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BULLETIN

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JOB WELL DONE

Assistant United States Attorney Gerald Walpin, Southern District of New York, has been commended by the FBI Special Agent in Charge, for the comprehensive, diligent and forceful attention he gave to a recent case involving violation of the Theft From Interstate Shipment Statute. All four defendants were convicted on two counts.

The Regional Commissioner, I & N Service, has commended Assistant United States Attorney Lawrence L. Fuller, Western District of Texas, for his constant attention to the problems of the Service, his intelligent and vigorous approach to such cases, and for the fact that he has made himself continually available as an understanding and sympathetic advisor to the Service officers in the El Paso area. The letter stated that the Government has benefited materially by his interest and efforts in several recent cases involving armed assault on Border Patrol officers, and the stabbing of a Patrol Inspector.

In expressing appreciation for the cooperative work of Assistant United States Attorney Henry C. Stone, District of Connecticut, in a recent land condemnation case, the Regional Counsel, GSA, stated that the execution of the task was so eminently satisfactory that no complaints have been received from any of the tenants required to vacate the premises for the construction of a new Federal building.

Assistant United States Attorney Leo C. Rodkin, Southern District of California, has been commended by the Public Works Officer, Twelfth Naval District, for his cooperation and assistance in the prosecution of recent acquisitions for land needed to establish a master jet station at Lemoore, California. The realty interests represented in the Government's four condemnation suits total $5 million, and planned improvements will exceed $80 million in value, thus making it one of the most costly and involved land acquisitions in the area in recent years. The letter stated that, although Mr. Rodkin was handling several other projects of comparable magnitude at the time, he was able, through initiative and ingenuity, to close the four actions except for six ownerships involving thirteen land parcels. As the closing problems included corporate and partnership interests as well as many ownerships involving trusts, wills, estates in probate and multiple interests, his work in behalf of the Department of the Navy was termed "truly remarkable" by the Public Works Officer. The writer stated he was pleased to learn that a further condemnation suit to acquire a tank farm site and permanent easement, 93 miles long, for a fuel pipeline for the Naval Air Station, has been assigned to Mr. Rodkin for handling since his past experience, knowledge and cooperative attitude, as evidenced in his securing an Order for Immediate Possession in this action, will reduce to a minimum the many problems presented by the numerous interests involved.

The Regional Commissioner, I & N Service, has expressed appreciation for the constant attention devoted to the problems of the Service by United States Attorney Donald G. Brotzman and staff, District of Colorado, and also stated that, in addition to an understanding and vigorous approach to such cases, the United States Attorney's office has made itself continually available in an advisory capacity to officers in the Denver area.

Assistant United States Attorney Elliott Kahaner, Eastern District of New York, has been commended by the Chief Postal Inspector, for his excellent work in a recent mail fraud case involving the selling of knitting machines for work-at-home purposes. The letter stated that Mr. Kahaner devoted long hours preparing the case for trial and that the masterful summation which he delivered at the conclusion of the trial left no doubt in the minds of the jury as to what their decision should be. The letter further stated that to date 37 persons and firms have been convicted of mail fraud in connection with knitting machine promotions, with many others pending before United States Attorneys for prosecutive action, and that the successful outcome of these trials should keep swindlers from engaging in this type of practice.

In expressing appreciation for the intelligent and vigorous approach, and the constant attention given to the problems of the I & N Service by Assistant United States Attorney Brian S. Odem, Southern District of Texas, the Regional Commissioner stated that Mr. Odem was a most understanding and sympathetic advisor to the officers in the Brownsville area.

Assistant United States Attorneys Philip C. Lovrien and William R. Crary, Northern District of Iowa, have been commended by the Acting Regional Counsel, Small Business Administration, for the expeditious way they have handled the work of that Administration in the past. The letter stated that of all of the offices that agency is required to deal with, the talent and service received from United States Attorney's office for the Northern District of Iowa is far superior to that given by comparable offices.

The Game Management Agent, Fish and Wildlife Service, has commended Assistant United States Attorneys William Francis Murrell and Frederick H. Mayer, Eastern District of Missouri, for their excellent cooperation in bringing a recent prosecution to a successful conclusion. The letter stated that, since violations of the Migratory Bird Treaty Act and Hunting Stamp Act are not covered by state law, federal prosecution is required, and the convictions obtained in recent baiting cases will act as a deterrent, and materially assist the cause of good conservation of one of our important natural resources.

United States Attorney Harlington Wood, Jr. and Assistant United States Attorney Marks Alexander, Southern District of Illinois, have been highly commended by the I.R.S. Acting District Chief, Intelligence Division; the District Director, and the Assistant Regional Commissioner (Intelligence)

on their splended work in obtaining a conviction in an income tax evasion case after eight weeks of difficult and arduous trial work. The commendations stated that the long hours they devoted to the case included not only night work, but also much time on week ends; that the skillful and dedicated manner in which they represented the Government, and the vigor with which they pressed the case and repulsed attacks upon the Government agents is deserving of the highest praise; and that their devotion to the cause of justice, not only in this case but in all of their other cases, is exemplary. The letters further stated that, while conducting the 8-week trial and doing everything possible to unravel the confusion created as the main line of defense (confusion created not only by the offering and identification by the defense of over 1,000 exhibits, but also by defendant's constant evasions and fabrications on the witness stand), Mr. Wood and Mr. Alexander also succeeded in disposing of six other internal revenue cases through pleas of guilty.

