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BULLETIN

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JOB WELL DONE

The Acting Regional Counsel, IRS, has expressed sincere appreciation to United States Attorney David C. Acheson and his staff, District of Columbia, particularly Assistant United States Attorney Frederick G. Smithson, for the wholehearted cooperation extended in a recent tax case. The letter stated that such cooperation covered the many months of preparation and litigation, as well as the vigorous and unrelenting efforts expended in the course of a long, arduous trial and subsequent appeals leading ultimately to the Supreme Court which affirmed the conviction along the lines contended for by the United States Attorney's office.

Assistant United States Attorney John K. Van de Kamp, Southern District of California, has been commended by the Acting Commissioner of Narcotics on his thoroughness in representing the Government in a recent matter involving violations of the narcotics laws. In congratulating Mr. Van de Kamp on his splendid performance, the Acting Commissioner stated that through his exhaustive research, study and masterful handling of the matter the motion to reduce the sentence of 30 years imposed on a flagrant narcotic trafficker was denied.

Assistant United States Attorney Richard C. Casey, Southern District of New York, has been commended by the Director, FBI, on his excellent handling of a recent case involving espionage. In congratulating Mr. Casey on a job well done, the Director stated that the efficient manner in which the case was brought to a successful conclusion is a tribute to Mr. Casey's legal ability. The Director also extended warmest appreciation to Assistant United States Attorney David R. Hyde for his outstanding performance in the prosecution of this espionage case. The letter stated that Mr. Hyde's proficient handling of the case with the resulting conviction reflected much credit on his ability.

The June Grand Jury, Southern District of New York, expressed appreciation for the excellent work done by Assistant United States Attorney Gerald Walpin in presenting the cases before it.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Motion To Quash Subpoena Denied. In Re Investigation of Electrical Industry. (E.D. Pa.). On May 5, 1961, General Electric Company filed a motion to restrict the Government's use of information contained in documents called for by a grand jury subpoena dated April 21. The company alleged that the subpoenaed documents related to pending and threatened Government antitrust damage suits against General Electric and that a protective order was therefore necessary to prevent possible prejudice to General Electric in the civil damage actions. The order prayed for would have impounded the subpoenaed documents in the custody of the Clerk of the Court, provided that the documents be returned to General Electric by June 15, and directed that no "employee of the United States shall disclose in any way the contents of said documents, in whole or in part, except in performance of his duties in connection with the pending grand jury investigation, or any subsequent criminal proceeding arising therefrom."

The Government opposed the motion on the ground that it would unduly restrict Government attorneys in the performance of their sworn duty to enforce the law and would injuriously hamper them in assisting the grand jury to conduct the pending criminal investigation. The Government stated that its sole purpose in issuing the instant subpoena was to assist the grand jury in an investigation of possible criminal violations of the antitrust law, but that if information was produced before the grand jury which in some presently unknown manner might be of value in conducting subsequent proceedings, including civil damage proceedings, civil equity proceedings, and subsequent criminal proceedings not arising from the instant investigation, Government attorneys had a duty to utilize such information in such proceedings. On oral argument, the Government urged that in light of the traditional secrecy surrounding grand jury proceedings, the court should rely on the Government's assertion that the subpoenaed documents related to a pending criminal investigation and not require the Government to discuss this matter in any detail in the presence of the persons under investigation. Finally, the Government stated that if any impounding order were entered with respect to the documents, it should impound the documents for whatever period might be necessary to complete the grand jury investigation and that no arbitrary date be set for the completion of that inquiry.

On June 5, 1961, the court denied General Electric's motion for a protective order. The court directed the company to promptly submit the documents, ordered the documents impounded only "after the said grand jury has completed its work with the aforesaid documents," and granted leave to the company "after the grand jury has completed its investigation" to move for a return of the documents and "to show that such documents are privileged documents and not available for use in civil antitrust cases . . . which fact the court in the present state of the record is unable to determine."

The motion was argued by Gordon B. Spivack.

Staff: Donald G. Balthis, John E. Sarbaugh and Gordon B. Spivack. (Antitrust Division)

SHERMAN ACT

Complaint Under Sections 1 and 2 Of The Sherman Act. United States v. Borg-Warner Corporation. (S.D. Texas). A civil antitrust complaint filed in Houston on July 27th charged seven corporations connected with the oil well servicing business with unlawfully conspiring to restrain and monopolize trade by controlling patents on a widely used oil well process.

The defendants are charged with conspiring since 1947, in violation of Sections 1 and 2 of the Sherman Antitrust Act, to:

1. Pool patents, patent rights, technology and know-how relating to the jet process;

2. Make Borg-Warner, through its Byron Jackson Division of Los Angeles, the exclusive licensing agent for all of the defendants' jet process patent rights;

3. Require licensees to accept licenses in the pool in order to get any, and to make available to the pool any related patent rights they hold or might obtain;

4. Use harassing litigation and threats of litigation alleging patent infringements to compel competitors to accept patents from the patent pool;

5. Deny the sale of jet perforating process supplies by Jet Research to non-licensees of the patent pool;

6. Discourage price competition.

The complaint said that the Gulf Research and Development Company of Pittsburgh and various unspecified oil well servicers participated in the conspiracy. These unspecified co-conspirators, not named as defendants, pay more than $4,000,000 per year in patent license fees to the defendants.

The Government asked the court to find that the conspiracy violated the Sherman Act, to forbid its continuation, and to enter such orders as may be "appropriate and necessary to dissipate the effects" of the alleged conspiracy.

Staff: Wilford L. Whitley, Jr., Sidney Harris and Bruce Montgomery. (Antitrust Division)

Optical Companies Indicted Under Sherman Act. United States v. American Optical Company, et al. (E.D. Wisc.). Indictment was returned on August 1, 1961 in Milwaukee charging American Optical Company, Bausch & Lomb, and the executive vice presidents of each with violation of Section 1 and Section 2 of the Sherman Act.

The corporate defendants are the principal manufacturers of lenses for eyeglasses with combined annual sales totalling $152 million. Total annual sales of their four leading competitors are approximately $33 million. The corporate defendants also operate over 400 branch wholesale laboratories throughout the country which compete with approximately 600 independent wholesale optical laboratories situated throughout the United States. Of the latter approximately 430 are also franchised distributors of the corporate defendants.

The indictment charges a conspiracy to monopolize the manufacture of lenses and the wholesale laboratory business through various predatory pricing practices, e.g.:

1. coercing independent lens manufacturers into adhering to the corporate defendants' agreed upon prices under threats of retaliatory price cutting;

2. manipulating the agreed upon prices to the detriment of the independent wholesale laboratories by establishing a narrow spread between the laboratory price and their resale price to dispensers;

3. operating at a loss certain branch laboratories which are in competition with independents and subsidizing such losses by factory profits;

4. compelling franchised dealers to adhere to prescribed prices under penalty of losing their franchises. The prescribed prices have been, at times, too low to permit the independent laboratories to operate profitably.

It is also charged that most of these pricing practices also constitute violations of Section 1 of the Sherman Act.

The individuals indicted are Victor D. Kniss, Executive Vice President of American Optical, and Alton K. Marsters, Executive Vice President of Bausch & Lomb.

