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UNITED STATES ATTORNEYS

BULLETIN

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NEW APPOINTMENTS

The nominations of the following United States Attorneys have been confirmed by the Senate:

Mississippi, Northern - Hosea M. Ray

Mr. Ray was born August 9, 1924 at Rienzi, Mississippi, is married and has one son. He attended the University of Mississippi at Oxford from September 21, 1942 to February 15, 1943. He served in the United States Air Force from February 21, 1943 to October 27, 1945 when he was honorably discharged as a Flight Officer. He returned to the University of Mississippi on September 16, 1945 and received his LL.B. degree on May 30, 1949. He was admitted to the Bar of the State of Mississippi that same year. He served as a member of the Mississippi House of Representatives from 1948 to 1952. He was recalled to active duty with the Air Force from February 15, 1951 to April 15, 1953 when he was honorably discharged as a First Lieutenant. From November 1953 to December 1954 he was treasurer and legal adviser for the Corinth Machinery Company in Corinth, Mississippi. From 1954 to 1956 and since 1958 he has been Prosecuting Attorney for Alcorn County, Mississippi.

Montana - H. Moody Brickett

Mr. Brickett was born October 18, 1918 at Haverhill, Massachusetts, is married and has three children. He attended Boston University from September 1937 to June 1938 and Montana State University from September 25, 1947 to June 4, 1951 when he received his LL.B. degree. He was admitted to the Bar of the State of Montana that same year. He served in the United States Army Air Force from January 31, 1943 to June 19, 1946 when he was honorably discharged as a Captain. After his completion of law school he was appointed Assistant Attorney General of the State of Montana on July 1, 1951 and on September 1, 1954 he was promoted to First Assistant Attorney General. He remained in that post until January 6, 1957 when he entered a legal partnership with Robert W. Gabriel in Great Falls, Montana. He also served as Deputy County Attorney for Cascade County, Montana from January 1957 to January 1959. On March 20, 1961 he was appointed United States Attorney, by the court, for the District of Montana, where he now serves.

North Carolina, Eastern - Robert H. Cowen

Mr. Cowen was born January 16, 1915, at Williamston, North Carolina, is married and has three children. He attended Wake Forest College from

1934 to 1939 and Wake Forest Law School from 1939 to August 8, 1942, when he received his LL.B. degree. He was admitted to the Bar of the State of North Carolina in 1942. He opened his law office in Williamston, North Carolina in 1942 and practiced until 1945. He was an attorney in the Office of the Solicitor, United States Department of Labor, Richmond, Virginia, from January 1945 to January 1947. He returned to Williamston and served as Town Mayor from July 1947 to February 1957. He served as State Senator to the North Carolina General Assembly from February to June 1957. In December 1957 he was appointed Assistant Counsel for the Merchant Marine and Fisheries Committee of the United States House of Representatives and has been Counsel from January 1959 to the present.

South Carolina, Eastern - Terrell L. Glenn

Mr. Glenn was born June 3, 1930 at Chester, South Carolina, is married and has two children. He entered the University of South Carolina on September 18, 1947 and received his A.B. degree on June 4, 1951 and his LL.B. degree on September 12, 1953. He was admitted to the Bar of the State of South Carolina that same year. He served in the United States Army from October 27, 1953 to September 26, 1955 when he was honorably discharged as a First Lieutenant. Since 1955 he has been associated with Edens and Hammer in Columbia and is now a law partner in that firm.

South Carolina, Western - John C. Williams

Mr. Williams was born January 24, 1903 at Lee Valley, Tennessee, is married and has two children. He attended Wofford College at Spartanburg, South Carolina from 1923 to 1927 when he received his A.B. degree and the University of South Carolina at Columbia from September 20, 1928 to June 10, 1931 when he received his LL.B. degree. He was admitted to the Bar of the State of South Carolina that same year. From 1931 to 1951 he was a partner in the firm of Johnston and Williams in Spartanburg and also served as a member of the State Legislature in 1931-32. He served in the United States Army from November 25, 1940 to February 15, 1946 when he was honorably discharged as a Colonel. He was appointed United States Attorney for the Western District of South Carolina on February 24, 1951 and served until his voluntary resignation on July 30, 1954. Since that time he has engaged in the private practice of law in Spartanburg.

The names of the following appointees as United States Attorneys have been submitted to the Senate:

Delaware - Alexander Greenfeld
Maine - Alton A. Lessard
Nevada - John W. Bonner
North Carolina, Middle - William H. Murdock
North Carolina, Western - William Medford
West Virginia, Southern - Harry G. Camper, Jr.

As of September 15, the score on new appointees is: Confirmed - 66; Nominated - 8.

