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UNITED STATES ATTORNEYS

BULLETIN

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PRINTING

It appears that some United States Attorneys are having contract field printers do printing which is not covered by the terms of their contracts. United States Attorneys are reminded that field printing contracts are limited to the printing of briefs, records, and other legal exhibits. All other printing should be obtained through regular channels in the Department from the Government Printing Office.

Attention is invited to the instructions on printing set out in Title 8, pp. 114-116, United States Attorneys Manual.

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UNITED STATES ATTORNEYS MANUALS

United States Attorneys and their Assistants who are resigning should not take United States Attorneys Manuals with them for their private use. The Manual is Government property and must be turned in upon leaving Government service, as is any other piece of Government property. Moreover, the taking of such Manuals is pointless, as without the addition of the correction sheets, which are issued monthly, the Manual is obsolete.

Administrative personnel and those in charge of keeping track of Manuals in each office should make sure that all Manuals are accounted for.

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COMMENDATORY LETTERS

In forwarding commendatory letters in which more than one individual is mentioned, it will be appreciated if a copy of the letter can be forwarded to the Executive Office for United States Attorneys for each person mentioned. Thus, where three individuals are commended three copies of the letter should be forwarded, so that a copy may be placed in each individual's official personnel file.

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JOB WELL DONE

The General Counsel, SEC, has commended Assistant United States Attorney Joseph S. Mitchell, Jr., District of Massachusetts, for the expeditious and capable manner in which he handled a recent case. The

letter stated that the Commission is most appreciative of the excellent cooperation extended to them in this and other Commission cases.

Assistant United States Attorney D. Arthur Connelly, Northern District of Illinois, has been commended by the District Supervisor, Bureau of Narcotics, for his exemplary handling of a recent case. The letter stated that through Mr. Connelly's attention to detail, extensive pre-trial preparation, and orderly and concise presentment of the evidence, the Government's case was placed before the jury in its best light. The letter further stated that it was an extreme pleasure to work with Mr. Connelly and congratulated him for his fine efforts in this matter.

The General Counsel, SEC, has expressed sincere appreciation for the able prosecution of a recent case handled by former Assistant United States Attorney John A. Guzzetta and Assistant United States Attorney Richard C. Casey, Southern District of New York.

The FBI Director and Special Agent in Charge have congratulated Assistant United States Attorney Charles N. Shaffer, Jr., Southern District of New York, for the splendid manner in which a recent case was handled. The letter stated that the successful outcome of this case, which resulted in eight guilty pleas and one conviction, was directly attributable to Mr. Shaffer's efforts in preparing and presenting the matter in court, and that such results reflect highly upon his ability.

The Assistant General Counsel, HEW, has commended United States Attorney Frank O. Evans, Jr. and Assistant United States Attorney John C. Bracy, Middle District of Georgia, for their very able and enthusiastic handling of three criminal prosecutions under the Federal Food, Drug, and Cosmetic Act, and has expressed sincere appreciation for the efficient manner in which these cases were prosecuted.

United States Attorney Robert Vogel, District of North Dakota, has been congratulated and commended by the General Counsel, SEC, for the successful conclusion of a recent case in which the last remaining defendant was convicted. In terming Mr. Vogel's work a job exceptionally well done, the General Counsel stated that the Commission is greatly indebted to him for his arduous efforts, and that the successful results obtained truly reflect the great skill with which he conducted the prosecution.

Assistant United States Attorney Gideon Cashman, Southern District of New York, has been commended by the FBI Special Agent in Charge, for the excellent manner in which he handled the prosecution of a recent case involving a theft from interstate shipment. The letter stated that through Mr. Cashman's efforts two defendants, known as members of the criminal element, were induced to become Government witnesses and that their testimony was instrumental in the conviction of the remaining two defendants. The letter also stated that the cooperation extended agents of the FBI, by Mr. Cashman, in the investigation was greatly appreciated.

Assistant United States Attorney Edward L. Stahley, Northern District of Florida, has been commended for his outstanding services in the preparation and trial of a case involving five defendants charged with conspiracy to transport motor vehicles interstate, and the sale and receipt of such vehicles so transported. The indictment contained thirty-three overt acts and eight counts. One defendant pleaded guilty and two others were convicted after a three-day jury trial. The commendation stated that the successful prosecution would not have been possible without Mr. Stahley's fine cooperation during the many conferences held with the witnesses and the actual trial, that his work in the preparation of the trial brief was invaluable, and that the professional services he rendered exhibited his keen analysis of the complicated and detailed facts involved. Mr. Stahley was also commended for his assistance in ten trials which lasted three weeks and which involved intricate mail fraud cases. The commendation stated that his successful prosecution of these cases resulted from his careful preparation of the trial briefs and his competent trial work.

The Assistant General Counsel, Department of Agriculture, has commended Assistant United States Attorney Philip E. Melangton, Jr., Southern District of Indiana, for his outstanding work in a recent matter involving a referendum to be held among the milk producers by the Department of Agriculture, against which referendum a restraining order was issued by the state court. Within two hours of receiving the matter, Mr. Melangton had drafted and filed the necessary papers to remove the action to Federal court, and to stay the state court's restraining order. The following morning, after a brief discussion by telephone with the Department of Agriculture in Washington, Mr. Melangton argued the matter at 9:30 a.m. and, despite vigorous opposition by opposing counsel, was sustained by the court. The commendation stated that without such expedition and skill the referendum probably could not have been held on the scheduled date, at a very considerable inconvenience and damage to approximately 3,000 producers in three states who would have appeared at some 83 polling places to no avail. The Assistant General Counsel expressed sincere appreciation for Mr. Melangton's intelligent, capable and expeditious handling of a matter on which he had very short notice, and with which he was not previously familiar, and for his fine spirit and public service in cancelling personal engagements for the evening so that the necessary removal and stay papers could be prepared and the matter argued the next morning.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

Ordering Forms Stocked by Administrative Office of the United States Courts

United States Attorneys Bulletin Volume 5, No. 19, Page 580, dated September 13, 1957, instructed United States Attorneys to order "Court" forms from the Administrative Office of the United States Courts or the Clerk. The Administrative Office of the Courts has requested that such forms be obtained in the future through the Clerk or other court officer for whom the forms are provided and not through the Administrative Office of the United States Courts.

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys' Offices have been issued since the list published in Bulletin No. 3, Vol. 9, dated February 10, 1961.

ORDERS	DATED	DISTRIBUTION	SUBJECT
228-61	2-1-61	U.S. Atty & Marshal	Designating Harold F. Reis to act as Assistant Attorney General in charge of Office of Legal Counsel
229-61	2-8-61	U.S. Atty & Marshal	Placing Assistant Attorney General William H. Orrick, Jr., in charge of Civil Division
230-61	2-10-61	U.S. Atty & Marshal	Placing Assistant Attorney General Louis F. Oberdorfer in charge of the Tax Division
231-61	2-10-61	U.S. Atty & Marshal	Placing Assistant Attorney General Nicholas deB. Katzenbach in charge of Office of Legal Counsel

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MEMO	DATED	DISTRIBUTION	SUBJECT
289	1-31-61	U.S. Marshals	Prisoner Record and Reporting System -- Revised "jail" and "in-transit" card forms.

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ANTITRUST DIVISION

Acting Assistant Attorney General W. Wallace Kirkpatrick

Compelling Witness to Answer Under Antitrust Immunity Statute - Garment Trucking Grand Jury (S.D. N.Y.). In connection with the grand jury investigation of possible violations of the antitrust laws in the New York garment trucking industry, a subpoena was addressed to an officer of a trucking concern. It directed his appearance before the grand jury to testify "in regard to an alleged violation of the federal antitrust laws."

