Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

December 2, 1960

United States

DEPARTMENT OF JUSTICE

Vol. 8 No. 25

UNITED STATES ATTORNEYS

BULLETIN

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JOB WELL DONE

The Division of Securities Chief, Department of Commerce, has complimented Assistant United States Attorney Oscar Altshuler, District of Columbia, on the very superior manner in which he conducted an extradition hearing for which the State of Ohio obtained extradition of a resident to face charges arising from the sale of New Mexico oil and gas leases. The letter stated that Mr. Altshuler's diligence, splendid cooperation, and assistance in this matter were greatly appreciated.

Assistant United States Attorney Gerald Walpin, Southern District of New York, has been complimented by the presiding judge for the thoroughness of his preparation as well as the fairness of his presentation in a recent case.

Acting Assistant Regional Commissioner, Intelligence Division, IRS, has commended Assistant United States Attorney Gideon Cashman, Southern District of New York, for an address recently given at a Refresher Training Course for incumbent special agents of the division. The letter stated that Mr. Cashman's presentation was most informative and constructive, and that some of the highlights covered of his recent successful trial of a tax evasion case capably explained how some of the principles of law involved have application to the current and future investigations of the division.

United States Attorney Jean L. Auxier and Assistant United States Attorney N. Mitchell Meade, Eastern District of Kentucky, have been commended by the Regional Counsel, Alcohol and Tobacco Tax Unit, for the splendid service they rendered in the defense of two Unit investigators in a recent trial. The letter stated that it was in no small part due to the able presentation of the officers' case by Messrs. Auxier and Meade, that it was made clear that the officers were properly and lawfully performing their duties at the time the plaintiff was arrested by the officers, and that the suit for damages against the officers was ill-founded. The letter further stated that an adverse decision in this case undoubtedly would have had serious repercussions among Service enforcement officers, not only in this district, but throughout the country.

The General Counsel, SEC, has commended United States Attorney Harry W. Hultgren, District of Connecticut, for his "truly outstanding" work in a recent case, and has expressed the Commission's deep indebtedness to Mr. Hultgren for the great boost which his energetic efforts have given to the enforcement program. The case, involving some 40 defendants, presented many complexities, including evidentiary matters in Canada, but in a relatively short time Mr. Hultgren had presented the matter to the grand jury and obtained a prompt indictment. The case was the first

"boiler room" prosecution in a number of years, and it was of particular importance to the Commission because a number of the defendants involved were part of a ring of securities promoters and salesmen which the Commission had been investigating in three or four districts. After considerable work on Mr. Hultgren's part, 26 pleas of guilty or nolo contendere were obtained.

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OFFICE OF ALIEN PROPERTY

Dallas S. Townsend, Director

Trading With the Enemy Act; Section 17 Action; Seizure of Debts Evidenced by Bearer Instruments Not in Possession of Attorney General; Inconsistent Provisions of State Law Must Yield to Trading With the Enemy Act; State Officers Under Duty to Comply With Terms of Vesting Order. Rogers v. Smith (S.D. Ill., June 14, 1960, 185 Fed. Supp. 401). This was a suit under Section 17 of the Trading With the Enemy Act against Elbert S. Smith, State Auditor of Public Accounts, and Joseph D. Lohman, State Treasurer, to compel compliance with a vesting order of the Attorney General which vested debts and obligations evidenced by bearer bonds of Illinois and coupons attached to or detached therefrom. Defendants paid to the Attorney General the debts evidenced by the bonds but refused payment of the debts evidenced by the coupons which were not annexed to the bonds. Defendants contended that the coupons were bearer instruments the title to which was in the person who possessed them; that the payment of the debts was conditioned upon presentation of the coupons evidencing such debts, and that if payment was made to plaintiff and the coupons were thereafter presented for payment by persons other than plaintiff, the defendants might be held liable therefor. Plaintiff contended that the debts evidenced by the coupons which neither plaintiff nor his predecessor ever found or possessed, were property of the United States, and that if defendants made payment to plaintiff pursuant to the vesting order they would be amply protected against double liability by the exculpatory provisions of Sections 5(b)(2) and 7(e) of the Act. The Court held defendant's position to be analogous to petitioner's in Cities Service Company v. McGrath, 342 U.S. 330, 72 S. Ct. 334, and that the Attorney General was authorized to vest and enforce for the benefit of the United States the ownership of the debts and obligations evidenced by the detached coupons. Plaintiff was not obligated to surrender the detached coupons as a condition precedent to their payment. Upon payment of the obligations, defendants would be acquitted and discharged for all purposes of the obligations as provided in the exculpatory provisions of the Act.

Staff: United States Attorney Harlington Wood, Jr. (S.D. Ill.) and Joseph Donald Moore (Office of Alien Property)

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ANTITRUST DIVISION

Assistant Attorney General Robert A. Bicks

SHERMAN ACT - CLAYTON ACT

Restraint of Trade - Automotive Exhaust Systems and Parts. United States v. A P Parts Corporation, et al., (N.D. Ohio). A civil antitrust case was filed on November 10, 1960, against A P Parts Corporation and Goerlich's Inc., both of Toledo, charging violation of Section 1 of the Sherman Act and of Section 3 of the Clayton Act through exclusive dealing arrangements in the sale and distribution of replacement mufflers, tail pipes, and exhaust pipes for auto exhaust systems.

Defendants are part of the Goerlich group. The other companies in the Goerlich group are Oldberg Manufacturing Company, Belord Industries, Inc., McKenzie Muffler Corp., and Gibbons Tubewell. The Goerlich group is the largest supplier, accounting for 42 percent of the $160,000,000 total dollar volume, of domestic sales of automotive exhaust systems and parts for the replacement trade.

The complaint charges that beginning sometime prior to 1957 and continuing to date defendants entered into contracts, agreements and understandings with more than 7,300 jobbers and distributors to purchase automotive exhaust systems and parts for resale exclusively from defendants and to refrain from purchasing and reselling the automotive exhaust systems and parts of competitors of defendant. It was also charged that in order to effectuate these agreements, defendants have regularly inspected and examined the inventories of distributors and jobbers to ascertain whether they have purchased automotive exhaust systems and parts from a competitor.

The exclusive dealing practices attacked by the complaint were alleged to have resulted in the following effects:

(a) Manufacturers and distributors of automotive exhaust systems and parts for the replacement market have been denied access to and have been excluded from a substantial part of the market for said products, and competition between the defendants and said competitive suppliers for said substantial part of the market has been eliminated;

(b) A substantial number of distributors, jobbers, and retailers have been denied the opportunity to purchase automotive exhaust systems and parts from manufacturers, distributors, and jobbers of their own selection in accordance with consumer demand and at prices established by free and open competition;

(c) The trade and commerce passing through more than 7300 distributors and jobbers of the defendants has been preempted and unreasonably

restrained by the defendants, thereby depriving the consuming public of the advantages of free competition for and between said distributors, jobbers, and their retailers, where the automotive exhaust systems and parts of other manufacturers and distributors would normally be available;

(d) Distributors and jobbers have been coerced by defendants into dealing exclusively in defendants' automotive exhaust systems and parts.

The Government asked the Court to declare the agreements, contracts and understandings illegal and to order defendants to cancel them, and to enjoin defendants from such actions in the future.

Staff: Robert B. Hummel, Robert M. Dixon, John D. Shaw, Jr., and Dwight B. Moore (Antitrust Division)

Opinion on Interrogatories in Clayton Act Case. United States v. Aluminum Company of America and Rome Cable Corporation, (N.D. N.Y.). On October 25, 1960, in this Clayton Act, Section 7 case, Chief Judge Stephen W. Brennan heard arguments on the Government's objections to certain of defendants' interrogatories.

Some of the objections were sustained and others overruled. Among those sustained were objections to interrogatories:

(1) Asking whether the effect of recent acquisitions in the wire and cable industry by companies other than defendants may be substantially to lessen competition or to tend to create a monopoly;

(2) Calling for the name of each company over which Alcoa has a competitive advantage;

(3) Seeking identification of each line of commerce and each section of the country "in which it is alleged that Alcoa has a competitive advantage";

(4) Asking how the enhancement of Alcoa's competitive advantage and increase in concentration may result in detriment to actual and potential competition, substantial lessening of competition, or tendency to create a monopoly;

(5) Calling for a description of "other aspects which may be involved in the acquisition of Rome-New York" on which the Government intends to rely.

Interrogatories which the Government is required to answer include the following:

(1) Identification of each line of commerce and section of the country in which the effect of Alcoa's acquisition of Rome may be substantially to lessen competition or to tend to create a monopoly.

(2) Specification of the products included in each line of commerce.

(3) The meaning of the term "potential competition".