FISCAL YEAR TOTALS

With the exception of criminal cases, totals in all categories of work pending in United States Attorneys' offices rose during the month of June. However, the sharp drop in pending criminal cases caused a reduction in the total number of cases and matters pending. The following analysis shows the number of items pending in each category as compared with the totals for the previous month:

	May 31, 1961	June 30, 1961	
Triable Criminal	7,157	6,724	- 433
Civil Cases Inc. Civil Less Tax Lien & Cond.	14,165	14,179	+ 14
Total	21,322	20,903	- 419
All Criminal	8,727	8,319	- 408
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	17,029	17,088	+ 59
Criminal Matters	10,431	10,498	+ 67
Civil Matters	13,098	13,240	+ 142
Total Cases & Matters	49,285	49,145	- 140

Both filings and terminations of civil cases showed a decrease from the previous fiscal year. In the criminal field, filings increased but terminations dropped. As a result of the reduction in the number of total terminations, the pending caseload registered an increase of 2,088 cases, or almost eight percent. The breakdown below shows the pending totals at the end of fiscal 1960 and 1961:

	F.Y. 1960	F.Y. 1961	Increase or Decrease Number	%
Filed				
Criminal	30,617	30,791	+ 174	+ .57
Civil	24,382	23,877	- 505	- 2.07
Total	54,999	54,668	- 331	- .61
Terminated				
Criminal	30,462	30,309	- 153	- .50
Civil	23,457	22,271	- 1,186	- 5.06
Total	53,919	52,580	- 1,339	- 2.48
Pending				
Criminal	7,837	8,319	+ 482	+ 6.15
Civil	19,134	20,740	+ 1,606	+ 8.39
Total	26,971	29,059	+ 2,088	+ 7.74

Total criminal and civil case filings during June dropped to the second lowest total for the twelve-month period. Terminations, however, reached the third highest level of the year. Set out below is an analysis by months of the number of cases filed and terminated.

	Filed			Terminated		
	Crim.	Civ.	Total	Crim.	Civ.	Total
July	1,709	1,863	3,572	1,600	1,463	3,063
Aug.	2,346	2,304	4,650	1,772	1,906	3,678
Sept.	3,201	1,897	5,098	2,328	1,798	4,126
Oct.	2,551	1,990	4,541	2,977	2,005	4,982
Nov.	2,479	1,889	4,368	2,832	1,627	4,459
Dec.	2,534	1,753	4,287	2,617	1,816	4,433
Jan.	2,574	1,914	4,488	2,513	1,797	4,310
Feb.	2,883	1,840	4,723	2,346	1,751	4,097
March	2,983	2,137	5,120	3,159	2,045	5,204
April	2,666	2,095	4,761	2,726	2,036	4,762
May	2,782	2,119	4,901	2,858	1,906	4,764
June	2,083	2,076	4,159	2,681	2,121	4,802

Total collection for fiscal year 1961 amounted to $34,837,720.39 or 5.68 percent over the $32,964,349.25 collected during fiscal 1960. This represents the fourth highest aggregate of collections in the last nine years.

JOB WELL DONE

Assistant United States Attorney Ronald R. Hull, Eastern District of Washington, has been commended by the Acting Director of Real Estate, U. S. Engineers, for the able manner in which he presented the Government's position in a recent group of lands cases in which the final awards were less than the deposits made by the Government. In expressing appreciation for Mr. Hull's excellent services and for his personal interest in the land acquisition program of the Engineer Corps, the letter stated that he has represented the Government in many land acquisitions in his district; he has been energetic and efficient in expediting the Corps of Engineers' military and civil works acquisition programs; he has been available to the Engineer Corps representatives and to landowners or their representatives at all times for conferences or discussions; he has frequently visited project areas to talk to the landowners, negotiate settlements, or arrange special appearances before the courts to expedite the disposition of pending condemnation actions; his activities have strengthened and promoted favorable relations between the Government and the landowners and have avoided delays in obtaining the possession of lands and in the distribution of funds on deposit; and his personal attention to Engineer Corps work has resulted in considerable reduction in the backlog of pending cases in the district, and the results achieved in settlements and trials have been satisfactory.

The General Counsel, FHA, has commended Assistant United States Attorney James W. Noonan, District of Massachusetts, for his excellent work in a recent case and has expressed satisfaction with the results obtained at the trial. The case was one in which a prior court of appeals ruling restricted the Government's defenses. Contrary to expectations, however, Mr. Noonan succeeded in obtaining a special verdict from the jury in favor of the Government.

Assistant United States Attorney John Kaplan, Northern District of California, has been commended by the Regional Attorney, Department of Agriculture, for his outstanding work in a recent false claims case. Mr. Kaplan obtained a judgment of over $13,000 for the Government, of which over half was represented by penalties and forfeitures under the Civil False Claims Act. The letter stated that the favorable decision was due, in large measure, to the exceptional talents that Mr. Kaplan displayed in the trial of the case, and that, more important than the money involved, is the salutary effect which the decision will have in curtailing the alarming number of false claims filed in recent years under some of the Department's programs.

The Associate General Counsel, FAA, has commended the outstanding service received from United States Attorney Francis C. Whelan and Assistant United States Attorney John Schell, Southern District of California, in an extremely important case which is written up in the Criminal Division's portion of this Bulletin under the heading of Federal Aviation Act. The Associate General Counsel stated that this was a particularly important case to that agency, for complaints were made by passengers, and the matter had received public attention and had also been mentioned before Congressional Committees who are currently considering proposed legislation to provide additional criminal sanctions for various acts committed by airline passengers. The letter stated that the action taken by Mr. Whelan's office wasextremely efficient and effective and was of inestimable help in a matter of great importance to the Federal Aviation Agency which feels greatly indebted to Mr. Whelan and his staff.

