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BULLETIN

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LAW BOOKS AND CONTINUATION SERVICES

The Supplies and Printing Section of the Administrative Division automatically orders continuation services and pocket parts for existing sets of books in United States Attorneys' offices.

Any books and/or continuation services no longer required should be reported to the Supplies and Printing Section, Department of Justice, Washington 25, D.C., not later than June 15, 1960, so that arrangements may be made to cancel the service, transfer the books and services to a place needed, or other disposition made.

JOB WELL DONE

United States Attorney Francisco A. Gil, Jr., District of Puerto Rico, has been commended by the Assistant Attorney General, Criminal Division, for his cooperation with the personnel of that Division, and for the efficient manner in which a recent prosecution under the Labor Management Reporting and Disclosure Act of 1959 was successfully concluded. The case was the first criminal prosecution brought under this Act.

The FBI Special Agent in Charge has commended Assistant United States Attorneys Morton J. Schlossberg and James M. Catterson, Jr., Eastern District of New York, on the successful conclusion of a recent bank robbery case. The Special Agent stated that Mr. Catterson's adroit handling of the Government's witnesses, and his logical presentation of the facts unquestionably played a large role in the successful outcome of the case. He further observed that Mr. Catterson's quick analysis of the tactics employed by the defense and his development of an effective trial strategy were most commendable and that such strategy had a very favorable effect on the jury, as evidenced by the relatively short period of deliberation before a verdict on all counts was delivered.

Assistant United States Attorney Donald F. Welday, Jr., Eastern District of Michigan, has been commended by the Commissioner and the District Supervisor, Bureau of Narcotics, on his handling of a recent case in which the defendant was convicted on all counts. The District Supervisor stated that the evidence in the case was admittedly somewhat weak but that he had never witnessed a case more ably prosecuted; that it was Mr. Welday's masterful handling of a very poor witness that undoubtedly secured a conviction; and that Mr. Welday has consistently contributed in a major way to the narcotics enforcement program in Detroit. The Commissioner extended to both Mr. Welday and United States Attorney Frederick W. Kaess congratulations and sincere appreciation for the splendid cooperation extended to the Bureau of Narcotics.

United States Attorney Donald G. Brotzman and his staff, District of Colorado, have been commended by the Regional Attorney, Department of Agriculture, on their efficient handling of a recent criminal case in which a conviction was obtained.

The Vice President of a local bank has extended congratulations to United States Attorney Kenneth C. Raub, Northern District of Indiana, for the part he played in obtaining a conviction in a recent case involving the transmittal of pornographic material through the mails. The Vice President offered sincere thanks, as a parent, for Mr. Raub's work in this case which was particularly offensive as it involved teen-age girls.

The Chairman, Federal Trade Commission, has expressed the Commission's appreciation of the diligent efforts made by Assistant United States Attorney Robert N. Johnson, Northern District of Illinois, in the conduct of a recent case which involved refusal to testify in obedience to a Commission subpoena. The Chairman stated that the Commission was very satisfied with the result of this litigation in support of its investigatory powers. This is believed to be the first successful criminal prosecution for failure to give testimony at hearings before a federal regulatory agency in response to a subpoena.

In August 1959, a federal grand jury indicted six individuals for violations of the federal narcotic laws. As a result of the capable work of United States Attorney Thomas R. Ethridge and Assistant United States Attorneys Guy N. Rogers and Lowell E. Grisham, Northern District of Mississippi, all six of the individuals have been convicted and sentenced to prison terms of from five to ten years.

The United States Marshal has commended Administrative Officer Wayne L. Thomas, Southern District of California, for his unstinting cooperation and for his exemplary response to requests for service or aid of any kind.

The Chief Postal Inspector has commended Assistant United States Attorney John W. Stokes, Jr., Northern District of Georgia, for his fine work in obtaining a recent indictment for mail fraud and conspiracy against twenty-four defendants. The letter stated that when advised of the indictment, the Postmaster General cited this case as a splendid example of the results obtainable through the coordinated efforts of United States Attorneys and Postal Inspectors. The letter further observed that Mr. Stokes not only worked in complete harmony with the Assistant Postal Inspector in Charge, but gave competent counseling and invaluable advice in the investigation of the case.

The District Director, Internal Revenue Service, has congratulated Assistant United States Attorney Andrew A. Caffrey, District of Massachusetts, on his very efficient processing of a recent case in which the Government is to receive $100,000 of a $160,000 cash seizure made by Massachusetts State Police.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

UNEMPLOYMENT COMPENSATION FORMS SF-8 AND ES-931

Before issuing Form SF-8, the following instructions should be followed:

> "On the reverse of the SF-8 under Item 2, the final sentence --'The Federal law further provides that you will not be eligible for benefits until the period covered by your lump-sum payment for terminal annual leave has expired.'-- should be blocked out or lined through as it is no longer applicable. Also, in Item 3 on the front of the SF-8 the words 'in the last 30 months' should be deleted."

Form SF-8 will be revised by the Federal Supply Service and made available as soon as possible.

Form ES-931 has also been amended to provide additional information under Items 2 and 3. Pending revision of this form, State agencies which will immediately need the additional information included in the revision will attach a supplement to their present Form ES-931.

EXPENSES OF MENTAL EXAMINATIONS BY HOSPITALS AND PSYCHIATRISTS

In recent months there has been an increasing tendency of the courts to commit to hospitals for mental evaluations or physical examinations persons accused of violating federal laws. In some instances, the period of commitment has been allowed to continue well past the time stipulated in the court order. United States Attorneys should confer with the judges in their districts and bring to their attention this increasing trend and the greatly increasing costs which are the consequence thereof.

A number of hospitals should be contacted to establish a panel of hospitals. A panel of psychiatrists should also be established, and efforts made to arrange a schedule of reasonable rates with hospitals as well as with the psychiatrists.

In some instances satisfactory mental and physical examinations are made on an out-patient basis at greatly reduced costs. Such arrangements should be considered in each case, if satisfactory to the court.

United States Attorneys should periodically follow up on the commitment of persons to hospitals for mental examination or observation to insure that the commitment period provided in the court order will not be exceeded. Such follow-ups will also serve as a reminder to hospitals in those instances in which periodic reports are required concerning the progress of the examination, or whether improvement in the mental

condition of the patient is indicated.

United States Marshals can help substantially by bringing to the attention of United States Attorneys those instances of prolonged hospital commitments coming to their attention.

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ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment Denied; Judgment for Defendant Granted on Merits and Complaint Dismissed. United States v. The United States Trotting Association, (S.D. Ohio). This action was commenced on March 4, 1958, by the filing of a complaint to prevent and restrain continuing violations of Section 1 of the Sherman Act.

On February 27, 1959 the Government filed a motion for summary judgment and on June 10, 1959, the defendant filed a cross motion for summary judgment. The Government limited its motion for summary judgment to certain specified rules and regulations which it challenged as unlawful per se, under Section 1 of the Sherman Act, contending that such rules and regulations constituted concerted refusals to deal or agreements to boycott. Both parties stipulated "that this action may be decided upon the record facts, and that neither party desires to present any further facts".

The Court, in a 5-page decision, relying upon United States v. Insurance Board of Cleveland, 144 F. Supp. 684 stated, in part:

> Defendant's rules and regulations, singled out by the Government's motion for summary judgment, insofar as they may be called group boycotts or concerted refusals to deal, are not such commercial boycotts as have been stricken down in previous cases as unlawful per se. The court is not unmindful of Klor's, Inc. v. Broadway-Hale Stores, Inc., et al., 359 U.S. 207. However, the court is of the opinion that Klor's is distinguishable upon its facts from the instance case in that it, too, dealt with such commercial boycotts.
>
> * * *
>
> Plaintiff has failed to establish that the main purpose of U.S.T.A. is an unlawful or hidden one different from its expressed purposes just mentioned. To determine whether the manner or means utilized by defendant to attain its main purposes are unlawful, the rule to be applied is whether the restraint imposed, if any, is such as 'merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.' Chicago Board of Trade v. United States, 246 U.S. 231, 238. The court cannot find upon this record that the activities of U.S.T.A. in maintaining and enforcing its Rules and Regulations are

unlawful as unreasonable and undue restraints upon competition in interstate commerce. . .

The Court without discussing the particular rules attacked in the complaint, found judgment for the defendant and against the plaintiff and dismissed the complaint.

Appeal is under consideration.

Staff: Henry M. Stuckey, Albert Parker and Eugene J. Metzger (Antitrust Division)

Court Holds Union in Violation of Sherman Act. United States v. Fish Smokers Trade Council, Inc., et al., (S.D. N.Y.). On April 22, 1960, Chief Judge Ryan handed down an opinion deciding this case in favor of the Government. The complaint charged violations of Section 1 of the Sherman Act and named as defendants six companies engaged in the sale and distribution of smoked fish, an association of these companies, Local 635 of the Fish, Sea Food, Smoked Fish and Canning Workers Union of Greater New York, and three individuals. All defendants except the Union and the individual defendants who were union officials had previously signed a consent judgment.