(4) A description of Alcoa's competitive advantage over other manufacturers, as an integrated aluminum producer, as a supplier of raw materials, and as a competitor.

(5) Identification of the lines of commerce and sections of the country affected by other acquisitions.

On November 8, 1960, Judge Brennan, adopting the "rationale in U. S. v. Swift & Co., 24 FRD 280 and U. S. v. Continental Can Company, 22 FRD 241," handed down a Memorandum Decision denying the Government's request that sales information obtained from third parties be protected against disclosure to defendants. Ruling that "defendants and their experts should not be deprived of the full opportunity to test the foundation of such data", the Court stated that, "any prejudice or harm to be occasioned by the companies answering the questionnaire seems more theoretical than practical . . . Approximate business statistics are available through investigating agencies and this court is of the opinion that under present business conditions production and sales figures are not a well kept secret from business competitors."

Staff: Samuel Karp, Edna Lingreen and Michael Gottesman (Antitrust Division)

Consent Judgment Entered by Two Defendants in Oil Cartel Case. United States v. Standard Oil Company (New Jersey), et al., (S.D. N.Y.). On November 14, 1960, consent judgments were entered by Judge John M. Cashin in the above case against defendants Standard Oil Company (New Jersey) and Gulf Oil Corporation. The case remains pending as to the three remaining defendants, Socony Mobil Oil Company, Texaco, Inc., and Standard Oil Company of California.

This litigation which has been in progress since 1953 involves the foreign operations of the international oil companies (the five defendants, British Petroleum Co., Ltd., and the Royal Dutch Shell partnership) over a period of some 25 years. The complaint filed in 1953 charged defendants with a continuing conspiracy to control production and supplies and to fix world prices of petroleum and its products, to exclude other United States oil companies from operations abroad, and to divide foreign marketing territories.

The judgment against defendant Standard Oil Company (New Jersey) provides for the separation of most of the assets of the giant integrated joint company, Standard-Vacuum Oil Company, between the two partners, Standard Oil Company (New Jersey) and Socony Mobil Oil Company, Standard-Vacuum, which has assets of $855 million, is primarily a marketing company in the Far East. In 1959 it had sales of over a billion dollars. It also has crude oil production of 84,000 barrels per day and a total

refinery output of 234,000 barrels per day, and operates a half dozen refineries in the Far East. The judgment requires that the division of assets be upon such a basis as will enable the two partners to compete with each other and, in addition, defendant Jersey is required to use reasonable efforts to compete with Socony in the area formerly served by Standard-Vacuum Company. Gulf Oil Corporation, which has no comparable joint marketing setup, is required to set aside for the benefit of independent oil companies over a period of 10 years, an amount of crude oil from its huge production in Kuwait of 100,000 barrels per day.

The final judgments are to continue in force for a period of 25 years. Defendants are enjoined from entering into any combination or agreement to fix prices, divide markets, or allocate production with any competitors engaged in the production, refining, distribution or sale of crude oil or petroleum products. The judgments also forbid defendants from entering into such agreements to limit importation of crude oil or petroleum products into, or their exportation from the United States, restrict the sale or distribution of petroleum products in foreign nations, or exclude third persons from competing in the production, refining, distribution or sale of crude oil. The injunctions apply to any combination affecting the trade or commerce of the United States with foreign nations and such effect is presumed if cartel activities are carried on by defendants in three or more nations at or about the same time. Exceptions are provided with respect to requirements of foreign law, or an official request of a foreign government, failure to comply with which would subject the defendants to the risk of losing that part of the business subject to the request.

The judgments prohibit defendants, subject to certain exceptions such as a requirement of foreign law, from participating in joint marketing companies with any of the other defendants which are subject to a similar judgment, and from acquiring an interest in joint marketing companies controlled by British Petroleum or Royal Dutch-Shell, or controlled by such companies in conjunction with defendants.

The judgments also enjoin defendants from adhering to the so-called "As Is" or "Achnacarry" agreements by which, the complaint alleges, defendants allocated supply and markets all over the world. Specific provisions of various contracts are also enjoined, including a provision in a long term crude oil sales contract between British Petroleum and Standard of New Jersey whereby Jersey was required to sell at the same prices as British Petroleum if it resold in territories east of Suez. Gulf likewise is prohibited from adhering to a provision in a crude oil sales contract between it and Royal Dutch Shell by which Gulf was penalized if it increased its own marketing in certain listed territories at the expense of Shell.

The judgments do not cover joint production, refining and pipeline operations which are located solely within a foreign country. But

such companies, controlled by defendants subject to judgments such as those against Jersey and Gulf, may not engage in marketing, with certain exceptions such as the requirement of foreign law. Each participant in such an arrangement must market independently.

Staff: Wilbur L. Fugate, Charles L. Whittinghill, Max Freeman, Barbara Svedberg and David I. Haberman (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEALS

ADMIRALTY

Appeal and Error; Exclusion of Evidence Bearing Upon Damages Not Reversible Error Where Non-liability Is Clearly Established. Ambrose v. Norfolk Dredging Co., Inc. and United States, (C.A. 4, Oct. 14, 1960). Appellant Ambrose, a crew member of the Norfolk Dredging Company dredge TALCOTT, sued his employer under the Jones Act, 46 U.S.C. 688, and the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), for damages for injuries arising from his attempt to assist a Government employee in raising an anchor used in connection with the Company's dredging operations for the Army Corps of Engineers. In the case against the employer, a jury trial resulted in a verdict against Ambrose and in favor of Norfolk Dredging Company. The case against the Government was heard by the district court which entered a final decree against Ambrose and in favor of the United States, finding that the evidence failed to establish any liability for either negligence or unseaworthiness.

On appeal, Ambrose alleged numerous errors, among them the trial court's refusal to permit him to testify with respect to reasons for his refusal to submit to a myelogram. The Court of Appeals affirmed the judgments below, pointing out that the jury, by its verdict in favor of the employer, and the court in the action against the United States, had reached identical, independent findings that there was insufficient evidence of liability. Thus, the court's exclusion of Ambrose's desired testimony could not have affected the determination of liability since the excluded testimony went only to the amount of damages and not to liability.

Staff: Alan Raywid (Civil Division)

ADMINISTRATIVE LAW

District Court Has Authority to Issue Subpoena Signed by Agency Examiner Without Finding of Specific Relevancy. Lee v. Federal Maritime Board (C.A. 9, Nov. 9, 1960). Appellant sought review of a district court order directing him to comply with a subpoena duces tecum calling for production of financial data of his cargo-carrying firm. The subpoena had been signed by an examiner of the Federal Maritime Board in connection with an investigation being conducted by the Board into general increases in Alaskan rates and charges.

Appellant argued that he should not be forced to comply with the subpoena because: (1) the district court lacked jurisdiction to enforce

it; (2) the examiner had no authority to sign it, hence it was invalid; and (3) issuance of the subpoena would constitute an unreasonable search and seizure since it called for allegedly irrelevant and confidential data.

The Ninth Circuit affirmed the enforcement order of the district court, and held that: (1) the district court had jurisdiction to enforce the subpoena under Section 27 of the Shipping Act of 1916 as amended. The appellate court rejected Lee's argument that the issuance of a subpoena was a "final" order of the agency, hence, within the exclusive jurisdiction of the court of appeals; (2) the examiner had authority to sign the subpoena under Section 7(b) of the Administrative Procedure Act, 5 U.S.C. 1006(b). The Court reasoned that the power of an examiner to "issue" a subpoena under 7(b) necessarily included the power to sign; and (3) the issuance of the subpoena would not be an unreasonable search and seizure. While neither the Board nor the district court had made a finding as to the relevancy of the requested material to the purpose of the investigation, this did not preclude issuance of the subpoena. The Court recognized the well-established rule that where the material requested by the agency may later be found to be relevant, the subpoena will be enforced.

Staff: Edward Schmeltzer (Federal Maritime Board); Morton Hollander (Civil Division)

ADMISSIBILITY OF EVIDENCE

Prior Inconsistent Statement May Not Be Used as Substantive Evidence. United States v. Rainwater et al. (C.A. 8, Nov. 4, 1960). In a suit under the False Claims Act for allegedly false Commodity Credit claims, the manager of defendant's warehouse was called as a Government witness for the purpose of establishing that defendants had pledged cotton which they did not own, as security for Commodity loans. On direct examination the witness' testimony was contrary to a written statement which he had given to a Government inspector prior to trial. The Government claimed surprise. The court allowed the use of the document, first to refresh the witness, then to impeach him.

Thereafter the Government investigator was called as a witness and the Government sought to introduce through him the prior inconsistent written statement of the manager as substantive evidence of defendants' liability. Defendants objected to its admissability as substantive evidence and their objections were sustained. The trial court then entered a directed verdict for defendants.