United States Attorney Robert E. Hauberg, Southern District of Mississippi, has been commended by the Regional Attorney, HEW, for his very effective representation and cooperation in a recent group of cases.

The District Director, IRS, has expressed his personal appreciation as well as that of his staff for the very fine services performed by Assistant United States Attorney Robert H. Wyshak, Southern District of California, in a recent case in which, through the extraordinary efforts of Mr. Wyshak, recovery of over $175,000 was made on a delinquent tax account. The account was otherwise uncollectible. The District Director stated that Mr. Wyshak had performed excellent services in behalf of the IRS many times but that this recent case was so outstanding as to merit special mention.

United States Attorney T. Fitzhugh Wilson, Western District of Louisiana, has received a letter of appreciation from the Director, Bureau of Inquiry and Compliance, ICC, for his commendable interest and zeal in a recent case against the railroad. In congratulating Mr. Wilson on a job well done, the Director stated that the $8,000 fine levied by the judge has resulted in substantial justice.

The Commissioner, IRS, has conveyed his personal appreciation and that of his staff for the fine job done by Assistant United States Attorney Thomas R. Sheridan, Southern District of California, in the

Mickey Cohen tax case. The letter stated that Mr. Sheridan personally directed the two extensive grand jury investigations which preceded the trial, and presented the case in its entirety in the district court; that he devoted himself so completely to the case that during the two months the trial was in progress, he did not go home except on week-ends but lived downtown in order to perfect each phase of the case day by day; that observers from other enforcement agencies, attorneys, accountants, and the general public have gone out of their way to comment favorably on Mr. Sheridan's able presentation of the case; and that the importance of this case to the IRS and to the cause of law enforcement generally can best be judged by the wide-spread publicity given the grand jury proceedings and subsequent trial. The Commissioner stated that the Assistant Commissioner, Operations, and the Director, Intelligence Division, join in his expressions of admiration and appreciation to Mr. Sheridan for the interest, skill, and exceptional devotion to duty he demonstrated and without which the case could not have been won.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT - CLAYTON ACT

New York Bank Merger. United States v. Manufacturers Trust Company and The Hanover Bank (S.D. N.Y.). On September 8, 1961, a complaint was filed against the named defendant banks charging that consummation of their contemplated merger would violate Section 1 of the Sherman Act and Section 7 of the Clayton Act.

Manufacturers Trust, which at the end of 1960 had total assets of $3.8 billion, deposits of $3.5 billion and loans of $1.5 billion, is the fifth largest bank in New York and sixth largest in the nation. Hanover, eighth largest in New York and fourteenth in the nation, had at that time total assets of $2.2 billion, deposits of $1.7 billion and loans of $948 million.

The complaint alleges that the merger would produce a bank which would rank third in New York and fourth in the nation, and would have 14% of the total commercial banking assets in New York; and that the merger would increase banking concentration in New York to the point where over three-fourths of the total commercial bank deposits and loans would be held by five banks.

The action sought a temporary restraining order, a preliminary injunction to prevent the merger until the case is adjudicated on its merits, and a permanent injunction. Prior to the filing of the complaint, on the same day, the banks merged.

On September 9, the Court issued an order to defendants to show cause why the merger should not be enjoined. As a result of a meeting with counsel for defendants and the Court on September 13, and in view of the fact that the banks had already merged, the Government withdrew its motion for preliminary injunction on the condition that there take place an early exchange of statistics and other information relating to the merits of the suit, and that the case be tried prior to January 1, 1962.

Staff: George D. Reycraft, John M. Toohey and Lawrence Kill. (Antitrust Division)

Complaint under Section 1 of Sherman Act and Section 7 of Clayton Act to Stop Bank Merger. United States v. Continental Illinois National Bank and Trust Company of Chicago, et al. (N.D. Ill.). On August 29, 1961, the Government filed a civil complaint against the merger of the subject banks, the second and the sixth largest in Chicago, the combination of which would create the largest commercial bank in Chicago and the ninth largest in the nation. Inasmuch as Chicago was already an area of heavy concentration in commercial banking, this union, the Government alleged, would be in violation of Section 1 of the Sherman Act as well as Section 7 of the Clayton Act.

This action was in accordance with the long-expressed intention of the Antitrust Division to attack the merger (if approved by the Controller of the Currency) as being in violation of the antitrust laws.

At the same time, the Government filed a motion for a temporary restraining order to prevent consummation of the merger scheduled for September 1, 1961 in order that appropriate proceedings on the merits might be had prior to the merger. Of particular significance in this regard was the applicable Illinois banking law prohibiting branch banking, the effect of which would be to obliterate the separate identity, personnel, procedures, records and even physical plant of one of the merging parties, in this case the City Bank.

Under the circumstances, the Government contended, should consummation of the merger be permitted, and thereafter, following a trial on the merits, be found to be illegal, the problems of unscrambling and identifying assets, divestiture, etc. would render appropriate relief and re-establishment of appropriate competitive conditions extremely difficult.