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ANTITRUST DIVISION

Assistant Attorney General Robert A. Bicks

Consent Decree Violation: Government Asks Court For Order to Show Cause. United States v. General Dynamics Corporation, et al., (E.D. N.Y.). On December 22, 1960 the Government filed a petition charging the four major manufacturers of carbon dioxide with criminal contempt of a 1952 consent judgment which barred price-fixing and other restrictive activities, upon which Judge Mishler issued an Order to Show Cause returnable January 16, 1961.

The four corporate respondents named in the petition are: General Dynamics Corporation, Air Reduction Company, Inc., and Olin Mathieson Chemical Corporation all of New York, New York; and Chemetron Corporation, Chicago, Illinois.

The petition also named as individual respondents: George C. Cusack, president of Pure Carbonic Company division of Air Reduction Company, Inc., John J. Lincoln, vice president of Air Reduction Company, Inc. and Henri C. Mathey and Rex L. Nicholson, vice president and president respectively of the Liquid Carbonic Division of General Dynamics Corporation.

The Government charged that respondents had violated the specific prohibitions of the 1952 consent judgment (a) by participating in a conspiracy since 1953 to determine, fix and maintain prices of carbon dioxide, and by exchanging information concerning the conspiratorial activities, and (b) by interfering with the business practices and policies of other persons and corporations engaged in the manufacture, distribution and sale of carbon dioxide in the United States.

The carbon dioxide industry is an extremely important one. Among the many uses of carbon dioxide, sold as dry ice, liquid or gas, are the refrigeration of food, the production of fuel for rockets and ballistic missiles, the environmental testing of aircraft, the carbonation of beverages, the charging of fire extinguishing equipment, and such industrial uses as the processing of rubber, metals, chemicals and plastics. Industry production of carbon dioxide in 1959 exceeded 850,000 tons, with a total sales value in excess of $65,000,000. In 1959, the four corporate respondents accounted for the following approximate shares of total industry shipments: General Dynamics - 32%, Air Reduction Company - 26%, Chemetron Corporation - 18%, and Olin Mathieson - 7%.

Staff: Bernard M. Hollander, Stephen R. Lang, Allen E. McAllester and Robert J. Wager (Antitrust Division)

Grand Jury Subpoena Duces Tecum Upheld. Aviation Insurance, (S.D. N.Y.). On December 7, 1960 Judge McGohey denied a motion by the Associated Aviation Underwriters to quash, modify and limit a grand jury subpoena duces tecum. This was the second attack upon the subpoena. The prior motion to quash had raised a jurisdictional challenge based upon the McCarran Act. Judge Cashin had denied that previous motion but "without prejudice to any motions addressed to the scope of the subpoena". Associated thereupon filed the present motion to quash, modify and limit, using this opportunity to reiterate its challenge to jurisdiction.

In denying this motion, Judge McGohey held that the Court on the prior motion had completely disposed of all contentions raised by Associated in support of its claim of lack of jurisdiction. He refused to review the ruling of the Court on the prior motion.

In addition to the jurisdictional challenges, Associated raised 23 specific objections to individual paragraphs of the subpoena and three general objections. It sought to limit the subpoena (1) to exclude records already in the possession of the Department, (2) to a period of time since 1954, and (3) to permit Associated to avoid disclosure of confidential information either by submitting sample contracts or through such other methods as the court would deem appropriate. The Government conceded the first objection. Judge McGohey denied the second and the third. However, he directed the Government and movant to stipulate on an arrangement "which would prevent the disclosure of internal and confidential information to Associated's competitors". The Government had indicated its willingness to enter into such an arrangement. As to the specific objections, Judge McGohey ruled that "most of the 23 individual objections were answered simply by the application of common sense and called for no modification or direction by the court". The Court did strike one paragraph as being vague and limited a second paragraph to cover matters concerned with the conduct of insurance as distinguished from employee and labor relations.

Staff: Edward R. Kenney and Herbert F. Peters.
(Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General George S. Leonard

COURTS OF APPEALS

ADMINISTRATIVE LAW

Participation in Administrative Proceedings Without Objection Precludes Assertion of Procedural Irregularity in Judicial Review. United States v. Hansson (C.C.P.A., December 22, 1960). In the spring of 1953, the Secretary of the Treasury began an investigation under the Anti-Dumping Act of 1921 to determine whether Swedish hardboard was being imported into the United States at less than fair value and, if so, whether these importations were causing injury to the domestic hardboard industry. Plaintiff and other importers were invited to participate in the investigation, and actively did so. No notice of the proceedings was published in the Federal Register. Plaintiff purchased hardboard while the investigation was being made, and received notice that its appraisement was being withheld pending the outcome of the investigation. The investigation was completed and a finding of dumping made in August 1954 and the goods purchased by plaintiff were appraised accordingly. At no time during the course of the investigation was any objection made, by plaintiff or others, of procedural irregularities based upon the Administrative Procedure Act.

Nevertheless, plaintiff argued successfully before the Customs Court that the "rule making" provisions of the A.P.A. applied to investigations conducted under the Anti-Dumping Act, and that the Secretary of the Treasury's determination was invalid because he failed to comply with the A.P.A. requirement that notice of "rule making" proceedings be published in the Federal Register. Relying heavily upon the holding and rationale of United States v. Tucker Truck Lines, 344 U.S. 33, the Court of Customs and Patent Appeals reversed, holding that plaintiff, by having actively participated in the dumping investigation without objection, waived any right it may have had to assert procedural irregularities upon judicial review. Under its disposition of the case, the Court found it unnecessary to reach the issue of whether or not an anti-dumping investigation was "rule making" within the A.P.A.

Staff: Acting Assistant Attorney General George S. Leonard and V. Judson Klein (Civil Division).