On appeal, the Government argued that well-recognized experts in the law of evidence -- Professors Wigmore and McCormick among others -- had long concluded that there was no sound reason for excluding prior inconsistent statements where the declarant was present in the courtroom and subject to cross-examination. The Eighth Circuit recognized that this

argument had "substantial and respectable support among certain text authorities and legal scholars", but affirmed the result below. The Court pointed out that notwithstanding the validity of the Government's argument, the well-established rule was to the contrary, and the Court refused to depart from it.

Staff: Kathryn H. Baldwin (Civil Division)

ANTIDUMPING ACT

District Court Has No Jurisdiction Over Action by American Manufacturers Challenging Determination of Secretary of Treasury Under Antidumping Act; Exclusive Jurisdiction in Customs Court. North American Cement Corp., et al. v. Anderson, et al. (C.A. D.C., October 20, 1960). In this action domestic cement manufacturers sought to challenge the determination of the Secretary of the Treasury that imported Norwegian cement was not being or likely to be sold in the United States at less than fair value within the meaning of Section 201 of the Antidumping Act of 1921, as amended, 19 U.S.C. 160. The district court dismissed the action for lack of jurisdiction over the subject matter on the ground that the plaintiffs had an adequate remedy in the Customs Court (See Vol. 8, No. 13). The Court of Appeals affirmed. It relied on: (1) 28 U.S.C. 1340, which excepts from the jurisdiction of the district courts "matters within the jurisdiction of the Customs Court"; (2) 28 U.S.C. 1583, which gives the Customs Court exclusive jurisdiction to review on protest all orders and findings as to the "rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury"; (3) Section 516(b) of the Tariff Act of 1930, as amended, 19 U.S.C. 1516(b), which gives an American manufacturer a right of protest in the Customs Court if he believes the proper rate of duty is not being assessed upon a particular class of imported merchandise; and (4) several prior decisions (e.g. Morgantown Glassware Guild v. Humphrey, 236 F. 2d 670 (C.A. D.C.), and Horton v. Humphrey, 146 F. Supp. 819 (D.D.C.), affirmed, 352 U.S. 921).

Staff: Alan S. Rosenthal (Civil Division)

CIVIL SERVICE RETIREMENT ACT

1956 Amendment to Act Setting Forth New Standards for Termination of Disability Annuities Held Applicable to Persons Retiring Before Its Effective Date, as Well as Prospectively; Retroactive Effect of Provision Constitutional as Act Does Not Grant Vested Rights. Stouper v. Jones, etc., et al. (C.A. D.C., November 10, 1960). In 1953, plaintiff, a Federal employee, was retired on grounds of disability and was awarded an annuity pursuant to Section 6 of the Civil Service Retirement Act of 1930, as amended, 5 U.S.C. 710-711 (1952 ed.). In 1956 the Retirement Act was generally amended, and Section 6 was replaced by a new provision, Section 7. The latter section directed the annual medical examination of "(e)ach annuitant retired under this section or under Section 6 of the

Act of May 29, 1930, as amended . . ." 5 U.S.C. 2257(c)(1958 ed.). It then set forth new conditions under which the disability annuity of "such annuitant" was to be terminated. Id. at 2257(d).

In 1959 the Civil Service Commission discontinued plaintiff's disability annuity, relying on the criteria enunciated in the 1956 amendment to the Act. Plaintiff brought suit against the members of the Commission, alleging that the annuity had been improperly discontinued. She argued: (1) that the relevant provision of the 1956 amendment did not purport to apply to persons like plaintiff who had retired before the effective date of the amendment; and (2) that, if the provision did apply to her, it was constitutionally invalid because its effect was to deprive plaintiff of vested rights which she had acquired under the original statute at the time of her retirement.

The district court entered summary judgment for defendants. The Court of Appeals affirmed. The Court held that the new criteria set forth in Section 7 clearly applied to plaintiff as "the words 'such annuitant' refer to those who retired either under Section 6 of the 1930 Act or under the 1956 amendment, and therefore include the present appellant." The Court concluded also that, in spite of her contributions to the retirement fund, plaintiff had not acquired a vested right to a disability annuity. Relying heavily on Flemming v. Nestor, 363 U.S. 603, the Court reasoned that "an employee has no right under the Retirement Act based on contractual annuity principles ..."

Staff: Mark R. Joelson (Civil Division)

NATIONAL SERVICE LIFE INSURANCE

Evidence of Intent to Change Beneficiary Coupled with Affirmative Action Sufficient to Sustain Jury Verdict. Wall v. Haas et al. (C.A. 5, Nov. 7, 1960). Mrs. Haas, the widow of a deceased serviceman sued to collect the proceeds of a N.S.I. policy. Mrs. Wall, the decedent's mother who was named beneficiary in the policy, interposed an objection.

At trial before a jury, the widow introduced evidence that one year before his death, decedent had handed the policy to his wife in the presence of his mother, and had told his wife to "hang onto it" and take it to the nearest military establishment if anything should happen to him. The mother argued, however, that the serviceman had never filed the proper change of beneficiary form, hence plaintiff could not be the legal beneficiary.

The case was submitted to the jury on the law set forth in Mitchell v. United States, 165 F. 2d 758 (C.A. 5), which held that an expression of intent on the part of the deceased, coupled with affirmative action, is sufficient to effectuate a change of beneficiaries, although the legal technicalities are not followed. The jury returned a verdict for the widow.

On appeal, the Fifth Circuit affirmed. It held that the case was submitted on the proper rule and that there was sufficient evidence to sustain the verdict.

Staff: United States Attorney Frank O. Evans; Assistant U. S. Attorney Truett Smith (M.D. Ga.)

PATENT SECRECY ACT

Sales of Inventor to Government Contractors Engaged in Classified Defense Production Constitute Both "Public Use" and "Sale" of Device Within 35 U.S.C. 102(b). Piet et al. v. United States, (C.A. 9, Nov. 7, 1960). In March, 1954, plaintiff filed an application for a patent on a device used to regulate the control of fuel in jet propulsion systems. The application was classified by the Armed Services Patent Advisory Board, and held in abeyance until April, 1959. The inventor brought suit under the Patent Secrecy Act 35 U.S.C. 182 et. seq. for damages sustained as a result of being unable to protect his alleged invention during the period in which his application had been held in abeyance by the secrecy order. The Government defended on the ground that Piet had not been entitled to a patent under the general requirements of 35 U.S.C. 102 at the time of his application in 1954. The Government's specific defense under the statute was that Piet's admitted sales of his inventions to Government subcontractors more than one year prior to application constituted both a "public use" and "sale" of his device within 102(b), thus barring his right to a valid patent. Piet responded with the argument that the only buyers of his invention were Government contractors engaged in classified production of missiles, hence the invention was never in "public use" or "on sale" because the public never knew of the device or had access to it.

The district court held that unrestricted sales for profit constituted both a "public use" and "sale" of the invention under 102(b), thus barring Piet's right to a patent at the time of application. The fact that the buyers were engaged in classified work did not alter the fact that the inventor had clearly indicated that the device was ready for patenting by exploiting it for profit more than one year prior to application.

On appeal, Piet stressed the fact that the invention had been used only in the research and development of experimental missiles, hence it was never ready for patenting until the date of application. The Government argued, however, that commercial exploitation plus Piet's failure to prevent his buyers from showing the valve to other contractors engaged in similar production, indicated that it was functionally operative at the time of sale.

The Ninth Circuit affirmed the judgment of the district court. In a per curiam opinion, the Court of Appeals pointed out that plaintiff chose neither to file an earlier application nor to restrict the use of the valve by his buyers and thus he forfeited his right to a patent at the time of application. The Court emphasized that the Patent Secrecy Act affords

protection only to those inventors who make a timely filing and are otherwise entitled to a patent.

Staff: Ronald A. Jacks (Civil Division)

PRIVILEGED COMMUNICATIONS

Statements of Special Federal Prosecutor Held Absolutely Privileged. Sauber v. Gliedman, (C.A. 7, Nov. 10, 1960). Plaintiff, a former District Director of Internal Revenue, brought an action for malicious defamation against a Special Assistant to the Attorney General. Defendant had been appointed for the purpose of prosecuting plaintiff and others for conspiracy to defraud the Government, and for the purpose of investigating any additional irregularities in the local office of the I.R.S. Plaintiff's action was based on allegedly defamatory remarks which defendant made at a press conference shortly after he took office.

Defendant moved for a summary judgment on the ground of absolute privilege, supporting the motion with an affidavit from his superior stating he was "authorized and expected to make such public statements as are called for in connection with his assignments." Defendant's motion was originally denied. However, it was renewed after the Supreme Court's decision in Barr v. Matteo, 360 U.S. 564 and subsequently granted.

