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BULLETIN

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YEAR-END TOTALS

The preliminary year-end caseload figures are rather discouraging, to say the least. As of June 30, 1960, the caseload had increased 1,739 cases or 6.9% over the same date in fiscal 1959. New cases filed during the year amounted to 0.7% more than in the previous year but terminations fell by 2.5% during the same period. Both the criminal and civil cases reflect a decrease in terminations. Similarly, there was an increase in the number of pending cases in both categories at year's end. The following table shows the comparable achievements for fiscal years 1959 and 1960.

	F. Y. 1959	F. Y. 1960	Increase or Decrease Number	%
Filed				
Criminal	31,328	30,953	- 375	- 1.2
Civil	24,036	24,816	/ 780	/ 3.2
Total	55,364	55,769	/ 405	/ 0.7
Terminated				
Criminal	30,929	30,503	- 426	- 1.4
Civil	24,507	23,527	- 980	- 4.0
Total	55,436	54,030	-1406	- 2.5
Pending				
Criminal	7,371	7,821	/ 450	/ 6.1
Civil	17,990	19,279	/1289	/ 7.2
Total	25,361	27,100	/1739	/ 6.9

In the field of collections the United States Attorneys have done extremely well. For the month of June 1960 they reported collections of $4,768,306. This brought the total for the fiscal year to $32,964,349. Compared with the previous fiscal year this is a decrease of $2,193,583 or 6.2% from the $35,157,932 collected last year.

During June $2,091,257 was saved in which the Government as defendant was sued for $3,604,842. 69 of them involving $1,704,622 were closed by compromises amounting to $864,156 and 35 of them involving $1,179,641 were closed by judgments against the United States amounting to $649,429. The remaining 35 suits involving $720,579 were won by the government. The total saved for the fiscal year amounted to $42,358,317 and compared to fiscal year 1959 decreased by $8,358,902 or 19.7 per cent from the $50,717,219 saved in that year.

JOB WELL DONE

Assistant United States Attorney John Kaplan, Northern District of California, has been commended by the Postal Inspector in Charge, for his successful prosecution of a recent mail theft case, which presented

special difficulties because the investigation by the postal inspection service developed only circumstantial evidence against the defendants. The letter stated that the manner in which Mr. Kaplan presented the facts in the case was directly responsible for the verdict of guilty returned against each of the defendants, and that he is to be congratulated on a job well done.

The Chief Postal Inspector has commended United States Attorney S. Hazard Gillespie, Jr., and Assistant United States Attorneys Anthony R. Palermo and John C. Lankenau, Southern District of New York, on obtaining a conviction in a recent complicated mail fraud prosecution involving a widespread stock swindle. According to the Chief Inspector, successful prosecution could not have resulted without the devoted efforts of Messrs. Gillespie, Palermo and Lankenau during the long period of trial.

The Secret Service Special Agent in Charge has commended Assistant United States Attorney Robert W. Rust, Southern District of Florida, for the excellent legal assistance he rendered in a recent criminal case. The Agent stated that he was greatly impressed by the thorough manner in which Mr. Rust prepared the case for trial, that this preparation built a chain of evidence which could not be refuted by the very skilled defense counsel, and that without Mr. Rust's advice and insistence that additional investigative factors be undertaken, the case would not have been brought to a successful conclusion.

The General Counsel, SEC, has written to the Attorney General commending United States Attorney S. Hazard Gillespie, Jr., Southern District of New York, on the wonderful job he has done for the Commission during his tenure of slightly over a year as United States Attorney. The letter stated that in this short period he and his staff have expedited and successfully prosecuted some of the largest and most important cases in the Commission's history; that his understanding of the subtleties of involved securities frauds has improved the whole enforcement picture in the country's busiest financial center; and that his keen understanding of the legal niceties involved and his splendid handling of the cases before the grand jury reflect great credit on Mr. Gillespie and on the Department of Justice.

An official court reporter has commended Assistant United States Attorney Luke C. Moore, District of Columbia, for his work in the recent trial of a case involving negligent homicide. At the end of the trial the court commended both counsel on a case most capably tried. The court reporter stated that in his opinion Mr. Moore's presentation of the case was the most outstanding he had heard throughout his fifteen years of reporting.

PERFORMANCE OF DUTY

During the recent strike of the Metropolitan Transit Department in the greater Boston area which resulted in a lack of public transportation, Miss Barbara Healion, a legal secretary in the office of the United States Attorney in Boston, walked to work from her home in Somerville, a Boston suburb. This involved a walk on a warm summer morning of approximately six miles. It is believed that the fine team spirit and outstanding devotion to duty displayed by Miss Healion are in the best tradition of the Federal public service and are deserving of the highest commendation.

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ANTITRUST DIVISION

Assistant Attorney General Robert A. Bicks

GRAND JURY

Use of Grand Jury Subpoena re Material Witness; Ladies Garment - Trucking Industry (Antitrust - Anti-racketeering). What is believed to be a novel use of the material witness provisions of the Federal Criminal Rules occurred in the course of a Grand Jury investigation conducted by the New York Office.

On April 13, 1960, a Grand Jury subpoena was issued for one Monroe Rubenstein. The Marshal's return on April 20, 1960 indicated that despite the correctness of the business and home addresses given Rubenstein could not be located and no information as to his whereabouts could be had. Written and oral inquiries were made at the trucking company of which Rubenstein was Vice-President, with no success. The services of the FBI appeared to be necessary.

At this point an Affidavit was presented to the court under Rule 46 (b) of the Federal Rules of Criminal Procedure stating that Rubenstein was a material witness, that failure to secure his presence before the Grand Jury within a reasonable period of time would impede the Grand Jury and that inability to locate Rubenstein to serve a subpoena and the resultant necessity for a dragnet search indicated that "it may be impractical to secure his appearance by subpoena." The Affidavit sought Rubenstein's arrest.

