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BULLETIN

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MONTHLY TOTALS

The aggregate total of cases and matters pending on June 30, 1960, the end of the fiscal year, was 45,087 - a reduction of 2,226 from the previous month. While this was a very encouraging reduction, the drop in the number of cases terminated, particularly civil cases, and the rise in the number of cases pending were not so encouraging. A continuation of this rise was indicated in the totals for July 31, 1960, the first month of the new fiscal year. Totals in all categories of work were up and the aggregate of cases and matters pending had increased by 1,690 items. During July fewer cases were filed, fewer cases were terminated, and more cases were pending at the end of the month. Set out below is a comparison of the cases filed, terminated and pending during July 1959 and July 1960:

	July 1959	July 1960	Increase or Decrease Number	%
Filed				
Criminal	1,916	1,709	- 207	- 10.8
Civil	2,151	1,863	- 288	- 13.4
Total	4,067	3,572	- 495	- 12.2
Terminated				
Criminal	1,896	1,600	- 296	- 15.6
Civil	1,639	1,463	- 176	- 10.7
Total	3,535	3,063	- 472	- 13.4
Pending				
Criminal	7,769	7,920	/ 151	/ 1.9
Civil	18,877	19,657	/ 780	/ 4.1
Total	26,646	27,577	/ 931	/ 3.5

Results in the field of collections were much more encouraging than in the area of litigation. For the month of July 1960, United States Attorneys reported collections of $3,162,585. This is $1,169,816 or 58.7 per cent more than the $1,992,769 collected in July 1959.

Similarly encouraging results were shown in the total savings effected to the Government during this month. During July $1,410,667 was saved in 71 cases in which the Government as defendant was sued for $2,810,655. 40 of them involving $1,251,270 were closed by compromises amounting to $358,573 and 17 of them involving $1,158,733 were closed by judgments against the

United States amounting to $1,041,415. The remaining 14 suits involving $400,652 were won by the Government. The total saved for July 1960 amounted to $1,410,667 and increased by $40,992 or 3.0 per cent from the $1,369,675 saved in July 1959.

JOB WELL DONE

Assistant United States Attorney H. Clyde Pearson, Western District of Virginia, has been commended by the Acting Assistant Regional Commissioner, IRS, for his diligent preparation and able prosecution of conspiracy cases resulting in convictions of many of the most important violators of liquor laws in the district. The letter stated that many of the principals in these cases were members of notorious syndicate groups, and that the able prosecution of these and other cases has contributed in a large measure to the success of the enforcement program in the district.

The Regional Counsel, Federal Aviation Agency, has commended Assistant United States Attorney Kenneth P. Ray, Northern District of New York, for the competence and diligence displayed in a recent case involving violation of the Civil Air Regulations. The letter stated that the Agency was most appreciative of the efforts made to collect the fine with interest and costs, and that the decision was a significant one.

United States Attorney Lawrence E. Dayton and Assistant United States Attorney James Schnake, Northern District of California, have been commended by the Chairman, Atomic Energy Commission, for their cooperation and help in the handling of a recent pacifist peace demonstration at the Livermore California Site which culminated in the arrest of four of the demonstrators on trespass charges.

A member of a private law firm has commended Assistant United States Attorney Kathleen Ruddell, Eastern District of Louisiana, for her exceedingly faithful and capable work as an employee of the United States Government, first as a secretary in the United States Attorney's office, then as a secretary to a district judge, and now as Assistant United States Attorney. The letter stated that since her appointment as Assistant United States Attorney, the law firm has handled various matters with her and has at all times found her to be a competent, realistic and fair attorney.

The General Counsel, Small Business Administration, has commended Assistant United States Attorney Sam D. Eggleston, Jr., Eastern District of Virginia, for his representation of the SBA in a complicated and extended litigation resulting from the bankruptcy of an SBA debtor. Mr. Eggleston's handling of the case was described as "most thorough and diligent."

Both the General Counsel, Securities and Exchange Commission, and the Chief Postal Inspector have expressed to Assistant Attorney General Malcolm Richard Wilkey their appreciation for the successful prosecution by United States Attorney William B. West III and Assistant United States Attorney William N. Hamilton, Northern District of Texas, of Robert L. Proffer and

his associates for mail fraud and securities law violations in the sales of stock in Teachers-Professional Investment Company, Inc., and sales of "scholarships" in Professional Business University, Inc., organized as a subsidiary of the former corporation. General Counsel Thomas G. Meeker of the Securities and Exchange Commission added that Mr. West had handled with great skill and expedition important enforcement matters referred to his district for prosecution. Chief Inspector Stephens of the Post Office Department lauded the unstinted efforts of Mr. West and Mr. Hamilton, as well as the excellent cooperation between the two agencies.

United States Attorney E. Coleman Madsen, Southern District of Florida, has commended John L. Murphy, John Ossea, and Frank M. Dunbaugh, all of the Civil Rights Division, for their able representation of the Government in the lengthy prosecution of 14 prison guards and former guards for inflicting brutal treatment in violation of the civil rights of prisoners. Although the court directed a verdict of acquittal at the close of the Government's case, Mr. Madsen stated: "There are times when a defeat is in reality a victory. In bringing to the public's attention the brutality against prisoners in the Florida State Prison at Raiford, the Government scored such a victory."

The Acting Judge Advocate General, United States Air Force has commended Assistant United States Attorney Thomas P. Simpson, Eastern District of South Carolina, for his outstanding performance in the trial of lawsuits arising from the accidental dropping of an atomic device from an Air Force plane. The plaintiffs in the case alleged heavy metal poisoning, radiation illness, and diminution of property value as a result of the accident, but the court found that they suffered no health hazard, and no other loss. The letter stated that this fine result in a case of extreme importance to the Air Force and affecting the national security is directly attributable to Mr. Simpson's interest, industry and professional competence in the preparation and trial of the case.

