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UNITED STATES ATTORNEYS

BULLETIN

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Vol. 8 August 12, 1960 No. 17

NECESSARY FORMS

Title 8 of the United States Attorneys Manual states specifically the forms which should be submitted to the Executive Office for United States Attorneys in connection with every personnel action, whether it be an appointment, resignation, transfer or salary increase. Moreover, from long practice and experience the administrative and clerical staff of each United States Attorney's office should be fully aware of what papers are necessary in each type of personnel action and of when they should be submitted. Despite this, a great deal of unnecessary time and effort must be expended each month in correspondence with such offices in an effort to procure the necessary forms and papers with which to complete personnel actions.

It is requested that closer attention be paid to the submission of all required forms in any personnel action. Carelessness or neglect in this regard militates against the best interests of the United States Attorneys, for it delays the effective date of any action and, in instances where employees are not promptly dropped from the roll, prevents utilization of such funds for additional employees.

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JOB WELL DONE

United States Attorney A. Pratt Kesler and Assistant United States Attorney William J. Adams, District of Utah, have been commended by the Director, Bureau of Safety and Service, Interstate Commerce Commission, for their efforts in a recent important case in which one section of the Commission's rules was construed for the first time by a district court. The Director stated that the favorable results obtained were due in large measure to the interest and devoted effort shown by Messrs. Kesler and Adams and that such results will materially assist in the future administration of safety regulations.

The General Counsel, District of Columbia Redevelopment Land Agency, has expressed his appreciation for the efficiency and maximum cooperation with which Assistant United States Attorneys Ellen Lee Park, William Laverick, and John F. Doyle, District of Columbia, handled a wide variety of complex cases. The General Counsel, in expressing his gratitude for the services rendered, stated that the decisions in such cases have been in the best interests of the Government.

The FBI Special Agent in Charge has commended Assistant United States Attorney Robert E. Cahill, District of Maryland, for his thorough presentation and complete knowledge of the facts, and the very effective manner in which his arguments were presented at the trial of a recent case involving a crime on a Government reservation. The Special Agent also thanked Mr. Cahill for fully refuting, through agents' testimony, an allegation by defendant that the interviewing agent had exerted duress in obtaining a statement from the defendant.

His Excellency, the Honorable Gunnar Jarring, the Ambassador of Sweden, has commended Principal Assistant United States Attorney Edward P. Troxell, District of Columbia, for the tactful and efficient handling of a recent case involving a former Embassy employee. The defendant was convicted on eighteen counts of larceny and false pretenses involving the theft of substantial sums of money from the Swedish Embassy. Letters of commendation also have been forwarded to the Department by the former Ambassador who was a witness for the Government.

The General Counsel, SEC, has conveyed to Assistant United States Attorneys Jerome J. Londin, David P. Bicks and George I. Gordon, Southern District of New York, heartiest congratulations and commendations for the superb job done in the case of U.S. vs. Guterma, et al., in which the convictions were recently affirmed. The wire stated that the speedy affirmance in this complicated case is a tribute to the splendid and superior efforts of these Assistants in this most important landmark case.

A local Atlanta newspaper recently published an extensive feature article based on a narcotics case handled by Assistant United States Attorney Floyd M. Buford, Middle District of Georgia.

The Acting Solicitor, Department of Labor has commended United States Attorney William B. Butler, Southern District of Texas, for the extremely able manner in which he conducted a recent case of far-reaching significance in the administration of the Mexican Labor Program. The letter also commended Assistant United States Attorney Robert Maley for the capable, commendable and informed manner in which he presented a recent case which he was called upon to try without the opportunity for prior preparation when another Assistant resigned.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

Litigation Expenses of Indigent Persons

On February 12, 1960, the Bulletin contained an item on the payment of indigents' expenses. There was a reference to a proposed monthly report of all such disbursements. It has been decided to forego this report indefinitely to avoid increasing the reporting burden on the United States Marshals.

The assistance of all United States Attorneys is requested in such instances. Whenever a request is submitted for authority to incur an expense on behalf of an indigent person (including a petitioner in a habeas corpus action), will you please clearly indicate on the Form 25B that the defendant or petitioner is proceeding in forma pauperis and attach a copy of the court order ordering the expense. Your cooperation will be greatly appreciated.

Employment of Foreign Counsel

Some United States Attorneys have had occasion to need the services of an attorney in a foreign country to represent the United States Government in important litigation. Generally, this is handled in the Department, nevertheless, we wish to acquaint you with new guidelines issued in Department MEMO No. 281 of July 27, 1960. It is essential that the procedures set forth therein be carefully followed should an occasion arise requiring foreign counsel. A note to this effect will be inserted in the United States Attorneys' Manual in the near future.

The following Memoranda applicable to United States Attorneys' Offices have been issued since the list published in Bulletin No. 16, Vol. 8 dated July 29, 1960.

ORDER	DATE	DISTRIBUTION	SUBJECT
208-60	7-22-60	U.S. Attys. & Marshals	Placing the Office of Alien Property in the Office of the Attorney General.
209-60	7-22-60	U.S. Attys. & Marshals	Designating Dallas S. Townsend Director of the Office of Alien Property in the Office of the Attorney General.

MEMO	DATED	DISTRIBUTION	SUBJECT
167 R S-3	7-20-60	U.S. Attys. & Marshals	Federal Employees Salary Increase Act of 1960.