The witness had been investigated in 1958 by the United States Attorney (S.D. N.Y.) because of records indicating questionable payments by his company to a union official and an alleged racketeer. The 1958 inquiry was blocked by the witness' invocation of the Fifth Amendment.

There has been every indication that the payments in question were in exchange for the union official's influence in preventing the trucker's customers from changing to competitive truckers. Consequently, the witness was subpoenaed to testify on January 25, 1961 before a grand jury investigating possible violations of the antitrust laws. When the witness was questioned about the payments and the persons to whom the payments were made, he refused to answer claiming that the questions relating to these payments were not matters involving possible violations of the antitrust laws but rather questions involving possible violations of other criminal statutes. He claimed that the immunity granted to him under the antitrust immunity statute (14 U.S.C. 32) does not give him immunity from prosecution as to matters which may be violations of criminal statutes other than the antitrust laws.

Upon the witness' continuing refusal to answer, a hearing was held on January 26, 1961 before Judge Dawson on the Government's application for an order compelling the witness to answer the questions involved. Judge Dawson ruled that since the witness had been subpoenaed to testify before a grand jury investigating violations of the antitrust laws, the immunity granted by 15 U.S.C. 32 would cover any matters coming within any criminal statute concerning which the witness was compelled to testify. The Judge directed the witness to answer.

In support of his ruling, Judge Dawson stated that the broad immunity granted under the antitrust immunity statute is "clear" since it provides that "No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise..."

Staff: John D. Swartz, Joseph T. Maioriello, Donald A. Kinkaid (Antitrust Division)

CLAYTON ACT

Complaint Under Section 7. U.S. v. American Smelting and Refining Co., et al., (S.D. N.Y.). On January 19, 1960, a complaint was filed charging the American Smelting and Refining Company with violation of Section 7 of the Clayton Act through acquisition of stock of General Cable Corporation and Revere Copper and Brass, Inc., also named as defendants. The complaint alleges that these stock acquisitions by American Smelting and Refining have resulted in the actual and potential foreclosure of General Cable and Revere as competitive purchasers of refined copper.

American Smelting is alleged to be the largest domestic smelter and refiner of copper, and a leading producer of copper and other nonferrous metals, having 15 per cent of the total domestic smelting capacity and 27 per cent of the refining capacity of electrolytic copper. It is the major participant in the recent development of Peruvian ore reserves by the Southern Peru Corporation. The output of the Southern Peru mines, which commenced operations early in 1960, is estimated at over 100 thousand tons annually. According to the complaint, in 1959 American Smelting had assets listed at more than $443 million and net sales of more than $390 million.

General Cable is one of the largest domestic fabricators of wire and cable, primarily engaged in the manufacture, distribution and sale of copper wire and cable. It is also one of the major domestic producers of aluminum and cable products. In 1959 it had assets listed at approximately $130 million and net sales of more than $170 million.

Revere Copper and Brass is one of the leading domestic fabricators of copper and copper-base alloy mill products. It is also a large fabricator of nickel-silver, aluminum and steel products. In 1959 Revere had assets listed at more than $135 million and net sales of more than $245 million.

Commencing in 1927, American Smelting and Refining began to acquire stock in the two fabricating companies and at present controls approximately 30% of the voting stock in General Cable and 35% of the voting stock in Revere. It is also alleged that both General Cable and Revere purchase substantial amounts of refined copper from American Smelting and Refining.

It is asserted that the business of copper mining, smelting and refining in the United States is highly concentrated, and that this concentration is coupled with a high degree of integration, placing the mining, smelting, refining and fabrication of copper and copper-base products in the hands of a few major producers.

According to the complaint, acquisitions of fabricating facilities by the major copper producers have had the effect of placing independent fabricators in the position of having to compete with their own suppliers.

The complaint alleges that the cumulative effect of these acquisitions in the already concentrated copper industry has been to lessen and will substantially lessen actual and potential competition and tend to increase monopoly. The prayer for relief asked that Asarco be required to divest itself of the stock and assets acquired in the transactions listed in the complaint; that it be enjoined from similar acquisitions without court approval; and that the companies of which it unlawfully gained control be enjoined from purchasing materials from Asarco on other than a freely competitive basis.

Staff: Bill G. Andrews, Arthur H. Kahn and Charles A. Degnan (Antitrust Division)

Complaint Under Section 7. U.S. v. General Cable Corp. (S.D. N.Y.). A companion case to U.S. v. American Smelting and Refining Co., et al. was filed charging the General Cable Corporation with violating Section 7 of the Clayton Act through acquisition of nine corporations engaged in phases of the wire and cable industry or related activities.

General Cable is primarily engaged in the manufacture, distribution and sale of copper wire and cable, as well as a major domestic producer of aluminum wire and cable products. It is the largest producer of copper and aluminum wire and cable in the United States with 1959 assets listed at approximately $130 million and net sales of more than $170 million.

The acquisitions made by General Cable since June of 1955, were General Insulated Wire Works (1955); New England Cable Company, Clifton Conduit Company, Clifton Conduit Company, Inc., Alphaduct Wire & Cable Company (1956); Metal Textile Corporation (1957); Hathaway Patterson Corporation (1958); Cornish Wire, Incorporated and Indiana Steel & Wire Company, Inc., (1959).

It is alleged that the cumulative effect of these acquisitions by General Cable, already one of the two largest domestic fabricators of electric wire and cable, may substantially lessen competition or tend to create a monopoly in the manufacture, distribution and sale of electric wire and cable. The prayer for relief asks that General Cable be required to divest itself of the stock and assets unlawfully acquired; that it be enjoined from similar acquisitions without court approval; and that the companies unlawfully acquired be enjoined from purchasing materials from General Cable on other than a freely competitive basis.

Staff: Bill G. Andrews, Arthur H. Kahn and Charles A. Degnan (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

SUPREME COURT

GOVERNMENT CONTRACTS

Contract With United States Unenforceable Because Government Representative Who Participated in Negotiations Had Indirect Interest In It. United States v. Mississippi Valley Generating Co. (January 9, 1961). In 1954 the Bureau of the Budget and the Atomic Energy Commission began discussions with Middle South Utilities, Inc., a utility company headed by Edgar H. Dixon, concerning a proposal under which a private plant was to be built to furnish electric power to the Atomic Energy Commission. The Commission, in turn, was to transfer the power to the Tennessee Valley Authority for sale to consumers in Memphis, Tennessee. For these negotiations the Bureau of the Budget retained the services of Adolph H. Wenzell, a Vice President and Director of the First Boston Corporation, an investment bank. Wenzell was to encourage the utility executives to develop their proposal and to advise the Government on interest costs. The Southern company, headed by Eugene Yates, ultimately joined in the proposal and the sponsoring utility group became identified as "Dixon-Yates." Between January 20, 1954 and April 10, 1954, when Wenzell believed his services as a consultant to have terminated, he contacted Dixon-Yates representatives and officials of the Bureau of the Budget and the Atomic Energy Commission on numerous occasions. In these contracts the terms of the proposal were being formulated, analyzed and negotiated. While he was participating, Wenzell arranged for First Boston to furnish financial information to Dixon-Yates. It soon became clear that Wenzell's company, First Boston Corporation, would probably receive the agency for financing. This induced Dixon to question the propriety of Wenzell's participation in the negotiation. Wenzell was subsequently advised by First Boston's lawyers to resign forthwith in writing from his position as a consultant to the Government. He did not do so.

