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Vol. 8 No. 13

UNITED STATES ATTORNEYS
BULLETIN

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Vol. 8 June 17, 1960 No. 13

IMPORTANT NOTICE

Through inadvertence the last issue of the United States Attorneys Bulletin was incorrectly paginated. The correct pagination of the issue is from page 353 to page 387. The necessary correction of the Bulletin and of its Index should be done in pen and ink.

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 30, 1960, so that arrangements may be made to cancel the service, transfer the books and services to a place needed, or other disposition made.

MONTHLY TOTALS

As of April 30, 1960, slight reductions were effected in pending criminal cases and matters, and in pending civil cases, exclusive of tax lien cases. The aggregate workload pending was reduced by 188 items, the major part of which reduction resulted from the drop in criminal cases and matters. This slight reduction of 188 items, as compared with the decrease of 1,134 items for the previous month, renders it speculative whether the pending workload on June 30, 1960 will drop below the record-breaking figure of 46,730 items achieved at the end of the previous fiscal year. To equal this record, some 1,812 items must be disposed of before June 30, 1960. The following comparison shows the workload pending on April 30 and at the end of the preceding month:

	March 31, 1960	April 30, 1960	
Triable Criminal	7,122	7,013	- 109
Civil Cases Inc. Civil Tax Less Tax Lien & Cond.	14,080	14,102	+ 22
Total	21,202	21,115	- 87
All Criminal	8,739	8,594	- 145
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	16,758	16,784	+ 26
Criminal Matters	10,494	10,382	- 112
Civil Matters	12,739	12,782	+ 43
Total Cases & Matters	48,730	48,542	- 188

The figures for the first ten months of the fiscal year show little or no change from the previous year's totals as far as the pending caseload is concerned. New civil cases filed rose by 612, but this was offset by a drop of 279 in the number of new criminal cases filed. Similarly, the rise of 113 in criminal cases terminated was offset by the decrease of 509 in the number of civil cases terminated. As a result, pending cases showed only a decrease of 68 from the ten-month period of the previous fiscal year. Set out below is a comparative study of the activity for the first ten months of fiscal years 1959 and 1960:

	1st 10 Months F. Y. 1959	1st 10 Months F. Y. 1960	Increase or Decrease Number	%
Filed				
Criminal	26,068	25,789	- 279	- 1.1
Civil	19,895	20,507	+ 612	+ 3.1
Total	45,963	46,296	+ 333	+ 0.7
Terminated				
Criminal	24,613	24,726	+ 113	+ 0.5
Civil	19,163	18,654	- 509	- 2.7
Total	43,776	43,380	- 396	- 0.9
Pending				
Criminal	8,872	8,594	- 278	- 3.1
Civil	19,691	19,901	+ 210	+ 1.1
Total	28,563	28,495	- 68	- 0.2

For the month of April 1960, United States Attorneys reported collections of $2,130,448. This brings the total for the first ten months of fiscal year 1960 to $25,079,352. Compared with the first ten months of the previous fiscal year this is a decrease of $2,762,650 or 9.9 per cent from the $27,842,002* collected during that period.

During March $2,768,528 was saved in 123 suits in which the government as defendant was sued for a total of $3,988,346. 54 of them involving $1,210,309 were closed by compromises amounting to $277,666 and 40 involving $1,814,888 were closed by judgments against the United States amounting to $942,152. The remaining 29 suits involving $963,149 were won by the government. The total saved for the first ten months of the fiscal year amounted to $34,051,702, a decrease of $2,692,636 or 7.3 per cent from the $36,744,338 saved during the first ten months of fiscal year 1959.

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* Adjusted since D.C. reported $81,003 too much in F. Y. 1959.

DISTRICTS IN CURRENT STATUS

As of April 30, 1960, the districts meeting the standards of currency were:

CASES

Criminal

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

Civil

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

MATTERS

Criminal

Ala., N.	Ariz.	Calif., N.	Dist.of Col.	Idaho
Ala., M.	Ark., E.	Colo.	Ga., S.	Ind., N.
Ala., S.	Ark., W.	Conn.	Hawaii	Ind., S.

MATTERS

Criminal (continued)

Iowa, S.	Miss., S.	N.C., E.	Pa., W.	Tex., W.
Ky., E.	Mont.	N.C., M.	P.R.	Utah
Ky., W.	Neb.	Ohio, N.	R.I.	W.Va., S.
La., W.	Nev.	Ohio, S.	S.D.	Wyo.
Md.	N.J.	Okla., E.	Tex., E.	C.Z.
Minn.	N.Mex.	Okla., N.	Tex., S.	Guam
Miss., N.	N.Y., E.	Okla., W.		

MATTERS

Civil

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

JOB WELL DONE

The Assistant Regional Commissioner, IRS, has expressed his appreciation for the address made by Assistant United States Attorney Elliott Kahaner, Eastern District of New York, to the Special Agents Refresher Training Class on various investigative and trial techniques in income tax cases. The letter stated that Mr. Kahaner emphasized the problems relating to 18 U.S.C. 3500, and that his presentation was most enthusiastic and his ideas stimulating.

Assistant United States Attorney Frederick H. Mayer, Eastern District of Missouri, has been congratulated by FBI Director J. Edgar Hoover, for his successful prosecution of a group of recent cases which resulted in eight bank robbery convictions. The letter stated that Mr. Mayer's excellent handling of these cases was responsible to a large degree for their outcome, that their presentation reflected many long hours of legal research and painstaking presentation, and that Mr. Mayer should take justifiable pride in his accomplishments in these cases.

The FBI Special Agent In Charge has commended the diligence, perseverance, and excellence with which Assistant United States Attorney Minor L. Morgan, Northern District of Texas, handled the prosecutive proceedings in a recent involved and complicated case. The letter stated that the Government's success in this unusually difficult matter can be attributed in no small measure to Mr. Morgan's trial preparation and legal acumen at the separate trials.

The District Director, Food and Drug Administration, has commended Assistant United States Attorney W. Francis Murrell, Eastern District of Missouri, on his work in a recent group of cases involving illegal sales of amphetamine-type pills by truck stop operators in southeastern Missouri. The letter observed that the adjudication of these cases closed one of the largest illegal operations of this type ever uncovered by the Food and Drug Administration. The District Director stated that Mr. Murrell's intimate knowledge of the details of each case, and the law involved, as well as his careful preparation of the cases resulted in their very satisfactory and speedy adjudication at a material saving to the Government.

The Acting Regional Counsel, Federal Aviation Agency, has expressed sincere appreciation for the excellent manner in which Assistant United States Attorney Willis F. Ward, Eastern District of Michigan, presented a case. The letter stated that Mr. Ward handled the matter with consummate skill, and that the successful outcome of the case was the direct result of Mr. Ward's careful and exhaustive preparation for trial, and the extremely skillful manner in which he conducted the trial.

The General Counsel, and the Regional Administrator SEC, and the Chief Postal Inspector and the Postal Inspector in Charge, have commended and congratulated United States Attorney William L. Longshore and Assistant United States Attorney Malcom Tanner, Northern District of Alabama, on their excellent handling of a recent case involving the use of the mails to defraud. The successful result was termed a magnificent victory, and all of the letters paid tribute to the dedicated efforts and fine legal ability of Messrs. Longshore and Tanner.

United States Attorney William B. West, III, Northern District of Texas, has been commended by the General Counsel, SEC, on obtaining an indictment in a case involving one of the most persistent and vicious frauds encountered by the Commission in recent years. The General Counsel stated that Mr. West's prompt attention to this matter contributed greatly to the effective enforcement of the federal securities laws not only in his own district but throughout the entire country.