The United States Marshal, District of Columbia, has commended Assistant United States Attorney Joseph M. Hannon, upon the very creditable knowledge, conduct and attitude he displayed during his lectures to the Deputy United States Marshals attending a recent training program.

The Assistant General Counsel, Department of Agriculture, has commended Assistant United States Attorneys Robert J. Ward and James McKinley Rose, Jr., Southern District of New York, on the extremely prompt and capable manner in which they handled a recent matter involving a subpoena duces tecum. The subject matter of the subpoena were the records of a meat packer who had shipped meat bearing false and counterfeit federal meat grade brands and identification markings. The letter stated that the Department of Agriculture considered this matter to be of great importance and that the prompt enforcement action by Messrs. Ward and Rose will materially aid future investigations under the Act.

Assistant United States Attorney Arthur V. Savage, Southern District of New York, has been commended by the Acting Assistant Regional Commissioner,

Alcohol and Tobacco Tax Unit, for the prompt, excellent and efficient manner in which he handled a recent matter involving the removal of wines from the premises without proper prepayment of the wine tax.

* * *

ANTITRUST DIVISION

Assistant Attorney General Robert A. Bicks

Price Fixing - Motion Picture Admissions. United States v. Central States Theatre Corporation, et al., (D. Neb.). On August 29, 1960 Judge Delehant, in a 72-page memorandum, rendered his opinion, findings and conclusions in the above case. The opinion is primarily important with respect to commerce questions.

The principal charge was that several drive-in theatres in the Omaha, Nebraska-Council Bluffs, Iowa area had conspired to fix prices to be charged for admission to defendants' theatres. The commerce involved was described by the Court as, "the leasing of moving pictures for exhibition in the Omaha area Drive-In Theatres, their transportation to withdrawal for exhibition from, and return to the Omaha offices of the several motion picture distributors, and their handling in successive transportations into and out from Omaha for numerous exhibitions, [remaining] within the reach and control of the distributors' Omaha offices."

After finding that defendants had agreed upon admission prices, but that such agreement was never "carried into practical effect" - instead "it proved to be abortive" - the Court held that "any movement of pictures from Omaha offices of distributors to either of . . . two theatres [in Iowa], or from either of those two theatres back to such Omaha offices, was openly and directly made in interstate commerce" (emphasis added).

Defendants relied strongly upon United States v. Starlite Drive-In, Inc., 204 F. 2d 419. The Court (1) distinguished Starlite on the ground that in the instant case "the amount of rental receivable by distributors for films was and is, in many instances, directly dependant on the admission charges enacted by the distributors in the Omaha area", and (2) in any event, the Court "frankly acknowledge [d]" that it disapproved "of the reasoning of the Starlite case", noting that Starlite "has not invariably been accepted without distinction", citing Las Vegas Merchant Plumbers Association v. United States, 210 F. 2d 732, 741, note 4; United States v. Stirone, 262 F. 2d 571, 579; United States v. Employing Lathers Association, 212 F. 2d 726, 730.

With respect to the further question of whether or not injunctive relief was necessary because the conspiracy had never been effectuated, the Court held: "The making of a contract in the nature of a combination and conspiracy violative of Title 15 U.S.C., Section 1, has been found. That finding has been made in the fact of explicit and persistent denial of its existence by each of the parties defendant, and by the individuals who, in the meeting of February 4, 1955, represented the corporate defendants. If the initial engagement in the combination and conspiracy be granted or, as is the present situation, determined, it has not been formally abandoned. That is not surprising. The participants in it could hardly deny that any combination or conspiracy was ever formed, yet, in the next breath, assert that such a combination or conspiracy

was abandoned or terminated. And the defendants hereto are not thus inconsistent. The combination or conspiracy, therefore, is to be regarded as persisting. That conclusion is not nullified or impaired by the failure of the parties to it actively to carry it forward to effect.

Staff: Earl A. Jinkinson, Francis C. Hoyt and Joseph E. Paige (Antitrust Division)

Standard of Pleading Required of Government in Sherman Act Cases. United States v. Irving Bitz, et al., (C.A.2). The appeal in this case was from dismissal of a count of the indictment which charged violation of Section 1 of the Sherman Act. The grounds upon which the district court had dismissed were (1) that the acts charged were not a per se violation of the statute, (2) that in these circumstances injury to the general public resulting from defendants' conduct must be alleged and (3) the count did not allege such injury or facts from which it could be inferred. The Court of Appeals in reversing on August 26, 1960, found it necessary to decide only that the facts which were alleged furnished sufficient basis for inferring public injury.

The Court also ruled that where, as in this case, an indictment had been dismissed upon two grounds, one involving the insufficiency of the pleadings and the other a construction of the statute upon which the indictment was founded, appeal is to the appropriate court of appeals and not to the Supreme Court. The provision of the Criminal Appeals Act providing for Supreme Court appeal from a judgment sustaining a "motion in bar" was likewise held inapplicable because the effect of the district court's dismissal was not to bar reindictment of the defendants, but simply to force the United States to replead.