After an acceptable proposal had been developed by the sponsors, and after Wenzell had left the public service, a written contract was negotiated between the Atomic Energy Commission and Dixon-Yates. This contract was terminated by the Government in August 1955 when the City of Memphis decided to build its own municipal power plant to meet local needs. In the meantime, Wenzell's participation in the transaction had been exposed and had become the subject of hearings before a committee of Congress. Discussions between the Atomic Energy Commission and Dixon-Yates for the purpose of determining termination costs under the cancelled contract ended on November 23, 1955 when the Atomic Energy Commission concluded that the contract was not an obligation which could be recognized by the Government. This conclusion was based upon the fact that Wenzell's participation in the negotiations was in violation of 18 U.S.C. 434, a statute which makes it a crime for anyone directly or indirectly interested in the profits or contracts of any business entity to act for the United States in the transaction of business with such business entity.

The Dixon-Yates group filed suit in the Court of Claims for breach of contract seeking recovery of their out of pocket expenses. A divided court (3-2) held that there was no conflict of interest and that the contract was enforceable against the United States.

Upon a writ of certiorari, the Supreme Court reversed this judgment. It held that Wenzell's position with the First Boston Corporation, the probable financial agent for the project, gave him an indirect interest in the contract in violation of 18 U.S.C. 434. Although no loss, corruption or unfairness was shown by the Government and although Wenzell's dual status was known to his superiors in the Bureau of the Budget (but not to the contracting agency, the Atomic Energy Commission), these facts do not make the contract enforceable. The statute is intended to prevent Government representatives from any tendency toward corruption; no loss need be shown, and knowledge by an employee's superior does not excuse his violation of the statute. Since the statute was violated by Wenzell, the contract, which was influenced by his activities, is tainted by a prohibited conflict of interest and is, therefore, unenforceable under the public policy expressed in the statute. Mr. Justice Harlan, with whom Justices Whittaker and Stewart joined, dissented on the ground that the probability that First Boston would receive the financing agency (i.e., a subcontract) did not constitute an indirect interest in the contract in view of the absence of a commitment, arrangement, or understanding to that effect between Dixon-Yates and First Boston.

Staff: Former Solicitor General J. Lee Rankin; Oscar H. Davis and Richard J. Medalie (Office of the Solicitor General); Howard E. Shapiro (Civil Division)

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

Federal Law of Damages Used in Determining Pecuniary Injuries for Wrongful Death in Alabama. Hoyt v. United States (C.A. 5, January 20, 1961). Plaintiff's son, aged 7, was killed on a military reservation in Alabama by the collapse of the walls of a drainage ditch in which he was playing. In an action for wrongful death, the district court found that the United States was guilty of negligence proximately causing the death. Recovery under the Alabama wrongful death act is strictly punitive in nature. Under 28 U.S.C. 2674, however, only damages for pecuniary loss may be awarded. The district court found that the only pecuniary damages suffered by plaintiff, as father of the decedent, were funeral expenses. Plaintiff appealed on the ground that the damages awarded were inadequate, and not in accordance with the standards prescribed by 28 U.S.C. 2674.

The Court of Appeals reversed. It first examined the Alabama cases which were decided when Alabama provided for compensatory damages in wrongful death cases. Under these cases the pecuniary benefits were measured only during the minority of the child. Since these cases were

"of ancient vintage," and since the court believed that Congress did not intend to have damages measured by "a handful of 50 year old cases," the Court held these authorities inapplicable. The Court found that Congress had rejected the state measure of damages, and had imposed a federal standard to be construed in accordance with federal law, in those states which have punitive damages. Under federal law, the Court found that damages should be the equivalent to the reasonable expectation of pecuniary benefits over the joint lives of the decedent child and the parent. The Court also rejected a contention that the parent's expenses of raising the child should be set off against the pecuniary benefits the parent could expect to receive from the child. It found such an argument "cold-blooded" and believed that Congress intended no such deduction to be made.

Staff: United States Attorney Hartwell Davis and
Assistant United States Attorney Paul L. Millirons
(M.D. Ala.)

FOREIGN LITIGATION

Austrian Court, in Suit Against United States, Finds Defective Service Cured by Actual Notice. Katlein Construction Firm v. United States (Court of Appeals, Vienna, Austria, December 15, 1960). Plaintiff, splitting its cause of action to save court expense under Austrian Law, sued for a "preliminary judgment" for 98,209 Austrian Shillings ($3,928) comprising legal interest for three months on 9,800,000 AS ($392,000) said to be due under a contract for the construction of a housing project for the United States Embassy staff. Service was made by mailing a copy of the complaint in the German language via registered mail to the Department of Justice in Washington, following a type of Austrian service used with foreign individuals. The Department, through local counsel, filed an answer objecting to this mode of service and interposed the jurisdictional defense of sovereign immunity. The Landesgericht in Vienna agreed and held the service void as contrary to accepted rules of international comity on the ground that Austrian courts were bound to apply the rules governing intercourse between nations, in addition to any local rules of service. The court said that a foreign sovereign must be served through diplomatic channels. On appeal, the Oberlandesgericht held that though the service was bad in form, the complaint did in fact reach the responsible officers of the United States and the defective service did not prejudice their opportunity to hire local counsel and to answer. Hence, actual notice cured the defective service and the case was remanded. A further appeal on the question of service may have been mooted by plaintiff's institution of a new suit for a "preliminary judgment" -- claiming legal interest for an additional month on the principal amount due -- in which service was effected through diplomatic channels.

Staff: Geo. S. Leonard and Bruno A. Ristau
(Civil Division)
Dr. Heinrich Foglar-Deinhardstein (Vienna, Austria)

GOVERNMENT CONTRACTS: TRANSPORTATION

Jurisdiction of Government's Claim for Overcharges on Intrastate Transportation Rests Upon 28 U.S.C. 1345. United States v. Pixley (C.A. 9, December 6, 1960). Pixley, a motor carrier operating within the State of California, transported certain Government property at various times between July 1943 and October 1947. The shipments moved on Government bills of lading which provided that charges were to be computed at the lowest tariff rates applicable to similar shipments by private shippers. Pixley's tariffs were on file with the California Public Utilities Commission. The United States sued in 1958 for certain overcharges based on these tariffs, alleging that jurisdiction rested on 28 U.S.C. 1345. The District Court dismissed the action on the ground that the Government's claim was barred by the three year limitation contained in Section 736 of the California Public Utilities Code, which applies to claims for overcharges under California's Regulatory Act. It held that Section 736 was "jurisdictional" as to the Government's claim, and that the suit must, therefore, be dismissed for lack of jurisdiction.

Upon appeal by the United States the district court's judgment was reversed. The Court of Appeals held that jurisdiction rests solely upon 28 U.S.C. 1345 and that the state limitation did not defeat this jurisdiction. Whether the Government's cause of action survives, however, is a question not passed upon by the district court, and the case was therefore remanded for consideration of whether the complaint stated a claim upon which relief may be granted.

Staff: Howard E. Shapiro (Civil Division)

"Initial Carrier" Is Contracting Carrier Within Meaning of Carmack Amendment; "Common Arrangement"; Government Not Subject to Post-Judgment Interest in Tucker-Act Recovery. United States v. Mississippi Valley Barge Line, (C.A. 8, December 27, 1960). The Barge Line instituted this action under the Tucker Act to recover unpaid portions of charges for shipments of government freight via the Mississippi River in 1956 and 1957. The Government conceded liability for these charges but, by permissive counterclaims, alleged offsetting liability for damages to other government property transported by the Barge Line in two 1955 shipments.

The 1955 shipments originated at Sharpe Station, near Baton Rouge. They were moved from there to the Port of Baton Rouge by the Illinois Central Railroad, where the Port Commission unloaded the shipments from the rail cars and reloaded them on the Barge Line's barges. The Barge Line then transported the shipments by water to Memphis where its wholly owned subsidiary unloaded them and placed them on other rail cars. The Illinois Central then transported the shipment to Memphis General Depot.