The District Engineer, Army Corps of Engineers, has expressed his appreciation for the commendable manner in which condemnation cases for the Mansfield Reservoir Project in Indiana were tried by Assistant United States Attorney Philip McLangton, aided by Assistant United States Attorney John Vandivier, Southern District of Indiana.

The Chief Postal Inspector has expressed to United States Attorney Donald G. Brotzman, District of Montana, his appreciation for the recent successful prosecution of a defendant who, on a plea of guilty, received a five year prison sentence for his extensive operation in Western states of fraudulent promotions relating to the sale of distributorships and franchises. The Chief Inspector also praised the good work of Assistant United States Attorney Jack K. Anderson in this matter.

The Chief Inspector also has extended congratulations to United States Attorney William H. Webster, Eastern District of Missouri, for successful prosecution of three defendants who were sentenced to prison terms on pleas of guilty to operation of a vending machine type of mail fraud. (See Bulletin dated April 8 and January 29, 1960). The defendants obtained an estimated $165,000 from their victims whom they induced to purchase radio and television tube testing machines. Assistant United States Attorney William C. Martin also was commended for his handling of the case.

The Administrator, Federal Aviation Agency, has written to the President expressing wholehearted appreciation and commendation of the work of United States Attorney S. Hazard Gillespie, Jr., Southern District of New York, in defending the Government's position on the recently issued regulation precluding pilots over sixty years of age from serving in air carrier operations. The Administrator stated that in the recent vigorous attack on the regulation in which Mr. Gillespie personally argued the case before the district court and the court of appeals, the legal questions were highly complex and without clearly defined judicial precedent. The letter further observed that Mr. Gillespie invited and was receptive to the technical information and expertise that was available from the legal staff of the Federal Aviation Agency, that he demonstrated a full measure of common sense as well as professional knowledge and skill in deciding the many problems that had to be resolved before the actual court hearings, that in the brief time available he developed a thorough understanding of the complicated facts and legal issues, and that this was most effectively illustrated in his succinct, well ordered arguments to the district and appellate courts. The letter stated that the subsequent opinions of these courts amply demonstrated how clear and well received Mr. Gillespie's presentations had been.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

Voucher Payments

This is the time of year when it is particularly important that all outstanding authorizations which will not be used prior to July 1, 1960, should be returned for cancellation. If the expense will be incurred after June 30, please submit a new Form 25B for authorization from the 1961 fiscal year appropriation. Please write the word CANCEL across the face of the unused Form 25B and return it to the Department, Attention: A3-1. You are reminded that the date or dates on which fees are earned, services rendered or expenses incurred, and not the date of certification or payment, determines the fiscal year from which payment shall be made, except that metered commodities or services such as electricity, telephone or gas, etc., shall be paid from the appropriation current at the end of the billing period. We wish to emphasize that terminal leave is payable as of the date of separation.

In the near future you will receive a reissue of Department MEMO No. 80, on the subject of unpaid obligations.

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OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Possessory Action to Recover Patent Royalties and Damages for Failure to Exploit Exclusive Patent License Contract; Non-availability of Counterclaim, Set-off and Defense of Illegality of Contract in Possessory Suit; Effect of Affixing Patent Notices to Goods After Claim by Licensee of Eviction from License. Rogers v. Engelhard Industries, Inc. (D.N.J., May 11, 1960). In 1936 certain German inventors granted an exclusive license to the Hanovia Chemical & Manufacturing Company to exploit, on a royalty basis, certain patents and patent applications relating to high pressure vapor discharge burners for ultraviolet irradiation; and in January 1941 Hanovia made another agreement with the General Electric Company to which the German inventors were also signatories, in which the 1936 "Hanovia-inventor" agreement was incorporated.

Following the outbreak of war between the United States and Germany, the Alien Property Custodian seized the German licensors' interests in both agreements. Thereafter and until September 30, 1949, Hanovia paid royalties of approximately $182,000 to the Custodian. In 1948 Westinghouse Electric Corporation, which had been accused by Hanovia of infringing the licensed inventions, successfully sued for a declaratory judgment that its device did not infringe Hanovia's, and the judgment was affirmed on appeal.

After such decision of affirmance, Hanovia notified the Custodian that it considered itself evicted from the license agreement; that it would pay no more royalties; that it would seek return of royalties already paid; and that it would make no further effort to exploit the licensed inventions. However, for five years following the Westinghouse decision, it continued to affix notices to some of its products stating that such products were protected by patents, some of which formed the consideration for the license agreement.

The Attorney General, as successor to the Alien Property Custodian, sued under Section 17 of the Trading with the Enemy Act for royalties due from September 30, 1949, and for damages for failure by Hanovia and its successor (the defendant) to exploit fully the licensed inventions. Defendant pleaded the defense of contract illegality, alleging package licensing and misuse of patents; asserted a counterclaim for return of $182,000 previously paid; a set-off for $89,000 allegedly incurred in defending the Westinghouse suit; and alleged eviction from the license as a result of the Westinghouse decision, which it claimed had the effect of narrowing the patent claims and denying it adequate patent protection within the meaning of a clause in the contract which provided that the agreement was to continue "until 1950 or for such longer or shorter period as patent rights of the Licensor covering the high pressure and the dosage feature afford adequate protection for the burners covered by this agreement."

The Attorney General moved to strike the defense of illegality, the counterclaim, and the set-off on the grounds that the defense was not available, and that the counterclaim and set-off were not properly in issue in a suit to reduce vested property to possession. The motion was granted in its entirety. Defendant then moved for summary judgment, and the Attorney General also moved for summary judgment under FRCP 56(c) only on the issue of liability. The Court (Meaney, D.J.) denied defendant's motion and granted plaintiff's, reserving for trial the fixing of damages.

The Court found no eviction because of the Westinghouse judgment, since only infringement and not patent validity was there in issue; that if any claims were narrowed, such resulted from the limitation contained in the specifications prepared by the German inventors and not by the decision in Westinghouse; and that by affixing patent notices to the products after the Westinghouse decision, defendant had placed itself, "in the unenviable position of having supported the very contention which now it would deny, namely, that the protection of the patent persisted after the Westinghouse decision." Defendant has indicated it will move the Court for reconsideration and for leave to appeal the interlocutory order under 28 U.S.C. 1292(b).

Staff: David Moses (Office of Alien Property).

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ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Price Fixing Conspiracy Conviction Affirmed. Plymouth Dealers' Association of Northern California v. United States (C.A. 9). On May 26, 1960 the appellant Association's conviction by a jury (and fine of $5,000) for engaging in a price-fixing conspiracy in violation of Section 1 of the Sherman Act was affirmed. The evidence before the jury established that the Plymouth dealers in the San Francisco Bay area, acting through the Association, agreed upon a retail list price to be published and circulated to the Association members; and that many member dealers used this agreed-upon price list as a starting point in bargaining with the customer. Appellant argued that no illegal price-fixing occurred because the list price (with a few exceptions) was used only as a starting point price, with the final sales price varying from dealer to dealer. The Court of Appeals, relying on Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, and United States v. Socony-Vacuum Oil Co., 310 U.S. 150, rejected this argument. It stated that the agreement to use the "uniform list price * * * established as a matter of actual practice one boundary of the range within which sales would be made," and thus had "a definite effect on prices." The Court further held that certain challenged instructions to the jury were correct, and that the evidence supported the jury's verdict, and in particular, its holding that "the price schedules so agreed upon were a substantial part of the price structure used in the sale of Plymouth motor cars by appellant."

