seaton, C.A. D.C., June 23, 1960. Appellant's applications for noncompetitive oil and gas leases under Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. sec. 226, were rejected by the Salt Lake City Land Office because the land applied for lies within the exterior boundaries of the Navajo Indian Reservation. Indian land cannot be leased under the Mineral Leasing Act. The Director of the Bureau of Land Management affirmed the rejections on the ground that, even if the land when applied for had been public land, it had been withdrawn for Indian use by the Act of September 2, 1958, 72 Stat. 1685. After the Assistant Secretary of the Interior approved this decision, appellant sued the Secretary in the District Court for the District of Columbia, seeking relief in the nature of mandamus to compel the Secretary to issue him the oil and gas leases. The District Court granted summary judgment for the Secretary and dismissed the action.

Appellant first argued that the land he had applied for was public rather than Indian land, having been impliedly taken out of the Navajo Reservation, an executive order reservation, by executive orders making the land part of a petroleum reserve, and having then become part of the public domain again when the petroleum reserve was dissolved. The supporting argument: The President can withdraw for petroleum reserves only public land; Indian land is not public land; we cannot impute an illegal action to the President; therefore, the President must have impliedly revoked so much of the Indian reservation as was named in his petroleum withdrawal. The Court refused to find any revocation by

implication, pointing out that doubtful expressions are to be resolved in favor of the Government's Indian wards. It held instead that the description of some Indian lands within the petroleum withdrawals was more probably for the purpose of protecting small pockets of public land which actually lay within the reservation.

Appellant further argued that his applications gave him a "valid existing right" within the meaning of the saving clause of the 1958 Act, and that the Secretary had a ministerial duty to issue the leases upon application, any discretion he may have had earlier having been destroyed by a 1946 amendment of Section 17 of the Mineral Leasing Act. Assuming without conceding that the land in question was public land when applied for, the Court held that the applications had given appellant no vested right against the United States because the Secretary did have discretion to reject them. Tracing the history of Section 17, the Court notes that the kind of lease appellant sought was originally available under Section 13 as a permit for prospecting in wildcat territory and that the language of old Section 13 had been considered permissive rather than mandatory. In 1935, Congress moved the provisions for exploration of wildcat territory from Section 13 to Section 17, eliminating prospecting permits and making leases the ordinary mode of opening public land to oil and gas exploration. Only those who had applied for prospecting permits more than 90 days prior to this amendment could get them; the Secretary was "directed" to issue permits only to such applicants. As to all others, the wording of Section 17--"All lands subject to disposition under this Act * * * may be leased by the Secretary of the Interior"--is plainly permissive rather than mandatory. It had been so construed before the 1946 amendment, and since that amendment had not changed this crucial language, the Court concluded that the amendment had not limited the Secretary's discretion as to what land is to be leased under the Act. Since the Secretary had not determined to lease this land under the Mineral Leasing Act (he had decided to lease it under statutes permitting mineral leasing of Indian lands), and since the Secretary had not accepted appellant's offers to lease, Congress, under its Constitutional power to dispose of and make all needful rules and regulations respecting the public lands, U.S. Const., Art. 4, Sec. 3, Cl. 2, could withdraw the lands and place them in the Navajo Reservation.

Staff: Hugh Nugent (Lands Division)

Administrative Law; Eminent Domain; Validity of Mining Claims. Humboldt Placer Mining Company v. Raymond R. Best (N.D. Cal., June 21, 1960). In the military program, it is often necessary to make use of some of the vast stretches of public domain land in the Western States. In such instances, authority for any particular agency to utilize public lands can be directed by executive order. However, such orders are made subject to existing rights of individuals arising under the mineral laws of the United States.

In some areas, public land may be dotted with mining claims, the validity of which has never been determined because they have never been the subject of a patent application. A valid mining claim constitutes a property right for which compensation must be paid, but an invalid claim, i.e., one not based on a valid discovery of minerals, creates no rights in the locator against the United States. In situations wherein it is necessary to obtain immediate possession of mining locations on the public domain the United States files a condemnation suit naming the mineral locators as parties. Thereafter, because the Department of the Interior has a specialized procedure for determining the validity of mining claims, contests are instituted in the Department of the Interior covering all of the doubtful claims located in the required areas. Upon a finding by the Department of the Interior that the claim is valid, the condemnation court determines just compensation. Upon a finding of invalidity by the Department of the Interior, the claim is dismissed from the condemnation case.