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ANTITRUST DIVISION

Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Suppression of Competition - Central Charge Accounts. United States v. Central Charge Service, Inc., (D.C.), United States v. Charg-It of Baltimore, Inc., (D. Md.). On July 18, 1960 two civil antitrust complaints were filed charging Central Charge Service, Inc., and Charg-It of Baltimore, Inc., with violations of the Sherman Act.

The complaints which are virtually identical in substance, allege that defendants require retail merchants to sign exclusive dealing contracts as a condition of participation in the central credit service plans which they operate. The contracts between defendants and their affiliated retail merchants require the merchant to "finance all of its sales of merchandise and service exclusively" through the defendant company.

Central Charge Service, Inc. and Charg-It of Baltimore, Inc., in operating their central credit service plans purchase consumer receivables from retail merchants at specified discounts and then assume the responsibility for billing and effecting collection from retail customers.

The complaints allege that Central and Charg-It have suppressed competition by foreclosing competitors from doing business with local retail merchants affiliated with the defendants through the wide-spread use and enforcement of unlawful exclusive dealing arrangements; and, by utilizing the economic leverage of their dominant position in the Washington and Baltimore metropolitan areas, respectively, have effectively restrained retail merchants from doing business with the defendants' competitors.

According to the complaints, the means used by the defendants in enforcing the unlawful exclusive dealing contracts have included: (a) terminating or threatening to terminate the membership of any member merchants who affiliate with or participate in the central credit service plan of any competitor; (b) requiring member merchants to discontinue affiliation with any competing central credit service plan as a condition of retaining affiliation; (c) requiring member merchants to remove from their business premises any advertising, insignia, or other indicia of affiliation with or willingness to honor credit cards of other competing central credit service plans; and (d) prohibiting member merchants from advertising or permitting others to advertise their affiliation with any competing central credit service plan.

The complaint in the case against Central Charge Service, Inc., asked the court to declare the exclusive dealing contracts to be unlawful under Section 3 of the Sherman Act, and in the case against Charg-It of Baltimore, unlawful under Section 1 of the Sherman Act; to cancel the contracts and enjoin the defendants from enforcing or claiming any rights under the

exclusive dealing provisions; and to require defendants to notify all member merchants that they are free to affiliate with or participate in any credit plan offered by competitors of the defendants.

Central Charge Service, Inc., has approximately 775 retail member merchants operating over 1175 retail stores. There are approximately 155,000 holders of Central Charge cards whose accounts are active. The dollar volume of accounts receivable purchased from retail merchants by Central Charge Service, Inc., is approximately $16,000,000 annually. Charg-It of Baltimore has approximately 730 retail member merchants who operate over 780 stores. There are approximately 100,000 holders of Charg-It cards whose accounts are active. The dollar volume of Charg-It's purchases of accounts receivable from member merchants is approximately 5½ million annually.

Staff: Paul A. Owens and Leo A. Roth (Antitrust Division)

Restraint of Trade and Commerce in TV Antenna Equipment. United States v. Jerrold Electronics Corporation, et al., (E.D. Pa.). On July 25, 1960 Judge Van Dusen filed a 58-page opinion and conclusions of law in this case in favor of the Government.

The complaint, filed on February 15, 1957, charged Jerrold Electronics Corporation, its president, Milton Jerrold Shapp, and five corporate subsidiaries, with being parties to contracts and a conspiracy in unreasonable restraint of trade and commerce in community television antenna equipment in violation of Section 1 of the Sherman Act, with making sales of such equipment upon unlawful conditions in violation of Section 3 of the Clayton Act, and with being parties to a conspiracy and attempt to monopolize trade and commerce in such equipment in violation of Section 2 of the Sherman Act. The complaint was amended with approval of the Court on April 2, 1959 to charge defendants with effecting a series of corporate acquisitions in violation of Section 7 of the Clayton Act and in further violation of Section 2 of the Sherman Act. The trial of the case lasted from November 9 to December 18, 1959.

The Court reviewed the background of this case and summarized a substantial portion of the evidence which revealed that defendants, in the process of marketing a new line of electronic equipment which facilitates the reception of television signals in various sections of the country previously precluded from receiving such television signals, had required purchasers of such equipment to execute a service contract as a condition precedent to buying Jerrold equipment. The service contracts provided that only defendants provide engineering installation, maintenance and repair services for the system, that purchasers agree not to install competitive equipment unless approved by defendants, and that purchasers agree to purchase exclusively from defendants all equipment required for expansion purposes. In addition, defendants refused to make separate sales of equipment and maintained the policy of selling equipment only as components of a complete system. The Government alleged, further, that defendants pursued

a course of conduct reflecting a specific intent to monopolize the industry by threatening to install competing systems in those communities in which the system operator refused to subscribe to Jerrold's engineering services and to make the required commitments as to its equipment purchases. Finally, it was alleged that defendants' misused their basic patent rights covering the master antenna principles.

The Court concluded that the defendants' requirement of tying service to the sale of equipment was lawful in its inception, notwithstanding the per se rule of the Northern Pacific case. Although the Court conceded that the Government had met the necessary tests with regard to the substantial amount of commerce involved and the economic power vested in the defendants, the Northern Pacific decision did not preclude consideration of the unique circumstances involved in this case, i.e., the technical and economic difficulties involved in the marketing of the new and highly complex electronic equipment. However, the Court found that the continued use of the same tie-in of service contracts at a later, more developed state of the industry, became a violation of Section 1 of the Sherman Act.