The Court also ruled that the fact that a majority of the Plymouth cars involved were assembled at a California plant did not undermine the Interstate Commerce finding, since on the evidence before it the jury could properly find (1) that the parts used in the assembly, almost all of which came from out-of-state, remained in the flow of commerce, through the conduit of the local assembly plant, until they reached the dealer and through him the customer; and (2) that 35% of the dealer's sales was pursuant to specific customer orders and therefore remained in interstate commerce until delivery to the customer.

Staff: Lyle L. Jones, Don H. Banks, Gilbert Pavlovsky, Luzerne E. Hufford, Jr., Richard A. Solomon and Henry Geller (Antitrust Division)

Restraint of Trade - Mattresses and Bedding Articles. United States v. Sealy, Inc., United States v. Serta Associates, Inc., United States v. The Spring-Air Company, United States v. Restonic Corporation, (N.D. Ill.). During the period between May 27th and

June 2, 1960 the Government filed separate civil antitrust suits against the above-named defendants, respectively. Each complaint charges defendant and its co-conspirator manufacturing licensees with having engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in the manufacture of mattresses and other bedding articles, in violation of Section 1 of the Sherman Act. In each case the defendant corporation is owned by numerous manufacturing-licensees who have plants located in various cities throughout the United States, and have been licensed by the respective defendants to manufacture and sell mattresses and other related articles under the trade-marks and trade names owned by the defendant corporation.

The complaints filed charge that the defendant corporation and its manufacturing-licensees, who are named as co-conspirators, have agreed to allocate exclusive sales territories among themselves, thereby prohibiting them from making sales outside of their assigned territory; and that as a part of the unlawful combination and conspiracy they have agreed "to fix uniform suggested resale prices" and have taken steps to induce retail stores to adhere to such suggested resale prices.

On May 27, 1960, a consent judgment was entered against the Restonic Corporation successfully terminating the case against that defendant. This consent judgment requires Restonic to condition the issuance or continuation of any franchise or license for the manufacture or sale of Restonic products on the agreement of the licensee to consent to be bound by the terms of the judgment; enjoins Restonic and the consenting manufacturers from agreements allocating exclusive sales territories and from agreeing "to fix, determine, maintain or adhere to prices, suggested or recommended prices, markups, or other terms or conditions of sale for any mattresses..." or other related items; prohibits Restonic from fining, discriminating against or otherwise penalizing its manufacturing-licensees for or on account of any practices with respect to the territories in which, the persons to whom, or the prices at which mattresses and related items are sold; and makes the continuation of the system of franchising or licensing manufacturers under Restonic trade names and trademarks dependent upon Restonic's maintaining quality controls with respect to such manufacture in conformity with the Trade-Mark Act.

Staff: Earl A. Jinkinson, Thomas J. Rooney, Harry H. Faris, Max Freeman and Paul A. Owens. (Antitrust Division)

CLAYTON ACT

Governments Motion For Preliminary Injunction Partially Granted in Section 7 Case. United States v. Aluminum Company of America, et al., (N.D. N.Y.). On May 31, 1960, the Court issued an opinion and order granting in part and denying in part the Government's motion for a preliminary injunction. Oral argument had been held on April 26, 1960, and additional memoranda, affidavits and materials had been submitted by both sides thereafter.

The injunction granted by the court provides that the stock of Rome-Delaware, owned by the defendant Alcoa, shall not be hypothecated or encumbered in any manner and that no further manufacturing or processing operations, now carried on by Rome-Delaware, shall be transferred to the Alcoa plants or any of its subsidiaries.

The Government had sought an injunction restraining defendants from ". . . consolidating or intermingling the business operations conducted by the defendant Rome Cable Corporation (Rome-Delaware), or its assets or operating personnel, with those of defendant Aluminum Company of America (Alcoa), or any other company, from selling, leasing, or conveying in any manner the assets of Rome-Delaware to Alcoa or any other company, and from making any changes in the corporate structure of Rome-Delaware, by way of consolidation or otherwise."

The Government had argued that "aluminum wire and cable" is a line of commerce, and that the acquisition of Rome by Alcoa may substantially lessen competition or tend to a monopoly in that line of commerce because of a high concentration in the hands of the integrated aluminum producers, and Alcoa's important position in aluminum wire and cable. Defendants had disputed both contentions, and had emphasized the fact that Rome was predominately a copper wire and cable producer.

The Court's opinion states: "No attempt, at this time will be made to discuss the merits of the action insofar as the line of commerce and the effect of the acquisition upon the competition are concerned. To do so would be to pre-judge issues which are not wholly submitted . . . It is sufficient to say " . . . that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and for more deliberate investigation." (Hamilton Watch Co., v. Benrus Watch Co., 206 F. 2d 738 at 740).

With respect to the legal principles governing the issuance of the requested preliminary injunction, the Court's opinion states: "It is not disputed that this court has the power to preserve the existing situation where a change therein would make its decree ineffective. (U.S. v. Adlers Creamery, 107 F. 2d 987 at 990). This power however is not to be exercised automatically. The necessity of injunctive relief, the balance of hardships thereby imposed and the reluctance of courts to interfere in corporate business transactions all dictate that the court must exercise an informed discretion in dealing with the problem involved. This discretion may be liberally exercised where the public interest is involved, (Virginian Rwy. v. Federation, 300 U.S. 515 at 552) since the public interest measures the propriety thereof (Hecht Co. v. Bowles, 321 U.S. 321, 331). The measure of the relief which this court may order is indicated in the language of the statute as being such as is "just in the premises." In determining same, the status of the action, its likely early disposition, the damage already caused or threatened are all to be considered as is the fact that here the merger is completed not threatened. (Fein v. Security Banknote Co., 157 F. Supp. 146).

The Court's opinion points to the elapse of a year's time between the date of the acquisition and the date of the filing of the Government's complaint, stating: "...Such delay would almost in itself preclude an injunction which would undo whatever has been accomplished since the date of the merger." This is true where, as here, there appears to be no evidence that the activities of Rome-Delaware have been altered up to date so as to seriously interfere with the granting of ultimate relief.

These factors and expectancy of any early trial of the issues were cited as the reasons for denying that part of the motion seeking an injunction against continuation of a consolidated sales program already begun by defendants. With respect to this denial, the Court's opinion observes that "In any event, plaintiff may again apply for relief should the occasion arise."

Staff: Samuel Karp, Michael H. Gottesman, Robert R. McMillan and Roy C. Cook (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEAL

ADMINISTRATIVE PROCEDURE ACT

Waiver of Right to Hearing Under Administrative Procedure Act Valid; Transfer of Agency Powers Held Contemplated by Agreement. U.S. Bio-Genics Corp. v. Robert K. Christenberry, etc. (C.A. 2, May 6, 1960). In 1957, the Post Office Department issued an administrative complaint against plaintiff, seeking a fraud order because of certain claims made by plaintiff on behalf of his Royjel Formula 101, which was being sold through the mails. The formal proceeding before a Hearing Examiner was discontinued when plaintiff signed an affidavit not to make certain representations about its product in the future, and further agreeing that if the Post Office Department should, in the future, receive evidence of the violation of this agreement, the Postmaster General, Deputy Postmaster General, or General Counsel of the Post Office Department might issue a fraud order against plaintiff without further notice. In 1958 the power to issue final agency orders for the Department, formerly vested in the General Counsel, was transferred to the Judicial Officer. Subsequently, the Department received notice that plaintiff was violating the agreement, and the Judicial Officer issued a fraud order against plaintiff.

The district court granted the Government's motion for summary judgment, holding that the agreement signed by plaintiff was legally binding and valid; that it represented a valid waiver of plaintiff's right to a hearing under the Administrative Procedure Act (5 U.S.C. 1001, et seq.); and that, under the affidavit as fairly construed, "[w]hen the power to issue final agency orders was transferred from the General Counsel to the Judicial Officer the power to act under the affidavit followed." On plaintiff's appeal, the Court of Appeals affirmed on the opinion of the district court. Judge Madden dissented on the ground that plaintiff had not agreed to the issuance of a fraud order against him by the Judicial Officer.