ADMIRALTY

Collision: United States Vessel Held Free From Negligence Under Principles of Navigation. United States v. Motor Tanker J.A. Cobb, et al. (C.A. 2, October 31, 1960). The Cobb collided with a barge being towed by an Army tug, the Rogers, near the west draw of the Central Railroad Company of New Jersey's bridge across the Newark Bay. There were two channels separated by an abutment raising the bridge. It had

been the custom for large vessels and tows proceeding north and south to use the broader west draw. The Rogers used the west draw channel, but kept to the starboard (right) side of the west channel. The Cobb did not have a lookout stationed at its bow, which was 150 feet forward of its pilot house. The district court found the Cobb to be negligent and solely responsible for the collision, and consequently granted the United States an interlocutory decree against the Cobb's owner.

The Court of Appeals affirmed. It held that, in the circumstances, it would not be reasonable to merge the east and west channels into, or to consider them as, a single narrow channel, or to require all northbound traffic to use the east channel. Accordingly it held that the Narrow Channel Rule (33 U.S.C. 210; Inland Rules Article 25) did not require the Rogers to use the east draw, but only required it to keep to the starboard side of the west draw channel. The Court also affirmed the district court's finding that the failure to keep a lookout at the bow of the Cobb constituted lack of prudent seamanship (see 33 U.S.C. 221, Inland Rules Article 29).

Staff: Louis E. Greco (Civil Division)

NATIONAL SERVICE LIFE INSURANCE ACT

Beneficiary May Establish Death of Insured During First Three Months of Disappearance by Showing He Was "Good Boy" on His Way Home When Last Heard of. United States v. Greenway, (C.A. 5, November 29, 1960). Plaintiff instituted this action to recover as beneficiary under an NSLI policy issued on the life of her son. The insured disappeared while on furlough from his Army post in Colorado, which he began on March 23, 1944. His parents in Detroit received a telegram from Chicago two days later signed with the insured's name stating that the insured had lost his wallet and requesting that they wire bus fare home. Ten dollars were sent but the insured never arrived home and was not heard of since. The insurance policy lapsed on June 30, 1944, some three months later. In addition to the above facts, the evidence showed that the insured was a "good boy", had never been in trouble, and was quite attached to his parents. There was no evidence of any physical or mental illnesses or abnormalities or of any specific danger that may have destroyed his life.

The district court submitted to a jury the issue as to whether the insured had died between his disappearance on March 25, 1944, and the date of lapse of the policy, June 30, 1944, rather than at the end of the seven-year period at which time death became established through a seven-year statutory presumption raised by 38 U.S.C. 108. The jury found that the death occurred before the policy lapsed.

The Court of Appeals affirmed, holding that the matter was controlled by Peak v. United States, 353 U.S. 43, which held that, although proof merely of seven years' unexplained absence would raise a presumption of death at the end of that period, plaintiff could establish death at an earlier date by proving "the insured's frail health and disability or

other relevant facts." The Court did not refer to its post-Peak decision in Jones v. United States, 266 F. 2d 654, in which it had been held that evidence similar to that presented by the beneficary in this case was insufficient as a matter of law to establish death prior to the end of the seven-year period.

Staff: United States Attorney Charles D. Read, Jr. (N.D. Ga.).

POSTAL FRAUD

Testimony of Single Medical Expert That No School of Medical Opinion Would Endorse Claims for Alleged Medical Product Held to Constitute Evidence of Intent to Deceive Sufficient to Support Fraud Order. Owen Laboratories v. Schroeder, (C.A. 7, November 28, 1960). A postal fraud order was issued against Owen Laboratories, selling "royal bee jelly" and "oyster concentrate" in pills called "Enerjol." According to Owen's advertising, Enerjol was supposed to have extraordinary therapeutic powers to cure a wide range of human ills. The sole expert witness testified that the consensus of medical opinion rejected the claims made for "royal bee jelly." On the basis of uncontradicted expert testimony, the Post Office Department issued a fraud order.

In Owen Laboratories' suit to restrain enforcement of that order, the district court held that the expert testimony as to the consensus of medical opinion was insufficient to support the fraud order under the test of Reilly v. Pinkus, 338 U.S. 269, because it was limited to medical opinion, and did not cover other sciences.

On appeal by the Government, the district court's decision was reversed. Upon the basis of a careful review of the expert testimony in the light of Reilly v. Pinkus, the Court of Appeals ruled that it was "compelled to conclude that there was substantial evidence to support the Department's finding of fraud." The Court noted that the expert had in fact referred to the views of chemists and apiculturists. It held that the uncontradicted testimony as to the present state of medical opinion was sufficient to support the fraud order.

Staff: Howard E. Shapiro (Civil Division).

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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.) This case was previously reported in the Bulletin, Vol. 8, No. 20, p. 629. On November 18, 1960, the Department obtained an order from the District Court authorizing the amendment of its complaint to include 34 additional defendants who were landowners in Haywood County, Tennessee, and who farmed the land with Negro sharecropper tenants. In addition, another bank and a wholesale food company were made defendants. On December 1, 1960, the Government filed a second complaint at Memphis, charging an additional 11 defendants in Haywood County, Tennessee, with similar violations of 42 U.S.C. 1971(b). U. S. v. Barcroft, et al. (W.D. Tenn.)

On the following day, the Government filed an application for temporary restraining orders in the two Haywood County cases. These applications were based on the affidavits of 52 Negro sharecroppers in Haywood County, Tennessee which stated, in effect that their farm tenancies were not being renewed because the sharecroppers had registered or attempted to register to vote. The Government sought a temporary injunction to prevent defendants from taking any steps to terminate or alter sharecropping arrangements until a hearing could be held.

The District Court refused to sign a temporary restraining order but did set the Government's motion for a preliminary injunction, for hearing on December 19, 1960.