In this particular instance, the owner of a mining claim that had been included in a condemnation action instituted an injunction proceeding in the same United States District Court against representatives of the Department of the Interior to enjoin further hearings in that Department. This action was based on the claim that the ordinary jurisdiction of the Department of the Interior was lost when the condemnation complaint was filed, i.e., that the condemnation court had exclusive jurisdiction to determine any title issue. The court held, however, that in this situation, the condemnation court and the Department of the Interior exercise a concurrent jurisdiction--and that a condemnation court may properly defer to the jurisdiction of an administrative tribunal having special knowledge of the subject. The court said that "where a court has jurisdiction of an entire controversy, it may wait until a court or tribunal of more limited jurisdiction adjudicates the issues peculiarly within its competency, and then give binding effect to the decision of such court or tribunal," citing United States v. Eisenbeis, 112 Fed. 190, and United States v. Adamant Co., 197 F. 2d 1 (C.A. 9, 1952). The court's action insures the continued availability of a procedure which relieves a condemnation court of the necessity of holding hearings more particularly suited to an administrative tribunal.

Staff: United States Attorney Laurence E. Dayton and Assistant United States Attorney Charles R. Renda (N.D. Cal.)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decisions

Estate Tax - Proceeds of Insurance on Life of Decedent - Constitutionality of Premium Payment Test. United States v. Manufacturers National Bank of Detroit (Sup. Ct., June 13, 1960). In this decision, the Supreme Court sustained the constitutionality of Section 811(g)(2)(A) of the 1939 Internal Revenue Code which requires inclusion in decedent's gross estate of proceeds of insurance on his life where he paid the premiums even though retaining none of the incidents of ownership of the policies. The Court held that the tax was not a direct tax on the proceeds which would require apportionment, but it was a transfer tax which is constitutional without apportionment. In this connection, the Court held that the tax was laid on the ripening at death of rights paid for by the decedent, and such ripening was the crucial last step in what Congress could reasonably treat as a testamentary disposition in favor of the beneficiaries. The Court noted that the taxable event--maturity of the policies at death--occurred long after the enactment of the statute, and that the premiums in question were paid after fair notice of the likely tax consequences; and in the circumstances the Court held that the tax was not retroactive in its impact nor offensive to due process.

In reaching its decision, the Court approved cases such as Estate of Loeb v. Commissioner, 261 F. 2d 232 (C.A. 2d), and Schwarz v. United States, 170 F. Supp. 2 (E. D. La.), where the tax was sustained; and disapproved Kohl v. United States, 226 F. 2d 381 (C.A. 7th), where the tax was held to be unconstitutional.

While it is true that the present estate tax provision (Section 2042 of the Internal Revenue Code of 1954) eliminates the premium-payment test, the change operates prospectively only with respect to estates of decedents dying after August 16, 1954; and a substantial number of cases which arose under the old law will be affected by the instant decision. The instant decision will also be useful in the administration of the estate tax generally since it clarifies fundamental principles and holds that there does not have to be a transfer from the decedent at death in a strict sense in order to justify the estate tax.

Staff: Robert Kramer, Assistant Attorney General, Office of Legal Counsel; Harry Baum and L. W. Post, Tax Division.

Percentage depletion - gross income from mining measured by value of crude fire clay and shale rather than finished sewer pipe. United States v. Cannelton Sewer Pipe Co. (Sup. Ct., decided June 27, 1960).

Under Section 114(b)(4) of the Internal Revenue Code of 1939 percentage depletion is allowed in the case of certain named minerals, to be computed as a percentage of the taxpayer's "gross income from mining." The controversy in that connection has centered around the definition of "mining" as including "the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products." Prior to the instant case, the Government had lost a series of cases in which the courts held that integrated miner-manufacturers are entitled to depletion on the sales price of their finished products.