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

ADMIRALTY

Service of Petition Impleading United States; Service Made Two Months and Four Days After Filing Is Not Compliance With Statutory Requirement of Service "Forthwith." The City of New York v. McAllister Brothers, Inc. (C.A. 2, May 17, 1960). In a suit in admiralty to recover damages for negligence, the respondent, on February 25, 1959, filed a petition impleading the United States. Copies of the petition were not served on the United States Attorney or mailed to the Attorney General until April 29, 1959.

Section 2 of the Suits in Admiralty Act (46 U.S.C. 742) (which is also part of the Public Vessels Act (46 U.S.C. 782)) states that, in a suit against the United States, the "libelant shall forthwith serve a copy of his libel on the United States attorney * * * and mail a copy thereof * * * to the Attorney General." The district court sustained the Government's exceptive allegations and dismissed the petition (177 F. Supp. 679). The Court of Appeals affirmed. It held that (1) Section 2 applies to a petition seeking to implead the United States, as well as to a libel; and that (2) a delay of over two months in serving and mailing of the petition did not constitute service "forthwith," citing Dickerman v. Northern Trust Co., 176 U.S. 181, 193.

Staff: Capt. Morris G. Duchin, U.S.N. (Civil Division)

JURISDICTION

Federal Court Refuses to Order Suppression, for Purposes of State Criminal Proceeding, of Evidence Allegedly Illegally Obtained by Federal Agents. Wilson v. Schnettler, et al. (C.A. 7, March 21, 1960). Plaintiff was arrested and searched without a warrant by federal narcotics agents, who found narcotic drugs on his person. Plaintiff was thereafter indicted in an Illinois state court and charged with the crime of unlawful possession of narcotic drugs. The state court denied his motion for suppression of the evidence obtained in the search and seizure. Plaintiff then brought suit for declaratory judgment against the agents in a federal district court, alleging that the seizure had been in violation of the Federal Rules of Criminal Procedure, and seeking that the evidence be impounded and the agents enjoined from testifying in the state proceeding. The district court dismissed the action.

The Court of Appeals affirmed. The Court stated, "[Rea v. United States, 350 U.S. 214] is predicated on the authority to exercise supervision over federal officials only insofar as these officials act under color of federal judicial authority and owe obedience to the federal rules. The facts and the legal authorities on which the Rea decision is based do not permit the conclusion that the court thereby intended to assume jurisdiction over all activities of the federal law enforcement authorities. We do not interpret the Rea decision as indicating that the Supreme Court holds that federal courts should directly or indirectly supervise or control the action of State courts on evidentiary problems while cases are pending in the State courts * * * Considerations of policy would constrain the denial of a discretionary exercise of judicial supervision in this case were such power vested in the federal courts."

Staff: United States Attorney Robert Tieken and Assistant United States Attorneys John P. Lulinski, Charles R. Purcell, Jr., and Robert N. Caffarelli (N.D. Ill.)

PERISHABLE AGRICULTURAL COMMODITIES ACT

License Under Act May Be Suspended Although Licensee Has Undertaken Corrective Measures Where Violations of Regulations Were Willful. Eastern Produce Co., Inc. and Charles Taxin v. Benson, (C.A. 3, May 12, 1960). After a hearing, a Judicial Officer of the Department of Agriculture determined that both Taxin and the Eastern Produce Co., of which he was an officer, had committed violations of the Perishable Agricultural Commodities Act of 1930, as amended, 7 U.S.C. 499, et seq. Specifically, it was found that they had failed or refused correctly to account and make full payment promptly for numerous shipments of perishable agricultural commodities received in interstate commerce on consignment or joint account. The Department of Agriculture suspended Eastern's license under the Act for forty-five days and withheld issuance of a new license to Taxin for the same period.

On petition for review of the Secretary's order, the Court of Appeals affirmed the order, holding that, despite petitioners' contention that they had undertaken full corrective measures before the license suspension order, the Secretary could order the license suspension; that, under 5 U.S.C. 1008(b), where a licensee's improper conduct has been willful, his license may be suspended without giving him an opportunity to take corrective action; that petitioners' repeated acts in disregard of the regulations constituted "willfulness"; and that the Secretary's choice of the license suspension remedy was allowable.

Staff: Neil Brooks and Donald A. Campbell
(Department of Agriculture)

DISTRICT COURTS

ANTI-DUMPING ACT

Dismissal of Suit Challenging Determination of Secretary of Treasury Under Anti-Dumping Act. North American Cement Corp., et al. v. Robert B. Anderson, et al. (D. D.C., May 18, 1960). Plaintiffs, 10 corporations engaged in the manufacture and sale of Portland cement, sought declaratory and injunctive relief with respect to the Secretary of the Treasury's determination of April 18, 1960, that Norwegian Portland cement was not being sold in the United States at less than the foreign market value as defined in Sections 203 and 205 of the Anti-Dumping Act, 19 U.S.C. 160, et seq. Plaintiffs sought to enjoin the Secretary from making a similar determination with regard to Portland cement being imported from Israel, West Germany, Sweden, and Belgium. Preliminarily, plaintiffs also sought to enjoin the revocation of a notice authorizing customs officials to withhold appraisement of entries of Norwegian cement.

Plaintiffs' application for a temporary restraining order was denied on the ground that they could not show irreparable injury in that the 376,000 barrels of cement on which they sought to enjoin appraisement had already entered the United States and been sold. Plaintiffs filed motions

for a preliminary injunction and summary judgment. The Government opposed these motions and moved for dismissal, on the ground that exclusive jurisdiction over the subject matter has been vested in the Court of Customs, 28 U.S.C. 1582, 1583, 19 U.S.C. 169, Horton v. Humphrey, 146 F. Supp. 819 (D. D.C. 1956), affirmed, 352 U.S. 921 (1956); Morgantown Glassware Guild, Inc. v. Humphrey, 236 F. 2d 670 (C.A.D.C. 1956), certiorari denied, 352 U.S. 896. Plaintiffs contended that the Court had jurisdiction as they were contesting the Secretary's interpretation of the law and in that they were manufacturers and the earlier cases dealt with importers. The District Court granted the Government's motion to dismiss on the ground that plaintiffs had an adequate remedy at law, i.e., in the Customs Court. Plaintiffs have noted an appeal.

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

CONFIDENTIALITY OF FEDERAL TRADE COMMISSION RECORDS

Denial of Motion in Private Antitrust Litigation to Compel FTC Investigators to Answer Questions Pertaining to FTC Investigation. Philip Rosen, et ux, etc. v. District Distributors, Inc., et al. (D. D.C., May 9, 1960). Two attorney investigators of the Federal Trade Commission were subpoenaed by plaintiffs in this private antitrust litigation for the purpose of taking their depositions with regard to an investigation of defendants by the FTC. Plaintiffs had not applied to the Commission, pursuant to 16 C.F.R. 1.134, for disclosure of information contained in the Commission's records. However, plaintiffs had secured an ex parte order from the District Court authorizing the taking of the depositions of the named witnesses "[p]rovided, however, that any statutory rights to privileged communications may be asserted by said witnesses." Plaintiffs contended that in light of this order and the amendment of 5 U.S.C. 22, they were not required to proceed pursuant to 16 C.F.R. 1.134, and that the order was of the type contemplated by 15 U.S.C. 50 and would absolve the employees of any criminal liability for answering questions put to them.