On appeal, the Seventh Circuit affirmed. The Court reasoned that defendant's statements were absolutely privileged under the rules laid down in the Barr case. As a Special Assistant to the Attorney General, defendant's powers were equivalent to a United States Attorney. With respect to his special assignment, defendant held the "responsibilities, duties and discretion of the Attorney General of the United States limited in scope only to the proceedings assigned to him." Statements to the press were found to be included within this authority and the one in question was clearly related to defendant's assignment. Therefore, the Court held that the civil action for defamation against defendant must be dismissed. The Court did note, however, that while such an official may be immune from tort liability, he would still be subject to official discipline and professional censure if his conduct warranted it.

Staff: Assistant Attorney General Robert Kramer; Herman Marcuse (Office of Legal Counsel); Morton Hollander (Civil Division)

SOCIAL SECURITY ACT

Referee's Denial of Social Security Disability Benefits Deemed Unsupported by Substantial Evidence. Hunter Lee Booker v. Arthur S. Flemming (C.A. 5, October 25, 1960). Claimant sought to establish that he was entitled to disability benefits, under 42 U.S.C. 416(i) and 423, because of his extremely high blood pressure and urinary tract ailments which forced him to give up his life's work as a bus driver. The medical

evidence, except for one report which indicated he might do light work, tended to show he was unable to engage in any substantial gainful activity within the meaning of the Act. However, subsequent to retirement from the bus company, Booker had been spending substantial hours each day at a friend's used car lot where he helped out in certain limited respects, earning $15 to $20 weekly. Booker claimed he was just "killing time" at the lot, but the referee found it evidence of his ability to engage in some substantial gainful activity and denied benefits.

The district court reversed and was upheld by the Fifth Circuit. Both courts laid emphasis on the medical reports and tended to agree with Booker that his employment at the used car lot did not constitute, in and of itself, substantial gainful activity. Both courts, however, overlooked the real basis of the administrative decision. That the work of the used car lot indicated, at the least, the ability to undertake other employment that would constitute substantial, gainful activity. Moreover, Booker's hypertension only precluded him from such tension-filled jobs as bus driving.

Staff: Herbert E. Morris (Civil Division)

"Salary" for Management of Non-Viable Corporation Consisting of Claimant's Assets, Constitutes "Wages" Under Social Security Act. Stark v. Flemming (C.A. 9, October 20, 1960). Claimant filed a claim for old age insurance benefits under the Social Security Act, contending she was fully insured by reason of employment with Stark Properties Company, Inc., for the minimum allowable period of 6 quarters.

Stark Properties was a corporation established by Mrs. Stark after her husband died. Its assets consisted of her farm, a duplex building she owned and some of her cash. It was not economically viable but was created solely for the purpose of affording her Social Security benefits. The record showed that her services were relatively minor and that her salary was the major drain on the corporate assets.

The referee and the district court both ruled that the purported employment of Mrs. Stark was not bona fide, thus she had not received "wages" under the Act. They both found that she was converting income rentals from real estate (expressly excluded from computation of the benefits here claimed) into apparent employment income.

The Ninth Circuit reversed, ruling that there had been proper compliance with normal corporate procedures and that the Secretary must therefore respect the corporate arrangement. The Court ruled further, however, that the Secretary was justified in taking exception to the amount paid Mrs. Stark for her services and remanded the case for a determination of what would have been a reasonable salary.

Staff: United States Attorney Lawrence C. Dayton, Assistant United States Attorney John Xeres Kaplan (N.D. Calif.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Harold R. Tyler, Jr.

Habeas Corpus; Federal Custody; Power of Attorney General to Designate Place of Confinement. Taylor v. Baker (C.A. 10). Petitioner, serving a state sentence in Arkansas, was sentenced by a federal court to three concurrent 5-year terms, to "begin at the expiration of the sentence . . . defendant is now serving in the Arkansas penitentiary . . ." After completion of the Arkansas State sentence, he was turned over first to Indiana authorities and then to Wisconsin authorities to serve sentence in those respective states. Upon termination of the Wisconsin sentence he was delivered to federal authorities.

On the theory that service of the federal sentence began at the time of release from the Arkansas penitentiary, thus making petitioner eligible for conditional release before filing his habeas corpus action, the district court granted habeas corpus. The Government appealed.

In reversing this order, the Court of Appeals based its decision on the language of 18 U.S.C. 3568, which provides that a federal sentence begins to run upon delivery of the convicted party at the institution where sentence is to be served or at a temporary place of detention, and stipulates that no sentence shall prescribe any other method of computation. On the basis of this statute and its interpretation in a number of cases cited in the Government's brief, the Court concluded that the "sentence imposed upon petitioner by the United States Court in Arkansas began to run at the time he was actually delivered into federal custody for service of such sentence rather than at the completion of service of the sentence in the penitentiary of Arkansas."

The decision has significance with respect to the power of the Attorney General to designate the place of confinement. Unless the Attorney General designates a state institution, service of the federal sentence cannot commence until such time as the prisoner is delivered to a federal prison.

Staff: Harold H. Greene, David Rubin and Gerald P. Choppin (Civil Rights Division)

Supremacy Clause; School Desegregation. United States v. Louisiana; Bush v. Orleans Parish; Williams v. Davis (E.D. La.). After almost eight years of litigation (Bush v. Orleans Parish, 242 F. 2d 156, cert. denied, 354 U.S. 921; 268 F. 2d 78; 5 R.R.L.R. 378), the District Court this year ordered the public schools of New Orleans to desegregate by November 14, 1960, beginning with the first grade level. On November 4, the legislature of the state, meeting in extraordinary session, enacted 29 statutes designed to frustrate the Court's order. The key measure in this, the fifth such package of resistance laws enacted by Louisiana, is an "interposition" statute, which purports to interpose the sovereignty of the

State of Louisiana between the federal courts and the citizens and agencies of the state, and to make it a misdemeanor for any federal judge, marshal, or other agent or agency of the United States to enforce the Supreme Court and lower court desegregation decisions or to serve process in connection with their enforcement. Other laws provide for control of the New Orleans schools by the legislature, discontinuance of the local school board, closing of schools which desegregate, withholding of funds and imposition of economic and academic sanctions upon such schools, their teachers and pupils, and freezing of the New Orleans schools in a segregated status.

On November 10, pleadings were filed by the private plaintiffs in the desegregation case to add the members of the legislature as defendants to their action. Before the U. S. Marshals went out to serve these pleadings, the United States filed suit to enjoin the interposition statute so as to protect the Marshals from arrest. A temporary restraining order was obtained, and, armed with this restraining order, the Marshals successfully served the papers. At the request of the Negro parents (in the Bush case), a group of white parents (in the Williams case), and the school board (who are defendants in these two cases), the Court also temporarily restrained the enforcement of the other laws enacted by the legislature. The United States entered these cases as amicus curiae, filed briefs, and argued before the three-judge court which, on November 18, heard motions for preliminary injunctions. The decision of the three-judge court is pending.

Meanwhile, on November 14, four Negro girls entered first grade classes in two formerly white schools, escorted by United States Marshals. State efforts to close the schools were unsuccessful, as the school board complied with federal orders. The week was marked by mob demonstrations, boycott of the schools by white pupils, and continuing assertion of authority by the legislature by means of innumerable resolutions, whose enforcement was promptly enjoined by Judge Wright. Two state court injunctions forbidding the school board to carry on its functions have been removed to federal court and the state orders vacated. A crucial problem appears to be the availability of funds for school operation, since both the legislature and the school board claim control.

Staff: United States Attorney M. Hepburn Many; St. John Barrett, Harold H. Greene, Gerald P. Choppin, Isabel Blair, David Rubin and Howard A. Glickstein (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

DENATURALIZATION

Concealment of Arrests; Materiality. Chaunt v. United States (No. 22, U. S. Supreme Court, November 14, 1960, Douglas, J.). Petitioner was naturalized in 1940 without opposition. In 1953, an affidavit showing good cause for denaturalization was filed by an attorney of the Immigration and Naturalization Service, charging that the naturalization had been obtained by concealment of material facts and wilful misrepresentation in that the petitioner had failed to disclose to the naturalization examiner his membership and activity in the Communist Party since 1929. On the basis of this affidavit, a denaturalization suit was started under Section 340(a) of the Immigration and Nationality Act. The complaint charged the concealment of Communist Party membership alleged in the affidavit and also that petitioner had concealed three arrests from the naturalization examiner. At the trial, the naturalization examiner testified that he had asked petitioner what organizations he belonged to and petitioner had stated he belonged only to a fraternal benefit society, the International Workers Order; also, that petitioner had denied having been arrested or charged with violation of any federal or state law or any city ordinance or traffic violation. The Government introduced evidence showing that petitioner had been an active member of the Communist Party since 1929 and employed by it as a district organizer in New Haven and elsewhere. Also introduced was the record of three arrests in New Haven, in 1929 and 1930, for (1) distributing handbills in violation of a city ordinanace; (2) making an oration, harangue or other public demonstration in violation of a park regulation; and (3) committing a general breach of the peace. There was also testimony that the Communist Party dominated the International Workers Order.