The damage to the first 1955 shipment was discovered upon the arrival of the shipment at its final destination. The damage to the second 1955 shipment was discovered as that shipment was being discharged

from the barge at Memphis. No unusual incident occurred during the water transportation which would have caused the damages and the time, place and cause of the losses are unknown. Each of the 1955 shipments moved under Government bills of lading, which named the Barge Line as the "Initial Transportation" and the "Transportation Company."

The Government in its counterclaim based its argument upon the Carmack Amendment to the Interstate Commerce Act which makes liable the "receiving" or "initial" carrier for shipment damage that occurred anywhere along the route, even when the shipment is in the hands of a connecting carrier. The shipper need show only receipt by the carrier in good condition and the delivery in damaged condition. The district court found the Carmack Amendment inapplicable, ruling that the "initial" carrier was the carrier first physically receiving the goods, namely the Illinois Central. The court, however, did hold the Barge Line liable for the damage to the second 1955 shipment on common-law principles, since the damage was discovered while the shipment was in its possession. It awarded the Barge Line judgment plus interest for the amount withheld to cover the damage to the first 1955 shipment.

The Eighth Circuit reversed. On the substantive and non-maritime aspects of the case, the Court went on to rule that the Barge Line contracted to transport the goods from Sharpe Station to the Baton Rouge Engineer Depot and is liable for damage caused anywhere en route.

The Court also ruled that the Carmack Amendment was applicable to the shipments. It found that there existed a "common arrangement" between the Barge Line and the Illinois Central so that the amendment was applicable even though part of the transportation was by water. It then held that the "initial" carrier, within the meaning of the amendment, is the contracting carrier and not necessarily the carrier first physically to receive the shipment. The Barge Line conceded on appeal that the trial court erred in allowing interest against the Government. In light of 31 U.S.C. 724(a), this concession was "a proper and required one," the Court of Appeals held.

Staff: Sherman L. Cohn (Civil Division)

HATCH ACT POLITICAL ACTIVITIES

State's Failure to Suspend or Remove Violators Within Thirty Days Does Not Moot Determination of Violation; No Defense That Actions Taken Pursuant to Orders of Superior; Failure to Recommend Dismissal of All Violators Not Defense to Those Dismissed. Utah, et al. v. United States, (C.A. 10, January 3, 1961). Utah and the individual appellants, employees of the Utah State Road Commission, petitioned the district court for review of the Civil Service Commission's orders which found them to have violated Section 12(a) of the Hatch Political Act, 5 U.S.C. 1181(a), and recommended that they be discharged from their state positions. The district court affirmed the Commission, holding that substantial evidence supported the finding of violation.

On appeal the Government, as a threshold argument, suggested mootness. By failing to remove the employees within 30 days of the determination, or having the determination stayed, the Government argued the state automatically subjected itself to the fund-withholding order by virtue of Section 12(b) of the Act, regardless of the outcome of the petition for review. The Court of Appeals rejected this argument, holding that should the determination of violation and removal fall, the withholding order would become invalid even though the state had not removed or suspended its employee within the requisite period.

On the merits, however, the Court of Appeals affirmed the district court ruling that the Commission's findings were not "clearly erroneous." In so holding, the Court rejected appellants' defense that they were acting only under the direction and control of their superior. The Court declared that, short of evidence "to indicate that they acted under duress, . . . it is no defense to prescribed activities that they were committed on orders from those in higher authority not within the coverage of the Act." In rejecting another of appellants' arguments, the Court held that, even if the dismissal of the charges against the fellow employee were erroneous, "it would be fallacious to say merely because one violator escapes punishment that others, equally guilty, should also be dismissed."

Staff: Sherman L. Cohn (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Satisfaction of Judgment Against Third Party Tortfeasor for Less Than Face Amount Without Written Approval of Employer Does Not Constitute Compromise Within 33 U.S.C. 933(g). Bell v. O'Hearne (C.A. 4, November 7, 1960). Plaintiff's decedent was killed in the course of his employment under circumstances which brought the case within the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq. His parents brought a wrongful death action against a third party, recovering judgment in the amount of $6,500. Defendant noted an appeal but before the appeal was heard, the parents accepted $5,000 in satisfaction of the judgment, without obtaining written approval of decedent's employer. As the $6,500 was less than the compensation to which plaintiff (decedent's mother, who was the sole surviving beneficiary) was entitled under the Act, she sought deficiency compensation under the Act, crediting the employer with the face amount of the judgment ($6,500). The Deputy Commissioner denied the claim on the ground that the satisfaction of judgment was a compromise under 33 U.S.C. 933(g). The district court granted the Deputy Commissioner's motion for summary judgment for the same reason.

The Court of Appeals reversed, holding that the acceptance of an amount less than judgment does not constitute a compromise contemplated by that section. Noting that this case was one of first impression, the Court stated that it would not favor a construction which visits a forfeiture on an employee or his dependents, in the absence of language plainly demanding that result. In this case, there was a judicial

determination of damages, and since the plaintiff conceded that the employer should be credited with the entire amount of the judgment, there could be no prejudice to the employer.

Staff: United States Attorney Joseph S. Bambacus (E.D. Va.); Alfred H. Myers (United States Department of Labor)

NATIONAL SERVICE LIFE INSURANCE

Affidavit of Person Performing Marriage Ceremony Is Inadmissable Hearsay, Although Evidence Could Not Otherwise Be Obtained. United States v. Grant (C.A. 9, January 19, 1961). Plaintiff brought suit for gratuitous National Service Life Insurance benefits as widow of a soldier killed at the beginning of World War II. At the trial, Mrs. Grant testified that she was married to the soldier in a ceremony performed by a Justice of the Peace. An affidavit of the Justice of the Peace was admitted into evidence over the Government's objection, on the ground that it was necessary to plaintiff's case, and that the evidence could not otherwise be obtained. The district court relied in part upon the affidavit in holding for plaintiff.

The Court of Appeals reversed, holding that the district court erred in admitting the affidavit, and remanded for a new trial. The Court found prejudice because of the district court's expressed partial reliance on the affidavit. The Court noted, however, that the trial judge was entitled to believe the plaintiff's testimony, notwithstanding some contradictions, if he is of the opinion that she told the truth.

Staff: United States Attorney Laurence E. Dayton and Assistant United States Attorney Robert N. Ensign (N.D. Calif.)

SOIL BANK ACT

Tenant Has No Right To Judicial Review of Administrative Determination That Lease Was Not Terminated in Violation of Soil Bank Act. Dickson v. Edwards, et al. (C.A. 5, January 31, 1961). Plaintiff-tenant and defendant-landlord entered into a traditional three-year lease, to expire on December 31, 1957, covering a farm in Texas. During 1957, they entered into a Conservation Reserve Contract with representatives of the Department of Agriculture for a period of five years (1957 through 1961). The contract called for annual payments for the acreage placed in the conservation reserve, two-thirds of which were to go to the tenant, and one-third to the landlord. The contract contained an express certificate by the landlord and tenant that they were all of the "producers having any control of the farm during the contract period." Late in 1957 the landlord notified the tenant that the lease would not be renewed or extended, then selected new tenants with whom a lease was executed. The effect of this transaction was to cut the original tenant off of soil bank payments after 1957. After exhausting his administrative remedies before the County Agricultural Stabilization Conservation (ASC) Committee, and the State ASC Committee, the tenant brought suit under 7 U.S.C. 1831(d)

for review in a trial de novo of the administrative determination that the landlord had not violated his Conservation Reserve Contract. The district court ruled that it was without jurisdiction to review this determination.

The Court of Appeals affirmed, holding that Congress did not intend judicial review of such a determination. The Court based its action upon 7 U.S.C. 1809, which provides that the decisions of the Secretary are final and not reviewable, and upon 7 U.S.C. 1831(d) which provides judicial review only of a determination by the Secretary of Agriculture that a violation has occurred, which violation is of such a substantial nature as to warrant termination of the contract. In this case there had been no administrative determination that the contract was violated, and hence there was no basis for judicial review.