Such was the holding of the Seventh Circuit in this case (268 F. 2d 334), where the taxpayer manufactured sewer pipe from the fire clay and shale which it mined. The Supreme Court held that, since fire clay and shale are sold in crude form by non-integrated operators, the taxpayer's depletion allowance should be based on the value of the crude clay and shale, stating that "the miner-manufacturer is but selling to himself the crude mineral that he mines, insofar as the depletion allowance is concerned." Rejecting the reasoning of the Seventh Circuit that the taxpayer was entitled to deplete its finished products because it could not sell the crude mineral at a profit, the Supreme Court stated that the taxpayer's argument lead to the conclusion that the clay and shale had no value in the ground and "one cannot deplete nothing." Justice Harlan concurred in a separate opinion; there were no dissents.

The Cannelton decision establishes the principles to be applied in this area, in which the Department has over 100 pending cases.

Staff: Ralph S. Spritzer, Assistant to the Solicitor General; Melva M. Graney, James P. Turner, Tax Division

Claim for Refund, Jurisdiction of, Where Advance Deposit is Made in Absence of Deficiency Assessment. Farnsworth & Chambers Co., Inc. v. Phinney, D.I.R. (C.A. 5th), decided June 15, 1960. Because of the pendency of criminal indictments against four corporate officers, alleging that they had wilfully attempted to evade substantial income taxes of the corporation, issuance of 30-day and 90-day letters was deferred. Taxpayer's attorneys, anxious to dispose of the civil phase of the matter, learned from Service officials that the tax deficiencies set up in the agents' reports totalled some $2,100,000. The Director refused to accept payment of the tax as such, but did accept and negotiate a check for $2,770,966.75, representing an advance deposit in the amount of the tax plus interest, in order to stop the further accrual of interest. The taxpayer immediately filed claims for refund (Form 843), and the Director advised it by letter that there was no basis for considering the claims--since no assessment had been made--but that the advance deposit would be returned upon receipt of a written request from the taxpayer. The taxpayer made no such request, but sued for refund in the District Court under Section 7422 of the Internal Revenue Code of 1954. Judge Ingraham dismissed the suit for lack of jurisdiction.

The taxpayer argued on appeal that it had met all the statutory requirements to maintain the suit; that the amount "paid" was the amount "claimed" by the Government as owing; that the lack of an assessment was not fatal; and that the "collection" of the $2,770,966.75 by the Director conferred jurisdiction. The taxpayer levelled an attack against the Department's long-standing policy against negotiating or litigating the civil aspects of a tax while a criminal prosecution is pending. The Government argued that the District Court was right in granting the motion to dismiss because there had been no tax "assessed or collected" within the meaning of Section 7422, or "paid" within the meaning of Section 6511(a); that the language of Section 7422(a) presupposes that there has been some administrative action or determination, which is alleged to be erroneous or illegal, in the assessment or collection of the tax; and that here no cause of action has accrued because the Director has not acted. Rosenman v. United States, 323 U.S. 658 and Thomas v. Mercantile Nat. Bank at Dallas, 204 F. 2d 943 (C.A. 5th). The Court of Appeals affirmed, holding that no tax liability had been determined, assessed, or collected; and that the advance deposit was accepted by the Director only as a means of suspending further accrual of interest, rather than a payment "in satisfaction of any assessed or otherwise determined tax liability."

Staff: I. Henry Kutz, Richard B. Buhrman (Tax Division)

District Court Decisions

Liens; Foreclosure Against Cash Surrender Value of Insurance Policies; Beneficiary Is An Indispensable Party. United States v. Solomon Fried and New York Life Insurance Company. (E.D. N.Y.) The United States filed a complaint against the taxpayer seeking a money judgment for unpaid income taxes. The complaint also joined a life insurance company as a co-defendant for the purpose of foreclosing federal tax liens against the cash surrender value of certain insurance policies under which the taxpayer was the assured and in which his wife had been named a beneficiary. The policies reserved to the taxpayer-assured the right to change the beneficiary. The taxpayer moved to dismiss the complaint on the ground that his wife was an indispensable party because she was the beneficiary and had not been joined as a party defendant. The question presented was whether she was an indispensable party. The Government contended that since her rights could be divested at the whim of the taxpayer-assured, she was, at most, a contingent beneficiary. The court held, however, that until the assured actually divested her of her property rights in accordance with the terms of the contract, her rights were vested and could not be summarily disposed of citing, United States v. Metropolitan Life Insurance Co., 41 F. Supp. 91.