The district court gave judgment for the Government, finding as fact that petitioner had concealed and misrepresented with respect to both his arrest record and Communist Party membership. On appeal, the court of appeals concluded that the district court's findings with respect to the concealed arrests had adequate evidentiary support and were sufficient in themselves to sustain the denaturalization judgment. It rejected petitioner's contention that the arrests were not material, stating that the test of materiality is not whether naturalization would have been refused if the petitioner had revealed the truth, but whether by his false answers the Government was denied the opportunity of investigating the facts relating to his eligibility. Having found the judgment sustained by the concealed arrests, the court found it unnecessary to rule on petitioner's attacks on the judgment insofar as it was based on the concealment of Communist Party membership. (See United States Attorneys Bulletin, Vol. 7, No. 22, p. 619, October 23, 1959.) In the Supreme Court, petitioner made two contentions: (1) the denaturalization judgment could not be based on the concealed arrests, since this ground was not stated in the "good cause" affidavit; and (2) in any event, the arrests were not "material" within the meaning of the statute.

In its opinion, the Supreme Court made no mention of the first contention. It agreed with petitioner, however, that a case for denaturalization was not made out by the concealed arrests. Although it stated that a naturalization petitioner owes it to the naturalization court to give frank, honest and unequivocal answers, in view of the grave consequences of denaturalization the Court felt that the arrests concealed were not reflections on the character of petitioner. They occurred some years prior to the critical five-year period preceding naturalization and did not involve moral turpitude. "Had they involved moral turpitude or acts directed at the Government, had they involved conduct which even peripherally touched types of activity which might disqualify one from citizenship, a different case would be presented." On this record the Court felt that the nature of the arrests, the crimes charged, and the disposition of the cases did not bring them, inherently, even close to the requirement of "clear, unequivocal and convincing" evidence that the naturalization was improperly procured.

The Government had contended that had the arrests been disclosed, they would also have opened the door to further investigation in New Haven, which could have disclosed that petitioner was then the Communist Party's district organizer there. The Court pointed out, however, that petitioner had revealed a much less tenuous and speculative nexus with the Communist Party when he acknowledged his membership in and employment by the International Workers Order. "Had that disclosure not been made in the application, failure to report the arrests would have had greater significance. It could then be forcefully argued that failure to disclose the arrests was part and parcel of a project to conceal a Communist Party affiliation. But on this record, the failure to report the three arrests occurring from 10 to 11 years previously are neutral."

While the Court did not specify any all-inclusive criterion for determining the materiality of a false statement, its opinion ended on this significant note: "We only conclude that, in the circumstances of this case, the Government has failed to show by 'clear, unequivocal, and convincing evidence' either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."

Since there were issues in the case which the court of appeals had not reached, the judgment was reversed and the case was remanded to that Court so that those issues could be considered.

Justices Clark, Whittaker and Stewart dissented.

Staff: Maurice A. Roberts and Philip R. Monahan (Criminal Division).

ALIEN SMUGGLING

Aliens Smuggled from Cuba to United States. United States v. Virginia Lawrence Bland and Raymond Lee Wilson (S.D. Fla.). Defendants, aircraft pilots, were convicted after a three-day jury trial on an

indictment charging that they flew into the United States two aliens not duly admitted by an immigration officer and not lawfully entitled to enter this country, in violation of 8 U.S.C. 1324. Both defendants were sentenced to 18 months' imprisonment. The evidence reflected that in accordance with a prearranged plan defendants, for a substantial fee, had flown in a rented plane to Cuba, where they picked up the aliens and brought them to this country. Defendants have appealed.

The sentences imposed in this case are among the most severe, if not the most severe, imposed in recent years in an alien smuggling case, and the judgment of conviction is considered a substantial victory for the Government in view of the recent outbreak of alien smuggling in the Southern District of Florida.

Staff: Assistant United States Attorney Paul E. Gifford (S.D. Fla.).

MAIL FRAUD

Use of Mails in Scheme to Obtain Control of Bank Accounts. United States v. Marvin E. Clark (D. Md.). On October 28, 1960, Marvin E. Clark was sentenced to two years after having been convicted on three counts of an indictment charging mail fraud (18 U.S.C. 1341). Clark had engaged in a particularly flagrant fraud involving the savings of an aged widow, Mrs. Bertha Toepfer, who resided in a public housing project of which Clark was the manager.

At the time of Mrs. Toepfer's death in October 1959, Clark informed her friends that she had died a pauper. The evidence at the trial established that Mrs. Toepfer had bank accounts totalling $30,000, but Clark had placed Mrs. Toepfer in a home for the aged, and had placed her on welfare so that she could obtain free medical care and assistance to pay for nursing care. Meanwhile, however, he submitted by mail forged documents to three banks for the purpose of having Mrs. Toepfer's accounts changed to show him as joint owner. A month after her death, he attempted to have a fourth account changed to include him as owner. Clark was arrested when he applied to have one of Mrs. Toepfer's accounts, which he had converted into a joint account, transferred to an account in his name and that of his wife.

Although, at the trial, Clark contended that Mrs. Toepfer had signed the documents and intended for him to have the money since he had cared for her in her last days, the Federal Bureau of Investigation handwriting expert proved them to be forgeries. The Government was also able to contradict a substantial portion of Clark's testimony by producing several letters which he had written to relatives of Mrs. Toepfer in Germany.

Staff: United States Attorney Leon H. A. Pierson; Assistant United States Attorney John R. Hargrove (D. Md.).

MAIL FRAUD
(18 U.S.C. 1341)

Conviction in Work-at-Home Scheme. United States v. Luther Ellington (S.D. Calif.). A Los Angeles jury on November 8, 1960 found Luther Ellington guilty on 8 counts of mail fraud in operation of a fraudulent work-at-home scheme which purported to offer part time employment in wrapping, addressing, and mailing advertising matter.

Ellington published advertisements in the "Help Wanted" sections of various newspapers purporting to offer employment in the home at $81.00 to $162.00 weekly and representing that neither capital nor experience was necessary. His advertisement stated that complete instructions could be obtained through remittance of small sums such as $1.00 or $2.00. In response to the inquiries and remittances made to these advertisements Ellington mailed the victims advertising circulars and application forms requesting additional and larger remittances for the attaining of the home employment. While the advertisements led the reader to conclude that employment was being offered, Ellington furnished the victims only information and instructions of negligible value while soliciting larger fees for further information of the same character.

Staff: United States Attorney Laughlin E. Waters; Assistant United States Attorney Russell R. Hermann (S.D. Calif.).

MAIL FRAUD

Advance Fee Racket. United States v. Edward W. Anspach, et al., d/b/a Beneficial Business Loan Service Corporation (D. Colo.). As reported in the November 4, 1960 issue of the Bulletin (Vol. 8, No. 23, p 686), Edward W. Anspach and Walter F. Turner, as President and Vice-President of Beneficial Business Loan Service Corporation, Denver, Colorado were found guilty of mail fraud in obtaining large fees in advance from owners of business enterprises by false representations concerning loans to be obtained for the businesses. On November 18 and November 21, 1960 both defendants were sentenced to two years' imprisonment on each of the 12 counts of the indictment on which they were convicted, the sentences to be served concurrently. As previously noted, this successful prosecution of one of the largest operations of its kind in the country constitutes a major advance in the Department's current program aimed at eradication of this species of consumer swindle.

Staff: United States Attorney Donald G. Brotzman; Assistant United States Attorneys Jack K. Anderson and Richard P. Matsch (D. Colo.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Judicial Review of Deportation Order; Injunctive Relief; Representation by Counsel. Barrese v. Ryan (D. Conn., Nov. 3, 1960). Plaintiff sued pursuant to 5 U.S.C. 1009 to enjoin defendant from deporting him to Italy and to set aside the administrative order of deportation. He contended that he was denied a continuance at his deportation hearing to secure other counsel after his counsel left the hearing; that he was denied benefit of counsel before the Board of Immigration Appeals on his appeal from the deportation order; and that the findings of deportability were contrary to the evidence.