Similarly, with regard to Jerrold's policy of full system sales, the Court found that, initially, it was a necessary adjunct to its policy of compulsory service; but that defendants had failed to justify the reasonableness of its continued existence. Therefore, the policy of selling a full system, while lawful at its inception, constituted a violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act during part of the time it was in effect.

As to the sale of equipment upon the condition that the purchasers agree not to buy competitive equipment unless approved by defendants, the Court reasoned that the language in the contracts was ambiguous, allowing Jerrold a choice of either approving or disapproving, and that, in fact, according to defense witnesses, it was neither the intent nor the practice to exclude all purchases of competitive equipment. The Court went on to say that the veto provision was a reasonable restraint in view of the maintenance obligation incurred by defendants under the service contract.

The Court condemned the provisions of the service contract under which the purchasers had to buy Jerrold equipment for expansion purposes as unlawful tie-in agreements in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act.

With regard to Jerrold's acquisition of ten operational community antenna systems, to which Jerrold sold its equipment, the Court held that the available evidence did not permit a finding that any particular one of those acquisitions foreclosed a portion of the market for other suppliers of equipment sufficient to create the effects prohibited by Section 7 of the Clayton Act. In view, however, of defendants' refusal to make relevant data available to the Government and to the Court, Judge Van Dusen drew some inferences against defendants. He found that between 1.5% and 10% of the market was so foreclosed and that, therefore, defendants' several

acquisitions (in cumulative effect) "are approaching, if not beyond, the point where it can be said that it is a reasonable probability that they will have the prohibited effects . . . ." The Court held that the Government is entitled to an injunction against further acquisitions, but not to divorcement of past acquisitions, by Jerrold.

Finally, the Court held that threats of co-defendant Jerrold Northwest to install competitive systems in those Northwestern cities in which system operators refused to yield to the defendants' demands, constituted an attempt to monopolize that part of trade, in violation of Section 2 of the Sherman Act. The Court declined, however, to impute the conduct and intent of Jerrold Northwest to the other defendants.

The Government was instructed to prepare a judgment in conformity with the opinion on or before August 15, 1960.

Staff: Wilford L. Whitley, John F. Hughes and Sidney Harris (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General George S. Leonard

COURTS OF APPEALS

EXECUTIVE PRIVILEGE

Renegotiation Board's Claim of Privilege Held Well Founded as to Subpoenaed Documents Relating to Board's Decision Making Process; Privileged Character of Specific Documents in Possession of Board to Be Determined by District Court by In Camera Examination of Documents; Factual and Investigatory Reports in Board's Files Not Privileged and Subject to Production in Tax Court Proceeding for Redetermination of Excessive Profits. Boeing Airplane Company v. Thomas Coggeshall, Chairman, Renegotiation Board (C.A. D.C., June 9, 1960). In the course of a proceeding before the Tax Court for a redetermination of the excess profits of the Boeing Airplane Company, the Chairman of the Renegotiation Board, by a Tax Court subpoena issued at the instance of Boeing, was ordered to produce all of the Renegotiation Board's file pertaining to the Board's renegotiation of Boeing's contracts. A motion to quash the subpoena was denied by the Tax Court, whereupon the Chairman declined to comply with the subpoena on the grounds of executive privilege. Boeing then petitioned the district court, in accordance with 26 U.S.C. 7604(a), for an order directing enforcement of the Tax Court subpoena. A formal claim of privilege was also asserted in the district court. The district court initially declined to enforce the subpoena but subsequently, on Boeing's motion, vacated its order and directed that the Chairman produce certain reports prepared by the Air Force, at the request of the Board to aid the Board in making a determination of Boeing's excess profits. Boeing appealed from the order of the district court insofar as it denied Boeing access to the remaining data sought by the subpoena and the Chairman appealed from that part of the order directing a partial compliance with the subpoena.

Affirming in part and reversing in part, the Court of Appeals held that there had been a showing of necessity for the production of the subpoenaed documents (cf. United States v. Reynolds, 345 U.S. 1); that, therefore, unless the data sought by Boeing was privileged, the Chairman was obliged to comply with the subpoena; but that the Chairman's claim of privilege was well founded to the extent that the subpoenaed documents dealt with recommendations as to policies which should be pursued by the Board or recommendations as to decisions which should be reached by it. However, as to so-called investigatory or factual reports by Board employees or reports or recommendations from persons outside the Board and not containing state or military secrets, the Court held, in effect, that the claim of privilege was not well taken. Such reports, the Court said, "would appear to be ones peculiarly available to the Board because of its continuing surveillance of contractors generally and because of its close relationship with the Government contracting agencies." The Court acknowledged that Government documents cannot be easily separated into fact

finding and decision making categories; if, however, the Board continues to assert privilege as to particular documents, the validity of the claim of privilege would have to be resolved by the district court who may examine in camera the individual papers and, if necessary, direct exclusions and excisions, keeping in mind the issues before the Tax Court, the nature and importance of the interests supporting the claim of privilege, and "the fundamental policy of free societies that justice is usually promoted by disclosure rather than secrecy." Similarly, the Court left it to the district court, on further proceedings, to protect the interests of third parties such as Boeing's competitors. As to third parties, compliance with the subpoena might well require disclosure of information concerning a competitor's costs, charges, efficiency and trade secrets which would possibly be inconsistent with both public and private interests. As to the interests of third parties and the public, the Court left the way open for the district court to conduct in camera examinations of documents and to permit interested and affected parties to intervene and present argument, should the district court find that procedure desirable.