The hearing on the Government's application commenced on December 20, 1960. At the close of the three-day hearing, the District Court enjoined 13 of 74 defendants from engaging in any threats, intimidation, or coercion of any nature for the purpose of interfering with the right of any other person to become registered to vote in Haywood County, but the Court refused to make any type of restraining order against 36 landowners who, the proof showed, were requiring their Negro sharecroppers to move, as punishment for having registered to vote. The Court stated that the injunction, as proposed by the Government, would interfere with "contract and property rights" and was not authorized by the 1957 Civil Rights Act.

The Government immediately filed notice of appeal and asked the District Court for an interlocutory injunction pending a hearing on the appeal. This was denied. A similar application was made to the Court of Appeals for the Sixth Circuit. This motion was argued orally in Cincinnati on December 29, 1960. On December 30, 1960, the Court of Appeals granted an interlocutory injunction enjoining defendant landowners from attempting to intimidate, threaten, or coerce any of their Negro sharecropper tenants for the purpose of interfering with the right of such persons to register and vote and from engaging in any act or practice which would deprive the tenants of their right to register, and from

evicting or removing their sharecropper tenants or refusing to extend or renew their leases for the purpose of intimidating or coercing their tenants, or to penalize them on account of the exercise of their right to register to vote.

The Court of Appeals also directed the District Court to consider any application by any defendant for relief on the ground that the eviction of the sharecropper was the result of a "legitimate action by landowners in relation to the sharecropper occupants of their land."

The Court expressly reserved the questions of whether the Civil Rights Act may constitutionally be employed to require private persons to continue or enter into contractural relations in respect to their own property.

On January 5, 1961, the District Court set a hearing for January 16, 1961, on all applications by landowners for relief.

On December 14, 1960, the Government filed a similar action against 82 defendants in Fayette County, Tennessee. United States v. Atkeison, et al. (W.D. Tenn.) The Court set the Government's motion for a preliminary injunction against the defendant landowners for December 27, 1960. At the close of the hearing in the Haywood County cases, the Court continued the Fayette County hearing indefinitely. The Government then applied for a writ of mandamus from the Court of Appeals for the Sixth Circuit. On December 30, 1960, this application was denied. The Circuit Court stated that no irreparable harm would occur to the sharecroppers before the Government could re-apply to the District Court for relief in accordance with the injunction issued that day by the Court of Appeals in the companion cases.

On the same day, the Government did obtain a temporary restraining order enjoining defendant landowners in Fayette County from evicting their tenants for the purpose of interfering with their right to register and vote or for the purpose of punishing a tenant who had registered.

On January 5, 1961, the District Court set January 16, 1961, for a hearing on all applications for relief by individual defendants.

Staff: John Doar, Harold H. Greene, J. Harold Flannery, Jr., D. Robert Owen, J. Rupert Groh, Isabel L. Blair, David Rubin, Howard A. Glickstein, Gerald P. Choppin (Civil Rights Division)

Negro Voting Rights; Effect of Law Redefining Boundaries. Gomillion v. Lightfoot (U.S. Sup. Ct. No. 32). As discussed in the Bulletin for September 9, 1960, a 1957 Alabama statute recharted the City of Tuskegee, Alabama, so as to exclude several thousand Negroes, but no white persons, from the city limits. Practically all of approximately 400 qualified Negro voters were thus disenfranchised from participation in municipal

elections. Negro citizens brought suit to enjoin the redistricting, a virtual gerrymander which transformed the city from a square to a dragon-shaped district, and which, in particular, excluded the area occupied by Tuskegee Institute, a well-known Negro educational institution. Petitioners alleged deprivation of Fourteenth and Fifteenth Amendment rights. The United States entered the case as amicus curiae after lower courts had dismissed the suit for want of jurisdiction.

On November 14, 1960, the Supreme Court reversed the decisions of the lower courts and remanded the case for trial. The Court rejected appellee's contention that a state has unlimited power to establish its own boundaries. It held that if petitioners' allegations of denial of their constitutional rights remain uncontradicted upon trial, the conclusion would be "tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." The Court further held that "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right . . . ."

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

School Desegregation, New Orleans. Bush v. Orleans Parish; Williams v. Davis (E.D. La.) These cases are discussed in the Bulletin for December 16 and December 2. The motion for a stay of the District Court's order of November 30, 1960 was denied by the Supreme Court on December 12, 1960. The Court held that the interposition argument of the State of Louisiana was without substance. The Court did not expedite a hearing on the merits and the appeals of the State and the school board are still pending.

After the November 30 decision of the District Court, the State of Louisiana enacted further measures designed to perpetuate segregation. Among these was an act dismissing the present school board and replacing it by one appointed by the Governor. The United States, as amicus, immediately obtained a temporary restraining order against enforcement of these measures. A hearing was held on December 16, 1960 on the constitutionality of this act and a later-enacted measure replacing the school board's attorney by the State Attorney General, as well as on various motions involving the school board's right to custody of school funds which had been sequestered by the legislature.

On December 21, a three-judge district court enjoined the State from enforcing the challenged acts, ordered the banks and the City Revenue Board to turn over the sequestered funds to the school board, and

declared that the federal court has the right to presume that any law, though innocent on its face will be carried out in an unconstitutional manner. In a blanket restraining order the court barred every public official in Louisiana from interfering with integration.

The Court also ordered three state officials to show cause, on January 13, 1961, why they should not be held in contempt for refusal to pay teachers in the two integrated schools. It also ordered the Secretary of State to show cause, on the same date, why he should not be enjoined from certifying the election (on November 8, 1960) of school board member Sutherland who supports the desegregation order of the court.