Upon instructions of the Chairman of the FTC, the witnesses declined to testify with respect to any information acquired by them as employees of the Commission. Plaintiffs then filed a motion to compel the witnesses to answer the questions propounded to them. The Government opposed the motion on the grounds that (1) the Chairman of the FTC lawfully withdrew from the employee witnesses discretion with regard to the disclosure of Commission records and information; (2) the Commission regulations with regard to the confidentiality of its records are proper and are founded on 15 U.S.C. 46(g); and (3) plaintiffs should be required to comply with 16 C.F.R. 1.134. The District Court denied plaintiffs' motion.

Staff: Donald B. MacGuineas, Andrew P. Vance (Civil Division)

FALSE CLAIMS ACT

Claim for Veterans' Hospitalization Is Covered By False Claims Act. United States v. Alperstein (S.D. Fla., April 20, 1960). A veteran applied for free hospitalization for a non-service-connected disability at a Veterans' Administration facility. His sworn application included the false statement that he could not defray the necessary expenses of hospitalization. The veteran also submitted a financial statement which understated his actual assets. In the latter respect, this case differed from United States v. Borth, 266 F. 2d 521 (C.A. 10). In the Borth case the Tenth Circuit held that an application for hospitalization is not a demand for money or property and therefore is not a "claim" within the meaning of the False Claims Act (31 U.S.C. 231).

The District Court, in the instant case, rejected the rationale of the Borth decision, asserting that "there is no logical, realistic or legal justification for distinguishing a claim for expensive (to the Government) hospitalization from any other claim for money or for the transfer of public property." The Court pointed out also that hospitalization includes not only services but also room, board, medicine, supplies, etc., all of which "involve property and things of very definite tangible value."

The veteran had been hospitalized on two occasions pursuant to two separate applications and the aggregate value of the hospitalization received amounted to $1,001. The Court entered judgment for the United States pursuant to the False Claims Act for twice that sum plus two forfeitures of $2,000 each. The Department will continue to invoke the False Claims Act where false applications are presented for VA hospitalization.

Staff: United States Attorney E. Coleman Madsen and Assistant United States Attorney Lavinia L. Redd; Maurice S. Meyer (Civil Division)

MANDATORY OIL IMPORT PROGRAM

Provision of Regulations Allocating Imports of Residual Fuel Oil Held Valid. Gulf Oil Corporation v. Seaton, et al. (D. D.C., May 24, 1960). Gulf Oil Corporation filed this action for declaratory judgment and an injunction against the Secretary of the Interior, challenging the validity of a regulation issued in implementation of the Mandatory Oil Program established by Presidential Proclamation 3279 which limits imports of petroleum and petroleum products in the interest of national security. The regulation allocates among eligible importers the right to import finished petroleum products (including residual fuel oil) in proportion to the ratio which each importer's 1957 imports bore to total 1957 imports.

The District Court granted defendant's motion for summary judgment, dismissing the complaint. It held that the regulation provides for a fair and equitable distribution of the imports in question, as required

by the Presidential Proclamation. Gulf Oil has noted an appeal.

Staff: Donald B. MacGuineas (Civil Division)

STATE COURTS

UNITED STATES SAVINGS BONDS

Executrix Rather Than Beneficiaries Entitled to Proceeds of Series G and H Savings Bonds Sought To Be Redeemed by Owner Shortly Before His Death. United States v. Lorene G. Wadlington, Executrix (Court of Appeals of Ky., March 25, 1960). On Thursday, the decedent presented several Series G and H savings bonds owned by him to a local bank for payment. On Friday, the next day, the bank mailed the bonds to the Federal Reserve Bank of St. Louis for payment, but on the following day, Saturday, decedent died. As the Federal Reserve Bank was not open on Saturday or Sunday, actual delivery of the bonds to that bank did not take place until Monday. Decedent's executrix, who cashed the checks subsequently issued by the Treasury, brought this suit against the named beneficiaries of the bonds in question, seeking a determination that the redemption of the bonds had been effective, so that the proceeds of the bonds belonged to the estate. The beneficiaries, and the United States as intervenor, alleged that the redemption had been ineffective and that, accordingly, ownership of the bonds had passed to the beneficiaries on decedent's death.

31 C.F.R. 314(c) provides that if the registered owner of a bond dies without having "presented and surrendered" it for payment, and is survived by the beneficiary, the beneficiary will be recognized as the sole and absolute owner of the bond. However, if the registered owner dies after he has "presented and surrendered" the bond for payment, payment will be made to his estate. The term "presented and surrendered" is defined in 31 C.F.R. 314(d) as meaning "the actual receipt of a bond, for payment, by a Federal Reserve Bank * * *."

The state trial court dismissed the Government's intervening motion and held that the bonds had been effectively redeemed. On the Government's appeal, the Court of Appeals affirmed. It held that the decedent had done all that was reasonably within his power to show that he no longer wanted the beneficiaries to receive the bonds. In so holding, it "construed" the federal regulations as not requiring actual receipt of the bonds by a Federal Reserve Bank prior to the bond owner's death. The Court emphasized that the beneficiaries had merely a conditional interest which was subject to nullification by the owner's cashing of the bonds.

Staff: Former United States Attorney J. Leonard Walker and Assistant United States Attorney Charles M. Allen (W.D. Ky.)

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CIVIL RIGHTS DIVISION

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

Suit Filed to Open Bathing Beach to Negroes. United States v. Harrison County, Mississippi, et al., (S.D.Miss.). On May 17, 1960, the United States Attorney for the Southern District of Mississippi filed a complaint, prepared by this Division, to open the use of the 26-mile long Harrison County Beach, the so-called "Riviera of the Gulf Coast" to the use of Negroes. The beach was constructed several years ago through use of Federal funds under a contract executed in 1951 between Harrison County and the U. S. Army Corps of Engineers. In the contract, Harrison County agreed to maintain the beach for public use perpetually. In April, violence flared in the resort area when Negroes, who had long been excluded from the beach, sought to bathe in the vicinity of Biloxi. The Negroes were assaulted and driven from the beach by gangs of white youths. The complaint alleges that the County and its officers, assisted by city officials of Biloxi, have enforced a policy of excluding Negroes, in violation of the agreement set out in the contract.

Staff: United States Attorney Robert E. Hauberg (S.D. Miss.); St. John Barrett, Irving N. Tranen (Civil Rights Division).

Department's Demands for Election Records Under Civil Rights Act of 1960 Opposed in Federal and State Court Proceedings. Manning, et al. v. Rogers, et al., (W.D. La., March 23, 1960); Bruce et al. v. Rogers, et al., (Circuit Court for Wilcox County). The Department of Justice demanded access to the registration and other election records in eight counties in four different states, citing the authority contained in Title III of the Civil Rights Act of 1960. In several instances full compliance was obtained but in two states suits were brought to enjoin the Attorney General and the Federal Bureau of Investigation from proceeding with the demand. In Manning v. Rogers, supra, an injunction action was filed in the District Court for the Western District of Louisiana by voting registrars of East Carroll, East Feliciana and Ouachita Parishes, on behalf of all the registrars in Louisiana. The complaint sought to restrain the enforcement of the 1960 Act anywhere in the State of Louisiana on the grounds of unconstitutionality of the statute and non-compliance by the Department with its provisions. District Judge Dawkins has requested the convening of a three-judge court.

The voting registrar of Wilcox County, Alabama, filed suit in state court asking the court to restrain and enjoin the Attorney General and the Federal Bureau of Investigation from further activities under the Act. Circuit Judge James Hare granted a temporary injunction prohibiting federal agents from seeking access to the voting records.