The complaint charged that the defendants and the co-conspirators, consisting of jobber members of the Union and officers and members of the Fish Smokers Council, engaged in an agreement to eliminate competition by allocating customers. The complaint further alleged concerted activity between the smokehouse employers and the Union to force independent jobbers to become members of the Union and action by the smokehouses in response to Union request to boycott jobbers who refused to join the Union or who refused to respect the allocation of customers. The principal issue involved was whether the jobbers were independent businessmen, as the Government maintained, and therefore not a proper subject of unionization with the consequence that the defendants' activities in forcing them into the Union and into an agreement to allocate their customers was in restraint of trade, or whether the jobbers were a legitimate labor group, as the defendants contended, whose activities were protected by the Clayton and the Norris-LaGuardia Acts. After an extensive review of the evidence the Court held that the jobbers were independent businessmen and not really a labor group, since the demands made by the Union on the employer smokehouses on behalf of the jobbers were "demands and requirements of independent businessmen having to do with extension of credit, price discrimination, and not with wages, working conditions, or hours of employees". Particularly, the Court went into the Union's attempt to have the smokehouses boycott those jobbers who were not respecting the agreement to allocate customers.

The Court concluded ". . . that the agreement among the Union, the smokehouses and the jobbers was solely to restrain competition among the jobbers and not to settle any labor dispute; that the agreement was successful in that it did restrain the trade and commerce in the sale, purchase

and distribution of smoked fish among the several states; that this was accomplished by allocating customers, by the 'no raiding' agreement, by cutting off the supply of fish to jobbers and their customers and consequently the public, if the jobbers did not refrain from competing; by calling a strike of the entire industry because of the smokehouses' reluctance to continue with the boycott agreement." The Court further held that the Union and the individual defendants could not successfully invoke the provisions of the Clayton and Norris-LaGuardia Acts, which contain exemptions from the antitrust laws relating to wages, hours, and working conditions. Accordingly, the Court found the defendants liable and directed that an appropriate judgment be submitted.

Staff: Walter W. K. Bennett, Francis E. Dugan, Agnes T. Leen and Donald S. Engel (Antitrust Division)

Indictments and Complaints Filed Under Section 1 of Sherman Act. United States v. Federal Pacific Electric Company, et al., (Cr. & Civ., E.D. Pa.), United States v. I-T-E Circuit Breaker Company, et al., (Cr. & Civ., E.D. Pa.), United States v. H. K. Porter Company, Inc., et al., (Cr. & Civ., E.D. Pa.). On May 19, 1960, the three above indictments and companion civil complaints were filed, as a further result of the continuing grand jury investigation of the electrical equipment industry. In the order listed above, these three pairs of cases involve, (1) power switching equipment, (2) navy and marine switchgear equipment, and (3) isolated phase buses. These are devices used in the generation and distribution of electricity. They are sold to various federal and local governmental authorities and to other consumers. Together, the sales of those products by defendants amount to about $50,000,000 per year.

Named as defendants in the power switching equipment indictment are:

Federal Pacific Electric Company, Newark, N. J.;
General Electric Company, New York, N.Y.; and
G. L. Roark, Manager, Marketing, High Voltage Switchgear Department;
I-T-E Circuit Breaker Company, Philadelphia, Pa.; and
H. K. Wilcox Division Manager, Greensburg Division;
Joslyn Mfg. and Supply Company, Chicago, Ill.;
H. K. Porter Company, Inc., Pittsburgh, Pa.; and
John Romano, General Sales Manager, Delta-Star Electric Division;
Schwager-Wood Corporation, Portland, Ore.; and
W. Maxwel Wood, Secretary-Treasurer;
Southern States Equipment Corporation, Hampton, Ga.; and
J. E. Cordell, Vice-President - Sales;
Westinghouse Electric Corporation, Pittsburgh, Pa.;
and W. T. Pyle, Sales Manager, Switchgear Devices Section, Assembled Switchgear and Devices Department.

This indictment charges that beginning at least as early as 1958, defendants engaged in a conspiracy to fix and maintain prices for power

switching equipment, to allocate among themselves the business of supplying such equipment to federal, state and local governmental agencies, to submit noncompetitive and rigged bids for supplying such equipment to those agencies and to submit collusive and rigged price quotations for such equipment to electrical utility companies and other purchasers; that defendants agreed that the United States would be divided into four geographical areas or "quadrants"; that each manufacturer would participate in the allocation of sealed bid business within a designated quadrant; and that one manufacturer and a representative thereof would act as chairman of each quadrant for the purpose of administering the allocation of sealed bids within such quadrant.

Named as defendants in the navy and marine switchgear indictment were:

I-T-E Circuit Breaker Company, Philadelphia, Pa.;
General Electric Company, New York, N.Y.; and
Westinghouse Electric Corporation, Pittsburgh, Pa.

This indictment charges a conspiracy to fix prices, allocate business and submit rigged bids for supplying navy and marine switchgear; that the price level to be charged for navy and marine switchgear would be raised; that the business of supplying navy switchgear would be allocated on the basis of 20% to General Electric, 30% to Westinghouse and 50% to the I-T-E Circuit Breaker Company; that the marine switchgear business would be allocated among the three companies on the basis of 40% to General Electric, 30% to Westinghouse and 30% to I-T-E; and that the three companies agreed to publish identical price lists as a basis for quoting to potential customers and would designate for each prospective order which of them would be the low bidder, the intermediate bidder and the high bidder, and the price range in which each bidder would quote.

Named as defendants in the indictment relating to isolated phase buses were:

H. K. Porter Company, Inc., Pittsburgh, Pa.;
General Electric Company, New York, N.Y.;
I-T-E Circuit Breaker Company, Philadelphia, Pa.; and
Westinghouse Electric Corporation, Pittsburgh, Pa.

According to this indictment, the defendants have conspired to fix substantially identical prices for isolated phase buses and to allocate bids to federal, state and local government agencies on the basis of 10% to H. K. Porter & Company, 42% to I-T-E Circuit Breaker Company and 48% to General Electric and Westinghouse, with the latter two companies then agreeing to divide their 48% share on the basis of 34% to General Electric and 14% to Westinghouse; and that defendants evolved a cyclic rotating formula under which one defendant would quote the low price, another would quote intermediate prices, and another would quote a high price, with these positions being periodically rotated among the defendants with the result that each defendant would submit the low quotation on every fourth customer.

This formula was calculated, according to the indictment, to establish a price spread that would be sufficiently narrow so as to eliminate price competition among the defendants but sufficiently wide to give an appearance of competition.

The effect of the alleged price-rigging, according to the indictments, was to raise, fix and maintain at high artificial levels prices of the electrical equipment involved; to restrain, suppress and eliminate price competition; to deprive government agencies and other consumers of the benefits of free competition, and to deny to public agencies the right to receive competitive sealed bids, and to force them to pay artificially established prices for various categories of electrical equipment.

Companion civil actions were also filed with respect to each product seeking injunctive relief against the various practices. These suits seek to require the companies to issue new price lists based upon costs independently arrived at, to submit affidavits of non-collusion with future bids to governmental agencies, and to prevent any communications among the companies respecting future prices and bids.

Staff: William L. Maher, Donald G. Balthis, John J. Hughes, Wharey M. Freeze, Morton M. Fine and Steward J. Miller (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEAL

AGRICULTURAL ADJUSTMENT ACT

Farmer's Subsequent Underproduction Does Not Offset Withdrawal from Storage of Excess Wheat for Purposes of Wheat Penalties. Calder, et al. v. United States (C.A. 10, April 8, 1960). In 1956 a wheat farmer overproduced wheat in violation of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C. 1281, et seq.), and filed a bond in the amount of the penalty, conditioned upon his storing of the excess wheat produced. In 1957 he removed 539 bushels from storage, but in 1958 he underplanted and underproduced in amounts more than sufficient to offset the amount withdrawn from storage.

The United States brought suit against the farmer and the sureties on the bond, alleging a breach of the conditions of the bond. Defendants denied a breach of the bond, pointing out that under applicable regulations, incorporated in the bond, farmers with a stored excess were "entitled to remove from storage without penalty any wheat so stored by them * * * to the extent of the normal production of the number of acres by which the acreage planted to wheat is less than the farm acreage allotment." 20 F.R. 9475, et seq., § 728.683(h).

The district court entered judgment for the United States. The Court of Appeals affirmed, holding "the plain meaning of the regulation is to offset only such underplanting and underproduction as occurred prior to the withdrawal, and appellant's was clearly subsequent to withdrawal." The farmer had also claimed that he was entitled to withdraw wheat from storage without penalty, under the terms of § 728.683(g), because he had suffered spoilage in 1957. The Court rejected this argument also, stating, "the plain meaning of the provision is that the spoiled wheat only may be withdrawn without penalty, and the wheat withdrawn by appellant was admittedly good wheat."