After two days of hearings, the Court on August 31, 1961, denied the Government's motion for a temporary restraining order on the ground that the merger had "progressed too far" and that a restraining order would create irreparable damage to the merging banks. In this regard the Court, while clearly rejecting any suggestion or intimation of bad faith on the part of the Government, did note that the banks had gone ahead with their merger plans in reliance on the Controller of the letter of approval (dated August 21, 1961), and communication with various governmental agencies, including Treasury and Justice, from which they were of the belief that it was the intention of the Government to attack the merger after, rather than before, the fact. In this respect, the Court noted that "the merger has been 'virtually completed' except for the physical transfer of the assets."

Under the circumstances, said the Court, issuance of a restraining order would cause irreparable damage upon the banks which it, as a court of equity, could not sanction.

Staff: Herbert G. Schoepke, John M. Toohey, Jr. and Charles A. Degnan. (Antitrust Division)

SHERMAN ACT

Price Fixing - Carbon Dioxide Storage Equipment; Complaint Corporation, et al. (E.D. N.Y.). On August 22, 1961, a civil antitrust complaint was filed against General Dynamics, Air Reduction Company, Chemetron Corporation and Olin Mathieson Chemical Corporation. This action is in the nature of a companion suit to the criminal contempt action filed on December 22, 1960 against the same defendants plus four individual respondents who are officers of Air Reduction Company, Inc. and General Dynamics Corporation. The complaint alleges a continuing conspiracy to fix and maintain prices of carbon dioxide from at least as

early as 1953, in violation of Section 1 of the Sherman Act. In addition, it alleges that certain tying agreements, by which General, Airco and Chemetron provide storage equipment for liquid carbon dioxide and require use therein of only their product, are illegal, under both Section 1 of the Sherman Act and Section 3 of the Clayton Act.

The complaint asks that defendants be required to issue new price schedules within sixty days, be enjoined from exchanging any price or bid information and that the tying agreements be cancelled. In addition, the Government seeks to have defendants enjoined from making any agreements for the sale of carbon dioxide which exceed one year, or discriminating between users and non-users of the defendant's product in the leasing of storage equipment. By stipulation, all proceedings in this action are being stayed until thirty days after the completion of trial of the criminal action, which is scheduled to begin on October 9, 1961.

Staff: Bernard M. Hollander, Alfred Karsted and Allen E. McAllester, (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

Workmen's Compensation Is Exclusive Remedy for Injuries Suffered by Employees of Non-appropriated Fund Activities. Dorothy Mae Flood Lowe v. United States (C.A. 5, August 29, 1961). James Lowe was an employee of a Non-commissioned Officers Open Mess in Mississippi, a non-appropriated fund activity of the armed forces. As such he was covered by workmen's compensation as required by the Employees of Non-appropriation Fund Instrumentalities of Armed Forces Act, 5 U.S.C. 150K. In the course of his employment he aggravated an old hernia condition by lifting a sack of potatoes, and died when the hernia became strangulated. Plaintiff, his wife, first sought workmen's compensation from the Mess and its surety, but the state courts of Mississippi decided against her on the merits of her claim. Plaintiff then brought this action under the Tort Claims Act, claiming negligence on the part of the Government in permitting her husband to carry heavy loads, knowing of his hernia condition.

The district court held that plaintiff's remedy under 5 U.S.C. 150K was exclusive, citing Aubrey v. United States 264 F. 2d 768, 103 U.S. App. D. C. 65, and United States v. Forfari, 268 F. 2d 29 (C.A. 9). The Fifth Circuit affirmed per curiam, further citing Posegate v. United States, 288 F. 2d 11 (C.A. 9).

Staff: Ronald A. Jacks (Civil Division)

POST OFFICE

Discharge of Employee: "Review and Disposition of Disciplinary Actions" Includes Power to Discharge. Stephen L. Kempenski v. LeRoy V. Greene (C.A. 3, July 10, 1961). Kempenski, a postal clerk in Philadelphia covered by Civil Service regulations, was discharged by the Director of the Philadelphia postal region. He brought an action for reinstatement on the grounds that the Regional Director did not have power to discharge him. The district court granted summary judgment for the Director, and the court of appeals affirmed. It interpreted the power delegated to the Regional Director in the phrase "review and disposition of disciplinary actions" to include the power to discharge. This conclusion was buttressed by the wide grant of power given to the Regional Directors by the Postmaster General in Order No. 55809. The Court also decided that Postal Regulations did not require such a delegation of authority in such matters to be in writing.

Staff: United States Attorney Walter E. Alessandroni; Assistant United States Attorney Mabel G. Turner (E.D. Pa.)

SOCIAL SECURITY ACT

Earnings of Nonresident Farm Owner Are "Self-employment Income" Under Section 211(b) of Act, Where Owner Furnishes and Makes Comprehensive Farm Plan for Ensuing Season. Arthur T. Conley v. Ribicoff (C.A. 9, August 10, 1961). Claimant, a resident of California, applied for old-age benefits under the Social Security Act, alleging as the basis for entitlement self-employment taxes paid in 1956 and 1957 on income from sharecropping operations on his North Dakota farm property. Under claimant's agreement with his tenants the latter furnished all the needed equipment, paid all the expenses, and performed all the physical labor; claimant received one-third of the crops. During the years in question, claimant made the farm plan for the ensuing season, deciding what was to be raised and designating the particular field in which a particular crop was to be planted. In making these decisions, claimant visited the property only twice a year, once in the fall to make his decision for the coming year, and once in the spring to confirm his previously formulated plan. The Social Security Administration denied the claim for benefits on the ground that the claimant had not "materially participated" in the "management of the production of . . . agricultural . . . commodities" on his farm property within the meaning of Section 211 of the Act, 42 U.S.C. 411, and that consequently his share of the crops was investment or rental income. The district court affirmed the decision of the Secretary.