Judge McGohey issued a bench warrant for Rubenstein on May 19, 1960. The warrant was drawn so that it could be served by any marshal in any district.

The warrant was given to the Marshal for the District of Massachusetts for execution. He stated that unless Rubenstein furnished bail for his appearance in New York, he would deliver him directly to New York, a procedure differing from the removal warrants used in extradition proceedings.

On June 9, 1960, Rubenstein surrendered in New York. His attorney requested Judge Kaufman to release Rubenstein in his custody. The Government asked for bail. Judge Kaufman ordered that Rubenstein be taken before the Grand Jury and after his appearance there, that some arrangement be worked out as to the disposition of the warrant.

However, upon the completion of the Grand Jury session, the Government, feeling that the picture painted by Rubenstein as to future availability was not encouraging, refused to alter its request of "bail or jail." Rubenstein was remanded to the Marshal's custody to await word from Judge Kaufman. On rehearing, Judge Kaufman ordered that Rubenstein post $1000 bail to insure his appearance. A bail bond forfeiting $1000

if Rubenstein failed to respond to a written notice to appear, mailed to his residence, was approved by Government counsel.

Staff: John D. Swartz, Joseph T. Maioriello, Donald A. Kinkaid and James J. Farrell, Jr. (Antitrust Division)

CLAYTON ACT

Reduction of Competition - Envelope Paper; Complaint Filed Under Section 7. United States v. West Virginia Pulp and Paper Company, (S.D. N.Y.). On August 25, 1960, the United States filed a complaint against the West Virginia Pulp and Paper Co., alleging that that company's recent acquisition of controlling interest in the U. S. Envelope Company violated Section 7 of the Clayton Act.

West Virginia is a large integrated manufacturer of pulp and various kinds of paper including paper used in the production of commercial envelopes. U.S. Envelope is by far the nation's largest producer of envelopes making from 20 to 25% of the total supply. It buys paper from various mills and converts it into envelopes which it sells to wholesalers and large users. Its plants are located throughout the United States. West Virginia acquired its controlling interest in May of 1960 by first exercising an option to purchase 25% of U. S. Envelope's capital stock and then offering the remaining holders of USE a premium price for an additional 27%. This was done at the time another pulp and paper producer was itself about to merge with U. S. Envelope. West Virginia voted its stock against that merger.

The complaint alleged that this vertical combination of West Virginia and USE will substantially reduce competition among the suppliers of envelope paper by tying the largest purchaser to a single supplier, West Virginia. It was also alleged that this vertical combination gives USE a competitive advantage over other envelope converters. In addition, because West Virginia sells all of its products directly to the user and largely refrains from dealing with wholesalers, these wholesalers will be foreclosed from a substantial source of supply of envelopes. The complaint also alleges that the acquisition will tend to lessen competition in the production and conversion of paper generally, and that it will spark additional mergers between producers and converters of paper.

The complaint requests an injunction to prevent the merger of the two firms and a final divestitute by West Virginia of its interest in USE.

Staff: Philip L. Roache, Jr., Allan J. Reniche and Jack L. Lipson (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEAL

AGRICULTURAL ADJUSTMENT ACT

Wheat Producers "Knowingly Overplanted" Where They Knowingly Planted in Excess of Their Quotas, Although Not Aware of Sanctions Imposed Therefor. Geib, et al. v. Joens; Geib, et al. v. Leitz, et al. (C.A. 9, August 12, 1960). Under the Agricultural Adjustment Act of 1938, as amended, 7 U.S.C. 1281, et seq., a penalty is levied against producers of wheat who plant in excess of their allotment. 7 U.S.C. 1340(a). In addition, under the wheat program in 1957, those who "knowingly overplanted" were subject to a reduction in their allotment for future years. 23 F.R. 1673. Plaintiffs knowingly exceeded their planting quotas in 1957, but did not know that their future allotments would be affected by their overplanting and were erroneously informed by the County Administrative Office that their allotments would not be so affected. The County Committee and the Review Committee reduced plaintiffs' allotments, but on review, the district court reversed holding that plaintiffs' overplanting had not been knowingly done within the meaning of the regulation.

The Court of Appeals reversed, reinstating the ruling of the local Committee. The Court stated that "[i]n the field of criminal law * * * to "knowingly" do an act means (save where specific intent is required) no more than a conscious doing of the act. An awareness of the law proscribing it or of the sanctions attending it is not necessary * * *" The Court noted further that, since a broad program of economic regulation was involved, the case appeared controlled by "those [cases] prohibiting the estoppel of the government on the basis of misinformation given out by local representatives."

Staff: Marvin S. Shapiro (Civil Division)

CONTEMPT

Contempt Adjudication as to Government Officials Upheld Where Officials Disobeyed or Acted Inconsistently With Injunctive Order of District Court; That Action of Government Official Is Taken Pursuant to Instructions of Superior Authority Is No Defense in Contempt Proceeding. Emil J. Nelson and Richard M. Roberts v. Harold G. Steiner, et ux. (C.A. 7, June 29, 1960). By the terms of an injunctive order entered on July 10, 1957, the District Director of Internal Revenue for the State of Wisconsin was enjoined, inter alia, to release of record all liens placed upon the taxpayers' property pursuant to an assessment declared to be invalid and to return to taxpayers all monies theretofore collected under the invalid assessment. The District Director was given 60 days in which to comply with the order. An

appeal to the court of appeals resulted in an affirmance of the district court's order. 259 F. 2d 853 (C.A. 7). The mandate of the appellate court was issued on November 10, 1958, and was filed in the district court on November 12, 1958.