Staff: United States Attorney W. B. West, III and Assistant United States Attorney Melvin N. Diggs (N.D. Tex.)

DISTRICT COURTS

FEDERAL TORT CLAIMS ACT

Suit Under Act Cannot Be Maintained for Alleged Wrongful Death Of Air National Guard Officer Resulting from Inactive Duty Training Flight. Margaret Layne, Exex., etc. v. United States, (S.D. Ind., February 2, 1961). Plaintiff's decedent, an officer of the Indiana Air National Guard, received injuries which ultimately resulted in his death during the performance of a routine training flight in inactive duty training status. Subsequently, the Veterans Administration found the cause of his death to be service-connected, and Dependency and Indemnity Compensation was awarded to plaintiff. The Department of the Air Force also paid plaintiff a death gratuity, as well as other benefits provided by law, for survivors of members of the military establishment whose death results from service-connected injuries sustained in line of duty during peacetime. The Government's motion for summary judgment was sustained because it was found that under existing laws plaintiff's decedent was actually in the service of the United States at the time of his accident; and, in accordance with the doctrine established by the Supreme Court in Feres v. United States (340 U.S. 135), there is no liability under F.T.C.A. for injuries to servicemen where the injuries arise out of, or in the course of, activity incident to their military service. Pointing out that plaintiff had received all of the benefits to which she would have been entitled by law had her decedent been a member of the regular military establishment, the Court stated that it was not the intention of Congress to grant to a National Guardsman on inactive duty all of the benefits of a serviceman on active duty in the Armed Forces of the United States, plus the rights of a civilian under the F.T.C.A.

This decision is of particular significance because it is the first case to be litigated since enactment of the Veterans' Benefits Act of 1958 involving the right of National Guardsmen to sue under the F.T.C.A.

for injuries received in line of duty while engaged in inactive duty training or service, and it may serve as a precedent for the extension of the doctrine of the Feres case to all individuals in such status in both the Army National Guard and the Air National Guard.

Staff: Russell O. Pettibone (Civil Division)

United States Not Liable Under Tort Claims Act For Cashing Government Checks Allegedly Stolen from Payee. Agnes Jones, etc. v. United States (E.D. N.Y., January 6, 1961). Plaintiff's decedent was issued five military retirement checks which were allegedly wrongfully taken from him by a third party and cashed. After the Treasury Department declined to pay plaintiff for these checks, she sued the United States under the Tucker Act. The complaint was dismissed for lack of jurisdiction (Jones v. United States, 185 F. Supp. 347).

Plaintiff then amended her complaint to allege a claim under the Federal Tort Claims Act. Judge Mishler granted defendant's renewed motion to dismiss, holding that the amended complaint did not show "injury or loss of property" as required by 28 U.S.C. 1346(b), since cashing the checks "did not result in a loss or injury to the decedent's property" (emphasis supplied).

Staff: United States Attorney Cornelius W. Wickersham, Jr., and Assistant United States Attorney William A. Dubrowski (E.D. N.Y.)
Alice L. K. Helm and David V. Seaman (Civil Division)

INJUNCTION

Plaintiff's Right to Instigate State Court Action for Extortion Does Not Prevent FBI Agents from Investigating State Court Action as Violation Of Federal Law Prohibiting Impediment Of A Government Witness (18 U.S.C. 1503). Dewey Marks v. Leonard Wolf (N.D. Ill., February 2, 1961). Marks sought an injunction against FBI Agent Wolf to enjoin him from interfering in a suit in the Illinois state court where Marks was charging one Evans with criminal extortion. Wolf believed that the purpose of the extortion charge in the state suit was to intimidate Evans who was a witness against Marks' brother in a criminal action in the federal court in New Jersey. Acting upon Wolf's information, the United States Attorney in Chicago filed an indictment against plaintiff Marks, alleging the State court action as a violation of 18 U.S.C. 1503, which makes it a crime to interfere with a Government witness. The Court refused to enjoin FBI Agent Wolf from proceeding with his investigation, overruling Marks' claim that Wolf's activities denied plaintiff equal protection of the law or violated the Civil Rights Act, 42 U.S.C. 1985. The Court also refused to restrain the FBI Agent by exercise of any supervisory power over Government agents.

Staff: Assistant United States Attorney Thomas W. James (W.D. Ill.)
Harland F. Leathers (Civil Division)

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CIVIL RIGHTS DIVISION

Acting Assistant Attorney General John Doar

Necessity For Obtaining Department Authority in Prosecutions of Juveniles. Attention is invited to the provisions of the Juvenile Delinquency Act, (18 U.S.C. 5032), which requires that a United States Attorney must proceed against a juvenile as a juvenile delinquent if he consents to such procedure, unless the Attorney General has expressly directed otherwise. The Attorney General delegated his authority to the Assistant Attorney General in charge of the Civil Rights Division by Attorney General's Order No. 198-59, dated November 12, 1959. Therefore, whenever it is deemed advisable to prosecute a juvenile as an adult, authority to institute criminal prosecution should first be obtained from the Assistant Attorney General in charge of the Civil Rights Division. There are no exceptions to this requirement.

Civil Contempt Action to Compel Payment of School Funds in Louisiana. United States v. Shelby M. Jackson, State Superintendent. (E.D. La.). The Department filed a civil contempt action in the District Court in New Orleans to compel payment of school funds which had been withheld by the State in the school desegregation controversy. The Government asked for the release of some $350,000 which had been withheld by the State from the Orleans Parish School Board since September, and that the superintendent be required to recognize the credentials and qualifications of the teachers hired by the Orleans Parish School Board since November 14--the effective date of the desegregation of two New Orleans schools.

The Louisiana House of Representatives recently passed a resolution refusing to provide funds for payment of teachers salaries in New Orleans by the duly-elected Orleans Parish School Board. Instead, the House purported to provide funds to a school board created by the Legislature, for payment of the teachers' salaries, which are about to become due. The money involved in the contempt proceeding involves school and milk program funds, separate from funds allocated for teachers' salaries. Almost all the money is in federally supported programs. The motion also asks that the superintendent be required to fill a requisition for text books, which was submitted by the school board.

An early hearing has been requested.

Staff: United States Attorney M. Hepburn Many (E.D. La.);
St. John Barrett (Civil Rights Division).

* * *

CRIMINAL DIVISION

Acting Assistant Attorney General William E. Foley

SLOT MACHINE ACT
15 USC 1171-1177

Transportation of Gambling Devices; Forfeiture Proceeding, 15 U.S.C. 1172 Inapplicable to Intrastate and Foreign Shipments; Sections 1173 and 1174 Registration, Marking and Labeling Requirements Applicable to Foreign Commerce; United States v. 420 Gambling Devices, Etc. (E.D. N.Y., February 6, 1961). In this litigation the Government sought to libel 420 slot machines which were shipped from Kentucky intended for delivery in London, England. The machines were seized in the Eastern District of New York. A stipulation was entered into wherein the Government and the claimants agreed (1) that the devices were gambling devices as defined by 15 U.S.C. 1171; (2) that claimant was the owner of the devices; (3) that claimant purchased the devices in Kentucky, had them packaged and labelled in Kentucky and shipped from there consigned to a shipping company at a pier in Brooklyn; (4) that the seizure was effected in New York during the course of the transportation of the devices from Kentucky to Brooklyn, New York; (5) that claimant had never registered with the Attorney General or filed monthly inventories and records of sales or deliveries; (6) that the crates were marked as indicated in certain exhibits (they did not specify the nature of the article or contents of package or address of shipper); (7) that claimant had previously contracted with the shipping company for shipment and export of the devices to a company in London, England and the shipping company had taken measures to effect such export. The Government contended that under these facts the shipper had violated 15 U.S.C. 1172, 1173 and 1174 and that the devices were subject to forfeiture under 15 U.S.C. 1177.