Staff: United States Attorney A. Pratt Kesler and Assistant United States Attorney Llewellyn O. Thomas (D. Utah)

FEDERAL TORT CLAIMS ACT

Suit Under Tort Claims Act for Automobile Collision; Assertion of Contractual Counterclaim. United States v. Springfield, et al.; United Transport, Inc. v. United States (C.A. 5, March 31, 1960). This case arose out of a highway accident in which an Army truck, driven by an employee of United Transport, Inc., ran across the center line of the highway and struck another vehicle, which was in turn struck by a closely

following vehicle. The injured persons and representatives of various decedents sued the United States under the Federal Tort Claims Act. The United States impleaded the contractor, United Transport, Inc., on the basis that its driver had negligently caused the accident. The contractor counterclaimed for approximately $5,400 which the United States owed it under the contract, but had withheld because of the damage done to its Army truck.

Plaintiff advanced the theory that the accident was attributable to a defect in a wheel of the Government truck which caused the truck to veer across the center lane. The manner in which this purportedly occurred would have caused severe jouncing of the truck with eyewitness observations completely negated. Nevertheless, the district court found that the accident had occurred because employees of the United States had negligently failed to discover the defect in the wheel of the truck. The court imposed $230,000 in damages on the United States and absolved the contractor of liability. It also ruled that the contractor's counterclaim, while valid if asserted in an original suit under the Tucker Act against the United States, could not be asserted as a counterclaim, whereby it constituted an unconsented suit against the United States.

The Court of Appeals, with one judge dissenting, held that the district court's findings of fact could not be said to be clearly erroneous, and it affirmed the finding of liability against the United States. It reversed the district court's ruling with respect to the counterclaim, agreeing with statements in United States v. Silverton, 200 F. 2d 824 (C.A. 1), and Thompson v. United States, 250 F. 2d 43 (C.A. 4) that, so long as the limitations of the Tucker Act were observed, the district court's jurisdiction might be invoked by way of counterclaim, as well as by an original suit.

Staff: United States Attorney Paul N. Brown and Special Assistant to the United States Attorney John L. Burke, Jr. (E.D. Tex.)

GOVERNMENT CONTRACTS

Question of Whether Additional Work Was Within Terms of Contract Held Issue of Law; Administrative Decision Rejected. Kayfield Construction Corp. v. United States (C.A. 2, May 5, 1960). Plaintiff brought suit under the Tucker Act, 28 U.S.C. 1346(a)(2), seeking $8,659.77 from the United States as the value of work done beyond the scope of a contract for repair work performed at the Brooklyn Navy Yard. Plaintiff's claim had earlier been rejected by the Navy contracting officer and by the Navy Contract Appeals Panel.

The district court denied plaintiff relief upon the ground that the question was one of fact, and that thus, pursuant to 41 U.S.C. 321, the administrative decision was final since it was not fraudulent, capricious, arbitrary, grossly erroneous or not supported by substantial evidence. The court determined also that, in any event, the work done was within the terms of the contract.

The Court of Appeals reversed with directions to enter judgment for the plaintiff. It ruled, first, that the question as to whether the work done was within the scope of the contract constituted an issue of law upon which the administrative decision was not final. The Court then ruled that the specifications of the contract did not impose on the contractor the additional work which had proven necessary.

Staff: United States Attorney Cornelius W. Wickersham, Jr. and Assistant United States Attorneys Elliott Kahaner and Malvern Hill, Jr. (E.D. N.Y.)

JURISDICTION

Suit in District Court to Enjoin Enforcement of Import Duty as Unconstitutional; Customs Court Held to Have Exclusive Jurisdiction; Three-Judge Court Not Required to be Convened. Eastern States Petroleum Corp. v. William P. Rogers, Attorney General, et al. (C.A. D.C., May 12, 1960). Appellant, a fuel importer, brought suit in the district court to enjoin the Attorney General, the Secretary of the Treasury, and their subordinates from enforcing an import duty through proceedings in the customs courts. The complaint alleged that, as a result of unfavorable decisions in two companion cases in the customs courts, appellant's opportunity to obtain recognition of its constitutional rights in the customs courts had become so "hazardous" and "onerous" that it constituted an inadequate remedy, and that appellant was therefore entitled to have its grievance heard in a district court with authority to enjoin administrative officials. Appellant also asserted that it was entitled to have its constitutional claims adjudicated in an Article III court. Appellant requested that a three-judge court be convened, pursuant to the provisions of 28 U.S.C. 2282.

The district court, sitting alone, dismissed the complaint for lack of jurisdiction. Appellant thereupon applied to the Chief Judge of the Circuit for an order designating two additional judges to complete a three-judge district court. This motion was denied. 265 F. 2d 593. Appellant then sought review of the district court's ruling by direct appeal to the Supreme Court, and moved for leave to file a petition for a writ of mandamus against the District Judge and the Chief Judge of the Circuit. The Supreme Court dismissed the appeal, 361 U.S. 7, and denied the motion, 361 U.S. 805. Appellant thereupon prosecuted the instant appeal from the dismissal below.

The Court of Appeals affirmed. It held that Congress, in 28 U.S.C. 1583, had expressly stipulated that the Customs Court had "exclusive jurisdiction to review on protest the decisions of any collector of customs * * *." And Congress had also expressly excepted from the jurisdiction of the district courts "matters within the jurisdiction of the Customs Court." 28 U.S.C. 1340. The injection of constitutional issues into the controversy did not militate against the exclusive jurisdiction of the customs courts. See, e.g. Horton v. Humphrey, 146 F. Supp. 819 (3-judge court, D. D.C.), affirmed, 352 U.S. 921.

The Court noted that the customs courts provided an adequate remedy except in cases of unusual hardship, but the fact that the customs courts were likely to reject appellant's constitutional claims did not make this such a case. Without deciding whether the customs courts should be regarded as Article I or Article III courts, the Court of Appeals observed that the appellant would not be denied access to a constitutional court, since decisions of the Court of Customs and Patent Appeals are reviewable in the Supreme Court on writ of certiorari.

Finally, the Court held that the district judge was plainly authorized to dismiss the complaint without requesting the convening of a three-judge court. The provision of 28 U.S.C. 2284 precluding single-judge dismissal becomes operative only after a three-judge court is convened.

Staff: Seymour Farber (Civil Division)

SURPLUS PROPERTY

Conspiracy in Violation of Surplus Property Act of 1944; Statute of Limitations. Solomon, et al. v. United States (C.A. 6, April 4, 1960). Several veterans, entitled to priority status under the Surplus Property Act of 1944 (50 U.S.C. App. (1944 ed.) 1611-1646), made written application to the War Assets Administration to purchase steel. They received the money for the steel from several non-veterans, then paid for the steel by their own checks. The veterans, contrary to statements made in their applications, were not engaged in the steel business, and the steel purchased was shipped as directed by the non-veterans. The United States brought a suit for damages under Section 26(b) of the Act against all the parties involved, alleging that the steel had been purchased by the non-veterans through fraudulent use of the priority rights of the veterans. Defendants contended that the purchases were bona fide transactions, whereby the veterans had resold the steel to the non-veterans before they had paid the Government for it.

A jury returned verdicts against four of the defendants. The Government elected to claim damages under Section 26(b)(2) of the Act, receiving, as liquidated damages, twice the consideration paid for the steel. On defendants' appeal, the Court of Appeals ruled that the evidence had been properly submitted to the jury. The Court held also that the Government's claim was not barred by the five year statute of limitations in 28 U.S.C. 2462 since it was not one brought to enforce a "civil fine, penalty, or forfeiture * * *" (See Koller v. United States, 359 U.S. 309; Rex Trailer Co. v. United States, 350 U.S. 148). The Court stated further that, under the statute, judgment for damages could go against both the veterans and the non-veterans, and also that a previous O.P.A. suit by the Government, treating the veterans as owners of the steel, did not preclude the Government from asserting here that the non-veterans had obtained the steel. Finally, the Court held that the lower court had not erred in instructing the jury to enter separate verdicts against the defendants, and in then entering the judgments against the defendants jointly and severally.

Staff: United States Attorney Fred W. Kaess and Assistant United States Attorney Willis Ward (E.D. Mich.)

DISTRICT COURTS

ADMIRALTY

Statute Regulating Working Hours of Great Lakes' Tugboat Crews Held Constitutional. United States of America v. Buckeye Steamship Co. (N.D. Ohio, April 20, 1960). The United States brought this suit to collect penalties for violations of that portion of 46 U.S.C. 673 which prohibits the employment of certain officers and crew members of tugboats operating on the Great Lakes for more than eight hours in any one day. Both parties moved for summary judgment, the defendant tug owner contending that the statute arbitrarily discriminated between Great Lakes' tug owners and tug owners in other American ports in violation of the due process clause of the Fifth Amendment. Defendant further argued that the statute violated the constitutional guarantee of freedom of contract. In granting the Government's motion, the Court held that there was a reasonable basis for the legislative classification, and that the statute was not an unlawful interference with the right of contract and was not unconstitutional.