On January 13, 1959, at the instance of the taxpayers, the district court issued an order to show cause why the District Director should not be held in contempt of court for failure to comply with the July 10, 1957 order. At the time the order to show cause issued, the Director had taken preliminary steps to comply with the order but actual compliance was not complete until January 27, 1959. For failure to comply with the order within 60 days of the receipt in the district court of the appellate mandate, the District Director was adjudged to be in civil contempt of court and was fined $400 payable to the taxpayers. At a hearing before the district court on the order to show cause, the District Director was represented by Mr. Roberts, the Chief of the Claims Section, Tax Division, who accepted responsibility for instituting a suit to foreclose tax liens which arose as a result of a valid jeopardy assessment against the taxpayers by the District Director on January 7, 1959. The foreclosure suit was particularly addressed to monies in the possession of the District Director and returnable to the taxpayers under the July 10, 1957 order. The district court held that by instituting the foreclosure suit, Mr. Roberts was in contempt of court since a purpose of the suit was to prevent the return of the money to the taxpayers as required by the district court's order. A fine of $400 was likewise imposed upon Mr. Roberts, payable to the taxpayers.

On appeal, the Court of Appeals affirmed. In affirming, the Court rejected the following arguments: (1) that the 60-day period in which the District Director was to comply with the mandatory requirements of the order did not commence to run until the time for filing a petition for a writ of certiorari from the judgment of the court of appeals expired or until the Solicitor General had determined that a petition for a writ of certiorari would not be filed. (If the 60-day period were computed from either of these dates it was argued that the District Director had timely complied with the order. Underlying this argument was the fact that pending appeal from the July 10, 1957 order, a stay of the order was never obtained; instead all parties, including the district court, assumed that the order was not final so long as the case was pending on appeal); (2) that the contempt order of the district court was an abuse of discretion inasmuch as the District Director was under a misapprehension as to the time that he had to comply with the order and that there was never any intention to disobey the order of the district court; (3) (with respect to Mr. Roberts) that the order of July 10, 1957 as orally interpreted by the district court did not expressly or by fair implication preclude the foreclosure suit to enforce tax liens of the Government unrelated to the liens previously invalidated by the district court; (4) that in directing the commencement of the foreclosure suit, Mr. Roberts was acting on the instructions of his superiors in the Department of Justice and, under Boske v. Commingore, 177 U.S. 459, and Touhy v. Ragen, 340 U.S. 462, he could not properly be held in contempt. On this point the Seventh Circuit's decision is at odds with the Supreme Court and in conflict with the Sixth Circuit in Appeal of the United States

Securities & Exchange Commission, 226 F. 2d 501, and with the Ninth Circuit in Ex parte Sackett, 74 F. 2d 922.

Staff: John G. Laughlin (Civil Division)

CUSTOMS

Presidential Proclamation 3108 Held Invalid as, Under Section 7 of Trade Agreements Extension Act of 1951, President Cannot Set Rate of Duty Other Than That Recommended by Tariff Commission. United States v. Schmidt Pritchard & Co., etc. (C.C.P.A., July 20, 1960). Duty was assessed pursuant to Presidential Proclamation 3108, T.D. 53883, on bicycles imported by plaintiffs. The Proclamation had been issued after an "escape clause" proceeding had been instituted in accordance with section 7 of the Trade Agreements Extension Act of 1951, 65 Stat. 74, as amended. In addition to the formal proceeding under section 7, the President had requested and the Tariff Commission had conducted a supplemental investigation, after which its final recommendations were transmitted to the President. The rates proclaimed by Proclamation No. 3108 which the President then issued differed in part from the rates which had been recommended by the Commission. Plaintiffs, acting under section 514 of the Tariff Act of 1930, protested the rate of duty assessed on the ground that Proclamation No. 3108 was invalid. They urged that (1) the assessed rate was illegal because it was not the one which had been recommended by the Commission; (2) various procedural requirements of the statute had not been complied with. The Customs Court sustained both of plaintiffs' contentions, and held the Proclamation illegal.

The Court of Customs and Patent Appeals affirmed. The Court noted that section 7 provides that, "the President may make such adjustments in rates of duty, * * * as are found and reported by the Commission to be necessary to prevent or remedy serious injury * * *", and concluded that "[t]he clear import of this language is that the President may proclaim adjustments in rate of duty, but he need not do so. * * * [h]owever, if the President decides to make an adjustment in rates of duty, he must proclaim the change which is recommended to him by the Tariff Commission." The Court sustained the Government's contention that, under section 7, supplementary inquiries may be conducted without regard to the various procedural requirements imposed by the section with regard to the formal "escape clause" proceeding. The Government will file a petition for a writ of certiorari.

Staff: Alan S. Rosenthal and William A. Montgomery (Civil Division)

President Lacks Power to Impose Both Quota and Fee Upon Imported Agricultural Product Under Agricultural Adjustment Act of 1937. United States v. Best Foods, Inc. (C.C.P.A., July 20, 1960). The President, purportedly acting under the authority of section 22 of the Agricultural Adjustment Act of 1937, as amended, 7 U.S.C. 624, issued Proclamation 3084 on March 9, 1955, which (1) increased the quota previously set for the importation of peanuts for quota year 1955 from 1,709,000 pounds to 51,000,000 pounds, and (2) imposed a two cent per pound fee. Section 22 provides that, upon certain

findings by the Tariff Commission, the President may "impose such fees not in excess of 50 percentum ad valorem or such quantitative limitations" as he shall find necessary to carry out the purposes of the statute.

Plaintiff imported peanuts under the increased quota allowed by Proclamation 3084 and paid the fee of two cents per pound in addition to the basic tariff of seven cents per pound. Plaintiff then protested the added two cents per pound fee on the grounds that (1) the President had no power under the Act to impose both a quota and a fee, and (2) certain procedural requirements incident to the imposition of the fee had not been followed. The Customs Court sustained the protest on the basis of the alleged procedural defects, expressly failing to reach the substantive question.