The Court of Appeals reversed, stating that the referee had utilized an improper test of "material participation" when he held that there must be supervision and management throughout the farming operation as distinguished from the working out of a farm plan at the beginning of the season. The Court pointed out that claimant's property was in a "dry-farming" area where little, if any, supervision was needed once the crops were planted, the success of the crop being wholly dependent on the weather. In the court's estimation, the 1956 Amendment to the Social Security Act, granting coverage to farm owners who "materially participate", requires only that their activity be of "substantial value or importance". Claimant's activity here, it was held, was of such nature and there was not substantial evidence to support the Secretary's decision to deny benefits on the ground of lack of material participation.

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

Disabled Claimant Entitled to Disability Benefits if Unable to Engage in Any Substantial Gainful Activity Considering His Experience, Training and Actual Availability of Employment for Person of His Age and Capabilities. Lawrence A. Ferran v. Flemming (C.A. 5, August 16, 1961). Plaintiff was a 53 year-old carpenter whose leg and hip were severely crushed, thereby rendering him incapable of engaging in carpentry or any other employment which required standing, walking, or

repeated rising from a sitting position. His claim for disability benefits under the Social Security Act was denied by the hearing examiner and the district court affirmed the examiner's decision. On appeal, the Fifth Circuit held that the Secretary had failed to show plaintiff's ability to engage in substantial gainful activity considering his experience, his training and the actual availability of work he could do. The Court placed great reliance on the holding of Kerner v. Flemming, 283 F. 2d 916 (C.A. 2) that a reasonable opportunity for substantial gainful activity must be shown. As stated before (United States Attorneys Bulletin, Vol. 9, p. 361, July 16, 1961), the Department would confine Kerner and the cases following it to claimants whose education and work background are limited, as was plaintiff's here.

Staff: United States Attorney M. Hepburn Many; Assistant United States Attorney Francis G. Weller (E.D. La.)

DISTRICT COURT

LABOR MANAGEMENT RELATIONS ACT

Substantial Contacts Between Maritime Operation and Important United States Interests Held to Give NLRB Jurisdiction Over Panamanian Vessel Owned and Operated by Panamanian Corporation 95% Controlled and Manned by Non-resident Aliens. Eastern Shipping Corporation; McCormick Shipping Corporation, 48 LRRM 1437 (NLRB, August 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 NLRB involving foreign flag vessels registered under Liberian, Panamanian, or Honduran laws. The brief was designed to present to the Board the State Department's views upon matters of maritime and international law, and certain defense policy considerations of the Defense Department. This is the third case decided by the Board, and, as in the two previous cases, West India Fruit and Steamship Co., 130 NLRB No. 46, 47 LRRM 1269, and Peninsular & Occidental Steamship Co., 48 LRRM 1293, the NLRB found that it had jurisdiction.

The ship involved in the instant case, the Yarmouth, is a Panamanian vessel, owned and operated by McCormick, a Panamanian corporation 95% of whose stock is owned by non-resident aliens, and manned primarily by non-resident aliens though not necessarily by citizens of Panama. McCormick's president and two of the five directors, however, are Americans. The vessel is operated primarily as a passenger cruise ship between Miami, Florida, and various Caribbean ports. Approximately 95 per cent of the $650,000 earned from passenger services in 1958 came from fares paid by American citizens; $50,000 of the $60,000 earned from cargo carriage was derived from cargo carried from American ports. Eastern, a domestic corporation wholly owned by an American citizen, serves as McCormick's exclusive agent for the Yarmouth in the United States in a manner found by the Board to constitute a single integrated enterprise with McCormick.

Since the facts established that the McCormick-Eastern enterprise concerning the Yarmouth is essentially a domestic operation, the NLRB concluded, in accordance with the doctrine announced by it in its lengthy West India decision, supra, that the presence of the aforementioned foreign attributes did not divest it of jurisdiction, and ordered the election sought by the union.

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

NATIONAL BANKING ACT

Comptroller of Currency's Power to Approve Affiliate Bank Application Upheld. Camden Trust Company v. Ray M. Gidney, et al. (D.D.C. August 16, 1961). Delaware Valley National Bank of Delaware Township, Camden County, N.J., filed an application with the Comptroller of the Currency for the issuance of a Certificate of Authority to commence the business of banking under the National Banking Act, 12 U.S.C. 20 et seq. The organizers of the Delaware Valley bank are also directors of the Haddonfield National Bank of Haddonfield, New Jersey, with which Delaware will be affiliated. After preliminary approval was given by the Comptroller, the plaintiff, a New Jersey banking corporation, sued to enjoin the Comptroller and for a declaratory judgment that the issuance of a Certificate would violate 12 U.S.C. 36(c). Delaware Valley intervened. Plaintiff contended that Delaware Valley's application was an attempt to circumvent the provisions of the New Jersey branch bank statute, N.J.S.A. 17:9A-19, as made applicable by 12 U.S.C. 36(c), or in the alternative, that the Comptroller was empowered to approve the establishment of independent unit banks only under 12 U.S.C. 27. After the institution of the suit, Delaware Valley became a body corporate by filing Articles of Association and an Organization Certificate with the Comptroller.