Staff: Earl A. Jinkinson, Willis L. Hotchkiss, Theodore T. Peck and Harold E. Baily (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

Liability for Ice on Highway: United States, as Owner of Highway, Held Not Liable for Injury Resulting From Allowing Patch of Naturally Formed Ice to Remain Unsanded on Highway. Jennings, et al. v. United States (C.A. 4, May 4, 1961, petition for rehearing denied June 23, 1961; second petition for rehearing pending). Suitland Parkway is a public highway owned and maintained by the United States connecting Andrews Air Force Base, Maryland, with Washington, D. C. The Parkway is regularly patrolled by police cars of the Park Police of the Interior Department. On January 23, 1956, Stewart Jennings was driving his automobile on the Parkway in Maryland to his place of work in Washington, with his brother Donald, as passenger, when it skidded on a patch of ice, went out of control and collided with an oncoming car. Stewart was killed and Donald injured.

Stewart's widow and Donald instituted three actions arising out of the accident alleging negligence in failing to discover and remove or sand the ice, and negligence in the design construction of the drainage "swales" of the highway. After a lengthy trial the district court found that the United States was charged with constructive knowledge that ice might exist at the spot and time in question, that the patch of ice had been there from before midnight, and that by the exercise of reasonable care, the patrolling policemen could have discovered the patch in time to have it sanded and prevent the accident. It imposed liability on the United States, entering judgments for the total amount of $106,528. The district court made no findings regarding the design and maintenance of the drainage swale. 178 F. Supp. 516. The United States appealed on liability, and issues of damages, and plaintiffs also appealed on damages.

The Fourth Circuit reversed, holding that the facts found by the district court did not warrant the imposition of liability, and remanded for further proceedings on the question of possible liability, on a showing that the drainage swale was so defective as to constitute a nuisance. The majority (per Haynsworth, J.) found that under Maryland law, the United States (as owner of the highway) had no duty to discover and sand the ice, which had formed only a few hours prior to the accident. Chief Judge Sobeloff concurred on the ground that Maryland law does not impose a duty upon the owner of a highway to remove or take precautions against snow and ice formed from natural causes.

Staff: David L. Rose
(Civil Division)

NATIONAL SERVICE LIFE INSURANCE ACT

Illegitimate Child of Deceased Serviceman Was Entitled to Recover Gratuitous Insurance Proceeds Provided by World War II National Service Life Insurance Act. United States v. Philippine National Bank, (C.A. D.C., May 18, 1961). The sole question presented to the court for decision was whether the illegitimate child of a serviceman killed during World War II was entitled to receive the gratuitous insurance benefits provided by the National Service Life Insurance Act of 1940. Under Section 602(d)(2)(B) of that Act the gratuity was payable to the " * * * child or children of the insured * * *" if there were no surviving spouse entitled to take. The Veterans Administration denied the child's claim on the ground that an illegitimate child is not a "child" within the meaning of that language. The District Court for the District of Columbia upset the determination of VA and held that an illegitimate child does qualify as a "child" for purposes of gratuitous insurance.

The Court of Appeals affirmed, on the grounds that in ordinary usage a man considers his "illegitimate child" to be his "child", and that neither the wording of the National Service Life Insurance Act nor its legislative history indicated an intention on the part of Congress to exclude illegitimate children from the provisions of the Act. The court also emphasized that, in United States v. Zazove, 334 U.S. 602, 610, the Supreme Court stated that the provisions of the Act "where ambiguous, are to be construed liberally to effect the beneficial purposes that Congress had in mind."

Staff: Arnold R. Petralia (Civil Division)

SOCIAL SECURITY ACT

One Who, As a Result of Childhood Injury, Suffers From Mental Disease to Such a Degree as to be Unable to Engage in Substantial Gainful Employment is Entitled to Childhood Disability Benefits Under Section 202(d) of the Act. Braun v. Ribicoff (C.A. 3, June 29, 1961). Plaintiff, the mother of John M. Braun, filed a complaint under the Act seeking judicial review of a denial by the Secretary of Health, Education and Welfare of a claim of John Braun for childhood disability benefits under Section 202(d) of the Act. In 1946 Braun, at the age of eleven, had sustained a fractured skull when struck by an automobile. Thereafter, he suffered severe personality changes, asphasia, and paralysis of the right arm, leg and face. He underwent surgery for the removal of a large subdural hematoma which resulted in some improvement. In 1948, he received a favorable proquoris from a physical standpoint. Nonetheless up to the time he applied for disability benefits he suffered repeated headaches, periods of intense irritability and hostility, and severe personality changes. The administrative record showed that while Braun worked periodically he was unable to maintain social or work relationships. The medical evidence showed that he continues to suffer from degenerative brain disease caused by trauma, characterized by changes in personality and intellectual deficiency, complicated by psycho-neurological defects. The Secretary, chiefly on the basis of the fact that Braun had held temporary employment, rejected his claim, and the district court affirmed.

The Court of Appeals reversed, holding that the decision of the Secretary was not supported by substantial evidence and that Braun had demonstrated that he was mentally incapable of engaging in any substantial gainful activity.

Staff: Chester A. Weidenburner, United States Attorney; Joseph M. Kraft, Assistant United States Attorney (D. N.J.)

SOVEREIGN IMMUNITY

Institution of Suit in a Foreign Court Does Not Constitute Waiver of Immunity as to Third Parties. United States v. Harper and the London and Lancashire Insurance Co., Ltd. (Court of Appeals, Rabat, Morocco, June 6, 1961). The United States filed an action in the Court of First Instance of Casablanca against Harper and his insurer, claiming a million dollars for two F-84 jet planes destroyed in a collision with a fuel truck. Mrs. Peral, widow of the Moroccan truck driver killed in the accident, although receiving payments from the State Compensation Fund, petitioned also to intervene in the suit filed by the Government and filed a separate action against the United States claiming damages for herself and her two minor children. In February 1960, the trial court entered two judgments, dismissing her separate action and denying the petition to intervene. The Court of Appeals of Rabat affirmed, sustaining the position of the United States that according to well-recognized principles of international law: (1) the Moroccan courts lack jurisdiction to try an action against the United States without its consent by virtue of the principle of sovereign immunity; and (2) although a foreign sovereign plaintiff may be deemed to have waived its immunity as to the defendant, there is no general waiver as to third parties even on claims arising out of the same facts alleged in the complaint. Traditionally, institution of suits by a foreign state constitutes a waiver of its immunity with respect to any counterclaim which arose from the same transaction, not in excess of the sovereign's recovery. The Moroccan courts limit this waiver to the defendant despite the identity of subject matter.

Staff: Geo. S. Leonard and Joan T. Berry (Civil Division) Avocat Jacques Rochon (Casablanca, Morocco).