The Court (Rayfiel, J.) citing United States v. Prock, 105 F. Supp. 263, concluded that 15 U.S.C. 1172 did not apply to shipments of the devices in intrastate or foreign commerce; that there was no question but that these devices were moving in foreign commerce and that the claimant had not violated 15 U.S.C. 1172. The Court found, however, that claimant had violated Sections 1173 and 1174 and gave judgment to the Government. The Court, in a comprehensive discussion of the history of the Act and the law relating to its interpretation, concluded that despite the fact that intrastate and foreign shipments were not in violation of Section 1172, all persons engaging in such activity in foreign commerce were nevertheless required to register and otherwise comply with the provisions of Sections 1173 and 1174. The Court noted:

> "It seems clear from the history of the Statute, as disclosed by the various reports and the debates thereon, that the registration, filing and regulatory provisions of Sections 1173 and 1174, and the criminal and civil forfeiture sanctions, prepared, as they were, by the bill drafting committee of

The Attorney General's Conference, were included in the legislation to provide the means for surveillance and investigation which would be conducive to more effective enforcement of the anti-gambling statutes of the states."

Citing the concurring and dissenting opinions in United States v. Five Gambling Devices, 346 U.S. 441, Judge Rayfiel points out that that case involved machines which had been shipped in intrastate commerce and that the concurring and dissenting opinions, subscribed to by six members of the Court clearly indicate that Sections 1173 and 1174 were applicable to shipments of gambling devices in foreign commerce.

It is the view of the Criminal Division that this is a most important decision which points the way to increased effective enforcement of the Slot Machine Act.

Staff: United States Attorney Cornelius W. Wickersham, Jr.; Assistant United States Attorneys James M. FitzSimons and Lawrence J. Galardi (E.D. N.Y.)

SECURITIES ACT OF 1933 - MAIL FRAUD

Sufficiency of Evidence to Support Verdict. J. Phil Burns v. United States (C.A. 10). Appellant Burns was one of a number of defendants, both individual and corporate, who were tried, convicted and sentenced in the Western District of Oklahoma, United States v. Selected Investments Corporation, et al., early in 1959. For a discussion of the pertinent details of this investment fraud case see Vol. 7, No. 11, p. 320 of the Bulletin issued May 22, 1959.

On appeal it was contended, inter alia, the evidence was insufficient to support the verdict. In its opinion of January 6, 1961 affirming Burns' conviction, the Court of Appeals observed, "the record discloses a cleverly executed fraud of surprising longevity in which untrue statements of material facts and concealment of material facts were used to mulct the unwary investor" and was concerned with only one point, appellant's participation in the scheme. Noting his association for 20 years with non-appealing co-defendants and his close connection with the operation's sales activities, it was deemed incredible that he could have been so artless and naive as not to have known what was going on around him. Commenting that Burns' acquittal on the conspiracy count did not require acquittals on the Securities Act counts, since each count is regarded as a separate indictment and consistency of verdicts is unnecessary, the Court concluded that he could not escape responsibility even though he did not himself write, sign or post any letters for, having knowledge of the use of the mails and as a partner in the criminal enterprise, acts in furtherance thereof were in law his own acts. A petition for rehearing was denied on January 26, 1961.

Staff: United States Attorney Paul W. Cress (W.D. Okla.)

MAIL FRAUD

Advance Fee Mail Fraud Scheme (18 U.S.C. 1341); Resume of Trial Strategy. United States v. Anspach et al. (D. Colo.). United States Attorney Donald G. Brotzman, District of Colorado, has recently furnished a report to the Criminal Division concerning the strategy employed by his office in the successful trial of the above entitled case, one of the largest advance fee schemes in the country which was operated under the name Beneficial Business Loan Service Corporation.

Copies of the report by the United States Attorney in this case will be made available upon request to other United States Attorneys handling similar matters.

Staff: United States Attorney Donald G. Brotzman; First Assistant United States Attorney Richard P. Matsen; Former Assistant United States Attorney Jack K. Anderson (D. Colo.)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Declaratory Judgment - Review of Deportation Order; Reopening of Prior Deportation Proceeding. Berghoefer v. Johnson (C.A. 5, Jan. 13, 1961). Plaintiff, a German national, was ordered deported for having remained in this country as an alien crewman for a longer time than permitted by law. He was denied the privilege of voluntary departure by the Special Inquiry Officer.

He had been deported in 1956, without contest, on the same charge and at his 1959 hearing he moved to have the 1956 administrative proceedings reopened in order to permit him to apply for voluntary departure, nunc pro tunc. His motion was denied by the Special Inquiry Officer and that action was affirmed by the Board of Immigration Appeals. The Board also affirmed the 1959 denial of voluntary departure and the order of deportation.

Plaintiff then brought suit for a judgment to declare the deportation order invalid. He attacked that order by asserting that his earlier deportation proceeding should have been reopened and that he should have been granted leave to apply for voluntary departure nunc pro tunc. He relied on a Service regulation, 8 CFR 103.5, which provides:

> "A proceeding provided for in this chapter may be reopened or the decision made therein reconsidered for proper cause upon motion made by the party affected and granted by the officer who has jurisdiction over the proceeding or who made the decision . . ."

In a per curiam decision the Court of Appeals held that there is nothing in the quoted regulation to authorize the Special Inquiry Officer in the current deportation proceeding to reopen the earlier completed deportation proceeding, which was not appealed from.

Declaratory Judgment - Review of Deportation Order; State Court's Expungement of Narcotic Conviction - Effect Under 8 U.S.C. 1251(a)(11). Arrelanos-Flores v. Rosenberg (S.D. Calif., Dec. 15, 1960). Plaintiff instituted an action to review a deportation order under section 241(a)(11) of the 1952 Act (8 U.S.C. 1251(a)(11)) based upon his conviction on March 9, 1956 in Los Angeles County Superior Court of illegal sale of marijuana in violation of section 11500, Health and Safety Code of California. He was placed on probation for five years conditioned upon serving one year in the County Jail.

He contended that since no final judgment of conviction had occurred in the State court there had been no "conviction" within

the meaning of 8 U.S.C. 1251(a)(11). The District Court entered judgment against him and the Court of Appeals, in affirming, held that there had been a "conviction" under both the Federal and California view which supported the order of deportation (Arrellano-Flores v. Hoy, 262 F. 2d 667, Dec. 29, 1958; cert. den., 362 U.S. 921, Mar. 21, 1960).

In California a conviction may be expunged after the defendant has abided by and completed all the conditions of his probation (Sec. 1203.4, California Penal Code). Relying upon that statute and the Board's ruling in a comparable case (Matter of D--, 7 I & N Dec. 670 - March 6, 1958), plaintiff moved the Board of Immigration Appeals (while his petition for certiorari was pending in the Supreme Court) for reconsideration. The Board certified to the Attorney General its decision to deny plaintiff's motion on the grounds that its decision in Matter of D-- did not require a different determination in plaintiff's case notwithstanding that they involved like statutes because plaintiff's appeal could not be sustained on the basis of a possibility that at some future date he might have his narcotic conviction set aside. (It added, however: "The situation is different when a record of conviction has already been expunged in California because, in such a case, there is no conviction whatever to support an order of deportation.")