The Court found that plaintiff acquiesced in his counsel's withdrawal from the hearing and effectively waived his right to be represented by counsel during the balance of the hearing. It also found that he asked the Board for a postponement of argument on his appeal because (1) he wished to be represented by counsel before the Board, (2) he was arranging to retain counsel for that purpose, and (3) he needed additional time to enable him to retain counsel because of difficulties of communication by reason of his confinement in a federal correctional institution. The Board denied his request for postponement.

The Court said that, under these circumstances, "it is clear . . . that plaintiff was deprived of his privilege of being represented by counsel of his choosing on appeal before the Board of Immigration Appeals and that plaintiff did not waive his privilege of being represented by counsel before that Board." (Sec. 292, 1952 Act; 8 U.S.C. 1362). The Court did not reach the other claims relied upon by plaintiff but remanded the case to the Board with directions to accord him the privilege of being represented by counsel of his choosing throughout the proceedings on appeal before the Board. Defendant was also enjoined from deporting plaintiff or from removing him from the jurisdiction of the Court except as such removal might be necessary or appropriate in pursuance of his appeal before the Board.

Judicial Review of Deportation Proceedings; Jurisdiction Under 8 U.S.C. 1009; Preference Quota Status - Child of Resident Alien. Contesi v. Pilliod (N.D. Ill., Nov. 1, 1960). Plaintiff, as the unmarried daughter of a legally-resident alien, was issued a third preference quota visa by the United States Consulate at Naples under the provisions of sec. 203(a) (3), 1952 Act (8 U.S.C. 1153(a)(3)). Three days before leaving Italy for the United States she married and did not disclose that fact to the immigration authorities when she applied for admission and was admitted to the United States.

Her marital status became known when she petitioned for a resident visa for her husband, and deportation proceedings followed. She was found

deportable by the special inquiry officer under sec. 241(a)(1), (8 U.S.C. 1251(a)(1)), because, at the time of her entry, she was inadmissible under sec. 211(a)(4), (8 U.S.C. 1181(a)(4)), as an alien who was not of the proper status under the quota. 8 U.S.C. 1101(b)(1) defines a "child" as an unmarried person under twenty-one years of age and no immigrant may be admitted unless he is of the proper status under the quota, (8 U.S.C. 1181 (a)(4)).

Her application for a visa waiver under sec. 211(c), 1952 Act, (8 U.S.C. 1181(c)) was denied as a matter of discretion. Her administrative appeal was dismissed. Thereupon she filed a declaratory judgment action pursuant to 5 U.S.C. 1009 for a review of the administrative proceedings, not only with respect to the finding of deportability, but also to the denial of the visa waiver which she contended was arbitrary, capricious and unreasonable.

The Court said that a review of the administrative record disclosed that plaintiff was accorded due process and a fair hearing, and that the order of deportation is supported by the evidence. The Court further said it was without jurisdiction to review the order denying the visa waiver since it was an agency action by law committed to agency discretion and is unreviewable under 5 U.S.C. 1009.

Summary judgment for defendant.

Habeas Corpus - Review of Deportation Proceedings and Detention; Eligibility of Crewman for Benefits of 8 U.S.C. 1253(h). U. S. ex rel. Szlajmer v. Esperdy and Loroch (S.D. N.Y., Oct. 26, 1960). Relator, an alien crewman, petitioned for a writ of habeas corpus challenging his detention by the master of a Polish ship (Loroch) under a deportation order of the Immigration Service. The order summarily revoked relator's conditional landing permit and remanded him to the master for deportation without a hearing, despite his claim that he would be subject to physical persecution if deported to his country on the ship which brought him here.

Relator claimed he was an alien "within the United States" by reason of his presence in this country under a crewman's landing permit and that he was eligible to receive the benefits of sec. 243(h) of the 1952 Act (8 U.S.C. 1253(h)) which authorized the Attorney General to withhold the deportation of any alien to a country in which, in that official's opinion, the alien would be subject to physical persecution.

The Service contended that that section of the statute is not applicable to relator, and that on the facts of the case he is either a mala fide crewman or a deserter from a ship still in port. If the former he is, in legal effect, an excluded alien and therefore not within the United States and if the latter, he is subject to summary deportation under sec. 252(b), 8 U.S.C. 1282(b) and its implementing regulations, 8 CFR 252.2.

The Court said that the case raises questions of first impression regarding the rights of alien crewmen under 8 U.S.C. 1253(h). In a long

and studied opinion it held that since relator was "permitted to land temporarily in the United States (8 U.S.C. 1282(a)(1)" he is within the United States and not an alien excluded from entry or held on the threshold in parole pending determination of his right to enter as in Leng May Ma v. Barber, 357 U.S. 185 (1958) and Rogers v. Quan, 357 U.S. 193 (1958); nor is he, as the Service urges, an excluded alien ab initio and therefore ineligible for the benefactions of 8 U.S.C. 1253(h) under the rule of Leng May Ma v. Barber, supra. That contention rests on a fiction not supported by the facts nor justified by the plain purpose of 8 U.S.C. 1253(h).

It said further that, while 8 U.S.C. 1282(b) expressly denies an ordinary deportation hearing to an alien crewman upon a finding that he does not intend to depart with his ship, it does not preclude the special proceedings following a claim for asylum which is prescribed by 8 CFR 243.3(b) promulgated under 8 U.S.C. 1253(h), and there is nothing in the letter of 8 U.S.C. 1282(b) repugnant to the provisions of 8 U.S.C. 1253(h). The argument that the statute's express denial of an ordinary deportation hearing shows a clear legislative purpose also to deny the special proceedings on a claim for asylum only proves, more convincingly, that Congress knows how to deny a hearing if it intends to do so.

In answer to arguments as to the merits or demerits of relator's claim for asylum, the Court said that the question, at this stage of the case, is not whether his claim for asylum should be granted or refused, but whether he is entitled to be heard. Accordingly, the writ was sustained, relator was released on his own recognizance (Rule 49(3), Supreme Court Rules, 28 U.S.C.), and the order of deportation stayed pending a determination by the Attorney General of his application for relief under 8 U.S.C. 1253(h).

"Country" to Which Alien May Be Deported (8 U.S.C. 1253) - Formosa. Cheng Fu Sheng and Lin Fu Mei v. Rogers (Sup. Ct., Nov. 14, 1960, No. 393; 29 LW 3146). (See: Bulletins, Vol. 7, No. 18, p. 532; No. 22, p. 623; Vol. 8, No. 6 p. 176 and No. 14, p. 446). In declaratory judgment proceedings respecting the deportation of natives and citizens of China, the District Court for the District of Columbia held that Formosa is not a "country" to which they could be deported (177 F. Supp. 281).

The Court of Appeals in reversing held that since Formosa is a well-defined geographical, social, and political entity, and since there is a government on Formosa which has undisputed control of the island, it is a "country", within the Immigration and Nationality Act (8 U.S.C. 1253), to which an alien may be deported (280 F. 2d 663).

The Supreme Court denied certiorari.

Habeas Corpus - Review of Deportation Order; Alienage - Burden of Proof. U. S. ex rel. George Leon v. U. S. Department of Justice, Immigration and Naturalization Service - District office, Philadelphia, Pa., (E.D. Pa., Nov. 4, 1960). Petitioner, while serving a sentence in San Quentin

in 1932, admitted to an immigration officer that he was born in Vancouver, British Columbia. His father (now deceased) corroborated his admission. Relying on that admission to establish alienage, without making any independent investigation to corroborate it, the Service issued a warrant for his deportation on January 9, 1933. In 1934 Canada declined to receive him as a deportee.

Acting in his own behalf he filed with the court a "Motion for Hearing" in which he alleged under oath, inter alia, that the orphanage records from the State of California show that he was born and baptized in Seattle, Washington. Having thus made a substantial claim to United States citizenship his motion was treated as a petition for a writ of habeas corpus and he was given a hearing de novo on the question of his citizenship. The only evidence offered by the Service to sustain its substantial burden of establishing alienage were the statements of the petitioner, obviously based on hearsay, at a time when he was incarcerated in San Quentin and (said the Court) "we think, anxious to be deported as a means of being released from custody", plus the corroborating statements of his father.

The Court could not ignore the fact that the Canadian authorities refused to acknowledge his citizenship and to permit him to be deported to Canada and assumed that their action was based on their own investigation of the matter. The Court said that while it is not conclusive that the petitioner was born in the United States it was convinced that the Service had not sustained the burden of proof that he is an alien.

Writ of habeas corpus granted, petitioner ordered released from custody and freed from the mandate of the warrant of deportation of January 9, 1933 and any subsequent orders, detainers, or other restrictions on his liberty issued by the Service.