Staff: Richard A. Solomon and Richard H. Stern (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURT OF APPEALS

ATOMIC ENERGY ACT OF 1954

Atomic Energy Commission May Not Issue Construction Permit to Build Nuclear Energy Production or Utilization Facility Unless It Finds That Such Facility When Constructed and Operated Will Provide Adequate Protection to Public Health and Safety. International Union of Electrical Workers, et al. v. United States (C.A.D.C. June 10, 1960). Power Reactor Development Company, a membership corporation composed of 14 public utilities and 7 equipment manufacturers, was granted a construction permit by the Atomic Energy Commission under Section 185 of the Atomic Energy Act of 1954 to construct a "fast breeder" reactor, the stated purpose being to demonstrate "the practical and economical use of nuclear energy for the generation of electrical energy . . ." The proposed reactor will be the largest of its type in the U.S. and its site is Lagoona Beach, Michigan, 30 miles southwest of Detroit. Petitioners are several labor unions who sought review of AEC's order granting the provisional construction permit on the ground that the reactor, under present technological conditions, will be inherently unsafe and will place the members of the unions and their families "in danger of an explosion or other incident."

The Court of Appeals held that the order was a "final order" and that petitioners were aggrieved by it, since it threatens them with economic injury. Having thus determined that the order was reviewable the Court reasoned that when Section 182 of the Act concerning issuance of operating licenses and Section 185 concerning construction permits are read together, they indicate that Congress required the AEC to find that the "facility can be operated at the location proposed without undue risk to the health and safety of the public" prior to issuance of a construction permit. The Court found support for its interpretation in the legislative history of the Act and felt that if a construction permit were issued and tremendous sums of money expended on the facility, there would be overwhelming pressure on the Commission to issue an operating license.

As to the AEC's specific safety findings made prior to the granting of the permit, the Court said that AEC's finding of "reasonable assurance" that it could be operated without undue risk was not sufficient in the following particulars: The "reasonable assurance" was based on "future evidence" to be submitted and the finding of safety is ambiguous when it should be free of ambiguity in view of the nature, size, and location of the project; the AEC ignored Congressional concern that no reactor should be located near so large a population center absent compelling reasons. The Commission's grant of a construction permit was accordingly set aside and the case remanded to the AEC for further considerations.

Judge Burger dissented on the grounds that at most there was only a future possibility of injury and that the order was not final and the petitioners had not been aggrieved. He felt the Court was usurping the function of the AEC in an area where its technical expertise should be applied and that further there was no reason to think the Commission would license an unsafe facility merely because the builder had expended large amounts of money. PRDC knew it was engaged in a speculation and if it found itself the owner of an unusable "50 million dollar white elephant", it would not be the first time that research was fruitless and a pecuniary loss.

A petition for a writ of certiorari will be filed.

Staff: Samuel D. Slade (Civil Division)
Lionel Kestenbaum (Atomic Energy Commission)

CONGRESSIONAL INVESTIGATIONS

District Court Has Jurisdiction to Entertain Suit Against Staff Member of Congressional Committee Asking Money Damages Based On Alleged Violations of Constitutional Rights. Donald Wheeldin, et al. v. William Wheeler, et al. (C.A. 9, June 28, 1960). Plaintiffs, Wheeldin and Dawson, were subpoenaed to appear before a sub-committee of the House Committee on Un-American Activities. They thereupon instituted suit against William Wheeler who caused the subpoena to be issued, against Robert W. Ware, the United States Marshal who with the Sheriff of Los Angeles County, Biscailuz, served the subpoenas, and against the sureties on the Marshal's and Sheriff's bonds. The complaint sought a declaratory judgment as to the validity of the subpoenas, and money damages from Ware and Biscailuz because of alleged violations of rights arising under the First, Fourth, and Fifth Amendments. A claim for injunctive relief was also asserted but became moot when the date for Wheeldin's appearance passed and when Dawson was excused from appearing.

The district court, in the exercise of its discretion, declined to exercise its declaratory judgment jurisdiction and dismissed the claims for money damages for want of jurisdiction. The Court of Appeals affirmed or dismissed the appeals save that insofar as it pertains to House investigator Wheeler, the Court reversed, holding that "in the sense of Bell v. Hood, 327 U.S. 678" there was jurisdiction to entertain the claim for money damages.

Staff: United States Attorney Laughlin E. Waters; Assistant United States Attorneys Richard A. Lavine and Arline Martin (S.D. Calif.)

PACKERS AND STOCKYARDS ACT

Stockyard Dealers Who Purchase Livestock Ordered to Cease Practice of Determining Priority of Right to Bid by Drawing Lots Among Themselves as Discriminatory Practice Forbidden by Packers and Stockyards Act of 1921. Aikins, et al. v. United States (C.A. 10, August 11, 1960). At the

Kansas City Stockyards livestock is sold by private treaty and not competitive auction. One person at a time is permitted to inspect and bid on a lot, and if his bid is refused, another buyer is admitted, and so on. For years the dealers who buy for resale, 38 of which are petitioners here, have determined among themselves who will be permitted to bid first by casting lots or flipping coins. The effect of this so-called "turn" system, coupled with the combined economic effect which these dealers could bring to bear on the stockyards, was to freeze out the farmers who wished to bid. The original proceeding, which alleged violation of the provisions of section 312a of the Packers and Stockyards Act of 1921 forbidding dealers (and others) to use any unfair or discriminatory practice in connection with the buying or selling of livestock "in commerce at a stockyard", sought a cease and desist order against both the dealers and the market agency, but upon the stipulation of the latter that it wished also to be rid of the practice and would discontinue giving recognition to the "turn" system, the cease and desist order was issued against only the dealers. The Department of Agriculture hearing officer recognized that the turn system could not work without the acquiescence of the marketing agency, but in view of the past economic pressure which the dealers had brought to bear to effectuate the system which only they were pleased with, it was thought a cease and desist order should be issued to prevent its recurrence in the future.