Staff: Solicitor General J. Lee Rankin
United States Attorney M. Hepburn Many (E.D. La.)
St. John Barrett (Civil Rights Division).

Interstate Commerce Act; Racial Segregation in Bus Terminal Restaurant. Boynton v. Virginia. U. S. Supreme Court No. 7.

This case, discussed in the Bulletin for September 9, 1960 was an appeal from conviction of a Negro passenger on an interstate bus for refusal to leave the "white section" of the Trailways Bus Terminal restaurant in Richmond, Virginia. The United States prepared a brief amicus curiae. On December 5, 1960 the Supreme Court reversed the judgment of the Supreme Court of Virginia and remanded the case to that tribunal.

Although the petition for certiorari presented only two questions, the invalidity of the conviction as (1) a burden on commerce under the Commerce Clause of the Constitution, and (2) a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Court chose to decide the case on the basis of Section 216(d) of the Interstate Commerce Act, which provides in part:

> It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever; or to subject any particular person . . . to any unjust discrimination or any unjust or unreasonable prejudice or disadvantage in any respect whatsoever . . . .

Citing Henderson v. United States, 339 U.S. 816, and Mitchell v. United States, 313 U.S. 80, which held that the Act forbade racial discrimination on railroad dining cars, the Court held that "should buses in transit decide to supply dining service, discrimination of the kind shown here would violate Section 216(d) [of the Interstate Commerce Act]." The Court then found that

> . . .we have a well-coordinated and smoothly functioning plan for continuous cooperative transportation services between the terminal, the restaurant and buses like Trailways that made stopovers there . . . . This bus terminal plainly was just as essential and necessary, and as available for that matter, to passengers and carriers like Trailways that use it, as though such carriers had legal title and complete control over all of its activities . . . .

Mr. Justice Whittaker, joined by Mr. Justice Clark, filed a dissenting opinion, voicing objections to the Court's consideration of the question of violation of the Act since that issue had not been raised by petitioner. The dissenters further held that Sec. 203(a)(19) of Part II of the Interstate Commerce Act (29 U.S.C. 303(a)(19)) requires that the restaurant be "operated or controlled by any [motor] carrier or carriers, and used in the transportation of passengers or property in interstate or foreign commerce, "in order to establish petitioner's right to remain and be served in the restaurant. The majority opinion had held that the fact that under that section the protection of the Act includes facilities which are so operated does not exempt carriers from their duty under Sec. 216(d) "not to discriminate should they choose to provide their interstate passengers with services that are an integral part of transportation . . . ."

Staff: Philip Elman, Richard Medalie (Sol. Gen. Office); Harold H. Greene, David Rubin, Gerald P. Choppin (Civil Rights Division).

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CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

CUSTOMS

Summary Judgment for Full Personal Penalty Value Following Redemption by Claimant of Jewelry at Appraised Value. United States v. Mrs. Dora F. Dodge (E.D. Mich.). Upon her arrival within the United States in 1957, Mrs. Dodge failed to declare jewelry appraised at $16,600, in violation of 19 U.S.C. 1497. To avoid a forfeiture, she redeemed the jewelry by paying $16,600 to the Government, the libel against the jewelry then being dismissed on the Government's motion. In that motion, it was stated that the redemption of the jewelry by the claimant did not affect her liability for the personal penalty under 19 U.S.C. 1497. There was thus posed the question of whether the Government was entitled to pursue both remedies.

On November 21, 1960, in the suit for penalty value, Chief Judge Theodore Levin, having determined that there was no genuine issue as to the material facts, granted the Government's motion for summary judgment made pursuant to Fed. R. Civ. P. 56, and ordered that the Government is entitled to judgment in the sum of $16,600, together with costs of $17.

This case, in addition to United States v. Samuel Leiser (S.D. N.Y.), discussed in the United States Attorneys Bulletin for June 17, 1960, Vol. 8, No. 13, pp. 411-412, should be a noteworthy deterrent to smugglers who reckon the added hazard and substantial cost of personal penalties under 19 U.S.C. 1497, that is, forfeiture of the undeclared articles and the penalty equal to their value.

Staff: United States Attorney George E. Woods, Jr.; Assistant United States Attorney John R. Jones (E.D. Mich.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Judicial Review of Deportation Order; Voluntary Departure - Alien "ship jumper" - Discretionary denial; Scope of review. Loconte v. Pederson (S.D. Ohio, Nov. 30, 1960.) Plaintiff admittedly "jumped ship" to remain in the United States as long as possible after he was admitted as a non-immigrant purportedly seeking only temporary shore leave. His only relative in the United States is an uncle, and his wife and two children are citizens and residents of Italy.

He was in this country nearly four years before he was apprehended and at his administrative hearing he conceded deportability and applied for voluntary departure at his own expense.

That relief was denied to him by the special inquiry officer as a matter of discretion because plaintiff by his admitted desertion wilfully violated the trust imposed in him as a nonimmigrant crewman that he would leave the United States within twenty-nine days, or when his ship left, whichever occurred earlier. He was then ordered deported.

When his appeal from that order was dismissed he sought judicial review of the order and in particular the denial of voluntary departure.

The Court found that the administrative declination to exercise the discretion of the Attorney General under section 244(e) of the 1952 Act (8 U.S.C. 1254(e)) in plaintiff's favor was neither arbitrary nor capricious nor, under the circumstances of the case did it constitute an abuse of discretion.

Temporary injunction vacated and summary judgment for defendant.

Judicial Review of Deportation Order; Concept of "meaningful association" in Rowoldt; Burden of Rebutting Presumption. Gastelum-Quinones v. Rogers (C.A. D.C., Dec. 8, 1960, 29 LW 2269.) Appellant appealed from a district court dismissal of his complaint for review of a deportation order based on his voluntary membership, after his entry into the United States, in the Communist Party.