Staff: John G. Laughlin (Civil Division)

FEDERAL EMPLOYEES' COMPENSATION ACT

Applicability of Reimbursement Provisions to Recovery in Wrongful Death Action Brought by Widow in Capacity as Administratrix. Randall v. United States (C.A. D.C., July 21, 1960). Francis E. Randall died in the crash of an Eastern Air Lines airplane while on official Government business. Under the express provisions of the Federal Employees' Compensation Act, 5 U.S.C. 767(b), no Tort Claims Act action will lie for such injury or death. Sections 26 and 27 of the Compensation Act, 5 U.S.C. 776, 777, provide that any compensation paid to decedent's beneficiary shall be refunded to the United States if a beneficiary entitled to compensation recovers damages for such injury or death from a third party who is liable therefor. In this case, the United States paid Randall's widow approximately $17,000 in compensation under the Act. The widow settled her wrongful death action against Eastern Air Lines for $37,500, which amount was paid into the registry of the district court by Eastern since the United States asserted that it had a lien on such recovery. On cross-motions for summary judgment, the district court ruled that the United States was entitled to payment of the sum of approximately $17,000.

On appeal, as in the district court, plaintiff contended that the reimbursement provisions of the Compensation Act applied to such a recovery when the third party was solely liable for the injury or death; but that such provisions were inapplicable when the United States as well as the third party was negligent. Plaintiff relied for proof of Government negligence on findings in cases brought by representatives of other decedents, who were not Government employees, against Eastern and the United States, wherein the latter parties had been found negligent with respect to the airplane crash.

The Court of Appeals affirmed, holding that the reimbursement provisions of the Compensation Act are applicable to the recovery against

a third party tortfeasor to the extent of the compensation beneficiary's share therein. Citing Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 411-412 which involved a similar case under the Longshoremen & Harbor Workers' Act, the Court held further that there was no statutory design to punish an employer, for the negligence of the decedent's fellow employee, by permitting the beneficiary a double recovery. One judge dissented on the basis that passage of the Federal Tort Claims Act and amendment of the Compensation Act dictated a changed legal meaning for the unaltered provisions of the Compensation Act providing for reimbursement.

Staff: Anthony L. Mondello (Civil Division)

FEDERAL TORT CLAIMS ACT

District Court, as Finder of Fact, Free to Reject Inference of Negligence Raised by Application of Doctrine of Res Ipsa Loquitur. Charles P. Gillen, Jr., et al. v. United States (C.A. 9, July 12, 1960). The decedent, widow and mother of the two plaintiffs, died after receiving blood transfusions at an Air Force hospital in Texas. Plaintiffs brought suit, alleging that the hospital personnel had negligently transfused decedent with incompatible blood. The district court entered judgment for the Government, holding that plaintiffs had failed to prove negligence or transfusion with incompatible blood.

The Court of Appeals affirmed. It held that the district judge had not erred to the prejudice of plaintiffs in ruling that the doctrine of res ipsa loquitur could not be invoked, reasoning that "when he found res ipsa loquitur not applicable he was doing no more than a jury might do when it declines to draw a merely permissible inference * * *." The Court found it unnecessary to determine whether the doctrine should be applied in terms of the "lex loci delicti" (Texas) or of the "lex fori" (California) because, under the law of both states, res ipsa loquitur gives rise to only a permissible inference of negligence, and not to a presumption of law.

Staff: United States Attorney Lynn J. Gillard and Assistant United States Attorney Frederick J. Woelflen (N.D. Calif.)

Government Must Indemnify Railroad for Settlement Entered Into With Its Employee Where Government Negligence Responsible for Injury to Employee. Hankinson v. Pennsylvania Railroad Co. & United States (C.A. 3, June 15, 1960). Plaintiff, an employee of defendant railroad, was injured by a latent defect in a mail bag which he was preparing for shipment. He brought suit against the railroad under the Federal Employers' Liability Act, 45 U.S.C. 51, et seq., and the railroad brought in the United States as a third party defendant on the ground that the Government was liable to it under the Tort Claims Act for either indemnity or contribution for all sums it was obligated to pay plaintiff.

Prior to trial, the railroad made a settlement with plaintiff. The district court subsequently held the railroad entitled to indemnification from the Government for the amount of the settlement.

The Court of Appeals affirmed. It rejected the Government's contention that the railroad had been a volunteer in entering into the settlement. It noted that the Government had recognized by stipulation the liability of the railroad to its employee and stated further that "[i]t has always been the policy of the law to encourage settlements, and we do not apply hindsight in analyzing the wisdom of settling." The Court held Dalehite v. United States, 346 U.S. 15, inapplicable because of the finding of negligence on the part of the Government.

Staff: United States Attorney Walter E. Alessandroni and Assistant United States Attorney Sullivan Cistone (E.D. Pa.).

DISTRICT COURTS

FEDERAL TORT CLAIMS ACT

Liability of Owner for Negligence of Contractor. Leonard Wallach v. United States (S.D. N.Y., June 20, 1960). Plaintiff was injured as the result of a fall from a scaffold on which he was working in a Brooklyn post office. He was a painter employed by an independent contractor, not a party to the suit, who had contracted with the United States to perform interior painting work in the post office. The contractor had agreed to furnish all labor and material necessary for the work. The contractor's employees had erected the scaffold, and the Government's employees had neither assisted in, nor supervised, its erection or use in any way.