Staff: United States Attorney Russell E. Ake and Assistant United States Attorney William J. O'Neill (N.D. Ohio); Anthony W. Gross (Civil Division)

FALSE CLAIMS ACT

Fraudulent Bidding Scheme Involving Use of Competitors' Stationery Held Violation of Act. United States v. Arc Welding Supply Co., Inc., et al. (S.D. N.Y., March 30, 1960). In 1951 the defendants, acting in conspiracy with a buyer employed by a Government prime cost-plus contractor, developed a plan to obtain purchase orders for welding supplies by means of rigged bidding. The defendants, by subterfuge and theft, obtained the stationery, containing letterheads, of various competitors of the defendant corporation. Fictitious bids, slightly higher in price or less attractive in terms than the defendants' bid, were placed on this stationery in purported competition with the defendants' own bid. The signatures of the officers of the competitor corporations were forged. This scheme was carried out at least fourteen times and resulted in the award of contracts to the defendants totaling more than $400,000.

The Court, relying primarily on United States v. Rohleder, 157 F. 2d 126 (C.A. 3), charged the jury, inter alia, that, as final payment of the defendant's claim came from the Government through the contractor, the fact that there was no direct connection between the defendants and the Government was immaterial for purposes of the False Claims Act (31 U.S.C. 231); that the lack of proof of actual damage to the Government was immaterial; and that the initial taint in the bidding carried through to the ultimate claims for payment. The Court also charged, however, that intent to defraud must be shown with respect to the "substantive" portions of the Act.

The jury entered a verdict in the sum of $26,000 for 13 separate substantive violations of the False Claims Act and $2,000 for a conspiracy under the Act.

Staff: United States Attorney S. Hazard Gillespie, Jr. and Assistant United States Attorneys Anthony H. Atlas and Paul L. Meaders (S.D. N.Y.); Louis S. Paige (Civil Division)

FEDERAL TORT CLAIMS ACT

Claim for Conversion by Government Employees of Personal Property Allegedly Entrusted for Safekeeping at American Embassy in Poland, Held "Claim Arising in a Foreign Country" Excepted from FTCA Coverage by 28 U.S.C. 2680(k); In Bailment Cases, Statute of Limitations Begins to Run Either Upon Demand for Return and Refusal, or from Some Other and Prior Act of Defendant Inconsistent With Bailment. Falkowski v. United States (N.D. Ill., April 27, 1960). Plaintiff alleged that in 1946 he had delivered certain valuable art works to Government employees at the American Embassy in Poland for safekeeping there; that in 1952 they had wrongfully given his property to persons, unknown to him, at the National Museum in Warsaw, in breach of the bailment agreement; and that when he demanded the return of his property in 1958, it was not delivered to him. The Government moved to dismiss the complaint upon two grounds: (1) the claim was one which had arisen in a foreign country and thus was excluded from the scope of the Tort Claims Act by 28 U.S.C. 2680(k); and (2) it was barred by limitations, the claim, if any, having accrued in 1952, more than two years before the commencement of the action in 1959.

In granting the motion, the Court accepted both of the Government's contentions. First, the Court rejected plaintiff's argument that, since the wrongful acts had occurred on the premises of the American Embassy, over which, it was argued, the United States had complete "sovereignty", the claim was not one which had arisen in a foreign country. The Court also held that, since the alleged wrongful removal of the property from the Embassy in 1952 would have been an "act inconsistent with the bailment", the statute of limitations had begun to run at that time, rather than in 1958, when plaintiff first learned of the conversion of his property and unsuccessfully demanded its return.

Staff: United States Attorney Robert Tieken (N.D. Ill.)

Control Tower's Failure to Warn Aircraft of Turbulence Created by Passage of Preceding Aircraft Held Not Proximate Cause of Landing Accident. William H. Johnson, et al. v. United States (E.D. Mich., April 25, 1960). While in the process of approaching for a landing, a Cessna 195, a single engine light aircraft, encountered turbulence created by the prior passage of an Air Force B-47 which was practicing I.L.S. approaches to the same runway of Omaha Municipal Airport. The Cessna was totally destroyed when it struck the ground after the pilot lost control. Suit was brought under the Federal Tort Claims Act by the owner and the pilot

for property damage, personal injuries, and lost business profits. Plaintiffs alleged that the accident was caused by: (1) the negligence of the control tower operator in failing to warn the Cessna of the B-47 practicing I.L.S. approaches; (2) the failure of the pilot of the B-47 to break off his approach when he realized that the Cessna might encounter turbulence in his wake; and (3) the failure of the control tower operator to maintain adequate separation between the Cessna and the turbulence of the B-47.

After trial, the Court found that plaintiff received adequate radio warning from the tower respecting the B-47 and that the pilot of the B-47 had acted reasonably since there was no collision hazard involved. All of the expert testimony at trial indicated that neither aeronautical engineers, pilots, nor control tower operators can accurately predict the exact location, duration, or extent of turbulence created by the passage of an aircraft through air space. Nevertheless, the Court stated that the control tower operator had breached his duty to take the turbulence hazard into consideration when granting clearance to land to the Cessna. However, the Court denied relief to plaintiffs, ruling that the accident had been caused solely by the negligence of the plaintiff pilot in employing improper landing techniques and in violating local landing regulations.

Staff: United States Attorney Fred W. Kaess and Assistant United States Attorney Willis Ward (E.D. Mich.); Milan M. Dostal (Civil Division)

Liability of United States for Negligence of Employee Driving Private Vehicle; Effect of Dismissal With Prejudice of Suit Against Employee. Roger Lee Petty v. United States (W.D. Okla., April 20, 1960). This suit was instituted to recover for injuries received in an auto collision with a car owned and operated by an Air Force officer who was en route from his permanent duty station at England AFB, Louisiana, to Tinker AFB, Oklahoma, as a temporary change of station. Plaintiff had also brought suit against the Air Force officer in a state court. That case had been settled by the officer's insurer for $4,000, and plaintiff's suit had been dismissed with prejudice. In defense of the instant suit, the Government asserted various affirmative defenses including lack of scope of employment when the accident occurred, release, and that the dismissal with prejudice of the suit against the officer rendered the action against the United States res judicata.

The Court accepted the Government's res judicata contention and dismissed the complaint on the Government's motion for summary judgment. In doing so, the Court specifically refrained from ruling on the scope of employment defense, noting the contrary result reached in Mraz v. United States, 255 F. 2d 115 (C.A. 10), although the possibility of the cases being distinguishable was also noted, i.e., Mraz applying New Mexico law while Oklahoma law would be controlling here. The Court rested its decision on the principle that, where the master's liability is vicarious and derives from the servant's negligence, the master may successfully assert any of the servant's defenses, here, specifically, the dismissal with prejudice.

Staff: United States Attorney Paul W. Cress and Assistant United States Attorney Erwin A. Cook (W.D. Okla.); Joseph Langbart (Civil Division)

Suit Based on Allegedly Improper Action by Agriculture Department Inspectors in Directing Peach Grower to Shut Down Packing Operations Held Claim Arising Out of Performance of Discretionary Function or Duty Within 28 U.S.C. 2680(a). United States v. Duke (M.D. Ga., April 22, 1960). The Government brought suit against a peach grower for a mandatory injunction directing compliance with the Agriculture Marketing Agreement Act (7 U.S.C. 601, et seq.) and orders thereunder, including the payment of an assessment. Defendant counterclaimed for damages under the Tort Claims Act, alleging that two Government inspectors, acting pursuant to Order No. 62 of the Act, had wrongfully determined that his peaches were below the required minimum grade and directed him to refrain from packing or shipping them, with loss resulting to the defendant.

The Court granted the Government's motion to dismiss the counterclaim for insufficiency, quoting that portion of the opinion in Dalehite v. United States, 346 U.S. 15, 35, which emphasizes that "discretionary function" "includes more than the initiation of programs and activities * * *. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." The Court stated: "[t]he facts alleged in defendant's counterclaim are a clear illustration of the carrying out of a discretionary function or duty by an agent of the Government. The inspector, or a superior who had previously given him instructions, had to make the determination of what action would be taken in the situation existing at defendant's packing shed on the date complained of. Perhaps the discretion so entrusted was abused. Nevertheless, the function was clearly a discretionary one, and, as such, not actionable under the Federal Tort Claims Act." This holding demonstrates the applicability of the discretionary function exclusion at the so-called operational level.

Staff: United States Attorney Frank O. Evans and Assistant United States Attorney Floyd M. Buford (M.D. Ga.); Donald B. MacGuineas and Irwin Goldbloom (Civil Division)

Whether Release of One Tortfeasor Bars Claim Against United States as Alleged Joint Tortfeasor Held Determinable by Law of Place of Wrong; Claim Held Barred Under Such Law Despite Releasor's Orally Expressed Intent to Reserve Rights Against Government. Matland v. United States, et al. (W.D. Pa., April 30, 1960). This was an action against the United States arising out of the mid-air collision on June 30, 1956, over the Grand Canyon in Arizona, between a United Airlines and a Trans World Airlines plane, in which plaintiff's decedent, one of the passengers, was killed. Plaintiff alleged that the accident was caused by the negligence of certain CAA traffic controllers.