The dealers sought review of the Secretary of Agriculture's order arguing that, since the stockyards had agreed not to honor the system, future violation was purely speculative and furthermore the system itself is desirable because the dealers are the best buyers and it is a better system than "fisticuffs and footraces" to settle who gets the first bid. The Court held that these considerations were outside the scope of its review and that the record shows ample support for the findings of the Hearing Officer that the system resulted in discrimination. The evidence showed that farmers were unable to bid on good lots of livestock and that the stockyards were forced to honor the system or suffer reprisals from the dealers. The mere fact that the dealers themselves were not disgruntled with a system of their own devising "cannot be held to restrict the administrative agency in its efforts to give effect to the declared policy of Congress to keep the stockyards open to free competition."

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

DISTRICT COURTS

TORT CLAIMS ACT

Medical Malpractice: Government Not Liable for Suicide of Mental Patient in Veterans Administration Hospital. Margaret P. O'Donnell, Administratrix of the Estate of Raymond L. O'Donnell v. United States (D. Mass., April 25, 1960). This was an action for wrongful death resulting from the suicide of a mental patient in a Veterans Administration hospital. Decedent was placed in a room on the 9th floor without barred windows, but next to the nurse's office. He was left alone for periods

of time and could move about freely. One morning he committed suicide by jumping out the window of his room. Expert medical testimony was presented by the Government that the patient was not a suicidal type. Other medical witnesses testified that the care and treatment given the patient were consistent with accepted medical practice in the locality. The Court found that in the circumstances there was no negligence on the part of defendant in failing to place the deceased in a closed ward.

Staff: United States Attorney Elliott L. Richardson and Assistant United States Attorney George C. Caner, Jr. (D. Mass.)

STATUTES

CASES CONCERNING SHIPPING AND NAVIGABLE WATERS

Tort of Contract Actions or Admiralty Suits Against United States, Concerning Ships or Shipping or Arising on Navigable Waters; Transfers Between District Courts and Court of Claims; Amendment of Suits in Admiralty Act by Public Law 86-770 of September 13, 1960. Hereafter any claim which could be asserted in admiralty, if a private person, vessel, cargo, or other property was involved, can be brought against the United States either as a civil action or as an admiralty suit. In either event, however, exclusive jurisdiction is under the Suits in Admiralty Act, as amended and supplemented by the Public Vessels Act (46 U.S.C. 741-750, 781-790), and not under the Tort Claims or Tucker Acts (28 U.S.C. 1346(a) and (b)).

Congress has amended Section 2 of the Suits in Admiralty Act (46 U.S.C. 742), relating to Government vessels, cargoes and employees effective September 13, 1960, so as to provide that:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 1 of this Act. [46 U.S.C. 741].

P.L. 86-770 also adds to Title 28 as new provisions, Sections 1406 (c) and 1506, authorizing the transfer of cases between the district courts and the Court of Claims, and vice versa, whenever suit is filed in the wrong court.

By this amendment, all claims concerning ships and shipping or arising on navigable waters now clearly come within the exclusive jurisdiction of the admiralty claims acts, but can be brought at the choice of the claimant either on the civil or the admiralty side of the court. The amendment has eliminated the conflict of decision as to whether jurisdiction in certain cases of this character was under the Tucker or Tort Claims Acts or under the admiralty claims acts. It also eliminates

previous difficulties as to suit by civil or admiralty action where private parties are sued together with the Government or the Government is impleaded as a third party in an existing civil or admiralty action.

For the convenience of United States Attorneys, the principal types of claims on which admiralty proceedings may be brought where private persons, vessels, cargoes, or other property is involved appear substantially as follows:

(a) Damage caused by or to a vessel or those aboard her by collision or otherwise.

(b) Loss of life or personal injury or disease caused by any vessel or its operation, or occurring on navigable waters.

(c) Salvage or assistance to vessels or cargoes anywhere, or to persons or other property on navigable waters.

(d) Agreements relating to the use of hire of any vessel, whether by charter party or otherwise, and whether oral or in writing.

(e) Agreements relating to the carriage of goods or merchandise by any vessel, whether by charter party, bill of lading or other contract of afreightment, and whether oral or in writing.

(f) Loss or damage to goods, merchandise, or baggage carried by any vessel.

(g) General average.

(h) Bottomry and respondentia.

(i) Towage of any vessel or other property, including aircraft, on navigable waters.

(j) Pilotage, including claims for statutory pilotage fees where services are refused.

(k) Agreements relating to furnishing any vessel with services, supplies and victuals, etc., including water, with a view to its operation or maintenance, and whether oral or in writing.

(l) Reconstruction, repair or equipment of any vessel, and port, dock and wharf charges, or statutory dues, on any vessel or cargo.

(m) Wages of masters, officers, or crew members, including penalty wages, overtime, subsistence allowances, personal effects, and other items which are by statute recoverable in the same manner as wages.

(n) Reimbursement of disbursements or expenses, made by the master, shipper, consignor, consignee, or agents, on behalf of a vessel or her owner or operator.

(o) Any litigation concerning possession, ownership or title of any vessel or any interest therein.

(p) Any litigation concerning an interest or share in a vessel or the custody, employment or earnings thereof.

(q) Any mortgage, lien, charge, or hypothecation of a vessel or any interest therein.

(r) Any claim for penalties, forfeiture, restoration, or declaratory judgment, concerning a vessel or cargo or other property involved in its operation.

Cases involving contracts for vessel construction and for operating and construction subsidy remain under the Tucker Act, and will continue to be handled by the Admiralty and Shipping Section.