The Attorney General agreed that plaintiff was convicted of a narcotic violation within the meaning of 8 U.S.C. 1252(a)(11) and to that extent he sustained the Board. However, he held that, for the purposes of 8 U.S.C. 1252(a)(11), it is immaterial that pursuant to a state statute like sec. 1203.4 of the California Penal Code or sec. 1772 of the Welfare and Institutions Code (Calif.,) the verdict of guilty has been set aside and the criminal charge dismissed (Matter of A--F--, Int. Dec. #1024, Oct. 12, 1959). He said that "it is hardly to be supposed that Congress intended, in providing for the deportation of aliens convicted of narcotics violations to extend preferential treatment to those convicted in the few jurisdictions which, like California, provide for the expungement of a record of conviction upon the termination of probation."

On May 13, 1960 the Los Angeles County Superior Court expunged plaintiff's 1956 conviction record and again the Board was moved to reopen and reconsider the deportation case. It denied the motion as no purpose would be served in reopening the proceedings in view of the Attorney General's ruling in this case on October 12, 1959.

The second round of litigation then followed and the District Court held that plaintiff was convicted on March 9, 1956 of a violation of law governing and regulating the sale of marijuana, and remained so convicted within the meaning of 8 U.S.C. 1251(a)(11) at all pertinent times throughout the administrative proceedings, and that the order and warrant of deportation are valid.

Judgment for defendant.

Physical Persecution; Scope of Judicial Review of Order Denying Stay of Deportation. Batistic v. Pilliod (C.A. 7, Jan. 13, 1961). Plaintiff appealed from a District Court order granting defendant's motion for summary judgment (See: Bulletin, Vol. 8, No. 9, p. 273; April 22, 1960).

After examining the administrative record the Court of Appeals found that the proceedings accorded plaintiff on his application for a stay of deportation on the grounds of physical persecution were proper and that he had a fair opportunity to present his case; that the Attorney General's discretion was properly exercised and that the order was sufficient on its face; that the Court cannot substitute its judgment for that of the Attorney General; that plaintiff had not been denied due process of law; and that he had had full benefit of the limited judicial review available to him.

Affirmed.

Judicial Review of Deportation Order and Denial of Stay of Deportation; Crime Involving Moral Turpitude (former 50 U.S.C. 311); Stay of Deportation - Ill Health and Pendency of Pardon Application; Res Judicata. Gordon-Foster v. Rogers (D.C., Jan. 31, 1961). Plaintiff, a British national, was found deportable in administrative proceedings on July 3, 1958 for having remained in the United States as a temporary visitor for a longer time than permitted under the law. He was granted the privilege of voluntary departure but when he failed to depart within the time authorized an alternate order for his deportation vested.

He then applied for administrative adjustment of his status under section 245 of the 1952 Act (8 U.S.C. 1255). That application was denied on the ground that he was ineligible for that relief because of his prior conviction of criminal violations of former 50 U.S.C. 311, crimes involving moral turpitude within the meaning of section 212(a)(9) of the 1952 Act (8 U.S.C. 1182(a)(9)). (He was convicted in 1947 of unlawfully making, and being a party to the making, of false statements as to the nonliability for military service of a registrant and co-defendant (Serge M. Rubinstein) under the Selective Training and Service Act of 1940, and of conspiracy to commit those substantive offenses.)

Following that denial he applied for a stay of deportation on two grounds: (1) ill health and (2) an application for a Presidential pardon was pending. The application was denied and this suit for judicial review of the administrative proceedings was instituted.

The Court found that the issue of whether the specific crimes of which he was convicted in 1947 involved his knowingly making false statements of fact with intent to perpetrate a fraud upon the Government had been litigated and decided adversely to him in his criminal case (U.S. v. Rubinstein, 166 F. 2d 249, cert. denied 333 U.S. 868(1948)),

and he was barred by the doctrine of res judicata or estoppel by judgment from relitigating that issue; the conviction involved crimes involving moral turpitude within the meaning of the excluding provisions of the immigration law (8 U.S.C. 1182(a)(9)) and made him statutorily ineligible for relief under 8 U.S.C. 1255.

It also found that the denial of the application for a stay of deportation was in the proper exercise of administrative discretion and was neither arbitrary nor capricious. The United States Public Health Service had determined, following a physical examination of plaintiff, that travel under normal conditions would not endanger his health, and the Pardon Attorney had determined that only after all other available remedies had been exhausted would it be proper to consider his case with a view to the possible grant of Executive clemency.

The Court took notice of the Service's proposal, should the deportation order be judicially sustained, to await the final outcome of plaintiff's pardon application before attempting to deport him, and to execute the order only after a new certification by the United States Public Health Service that travel under the then-prevailing conditions would not endanger his health.

Summary judgment for defendant.

NATURALIZATION

Reopening and Setting Aside Order and Judgment of Naturalization; Newly Discovered Evidence. Petition of Eladio Arelliano Rosario (C.A. 5, Dec. 6, 1960). On May 29, 1959, petitioner filed a petition for naturalization in the Circuit Court of the Fifth Circuit (Kauai, Hawaii). He appeared for a final hearing on his petition on September 15, 1959 and swore before the Designated Naturalization Examiner that he had not committed any crime or offense after he had filed his petition and up to the day of his final hearing. The Examiner then recommended that his petition be granted. The Court accepted that recommendation and petitioner was admitted to citizenship.

Two days later, September 17, 1959, he was arrested by the local police on the complaint of a female under the age of sixteen years that he had sexual relations with her on June 3, 1959. He was promptly indicted and arraigned and pleaded guilty a week later. On October 19, 1959 he was sentenced to imprisonment for ten years (suspended) and placed on probation for five years. The criminal proceedings were before the same Court which had naturalized him earlier.

Despite periodic visits thereafter to that Court by Naturalization Examiners from Honolulu it was not until June 21, 1960 that one of them, quite by accident, learned of petitioner's commission of a crime and of his conviction. The District Director then filed a motion with the

Court under the provisions of section 340(j) of the 1952 Act (8 U.S.C. 1451(j)) and Rule 60(b) of the Hawaii Rules of Civil Procedure (in essence quite similar to Rule 60(b) F.R.C.P.) for a reopening of the judgment admitting the petitioner to citizenship on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)".

The Court held that the motion had properly invoked the provisions of the statute and the Rule and that while it was not until some nine months after the naturalization that the Government learned of the commission of the crime, a fact in existence at the time of the naturalization, the District Director and his Naturalization Examiners were, under the circumstances, excusably ignorant of it. The Court added that the personal knowledge of the judge in the naturalization proceedings, or the knowledge of his staff, of the Clerk of Court and his staff, or of the Probation-Parole Administrator and his staff concerning the criminal action which occurred in that Court was not imputable to the Service.

Accordingly, he granted the District Director's motion to reopen the naturalization proceedings and to set aside the order admitting petitioner to citizenship. At that point, petitioner's counsel orally moved that petitioner be permitted to withdraw his petition for naturalization. His motion was granted. The Court then ordered petitioner to surrender the naturalization certificate issued to him on September 15, 1959 for appropriate disposition by the Service.

* * *

LANDS DIVISION

Acting Assistant Attorney General J. Edward Williams

Condemnation; Valuation; Exclusion of Evidence Not Prejudicial Where Larger Valuation, on Different Basis, Was Received. Paper v. District of Columbia Redevelopment Land Agency, (C.A. D.C., December 1, 1960). In this condemnation action to acquire property being used for a combination grocery and liquor store, the trial court sustained the Government's objection to testimony of a percentage of gross income as evidence of fair market rental to be capitalized for reaching an indicated market value of the fee. It was offered on the ground that it was the custom in the trade, both locally and nationally, to fix rental at a percentage of gross income.

On appeal by the landowner, the judgment was affirmed. The appellate court held that "appellants presented their version of the fair market rental, nonetheless" by other testimony (of the owner) which exceeded the figure that was excluded. Therefore, it did not squarely pass on the ruling of the trial court concerning percentage of gross income.