The Court granted the motion of Delaware Valley and the Comptroller for summary judgment, and entered the following conclusions of law: 1. The Comptroller was authorized by 12 U.S.C. 21-28 to approve the establishment of Delaware Valley in his discretion, and the exercise of this discretion is not subject to judicial review; 2. Delaware Valley as a national banking association and a body corporate under 12 U.S.C. 24, is an instrumentality of the Federal Government, subject to the paramount authority of the Federal Government, and its affiliation with another banking association does not make it any less a body corporate; 3. plaintiff does not have standing to challenge Delaware Valley's corporate existence; 4. plaintiff does not have standing to challenge the Comptroller's approval of the establishment of a new bank; and 5. the provisions of 12 U.S.C. 36(c) are inapplicable to this case.

Staff: Andrew P. Vance (Civil Division)

STATE COURT

FEDERAL RULES OF CIVIL PROCEDURE

Answer to Third-Party Complaint Under Rule 14, Which Treats Original Complaint as Pertinent to Third Party, Waives Necessity of Formally Amending Original Complaint to Include Claim Against Third Party; Parties Not Indispensable if Beneficiaries of Trust Are Sufficiently Represented by One of Litigants. Neal Hardy v. Island Homes; Alaska Housing Authority v. Neal Hardy (S. Ct. Alaska, July 11, 1961). Island Homes built a housing project in Alaska with Federal and Territorial funds. In connection therewith, the Federal Housing Administration constructed a sewage disposal system under the Alaska Public Works Act, 48 U.S.C. (1952 ed.) 486, with the Alaska Housing Authority paying half the cost. Although it is not clear how Island Homes got title in the first instance, there is on record a deed of trust from Island conveying the sewage system to the Authority as "trustee" in return for the right to charge a reasonable rate. When the parties disagreed about the rate, Island brought an action against FHA for services furnished, and FHA joined the Authority as a third party under a management contract between FHA and the Authority which provided that the Authority would operate sewage facilities. On appeal, the rate found by the lower court was held unreasonable since it took into account depreciation and reserve, whereas Island was not the owner of the system nor required to replace it.

The lower court had held the Authority directly liable to Island in those instances where the homes in the project had been sold to private owners. The Authority argued on appeal that Island was not entitled to recover, since Island had never made a claim directly against the Authority. The Alaskan Supreme Court affirmed on the theory that the Authority waived formal amendment of the complaint by Island when the Authority made allegations and asserted defenses in its answer which would be pertinent only if Island were moving directly against it. The Authority also waived its right by consolidating its defenses at trial with FHA.

The Court rejected FHA's contention that persons who had purchased their homes in the project were indispensable parties under F.R.C.P. 19(a), holding that such persons were beneficiaries of the deed of trust and, under the circumstances, were adequately represented.

Staff: Assistant United States Attorneys George M. Yeager and Howard E. Haskins, Jr. (D. Alaska)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Publication and Distribution of Unlabeled Political Literature. United States v. John W. Scott (N.D.) On November 15, 1960, the United States Attorney at Fargo, North Dakota, filed an information charging John W. Scott with willfully publishing and distributing copies of an anonymous political circular concerning Quentin Burdick, the Democratic candidate for the office of United States Senator from the State of North Dakota, in the Special Senatorial Election held in that State on June 28, 1960.

The trial of Scott was held September 6, 1961, without a jury, before Judge Ronald W. Davies at Grand Forks, North Dakota. The defendant pleaded not guilty to the information and then voluntarily took the stand and admitted all the evidence necessary to sustain a conviction. He was found guilty of violation of 18 U.S.C. 612 and was sentenced to pay a fine of $500.

Staff: United States Attorney John O. Garaas;
Assistant United States Attorney Gordon Thompson
(D. North Dakota).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FEDERAL AVIATION ACT

Drinking Liquor Not Served by Carrier in Aircraft; Civil Penalty. Raymond Moore (S.D. Calif.). Moore, a passenger on a South Pacific Air Lines' plane from Tahiti to Hawaii was refused further liquor from the airline because of abusive and obnoxious conduct. Although informed that he would be violating a Civil Air Regulation, he drank from his own supply. His antics included placing his bare feet in the faces of fellow passengers, brandishing a cigarette lighter in their faces and laying his hands upon a stewardess. The Federal Aviation Agency reported that this was one of the most flagrant cases brought to its attention and recommended that nothing less than the maximum penalty ($1,000 under 49 U.S.C. 1471) for violation of Section 41.135(a) of the Civil Air Regulations (14 C.F.R. 41.135(a)) be demanded. The United States Attorney's office issued a press release announcing its intention to seek the maximum penalty which was published in many local newspapers. A two-day demand was made upon Moore which resulted in full payment by a cashier's check for $1,000. The total elapsed time between the Federal Aviation Agency's letter requesting suit and collection without suit was four days.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney John R. Schell (S.D. Calif.).