The Court fuled in favor of the Government. It held that a scaffold was not an inherently dangerous instrumentality whose erection or use could not have been delegated from the Government to the contractor. Since the Government had assumed no responsibility for supervising the erection of the scaffold and had given no directions or assurances of safety, it was not liable for the negligence of the contractor, even though it had retained a limited contractual power of general supervision for the purpose of seeing that the work was done according to specifications.

Staff: United States Attorney S. Hazard Gillespie, Jr. and Assistant United States Attorney Charles T. Beeching, Jr. (S.D. N.Y.)

OBSCENITY

Administrative Finding of Obscenity Held Not Supported by Substantial Evidence. Big Table, Inc. v. Carl Schroeder, etc. (N.D. Ill., June 30, 1960). The defendant, Postmaster for Chicago, refused to accept "Big Table I," a "beatnik" publication, for mailing, pursuant to an order of

the Post Office Department determining that two articles dominating the publication were obscene and filthy and that, consequently, the publication was non-mailable under 18 U.S.C. 1461. Plaintiff sought injunctive relief from the operation of the order and a declaratory judgment that the magazine was not obscene or filthy.

The Court ruled that judicial review on the issue of obscenity, pursuant to 5 U.S.C. 1009, was limited to a determination of whether the agency action was supported by substantial evidence. Compare Grove Press, Inc. v. Christenberry, 276 F. 2d 433 (C.A. 2). It also held that it was not error for the Hearing Examiner to exclude evidence related to contemporary community standards. The Court concluded, however, that, as a matter of law, the two articles could not be found obscene. The Court noted with reference to language from "Old Angel Midnight" by Jack Kerouac that "any libidinous effect those words might commonly have could not possibly occur from their present position among other printed characters which sometimes rise to the dignity of a word and sometimes do not." "Tan Episodes from Naked Lunch" by William S. Burroughs was deemed "similarly unappealing to the prurient interest." The Court also held that, on the basis of the evidence in the record and the test set out in Verner v. United States, 183 F. 2d 184 (C.A. 9), the articles were not "filthy."

Staff: United States Attorney Robert Tieken and Assistant United States Attorney Charles R. Purcell, Jr. (N.D. Ill.); Donald B. MacGuineas and Andrew P. Vance (Civil Division)

TEXTILE FIBER PRODUCTS IDENTIFICATION ACT

Federal Trade Commission Rule Defining Generic Name Rayon Upheld. Bigelow-Sanford Carpet Company, Inc. v. Federal Trade Commission, et al. (D. D.C., June 30, 1960). The Textile Fiber Products Identification Act, 15 U.S.C. 70-70k, was designed "to protect producers and consumers against misbranding and false advertising of the fiber content of textile fiber products." "Rules and Regulations" under the Act were issued by the Federal Trade Commission to become effective on March 3, 1960. Rule 7(d) included a generic definition of rayon. Plaintiff, who had not participated in the hearings preceding the rule-making, applied for the establishment of a separate generic name of "polynosic" for a cellulosic fiber to which it had applied its own trade name "Zantrel." The Commission denied plaintiff's application and advised it that its fiber came within the already established generic name "rayon." Plaintiff then brought this suit for declaratory and injunctive relief against the Commission's denial of its application.

Plaintiff contended that the Commission's determination that its rule defining rayon includes "polynosic" fiber was arbitrary in that such fiber was discovered subsequent to the public hearings held with regard to the rule and the fiber differs chemically from the heretofore

accepted generic definition of rayon. Plaintiff contended that, if it is forced to label products using the new fiber as "rayon" it will be irreparably injured in view of the strong prejudice in the textile industry and among consumers against the name "rayon." The Court denied plaintiff's motion for a preliminary injunction, and an appeal is pending. The Court subsequently granted the Government's cross motion for summary judgment and dismissed the complaint with prejudice.

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

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CIVIL RIGHTS DIVISION

Assistant Attorney General Harold R. Tyler, Jr.

Voting, Production of Records; Civil Rights Act of 1960. United States v. Association of Citizens Councils of Louisiana, Inc., et al. (S.D. La.). The Bienville parish voting case, discussed in the July 15 Bulletin in which the Government seeks an injunction under the Civil Rights Act of 1957 against racially discriminatory voting practices and in which the defendants attacked the constitutionality of Title III of the Civil Rights Act of 1960 was argued by Assistant Attorney General Tyler on July 27 before a three-judge court in the Western District of Louisiana. At the conclusion of the hearing, the three-judge court dissolved itself, holding that the constitutionality of Title III, the records-production title of the Civil Rights Act of 1960, was not in issue, since the Government had made no demand for production in this case under the records-production Title III of the 1960 Act but had proceeded under the 1957 Act (42 U.S.C. 1971) and then moved to produce under Rule 34 of the Federal Rules of Civil Procedure. However, the court did indicate that Title III did not violate the ex post facto clause since with respect to criminal prosecutions, the Act operates prospectively only. And it further held, citing Smith v. Allwright, 321 U.S. 649, 664; United States v. McElveen, 177 F. Supp. 355; 180 F. Supp. 10, Aff. sub nom. United States v. Thomas, 362 U.S. 58, that the actions of the private members of the Citizens Councils (in challenging Negro voters) were "state action" under the Fifteenth Amendment, since they triggered action by the registrar under state law.