The Court of Customs and Patent Appeals affirmed on the ground that the President had no power to impose a fee under section 22 once he had established a quota. The Court failed to reach the procedural questions. The Court upheld plaintiff's reading of the statute on the basis of what it declared to be the plain meaning of its terms and on its reading of congressional intent in the legislative history. It held that the President had the discretion to impose either a quota or a fee, but that his discretion did not include both. Therefore, upon the establishment of a quota, the President lost the power to impose a fee. The Court also rejected the Government's argument that, when plaintiff chose to benefit from the increased quota, it was estopped from challenging the fee.

Staff: Alan S. Rosenthal and William A. Montgomery (Civil Division)

FEDERAL TORT CLAIMS ACT

Under National Housing Act, Government Owes Duty to Purchaser of Exercising Due Care in Appraising Property for Purposes of Determining Eligibility to Mortgage Insurance; Misrepresentation Exception of 28 U.S.C. 2680(h) Does Not Apply Where Purchaser Relied on Negligent Appraisal of Property. United States v. Neustadt. (C.A. 4, August 19, 1960.) Under the National Housing Act, 12 U.S.C. 1709(a), the Federal Housing Commissioner may insure a mortgage on certain residential property in an amount computed on the appraised value of the property. An FHA appraiser inspected and appraised a residence which was for sale, and plaintiffs, as prospective purchasers, were advised of the appraisal. The premises were secured by an FHA mortgage and plaintiffs took possession. Shortly thereafter, substantial cracks began to appear in the walls and ceilings of the house. Plaintiffs brought suit for damages under the Tort Claims Act alleging damage as a result of the FHA appraiser's negligent appraisal of the property. The Government defended on the sole ground that plaintiffs' claim arose from a misrepresentation and, accordingly, was excluded from the scope of the Tort Claims Act by 28 U.S.C. 2680(h).

The district court entered judgment in favor of plaintiffs and the Court of Appeals affirmed. The Court emphasized the desire of Congress to protect purchasers under the Act, and pointed out that, while under the Act there is no technical relationship between the FHA and the purchaser,

the 1954 amendment to the statute, 28 U.S.C. 1715(g), specifically provides that the purchaser be given a written statement setting forth the FHA's appraised value of the property so that the purchaser may be informed as to the amount that would be warranted as a purchase price. Thus, the Court concluded that "it is abundantly clear that the government owed a specific duty to the plaintiffs in this case even though there was no contractual relationship between them." In rejecting the Government's defense, the Court stated that, although misrepresentation in the form of the appraiser's report was undoubtedly an element of the harm imposed on the plaintiffs, the gravamen of the offense was the negligent appraisal itself. The Court expressed the view that, "[i]n view of this situation we do not think that the government is necessarily absolved from liability in every case of wrongful conduct on its part which incidentally embraces misrepresentation."

Staff: Morton Hollander and William A. Montgomery (Civil Division)

COURT OF CLAIMS

COURTS-MARTIAL

Paragraph 126(e) of Manual for Courts-Martial (1951) (Providing for Automatic Reduction to Lowest Enlisted Pay Grade When Enlisted Man Court-Martialed and Sentenced to Dishonorable or Bad Conduct Discharge, Confinement, or Hard Labor Without Confinement) Held Valid Exercise of President's Constitutional Power; Ruling of Court of Military Appeals Not Followed. Garrard Johnson v. United States (C. Cls., July 15, 1960). Plaintiff, a master sergeant in the Air Force, was convicted in 1956 of larceny by a general court-martial and sentenced to a dishonorable discharge (later suspended) and confinement at hard labor. Under paragraph 126(e) of the Manual (as amended by Executive Order 10652 (January 20, 1956)), he was administratively reduced to the lowest enlisted pay grade. Relying on a divided opinion of the United States Military Court of Appeals in United States v. Simpson, 10 U.S.C.M.A. 229 (1959) that amended paragraph 126(e) was invalid because "so interwoven with the court martial process" that it was judicial in purpose and effect and beyond the administrative powers of the executive, since it operated to increase improperly the sentence, plaintiff sued for the losses in pay and allowances of his former grade.

The Court of Claims denied recovery, unanimously holding that paragraph 126(e) was a valid and proper exercise of the President's power as Commander-in-Chief of the Army and Navy under the Constitution, Article II, § 2. The Court pointed out that the President wished to prevent "the less than inspiring spectacle" of an Air Force sergeant doing hard labor in a stockade, and that a proper exercise of judicial restraint required the Court to decline to intervene in such military policy enforced for half a century. (Public Law 86-633, 86th Congress, 2d Sess., approved July 12, 1960, amended Title 10, U.S. Code by adding § 858a, Art. 58a, to authorize reduction in enlisted grade upon approval of court-martial sentences).

Staff: John R. Franklin (Civil Division)

DISTRICT COURTS

ADMIRALTY

Maritime Liens; Doctrine Forbidding Liens While Vessel in Custodia Leges Not Applicable When Court Authorizes Advances. United States v. Liberty Ship Audrey II (N.D. Calif., July 15, 1960). The Government asserted a prior lien for advances to suppliers and the crew of the vessel, the advances being made pursuant to authorization of the court in whose custody the vessel had been placed under the Ship Mortgage Act, 46 U.S.C. 911-984. Prior liens were claimed by others for materials or services supplied before the Government advances were made.

The Commissioner to whom the case had been referred ruled against the Government on the theory that no liens could attach to a vessel in the custody of a court, but this position was reversed by the Court on review. The Court granted the Government a prior lien, rejecting the interpretation of the in custodia leges doctrine urged by the other lien claimants. The Court pointed out that the doctrine is subject to an exception where, as here, the custodial court has itself authorized the advances and specifically given them the rank of liens. Since under the general rule maritime liens of the same rank take priority in an order inverse to that in which they accrued, the latter taking precedence over the earlier, the more recent advances by the Government were given precedence over the services furnished earlier by the other claimants.