At his administrative hearing he invoked the Fifth Amendment and refused to testify. His administrative appeal from the deportation order was dismissed by the Board of Immigration Appeals.

A month later the Supreme Court rendered its decision in Rowoldt v. Perfetto, 355 U. S. 115, and, at appellant's request, the Board reopened the case to permit him to present such evidence as might be appropriate

to place his case within the framework of Rowoldt. At his reopened hearing he neither presented evidence nor testified but relied on his contention that the evidence did not establish the "meaningful association" adverted to in Rowoldt and, therefore, that it was unnecessary to offer any further evidence.

The special inquiry officer reaffirmed his original findings and conclusions and again entered an order of deportation. The appeal from that order was dismissed as was the complaint seeking judicial review which followed.

The Court of Appeals said that "since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation, the Government having made a prima facie case by proving voluntary membership. We think that the findings of the Board that appellant's Party membership was meaningful is established by the record, and since appellant here failed to offer any evidence whatsoever, the presumption must stand."

It added that neither it nor the Board drew any inference from the fact of the alien's silence and it need not, under the circumstances of this case, determine whether such an inference may be drawn.

Affirmed.

NATURALIZATION

Good Moral Character; Non-support of Minor Children. Petition of Dobric. (D. Minn., Dec. 21, 1960.) Petitioner for naturalization came to the United States as an immigrant in 1952. His wife remained in Italy with their two infant children. In 1954, in Chicago, Illinois, he divorced her and remarried in Minnesota in 1956. His petition for naturalization was filed on July 15, 1957.

Prior to his second marriage he sent money to Italy from time to time for the support of his minor children. This was in amounts of two to ten dollars and after July 1956 he sent none despite a request from his wife through the Italian Consul at Chicago for more support.

The Court was convinced that the petitioner evaded his solemn obligation adequately to support and care for his infant children and that he could have done so out of wages earned in the United States. (Petitioner testified that he had an annual income of "around $3000.")

The Court said that, as a husband, he had the right to choose his place of domicile and to withhold support from a wife who failed to abide by it, but that her deficiency in that respect afforded no justification for his failure to support his infant children whom she retained in Italy. Such shortcomings of the parents must not be visited upon the innocent children.

He was and is obligated by all applicable law, natural, human, and moral and divine to protect, support and care for his infant children and, failing that he has not established the requisite good moral character for naturalization.

Petition denied.

Derivative Citizenship - Loss by Revocation of Father's Naturalization; Ineligible to Citizenship - Neutral Alien; Savings Clause 1940 Act. Matter of Joseph Estevez (E.D. Pa., Dec. 9, 1960.) Petitioner for naturalization was born in Spain in 1916, came to the United States with his father in 1932, and has remained in this country since that time. His father, who was naturalized in 1932, returned to Spain permanently in 1933. On June 5, 1940 suit was instituted to revoke his naturalization and that was accomplished in 1941. In 1943 petitioner applied for and received exemption from service in the United States armed forces as a neutral alien.

While under section 338(d), Nationality Act of 1940 (8 U.S.C. 738 (d)) derivative rights of a child are not extinguished by the revocation of the parents' naturalization unless it be on the grounds of actual fraud, the Court held that the 1940 Act savings clause, section 347(a) - 8 U.S.C. 747 (a) - preserved the revocation suit commenced prior to the enactment of the 1940 Act and its effect must be determined under the law when it was commenced.

The greater weight of authority in determining the law prior to 1940 has held that derivative citizenship was lost if the person through whom citizenship was derived had his certificate revoked for either actual or presumptive fraud. Since petitioner's father failed to return to the United States it is presumed that he obtained his certificate by fraud and petitioner cannot be said to have retained his derivative citizenship by virtue of the old law.

However, the Court found him ineligible for naturalization, in spite of several appealing factors, for having made an "intelligent choice" in applying for exemption from military service as a neutral alien in 1943 (which was granted) and not being saved from the operation of that disability by the holding in Moser v. U. S., 341 U.S. 47.

Petition denied.

FINES

Administrative Fine - Stowaways; Materiality of Line's Lack of Knowledge and Search of Vessel. Grace Line, Inc., v. White (S.D. Calif., Dec. 5, 1960.) Three Ecuadorian nationals stowed away on plaintiff's vessel and illegally entered the United States at Los Angeles Harbor on March 7, 1959. Subsequently plaintiff was fined $3,000 by the Service pursuant to section 273(d) of the 1952 Act (8 U.S.C. 1323(d)). Plaintiff opposed assessment of the fine on the grounds that it, and the officers and crew

of its vessel, had no knowledge of the existence of the stowaways on board and that due diligence had been exercised in searching the vessel for stowaways. The Service took the position that due diligence and lack of knowledge were not defenses to assessment of the fine.

Having exhausted its administrative remedies, plaintiff, on May 11, 1960, paid to defendant (Collector of Customs) the $3,000 fine and brought this action to recover it. The Court held that section 273(d) imposes a fine for failure to detain stowaways aboard plaintiff's vessel, and that plaintiff's lack of knowledge of the existence of the stowaways and its efforts in searching the vessel previously for possible stowaways are not material, nor are they elements to be considered in the imposition of the fine.

Summary judgment for defendant.