Proceedings then continued before Judge Dawkins, who allowed the Government's motion to dismiss the intervention complaint filed by all Louisiana registrars. Still under advisement are motions to dismiss, and the Government's motion to produce under Rule 34.

Staff: United States Attorney T. Fitzhugh Wilson (W.D. La.); Harold R. Tyler, Jr., Harold H. Greene, Henry Putzel, Jr., David L. Norman and D. Robert Owen (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

OBSCENITY

Obscene Mail; New Venue Provision of 18 U.S.C. 1461. United States v. Roy A. Oakley (M.D. Tenn.). The defendant in this case, one of the most persistent obscene mail purveyors in the past dozen years, operated under the cloak of a local small town photographic studio. Efforts by the Post Office Department to curb his activities by a "stop order" were unsuccessful. He was indicted in ten counts in the Middle District of Tennessee for mailings from that District and in the Southern District of Florida, in one count for a mailing into that District. The cases were consolidated for trial in Tennessee and on June 14, 1960, he was found guilty by a jury on all except one count (in the 10-count indictment) which count was dismissed because of absence of a Government witness. He was given a sentence of two years on each of the ten counts to be served concurrently. The Post Office Department regards this jury conviction as a major victory, covering as it did, not only the offenses at the point of mailing but also the offense in Florida under the new venue provisions of 18 U.S.C. 1461.

Staff: United States Attorney Fred Elledge, Jr.; Assistant United States Attorney Rondal B. Cole (M.D. Tenn.).

BANKRUPTCY

National Bankruptcy Act; Concealment of Assets; Service of Process. United States v. Walter Elwood Kramer (C.A. 3). On June 21, 1960, the Court of Appeals affirmed, after reargument, the conviction of Walter Elwood Kramer in the United States District Court at Pittsburgh, Pennsylvania, on one count of a multiple count indictment charging him with a violation of 18 U.S.C. 152, in that he concealed assets from a receiver in bankruptcy.

The bankrupt's principal contention was that, since the United States Marshal admittedly attempted to effect service of a subpoena upon him only four days rather than "at least five days prior to the return day" thereof as required under Section 18(a) of the Bankruptcy Act (11 U.S.C. 41(a)), the service of the subpoena upon him by publication after the return day was a nullity, even though he had left the jurisdiction of the court on such day, and that therefore he could not be guilty of concealing assets from a receiver who had no legal existence.

Although Section 18(a) provides for service by publication "in case personal service cannot be made within the time allowed," the Court, after inferring that the bankrupt was evading service of process when he could not be found at his office or the place of his customary abode prior to the return date of the subpoena, and after noting that if he

"could have been found effective personal service could have been made upon him by an extension of the return date by the court as provided by Section 18(a)," held "that if an attempt personally to serve an alleged bankrupt while he is within the state of the bankruptcy court has failed because it was not in accordance with the provisions of Section 18(a) and the bankrupt then leaves the state, service may be made by publication," otherwise "the obvious purpose of the Bankruptcy Act to distribute equitably the assets of the bankrupt among his creditors" would be frustrated.

Staff: United States Attorney Hubert I. Teitelbaum; Assistant United States Attorney Thomas J. Shannon (W.D. Pa.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Motion for Temporary Injunction; Due Process of Law. Mike Giaimo v. Thomas M. Pederson and Oral K. Chandler, (N.D. Ohio, June 28, 1960). Petitioner was given a deportation hearing while confined in jail. At the deportation proceedings he was advised that he was entitled to be represented by a lawyer, and he expressed the desire to secure such representation. The hearing was adjourned for this purpose but when it was reopened, petitioner stated "I don't know whether he is going to show up or not so you can go ahead with the proceeding without him". At the conclusion of the hearing the special inquiry officer ordered petitioner's deportation under the provisions of 8 U.S.C. 1251(a)(4) in that he had been convicted of two crimes involving moral turpitude after entry (receiving stolen goods - 1957 and burglary - 1958). The challenge in Court to the deportation was grounded solely on petitioner's claim that he was denied due process in the deportation proceeding in that he was denied the opportunity to obtain the services of counsel.

The Court rejected this claim, pointing out that the record showed that the alien had voluntarily elected to proceed without counsel. Furthermore the Court stated that even if the fact were otherwise, there was no evidence of prejudice to the alien. He admitted the two convictions after entry. Also he was not eligible for suspension of deportation under 8 U.S.C. 1254(a)(5) because he was unable to prove good moral character for a ten year period following the last conviction which rendered him deportable. He was also ineligible for voluntary departure under the provisions of 8 U.S.C. 1254(e) because he was unable to show ten years continuous physical presence in the United States since his deportable status arose in 1958.

NATURALIZATION

Marital Union With Citizen Spouse Under 8 U.S.C. 1430(a). In the matter of Ingeborg Maria Elizabeth Noland, (D.C. Neb., July 22, 1960). Petitioner sought naturalization under the special provisions of 8 U.S.C. 1430(a) which permits naturalization under certain conditions to persons married to United States citizens, in three years rather than in five years as required by the general provisions of the Immigration and Nationality Act.