Staff: Graydon S. Staring (Civil Division)

FEDERAL TORT CLAIMS ACT

Warden of Federal Penal Institution Not Liable to Prisoner for Torts Committed in Performance of Official Duties During Confinement. Philip Golub v. Alex Krimsky, Warden, etc. (S.D. N.Y., August 5, 1960). A federal prisoner sued the Warden of the Federal House of Detention in New York alleging injuries during confinement from (1) a defective condition of the premises due to negligence of the warden and his subordinates, (2) the failure to provide him proper medical care and removing him to another institution when he was not in a condition to travel.

The suit was dismissed on the ground that the complaint failed to state a claim for which relief could be granted. The Court expressed the view that to allow such suits would be prejudicial to the maintenance of discipline and that the same rule should be applied to the defendant as that applied by the federal courts to other similar federal officials, i.e. that they are immune from personal liability for wrongful acts or omissions which are clearly within the scope of their official duties.

Staff: United States Attorney S. Hazard Gillespie, Jr., and Assistant United States Attorney Burton M. Fine (S.D. N.Y.); Fendall Marbury (Civil Division)

CIVIL RIGHTS DIVISION

Assistant Attorney General Harold R. Tyler, Jr.

Amicus Curiae Briefs. Gomillion v. Lightfoot (U.S. Sup. Ct. No. 32); Boynton v. Commonwealth of Virginia (U.S. Sup. Ct. No. 7).

Because of the important Constitutional issues involved, the Department has filed amicus curiae briefs with the Supreme Court in two cases in which the Department previously had not participated.

Gomillion involves a 1957 Alabama statute which recharted the boundary lines of the City of Tuskegee so as to exclude several thousand Negroes including all but four or five of the approximately 400 qualified Negro voters. No white persons were removed. The lower courts upheld the validity of the statute. The Government brief contends that the controversy does not involve a so-called "political question" beyond judicial review but an arbitrary and unreasonable deprivation of the right to vote (in violation of the Fifteenth Amendment) and of the right to receive municipal services (in violation of the Fourteenth Amendment). The brief demonstrates that the purpose and effect of the Alabama statute were to deprive Negroes of their civil and constitutional rights and emphasizes that "the ghetto has no place in American life."

In Boynton, an interstate bus passenger was arrested for trespass after having insisted on service at the Richmond, Virginia bus terminal restaurant "customarily used for . . . white" people. Boynton's conviction was upheld by the Supreme Court of Appeals of Virginia. In its brief, the Government emphasizes that the significance of the case arises from its public, interstate and Governmental action aspects. The brief argues that the discrimination involved conflicts with the Interstate Commerce Act and imposes an invalid burden on interstate commerce. In addition, the brief asserts that the application of an otherwise valid law to effectuate a racially discriminatory policy of a private agency engaged in public, interstate activities, and enforcement of such discriminatory policy by state governmental organs, constitutes a denial by state action of rights secured by the Fourteenth Amendment. Finally, the Government urges that when a state abets or sanctions discrimination against a Negro who seeks to patronize an interstate business establishment open to the general public, the Negro is thereby denied the right "to make and enforce contracts" and "to purchase personal property" guaranteed by 42 U.S.C. 1981 and 1982.

Staff: Philip Elman, Daniel M. Friedman, Richard Medalie (Sol. Gen. Office); Harold H. Greene, D. Robert Owen, David Rubin, Gerald Choppin, J. Harold Flannery (Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

CONFLICT OF INTEREST

Government Employee Acting as Officer or Agent of United States for Transaction of Business With Own Firm (18 U.S.C. 434). United States v. L. M. Smith and Earl C. Corey (D. Ore.). On April 21, 1960, an eleven-count indictment was returned against L. M. Smith, a Portland, Oregon businessman and Earl C. Corey, former Director of the Portland Commodity Office, Commodity Stabilization Service, United States Department of Agriculture. The first eight counts charged defendant Smith with making false statements in violation of 15 U.S.C. 714(m)(a); defendant Corey was charged in the ninth count with violation of 18 U.S.C. 434; both defendants were charged in the tenth count with conspiracy to violate 15 U.S.C. 714(m)(a) and in count eleven with conspiracy to violate 18 U.S.C. 434 and to defraud the United States of the honest and faithful services of the defendant Corey in his government position.

The charges alleged were the outgrowth of the activities of the defendants and one Willard A. Richards, who was named as a co-conspirator but not as a defendant. These individuals had organized a firm known as the Three State Warehouse Company and had engaged in the business of storing surplus wheat for the Commodity Credit Corporation. However, in the course of business dealings with the Commodity Credit Corporation the interest of Corey and Richards in the Three State Warehouse firm was not disclosed.

In defense, Corey contended that his duties did not require him to participate directly in the transactions between the Portland Commodity office and the Three State Warehouse Company, that he did not participate, that he was a mere investor and undisclosed partner in the business venture, and that he extended no favoritism to the Three State firm. These contentions were proven to be without substance and on August 9, 1960, after one week of trial both defendants were found guilty as charged in the indictment.

This prosecution is believed to be of general interest because of the few reported cases pertaining to the enforcement of Section 434.

Staff: United States Attorney Clarence Edwin Luckey;
Assistant United States Attorney David Robinson, Jr.
(D. Ore.).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

IMMIGRATION

Declaratory Judgment; Court's Jurisdiction Over Subject Matter and Defendant; Relief Is Discretionary. Rivera-Ferrer v. Rogers and Rosenberg (S.D., Calif., August 12, 1960) In 1955 plaintiff applied for admission into the United States as a native-born citizen but was excluded on the ground that he had expatriated under the provisions of sec. 401(j), I & N Act (8 U.S.C. 1106(j)).