In conformity with the Department's view that litigation concerning the application of Title III must be conducted within the procedural framework of the Civil Rights Act itself, pleadings were filed in both cases asking for dismissal of the complaints on procedural grounds. In the Louisiana case the Government's motion to dismiss challenges venue in the Western District of Louisiana, and attacks the jurisdiction of the court because of lack of proper service of process on the defendants. In the Alabama case a petition has been filed to remove the case from the state court to the federal District Court. As soon as removal is effected, a motion to dismiss for lack of jurisdiction will be filed.

Staff: United States Attorney, T. Fitzhugh Wilson (W.D. La.);
United States Attorney, Ralph Kennamer (S.D. Ala.);
Harold H. Greene and D. Robert Owen (Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

REFERRAL PROCEDURES IN FAIR LABOR STANDARDS ACT CASES

As a result of conferences and agreements with the Department of Labor, arrangements have been made for the direct referral to the United States Attorneys by that Department of criminal cases, including criminal contempt for violation of injunction decrees, arising under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201-219, particularly Sections 215 and 216. This new procedure is intended to accelerate the preparation and prosecution of these cases. The effectiveness of prosecution in a Fair Labor Standards Act case is frequently enhanced by prompt action. The new referral procedure should contribute toward this end.

The direct referral procedure is effective immediately and covers all criminal cases arising under the mentioned statute, except those upon which the Department of Labor may desire initial examination and review by the Criminal Division. In such cases, the Criminal Division will receive the referral from the Department of Labor and, after review, will transmit the case to the appropriate United States Attorney if the facts warrant. (The Department of Labor itself handles the civil cases under the Act (29 U.S.C. 216(c), 217).)

The criminal cases will otherwise be handled in conformity with existing policies and procedures as outlined in the United States Attorneys Manual (Title 2, pages 66.1-68). Further, it is the policy of the Department, in all Fair Labor Standards Act cases where appropriate, that every reasonable effort be made to secure restitution to those employees who have been deprived of their lawful wages by the misconduct of the defendants. In this connection, the court should be urged to make restitution a condition of the sentence imposed following conviction (upon a plea or after trial). In all Fair Labor Standards Act cases involving violations of the minimum wage or overtime provisions, or both, such violations involve conduct which results in a civil liability on the part of the employer, a liability which the Department of Labor could seek civilly to enforce on behalf of the individual aggrieved employees under 29 U.S.C. 216(c). We believe it is proper and highly appropriate to urge such restitution at the time of sentencing; see 18 U.S.C. 3651.

The Department of Labor will furnish to the Criminal Division copies of its initial referral letters and of all subsequent correspondence with the United States Attorneys in these cases, and it is requested that copies of all correspondence from United States Attorneys to the Labor Department be furnished to the Criminal Division. The Division will continue to follow developments in these cases and to

exercise its supervisory jurisdiction. The new procedure does not mean that there has been any change in emphasis or attitude in these cases. These criminal cases are deemed an essential part of the administration and enforcement of this beneficial statute. The importance and role of the statute in the economy of our country need no discussion.

To retain the general uniformity which now exists in the handling of these cases, a uniformity believed to be highly desirable, it is part of the policy that when a United States Attorney for any reason declines or recommends against prosecution, he is to forward the file, together with his comments, to the Criminal Division for review.

It is, of course, the general policy applicable to all criminal cases under the supervisory jurisdiction of the Criminal Division that no indictment or information be dismissed as to any one or more defendants without prior authority. United States Attorneys Manual, 2: 18 et seq. Thus, with respect to Fair Labor Standards Act cases, as well as other criminal cases, no prosecution may be disposed of on an arrangement or agreement to dismiss as to certain defendants and accept pleas as to others, without the express consent of the Criminal Division. The Division will not approve any request for authorization to dismiss based upon such an arrangement or agreement in the absence of unusual circumstances requiring such action. Particularly, the Criminal Division will not approve the disposition of a case based upon acceptance of a plea of a corporate defendant and dismissal as to the individual defendants, unless such disposition is based on materially more than an effort to avoid litigation.

The Department of Labor will bring to the attention of the Criminal Division any Fair Labor Standards Act case which is deemed unusually important or which may involve unusual issues or problems. Nevertheless, it is requested that the United States Attorneys, in their processing of these direct referral cases, also bear in mind the need for keeping the Criminal Division informed of major criminal matters and of important questions or developments in criminal cases pending in their offices. The United States Attorneys should, of course, feel free to request advice and assistance from the Criminal Division on any problem which may arise. In any event, close cooperation with the Regional Attorney of the Department of Labor is strongly recommended.

The article in the United States Attorneys Manual on the handling of Fair Labor Standards Act cases will shortly be amended to reflect the new direct referral procedures.

CUSTOMS

Successful Actions for Forfeiture and for Penalty Value Following Acquittal in Criminal Case. United States v. Samuel Leiser (S.D. N.Y.). After a 9-day jury trial, Leiser was acquitted in 1955 on charges of smuggling and knowingly bringing in diamonds (appraised at about $70,000),

contrary to law because of failure to declare them as required by 19 U.S.C. 1497 and 1498, in violation of 18 U.S.C. 545. Leiser had been traveling by air from Germany to Gander, Newfoundland, with no stop in the United States and with Bermuda as his ultimate destination, but adverse weather made his plane overfly Gander and he landed in Boston contrary to expectation and intent.

Shortly after the acquittal, libel was filed against the diamonds, their forfeiture to the United States being sustained (despite Coffey v. United States, 116 U.S. 436 (1886)) by both the district and appellate courts. United States v. Leiser, 16 F.R.D. 199 (D. Mass., 1954); United States v. 532.33 Carats, More or Less, of Cut and Polished Diamonds, 137 F. Supp. 527 (D. Mass., 1956); Affirmed sub nom; Leiser v. United States, 234 F. 2d 648 (C.A. 1, 1956), cert. den. 352 U.S. 893 (1956). It was held that since the diamonds were not declared they were subject to forfeiture even if the failure to make declaration was in good faith. (See Bulletin, Vol. 4, No. 5, p. 142, and Vol. 4, No. 15, p. 505.)

On June 1, 1959, civil suit was filed in the Southern District of New York to recover the penalty value under 19 U.S.C. 1497, Leiser having been found there and reportedly possessing assets as an active diamond dealer. The Government proceeded upon the theory of collateral estoppel implemented by affidavits to establish the value of the diamonds, which had previously been sold for close to their appraised value.

On April 23, 1960, Judge Thomas F. Murphy granted the Government's motion for summary judgment in the sum of $66,438.00. Customs considers that this places helpful emphasis on complying with the law concerning declarations, as well as constituting deterrents to smugglers reportedly watching the development of the penalty value case.

Staff: United States Attorney S. Hazard Gillespie, Jr.; Assistant United States Attorney Myron J. Wiess (S.D. N.Y.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Physical Persecution; Judicial Review of Order Denying Application for Stay of Deportation. Dunat v. Holland, (E.D. Pa., May 10, 1960). Plaintiff, a Yugoslav national, was ordered deported in May 1958 for having remained in the United States for more than 29 days as a non-immigrant alien crewman. The validity and propriety of the deportation order was not disputed.

Subsequently plaintiff applied, under the provisions of section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h)) for a withholding of his deportation to Yugoslavia on the ground that he would be subject to physical persecution in that country. After proceedings before a special inquiry officer the Regional Commissioner, on February 26, 1960, denied his application on the ground that he had failed to establish that he would be physically persecuted if returned to Yugoslavia. His action for judicial review of the order denying his application followed.