LIQUOR REVENUE

Indictments; 26 U.S.C. 5205(a) (2) Presently Governing Statute; Form of Indictment to Be Used. It has come to our attention that, in at least one district, indictments for transporting, possessing, transferring, and selling distilled spirits without proper tax stamps are still couched in the language of Section 2803 (q) of the Internal Revenue Code of 1939, although that statute was repealed as of January 1, 1955. All future indictments for such offenses should be couched in the language of the statute which is now effective, 26 U. S. C. 5205 (a)(2), e. g.:

The Grand Jury Charges:

That on or about _____ (date) in (_____ (County, City, etc.), in the (_____ (District) and within the jurisdiction of this Court, _____ (defendant) did unlawfully and feloniously have in his possession _____ (quantity) of distilled spirits, the immediate containers thereof not having affixed thereto stamps evidencing the determination of the tax and indicating compliance with the provisions of Chapter 51 of the Internal Revenue Code of 1954, as amended on September 2, 1958, in violation of 26 U.S.C. 5205 (a)(2) and 26 U.S.C. 5604 (a)(1).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

NATURALIZATION

Attachment to Principles of Constitution. Petition of Sittler (S.D. N.Y., August 24, 1961.) Petitioner was born in Ohio in 1916. In 1937, at the age of 21 and after two years of college, he left the United States for Germany. His asserted purpose was to further his education and culture in the land from which his grandparents had come. He attended German universities and worked as a teacher and translator until 1940. In September 1939, immediately on the outbreak of World War II, he applied for German citizenship and in the spring of 1940 he was naturalized. He denied taking an oath of allegiance to Germany but admitted voluntary renunciation of his United States citizenship.

His first marriage in the United States had proved unsuccessful. In September 1940, he married his present wife in Germany. She possessed both British and German nationality. He was drafted into the German Army in 1940 and after basic training was transferred to radio service. He voluntarily joined the Nazi Party in 1942 and engaged in propaganda work all during World War II in the interest of Germany and against the United States. In the final hours of the war he was in the uniform of the Elite S.S. Guard.

After the war he became a witness for the United States in the treason prosecutions of certain of his former associates in the German anti-American activities. While in the United States temporarily in that connection he was permitted to take employment and to further his education. In 1950 he received his Ph.D from Northwestern University and in the same year he left the United States and was readmitted for permanent residence. He has followed a teaching career in the United States but has found difficulty in maintaining positions because of his Nazi background. Though his wife is with him in this country, his eight children - four born in Germany and four in the United States - have been returned to Germany to live with friends because of petitioner's financial plight.

Petitioner complied with all the formal requirements for naturalization. The Naturalization Examiner opposed the grant of the petition on the ground that petitioner had failed to prove that during the five years preceding the filing of his petition he had been and still is attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States, a prerequisite to naturalization under Section 316 of the I & N Act (8 U.S.C. 1427). Twenty witnesses composed of neighbors, pupils, colleagues, relatives, friends and an attorney of the Department of Justice who had questioned petitioner at length in 1946, all testified to his good conduct and habits. None had ever heard him say anything against the United States. All thought him attached to the principles of the Constitution and recommended him for citizenship.

The Court said that the required attachment meant acceptance of the fundamental political habits and attitudes which prevail in the United States and a willingness to obey resulting laws. The question, said the Court, was whether petitioner was sincere in declaring his attachment, etc. After reviewing the evidence at great length and in detail, the Court said: "The conclusion is inescapable * * * that Sittler's application for citizenship is motivated, not by bonds of affection for the United States and attachment to the principles of the Constitution, but by the opportunistic demands of self-interest." Petitioner had failed to sustain his burden of proof of showing otherwise. The gift of citizenship is not to be conferred lightly, and certainly not to those as unworthy as petitioner, the Court observed.

Petition denied.

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Computation of Oil and Gas Royalties Under Mineral Leasing Act--"Production" Refers to Gas Conditioned for Market. The California Company v. Udall (C.A. D.C., August 10, 1961). The California Company (Calco) is the lessee of the United States in four oil and gas leases from which it was selling gas at 12 cents per thousand cubic feet. The Secretary of the Interior billed Calco for royalties based upon this price, but Calco claimed that the costs of gathering, dehydrating and compressing the gas for market should be deducted from the sales price before computation of royalties. These costs ran as high as 5.05 cents per mcf. The Secretary's authority to collect royalties stems from Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 443, as amended 30 U.S.C. 226, which conditions all leases upon the payment "of a royalty of 12-1/2 per centum in amount or value of the production removed or sold from the lease." The Court of Appeals saw the meaning of the term "production" as the heart of the controversy. The Court pointed out that under the Secretary's regulations the lessee is required to market the gas, and the Secretary has therefore concluded that "production" refers to the product in marketable condition. Considering the purposes of the Mineral Leasing Act--wise development of the nation's resources and a reasonable financial return to the public on public assets--and the Secretary's responsibility as the guardian of this public interest, the Court considered his definition of "production" as gas conditioned for market a reasonable definition and refused to disturb it.