MUNICIPAL COURT OF APPEALS

FALSE ARREST

Liability of Airport Police Officers Making or Maintaining Unauthorized Arrest. Craig v. Cox and Doak (Mun.Ct. App. D.C., June 2, 1961). Appellant, Craig, drove with friends to National Airport and parked his automobile at a metered parking space. On returning to his automobile, he found a parking ticket on it charging him with occupying part of a second parking space. Later, he went to the airport police station to have the return date on the summons changed. Cox, who was in charge at the station, told appellant he would have to post collateral, and appellant protested. Cox then warned him

that he would have to post collateral or be taken into custody. Appellant again protested, and Cox demanded his possessions and ordered him to follow another officer, Doak. On repeating a request for a receipt for his possession, Doak allegedly struck him with a blackjack and forced him into a cell, where he remained for thirty minutes when he consented to pay the collateral. Appellant brought suit against Cox and Doak for false arrest and against Doak for assault and battery. The cases were consolidated and the jury found for appellant against Cox, in the amount of $1,000, and Doak, in the amount of $500 for false arrest, and against Doak, in the amount of $1,000 for assault and battery. The trial court granted summary judgment for appellees in the false arrest case, holding that the arrest was lawful; and in the assault and battery case, ordered a new trial because of its ruling in the other case.

The Municipal Court of Appeals for the District of Columbia reversed, holding that an airport police officer who has been authorized to accept collateral, under Section 7-1408 of the D.C Code, 1951, did not have the right to demand collateral of one who had received a summons issued by another officer to appear at a stated time and place before a court or commissioner to answer a charge of a parking violation, and, when his demand is refused, to arrest such a person without a warrant. It further held, with relation to the claims of assault and battery, that since Doak was merely maintaining the arrest improperly made by Cox, his superior officer, the issue on the new trial should be limited to whether he had used excessive or unreasonable force in maintaining the arrest.

Associate Judge Quinn dissented on the grounds that the actions of appellees were entitled to the immunity from civil liability for official acts afforded federal officers of greater rank.

Staff: Oliver Gasch, United States Attorney;
Nathan J. Paulson, Assistant United States Attorney (D. D.C.).

DISTRICT COURTS

FALSE CLAIMS ACT

Statute of Limitations Commences to Run in FHA Title I Loan Insurance Cases Against Wrongdoers When Innocent Bank Presents Claim to FHA; Doubling of Original Damages Should First be Computed Before Allowing Credit for Restitution. United States v. Globe Remodeling Company, et al., Civ. No. 2719, D. Vt., July 6, 1961. In a civil suit under the False Claims Act (31 U.S.C. 231) a home improvement contractor and its salesmen were charged with causing a bank to present false claims to Federal Housing Administration for insurance indemnity on defaulted Title I loans. The Government moved for partial summary judgment based on the res judicata effect of defendants' prior criminal conviction.

Defendants contended that, since their fraudulent acts were committed more than six years prior to the filing of suit, the action was barred by limitations. In an order filed on June 8, 1960 the district court rejected

that contention, holding that the period of limitations under the False Claims Act does not commence to run against the perpetrator of the fraud until the date the bank presents its claim to FHA for insurance indemnity on the defaulted Title I loan.

The issue of the measure of damages was resolved in a judgment order filed July 6, 1961. The court, in holding defendants jointly and severally liable, adopted the Government's contention that the measure of liability under 31 U.S.C. 231 is calculated by first doubling the amount FHA paid on the respective claims (single damages) and adding a forfeiture before allowing defendants credit for restitution (such restitution having been effected by the borrowers' repayment on account of their previously defaulted loans).

Staff: Joseph F. Radigan, United States Attorney; Joseph Frank, Assistant United States Attorney (D. Vt.); Victor S. Evans (Civil Division)

FEDERAL TORT CLAIMS ACT

United States Has No Duty to Travelers on Highway Constructed With Funds Under Federal-Aid-To-Highway Legislation. Leopold Mahler, et al. v. United States, (W.D. Pa., decided June 30, 1961). The driver and passenger in an automobile proceeding westerly on the Penn Lincoln Parkway were injured when without warning a large rock rolled from the adjacent hillside onto the extreme right-hand lane. The parkway - six lanes at this juncture - was constructed with Federal-aid-to-highway funds. Plaintiffs alleged various acts of negligence on the part of Bureau of Public Roads' employees.

The district court granted summary judgment to the Government on the ground of a lack of duty on the part of the United States analogizing its position to a "donor" and agreeing that the inspections and supervision under the Federal statutes were designed exclusively to protect the Government's fiscal interests.

Staff: Joseph S. Ammerman, United States Attorney; Thomas S. Ammerman, Assistant United States Attorney (W.D. Pa.).

LABOR MANAGEMENT RELATIONS ACT

Foreign Incorporation of Nominal Owner and Operator of Liberian Registered Vessel Manned by Alien Crew Sailing Between Miami and Nassau and Havana Held Not to Bar NLRB Jurisdiction in Unfair Labor Practice Proceeding. Peninsular & Occidental Steamship Company, etc. (NLRB, July 10, 1961). At the request of the Departments of State and Defense, the Department of Justice filed an amicus brief in four cases pending before the National Labor Relations Board involving foreign flag vessels registered under either Liberian, Panamanian, or Honduran laws, for the purpose of presenting to the Board the State Department's view upon matters of maritime and international law, and certain defense policy considerations advanced by the Department of Defense.

On July 10, 1961, the Board, in a two to one decision, decided the second of these cases, Peninsular & Occidental Steamship Company and Green

Trading Company. The Board found that P & O, a Connecticut corporation, had organized Blue Steamship Company and the Green Trading Company as Liberian corporations; that it then transferred the two ships involved, which had been United States flag registered and manned by the requisite American crews, to Blue who registered them under Liberian laws and chartered them to Green; and that after alien crews were taken on the ships continued to ply between Miami and Havana or Nassau. Extending the doctrine announced in West India, the Board majority held that as Blue and Green were but instrumentalities of P & O which in fact had full control of the vessels and was their beneficial owner, the foreign incorporation of the nominal owner (Blue) and operator (Green) could not bar the Board's jurisdiction under the Labor Management Relations Act [Taft-Hartley].

Staff: Donald B. MacGuineas and Andrew P. Vance
(Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Airport Desegregation. United States v. City of Montgomery, et al. (M.D. Ala.).

On July 26 the Department filed suit in the Middle District of Alabama for an injunction to halt asserted discrimination against Negroes in the use of airport facilities at Dannelly Field in Montgomery. The complaint named as defendants the City of Montgomery and its Board of Commissioners, together with Ranch Enterprises, Inc., which operates "The Sky Ranch," the airport restaurant, and charged them with requiring Negroes to use separate waiting room, water fountain and toilet facilities, and denying them service at the restaurant. The complaint alleges that such discrimination against Negroes subjects them to unjust discrimination and undue and unreasonable prejudice and disadvantage, thus violating the Federal Aviation Act and causing a burden upon interstate and foreign commerce.

Staff: United States Attorney Hartwell Davis;
J. Harold Flannery (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

ALCOHOL AND TOBACCO TAX

Statutory Presumptions Arising from Presence at Unregistered Still Held Constitutional. Phillips v. United States, 286 F. 2d 428 (C.A. 6, 1960), certiorari denied, 365 U.S. 884. In 1958 Congress enacted into law certain changes in that part of the Internal Revenue Code which deals with excise taxes. In two of the penalty sections statutory presumptions analogous to those found in the narcotics laws were inserted. See 26 U.S.C. 5601(b) and 5681(d). The four presumption sections in subsection (b) of Section 5601 are geared to the various crimes specified in subsection (a). In general, they provide for inferences to be drawn when a defendant is shown to have been present at an illegally operated still. The presumption in Section 5681, which deals with the requirement of posting a sign, is similar. This case is the first one in which the issue of the constitutionality of these presumptions has been decided by a Court of Appeals. Unfortunately, while the decision of the Sixth Circuit was favorable to the Government, the Court affirmed in a brief per curiam opinion which does not spell out the issues raised. However, the common ground in the several cases cited by the Court of Appeals in support of its decision happens to be an issue based on a presumption.