United States Attorneys should take particular notice of the changes resulting from the amendment and make sure that all matters concerning ships or shipping or occurring on navigable waters are marked for the attention of the Admiralty and Shipping Section.

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CIVIL RIGHTS DIVISION

Assistant Attorney General Harold R. Tyler, Jr.

Voting and Elections; Civil Rights Act of 1957. United States v. A. T. Beaty, et al. (W.D. Tenn.). On September 13, 1960, the Department filed a civil complaint at Memphis, charging twenty-nine defendants, including two banks, with violation of 42 U.S.C. 1971(b). This civil suit is the sixth to be brought by the United States under the Civil Rights Act of 1957 and the first occasion on which the government has invoked 42 U.S.C. 1971(b).

Under 42 U.S.C. 1971(b) any person, whether acting under color of law or otherwise, is prohibited from threatening, intimidating, coercing or attempting to threaten, intimidate, or coerce any other person for the purpose of interfering with the latter's right to vote for candidates for federal offices. In this connection, the complaint states that under Tennessee law, registration for voting is a prerequisite to voting in any election, including voting for federal candidates.

The complaint alleges that defendants engaged in acts of economic pressure and reprisal in Haywood County, Tennessee, against potential Negro registrants, Negro registrants, and others who failed to cooperate with defendants. The acts of economic pressure listed in the complaint include: termination of share crop and tenant farming relationships with certain Negroes; termination of employment of certain Negroes; refusal to sell necessaries and other goods and services even for cash to certain Negroes; refusal to sell necessaries and other goods and services on credit to some Negroes, although the latter were economically and otherwise entitled to credit purchases and were formerly afforded such credit; refusal to lend money to some of the Negroes although such Negroes were otherwise qualified for and entitled to such loans; refusal to deal with merchants and others accused of or suspected of selling goods to Negroes; inducing suppliers of merchants not to deal with certain merchants; inducing merchants, landowners and others to penalize economically certain Negroes; and, inducing wholesale suppliers of Negro merchants not to deal with such Negro merchants and others in the Negro community believed by defendants to be sympathetic to registration and voting by Negroes.

The complaint alleges that defendants and others arranged and attended meetings to discuss and organize the economic intimidation and circulated among the white business community lists of Negro registrants and Negroes active in the registration movement. A second cause of action charges defendants with conspiring to perform the coercive acts.

The complaint asks that the Court enjoin defendants and all persons acting with them from engaging in any threats, acts of intimidation or

coercion of any nature for the purpose of interfering with the right of Negro citizens to register and to vote for federal candidates.

Staff: United States Attorney Warner Hodges (W.D. Tenn.); John Doar, Henry Putzel, Jr., Philip Marcus, J. Harold Flannery, Jr., Warren S. Radler (Civil Rights Division)

Voting and Elections; Civil Rights Act of 1957. United States v. Raines (M.D. Ga.) On September 13, 1960, the District Court entered its decree permanently enjoining the Board of Registrars and the Deputy Registrar of Terrell County, Georgia, from depriving Negroes of rights secured by 42 U.S.C. 1971(a). Among the specific practices enjoined are the use of differently colored registration application forms for white and Negro voters; the keeping of separate registration and voting records for whites and Negroes; following different procedures in administering the literacy tests to Negroes and whites; delaying action upon applications for registration by Negroes, and requiring a higher standard of literacy of Negro than of white applicants. The Court ruled that each of these practices involved, as a matter of law, a "distinction of race" within the meaning of Section 1971(a). The Court specifically ruled that the section forbids any distinction in the voting process based upon race or color irrespective of whether such distinction involves an actual denial of the vote. Thus, even those Negroes who were successful in registering were subjected to the deprivation of rights under 1971(a) by reason of the different procedures and more stringent standards applied to them.

On another important point of statutory construction, the Court ruled that Negro citizens are "otherwise qualified by law to vote at any election" within the meaning of Section 1971(a) if they possess all of the qualifications and none of the disqualifications set out by state law as those qualifications and disqualifications are applied by the registration officials to other citizens. The Court enjoined the illegal practices and ordered the names of those Negroes who had been wrongfully denied registration to be added to the registration rolls within ten days.

The Court has not yet ruled on the question of whether the deprivations were "pursuant to a pattern or practice" within the meaning of subsection (e) of 42 U.S.C. 1971 as added by the Civil Rights Act of 1960. The Government has, however, asked for such a finding.

Staff: St. John Barrett and Ben Brooks (Civil Rights Division); Assistant United States Attorney Earl May (M.D. Ga.)

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CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

AUTOMOBILE INFORMATION DISCLOSURE ACT

Constitutionality. United States v. Melvin Henry Cummings (W.D. Pa.). On May 18, 1960, the United States District Court at Pittsburgh, Pennsylvania upheld the constitutionality of the Automobile Information Disclosure Act in the first case so challenging the Act. It denied a motion made by Melvin Henry Cummings to dismiss an eight-count information, charging him with the removal of manufacturer's labels of information from various automobiles in violation of 15 U.S.C. 1233(c), on the ground that since he was charged with removing such labels only after the interstate transportation of the vehicles involved came to rest at his place of business, the Act was unconstitutional to the extent that it regulates a purely intrastate activity.

Noting that the legislative purpose of the Act was to correct abuses which tended to affect our national economy, and relying on the substantial relation to commerce doctrine enunciated in National Labor Relations Board v. Jones & Laughlin, 301 U.S. 1, the trial court held that, although the local sale of an automobile by a retail dealer involves purely intrastate commerce, such "transaction has such a close and substantial relation to interstate commerce, as is developed in the legislative history, so as to constitutionally sanction this regulation as an appropriate control to protect interstate commerce from burdens or obstructions."