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Valuation of Mining Claims. United States v. Silver Queen Mining Company (C.A. 10). In 1959 the United States condemned the fee title to land contained in four patented mining claims owned by the Silver Queen Mining Company. The claims had lain dormant from about 1910, when there had been some financially unsuccessful operations, to 1941, when the United States acquired temporary use of the property. Witnesses for the owner testified that such claims were not bought and sold for cash but that they were sold on various "lease-option" arrangements. Option prices of from $175,000 to $250,000 were testified to by witnesses for the owner. The propositions of which they were testifying contemplated that the options would be exercised only if future exploration proved ore in commercial quantities and the future market conditions warranted exercise of the option. It was admitted that no substantial down payment would be made under such option arrangements. No evidence on behalf of the owner was directed to the cash value which would be paid on the market at the time of the taking. Government witnesses testified that the properties had no value as mining properties and had value of from $1,500 to $2,000 as desert land. A jury awarded $50,000 as just compensation and judgment was entered in that amount. The Government appealed primarily on the ground that the proper measure of just compensation, i.e., the fair market value of the property at the date of taking paid in cash or the equivalent of cash, was not applied. Other grounds for reversal included errors in the charge to the jury, erroneous curtailment of direct examination into a material matter, undue restriction of cross-examination, refusal to give requested charges, erroneous rulings on evidence, and undue actions of the trial court which were prejudicial to the Government's cause.

The Court of Appeals affirmed. The position taken by the Court of Appeals is readily reflected in four sentences from its opinion as follows:

> Emphasis is placed upon the complete absence of an expert opinion upon cash market value and upon the speculative nature of the opinions of values received. And viewed from a purely academic and definition-bound aspect it would be naive to deny the merit of the government's argument. We believe, however, such approach to be too narrow under the circumstances of this case. * * * Some speculation is inherent in the ascertainment of value of all resource property, be it mineral, oil, gas or otherwise, and if the quality of proof of value follows the custom of the industry, is the best available, and is sufficient to allow the jury or court to make an informed estimate as to the fact of value, such proof is sufficient to meet the burden.

The Court of Appeals also expressly found merit in some of the other assignments of error by the Government but held that they did not warrant a

reversal of the judgment. It has not yet been determined whether certiorari will be sought.

Staff: Harold S. Harrison (Lands Division)

Attorneys in Suit to Secure Indian Allotments Cannot Obtain Judgments for Legal Fees Against Members of Tribe Who Did Not Directly or Inferentially Authorize Performance of Legal Services. Preston v. United States (C.A. 9, Nov. 30, 1960). This proceeding was ancillary to the last of the several cases about allotment of the Palm Springs (Agua Caliente) Indian Reservation. The question in this appeal was whether the appellants, attorneys for the plaintiffs in this suit, were entitled to a judgment for attorneys' fees. In essence, the attorneys were claiming that because of their legal services in this and preceding litigation they had secured the allotment of the reservation. Therefore they claimed to be entitled to a judgment against all members of the tribe, most of whom had never retained these attorneys, and to a lien against all tribal lands both allotted and unallotted. The attorneys had already received fees from the plaintiffs who had employed them.

The district court dismissed the attorneys' petition for supplemental fees and quashed a lis pendens covering all tribal lands that had previously been filed. On appeal the Ninth Circuit held it had jurisdiction on the "collateral orders" theory of Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546-547 (1949), and that the attorney himself may appeal from an order awarding or denying him fees. The Court of Appeals held against the attorneys, primarily on the fact that the district court had no jurisdiction over other members of the tribe, who were not parties to this suit. This was not a class action. The Court went further and said even if the district court "acquired jurisdiction of the person, it would still be lacking in power to grant a money judgment against any member of the Band in circumstances wherein it is not claimed that petitioning attorneys were authorized directly or by implication to perform the services * * *." The Court held the present case was clearly distinguishable from those cases where one of several owners has brought common property into court to prevent its dissipation. Finally, the Ninth Circuit held that there was no basis for a lien without an order for attorneys' fees, and that the lis pendens for attorneys' fees is not effective in California.

Staff: A. Donald Mileur (Lands Division)

RULE 60(b), F.R. Civ. P., Motion to Vacate Judgment; Insufficient Grounds. John B. Kathe v. United States (C.A. 9, Dec. 5, 1960). Appearing pro se, appellant had unsuccessfully petitioned the district court to vacate its judgment entered almost four years earlier. The judgment referred to had resulted in the award of just compensation to appellant for the temporary taking of his land. Appellant had consented to the entry of the judgment without a trial and had also accepted full payment of the award and had executed a receipt in satisfaction of the judgment. Appellant contended in his petition that he had been deprived of just compensation and had been deceived and harassed into accepting the award,

and now wished to have a trial on the issue of just compensation. In affirming, the Court of Appeals considered the petition as a motion under Rule 60(b) (1) and (3) to vacate judgment. The Court held that since the motion was filed after the one year provided in the Rule had expired, the district court was without jurisdiction. Only because appellant appeared pro se did the Court of Appeals then consider the merits of the case in detail before deciding that the petition presented no grounds under Rule 60(b) to vacate the judgment.

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

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TAX DIVISION

Acting Assistant Attorney General Abbott M. Sellers

CIVIL TAX MATTERS
District Court Decisions

Liens; for taxes on Life Insurance Attaches Only to Right as Established by State Law; No Marshalling of Assets Where Insurer Has Made Loans. United States v. Marie F. Pilley, et al. CCH 60-2, USTC par. 9794 (W.D. Tenn.) This was an action to foreclose a tax lien levied on the cash surrender value of life insurance policies, the face value of which had been paid over to the beneficiary at the death of the insured. There was no dispute as to the facts and the Court heard a motion for summary judgment. The Court held that the lien attaches only to the net cash values at the date of death; that the federal tax lien statute creates no rights and that the lien attaches to the rights created under state law. The borrowing against the surrender value by the insured was an election to receive an advance which lessened the value of the insurance contract as well as the surrender value.