Plaintiff had previously filed a separate suit against the airlines alone, alleging negligent operation by both pilots, and this suit had resulted in a substantial settlement. While the general release instrument given by plaintiff to the airlines did not contain a reservation of

rights against the United States (nor could it be construed as a covenant not to sue), plaintiff contended that it was the intent of the parties to the settlement agreement that such rights were not to be released thereby. The Government moved for summary judgment on the ground that plaintiff's release of the airlines had nevertheless discharged the United States as well. It contended that any release of one of several joint tortfeasors releases all others and that, in any event, a merely orally expressed reservation of rights would be insufficient to prevent such a result.

In granting the Government's motion, the Court ruled that the applicable law with respect to the effect to be given the release was not that of Pennsylvania, where the release had been executed and delivered, nor federal law, but, rather, that "the rights of the parties under the Federal Tort Claims Act must be governed by the law of the place of the wrong, and whether this be Arizona, whose law we think governs, or Utah or California [in which states Government negligence was alleged], under the law of all of these states, a release of one joint tortfeasor releases all." The Court held further that this rule was applicable since "if there was any employee of the United States who was negligent it was joint negligence with the airlines and not independent of the airlines."

Staff: United States Attorney Hubert I. Teitelbaum and Assistant United States Attorney John R. Gavin (W.D. Pa.); Harry N. Stein and William C. Pryor (Civil Division)

STATE COURTS

VETERANS' AFFAIRS

State Inheritance Tax Held Improperly Assessed on Veteran's Estate Passing to United States Pursuant to 38 U.S.C. 17-17J (1952 ed.) Estate of John J. Maguire (No. 2), Deceased. (Orphans' Court of Philadelphia County (Pa.), April 22, 1960). The decedent, a resident of Philadelphia, and a veteran of World War I, died intestate in 1953 at a United States veterans' hospital. He had been in the care of the hospital since 1922 and left an estate of $21,138.73, one-third of which he had received by inheritance, one-third from payments by the Veterans' Bureau, and one-third consisting of accumulated income. The Government claimed the estate under 38 U.S.C. 17-17j (1952 ed.) which provides that the personal property of veterans who die, intestate and without heirs, in a facility while being furnished care by the Veterans' Administration, shall become the property of the United States. The Government's claim was upheld as against that of the Commonwealth of Pennsylvania, (Maguire Est., 13 D. & C. 2d 247 (Pa.)).

In 1958 the Commonwealth assessed a state inheritance tax (72 P.S. 2301) of 15% on the estate which had been awarded to the Government. On the Government's appeal, the Orphans' Court of Philadelphia County held that the tax had been improperly assessed. The Court pointed out first that the federal statute is a valid exercise of Congress' power to wage war and provide for the common defense and that, thus, imposition of the

state tax would be an unwarranted interference with the Congressional powers. The Court held further that the state tax did not support the assessment here since it permitted deductions "in the case of any indebtedness of the decedent * * * to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth." The court noted that, by the terms of the federal statute, the Government's right to the veteran's property was a contractual right which rested on adequate and full consideration tendered the veteran.

Staff: United States Attorney Walter E. Alessandroni and Assistant United States Attorney Michael L. Temin (E.D. Pa.)

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CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

GAMING

Ten Per Cent Wagering Excise Tax; $50 Occupational Tax; Attempt to Evade and Defeat Taxes. United States v. Harry L. Donovan (E.D. Va., May 20, 1960.) In this case the 11 count indictment charged that Donovan had failed to pay the 10% excise tax imposed on one in the business of accepting wagers, had failed to obtain the $50 occupational stamp and had attempted to defeat and evade these taxes.

Internal Revenue agents testified that a surveillance of Donovan's place of business revealed a pattern of activity which indicated that a major numbers operation was being conducted. These agents were backed up by motion pictures in color. The pictures depicted a car parked in Richmond, Virginia, manned by Donovan's lieutenants and a procession of various vehicles passing brown paper bags into the parked car. Subsequent surveillance and motion pictures established that Donovan's lieutenants then proceeded to a private dwelling on Chamberlin Avenue where they carried in brown paper bags and remained for approximately four hours. Surveillance and motion pictures at Donovan's business front, the Richmond Amusement Sales Company, revealed that Donovan's lieutenants appeared there on a daily basis. In addition, members of the Richmond Police Department were seen to frequent Donovan's establishment.

The evidence at trial further disclosed that on January 22, 1960, simultaneous raids were made at Richmond Amusement Sales and the Chamberlin Avenue home. At Richmond Amusement Sales Internal Revenue Service Agents and Deputy United States Marshals uncovered a secret compartment containing $6,000 in cash and a 3" by 5" spiral notebook which contained pencilled figures. Chamberlin Avenue revealed three adding machines and numerous numbers slips which were in brown paper bags.

By means of an opaque projector United States Attorney Bambacus and his Chief Assistant Henry FitzGerald demonstrated to the jury how the numbers tickets found at Chamberlin Avenue tallied to the penny with the figures found in the spiral notebook. Furthermore, a handwriting expert testified that the spiral notebook was in Donovan's handwriting.

One of Donovan's "pick up" men, testifying for the Government, stated that he worked for Donovan and that Donovan had told him in December 1959 to let the "pick up" man's writers withhold $50 as a Christmas present. The "pick up" man identified some of his writers' numbers slips which were among those seized at Chamberlin Avenue.

In light of this evidence Donovan shifted his plea and admitted guilt to all eleven counts of the indictment. He was sentenced to four years'

imprisonment.

Staff: United States Attorney Joseph S. Bambacus; Chief Assistant United States Attorney Henry St. J. FitzGerald (E.D. Va.); Plato Cacheris, Organized Crime and Racketeering Section, Criminal Division.

COMMODITY CREDIT CORPORATION

Conversion of Commodity Credit Corporation Grain (15 U.S.C. 714m(c) and 714m(a)). United States v. Richard L. Coultas (S.D. Ill.). Defendant pleaded guilty to five counts of a sixteen count indictment charging him with conversion of $1,300,000 worth of Commodity Credit Corporation grain stored in his elevators and with making false statements to the Commodity Credit Corporation. Upon such plea of guilty, defendant was sentenced to a total of nine years' imprisonment with the provision that he become eligible for parole after serving a minimum of two years. It was indicated that this was the largest single shortage of stored grain belonging to the CCC by way of embezzlement or conversion in the Midwest during the entire history of the United States program for grain storage.

Staff: United States Attorney Harlington Wood, Jr. (S.D. Ill.)

FEDERAL TRADE COMMISSION ACT

Refusal to Answer Lawful Inquiries Re Punchboards Despite Immunity Under 15 U.S.C. 49. United States v. Joseph Freeman (N.D. Ill.). In testifying under subpoena in a Federal Trade Commission (still pending) proceeding against him, Freeman refused to answer proper inquiries about the unlawful use of punchboards in selling merchandise, despite his acknowledging that he understood he had full immunity under 15 U.S.C. 49.

In what appears to be the first successful criminal prosecution for failure to give testimony before a Federal regulatory agency in response to a subpoena, Freeman (after withdrawing his not guilty plea) pleaded guilty to all counts of the nine-count information charging violations of the first paragraph of 15 U.S.C. 50. On April 13, 1960, a fine of $1,000, was imposed, allowing 30 days for its payment. (The maximum fine is $5,000, with imprisonment up to a year, or both.)

Since the past practice has been to rely on 15 U.S.C. 49 by invoking the aid of a district court in requiring the testimony of a witness in case of contumacy, the Federal Trade Commission has released to the press its view that Freeman is a "landmark criminal case". It seems a fair inference (in which the Federal Trade Commission informally concurs) that this case may noticeably facilitate and expedite future Federal Trade Commission proceedings involving contumacy, especially as to key

witnesses, the avoidance of upset schedules and the suspension of important hearings.

Staff: United States Attorney Robert Tieken; Assistant United States Attorney Robert N. Johnson (N.D. Ill.)

EMBEZZLEMENT

Naval Disbursing Clerk at Sasebo, Japan. United States v. Charles Michael Knott (S.D. Texas). An audit conducted by the General Accounting Office of the Navy Disbursing Office, Sasebo, Japan, for the year 1957, revealed that 20 servicemen had received a total of $5,123, although no pay record jackets concerning these 20 names could be found in the Navy Finance Center. Investigation conducted by the FBI pursuant to the "Memorandum of Understanding", which governs the investigation and prosecution of offenses committed by military personnel, disclosed that Charles M. Knott, the former disbursing clerk at the Sasebo Office, had committed the embezzlements revealed by the GAO audit. Knott, who was still a serviceman, was indicted under 18 U.S.C. 641, and upon his plea of guilty was sentenced to 18 months in custody of the Attorney General.