Staff: United States Attorney Hubert I. Teitelbaum; Assistant United States Attorney John F. Potter (W.D. Pa.)

MOTION TO SET ASIDE JUDGMENT OF CONVICTION (28 U.S.C. 2255)

Motion Denied Because of Petitioner's Deliberate Failure to Appeal from Judgment of Conviction. Lewis Woodward Larson v. United States (C.A. 5). On June 27, 1960, the United States Supreme Court denied the petition of Lewis Woodward Larson for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit, entered on February 29, 1960, which affirmed the order of the United States District Court for the Northern District of Georgia denying Larson's motion under 28 U.S.C. 2255 to vacate his judgment of conviction on the ground that he had been denied due process of law by being tried by a prejudiced jury.

On December 2, 1953, Larson and a co-defendant were jointly convicted of murdering a deputy United States marshal who was transporting them by automobile to a Federal penitentiary to serve a sentence of five years' imprisonment. The jury recommended against capital punishment for Larson, but made no such recommendation for his co-defendant. The latter received

a death sentence, while Larson was sentenced to life imprisonment. The record shows that each member of the trial jury empanelled had expressed a pre-conceived opinion as to Larson's or his co-defendant's guilt. It also shows that each such member assured the trial court that he could, however, base his verdict on the evidence free from that opinion.

Larson did not appeal from his conviction, but his co-defendant did and the Court of Appeals for the Fifth Circuit reversed his judgment of conviction and set aside his death sentence, on the ground that the trial court erred in failing to grant his motion for a change of venue or a continuance and that he was forced to trial before a jury, every member of which admitted he had an opinion that the defendant was guilty. The co-defendant was subsequently retried, convicted, and sentenced to life imprisonment.

The Court of Appeals noted the trial court's observations from the record, to the effect, that Larson's failure to join his co-defendant in motions, such as for change of venue or continuance, indicated a strategy to maneuver himself into a position so as not to be tried together with his co-defendant, who was the actual murderer, in the hope of escaping the death penalty, and that his deliberate withdrawal of his motion for a new trial after conviction and his failure to appeal were all part of considered strategy not to jeopardize his life by running the risk of a new trial. On the basis of such observations it concluded that Larson "may not now substitute a proceeding under Section 2255 for the orderly appellate process he deliberately declined to use for the purpose of correcting errors, if they were errors, that were as obvious when he was tried six years ago as they are today." It held that "failure to appeal, like failure to raise a known question of unconstitutionality, bars resort to habeas corpus and Section 2255, if the record indicates a conscious election not to appeal." The Court added the caveat, however, that it was not generalizing with respect to habeas corpus and Section 2255, and that its decision should not be taken as holding that there must be an appeal in every instance before resort to Section 2255 can be had, but only "that, in the circumstances of this case, Larson, taking a calculated risk, made a free choice not to jeopardize his life, and he is bound by that decision."

Staff: United States Attorney Charles D. Read, Jr.;
Assistant United States Attorney E. Ralph Ivey
(N.D. Ga.)

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Misbranding - Testimony of General Practitioners as to Efficacy of Specialized Drug Held "Not Substantial." United States v. Lela S. Weir (C.A. 5). The Government sought to enjoin appellee from distributing Tri-Wonda products in interstate commerce while misbranded. It was alleged that the product was misbranded because it falsely was represented to be effective for the cure and treatment of arthritis and other related diseases, and to be effective for the relief of symptoms characteristic of those diseases. Following an exhaustive presentation of

evidence marked by comprehensive medical testimony, the District Court (S.D. Miss.) enjoined defendant from claiming the drugs were a cure or an adequate treatment for any form of arthritis. However, the Court found that on the basis of all the evidence the Government failed to sustain the allegation that the drugs were not effective for symptomatic relief, and accordingly it refused to enjoin representations to this effect.

The Government appealed from the unfavorable portion of the decree contending that the factual finding was clearly erroneous. The Court of Appeals agreed with the contention, holding that the overwhelming weight of the evidence supported the Government's position.

The relative weight attributed by the Court of Appeals to the medical evidence offered by each side is significant. The Government presented a number of highly qualified specialists in the field of arthritic diseases, and also presented the testimony of three pharmacologists. All were of the opinion, based upon scientifically-recognized tests and personal knowledge and experience, that the claims made for the drug by the appellee were false and misleading. On the other hand, the appellee attempted to support those claims with the testimony of five general practioners who had no special qualifications for treating arthritic diseases, and also with the testimony of several "satisfied customers."

The Court, setting up a standard for weighing conflicting evidence of the drug's efficacy, stated that the testimony of a layman that he is suffering from or that he has been cured of a disease, "however honestly given and however firmly believed, does not rise to the dignity of substantial evidence" where the disease involved is one "whose presence or cure can be ascertained only by persons trained in medical science and by the use of scientific aids or surgery." Then, after first acknowledging the conflict of scientific opinion among the medical witnesses, the Court proceeded to review the personal qualifications of the experts, and the data each used as the basis for his conclusions. So viewed, the Government's evidence was considered relatively so persuasive that the Court branded the appellee's medical evidence "not substantial," and held that the District Court's failure to grant the injunction as requested evidenced an abuse of discretion.

Accordingly, the judgment was reversed and the case remanded with instructions to grant the injunction as prayed for by the Government.

Staff: United States Attorney Robert E. Hauberg; Assistant United States Attorney Edwin R. Homes, Jr. (S.D. Miss.)