On August 29, 1958 he filed a petition for declaratory judgment, judicial review, or trial de novo, and an amended petition on December 5, 1958. On both dates he was physically present in the United States and no deportation or exclusion hearings had been instituted against him since 1955.

The Court found that it lacked jurisdiction over the subject matter of this action because (1) jurisdiction does not lie under sec. 360, I & N Act (8 U.S.C. 1503), plaintiff's status having arisen as a result of exclusion proceedings; (2) no cause of action arose under the repealed Nationality Act of 1940 which might have been preserved by section 405(a) of the I & N Act (8 U.S.C. 1101, note); (3) the Administrative Procedure Act (5 U.S.C. 1001) does not confer jurisdiction because it is not alleged that administrative remedies were exhausted; (4) no claim is, or can be, asserted upon which relief can be granted under the Constitution; (5) the Federal Declaratory Judgment Act (28 U.S.C. 2201) does not confer jurisdiction but merely provides possible remedies where the court otherwise has jurisdiction; and (6) since the case did not arise under the Civil Rights Act (42 U.S.C. 1981-1994) jurisdiction is not conferred by 28 U.S.C. 1343.

Lacking jurisdiction of the subject matter, the Court also held that it lacked jurisdiction over the person of the defendant Attorney General, and added that, even if it had jurisdiction of the subject matter, the action should be dismissed solely upon the ground that, in the proper exercise of the Court's discretion, relief by way of declaratory judgment should be denied without consideration of the merits

Summary judgment for defendants.

Judicial review; Denial of Stay of Deportation; Physical Persecution in Country of Deportation; Delegation of Attorney General's authority. Predovan v. Esperdy (S.D., N.Y., Aug. 22, 1960) Petitioner sought judicial review of the denial of his application for a stay of deportation to Yugoslavia (sec. 243(h), I & N Act; 8 U.S.C. 1253(h)).

His application alleged that his deportation to that country would subject him to physical persecution there. In support of his claim he was represented by counsel and was permitted to submit evidence to support his application. After consideration of the entire record the Regional Commissioner denied his application and this action then ensued.

Petitioner urged that: (1) the Regional Commissioner never passed upon his application - a groundless contention on the basis of the administrative record; (2) denial of the application was an arbitrary and capricious abuse of discretion; and (3) the denial was invalid since the responsibility of the Attorney General to pass upon the application is non-delegable.

The Court said that it is well settled that "under section 243(h) the question of whether deportation should be withheld * * * rests solely with the Attorney General or his delegate" (U.S. ex rel. Moon v. Shaughnessy, 218 F. 2d 316).

Here the record demonstrated beyond cavil that petitioner was afforded a full and fair consideration of his application and there was nothing to indicate that the determination was based other than on the evidence in the administrative record.

Summary judgment for respondent.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Trading With the Enemy Act. U. S. v. Atkinson (N.D. N.Y.). On August 15, 1960 the defendant entered a plea of guilty to an information charging violations of the Trading With the Enemy Act (50 App. U.S.C. 5(b)) and the rules and regulations promulgated thereunder (31 C.F.R. 500.101 et seq.). Sentence was deferred pending a probation report.

The violations were based on defendant's participation in prohibited transactions involving the purchase and sale of a large quantity of borax with knowledge that the borax ultimately was to be delivered to a country within the Soviet bloc. Borax is a critical ingredient in the manufacture of certain important missile fuels. Firms in Canada, Argentina and Europe were also involved in the transactions.

Staff: United States Attorney Theodore F. Bowes and Assistant United States Attorney Kenneth P. Ray (N.D. N.Y.).

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LANDS DIVISION

Assistant Attorney General Perry W. Morton

Claim for Just Compensation and Damages; Necessity of Proof That Government Project Caused Damage. Charles H. Nattress, Sr. v. United States (N. Mex.). By the Act of July 14, 1956, 70 Stat. A-121, jurisdiction was conferred upon the United States District Court for the District of New Mexico, notwithstanding lapse of time or limitations on jurisdictional amounts, to hear, determine and render judgment upon the claims of Charles H. Nattress, Sr. and 78 other persons whose property, both real and personal, was destroyed in floods on the Rio Grande in 1929.

Pursuant to that private act, this action and a number of others were instituted. In all, the claimants sought to recover judgments against the United States in the total sum of $780,327.50. Plaintiffs all asserted that their property, located in the former town of San Marcial, New Mexico, was destroyed in the floods of August and September, 1929. They alleged that the floods were caused by the construction in 1915 and the operation of Elephant Butte Dam about 42 miles downstream from San Marcial.

The basis for the contention that the United States was responsible was that the water impounded by the dam exerted a backwater effect upon the flowing waters of the Rio Grande. It was alleged that the backwater effect caused the river to deposit silt and sediment progressively further upstream from the head of the reservoir so that by 1929 the bed of the Rio Grande near San Marcial had aggraded, that is, built up. As a consequence, plaintiffs asserted, the river overflowed its banks and destroyed their property in San Marcial.

The case of Nattress v. United States was tried on the issue of liability alone and, by agreement of counsel and with the approval of the Court, is a test case controlling the related cases. At the trial a great many technical exhibits, consisting of maps, hydrographs and charts, together with the evidence of engineers and geologists, were offered by both parties. The Court held that this evidence established that Elephant Butte Dam and Reservoir were not responsible for the flooding of plaintiffs' properties. The Court found that there was no causal connection between the construction and operation of the dam and the floods, that the project did not cause any measurable aggradation at San Marcial, and that the floods of 1929 were of such magnitude that even if the dam had not been built the town of San Marcial would have been flooded. The Court found further that there were numerous factors other than the Government project which produced the conditions about which claimants complained, and that plaintiffs did not meet the burden of proof and did not establish by a preponderance of the evidence that the Government project was the cause of loss. Accordingly, judgment was rendered in favor of the Government.