Relying upon the leading Supreme Court case of Shields v. Barrow, 17 How. 129, the Court ruled that the taxpayer's wife was an indispensable party, pointing out, however, that since the Federal Rules permitted

parties to be added or dropped at any stage of a proceeding (Fed. Rule 21), the Government should be afforded a reasonable opportunity to join the wife as a party-defendant, on default of which the complaint would be dismissed.

Staff: United States Attorney Cornelius Wickersham and Assistant United States Attorney Elliott Kahaner Clarence J. Nickman (Tax Division)

Issuance of Statutory Notice of Deficiency Enjoined; Determination of a Proposed Deficiency in Income Taxes by the Use of the Bank Deposits Method of Reconstructing Income was Enjoined on the Ground that this Method was Inequitable and Unjust. M. F. Guetersloh, et al. v. Ellis Campbell, Jr., Dis. Dir. 60-1 U.S.T.C. 9466 (N.D. Tex.)

Taxpayers brought this action against the Director praying that the Court permanently enjoin the issuance of a statutory notice of deficiency (90-day letter) on the grounds that the bank deposits method of reconstructing income when applied to their situation was grossly unjust because it took the Revenue Service 8 years to complete the audit investigation and the Service had represented that the net worth method would be used. Taxpayers also contended that the Tax Court would have no jurisdiction to set aside the bank deposits method or hear evidence which taxpayers felt indicated highly irregular conduct by the Revenue Service.

The taxpayers are brothers who during the tax years had engaged in numerous businesses related to farming. They maintained numerous bank accounts which had a great volume of activity. They testified that much of the activity in their bank accounts reflected the repayment of loans which was not properly taxable as income. They complained that to come forward after eight years and maintain that unexplained deposits represented income placed a tremendous burden which they could not meet. They also argued that certain records of Anderson-Clayton, a cotton brokerage firm with whom they had done business were transcribed by the Revenue Service but that the Revenue Service had not required this company to preserve the records which have now been destroyed.

The taxpayers also testified that they could not raise sufficient funds to ever pay the proposed taxes and bring an action for refund.

In granting an injunction against the Director from issuing a notice of deficiency where the bank deposits method was employed, the Court stated that it was unjust after the investigation had been under way for six years and representations had been made that a net worth method would be utilized for the Revenue Service to come forward and employ the bank deposits method for the first time. The Court pointed out that the taxpayers could not possibly recall the transactions which made up a particular deposit slip which under the Government theory if unexplained would be treated as income. It appears that the Court was also influenced by the loss of certain books by the Revenue Service

relative to one of the tax years and the taxpayers' inability to pay the proposed deficiencies. However, the Court left the door open to the Director to issue a notice of deficiency which was not based upon the bank deposits method of reconstructing income. The case is currently on appeal to the Fifth Circuit.

Staff: United States Attorney William B. West, III, Assistant United States Attorneys William N. Hamilton and William E. Smith (N.D. Texas); and Stanley F. Krysa (Tax Division)

Claims in Bankruptcy Under Section 3710, Internal Revenue Code of 1939, are not Classifiable as Penalties so as to be Barred from Collection in Bankruptcy Under Section 57j, Bankruptcy Act, As Amended. In the Matter of Cal-Neva Lodge, Inc., a Nevada Corporation, in Bankruptcy. Decision by the United States District Court, District of Nevada, Rendered on June 27, 1960. The United States made a levy against Cal-Neva Lodge, Inc., under Section 3692, Internal Revenue Code of 1939, on account of a mortgage indebtedness of Cal-Neva to one Elmer F. Remmer and wife upon which mortgage there was a balance due of about $198,000, Remmer being indebted to the United States for income taxes of over $800,000.

Cal-Neva refused to honor the levy and thereafter the Remmers sold the note and mortgage to Park Lake Enterprises, Inc. Cal-Neva was later adjudicated bankrupt and the United States filed a claim in the bankruptcy proceeding for the statutory liability of Cal-Neva under Section 3710, Internal Revenue Code of 1939, which provides that where one holds rights to property subject to distraint and refuses to honor a distraint, such party is liable to the United States for a sum equal to the value of the rights so held but not exceeding the amount of the tax.