Staff: United States Attorney William B. Butler; Assistant United States Attorney Myron N. Sheinfeld (S.D. Texas).

MAIL FRAUD

Check Tear-up Scheme (18 U.S.C. 1341, 2314). United States v. Doran, et al. (N.D. Ill.). (See Bulletin April 22, 1960, Vol. 8, No. 9, Page 270). Prior to imposing sentence on the defendants in this case, the Court requested the United States Attorney to prepare a graph of maximum sentences as to each defendant. Sentences of 25, 15 and 10 years were imposed on the three principal defendants Doran, Grieco and Abbrescia, and 1 or 2 years on the other defendants Harris, Schulman, Di Domenico, and Lo Celso.

Staff: United States Attorney Robert Tieken; Assistant United States Attorneys Paul D. Keller and James B. Parsons (N.D. Ill.)

CITIZENSHIP

Court Lacks Jurisdiction Over Suit for Declaratory Judgment of Nationality by Citizenship Claimant Abroad. Sato v. Dulles, (C.A. 9, May 5, 1960). Plaintiffs were citizens of the United States by birth in Hawaii to Japanese parents, who took them to Japan for a visit in 1940. They were unable to defray the expenses of returning to the United States until 1955. They then applied to an American Consul in Japan for passports. They had voted in political elections in Japan, most recently in 1954, but contended this was under duress. In 1956, they were notified that their passport applications had been denied because they had

been expatriated by their voting, and Certificates of Loss of Nationality were issued. Still residing in Japan, they retained counsel in Hawaii, who filed a suit in their behalf in the United States District Court there against the Secretary of State, seeking a declaratory judgment of nationality under Section 503 of the Nationality Act of 1940, 8 U.S.C. (1946 ed.) 903. The 1940 Act had been repealed effective December 24, 1952, by the Immigration and Nationality Act of 1952, but plaintiffs contended that their rights to sue for a declaratory judgment under Section 503 were saved by the savings clause in the 1952 Act. The Government moved to dismiss for lack of jurisdiction, contending that plaintiffs' sole remedy lay in Section 360(b) and (c) of the 1952 Act. Under those provisions, a disappointed citizenship claimant abroad may apply for a certificate of identity to travel to the United States to apply for admission, and if excluded as an alien may obtain judicial review of the exclusion order in habeas corpus proceedings and not otherwise.

In an unreported opinion dated September 19, 1958, the District Court granted the Government's motion to dismiss. Reviewing the legislative history of the declaratory judgment provisions, the Court concluded, "In establishing the new procedure as to such persons outside the United States and providing that a final exclusion by the Attorney General can be reviewed by the courts in habeas corpus proceedings and not otherwise, Congress clearly intended to take from persons in the position of plaintiffs the right to bring an action for declaratory judgment."

As for the savings clause contention, the Court pointed out that this case is distinguishable from the others in which declaratory judgment actions had been permitted even after repeal of the 1940 Act. Here, none of the acts constituting a basis for action under Section 503 took place before its repeal in 1952. The passports were first applied for in 1955 and were denied in 1956. At this stage of the administrative proceedings, the Court held, judicial review is expressly precluded by Section 360 of the 1952 Act and the Court therefore lacks jurisdiction of the subject matter.

In a brief per curiam order, the Court of Appeals affirmed on the opinion of the district court.

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

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

CITIZENSHIP

Limitation on Declaratory Judgment of Citizenship. Kokkinis v. Rogers and Herter, (N.D. Ill., May 9, 1960).

Section 360(a) of the Immigration and Nationality Act, 8 U.S.C. 1503(a) provides, with certain exceptions not here material, that any person within the United States who claims a right or privilege as a national which is denied by any department, agency, or official thereof, may bring an action under 28 U.S.C. 2201, against the head of the department or agency for a judgment declaring him to be a national of the United States. It is also provided, however, that such an action may be instituted only within five years after the final administrative denial.

Petitioner was born in the United States and taken to Greece with his parents when a minor of eight years. In 1933 he served in the Greek Army, taking an oath of allegiance to Greece in connection therewith. He was denied a passport as a citizen of the United States in 1934. In 1951 he obtained a visa as a Greek refugee and entered this country. The same year he filed a preliminary form of Declaration of Intention to become a citizen. As a result of this action he was interviewed on two occasions and letters were sent to him by the Immigration and Naturalization Service.

The Court considered two questions to be presented: (1) whether there exists an actual controversy between the parties, and (2) whether any claim or right or privilege of citizenship has been denied to the petitioner on the ground that he was not a national of the United States within five years prior to the filing of his suit in 1959. The Court found that the denial of a United States passport in 1934 and the issuance of an immigration visa in 1951 occurred more than five years before the suit was filed, hence his claims of denial of rights and privileges as a national were proscribed by the time limitations of Section 360(a) of the Immigration and Nationality Act, 8 U.S.C. 1503(a). Affidavits of investigators of the Immigration and Naturalization Service attested to the interviews had with petitioner in October 1956 and December 1958. Petitioner claimed that during the 1958 interview the investigator had told him that he was subject to deportation and that the interview was directed to that end. The Court said that accepting the truth of petitioner's assertion as to that interview, the Court was nevertheless of the opinion that the investigation and interrogation was not a denial of petitioner's rights such as to bring the case within the statutory limitations for the reason that in July 1958, the Department of State had notified the Immigration and Naturalization Service that because it could not be proved that petitioner's Greek army service had been voluntary its records were being amended to show that petitioner did not lose United States citizenship because of such service. Also for this latter reason, at the time the complaint was filed, the Government no longer

disputed petitioner's citizenship. Defendants' motion for summary judgment was sustained and the complaint dismissed.

DEPORTATION

Dismissal of Complaint Erroneous Where Question of Fact in Dispute. Ullah v. Hoy, (C.A. 9, May 3, 1960). Appeal from judgment of district court denying relief in declaratory judgment action. Reversed and remanded for further proceedings.

Plaintiff was ordered deported and alleged that he had applied to defendant for the privilege of voluntary departure in lieu of deportation and that his application had been denied. Defendant denied that plaintiff had applied for the privilege of voluntary departure in lieu of deportation and that such application had been disapproved.

Upon the filing of the answer, the district court entered an order that the action be placed on the calendar for pre-trial conference and setting without regard to Local Rule 9. Counsel were duly informed and requested to be present. The pre-trial conference was attended by counsel for the parties. Plaintiff was not present. After lengthy colloquy between the court and counsel for plaintiff, the court inquired whether he was correct in understanding that plaintiff was asking that the Immigration Service give him another opportunity for voluntary departure. Counsel for plaintiff replied in the affirmative. The court then stated that such a matter was one for the Immigration Service and not the court. Though counsel for the plaintiff questioned the accuracy of the transcript, in reply to a further statement by the court he said "Very well, your Honor, all I can do is submit it." The transcript was then marked as an exhibit. The clerk inquired whether the proceeding was to be considered as a trial. The court replied that it was a "Hearing on the matter" and followed by the statement "And it is ordered that petition for review is dismissed." Appropriate findings of fact, conclusions of law and judgment in favor of the defendant were then entered.

On appeal, appellant urged that it was error for the district court to make the pre-trial conference a trial of the action and that the court erred in rendering a final judgment against the plaintiff at the time of pre-trial without notice of trial and the holding of a trial pursuant to statute. The court, urged appellant, could not summarily convert a pre-trial conference into a trial and render a valid final judgment at the time and place set only for pre-trial conference.

The appellate court found it unnecessary to reach an answer to that contention since it noted that by the pleadings there had been raised "a genuine issue as to material fact", as to whether plaintiff had made application for voluntary departure which had been denied. That issue had not been disposed of by affidavit, deposition, testimony or admission of the plaintiff and had not been mentioned in the findings of fact by the trial court.

No opportunity had been afforded to dispose of that issue by proceedings for a summary judgment under the provisions of Rule 56 of the F.R.Civ.P. In the absence of some such basis for disposition of that issue, the Court was of the opinion that it could not be disposed of by summary dismissal of the complaint whether it occurred at a pre-trial conference or at a regular trial.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Violation of Foreign Agents Registration Act of 1938, as amended, and Conspiracy to Violate Act. United States v. Alexander L. Guterma, Hal Roach, Jr. and Garland L. Culpepper, Jr. (D.C. D.C.) On May 16, 1960, the trial of the above case commenced before Judge Joseph R. Jackson and a jury. (See United States Attorneys Bulletin, Vol. 7, Nos. 19 and 26.) On motion by the Government, the indictment was dismissed at the outset of the trial against Garland L. Culpepper, Jr. On May 18, 1960, the remaining two defendants, Alexander L. Guterma and Hal Roach, Jr., proffered pleas of nolo contendere to the Court to separate substantive counts of the indictment. The plea offered by Guterma was to Count I of the indictment, charging him individually with wilful failure to file a registration statement under the Foreign Agents Registration Act as a publicity agent for the Dominican Republic, and the plea offered by Roach was to Count II of the indictment charging him in his capacity as a Director of Mutual Broadcasting System, Inc., with failure to cause the registration of MBS under the above statute. Both pleas were accepted by the Court over the objection of the Government. No date has yet been set for sentencing of the two defendants.