Petitioner was married to a native-born United States citizen abroad on September 24, 1955, and was lawfully admitted to the United States for permanent residence on July 25, 1956, and resided in the United States continuously thereafter. Slightly more than three years after the lawful admission she filed her petition for naturalization. During this entire period she lived in marital union with her citizen spouse. However,

between the date of filing the petition and the date of the final hearing in court, her husband died. After her husband's death and before the date of the final court hearing, petitioner married her husband's brother, also a United States citizen.

The petitioner argued that she had lived in marital union with a citizen spouse for three years immediately preceding filing of the petition for naturalization and also that she had a citizen spouse (albeit a different one) at the time of the final hearing on the petition for naturalization.

Faced with this unusual situation (which appears to be one of first impression) the Court ruled that 8 U.S.C. 1430(a) presupposes that the spouse upon whose citizenship shall rest the right to file a petition after only three years of residence, and the spouse on whose citizenship an order finally granting the petition shall depend, shall be the same person. The Court reached this conclusion by noting that the statute referred to "the citizen spouse" employing a definite article and thus describing one person. Furthermore the Court pointed out that the identity and character of the citizen spouse mattered considerably in connection with the good moral character and loyalty of the petitioner who is married to such spouse; and Section 1430(a) manifestly contemplates a situation in which, from the date of the filing of the petition for naturalization (as well as during these three years theretofore) until final decree, the petitioner shall be the spouse of the same citizen husband or wife.

Petition for naturalization denied.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

False Statement - Industrial Security Program. United States v. Billy Maurice Ogden (S.D. Calif.) On July 22, 1960, after a ten-day trial, Billy Maurice Ogden was found guilty on both counts of a two-count indictment charging him with violation of 18 U.S.C. 1001 in that he falsely denied membership in and association with the Communist Party in an application for a security clearance for access to classified information which he filed with the Department of the Air Force. Sentencing has been continued until September 12, 1960 at which time the Court will also rule on a pending motion for judgment of acquittal. This is the first case of this type brought by the Government subsequent to the decision of the Supreme Court on June 29, 1959 in Greene v. McElroy, 360 U.S. 474. In that case, the Court held that the Secretary of Defense could not, in the absence of authorizing legislation or presidential mandate, deprive an individual of his employment by revoking his security clearance in a proceeding where the rights of confrontation and cross-examination were not afforded. The decision in Greene did not invalidate the Government's Industrial Security Program in its entirety and does not preclude the Government from undertaking criminal prosecutions based on false statements made by individuals in connection with the program.

Staff: Assistant United States Attorney Timothy M. Thornton

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TAX DIVISION

Assistant Attorney General Charles K. Rice

Printing of Appellate Briefs

Some misunderstanding has arisen in connection with the stamped instructions placed on appellate briefs in tax cases to be printed in the field. This stamp instructs the United States Attorney to "Please have this brief printed in its present form without change." In order to clarify any misconception of the purpose of the stamp, it is thought that we should give the background of its adoption and use.

When the Tax Division was created in 1934, it was felt that, in the interest of efficiency and in maintaining a high quality of briefs, a standard form should be adopted. Judges and clerks were contacted and a form, following generally the style required by the Supreme Court, was adopted. Although the courts of appeals have changed their rules from time to time, they have continued to accept Tax Division briefs in the standard form, although occasionally they have requested that some particular change in the rules be followed.

The stamp requests that briefs be printed in their present form in order to avoid the making of changes which might appear to conform more accurately to the current rules. It has reference to form only and, of course, the Tax Division welcomes any suggestions or advice from United States Attorneys concerning the contents of briefs. Time permitting, such suggestions will be given the closest attention.

Present procedure calls for having as much printing as possible done in the field in order to spread the work among printers. The Government Printing Office is not only overloaded with such work, but its charges are generally greater than those of local printers.

CIVIL TAX MATTERS
Appellate Decisions

Lien; Attachment to Proceeds of Sale of State Liquor License. United States v. State of California (C.A. 9, July 11, 1960.) The assets of a taxpayer, including a liquor license, were seized by a District Director to satisfy federal taxes owed by taxpayer, but later were relinquished to the receiver of taxpayer's bankrupt estate. The receiver sold the liquor license, but the State of California refused to transfer it to the purchaser until certain state taxes were paid, as provided in a State statute giving it the power to refuse to transfer a liquor license if the transferor was delinquent in the payment of any State taxes. The United States sought the return of the amount of the State taxes so paid on the ground that its lien on the liquor license and the proceeds of the sale thereof was superior to the claim of the State. The Ninth Circuit

said that the question was not as to the supremacy of the tax lien of the United States, but as to the nature of the "property and rights to property" (Sec. 6321 of 1954 Code) to which the lien attached. It reasoned that whatever value the license, or property, may have had to a purchaser was limited by its transferability; that if the State saw fit to impose conditions upon issuance or upon transfer of property which it had created, such was its prerogative so long as its demands were not arbitrary or discriminatory; that those conditions constituted a limitation upon the right of the applicant and upon the property and the value which attached to that property; and that those values and no greater values became a part of the bankrupt estate and fell within the reach of the United States. Cf. United States v. Blackett, 220 F. 2d 21 (C.A. 9); Golden v. State, 133 Cal. App. 640, 285 P. 2d 49; and see Roehm v. City of Orange, 32 Cal. 2d 280, 196 P. 2d 590. Although not cited in the opinion, the instant case falls within the rationale of the Supreme Court decision in United States v. Durham Lumber Co., 28 U.S. Law Week 4541.