Staff: S. Billingsley Hill (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

Notification of Department in Actions to Enforce Administrative Summonses

Due to the increased resistance of the public to summonses issed by the Internal Revenue Service, it has been determined that the Department should be advised of all actions brought to enforce administrative summonses. In the future, it is, therefore, requested that the Department be notified when the Internal Revenue Service requests your office to commence an enforcement proceeding. Copies of any pleadings filed should be forwarded to the Department; however, it will not be necessary for your office to obtain authorization prior to filing the petition for compliance with the administrative summons. It is requested that the Department be advised of all pending actions to enforce administrative summonses not previously reported and that the Department be furnished with copies of all pleadings and other papers filed with the Court in such actions.

Appellate Decisions

Injunction; Taxpayer's Suit to Restrain Assessment and Collection of Taxes Was Properly Dismissed Where He Asserted Financial Hardship and Little More, Thus Failing to Show Extraordinary Circumstances Necessary to Justify Issuance of Such Injunction. Sam G. McDonald v. Robert L. Phinney, Director of Internal Revenue, First District of Texas, and United States (C.A. 5; 7 A.F.T.R. 2d 408, Jan 5, 1961). Taxpayer was notified by mail on November 29, 1955, of asserted deficiencies in income tax payments for 1946 in the amount of $44,997.26 plus fraud penalties of $22,498.63 under Section 293(b) of the 1939 Code and additional penalties for substantial underestimation of tax of $2,709.24 under Section 294(d)(2). He filed a petition for redetermination of the deficiency in the Tax Court but settled the case upon stipulation of counsel on the basis of a deficiency of $6,500 plus an additional sum of $325 under Section 293(a) of the 1939 Code. The Tax Court entered judgment accordingly and no appeal was taken.

Subsequently, taxpayer filed a complaint in the district court for an injunction against the assessment of taxes, penalties or interest due against him for 1946 and to prohibit any levy against his property. He asserted that the assessment and collection of the claim was barred by the statute of limitations, that he lacked funds to pay the sum allegedly due the Government and that to allow collection from him would be to subject his property to forced sale which would result in irreparable damage to him. He claimed equitable relief on the basis that no legal remedy was available to him since he could not pay the sums due and bring suit for refund without considerable damage to himself.

The district court granted a temporary injunction but declined to make it permanent and dismissed the complaint under the provisions of Section 7421 of the 1954 Code and 28 U.S.C., 2201 and 2410.

The Court of Appeals affirmed, holding that Section 7421 clearly prohibits suits to restrain the assessment or collection of taxes except under certain circumstances not here presented. Such suits are not permitted in such cases as this, where the complaining party asserts financial hardship and nothing or little more and consequently fails to show the extraordinary circumstances which would justify the issuance of an injunction.

Staff: United States Attorney, Russell B. Wine and Assistant United States Attorney, K. Key Hoffman, Jr., (W.D. Texas); C. Moxley Featherston, A. F. Prescott and Norman H. Wolfe (Tax Division).

District Court Jurisdiction Over Suit for Refund of Taxes and Set Aside Tax Liens. Margaret Bell and Estate of Lucille Nestley, Deceased, by Edward J. Nestley, Administrator v. William Gray, District Director. (C.A. 6, December 19, 1960). This was an action against the District Director to set aside a stipulation on which final decision had been entered in the Tax Court for a deficiency for $50,000 against Edward and Lucille Nestley, husband and wife; to set aside a lien on property in the estate of Lucille since deceased; and to recover $25,000 which allegedly had been seized out of the estate assets. Plaintiff, Margaret Bell, was the sole beneficiary of the estate of her sister, Lucille Nestley.

The Government defended on several grounds: (1) that the district court had no jurisdiction to set aside a final decision of the Tax Court which had been entered more than five years ago; (2) that to the extent that the suit was one for recovery of the assets seized to pay the deficiency, it was a suit for refund of taxes and no administrative claim for refund had been filed; (3) that insofar as it was a suit to set aside the lien on the remaining assets of the estate., it was a prohibited suit to enjoin the collection of taxes; and (4) that the United States was an indispensable party to any suit to set aside a tax lien.

Without passing on the first ground the District Court for the Eastern District of Kentucky in a memorandum opinion not officially reported (5 A.F.T.R. 2d 940) entered judgment dismissing the complaint on the second, third and fourth grounds raised in the defense. The Court of Appeals entered a per curiam order affirming the judgment on the opinion below.

Staff: United States Attorney Jean L. Auxier (E.D. Ky.)
Louise Foster (Tax Division)

District Court Decisions

Liens; Relative Priority of Federal Tax Liens and Rights of Taxpayer's Assignee; Tax Lien Accorded Priority over Rights of Assignee Where Tax Liens Arose and Were Duly Recorded Prior to Date of Assignment. Keystone Merchantile Corporation v. Francis P. Graham, District Director (M.D. Pa, 61-1 U.S.T.C. par. 9202.) Taxpayer entered into various conditional sales contracts for purchase of certain machinery and equipment. Subsequent thereto, various assessments were made against taxpayer for which notices of federal tax liens were duly filed in the sum of $93,265.71. After the tax liens had been duly recorded the assignee on and after July 12, 1954, contended it advanced various sums to the taxpayer but did not take an assignment of the conditional sales contracts until December 14, 1954. The Court held the assignee had no interest in the conditional sales contracts until December, 1954, and since the tax liens had already arisen and been recorded prior thereto, whatever rights taxpayer had in the property at the time the tax liens attached was subject to the tax liens, citing United States v. Bess, 357 U.S. 51.

Staff: United States Attorney Daniel H. Jenkins and Assistant United States Attorney William D. Morgan (M.D. Pa.); Norman E. Bayles (Tax Division)

Injunction; Jurisdiction; Federal Tax Liens Held Valid Although No Notice of Deficiency Sent to Taxpayers and Taxpayers Denied Injunction Where They Could Not Show Special and Extraordinary Circumstances Nor That Assessment Was Illegal Exaction In Guise of Tax. Botta, et al. v. Scanlon, 6 A.F.T.R. 2d 5486 (E.D. N.Y.) and Lipsig v. United States, 6 A.F.T.R. 2d 5488 (E.D. N.Y.). In granting the Government's motion to dismiss in both of these cases in which plaintiffs sought injunctive relief against the enforcement of certain tax liens, the Court ruled that plaintiffs were not entitled to be served with "ninety day letters" notifying them of tax deficiencies. Section 7421 of the Internal Revenue Code of 1954 bars any suit for the purpose of restraining the assessment or collection of any tax except where there has not been a compliance with the "ninety day letter" requirement of Sections 6212 and 6213. These sections require such notice of deficiency only where a tax or penalty is imposed by Subtitles A or B of the Code (relating to income and estate taxes) and not where, as here, the taxes are withholding and social security taxes imposed by Subtitle C. Therefore, the tax liens involved were valid, and the general prohibition against injunctive relief applied to both of these situations.

The Court also held that the "judicial exception" to the bar of Section 7421 was inapplicable in both cases, since plaintiffs had failed to show that the taxes assessed were illegal exactions in the guise of a tax and that there were special and extraordinary circumstances present sufficient to bring the cases within some acknowledged head of equity jurisprudence. The allegation that plaintiff-taxpayers were not proper parties to be charged with Section 6672 penalties was held not to be

sufficient alone to invoke equity jurisdiction, although the Court indicated that, if true, this might be a basis for recovery in an action for a refund after payment of the penalty. The fact that it might ultimately be determined that the penalty was not owing is insufficient to merit the issuance of an injunction.

Staff: United States Attorney Cornelius W. Wickersham, Jr.; and Assistant United States Attorney John H. Hammer (E.D. N.Y.).

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