Staff: Hugh Nugent (Lands Division)

Public Domain; Department of Interior Did Not Retain Jurisdiction to Adjudicate Validity of Mining Claim Where United States Condemned Land on Which Alleged Mining Claim Is Located. Humboldt Placer Mining Co., et al. v. Best (C.A. 9, August 18, 1961). In June 1957, the United States filed a condemnation action seeking to acquire outstanding adverse interests in public domain lands. On part of these lands are located unpatented mining claims which appellants allege they own and to which they alleged a right of possession. In March 1960, the appellees, who are officials of the Department of the Interior, began an administrative proceeding to adjudicate the validity of appellants' mining claims. It was alleged that the lands embraced in the mining claims were nonmineral in character and that minerals had not been found in sufficient quantities to constitute a valid discovery. Thereafter, appellants commenced this action in the district court to enjoin the administrative proceeding. Summary judgment was granted in favor of appellees.

The Court of Appeals reversed. It stated that without the condemnation action the administrative proceeding to determine the validity of an unpatented mining claim on public land would have been proper. However, in bringing the condemnation action, it was alleged that the mining claims were invalid. The

Court of Appeals was of the view that the United States had invoked the jurisdiction of the district court to have the issue of the validity of the mining claim determined. Rule 71A(h), F.R.Civ.P., provides in eminent domain cases that, except where a tribunal specially constituted by act of Congress or a commission has been established to try the issue of just compensation, the trial of all issues shall be by the court. The Court could find no statute or controlling authority indicating the administrative tribunal had retained jurisdiction to adjudicate the validity of the mining claim after the United States had invoked the jurisdiction of the district court by filing a condemnation action in which the same issue is raised.

The Court of Appeals distinguished Cameron v. United States, 252 U.S. 450 (1920), because that case did not involve eminent domain. In Cameron the jurisdiction of the district court was not invoked until after Interior had determined the mining claim was invalid, when court action in the nature of trespass to eject and dispossess Cameron was instituted.

The Department is now considering whether a petition for certiorari should be filed in the Supreme Court.

Staff: A. Donald Mileur (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

Reorganization of Trial and Compromise Functions

Effective September 5, 1961, the civil trial and settlement sections of the Tax Division were reorganized in order to assure the maximum use of existing and new personnel, focusing their attention and efforts toward the most important issues as well as affording them the opportunity to take the initiative in the preparation of civil cases for trial or settlement. The Tax Division Directive effecting such change and the implementing memorandum are reproduced here for the information of United States Attorneys and their staffs:

Under the authority of subsection (a) of section 25 of Order No. 175-59, of January 19, 1959, as amended, the following organizational changes in the Tax Division are effective September 5, 1961.

1. The Trial Section is reconstituted into the following sections for the purpose of handling refund litigation in the federal district courts and the Court of Claims:

a. Court of Claims Section
b. Refund Trial Section No. 1
c. Refund Trial Section No. 2
d. Refund Trial Section No. 3

The areas of responsibility of and the personnel assigned to these four sections will be determined by the Assistant for Civil Trials after consultation with the Assistant Attorney General and the First Assistant.

2. The name of the Claims Section is changed to General Litigation Section.

3. The office of Assistant for Civil Trials is established. The Assistant shall, under the supervision of the Assistant Attorney General and the First Assistant, have charge of and be responsible for representing the United States and officials thereof in all civil litigation under the cognizance of the Tax Division in the federal and state courts of original jurisdiction. He shall exercise supervision over the General Litigation Section, the Court of Claims Section and the Refund Trial Sections.

4. The Compromise Section is reconstituted as the Review Section, which shall be responsible for the functions heretofore exercised by the Compromise Section as well as the conduct of legal and legislative research not directly related to specific cases pending in other operating sections. The Chief of the Review Section shall exercise the authority delegated to the Chief of the Compromise Section in Tax Division Directive No. 3 dated June 6, 1961.

Implementing Tax Division Directive No. 4, dated August 28, 1961, the following appointments will be effective September 5, 1961:

1. Mr. Edward S. Smith is designated Assistant for Civil trials.

2. Mr. Rufus E. Stetson is designated Special Assistant to the Assistant for Civil Trials.

3. Mr. Lyle M. Turner is designated Chief and Mr. Philip R. Miller is designated Assistant Chief and Reviewer of the Court of Claims Section.

4. Mr. David A. Wilson, Jr., is designated Chief and Mr. Jerome Fink is designated Assistant Chief and Reviewer of Refund Trial Section No. 1.

5. Mr. Myron C. Baum is designated Chief and Mr. Charles W. Mehaffy is designated Assistant Chief and Reviewer of Refund Trial Section No. 2.

6. Mr. Fred J. Neuland is designated Chief of Refund Trial Section No. 3.

7. Mr. C. Moxley Featherston is designated Chief and Mr. Elmer J. Kelsey is designated Assistant Chief of the Review Section.

8. Mr. Richard M. Roberts is designated Chief, Mr. John J. McCarthy is designated Assistant Chief, and Mr. Homer R. Miller is designated Reviewer of the General Litigation Section.

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