Staff: Herbert Pittle (Lands Division)

Public Lands; Mandamus; Compliance With Procedural Requirements of Department of Interior; Abuse of Discretion in Refusing to Waive Departmental Rules. Pressentin v. Seaton (C.A. D.C., June 30, 1960). Appellants sought to appeal to the Director of the Bureau of Land Management from an adverse ruling by a hearing examiner. They filed a timely notice of appeal on January 30, 1957, from which time they had 30 days, or until Friday, March 1, 1957, to file a supporting statement of reasons in the Office of the Director. Under Departmental rules, failure to file this statement of reasons in time subjected the appeal to summary dismissal. On Monday, March 4, the Director's office received the statement in an envelope postmarked at 6:30 p.m. on February 27, in Spokane, Washington, and sent by regular mail. On April 16, 1957, the Director dismissed the appeal because the statement had not been timely filed. Eleven months later, on March 22, 1958, the Department amended its rules to provide that any document received within 10 days of its due date would be accepted if it had been transmitted within the filing time. Then on April 2, 1957, the Secretary affirmed the Director's dismissal of this appeal, and on rehearing, refused to give the rule change retroactive effect. Appellants sued the Secretary in the District Court for the District of Columbia, which granted summary judgment for the Secretary and dismissed. Appellants alleged that service of their statement of reasons had been made on the hearing examiner and on opposing counsel within the filing time, but the Secretary denied these allegations.

The Court of Appeals stated that the sole issues before it were (1) whether the Secretary erred in his determination that the statement of reasons was not timely filed and (2) whether the Secretary abused his discretion in dismissing the appeal. Appellants contended that their statement had, as a matter of law, been timely filed, relying on Dayton Power and Light Co. v. Federal Power Commission, 251 F.2d 875 (C.A.D.C. 1957), where service of a courtesy copy on the F.P.C.'s General Counsel was held to be substantial compliance with a statutory requirement of service on the F.P.C. The Court pointed out that the Secretary's rules were quite explicit that the statement be sent to the Office of the Director, and accepted earlier rulings by the Secretary that service on an official in the field does not constitute filing "in the Office of the Director." "We must give considerable weight to the Secretary's interpretation of his own rules. Since that interpretation is not unreasonable, arbitrary or capricious, we accept it." The Court therefore concluded that the statement had not been filed on time.

Turning to whether the Secretary had abused his discretion in dismissing the appeal, the Court listed four "features of the case pertinent to the discretion involved in the dismissal of the appeal." (1) The statement would have been in time had it been sent by air mail. (2) If the Director had had an "office" in Portland, the statement would have been on time. (3) An Interior official, the hearing examiner, received the statement on time. (4) The Secretary changed the rule before he decided the case. The Court later commented that this change was "enough to show the basic merit

of appellants' position." The Court concluded: "The factors we have listed add up to the inescapable conclusion that, discretion being implicit in the controlling rule, and no prejudice to anyone being shown or even claimed, this appeal, having been timely filed, should not have been dismissed for a technical, excusable delay over one weekend in the filing of the supporting statement of reasons. * * * We hold that the Secretary abused his discretion, in a legal sense, in dismissing this appeal * * *."

Staff: Hugh Nugent (Lands Division)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decision

Exemptions; Definition of Social Club: Federal-Dues Tax. Down Town Association v. United States (C.A. 2, May 2, 1960). The Court of Appeals affirmed the decision of the District Court for the Southern District of New York, holding that the Down Town Association in the City of New York was a social club within the meaning of the federal dues tax statute, Section 1710(a)(1) of the Internal Revenue Code of 1939.

Taxpayer argued that it was a businessmen's luncheon club serving the individual business purposes of its members, and that since it had no entertainment functions such as dances or parties and was open solely for the serving of luncheon to members and guests during business hours, it was not a social club within the meaning of the statute but in the nature of a business club. Taxpayer relied heavily on early cases in the Court of Claims which had narrowly construed the meaning of "social club" under the statute and the decision of the Southern District of New York in Rockefeller Center Luncheon Club v. Johnson, 131 F. Supp. 703 (S.D. N.Y. 1955), which stated that a club which served its members' individual business purposes was not a "social club" within the statute.

The Government argued that the corporate purposes and activities of a club, not the individual purposes and activities of its members, control whether it is a "social club" within the meaning of the statute, and that the purposes and activities of the Down Town Association with respect to its membership policies, the facilities provided, and its stated charter purpose are altogether social. In support of its argument, the Government pointed out that the Third Circuit in Duquesne Club v. Bell, 127 F. 2d 363 (1942), cert. den. 317 U.S. 638, the First Circuit in Turks Head Club v. Broderick, 166 F. 2d 877 (1948), and the Fifth Circuit in Downtown Club of Dallas v. United States, 240 F. 2d 159 (1957) have all rejected the doctrine that the individual purposes of the members rather than the aggregate purpose of the club control its classification for purposes of the statute, and that even the Court of Claims in its decisions post-dating the Turks Head case has broadened its view of the statute and apparently overruled sub silentio its early decisions cited by plaintiff-appellant.

The Court of Appeals held that "a businessman's luncheon club, serving no function of entertainment, is by definition a social club". The Court rejected the club's argument that its members' individual business purposes control its characterization, and held that "the congregation of people together into an association creates a social club unless their aggregation is shown to be for a definite mass purpose other than the desire of human beings to seek companionship."

The taxpayer has filed a petition for certiorari.

Staff: Louise Foster (Tax Division), Assistant United States Attorney Joseph M. Fields (S.D. N.Y.)