Staff: Paul C. Vincent, Irene A. Bowman and James C. Hise (Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Condemnation; General Appropriation Act Providing Funds for Acquisition of Land May Be Used With 40 U.S.C. 257 as Authority to Acquire by Condemnation. United States v. Kennedy (C.A. 9, April 13, 1960). The United States filed suit to condemn privately held land within the boundaries of Mount McKinley National Park. The trial court dismissed the complaint, holding that it failed to disclose statutory authority under which the Secretary of the Interior could condemn land in the Park. On appeal, this was reversed. The authority on which the United States relied for its power to condemn was a general appropriation act for the Department of the Interior and 40 U.S.C. 257. The appropriation act provided funds for the acquisition of lands within the exterior boundaries of existing national park areas. 40 U.S.C. 257 provides that whenever an officer of the Government is "authorized to procure real estate" he may acquire it by condemnation. The Ninth Circuit noted that the appellee conceded that the statutory authorization to procure may be evidenced by an appropriation act as well as by a specific authorization to acquire. Polson Logging Co. v. United States, 160 F. 2d 712, 714 (C.A. 9, 1947). The appropriation on its face indicated it was for "the acquisition of lands" in any national park. "If, then," the Court continued, "this appropriation item is to be given a more restricted meaning so as to exclude Mount McKinley National Park, it must be due to compelling legislative history or the limiting effect of other statutes." The Court examined and rejected the several arguments of the appellees based on the legislative history and the effect of other statutes.

Staff: A. Donald Mileur (Lands Division)

Condemnation; Trial; Reference to Commissioners Under Rule 71A(h). United States v. Honorable Peirson Hall (C.A. 9). On May 23, 1960, the Supreme Court denied certiorari in this case. See 8 U.S. Attys Bulletin, No. 4, p. 112.

Condemnation; Rule 71A(h); Facts Justifying Appointment of Commission; Trial by Commission; Necessity of Detailed Findings of Fact and Conclusions of Law. United States v. Cunningham (C.A. 4). On May 23, 1960, the Supreme Court denied certiorari in this case. See 8 U.S. Attys Bulletin, No. 4, pp. 112-114.

Administrative Procedure; Public Lands. Union Oil Company of California v. Fred A. Seaton, Secretary of the Interior (D.C. D.C.). In 1920, Congress terminated the right to make mineral locations on public lands believed to contain oil shale and provided that thereafter such lands would be subject only to leasing. The 1920 Act, however, contained a savings clause relating to pre-existing locations. Some time prior to 1953, the Union Oil Company acquired by assignment rights to a large number of oil shale locations made before 1920. It applied for a patent

and paid the public land price therefor to the Manager of the Land Office in Denver. At this time, the records showed that a part of the lands had been included in a government oil and gas lease issued in 1951. In 1954 Congress passed an act permitting public lands oil and gas lessees to institute proceedings challenging the validity of old mining claims found to exist on any lands covered by an existing lease. Pursuant to this act, the lessee requested the Manager to hold up further patent proceedings in order that he might institute an adverse administrative action. The Manager held the act inapplicable. On appeal his action was reversed by the Director, Bureau of Land Management. On a further appeal to the Secretary it was held not only that the 1954 Act applied but that any applicant for a mineral land patent must first institute affirmative proceedings to clear the records of any entry based on an existing oil and gas lease. Plaintiff then brought this suit under the Administrative Procedure Act.

On March 30, 1960, Judge Matthews sustained defendant's motion for summary judgment and denied a similar motion filed by the plaintiff. The Court overruled contentions by the plaintiff that (a) acceptance of the purchase price for public lands constitutes a conclusive determination that the applicant is entitled to a patent and (b) that the 1954 Act did not apply to oil shale locations. The Court specifically upheld the Secretary's contention that it is incumbent on a patent applicant to clear the records of any existing leases before his application can be considered. Since oil shale locators are not required to remain in possession or to even do annual work in order to preserve their rights against the United States, there are probably thousands of acres of public lands in Colorado and other states now under lease that may be subject to old claims. Under this decision, the burden of clearing the records is placed on the holders of these old locations.

Staff: Thos. L. McKevitt (Lands Division)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decisions

Immunity from State Taxes; Power of States to Tax RFC Property Declared Surplus and Transferred to War Assets Administration for Government Use. Rohr Aircraft Corporation v. County of San Diego (Supreme Court, May 23, 1960). Rohr Aircraft Corporation was a lessee of real property formerly owned by the Reconstruction Finance Corporation (RFC) and its subsidiary, Defense Plant Corporation. In 1946 acting under the provisions of the Surplus Property Act of 1944, RFC declared the property to be surplus to its needs and control of the property was transferred to the War Assets Administration (WAA) which had the function of handling the property or arranging for its disposition and had the power to execute all necessary documents of title in connection with disposition of the property. No deed transferring legal title was executed by RFC until 1955. WAA and its successor, General Services Administration, retained possession of the property and used it until September, 1949, when it was leased to Rohr Aircraft Corporation. This lease was executed by RFC and the United States "both acting by and through the General Services Administrator." Section 8 of the Reconstruction Finance Corporation Act of 1932 provides that real property of RFC shall be subject to state and local taxation. Acting under this waiver of tax immunity and the absence of a deed to the United States, the County of San Diego and the City of Chula Vista assessed ad valorem real property taxes against RFC with respect to the property involved for the fiscal years 1951 through 1955. Under its lease Rohr Aircraft Corporation was obligated to pay any taxes lawfully assessed upon the lease premises and it therefore paid the taxes and brought suit in the state courts of California for refund. Recovery was denied by the trial court because of the absence of a deed and the judgment of the trial court was affirmed by the Supreme Court of California.

On appeal taken by Rohr Aircraft Corporation to the United States Supreme Court, the United States appeared as amicus urging reversal. On May 23, 1960, the Supreme Court reversed the judgment appealed from, two Justices dissenting. In its view the decisions of the courts below placed undue emphasis upon the technicality of the absence of a deed transferring legal title to the United States. Upon the declaration of surplus the Court held the property was effectively transferred to the United States and was "owned" by it. Consequently, it was immune from state and local taxation. The test applied by the Supreme Court was one of practical ownership rather than naked legal title since, after the declaration of surplus, the RFC no longer retained any true proprietary interest of control with respect to the property and received no benefits therefrom. The Court concurred in the decision of the Court of Claims in Board of County Comm'rs. of Sedgwick County v. United States, 105 F. Supp. 995 that since beneficial ownership was in the United States the property was immune from

local taxation. The Court also noted the congressional intent expressed in a statute enacted in 1955 providing for payments in lieu of taxes in situations where there had been a transfer of custody and control of property by the RFC, and the Court held that any inconsistent administrative practice, illustrated by the failure to deliver a deed in order to continue taxability, could not effect a waiver of immunity contrary to the legislative mandate.

Staff: Myron C. Baum and John J. McCarthy (Tax Division)

Liens; Priority of Tax Liens as Claims in Bankruptcy; Proof of Claim Filed by District Director With Referee in Bankruptcy Complied With Requirement That "Demand" Be Made Upon Taxpayer Before Tax Lien Arises; Trustee in Bankruptcy Not "Judgment Creditor" Within Purview of Section 3672, Internal Revenue Code of 1939. In re Fidelity Tube Corp. (C.A. 3, May 3, 1960). A proof of claim was filed in the bankruptcy proceeding based upon tax liabilities of the bankrupt falling into three categories: First, claims for which both the assessments and the demand for payment thereof were made prior to the adjudication of bankruptcy: Second, claims based upon assessments made prior to bankruptcy but for which demand, consisting of the proof of claim filed with the Referee in Bankruptcy, was made after bankruptcy: Third, those claims for which both the assessments and the demand for payment thereof were not made until after the adjudication, and with respect to which the United States conceded no tax liens existed in favor of the United States.

The referee had held the trustee was a "judgment creditor" entitled to the protection of Section 3672, Internal Revenue Code of 1939, thus requiring that notice of the tax liens must be recorded to be valid against the trustee. Since no notices of tax liens were filed with respect to any of the three categories above-referred to, the referee concluded no valid tax liens existed against the trustee and the claims of the United States were accorded priority not as secured claims but under Section 64(a)(4) of the Bankruptcy Act, 11 U.S.C. 104(a)(4). The district court reversed the referee. The Court of Appeals in affirming the district court considered three questions.