The Court stated that the withholding of an alien's deportation under section 243(h) is permissive rather than mandatory and that it rests wholly within the administrative judgment of the Attorney General or his delegate. Quoting from U.S. ex rel. Dolenz v. Shaughnessy, 206 F. 2d 392, (C.A. 2, 1953) and U.S. ex rel. Leong Choy Moon v. Shaughnessy, 218 F. 2d 316, (C.A. 2, 1954), the Court concluded that plaintiff had been afforded all the rights of procedural due process to which he was entitled and that his evidence was not so strong that failure to withhold deportation amounted to a failure to consider the evidence.

Respondent's motion for summary judgment was granted.

Evidence in Deportation Proceedings, Admissibility and Competency of. Lattig v. Pilliod, (N.D. Ill., May 18, 1960). Petition for judicial review of findings and order of deportation.

Plaintiff, a German alien, was ordered deported on the ground that he was excludable at the time of his last entry on or about November 15, 1952 (sec. 212(a)(9), I & N Act; 8 U.S.C. 1182 (a)(9)) by reason of his conviction in August 1952 of first degree burglary, a crime involving moral turpitude (sec. 241(a)(1), I & N Act; 8 U.S.C. 1251(a)(1)).

To establish the date of the alien's entry the Immigration Service, in his deportation hearing, offered in evidence a sworn

statement by him in which he stated that he last entered the United States "about November 15, 1952." Over his objection that it was hearsay, of no probative value, and not the best evidence since he was present at the hearing and available for questioning, it was admitted into evidence. Plaintiff, by his own testimony and documentary evidence in the hearing, attempted to show the improbability of his entry on that date.

Plaintiff, in his petition for judicial review, contended that the order of deportation was illegal and void because: (1) it was contrary to the evidence; and (2) the findings and order were not supported by substantial, reliable, sufficient and probative evidence but were found on irrelevant and immaterial evidence.

The Court said that plaintiff's sworn statement was admissible and competent evidence under the Service regulations and that it was apparent from the special inquiry officer's finding on the issue of entry that he placed no reliance on the plaintiff's denial of his entry on the date in question and that, in that officer's opinion, his testimony was not of such convincing character as to overcome his sworn statement.

The Court said further that a determination of whether there is substantial evidence does not require that the evidence be weighed, but only that there be reasonable support in the evidence to induce conviction that the finding was proper or that it furnished substantial basis for fact from which the issue tendered could be reasonably resolved.

The Court was of the opinion that there existed substantial evidence to support the findings and order; that the special inquiry officer was justified in fixing the date of entry as "on or about November 15, 1952," and that the issue of credibility is solely the function of the special inquiry officers and not reviewable by the court.

Plaintiff's petition was dismissed.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Suits Against Government; Discharge of Naval Reserve Officer Upheld. Robert O. Bland v. William B. Franke, Secretary of the Navy (D. D. C.) Plaintiff filed suit against the Secretary of the Navy in the United States District Court for the District of Columbia on December 15, 1959 for injunctive relief and a declaratory judgment to the effect that proceedings under the Navy and Marine Corps Military Personnel Security Program resulting in his receiving a discharge from the USNR under conditions other than honorable be declared void, unlawful and of no effect, and directing defendant to issue him an honorable discharge. Defendant filed an answer dated February 12, 1960 denying plaintiff's conclusions of law and his entitlement to the relief demanded and further interposed a defense of res judicata based on an action plaintiff had instituted and which had been finally adjudicated by the Court of Appeals in the Ninth Circuit (Bland v. Hartman, 245 F. 2d 311). Plaintiff filed a motion to strike this defense (res judicata) under Rule 12 (f) F.R.C.P. and a motion for judgment on the pleadings and for summary judgment, both dated February 24, 1960. Defendant filed a cross-motion for summary judgment and opposition to plaintiff's motion to strike defense on March 28, 1960 which asserted the sufficiency of the defense of res judicata and that the proceedings against plaintiff under the program were valid and constitutional. By order dated June 7, 1960 the District Court granted defendant's cross-motion for summary judgment, denied plaintiff's motions to strike the defense under Rule 12(f) and for judgment on the pleadings and for summary judgment and dismissed the complaint.

Staff: Oran H. Waterman, Herbert E. Bates and Samuel L. Strother (Internal Security Division)

Trading With the Enemy; Foreign Assets Control Regulation. United States v. Joe Quong, et al. (W.D. Tenn.) On February 10, 1959 a ten count indictment was returned against Joe Quong and seven other defendants charging them, inter alia, with substantive and conspiracy violations of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) and the rules and regulations promulgated thereunder (31 C.F.R. 500.101 et seq.) by engaging in transactions involving prohibited merchandise, to wit, Chinese-type drugs. Violations of the customs laws (18 U.S.C. 545) were also charged. (See Bulletin Vol. 7, No. 9) On April 28, 1959, a superseding indictment was returned naming two additional defendants and including three additional conspiracy counts all relating to Customs and Trading With the Enemy violations. Three defendants pleaded in San Francisco under Rule 20 and on February 4, 1960 were fined $1,000 each. Three defendants are fugitives. On May 20, 1960, Joe Quong and his sons, Joe Wing Wah and Joe Wing Fong, were convicted. Each received a sentence of ten years imprisonment and the three were fined a total of $25,000. Bail was set at $25,000 for Joe Quong and $20,000 for the other convicted defendants.

One defendant, Lun Fee Lee, was acquitted by the jury. The operation involved sales in this country of over a quarter-million dollars of herbs which were smuggled in from Communist China via Canada and Memphis, Tennessee and sold at tremendous profits. The herbs are used by Chinese families in medicinal preparations.

Staff: United States Attorney Warner Hodges
(W.D. Tenn.)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Condemnation; Instructions to Jury; Comparable Sales Best Evidence of Market Value; Use of Land Taken by Government Should be Excluded from Consideration of Market Value. United States v. Baker, et al. (C.A. 9, May 24, 1960.) The United States condemned 132 acres of a 513-acre farm for the purpose of constructing a Capehart housing project to serve nearby Luke Air Force Base. Government experts testified that the highest and best use of the land was for farming and based their estimates of market value on comparable sales, although specific evidence of individual sales was not introduced. The landowners' experts testified they found no comparable sales and relied on their familiarity and experience in the area and valued the land as residential and commercial. The court refused the Government's request for instructions that comparable sales are the best evidence; and that the use to which the Government had placed the land was not to be considered in arriving at market value on the date of taking. The Government appealed on the grounds that it is well established that comparable sales are the best evidence. It also contended that the Government's use of the land was not proper evidence as the demand for housing was not being met by private development, since that was the basic prerequisite for the adoption of the Capehart program.

In affirming, the Court took the position that the Government's sales may have been comparable as sales of farmland, but that they would be of no help in valuing the land as residential land. Accordingly, there was a dispute as to comparability, and since the Government's requested instruction failed to charge the jury as to their initial responsibility of determining the issue of comparability, the instruction was correctly refused "since it placed unwarranted weight on the theory of the government." In other words, the holding is that the request was incomplete and accordingly, properly refused. On the second point regarding the use of the land by the Government, the Court also affirmed on the grounds that other instructions given cured any defect in refusing the requested instruction, and, second, that the Government's use of the land for a housing project adversely affected the use of the remaining land thus creating an issue of severance damages, making necessary consideration of the Government's use. A concurring opinion relied on the absence of "proper direct proof of any one sale" to support the Court's refusal to instruct on comparable sales.