District Court Decisions

Lien Against Cash Surrender Values Enforced: Ownership of Policies Vested in Taxpayer-Husband Despite Claim of Ownership by Wife-Beneficiary Who Had Possession of Policies and Paid Most Premiums; Tax Lien Which Attached Before Taxpayer's Death Enforceable Against Proceeds to Extent of Cash Surrender Values. Pollard v. United States, 60-2 U.S.T.C. 9569, 6 AFTR 2d 5236 (E.D. Va.) This was an action to quash levies served upon insurance companies directed toward cash surrender values totalling $1,418.24 and for an injunction restraining collection of taxes. Plaintiff was the beneficiary under certain policies issued to her taxpayer-husband who was indebted for taxes to the Government. Liens were filed prior to his death. The policies were issued at plaintiff's insistence and delivered directly to her. She retained possession of the policies at all times and paid most of the premiums from her sole and separate funds. Taxpayer retained the rights to change the beneficiary under the policies.

The Court in holding that the tax lien was enforceable against the cash surrender values rejected the beneficiary's claim of ownership of the policies and pointed out that since taxpayer retained the right to change the beneficiaries under the policies, the ownership of the policies was always vested in him. Royal Arcanum v. Behrend, 247 U.S. 394. In subjecting the cash values to the tax lien the Court relied upon United States v. Bess, 357 U.S. 51.

Although not mentioned in the opinion, the Court rejected the case of United States v. Burgo, 175 F. 2d 196 (C.A. 3) relied upon heavily by plaintiff where in similar circumstances the Court held that the ownership of the policy was vested in the beneficiary-wife, hence the tax lien outstanding against the husband would not attach to the insurance policy issued on the taxpayer-husband's life. A distinction between the Burgo case and the instant case, not mentioned in the opinion, is that under New Jersey law where the Burgo case originated, the beneficiary of a life insurance policy has a vested interest whereas under Virginia law the beneficiary has nothing but a contingent interest.

Plaintiff's complaint was dismissed under Section 7421 of the Internal Revenue Code of 1954 and the Government's counterclaim for foreclosure of tax liens against the cash surrender values allowed.

Staff: United States Attorney Joseph S. Bambacus and Assistant United States Attorney Shanley Keeter (E.D. Va.); Stanley F. Krysa (Tax Division)

Levy and Distraint; Title to Cloth Used by Taxpayer to Manufacture Dresses Held Vested in Taxpayer and Subject to Levy and Distraint for Taxes Where Accommodating Party Claimed Title to Cloth After It Pledged Its Credit to Guarantee Payment for Cloth to Supplier. Fine Fashions, Inc. v. Gross, 60-2 USTC 9653 (D. N.J.). Taxpayer, a dress manufacturer, after obtaining a Government contract for nurses' uniforms was unable to purchase the cloth needed for the contract from Reeve's Bros. because of lack of cash and poor credit. Fine Fashions, Inc., petitioner herein, for whom the taxpayer did work, as an accommodation, informed taxpayer of its willingness to purchase the cloth from Reeve's Bros. and to make it available to taxpayer solely for the Government contract. An arrangement was worked out whereby Fine Fashions, Inc., would be repaid through a factor after Fine Fashions had paid Reeve's Bros. Under the purchase contract between Fine Fashions and Reeve's Bros., the cloth was delivered directly to taxpayer who proceeded to perform the Government contract.

After taxpayer became indebted for taxes, the District Director levied and seized 16,954 yards of material and 470 completed uniforms in taxpayer's possession. The uniforms were delivered to the Government and the payment therefor, $1,809.50, was deposited in Court.

This action was brought by Fine Fashions to quash the levy and for the recovery of the seized cloth and the funds deposited with the Court.

In holding that title to the cloth was vested in taxpayer and the cloth was subject to levy and distraint, the Court found that the true intent of the parties was that Fine Fashions, Inc., pledged its credit to guarantee payment for the cloth and that title would vest in taxpayer. Since title to the cloth was always in taxpayer, the cloth was subject to seizure under Sections 6331, 6332 of the Internal Revenue Code of 1954.

Staff: United States Attorney Chester A. Weidenburner and Assistant United States Attorney John H. Mohrfeld, III (D. N.J.); Stanley F. Krysa (Tax Division)

CRIMINAL TAX MATTERS
District Court Decision

Sentencing; Judge's Comments in Failure to File Case. United States v. Kenneth N. Kimura (D. Hawaii). On May 18, 1960, Judge John R. Ross, sitting in the District Court of Hawaii on assignment from the District of Nevada, imposed a sentence of 6 months' imprisonment and a $5,000 fine upon Kenneth N. Kimura, who had been charged with failure to file his individual income tax returns for the years 1955 and 1956, in violation of Section 7203, Internal Revenue Code of 1954. Kimura operated an electrical contracting business and also received income from rents, dividends, and real estate sales. It appeared that he had filed for only one year subsequent to 1947. In imposing sentence, Judge Ross made the following comments:

Briefly, you are charged with failing to have filed an income tax return. This charges you with having committed a misdemeanor. As far as this Court is concerned, the legislators should have made this a felony. It is just as much an offense to evade payment to the government of taxes by failing to file an income tax return as it is to file a fraudulent one. That is my personal view. However, the section does make this a misdemeanor.

* * *

Mr. Kimura, in failing to make these income tax returns, in failing to file your returns, in failing to make the payments that you would have been required to make had you made them and shown your true income, you were increasing your wealth and property at the expense of every other taxpayer in the United States, weren't you? Do you understand me? If I don't pay my taxes, you are carrying my share of the cost of government, and I am a slacker and I am escaping and in a way I am committing a type of treason because I am not supporting my country. Now, these things cannot be disposed of lightly.

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

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