Caution should be exercised in the trial of such cases lest needless reliance be placed on these statutory presumptions. This is particularly urged in view of the lack of authoritative precedent available under these provisions, with the exception of this case.

Staff: United States Attorney John C. Crawford, Jr.; Assistant United States Attorneys Ray Jenkins and John F. Dugger (E.D. Tenn.); Beatrice Rosenberg and Bruno Colapietro (Criminal Division, Washington, D. C.).

AIRPLANE BOMB HOAX

False Report Concerning Attempt to Destroy Aircraft. United States v. Albert George Nygren (D. Colo., decided April 28, 1961). In this bomb hoax case the defendant pleaded guilty and received a sentence of four months' imprisonment. Nygren was apprehended by FBI agents shortly after telephoning from a tavern to the Stapleton Airport Control Tower that he had placed "six sticks of dynamite, two caps and and alarm clock" aboard a westbound flight. When apprehended, he confessed that it was a hoax perpetrated because of aggravation with his wife. This information was relayed immediately to airline officials. Consequently, no precautionary measures were required to be taken by the airline and the flight was delayed only twenty minutes.

Successful prosecution of this case and United States v. Allen (D. Conn.), reported in Vol. 9, No. 15 of the United States Attorneys Bulletin, dated July 28, 1961, despite the absence of aggravating circumstances, greatly enhances the Government's drive against false bomb reports made by pranksters.

Staff: United States Attorney Lawrence Henry; Assistant United States Attorney Donald L. Giacomini (D. Colo.).

FEDERAL AVIATION ACT

Operation of Aircraft after Suspension of Airman's Certificate; Civil in Personam Penalty; Libel of Aircraft. United States v. Richard F. Sanderford, Jr. (S.D. Miss.); United States v. One Cessna Aircraft (N.D. Ala.). Effective December 1957, Sanderford's Airman's Certificate was suspended for violation of Civil Air Regulations. He, however, failed to surrender the Certificate as required and during July to November, 1960, operated the captioned aircraft 18 times. Proceeded against personally and having surrendered his Certificate to the Federal Aviation Agency just prior to hearing of the case, the Court (S.D. Miss.) imposed civil penalties (under 49 U.S.C. 1471(a)(1)) of $100 on each of 12 violations and $50 on each of 6 violations, or a total of $1,500 plus costs. The aircraft being proceeded against by a libel to enforce a lien for the penalties (under 49 U.S.C. 1471(b), 1473(b)(1)), the Court (N.D. Ala.), having found a lien in favor of the Government, and it appearing that the above penalties and costs had been paid by the claimant owner of the aircraft (Sanderford's employer), ordered the lien extinguished and directed the claimant owner to pay all costs of the in rem proceeding including those incident to seizure of the aircraft. This matter reflects successful conclusion in different districts of in personam and in rem actions related to the same violations, the imposition of substantial penalties and the surrender of the Airman's Certificate $3\frac{1}{2}$ years after it was suspended.

Staff: Chief Assistant United States Attorney E. R. Holmes (S.D. Miss.); Assistant United States Attorney R. Macey Taylor (N.D. Ala.).

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Adulteration (Decomposition) of Frozen Fish Fillets; Value of Organoleptic Tests to Evidence Decomposition. United States v. 129 Cases * * * Ocean Perch Fillets, et al. (4 cases) (D. Maine, June 30, 1961). In these consolidated cases involving the same issues, the United States filed libels against five lots of frozen ocean perch fish fillets which were alleged to be adulterated and subject to condemnation under the Federal Food, Drug, and Cosmetic Act. The libels alleged that the articles were adulterated because of the presence therein of decomposed fish fillets.

Proof of the decomposed state of the fish was supplied by testimony given by experts of the Food and Drug Administration who based their conclusions upon organoleptic tests. Such tests consist of examinations wherein the senses of sight, smell, taste, and touch are utilized. In these cases the sense of smell was used. The fish then is classified and assigned a number which corresponds to its odor. For example, a slight, inoffensive, characteristic fishy odor is classified as number 1; a slight but distinct odor of decomposition is classified as number 2; and a decidedly strong odor of decomposition is classified as number 3.

The Court found in each case that the seized lots of fish contained in excess of 6% Class 3 fillets. Accordingly the entire lots of fish seized in each case were condemned.

The case is significant for its acceptance of the reliability of organoleptic tests to detect decomposition in fishery products, and will, we believe, promote the efficiency of the inspection program directed toward these foods.

Staff: United States Attorney Peter Mills (D. Maine).

COUNTERFEITING AND FORGERY

Advertisements Attached to Coins; Legislative Interpretation. Section 475 of Title 18 U.S.C. provides in part: "Whoever . . . writes, prints, or otherwise impresses upon or attaches to any . . . instrument, obligation, or security, or any coin of the United States, any business or professional card, notice, or advertisement, or any notice or advertisement whatever, shall be fined not more than $500." (New matter added by 1951 amendment underlined.)

In the United States Attorneys' Bulletin, Vol. 4, No. 21, pp. 673-4, October 12, 1956, it was stated that the Criminal Division would adhere to the Treasury Department interpretation of the statute that when coins are fastened to advertising matter, Section 475 is not applicable unless the coin is attached with some degree of permanency and in a manner calculated to continue beyond receipt by the addressee of the advertisement.

The Criminal Division has further reviewed this interpretation in light of the legislative history as revealed by Senate Report No. 467, 82nd Congress, 1st Session, p. 2. This report discloses that the evil at which the amendment was directed was the attachment to coins of paper labels bearing advertising material. The objection to the attachment of such labels was that they could facilitate the passing of counterfeit coins, that they interfered with the operation of coin counting and vending machines used by banks and other business organizations, and that they were a nuisance to the public which used the coins.

In view of this legislative history, the Criminal Division is of the view that, despite the fact that the statute is capable of a broader application, it should be applied only to paper labels or other similar advertisements, of the size of a coin or smaller, which are attached to coins which remain in circulation. It should not be applied to the attachment of advertisements which permanently withdraw the coins from circulation. Under the new interpretation, the statute shall not be applicable to the manufacture and sale of advertising novelty devices to which coins are either permanently joined, or from which they must be freed before they can be reintroduced into circulation.

FRAUD

Securities Violation. United States v. Abraham Rosen and Paul McDonald (D. Mass.). The indictment in this case, which was returned in April, 1959, charged fraud in the sale of securities, wire fraud, and conspiracy, arising out of a scheme whereby the defendants obtained approximately $13,000 from a customer of their broker-dealer firm.

In June, 1960, defendant McDonald entered a plea of guilty, and was given a six-months' suspended sentence and probation for five years, with the condition that he make restitution to the victim of $10 per week.

The other defendant, Rosen, fled to Canada. He was apprehended by the Royal Canadian Mounted Police in Montreal in March of this year pursuant to extradition proceedings. He elected to waive extradition, and returned to the United States. On April 13, 1961, he pleaded guilty to four counts of the indictment, and has been sentenced to imprisonment for one year. The remaining counts were dismissed, three of which counts were not covered by treaty stipulations.