OBSCENITY

Sufficiency of Indictment; Collateral Estoppel; Constitutionality of New Venue Provision of 18 U.S.C. 1461; Bill of Particulars. United States

v. James S. Frew; United States v. Harold R. Steiner (E.D. Mich.). On August 12, 1960, Judge Clifford O'Sullivan of the Sixth Circuit, sitting by designation in the Eastern District of Michigan, denied defendants' motions to dismiss the indictments charging both defendants with mailing circular advertisements giving information about where obscene material could be obtained, and defendant Steiner with actually mailing obscene material in violation of 18 U.S.C. 1461. With few exceptions their motions for bills of particulars were also denied.

The Court's opinion established the following principles: (1) An obscenity indictment may plead substantially the words of the statute. It need not charge specific knowledge that the mailed material is legally objectionable and specific intent to appeal to prurient interests. Nor need is set forth a detailed description of the material alleged to be obscene. (2) A civil determination in an action between the Post Office and a mail order publisher that circular advertisements do not give information concerning where obscene material may be obtained does not collaterally estop the Government from bringing a criminal prosecution against the publisher's successor-in-interest based on the mailing of identical circulars. (3) The venue amendment to 18 U.S.C. 1461 which allows prosecutions in the district where the mail is received as well as in the intermediate districts through which the mail has passed does not make the statute unconstitutionally vague on its face nor tend to inhibit freedom of publication. The constitutionality of the statute must be judged on the basis of how it is applied in the specific instance, and prosecution is properly brought in the district of receipt since the mail order publisher, having chosen to carry on his enterprise in such district, must take the hazard that his material will offend the standards prevalent there. (4) A defendant in an obscenity prosecution is entitled to no greater description of the materials he is charged with mailing than is necessary for identification purposes. Neither is he entitled to answers to what are essentially questions of law concerning the theory of the Government's case, nor, where the indictment charges the mailing of circular advertisements, to description of the material obtainable by responding to such advertisements.

Staff: Former United States Attorney Fred W. Kaess; Assistant United States Attorney Robert E. DeMascio (E.D. Mich.)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

IMMIGRATION

Habeas corpus; Judicial Review of Deportation Proceedings and Release on Bond. U. S. ex rel. Rotondi v. Esperdy (S.D., N.Y., Aug. 3, 1960). An alien appealed to the Board of Immigration Appeals from a May 31, 1960 order of deportation and the Service refused to release him on bond while his appeal was pending.

On June 14, 1960 the Board ordered his release on bond if travel documents to effect his deportation to Italy "have not been secured by June 17, 1960". The issuance of such documents by the Italian Consulate were dependent on receipt of sailing particulars which the Service could not furnish while his appeal from the deportation order was pending. Habeas corpus proceedings to effect his release followed.

In dismissing the writ the Court said that the petitioner had not shown either an abuse of discretion by the Service or its failure to proceed with his deportation with reasonable dispatch, for any failure by the Service to comply with the Board's order of June 14th was caused by his own actions, and the fact that such actions are authorized by law does not change the result.

Declaratory Judgment; Review of Denial of Visa Petition; Nonquota Status in Issuance of Immigrant Visa; Adopted Child; Residence Requirement. Ng Fun Yin v. Esperdy (S.D., N.Y., July 25, 1960). A citizen and his alien wife adopted a male child in China in October 1948 who continued thereafter to live in China with his adopting mother. The citizen returned to the United States in May 1949 and has lived here since that time.

His petition for the issuance of a nonquota immigrant visa to his adopted son was denied by the Service on the ground that the son did not qualify as an adopted child under the definition of that term in section 101(b)(1)(E) of the 1952 Act (8 U.S.C. 1101(b)(1)(E)) so as to accord him a nonquota status under section 101(a)(27)(A) of the Act (8 U.S.C. 1101(a)(27)(A)). Another petition to issue a nonquota visa to his wife was approved.

Thereupon he brought an action under sec. 10 of the Administrative Procedure Act (5 U.S.C. 1009) and the Declaratory Judgment Act (28 U.S.C. 2201) for a judgment declaring invalid the decision denying his petition in behalf of his adopted son.

The administrative decision was based upon the authority of Matter of C-F-L, Int. Dec. #996, in which the Attorney General had interpreted the provision of law (8 U.S.C. 1101(b)(1)(E)) to require that the two year legal custody and residence of the adopted child be had with both the adoptive parents where two exist or with one when the family unit consists of only one adoptive parent in order to bring an adopted child within the statutory definition of "child".

The Court disagreed with the Attorney General's interpretation and expressly overruled Int. Dec. #996. While agreeing with the Attorney General that the purpose of amending 8 U.S.C. 1101(b)(1) to include a child by adoption was to foster continued bona fide family relationships, the Court said that that purpose could be implemented in this case only by granting plaintiff's son a nonquota immigrant status.

There is no doubt, the Court went on, that plaintiff and his wife have, for years, had a bona fide family relationship, and so have his wife and their adopted child. The only way in which these two relationships can be maintained is to allow all three of the individuals involved to maintain a single residence. This result cannot be achieved by merely allowing the wife to rejoin her husband. If only that were done, the bond between mother and child would be broken. If the bond between the mother and child is sought to be maintained, the bond between the wife and husband must be broken.

Since the Court could not ascribe to Congress an intent to condone such an illogical result, entry of judgment was directed declaring the decision denying plaintiff's petition for a nonquota visa for his adopted son to be null and void and that such petition be approved.

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decisions

Gain Recognized When Appreciated Property Transferred to Pension Trust. United States v. General Shoe Corp. (C. A. 6, September 2, 1960). In 1945, taxpayer established an Employees Retirement Plan and created an Employment Retirement Trust to implement the plan. Contributions were to be made only by the employer. It was taxpayer's intention to make contributions to the plan, but it expressly reserved the right to discontinue them at any time.