NATURALIZATION

Amendment to Petition and Certificate - 8 CFR 334.16(b); Official Service Records; Showing of Good Cause. Petition of Konsh (E.D. N.Y., Oct. 31, 1960). Konsh was naturalized in 1936 on the basis of his petition in which he averred that he was born in 1909. In his application for his immigration visa in 1929 he supplied the same year of his birth which corresponded with his birthdate in his Polish passport. His declaration of intention, issued on his application in 1930, also showed him to be born in 1909.

He now contends that this date is erroneous, that he was actually born in 1905, and applies to the Court pursuant to 8 CFR 334.16(b) for an order amending his petition for naturalization and his certificate of citizenship to change the year of birth. In support of his application he submitted his 1928 marriage certificate, a 1935 bank letter, and a photostat of his 1934 union book, all of which show his year of birth to be 1905.

He offered no explanation as to why, in his sworn statements to the Immigration and Naturalization Service prior to his naturalization, he stated the year of his birth was 1909; why he waited from 1936 to the present to apply for the amendment; why the change must now be made except that he was so advised by his attorney (obviously, as suggested by oral argument, that he could seek Social Security benefits four years sooner); nor as to what harm he might suffer if the change is not now made.

Absent a showing of good cause, the Court said, it is reluctant to order a change in the official records of the Service and since no such cause has been demonstrated the application was denied. In reaching that conclusion, the Court made no finding with respect to Konsh's true age nor any finding which might prejudice his right to establish his true age in any other proceeding.

Residential Requirement; Honorable Service In U.S. Armed Forces; Credit for Reserve Duty. Petition of Papathanasiou (E.D. N.Y., Oct., 1960). Petitioner entered this country as an alien crewman and was drafted into the Army on October 2, 1951. He served until September 10, 1953, when he was transferred to the Ready Army Reserve. On May 7, 1957, he was transferred to the Stand-By Reserve until his honorable discharge on October 15, 1959.

On November 13, 1959, he filed a petition for naturalization under section 328 of the 1952 Act (8 U.S.C. 1439) which relieves an alien who has served honorably in the armed forces for a period or periods aggregating three years from the requirement of five years' residence in the United States applicable to petitioners generally. He contended that he should be permitted to augment his active service with enough of his reserve service to provide him with the period of three years required by the statute, and the Government argued that the words "served" and "service" in section 328 mean "active service" and that reserve service may not be substituted for active service.

The Court found the facts to be similar to those in U. S. v. Rosner, 249 F. 2d 49, on which petitioner relied. In that case, petitioner's contention that service on reserve was service contemplated by section 328 was upheld. The Court in that case observed that, while in sections 329 and 329a (which apply to a petitioner's service in an active-duty status between certain dates - 8 U.S.C. 1440 and 1440a) Congress expressly inserted the words "active" and "actively" in reference to the type of military service required by those sections, their omission in section 328 raised a strong inference that Congress meant the type of military service required by the latter section to be somewhat different than that required by the other two.

The Court said that since sections 328 and 329 were simultaneously enacted and that only the latter refers to "active duty" status, he concluded that petitioners under section 328 are entitled to credit the period of reserve duty as part of their service in the armed forces, within the meaning of that section.

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LANDS DIVISION

Assistant Attorney General Perry W. Morton

Avigation Easements; Claim for Just Compensation; When Cause of Action Accrues for Purpose of Statute of Limitations; Change in Flight Pattern or Increase in Flights Does Not Create New Cause of Action. Carl H. Klein, et al. v. United States, No. 157-58, C. Cls., November 2, 1960. This action was brought to recover just compensation for the taking of an avigation easement in connection with the operation of Andrews Air Force Base.

Military aircraft were first used at that base in 1943 and, until 1947, they were exclusively propeller-driven aircraft. In April 1947, 14 P-80 jet-powered fighters were assigned to the base and from that time on, both propeller-driven and jet-powered aircraft have been in use. In 1947, the monthly average number of takeoffs and landings of combined propeller-driven and jet aircraft were 2,947. By 1952, the average monthly takeoffs and landings increased to 5,821. In 1953, there were 8,702 takeoffs and landings each month, and in 1954, there was an increase to 12,481. By 1957, there were 19,310 takeoffs and landings each month.

Plaintiffs' property is located about 4,500 feet from the end of one of the runways. Aircraft have been flying at elevations as low as 75 feet above the property since at least 1947, when jet aircraft were first used.

The Government pleaded the statute of limitations, contending that the action was barred six years after April 1947, when the first jet-powered aircraft first flew over the property. Plaintiffs contended that the taking did not occur prior to August 1954, when the commandant issued a regulation requiring all aircraft to execute a right turn when taking off from the runway in question. The effect of that regulation was to cause almost all of the aircraft to fly directly over plaintiffs' house. Prior to the issuance of that regulation, aircraft flew over the property and occasionally over the house. Plaintiffs also argued that the vast increase in the number of takeoffs and landings each month subsequent to 1954 and the increase in the number and variety of the jet aircraft caused considerably more noise, disturbance and interference with the use of their property.

The Court concluded that the action was barred by the statute of limitations, holding that the cause of action first accrued when defendant for the first time flew one of its jet-powered planes over the property with the intention of continuing to do so at will.

Staff: Herbert Pittle (Lands Division)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS

IMPROPER TAXATION OF COSTS AGAINST UNITED STATES IN TAX REFUND SUITS

Your attention is again directed to the requirement in Rule 54(d) of the Federal Rules of Civil Procedure that exception to the improper taxation of costs against the United States by the clerk must be taken by your filing a motion for review by the court within five (5) days from the date they are taxed by the clerk. Of late it has been noticed that in some instances cost bills are being forwarded by the United States Attorneys for processing and payment without their having taken exception to the improper costs taxed therein. Usually, by the time these cost bills are received in the Tax Division and reviewed, it is too late to request your offices to move for review by the court, the time for filing a motion to review having expired. It is requested, therefore, that this matter be given your special attention so that in the future the payment of improper costs may be avoided.

As you know, the United States is liable for fees and costs only when Congress has expressly so provided. 28 U.S.C. 2412(a). The authorization to tax the United States with costs in tax cases is found in 28 U.S.C. 2412(b). This Section limits costs in tax refund suits in which the United States is named as the defendant to those allowed by the trial court and such costs shall include only those actually incurred for witnesses and fees paid to the clerk after joinder of issue. Other costs, e.g., the $15 filing fee paid to the court clerk at the time the suit for refund of federal taxes is instituted and the Marshal's fee for service of summons, both of which are paid prior to the joinder of issue, are not recoverable. See: United States v. Mohr, 274 F. 2d 803 (C.A. 4); Georg Jensen, Inc., v. United States, 185 F. Supp. 251 (S.D. N.Y.). See also: Lichter Foundation, Inc., v. Welch, 269 F. 2d 142 (C.A. 6) (dictum). The $20 attorney's docket fee under 28 U.S.C. 1923 is also not recoverable against the United States since it is paid directly to the prevailing party's attorney rather than to the court clerk. See: Georg Jensen, Inc., v. United States, 185 F. Supp. 251 (S.D. N.Y.).

The examples cited above provide sufficient guide lines and indicate the controlling criteria. A recoverable cost against the United States must be one which was actually incurred for a witness or a fee paid to the clerk. If the expenditure qualifies on either of these grounds, it is subject to the further prerequisite that it must be incurred after joinder of issue. If any one of these requirements is not met, care should be taken to make timely objection in accordance with Rule 54(d) of the Federal Rules of Civil Procedure.

Where the tax refund suit names the District Director as defendant, it is the Division's position that the only costs allowable are the same

as those recoverable in suits against the United States, with the exception of suits filed in district courts of the Sixth Circuit where the Lichter Foundation case, supra, is controlling.

It is especially important that the Government be consistent in its position with regard to costs. The existence of a uniform administrative practice or the lack thereof may or may not be a factor considered by the judiciary in determining in future cases whether certain costs are allowable. See: United States v. Mohr, supra. You will be advised on the pages of this Bulletin as different items of cost, in addition to those given as examples above, are judicially tested.

Finally, the Division should be promptly furnished with one certified and two uncertified copies of cost bills (together with the required and appropriate copies of judgments and certificates of probable cause) to enable the Internal Revenue Service to expedite payment and hold the Government's liability for interest to a minimum.

NOTICES OF MORTGAGE FORECLOSURE SALES

Since the decisions of the Supreme Court in Bank of America v. United States and United States v. Brosnan, there have been a number of notices of sales served upon the Attorney General. In most cases, notices have been served upon the United States Attorneys' offices also.