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

* * *

TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decision

Deductions; Travel Expenses; Rent Paid by State Court Judge for Apartment in City Where Court Was Located. United States v. Elmire L. LeBlanc (C.A. 5, May 17, 1960.) Prior to his election as a Justice of the Supreme Court of Louisiana, taxpayer was a resident of Napoleonville, La., about 75 miles from New Orleans. The Court held its sessions in New Orleans, where the State provided offices for each of the Justices, and where their clerks and stenographers were located. After taxpayer's election, and during the taxable years, he rented an apartment in New Orleans where he lived with his family, but retained his home in Napoleonville. He sought to deduct from his gross income as a traveling expense, the rent paid for his New Orleans apartment, but the Commissioner disallowed the deduction on the ground that the rental expense was a personal and living expense under Section 24(a)(1) of the 1939 Code rather than a business expense under Section 23(a)(1)(A). Taxpayer paid the resulting deficiency, filed a claim for refund, and after the lapse of six months without action on his claim, brought suit in the district court. The district court rendered judgment for taxpayer on the ground that for federal income tax purposes Napoleonville was his home. On appeal, the Fifth Circuit affirmed, with one Judge dissenting.

The majority opinion distinguished this case from Commissioner v. Flowers, 326 U.S. 465, on the ground that the Louisiana Constitution required the taxpayer to maintain a home in Napoleonville and to do his work in New Orleans. In this manner the Court also distinguished Barnhill v. Commissioner, 148 F.2d 913 (C.A. 4), involving a judge on the highest court of North Carolina, where the judge maintained two residences and the court disallowed the amounts spent by taxpayer for rent and food in the city where the court sat. In view of the fact that some state court judges and other state officials will be permitted to deduct rent paid for apartments under circumstances similar to those in this case, and others will not, where the state constitution does not require two residences, serious consideration is being given to the question of applying for certiorari in the LeBlanc case.

Staff: Morton K. Rothschild (Tax Division).

District Court Decisions

Liens; Priority Between Federal and State Tax Liens; Federal Tax Lien Held Prior in Time and Superior to County Tax Deed. United States v. Bruce J. Waters, et al. (W.D. Wis.) The United States sued to enforce its lien against defendant for unpaid interest on income taxes for

the year 1947 assessed against him by foreclosure upon his undivided one-half interest, as joint tenant with his wife, in certain real property situated in Barron County, Wisconsin. Notice of tax lien was filed by the United States on January 27, 1951.

Thereafter, on December 17, 1957, the County Clerk of Barron County certified delinquency in local taxes on the property for the years 1952-1956 and issued a tax deed to the county. The County Treasurer answered the Government's complaint, but there was no appearance in behalf of the county at the trial and his attorney waived notice of application for judgment. All other defendants were in default or previously had been dismissed as parties defendant.

The Court held, inter alia, that the United States had a valid and subsisting tax lien upon the property of the taxpayer, real and personal, which was prior and superior to the tax deed issued to Barron County for the real property above referred to, that the real estate in question be sold, as a whole to prevent injury to the interests of the parties, at public sale, and entered judgment accordingly.

Staff: United States Attorney George E. Rapp and Assistant United States Attorney Robert J. Kay (W.D. Wis.); Leon F. Cooper (Tax Division).

Liens; Effectiveness of Open-End Mortgage to Secure Future Loans. United States v. Automatic Heating & Equip. Co., Inc. (E.D. Tenn., March 8, 1960, 5 AFTR 2d 1269, CCH 60-1 USTC par. 9376). On January 3, 1956, Park National Bank loaned the amount of $24,939.60 to the taxpayer, Automatic Heating and Equipment Co., Inc., secured by a deed of trust on certain real property. The deed of trust contained a so-called open-end provision, providing that it "shall also secure any and all other indebtedness due from * * *" the taxpayer. At the time of execution of the deed of trust, taxpayer already owed the bank the amount of $82,526.08, for prior loans. This indebtedness was paid in full on March 1, 1956. Subsequently, during 1956, the bank made three additional loans to the taxpayer, on which there is a balance outstanding in the total amount of $69,083.08. Eachof these subsequent loans was secured by assigned accounts. After all of these loans had been made, taxes were assessed against the taxpayer, and notices of liens therefor were filed. There is a balance outstanding on the taxes in the amount of $28,788.07.

Under an agreement among the bank, the taxpayer and the District Director of Internal Revenue, the property was sold and the liens were transferred to the proceeds of sale. Part of the proceeds were applied to fully satisfy the balance outstanding on the loan made at the time of execution of the deed of trust, and the balance of the proceeds, $7,685.78, was placed in escrow to await the outcome of this action.

The bank claimed that the open-end provision of the trust deed caused it to secure the subsequent loans, and the Government contended that the subsequent loans were not secured by the trust deed. The

Court held that the language of the open-end provision caused the trust deed to secure only indebtedness existing at the time it was executed, but that such language did not apply to future transactions, and that therefore the subsequent loans were not secured by the deed of trust. Accordingly, the Court ordered the escrow money paid to the Government in satisfaction of its tax liens thereon. The bank has filed an appeal with the Court of Appeals for the Sixth Circuit.

Staff: United States Attorney John C. Crawford, Jr., (E.D. Tenn.), Robert L. Handros (Tax Division).

Liens; Taxpayer Prevented from Contesting Assessment in Suit to Enforce Tax Liens and Obtain Deficiency Judgment. United States v. Nicholas Briglia, et al. (S.D. N.Y., 60-1 U.S.T.C., par. 9266.) The New York City Police Department had possession of property which the Government contended belonged to taxpayer. In an action to enforce the tax liens on this property, the Court held that the fact that taxpayer made an immediate complaint of the theft of precious stones to the police and subsequently, after their recovery, filed the only claim as owner, was sufficient to establish a prima facie case of ownership. The Court found that under the circumstances, this was sufficient proof that taxpayer was the owner of the property, and accordingly, entered a decree foreclosing the tax liens against this property.

At the trial, the Court refused to permit taxpayer to contest the assessments by offering to prove the non-receipt of income during the years in question, on the ground that such assessments were immune from collateral attack. Accordingly, judgment was entered against taxpayer for the full amount of the assessment.

It has been the Tax Division's position that in an action to obtain a judgment against a taxpayer that the taxpayer could contest the merits of the assessment. It is the Department's understanding that the Judge in the Briglia case, on his own and without urging by the United States Attorney's office, adopted the above ruling.

At the present time, the Department is reviewing its position and in the meantime it is requested that the United States Attorneys' offices not advocate the position adopted by the Court in the Briglia case. It is our present position that the assessment is only prima facie evidence and that the merits are open to attack in a suit to obtain judgment for the tax. It should be noted, however, that we do take the position in a straight lien foreclosure action that the merits are not open to dispute.

Staff: United States Attorney S. Hazard Gillespie, Jr., and Assistant United States Attorney Marguerite De Smet (S.D. N.Y.).

CRIMINAL TAX MATTERS
Appellate Decision

Evidence; Income Tax Evasion; Admissibility of Evidence of Errors in Tax Return Sufficient to Offset Alleged Tax Deficiency. Koontz v. United States (C.A. 5, April 14, 1960.) Appellant was indicted for the wilful attempted evasion of income tax for 1953. He contended that there was no tax deficiency because he had erroneously reported an ordinary loss as a capital loss and the reduction in tax liability that would result from the correction of this error would be more than enough to wipe out the modest tax deficiency alleged by the Government. The trial court admitted some evidence relating to the loss, but then struck it out on the ground that appellant had made no showing that he had filed an amended return or made any other effort to get the alleged error corrected. The court limited the jury's consideration of the evidence to the alleged fraud item, instructing them to ignore all testimony concerning the loss item relied upon by appellant. The Court of Appeals reversed, holding that the proferred evidence was relevant and competent to sustain the appellant's contention that there was no tax owing for the year 1953. The Court stated that the question whether that evidence made out a defense was not one of law, but a question of fact for the jury under appropriate instructions.

Staff: Assistant United States Attorney John L. Briggs (S.D. Fla.).

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