Staff: United States Attorney W. Arthur Garrity, Jr.; Assistant United States Attorney Joseph S. Mitchell, Jr. (D. Mass.).

FRAUD BY WIRE

Conspiracy; Gambling Operations Involving Illegal Use of Long Distance Telephone Service. United States v. Benjamin Lassoff et al. (E.D. La.). On June 27, 1961, a federal Grand Jury in New Orleans, Louisiana, returned a 20 count indictment against 13 leading gamblers and bookmakers from various parts of the United States. Named in the indictment, which charges a conspiracy to defraud the United States in violation of 18 U.S.C. 371 and fraud by wire in violation of 18 U.S.C. 1343, are the following: Benjamin Lassoff, Robert Lassoff and Myron Deckelbaum from the Cincinnati-Newport, Kentucky area; Sam Di Piazza, Charles Perez, Harold Brouphy, Louis E. Bagneris, and Anthony Glorioso from the New Orleans area; Alfred Mones and Gil Beckley from the Miami area; Eugene A. Nolan, Baton Rouge, Louisiana; Peter Joseph Martino, Biloxi, Mississippi; and Alfred Reyn, New York City.

This indictment stems from the activity of the defendants in securing certain telephone company long-lines repairmen to place free and unauthorized long distance telephone calls for the defendants in connection with their widespread gambling and layoff operations. As a consequence of obtaining this service, the defendants were able to prevent toll slips from being made, with the result that no records were made of their gambling calls. In this manner, the defendants were able to obstruct the lawful functions of the Internal Revenue Service in investigating the long distance telephone activity of these defendants with a view toward assessing, levying, ascertaining, and collecting gambling excise taxes. As another aspect of the conspiracy charged against these 13 defendants, the functions of the United States Internal Revenue Service were further impaired insofar as the defendants also prevented the collection of the 10% tax imposed on long distance telephone activity.

Of great significance in this case is the fact that long distance telephone communications are essential to the effective carrying on of major layoff betting operations, such as that of the Lassoffs in Newport, or Di Piazza in New Orleans, or Mones and Beckley in Miami. Hence a major factor in curtailing such activity is the ability to check on such long distance telephone contacts. Therefore, an indictment charging an unlawful obstruction of this lawful inquiry serves to aid the effective enforcement of the federal gambling excise tax laws and to provide an effective weapon against large scale gambling operations.

The defendants also defrauded the American Telephone and Telegraph Company, its subsidiaries and affiliates of sums that should have been paid for the long distance calls they placed. As a consequence they are also charged with having devised a scheme to defraud and with having used the facilities of interstate wire communication in execution thereof, in violation of 18 U.S.C. 1343. Nineteen counts for violations of this statute are charged against 11 of the 13 defendants named on the conspiracy count as follows: two counts each against Benjamin Lassoff, Robert Lassoff, Myron Deckelbaum, Sam Di Piazza, Charles Perez, Anthony Glorioso, Harold Brouphy, Alfred Mones, Peter Joseph Martino, and Eugene A. Nolan; and one count against Gil Beckley.

United States District Judge Christenberry set bail at $25,000 each upon return of the indictment and the issuance of bench warrants for the arrest of each defendant. Removals have been effected against Alfred Mones, who was arrested in Las Vegas, Robert Lassoff, Benjamin Lassoff and Myron W. Deckelbaum, who were arrested at Newport, Kentucky, and Alfred Reyn who was arrested at New York City. Removal proceedings are presently pending against Gil Beckley in Miami, Florida. Upon the completion of this last removal proceeding, it is expected that an arraignment of all the defendants will take place in New Orleans in early August.

Staff: Edward Molenof, John E. Sprizzo and Robert Peloquin, Organized Crime and Racketeering Section, Criminal Division.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Motion under Rule 60(b) as Substitute for Appeal. Williams v. Sahli (C.A. 6, No. 13762, July 3, 1961).

Williams had been before the courts on two previous occasions in unsuccessful attacks, on various grounds, on a 1954 deportation order. Following an affirmance of the judgment and the denial of certiorari by the Supreme Court in his second case he was ordered to report for deportation.

That order triggered his third round - a motion in the District Court under Rule 60(b) F.R.C.P. to reopen his case, presenting a constitutional question which he claimed had not been adjudicated or considered in his previous two cases. The District Court concluded that he did not have authority to entertain the motion to reopen without the Court of Appeals' approval and Williams' petition to that court for leave to proceed followed.

The Court of Appeals found that the constitutional question asserted in his motion under Rule 60(b) was asserted in his complaint in his second case and briefed and argued in the Court of Appeals. That question was whether the suspension of deportation procedure (8 U.S.C. 1254(a)) violated due process because it required him to apply for suspension (as an alien) during his deportation hearing and before his alienage and deportability were determined. But his brief concluded with an abandonment of the constitutional issue by pointing out that the Board of Immigration Appeals, "by allowing a final deportation order to be set aside for this purpose (to consider an application for suspension) has evolved a method of applying the statute in a manner that avoids these constitutional pitfalls."

Relying on that abandonment the Court of Appeals did not decide the constitutional question in the second case by concluded that the Board had not abused its discretion in refusing to reopen the case to permit Williams to apply for suspension of deportation since the Board had considered the matter on its merits, although not obliged to do so, and found him ineligible for suspension. To reopen under the circumstances would have been to do a vain thing.

As to the petition for leave to proceed under Rule 60(b) the Court said that neither a petition for a rehearing before it nor for certiorari to the Supreme Court on the constitutional issue had been filed and that a motion to reopen under that rule may not be used as a substitute for appeal. (Ackerman v. U. S., 340 U.S. 193; Polites v. U. S., 364 U.S. 426). Since the Court found no merit to the petitioner's claim and because the seven-year litigation should be brought to a conclusion it denied his petition for leave to proceed under Rule 60(b) with instructions to the

District Court to dissolve the existing injunction against his deportation and to dismiss his motion. (The District Court did that three days later).

Habeas Corpus to Challenge Deportation Order; Conviction of Crime Involving Moral Turpitude and Sentence to Confinement of One Year - Actually Served Less Than One Year. Burr v. Edgar (C.A. 9, No. 16999, July 6, 1961).

Burr, an alien, was convicted in California in 1951 of the offense of issuing an insufficient funds check, a crime involving moral turpitude. The offense was committed within five years of his entry into the United States. He was granted probation for a period of ten years on condition that he serve ten months of that period in jail and that he make restitution.

In 1959 his probation was revoked and he was sentenced to a year in the County Jail. Deportation proceedings were then instituted which resulted in an order for his deportation under 8 U.S.C. 1251(a)(4). He challenged that order in habeas corpus proceedings contending that his sentence was not a one-year sentence since, with time off for good behavior and for work performance ((Calif., Penal Code, secs. 4019, 4019.2), he had actually served but ten months. The District Court discharged the writ and he appealed.

The Court of Appeals held that he is clearly deportable under 8 U.S.C. 1251(a)(4) since the statute requires only that an alien be sentenced to a year or more; it is not necessary that actual confinement for a year or more, or indeed, any actual confinement, occur pursuant to the sentence.

Affirmed.