In 1951 and 1952 it contributed to the trust real estate which had greatly appreciated in value since its acquisition by taxpayer. The basis of the real estate was $168,754.73, and its market value was $1,047,500. It contended, successfully in the district court, that it was entitled to deduct, as a business expense, the full market value, but that the gain of $878,745.27 was not taxable. The Court of Appeals reversed, holding that taxpayer had realized a taxable capital gain, that it had received an economic gain capable of valuation. The Court followed the reasoning of the Second Circuit in International Freighting Corp. v. Commissioner, 135 F. 2d 310, and distinguished its own recent case of Commissioner v. Marshman, 279 F. 2d 27.

Under the decision of the district court a corporation would be able to satisfy an obligation assumed by it with appreciated property, obtain a tax deduction based on the appreciated value, but escape taxation on an undisputed gain which had in fact been realized. The decision of the Court of Appeals closes this loophole.

Taxpayer has petitioned for rehearing, asserting that this decision is inconsistent with the Marshman decision.

Staff: David O. Walter, Meyer Rothwacks (Tax Division)

District Court Decisions

District Court Restrains Assessment and Enforcement of Illinois Retailers' Occupation Tax. United States and Olin Mathieson Chemical Corporation v. Department of Revenue of the State of Illinois, et al. (N.D. Ill., August 31, 1960)

The United States and Olin Mathieson filed suit to enjoin the assessment and enforcement of the Illinois Retailers' Occupation Tax, a gross receipts tax based on the vendor's sales of tangible personal property in Illinois. The amount of the tax is based on gross sales within the state

but excludes any such sales to the State of Illinois, any county or political subdivision or municipality thereof, and to any instrumentality or institution thereof, or to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes. Defendants had made a determination that sales by Olin Mathieson to the Air Force were subject to the tax. Plaintiffs alleged that the statute is unconstitutional because it discriminates against the United States and persons dealing with the Government; that their remedy under the state law was inadequate because the state law did not provide for the payment of interest on any payments made under protest and successfully contested; and that in addition to Olin Mathieson Chemical Corporation there were more than 550 firms in the state who made sales of tangible personal property to the United States totalling at least $600,000,000 per year who might be subject to the tax. Plaintiffs prayed for a temporary restraining order and a permanent injunction against the assessment and enforcement of the tax, and for a declaration that the statute is unconstitutional because it discriminates against the United States and persons dealing with the United States.

At a hearing on the application for a temporary restraining order the Court found that there was a substantial federal question presented, that the Court had jurisdiction, that the United States was a proper party to raise the issues involved in the case, and that irreparable harm might result if the Court did not grant the motion for a temporary restraining order, which was granted. Hearing before a three-judge federal court under 28 U.S.C. 2281 on the application for a permanent injunction and a declaration that the Illinois statute is unconstitutional will be held on October 6, 1960.

Staff: United States Attorney Robert Tieken; Assistant United States Attorney Harvey Silets (N.D. Ill.); Thomas R. Scovel (Tax Division)

Statutory Notice of Deficiency Sent to Taxpayer's Last Known Address; Permanent Injunction Denied Despite Contention That Assessment Was Void Because Statutory Notice Was Sent to Taxpayer's Father's Address. R. P. Bergfeld v. Campbell, 60-2 USTC 9663 (N.D. Texas). Taxpayer in this action sought a permanent injunction restraining the collection of $157,000 in taxes, penalties, and interest assessed for the years 1943 through 1946, claiming that the assessments for these years were void because of non-compliance by the Commissioner with Section 272(k) of the Internal Revenue Code of 1939 providing that the statutory notice of deficiency (90-day letter) must be sent to the taxpayer's past known address.

The evidence showed that during the audit investigation by Revenue from early 1947 through April 28, 1949, the date the notice was sent, taxpayer had no less than six different addresses, five in Dallas and one in Houston. During this period, taxpayer had remarried three times. None of the addresses were furnished to the then Collector of Internal Revenue by taxpayer although he was aware of the investigation. The returns filed

for the years involved bore the address 2518 Main Street which was taxpayer's business address.

Early in the investigation by Revenue, the reports of the Agent bore an address of 6655 Lakewood Boulevard, Dallas, Texas. This was the address of taxpayer's father. On January 2, 1948 a thirty-day letter was sent to taxpayer at the Lakewood Boulevard address. Within 30 days, a protest dated January 29, 1948, signed under oath by taxpayer which showed the Lakewood Boulevard address, was filed by taxpayer. Subsequent correspondence regarding conferences were sent by the Revenue Service to the Lakewood Boulevard address. Finally after negotiations broke down, the statutory notice was sent to the Lakewood Boulevard address. It was received by taxpayer after the 90-day period had expired and a subsequent petition to the Tax Court was dismissed because of lack of jurisdiction.

In denying taxpayer's claim for relief, the Court pointed out that although the returns bore a Main Street address, there was subsequent correspondence between the Revenue Service and the taxpayer directed to the Lakewood Boulevard address and that since taxpayer changed his address on several occasions it may readily be assumed that he intended to treat his father's address (6655 Lakewood Boulevard, Dallas, Texas) as his permanent address. The Court then stated that regardless of intention the issue would turn upon the last known address given to the Revenue Service, apparently referring to the protest filed with the Revenue Service on January 29, 1948 which bore 6655 Lakewood Boulevard as taxpayer's address.

The injunctive relief was denied despite the further contentions of taxpayer that he was without an adequate remedy at law and that the assessment created a great hardship.

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

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