Until a procedure can be adopted which will fully protect the Government's interests, it is requested that each United States Attorney immediately notify the Regional Counsel's office for his district upon receipt of a notice of sale. If the Revenue Service advises that it appears that the taxpayer has an equity in the property to be sold, and if the Regional Counsel so recommends, a lien foreclosure action should be immediately begun in the United States district court, with a request that the court issue a temporary restraining order restraining the mortgagee from selling the property. The foreclosure proceeding should contain a prayer for an injunction restraining the sale and asking that the property be sold at a judicial sale. It is our belief that a majority of the courts should go along with this procedure, as it will insure the mortgagee obtaining satisfaction of his mortgage and any overage being applied to the taxpayer's tax liability.

If time will permit, the Tax Division should be contacted concerning the institution of the suit. If not, a full report should be made of the action taken and, in any event, the Regional Counsel of the Revenue Service should be kept apprised of this situation. Any action brought pursuant to these instructions will require either authorization by the Commissioner of Internal Revenue and the direction of the Attorney General in advance or the subsequent sanction of such action.

Appellate Decisions

Estate Tax; Marital Deduction of Life Insurance Proceeds Under Optional Settlement Plan. Edward J. Meyer v. United States (Sup. Ct., November 21, 1960). This is the first case decided by the Supreme Court

construing the marital deduction allowed in computing the estate tax (1939 Code Section 812(e); 1954 Code Section 2056). Under an optional mode of settlement of policies insuring his life which decedent had selected, the companies were required to pay his wife for her life equal monthly installments in an amount fixed by the policies, with 240 installments guaranteed; it was further provided that if the wife should die before receiving the 240 installments his daughter would receive the remainder of them, but if both the wife and daughter died before receiving the 240 installments the commuted value of those unpaid was to be paid in one sum to the estate of the last one of them to die. The Supreme Court, affirming the Second Circuit in a 6-3 decision, held the policy proceeds disqualified for the marital deduction by the express provisions of Section 812(e)(1)(B) of the 1939 Code, since under the policy terms the "interest passing to the surviving spouse [may] terminate or fail" and a "person other than [the] surviving spouse * * * may possess or enjoy [a] part of such property after such termination or failure of the interest so passing to the surviving spouse; * * *".

The executors, relying upon In re Reilly's Estate, 239 F. 2d 797 (C.A. 3), had contended that the sum, representing the portion of the proceeds of the policies actuarially computed by the insurance companies as necessary to continue the installment payments to the wife for her life expectancy beyond the 20 years certain, constituted a separate "property" in which the daughter had no interest, and that portion qualified for the marital deduction. The Government argued, and the Court held, that the proceeds of the policies were one property and since, under the guaranteed minimum refund provision, the daughter may enjoy a part of the proceeds after the wife's death, the wife's interest in that one property constituted a nondeductible terminable interest. The Court also ruled that the actuarial allocations of the policy proceeds by the insurers were no more than bookkeeping entries made for their own convenience, and that it was the terms of the policies and not these entries which created the rights involved.

Staff: I Henry Kutz and John J. Pajak (Tax Division)

Liens; Assessments Made Subsequent to Taxpayer's Assignment for Benefit of Creditors and Prior to Its Bankruptcy Did Not Provide United States With Lien on Assigned Property. The City of New York and the Industrial Commissioner of the State of New York v. United States (C.A. 2, October 31, 1960). Taxpayer, unable to pay its debts, executed a general assignment for the benefit of creditors under the New York Debtor and Creditor Law. Within four months after that assignment, taxpayer's creditors filed an involuntary petition in bankruptcy against it. Taxpayer was adjudicated as bankrupt, and a trustee was appointed. In the period between the dates of the assignment and the filing of the petition in bankruptcy, the United States assessed tax deficiencies against taxpayer for unpaid FICA, FUTA and withholding taxes. The District Court upheld the order of the referee in bankruptcy granting lien status to the claims of the United States grounded on those assessments. The Second Circuit reversed.

The Court held that under New York law, the assignment for the benefit of creditors stripped taxpayer of its title in the property involved and, therefore, the subsequent assessments by the United States did not impress a lien thereon. The Court rejected the Government's contention that under Section 70a(8) of the Bankruptcy Act (11 U.S.C. 110(a)(8)), the bankruptcy adjudication avoided ab initio the attempted passage of title to the property by the assignment and rendered the assignee a mere bailee. The Court reasoned that that section was intended only to facilitate the summary jurisdiction of the bankruptcy court and did not otherwise affect the assignee's title. The Court also held that the claims of the United States were not entitled to a priority under Section 3466 of the Revised Statutes (31 U.S.C. 191) because the provisions of that section are inapplicable in bankruptcy proceedings.

Staff: Douglas A. Kahn (Tax Division)

District Court Decisions

Liens; Jury Trial Denied in Action to Enforce Federal Tax Liens. United States v. Bernard Damsky, et al., (E.D. N.Y., Sept. 30, 1960). In this action, the Government is seeking to enforce federal tax liens on certain real properties, and to obtain judgment for outstanding tax liabilities. The taxpayers and other defendants timely demanded trial by jury in their answer. The Government moved to strike the demand for jury trial, on the ground that there is no right to jury trial in an action of this kind. The Court granted the motion, holding that there is no right to jury trial in an action to enforce federal tax liens, even though judgment for the outstanding taxes is also sought, since an action of this kind would have come within equity jurisdiction prior to the merger of law and equity.

Staff: United States Attorney Cornelius W. Wickersham, Jr., and Assistant United States Attorney Irving L. Innerfield (E.D. N.Y.); Robert L. Handros (Tax Division)

Liens; Priority Between Tax Liens and Purchaser of Trucking Business; Liens Held Inferior to Purchaser's Title in Trucking Business Where Liens Filed After Date of Sale. I.C.C. Approved Subsequent to Date Liens Filed Did Not Alter Situation Where Such Approval Was Not Condition Precedent to Validity of Contract of Sale. United States v. Boston & Berlin Transportation Co., Inc., 6 A.F.T.R. 2d 5671 (D. N.H.). This is an action by the United States to foreclose tax liens claimed to be outstanding against equipment of a trucking business and a debt due under a purchase agreement. A motion for summary judgment was filed by the United States with respect to the first cause of action.

The facts show that on February 15, 1952, Lavigne contracted with the taxpayer, Boston & Berlin, to purchase the latter's trucking business for $27,000. Although both Lavigne and Boston & Berlin had trucking certificates from the I.C.C., title to the latter's business could not

pass because of I.C.C. regulations until the sale had been approved by the I.C.C. The tax liens arising on assessment made against Boston & Berlin were recorded on March 11, 1952, after the above agreement. The sale was subsequently approved by the I.C.C. on August 28, 1952, and installment payments were made by Lavigne after that date.

The Court in concluding that Lavigne became a "purchaser" on February 15, 1952 within the meaning of 28 U.S.C. 6323 pointed out that the approval of the I.C.C. to the sale was nothing more than a formality since both the seller and the purchaser were already licensed by the I.C.C. The Court pointed out that "no additional agreement was entered into after the I.C.C. approval, nor was any necessary, because the February 22, 1958 agreement spelled out all the obligations of the parties."

The Court further pointed out that although Lavigne did not obtain title by the contract of February 1952, he did obtain an interest in the property as defined in the Treasury Regulations which define the word "purchaser" under Section 6323 of the Internal Revenue Code of 1954. It further pointed out that approval by the I.C.C. was not a condition precedent to the validity of the contract.

Staff: United States Attorney Maurice Bois (D. N.H.); and Stanley F. Krysa (Tax Division)

CRIMINAL TAX MATTERS
District Court Decision

Sentencing Considerations. Pugh v. United States (S.D. Iowa). In this case Judge Van Pelt, overruling a motion to suspend a two-year prison sentence, on April 12, 1960, made the following pertinent observations:

> It is true that the punishment falls severely upon the wife and upon the adult children. This the Court regrets. The Court tried to point out when sentencing the defendant that this result is the defendant's doing and not the Court's. A criminal must never blame the apprehending officers for uncovering his crime, the Department of Justice for prosecuting, thereby making his misdeeds public, or the judiciary for sentencing because in truth all of the publicity and all of the disgrace visited upon his family is of the defendant's making. In this case the making was not accidental but deliberate.
>
> Undoubtedly in this and many other cases the inherited wealth the family will eventually secure from the despicable practices that resulted in its amassment is not worth it to any member of the family. Again, it

is the defendant, not the Court or prosecutors, who made the choice. He could have lived the life of a loyal, well paid purchasing agent for a respected company though he probably never would have become rich or wealthy. It is evident that following the practices defendant followed that he has amassed a large estate. The choice was his. As above stated, it was deliberate. Neither the courts nor the prosecuting officers are to blame either for the publicity which has resulted or the punishment that he must suffer.

Staff: Former United States Attorney (now District Judge) Roy L. Stephenson (S.D. Iowa)

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