IMMIGRATION

Adjustment of Status - Exchange Visitor to Permanent Resident; Validity of Regulation. William and Grace Lee v. Kennedy (C.A. for D.C., No. 15987, June 29, 1961).

The appellants are husband and wife and for the purposes of the case the wife's status depends upon the husband's. In 1954 he obtained a change in his nonimmigrant status to that of an exchange visitor and was thereafter granted four annual extensions of temporary stay.

In 1959 his application to adjust his status to that of a permanent resident under 8 U.S.C. 1255 was refused on the grounds that under the regulation (8 CFR 245.1) he was ineligible to apply for such an adjustment since he had not met the requirement in section 201(b) of the United States Information and Educational Exchange Act (22 U.S.C. 1446(b)) that he have two year's residence in a cooperating country following his departure from the United States. His action seeking a judgment declaring that the refusal to act on his application was contrary to law and that the regulation is invalid because it is broader than the statute resulted in an adverse summary judgment from which he appealed.

He argued that he is exempt from the two-year residence requirement of 22 U.S.C. 1446(b) because he had acquired exchange visitor status before June 4, 1956, the cut-off date in the proviso to that section.

The Court of Appeals found that no exchange visitor admitted to the United States before February 25, 1959 (the effective date of the regulation) could still have been enjoying an exchange visitor status as of that date - or the present time - without having sought and procured an extension or extensions of temporary stay after enactment of the 1956 amendment to the Act.

"It follows", said the Court, "that although the words of the regulation appear broader than those of the statute, the regulation like the statute actually applies to 'persons acquiring exchange visitor status subsequent to June 4, 1956' and to no other persons".

Affirmed.

Judicial Review of Administrative Action; Exhaustion of Administrative Remedies; Motion to Dismiss Treated as One for Summary Judgment. Ching Kwong Chao v. Esperdy (S.D., N.Y., 60 Civ. 3773, July 14, 1961)

The plaintiff sought a judicial review of the administrative denial of his application under 8 U.S.C. 1255 to adjust his immigration status to that of a permanent resident alien and prayed that the court set aside the defendant's denial order and direct the granting of the application.

The defendant moved, pursuant to Rule 12(b)(6) F.R.C.P. to dismiss the complaint for failure to state a claim upon which relief can be granted and submitted an affidavit stating facts outside the four corners of the complaint, and also the administrative record. His motion, therefore, was treated as one for summary judgment under Rule 56.

The court found that the plaintiff had failed to appeal from the defendant's denial of the application, as he could have done under 8 CFR 103.1(e), and instead instituted this action. It also found that the plaintiff had presented no compelling reason for making an exception to the well established doctrine that one is not entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted (Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 40).

The court commented that all that the plaintiff was required to do here to get his case before the Regional Commissioner was to file a motion to appeal and pay a fee of $10. He was not threatened with deportation prior to the final determination of the controversy and the procedure prescribed by the regulation and indeed suggested to him was not unreasonable.

Summary judgment for defendant.

NATURALIZATION

Continuous Residence in U. S.; Midway Islands in U. S. Petitions of Alacar and Castillo (D. C., Hawaii; No. Tr. 124,22031; July 3, 1961)

The petitioners for naturalization contended that they met the requirement of continuous residence in the United States during the five-year period immediately preceding the date of filing their petitions (8 U.S.C. 1427(a)) despite the fact that for more than a year during that period they were physically present in the Midway Islands as employees of Hawaiian Dredging Co., a Hawaii corporation, engaged in contract work for the military authorities of the United States on Midway.

The General Attorney for the Service opposed a grant of the petitions on the grounds that Midway is not included in the definition of "United States" in 8 U.S.C. 1101(a)(38) and that the petitioners had neither applied for nor been granted preservation of their residence in the United States for naturalization purposes as provided in 8 U.S.C. 1427(b).

The court (Tavares, J.) after considerable research and calling in part on his personal knowledge of and his intimate connection with the Hawaii statehood movement as chairman of the Hawaii Statehood Commission and following an earlier decision of his court by Judge Chase Clark (Petitions of Acosta, et al., No. 20826, Oct. 27, 1959, unreported; See Bulletin, Vol. 7, No. 25, p. 700) concluded that prior to the Hawaii Statehood Act of March 18, 1959 the Midway Islands were a part of Hawaii and thus were included in the definition of "United States" in 8 U.S.C. 1101(a)(38) under the use of the term "Hawaii" in that definition. (The Statehood Act specifically provided that the "State (Hawaii) shall not be deemed to include Midway Islands").

Since he concluded that Midway was in the United States prior to statehood and since the petitioners' presence on Midway terminated prior to the enactment of the Statehood Act the court found that they met the continuous residence requirement of 8 U.S.C. 1427(a).

The court overruled the recommendation that the petitions be denied and directed that the petitioners might take the oath of allegiance and be admitted to citizenship after thirty days following the filing of its decision unless, during that thirty-day period the Government has filed an appeal.

Judicial Cancellation; Burden of Proof. U.S. v. Graziano (E.D., Mich., No. 18244, June 29, 1961).

Graziano moved to set aside the court's order of December 2, 1958 which cancelled his naturalization of December 22, 1930 (8 U.S.C. 1451(d)) on the grounds that he had established permanent residence in Italy on or about June 23, 1931.

Service in the revocation of naturalization suit was by publication on July 30, 1958 and he contended that the filing of the affidavit of default and of the order pro confesso, both before October 30, 1958, were premature as being less than three months from the date of publication. The court held that the entry of the order of cancellation, being more than three months after publication, cured any defect of alleged prematurity since Graziano had more than three months in which to appear to avoid entry of the default order.

An additional ground was urged in Graziano's motion. Attached to the complaint for revocation was an affidavit regarding his residence abroad executed by a vice consul of the U. S. in Italy on June 24, 1957. That affidavit was used as the basis for advising the U. S. Marshal in July of 1958 that Graziano could not be found in the United States whereupon the summons and complaint were returned not found. On July 29, 1958 there was filed the affidavit of non-residence also based on the year-old affidavit of the vice consul.

The court commented that obviously it is unwarranted to rely upon a year-old report of a person's residence as proof that he is not in or at another place today and that he thought the Government should, in such cases, make an effort to show more concretely that the person is, in fact, not here.

But he also thought that in this proceeding to set aside an order of the court Graziano, the moving party, has a duty also. Any prejudice resulting to him exists in the event, and only in the event, that he was actually in this country during any part of the period of July 30, 1958 to December 2, 1958 and it was incumbent upon him to have shown this as part of his case on the motion, by affidavit or otherwise.

The motion to set aside and vacate was denied but with jurisdiction in the matter reserved by the court for 90 days within which Graziano may file a renewed motion should he be able to show his presence in this country during any of the critical period described.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to Commit Espionage: United States v. Robert Soblen (Southern District, New York) (See Vol. 8, No. 26, BULLETIN.) After trial lasting almost four weeks the jury, on July 13, 1961 returned a verdict of guilty on both counts of the indictment which charged a conspiracy to violate 18 U.S.C. 793(a) and (c) and 794(a). Sentencing is scheduled for August 7, 1961.