Staff: George F. Lynch (Tax Division)

Waivers; Form 870 (Waiver of Restrictions on Assessment and Collection of Tax) Held Valid and Binding in Absence of Fraud or Duress, Even Though Taxpayer Signed by Mistake. Quigley v. Fox, D.I.R. (C.A. D.C., July 14, 1960.) Taxpayer sued to quash a levy and to permanently enjoin the Director from collecting federal income taxes assessed against him. Taxpayer, by signing a Form 870, had waived the protection of Section 6213 of the Code, which prohibits assessment for a period of 90 days after the mailing of a notice of deficiency. Taxpayer, who had pled guilty to criminal charges of tax evasion and was in prison at the time he signed the Form 870, contended that he was under the impression that he was signing a Form 872 (to extend the period of limitations as to certain years and thus enlarge the time for negotiating on the civil side) and did not intend to sign the Form 870. The Court of Appeals, accepting this contention as true, held nevertheless that the waiver could not be set aside because it is "in effect a contract" under which the taxpayer consents to immediate assessment and in return the running of interest stops earlier than would otherwise be the case: The Court said "We think appellant would therefore be entitled to relief if he could establish, for setting aside Form 870, grounds which normally render contracts between a citizen and the Government void or voidable."

Here the District Court found that if appellant * * * did not intend to agree to immediate assessment, his execution of Form 870 was a unilateral mistake of fact. We think the District Court was correct in concluding that the agreement could not be set aside on that ground. Since appellant has shown no fraud or duress on the part of the Government, we think the District Court properly denied relief.

Staff: A.F. Prescott and Richard B. Buhrman (Tax Division)

District Court Decisions

Liens; Enforcement Against Cash Value of Life Insurance Policy; Liability of Insurer to Government for Making Loan on Policy After Receiving Service of Levy; Right of Government to Increases in Cash Value After Service of Levy. United States v. Frank Budak, et al. (N.D. Ohio, June 28, 1960 (6 AFTR 2d 5136; CCH par 9575)). This was an action to enforce federal tax liens on the cash value of policies of insurance on the life of the taxpayer. Taxpayer and the beneficiaries of the policies argued that the Government could not recover the cash values of the policies during the lifetime of the insured, because this would destroy the rights of the beneficiaries in the policies. One of the insurance companies had made a loan to the taxpayer-insured, against the policy, after levy had been served upon it by the Internal Revenue Service, and this insurer argued that it was entitled to deduct the amount of this loan from the cash value of the policy to be paid to the Government. The cash value had increased after the date of service of the levy, and the insurer argued, in the alternative, that the Government could recover no more than the cash value as of the date of levy, and was not entitled to subsequent increases in the cash value.

The Court decided all issues in favor of the Government, holding: (1) that tax liens may be enforced against the cash values of life insurance policies during the lifetime of the insured; (2) that the insurer may not deduct the loan which it made against the policy after being served with levy; and (3) that the Government is entitled to increases in the cash value after service of levy.

Staff: United States Attorney Russell E. Ake and Assistant United States Attorney James C. Sennett (N.D. Ohio); Robert L. Handros (Tax Division)

Liens; Priority Between Tax Lien and Conditional Sales Agreement Executed But Not Recorded Before Notice of Federal Tax Lien Was Filed. Diamond T. Motor Co. v. United States (D.C. Colo.). The Court held that a conditional sales agreement executed before notice of tax was filed, was a valid chattel mortgage under the laws of Colorado and that even though it had not been recorded in the correct county, before notice of tax lien was filed, it, nevertheless, was a prior claim to the property which secured the mortgage. The Court referred to Mason City & Clear Lake Railroad Co. v. Imperial Seed Co., 152 F. Supp. 145 (D.C. Iowa), in which case it was pointed out that the courts are not in agreement as to whether under Section 6323 of the Internal Revenue Code of 1954 a mortgage has to be recorded in order to be entitled to the priority given a mortgage in that Section. The Iowa Court held that the Government was an "existing creditor" within the meaning of the Iowa recording statute which makes unrecorded mortgages void as to existing creditors. A similar decision was handed down in Underwood v. United States, 118 F. 2d 760 (C.A. 5) under a similar state statute. The court in the instant case points out that the Colorado statute differs from that in Iowa and

Texas. The Court also cited United States v. Anders Construction Co., 111 F. Supp. 700 (W.D. S.C.), which held that an unrecorded conditional sales contract had priority over a subsequently filed tax lien, the South Carolina Statute being less stringent than those of Iowa and Texas. The Court distinguishes the Mason City and Underwood Cases and points out that the equities of this case favor the result in the Anders Case where the chattel mortgage was not given to secure a prior obligation but arose from a conditional sales contract, the sellers expressly retaining title to the chattels. In addition to looking to state law, the Court also refers to the minority opinion in United States v. R. F. Ball Construction Co. Inc., 355 U.S 587 in which four of the Justices stated, "Neither does the fact that the instrument was not recorded . . . makes any difference here, for the instrument was valid between the parties to it, . . .". The majority opinion did not reach such issue as to the requirement of recording and stated nothing, either approving or disapproving, concerning the minority's conclusion on such issue. Decision has not been reached with respect to appeal in the instant case.

Staff: United States Attorney Donald G. Brotzman and Assistant United States Attorney Robert S. Wham (D.C. Colo.); Paul T. O'Donoghue and Harold S. Larsen (Tax Division)

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