On the first question, whether the filing of the proof of claim with the referee with respect to the claims falling within the second category constituted a "demand" within the purview of Section 3670, Internal Revenue Code of 1939 (Section 6321, Internal Revenue Code of 1954), the Court in finding the statutory requirement had been complied with said that nothing in the Bankruptcy Act prevented a valid tax lien from arising where the assessment was made prior to bankruptcy but demand was delayed until after the adjudication.

The second question, whether, if a valid demand was made, the United States was entitled to prevail against the trustee as a lien claimant on the tax claims in the second category, and the third question, whether the United Stateswas entitled to prevail against the trustee on

these claims falling within the first category, were both governed by the same principles of law. These questions turned on whether the trustee qualified as a "judgment creditor" within the meaning of Section 3672, Internal Revenue Code of 1939 (Section 6323, Internal Revenue Code of 1954). The Court relying on United States v. Gilbert Associates, 345 U.S. 361, applied the Supreme Court's definition of a "judgment creditor" enunciated in that case as one "in the usual, conventional sense of a judgment of a court of record since all states have such courts" and concluded the trustee did not fall within the purview of Section 3672.

Staff: Richard M. Roberts (Tax Division)

Deduction of Personal Expenses, Constitutionality of Prohibition Against; Suit for Refund of Taxes Brought As Suit Based on Common Counts to Avoid Requirements of Filing a Claim for Refund. John Charles Owen v. United States (C.A. 9, April 5, 1960). Taxpayer brought this suit to recover amounts withheld from his wages for income taxes. He claimed that the term "income," as used in the Sixteenth Amendment, means only those amounts remaining after subtracting all expenses, and that Section 262 of the Internal Revenue Code, and all related sections, which prohibit the deduction of personal expenses in determining taxable income, are unconstitutional. The Government moved for summary judgment: (1) for lack of jurisdiction, because taxpayer failed to file a claim for refund as required by Section 7422 of the Internal Revenue Code for 1954, and because taxpayer failed to wait until any claim for refund he might have filed had been rejected or had not been acted upon for six months, as required by Section 6532 of the Internal Revenue Code of 1954; and (2) in the alternative, because the complaint failed to state a cause of action in that the prohibitions against the deduction of personal expenses are constitutional as a matter of law. The district court granted judgment in favor of the Government on all grounds advanced by the Government. On appeal, the Ninth Circuit affirmed per curiam on the jurisdictional grounds alone and did not reach the substantive issue. Taxpayer argued on appeal that he did not have to comply with the Internal Revenue Code's requirements for bringing suit because his suit was based on the common counts for money had and received rather than on the Internal Revenue Code. The Court said, however: "Appellant's admission that such is the sole basis of his complaint puts him out of court. The United States is not liable in any such action. The sovereign immunity to suit is waived only by express enactment and such waiver is always subject to the statutory conditions." Taxpayer is in the process of filing a petition for certiorari with the United States Supreme Court.

Taxpayer has also instituted a separate suit against his employer for actual damages and exemplary damages for money withheld from his wages and paid over to the United States as income taxes, claiming that the provisions of the Internal Revenue Code authorizing such action are unconstitutional. The district court dismissed the action on its own motion and taxpayer has filed a notice of appeal.

Taxpayer has also instituted a separate suit against the Secretary of the Treasury, the Commissioner of Internal Revenue, and the District Director, requesting a declaratory judgment that the statutes imposing a tax on wages is unconstitutional, and requesting an injunction prohibiting the further withholding of taxes from his salary. The district court also dismissed this action on its own motion, and taxpayer is attempting to take a direct appeal to the United States Supreme Court.

Staff: Lloyd J. Keno, Kenneth E. Levin, John J. Gobel and Robert L. Handros (Tax Division)

Injunctions; Jurisdiction; Suit to Enjoin Collection of Employment Taxes. Missouri Valley Intercollegiate Athletic Association v. Bookwalter, (C.A. 8, April 5, 1960). The Big Eight Conference controls and manages intercollegiate athletics in its member colleges and universities. The District Director of Internal Revenue assessed withholding and FICA taxes against the Big Eight based on the wages paid game officials at the athletic events of its member schools. The Big Eight sought to enjoin the collection of the tax primarily on the ground that the tax was due from the member schools who paid the wages. The district court dismissed the action on the ground that it was barred by Section 7421(a) of the Internal Revenue Code of 1954 and the Big Eight appealed. The Court of Appeals recited the dual test for injunctive relief expressed in Miller v. Standard Nut Margarine Co., 284 U.S. 498, i.e., an illegal exaction in the guise of a tax coupled with special and extraordinary circumstances, and stated that appellant did not allege an illegal exaction in absence of a claim that the tax, itself, was illegal, but merely claimed that its member schools were the proper taxpayers. Furthermore, since the Big Eight admitted that it paid certain officials, the dispute was solely over the amount of the tax due which would not justify the exercise of equity jurisdiction. As to "special and extraordinary circumstances" the Court stated that mere conclusions in the complaint that the taxpayer would suffer irreparable harm in the event of collection of the tax did not suffice.

The Big Eight claimed that it came within an exception to Section 7421 where the property of one was being taken to pay the tax liability of another for it alleged that since the member schools owed the tax, the Big Eight's property was being seized to pay their taxes. The Court distinguished the line of cases relied upon by the Big Eight for this premise by stating that they applied to taxes due from and assessed against parties other than the party bringing the suit. In this case the tax was assessed against the appellant who was primarily liable for its payment. The district court order dismissing the complaint was affirmed and the Court of Appeals denied a subsequent petition for rehearing.

Staff: United States Attorney Edward L. Scheufler and Assistant United States Attorney Horace W. Kimbrell (W.D. Mo.); John J. Gobel (Tax Division)

District Court Decision

Jurisdiction; Action to Quiet Title; Suit by Nontaxpayer; United States Junior Tax Lienor: Jurisdictional Grounds. Robert E. Jones v. United States (S.D. Calif., December 24, 1959). The plaintiff acting as agent for the second mortgagee purchased the property in question at a sale ordered by the trustee of the first mortgagee after default by the mortgagor. The federal tax liens against the mortgagor were not filed until after the execution of the second mortgage. No warrants of distraint or levy to collect the taxes had been issued. Plaintiff then brought this action to quiet title. The Government moved to dismiss plaintiff's amended complaint on the grounds that the applicable statutes did not confer jurisdiction on the Court to entertain the action to quiet title against the United States. The Court granted the Government's motion to dismiss citing Wells v. Long, 162 F. 2d 842 (C.A. 9, 1947), holding that the purpose of 28 U.S.C. 2410 is not to confer jurisdiction on the federal district courts but to waive the sovereign immunity of the United States where other independent grounds of jurisdiction already exist. The Court rejected plaintiff's contention that 28 U.S.C. 2463, providing that all property taken under any revenue law of the United States is not repleviable but is deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof, conferred jurisdiction on the Court. The Court recognized that Section 2463 had been construed to confer jurisdiction but only where warrants of distraint or levy have been issued. The Court said that to read the statute as urged by plaintiff was to deny to the state courts the jurisdiction to settle disputes relating to property. Since the California Constitution conferred jurisdiction on the state courts to entertain such actions, the Court held that the plaintiff's remedy was to be pursued in the state courts.

Staff: United States Attorney Laughlin E. Waters and Assistant United States Attorneys Edward R. McHale and Eugene N. Sherman (S.D. Calif.)

State Court Decision

Assessment: Presumption of Regularity and Validity Not Overcome; Doctrine of Laches Applied Where No Objection Made to United States Claim for 11 Years; Liens; Prior United States Lien Superior to State Tax Claims Where Estate Insolvent. In Re Angelo (County Court, Iron County, Wis., March, 1960). The administrator sought an adjudication of the relative merits and priority of claims filed against the decedent's estate by the United States and the State of Wisconsin. The State, challenging the validity of the assessments for income and FUTA taxes made by the Commissioner under Sections 3640, 3641 and 3642, Internal Revenue Code of 1939, against the decedent, contended principally that the Commissioner failed to sign and certify the assessment lists.

The Court overruled this objection, after reviewing all of the procedures used for assessing taxes, and found that the Commissioner signed the "Assessment Certificates" which were attached to "Assessment Lists" as prescribed by law and that such attachment of lists to certificates need not be permanent. It was pointed out that "Assessment Lists" are never signed. The burden of proving that the assessment is not correct is on the taxpayer. The State offered no evidence to overcome the presumption of regularity and validity of assessments.

The Court further held that the 11 year lapse between the filing of the Government's proof of claim against the estate and the asserting of objections by the State invoked the doctrine of laches, so that any valid objections were abandoned long ago.

With respect to the priority of the federal claim vis-a-vis the State's claim, the Court held that the governing statute, 31 U.S.C. 191, accorded paramount priority to debts due the United States where the assets of a decedent's estate are insufficient to satisfy all claims asserted against it.

Staff: United States Attorney George E. Rapp and
Assistant United States Attorney Robert J. Kay (W.D. Wis.)
Mary Jane Burruss (Tax Division)

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INDEX