Staff: Assistant United States Attorneys
Richard C. Casey and David Hyde
Southern District, New York

Sabotage; Destruction of "War Utilities." United States v. Bernard Jerome Brous and Dale Christian Jensen (District of Nevada). On July 11, 1961 the defendants pleaded not guilty to a two-count indictment returned on June 29, 1961, charging a conspiracy under 18 U.S.C. 2153(b) to injure and destroy two microwave relay stations located near Wendover, Nevada and Cedar Mountain, Utah and a K-repeater underground cable station near Knolls, Utah. A substantive count under 18 U.S.C., Sections 2153(a) and 2, alleges the destruction of the facility at Wendover. These stations, which are owned and operated by the American Telephone and Telegraph Company, are "war utilities" within the meaning of the sabotage statutes. A trial date has not been set. A Commissioner's complaint, filed June 20, 1961 in the District of Utah, remains outstanding against Brous and Jensen relative to the destruction of the facilities in Utah.

Staff: United States Attorney Howard W. Babcock
(District of Nevada)
John H. Davitt and Alta M. Beatty
(Internal Security Division)

Civil Case. Seizure of Aircraft: United States v. One B-26 Aircraft, et al. (S.D. Fla.) In a libel of information filed on April 27, 1961, the United States alleged that on April 15, 1961 it seized an armed B-26 aircraft bearing markings F.A.R. 933 which had taken part in an air raid on Cuba earlier that day and which had thereafter landed at Miami International Airport. The libel asserted that the pilot, one Sr. Garcia Mendoza, had illegally imported the aircraft into the country without first having obtained an appropriate license from the State Department's Office of Munitions Control. The pilot did not oppose the seizure. However, the Florida advertising firm of Harris and Company attached the aircraft and moved to intervene on the ground it possessed a Florida State court judgment against the Republic of Cuba and was entitled to levy execution on this alleged Cuban property. The United States opposed the intervention on the theory that even if Harris and Company had a valid state court judgment against the Republic of Cuba and the aircraft were Cuban, that nevertheless the intervenor had no standing, for under the cases of The Schooner Exchange v.

M'Faddon, 7 Cranch 116 (U.S. 1812), and Harris and Company v. Republic of Cuba, 127 So. 2d 687 (Fla., Mar. 2, 1961), American citizens may not proceed against the national "warships" (military aircraft) of foreign countries which may be found in the United States. Thereafter, Harris and Company withdrew its motion to intervene purportedly acknowledging the validity of the Government's memorandum of law. The bomber and the munitions of war were forfeited to the United States by default on July 19, 1961.

Staff: Oran H. Waterman and Benjamin C. Flannagan (Internal Security Division) and Assistant United States Attorney Daniel S. Pearson (S. D. Fla.).

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Administrative Law--Oil and Gas Leasing on the Public Domain. Miller v. Udall (D.C. D.C., June 23, 1961). In 1959, the Secretary of the Interior reversed a decision of the Director, Bureau of Land Management, which had held that the partial assignment of a public lands lease in the last month of its extended term would result in a two-year extension of both the assigned and retained portions. The Secretary held that a correct interpretation of the Mineral Leasing Act required that such assignments be made before the last month in the lease term. It was thereafter brought to the Secretary's attention that the opinion of the Director had followed an earlier informal opinion of an associate solicitor and that numerous lessees in reliance on the earlier interpretation had delayed making assignments until the last month. The Secretary then held that, in view of the public reliance on the earlier interpretation, his opinion would be given only prospective effect and would not affect assignments made prior to or during the month that the changed interpretation was announced.

Numerous individuals who had applied for new leases covering lands in existing leases that would have expired by strict application of the Secretary's interpretation thereafter persisted in their applications. The applicants contended that the Mineral Leasing Act could have only one interpretation and that the Secretary erroneously concluded that that interpretation should be given only prospective application. All of these applications were rejected. Seven separate suits were thereafter instituted against the Secretary under the Administrative Procedure Act. These actions were consolidated for hearing on cross-motions for summary judgment. On June 23, 1961, the defendant's motion for summary judgment was granted. Although the district court did not write an opinion, it necessarily concluded that administrative officials are not bound to give their interpretation of a statute retroactive effect. The fact that courts have the power to "make a choice * * * between the principle of forward operation and that of relation backward" has often been recognized. Gt. Northern Ry. v. Sunburst Co., 287 U.S. 358. And the Internal Revenue Service has been given this right by statute. There is a dearth of precedent on the point, however, as applied to administrative agencies. See 1 Davis, Administrative Law Treatise, sec. 5.09. The seven cases consolidated here affect some 400 leases covering 75,000 acres of land.

Staff: Thos. L. McKevitt (Lands Division)

Tucker Act--Rights of Individual Indians in Tribal Property. Ambrose Whitefoot and Minnie Whitefoot v. United States (C.Cls., July 19, 1961). In 1950, Congress authorized construction of The Dalles Dam in the Columbia River at a point approximately twenty miles west of the famous Indian fishery at Celilo Falls. This area had from time immemorial been a favorite salmon fishing grounds of many of the Northwest tribes later consolidated into the Yakima Nation, the Umatillas, the so-called Warm Springs

Indians and the Nez Perce. When the United States entered into treaties with these tribes in 1855 each reserved to the Indians the right to fish (off their new reservations) "at all usual and accustomed places."

Following authorization of construction and the attendant inundation of the Celilo fishing sites, the Corps of Engineers entered into negotiations with the four named tribes and eventually paid them a total of approximately $26,000,000 as compensation for their loss. The moneys so received by the Yakima Nation were distributed on a per capita basis despite the fact that some of the Indians did little or no fishing in the area and that others had earned their entire livelihood as commercial fishermen at Celilo.

In 1957, two Yakima Indians instituted a suit against the Secretary of the Interior in the United States District Court for the District of Columbia to require preferential distribution. That suit was dismissed on jurisdictional grounds. At the same time, this action was instituted in the Court of Claims by the same two Indians who contended that, by tribal custom, the fishing rights were individually owned and that the treaty provision constituted a reservation of individual fishing rights--which had passed to the plaintiffs by inheritance. Testimony in this case established that by custom among the particular bands who had lived along this stretch of the Columbia in 1855 particular sites could be claimed by individual Indians and that the same rights would be recognized in their descendants. The testimony also established, however, that the Indian tribes had no notion of individual ownership or of the inheritance of real property.

In an opinion handed down on July 19, 1961, the court, through Mr. Justice Reed, sitting by designation, concluded that the plaintiffs had not established their claim of private ownership, that the communal holding of property was in accord with normal Indian custom and that the rights reserved by the 1855 treaties were reserved to the tribe rather than to the individual tribal members. It held that the right to use the "accustomed" fishing places was a tribal right and that the United States had not "taken" anything from the individual Indian plaintiffs when it constructed the dam.

The issue decided here has been raised at various earlier times in suits to enjoin the construction of both the McNary and the John Day dams and in Bonneville dam condemnation cases. All of the earlier cases, however, went off on other points. This is the first time it has been definitely held that individual Indians acquired no legally recognizable rights in the Indian fishing sites which dot the salmon-rich rivers of the Northwest.

Staff: Thos. L. McKevitt (Lands Division)

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Accounting - Correction of error in reporting material item held to be change of method of accounting for which consent of Commissioner must be obtained. Commissioner v. O. Liquidating Corporation (C.A. 3d, June 14, 1961).