The doctrine of marshalling of assets, when the face value less the amount of the loans was paid on the death of the insured, is not involved in this case, according to the Court, distinguishing the present action from previous decisions. The Court on its own motion amended the order awarding to the United States the difference between the cash surrender value and the amount of the loans.

Staff: United States Attorney Warren Hodges, and Assistant United States Attorney Edward N. Vaden (W.D. Tenn.); Mark S. Charwat (Tax Division)

Injunctions; Suit to Restrain Collection of Taxes Not Prohibited by Section 7421 of Internal Revenue Code for 1954 Where Evidence Shows Alleged Transferee Received No Funds from Original Taxpayer. Mattie Bell Anderson Clay v. Bookholt, and Mattie Bell Anderson Clay, as guardian, v. Bookholt, 6 AFTR 2d 5830 (N.D. Ga.) These two actions, joined for trial, sought to restrain the District Director of Internal Revenue from proceeding against property held by plaintiff for herself or as guardian for her children. The original taxpayer married plaintiff after the events which pertained to the taxes. The original taxpayer made small loans, taken in the name of plaintiff both as individual and as guardian. Assessments were made against the original taxpayer and also against the plaintiff in both capacities, as transferee.

A Special Master took evidence and found that plaintiff, as individual and as guardian, did not receive funds from the original taxpayer but was given funds by her father and mother. The Court adopted findings and held that, since plaintiff received no funds

from the original taxpayer, she was not a transferee. Therefore, the assessments, purported lien and warrant of distress were null and void. Although the Government contended the action was prohibited by Section 7421 of the Internal Revenue Code of 1954, the Court found extraordinary circumstances which exempted the action from the provisions of such section.

Staff: United States Attorney Charles D. Read, Jr., and Assistant United States Attorney Slaton Clemmons (N.D. Ga.), John J. Gobel (Tax Division)

Enforcement of Internal Revenue Summons; Oral Examination of Taxpayer's Attorney as Witness Against Taxpayer: Examination of Taxpayer's Books and Records in Possession of Taxpayer's Attorney; Claims of Attorney-Client Privilege and Incrimination of Taxpayer Rejected. In the Matter of Sidney Blumenthal, (S.D., N.Y., October 10, 1960.) An administrative summons was served upon taxpayer's accountant-attorney directing him to appear before an agent of the Internal Revenue Service to give testimony pertaining to the income tax liability of the taxpayer and to produce all related books and records in his possession. The witness refused to comply and a motion was filed under Sec. 7604, Internal Revenue Code, 1954 to enforce the summons. The motion was resisted on the ground of attorney-client privilege and the taxpayer's privilege against self-incrimination.

The Court rejected both contentions. As to the claim of attorney-client privilege, the Court pointed out that a client's papers are not confidential communications, citing Grant v. United States, 227 U. S. 74; Falsone v. United States, 205 F 2d 734 (C. A. 5), certiori denied, 346 U. S. 864 and United States v. Willis, 145 F Supp 365 (M.D. Ga.).

As to the claim that the papers if produced might incriminate the taxpayer, the Court observed that the privilege against self-incrimination (Fifth Amendment) is purely personal and is not extendable in favor of some third person who might be incriminated even though the witness is an agent of that third person. Hale v. Henkel, 201 U. S. 43, 69. The Court further indicated that the evidence showed that the witness was no longer acting as the taxpayer's attorney so that the witness was thus asserting the privilege of a custodian on behalf of another for whom he (the witness) could not claim to speak.

As to the oral communications between the witness and the taxpayer, the Court concluded that if the questions propounded to the witness should call for answers that would violate the attorney-client privilege, it would be then time enough to refuse to answer the particular questions after the witness first appeared in compliance with the summons since no forecast could be made as to the particular

subjects on which the witness would be interrogated. Hoffman v. United States, 341 U. S. 479, 486.

Staff: United States Attorney S. Hazard Gillespie, Jr. and Assistant United States Attorney Anthony H. Atlas (S.D. N.Y.) Clarence J. Nickman (Tax Division)

Court of Claims Decision

Deductions From Gross Income; Legal Expenses Incurred in Attempting to Forestall Return of Indictment For Criminal Tax Evasion. L.M. and Reba A. Tracy v. United States (Ct. Cl., December 1, 1960). This case involves an attempt by a taxpayer to deduct legal fees expended by him in an effort to avoid being indicted for criminal tax evasion. It has been fairly well settled that legal fees for an unsuccessful defense of a criminal prosecution are not deductible, but this case presented a situation where the fees were incurred prior to prosecution. After the taxpayer, L. M. Tracy, was notified that it had been decided to prosecute him for criminal tax evasion, he employed an attorney in Phoenix, Arizona, and a Washington law firm for the purpose of attempting to persuade the administrative officials that he should not be criminally prosecuted. Nevertheless, an indictment was returned and the services of the Washington attorneys were immediately terminated. Taxpayer subsequently pleaded guilty. There was no evidence that the attorneys' services were involved in any way with a determination of the taxpayers' civil liability for which a deduction might be allowable. The Court of Claims held that the amounts paid for legal fees were not deductible from gross income because they constituted personal expenses of the taxpayer. It indicated that if taxpayer had been acquitted, then it would probably have held that the legal fees were necessitated by the business of the taxpayer and therefore deductible. However, under the circumstances of the case, since the taxpayer did enter a plea of guilty to the indictment for criminal tax evasion, the Court held that the fees were directly related to the taxpayers' personal misconduct and therefore could only be characterized as non-deductible personal expenses.

Staff: Myron C. Baum and Robert Livingston (Tax Division)

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