The referee denied the claim of the United States on the ground that it was a penalty and not allowable under Section 57j, Bankruptcy Act, as amended, and for the further reason that the United States was obliged to first exhaust its rights against Park Lake before proceeding in bankruptcy.

The District Court reversed the referee and held that the claim was not a penalty but was for a statutory liability and pointed out that the liability was limited to the value of the rights which the bankrupt held against the taxpayer. The court further held that the levy was effectual and that the rights of the United States under Section 3710 were cumulative and in addition to other remedies which the United States was given to proceed against Park Lake.

Staff: Howard W. Babcock, United States Attorney, Herbert F. Ahlswede, Assistant United States Attorney, Homer R. Miller (Tax Division), D.C. Nevada.

CRIMINAL TAX MATTERS
Appellate Decision

Excessive Participation in Trial by District Judge. United States v. Curcio and Baker (C. A. 2d), decided June 6, 1960. Appellants were convicted of making false statements in a matter within the jurisdiction of the Internal Revenue Service (18 U.S.C. 1001) and of conspiring to obstruct justice by impeding a grand jury investigation (18 U.S.C. 1503). On appeal they contended that they had been deprived of a fair trial by the District Court's "inordinate and excessive" participation in the examination and cross-examination of the witnesses. They urged that the judge examined the Government's key witness extensively in a manner that clearly told the jury he believed her testimony; and, conversely, interrogated the key defense witness at length in a sarcastic manner suggesting that his testimony was unworthy of belief. Appellants relied upon United States v. Marzano, 149 F. 2d 923, 926 (C.A. 2d); Hunter v. United States, 62 F. 2d 217, 220 (C.A. 5th); and United States v. Brandt, 196 F. 2d 653, 655 (C.A. 2d). The Court of Appeals, presumably having reviewed the record in the light of this contention, affirmed the conviction, but with the following admonition:

> The only matter which gives us pause is the trial judge's persistent examination of witnesses and his interference in the conduct of the case to an extent greater than seems desirable to assure the wholly impartial administration of justice. It is one of the glories of federal criminal law administration that a district judge is more than a moderator or umpire and has an active responsibility to see that a criminal trial is fairly conducted. Hence he will often have a duty to participate actively to that end; but he must not interfere for a merely partisan purpose or permit even the appearance of such an interference.* * * There were occasions here where the judge came close to error, and we are constrained to say that it would have been the part of wisdom for him to have refrained from such active participation. Yet he constantly admonished the jury of their final responsibility and did this again explicitly in the course of a fair charge. Under all the circumstances we do not think the accused were deprived of a fair trial. United States v. DeFillo, 2 Cir., 257 F. 2d 835, 839, certiorari denied 359 U.S. 915; United States v. Brandt, 2 Cir., 196 F. 2d 653, 655.

Staff: United States Attorney S. Hazard Gillespie, Jr.; Assistant United States Attorneys Stephen E. Kaufman and David R. Hyde (S.D. N.Y.)

District Court Decision

Tax Offenses--Sentencing Policy--Deterrent Effect. United States v. James O. McCue, Jr. (D.C. Conn., June 8, 1960). Defendant was convicted of making oral false statements to a Special Agent during an investigation of his corporate and personal income tax liabilities. In

imposing a sentence of one year imprisonment (to be suspended after service of 4 months), fines totalling $10,000 and costs totalling $5,314.50, the Court stated as follows:

> Of course, the handling of the matter of punishment in a case of this sort is probably the most difficult thing that the Court has to do, because I am perfectly well satisfied that this defendant would probably never repeat this particular offense and would probably commit no other, from his good record, good standing in the community and holding a responsible position. But of course Congress has fixed punishment for this kind of offense. And the reason punishment has to be imposed is not so much for the reform or rehabilitation of the defendant but as a matter of public example and for the deterrent effect in an area where unfortunately there are probably a great many breaches of the law.

Staff: Eldon F. Hawley and John P. Burke (Tax Division)

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