Taxpayer has at all times kept its books and reported its income on the accrual basis. Prior to 1953, taxpayer had consistently accrued and reported the estimated amount of premiums it anticipated receiving on a group insurance policy as income in the year preceding that in which the amount of premiums was finally determined by the insurance company and distributed. These estimates were often accurate to the penny. However, in 1953, taxpayer concluded that it was error to accrue the premiums in the year prior to the determination by the insurance company of the amount to be distributed, if any. Accordingly, taxpayer did not report any income from premiums in 1953, and in 1954 it reported the amount of premium actually received in that year. The Commissioner adjusted taxpayer's 1953 return and added thereto as income the amount of premium received by it in 1954, in accordance with taxpayer's prior method of reporting that item. The Tax Court held that the taxpayer had not changed its method of accounting but had merely corrected an error in its method of reporting. Accordingly, the court determined that the premiums distributed in 1954 were not includible in taxpayer's income for 1953.

The Third Circuit reversed in a 2-1 decision. Noting that the Commissioner did not contest that taxpayer had corrected an error in its method of reporting the item in question, the Court held that, nevertheless, taxpayer had thereby attempted to change its method of accounting and could do so only with the permission of the Commissioner. The Court noted that the purpose of the general rule that a taxpayer may change his method of accounting only with the consent of the Commissioner was to protect the revenue from loss due to the distortion of income that normally results from such a change. The Commissioner can prevent this by conditioning his consent on appropriate adjustments by the taxpayer which would reimburse the treasury for losses suffered due to the change. Consequently, the rule applies equally where a taxpayer changes its method of reporting a material item as when the change involves an over-all system of accounting. And, the distortion of income is no less where the prior method of reporting the item was incorrect; and the Commissioner must be permitted to protect the revenue in that instance also. Consequently, the Court concluded that taxpayer was obligated to obtain the consent of the Commissioner.

Staff: Douglas A. Kahn and Harry Baum (Tax Division)

District Court Decisions

Bankruptcy -- Contemplated Liquidation Not a Bar to a Valid Election By Small Business Corporation Pursuant to Section 1372 I.R.C. of 1954, Subchapter S. In the Matter of Novo-Plas Mfg. Co., Inc., Bankrupt, Eastern District of New York. In 1958 the sole shareholder of the corporation was Raymond Zurawin. On November 29, 1958, the corporation, in accordance with Subchapter S, Sections 1371-1377, IRC of 1954, elected to be taxed on the same basis as a partnership. These sections provide in essence that the tax consequences of the election year are to be attributed to the corporate shareholders.

On January 23, 1959, the corporation executed an assignment for benefit of creditors. On February 16, 1959, an involuntary petition in bankruptcy was filed against the corporation and it was adjudicated a bankrupt on March 23, 1959. The corporation incurred liability for social security and withholding taxes in the sum of $7,155.61, for which sum the District Director of Internal Revenue filed a proof of claim in the bankruptcy proceeding.

The trustee for the bankrupt corporation petitioned the Referee for an order requiring the District Director to permit the trustee, pursuant to Section 172 IRC of 1954, to apply the net operating loss of the corporation for the taxable year 1958 as a carryback against the taxable income of the corporation for the taxable years 1955 and 1956, thereby entitling the corporation to a refund of $8,011.52 in taxes paid by the corporation in the latter two years.

Thus the issue was presented whether the trustee, on behalf of the corporation and its creditors, or the shareholder of the duly electing and qualifying corporation may utilize the 1958 net operating loss of the corporation in accordance with Section 172 of the IRC of 1954. This issue turns upon whether a so-called Subchapter S election is valid for all purposes when made at a time when the electing corporation may be said to have been insolvent and/or contemplating liquidation.

The trustee's basic argument was based on the premise that it is manifestly inequitable for the provisions of Subchapter S to deprive the corporation and its creditors of the benefits of this 1958 net operating loss. Further, that Congress may not and did not intend to retroactively deprive the corporation and its creditors of the credit for taxes paid in years prior to the enactment of Subchapter S.

In denying the trustee's petition the Referee stated it is clear that the right to utilize a net operating loss as a carryforward or carryback is purely a matter of legislative grace, revocable at will and upon the terms and conditions as Congress sees fit; that the indirect effect of the election under Subchapter S on corporate creditors cannot be the basis upon which to make a determination as to the propriety of said election. There is no doubt that Congress can retroactively deprive the corporation of the benefit of taxes paid in earlier years. The Referee held that since the provisions of Subchapter S allocate the taxable consequences of the election year to the corporate shareholders (Sections 1373 and 1374), the corporation is not the "taxpayer" to whom a deduction is available.

The trustee further requested that the Court order the shareholder to assign his interest in the net operating loss to the trustee. The Referee denied this request holding such relief would be barred by 31 U.S.C., Section 203 and the right to a deduction or tax loss credit is clearly not assignable.

On petition for review the Referee was sustained by the District Court.

Staff: Joseph P. Hoey, United States Attorney for the Eastern District of New York; Jon H. Hammer, Assistant United States Attorney. C. Stanley Titus (Tax Division)

Injunctions - Penalties are not Provable Debts in Bankruptcy.-A Suit Will not lie Against the District Director to Enjoin the Administrative Collection of Penalties Disallowed in Bankruptcy. Steckler v. United States (D.C.S.D. Indiana, CCH Par. 15,349). The taxpayer was adjudicated a bankrupt and the District Director filed a proof of claim with the estate for excise taxes, penalties and interest. The referee allowed the claim for taxes and interest to the date of bankruptcy, but disallowed the claim as to all penalties and as to interest accruing subsequent to the bankruptcy. The taxpayer was granted a discharge in bankruptcy and shortly thereafter the District Director informed the taxpayer that the disallowed penalties were still legally due and that administrative procedures would be used to collect them. Taxpayer filed a suit seeking to enjoin the United States and the District Director from taking any steps to collect the penalties, on the grounds that the collection of the penalties was unlawful because of their having been discharged in bankruptcy, and that an attempt to collect them subjected him to harassment, that it jeopardized his new business transactions and that he was unable to pay. Motions to dismiss the United States and District Director were filed.

The Court held:

1. An injunction suit may not be maintained against the United States.

2. The Complaint failed to state a claim against the District Director upon which relief could be granted. Penalties are not provable debts in bankruptcy and therefore are not discharged by a bankruptcy proceeding. They remain legal obligations and the District Director may attempt their collection. The taxpayer also failed to allege any extraordinary and unusual circumstances so as to bring himself within the exception, Miller v. Standard Nut Margarine Co., 284 U.S. 498, to the statutory bar of Sec. 7421 of the Internal Revenue Code of 1954.

The Court distinguished National Foundry Co. v. Director of Internal Revenue, 229 F. 2d 149 (C.A. 2) and refused to follow United States v. Mighell, 273 F. 2d 682 (C.A. 10), relying instead upon the reasoning in United States v. Harrington, 269 F. 2d 719 (C.A. 4); United States v. Phillips, 267 F. 2d 374 (C.A. 5) and In re Parchem, 166 F. Supp. 724 (D.C. Minn.).

Staff: United States Attorney Richard P. Stein (Indiana) Edward A. Bogdan, Jr., Norman E. Bayles (Tax Division)

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