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UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 10 January 26, 1962 No. 2

NEW APPOINTMENTS

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

Arkansas, E. - Robert D. Smith, Jr.
Arkansas, W. - Charles M. Conway
Iowa, S. - Donald A. Wine
Wisconsin, W. - Nathan S. Heffernan

As of January 19, 1962, the score on new appointees is: Confirmed - 73; Nominated - 9.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

Disposition of Penalties in Actions Under Safety Appliance Acts and Related Statutes

Correspondence from a number of United States Attorneys indicates that some may not clearly understand the instructions in Department Memo No. 207, Second Revision, covering the disposition of payments of penalties in actions under the Safety Appliance Acts and related statutes. Some United States Attorneys have required carriers to make payments to the Clerk of the Court, and others have received payments for transmittal to the originating agency, in these cases the Interstate Commerce Commission.

Cases under the above acts are civil actions (see Title 2, pages 95 and 96 of the United States Attorneys Manual, and 28 U.S.C. 2461(a) and Reviser's note thereunder). Payments in these cases should be made to your offices for forwarding to the originating agency with a copy of Form No. USA-200.

All questions concerning the disposition of collections, or interpretation of the provisions of Memo No. 207, Second Revision, should be addressed to the Administrative Assistant Attorney General.

MEMOS AND ORDERS

The following Memoranda and Orders applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 23, Vol. 9, dated November 17, 1961.

ORDER	DATED	DISTRIBUTION	SUBJECT
254-61	11/24/61	U. S. Attorneys	Regulations Governing the Defense of Suits Against Federal Employees Arising Out of Their Operation of Motor Vehicles.
256-62	1/ 5/62	U. S. Attorneys and Marshals	Regulations Pertaining to the Answering of Certain Circular Questionnaires.
258-62	1/10/62	U. S. Attorneys and Marshals	Designation of Maceo W. Hubbard as Employment Policy Officer of Department of Justice.
259-62	12/28/61	U. S. Attorneys and Marshals	Amending Section 18(a) of Order No. 175-59 - Functions Relating to Immigration and Nationality Laws

MEMO	DATED	DISTRIBUTION	SUBJECT
304	11/ 8/61	U. S. Attorneys	Fugitive Felon Act as amended.
306	12/ 4/61	U. S. Attorneys and Marshals	Federal Aviation Agency Regulations Pertaining to Crime Aboard Aircraft.
307	12/14/61	U. S. Marshals	Designation of Assistant Disbursing Officer.
124 Rev. S3	12/19/61	U. S. Attorneys	Docket and Reporting System Manual.
184 S5	12/21/61	U. S. Attorneys and Marshals	Position Schedule Bonds for 1962-63.
245 S6	12/22/61	U. S. Attorneys and Marshals	Sickness during Annual Leave.
308	12/22/61	U. S. Attorneys and Marshals	Civil Service Commission's Improved Personnel Statistics Program.
309	1/11/62	U. S. Attorneys	Law Applicable to Questions of Priority of Liens.
311	1/16/62	U. S. Attorneys	Collection of Money Judgments in Favor of United States During Pendency of Appeal by Judgment-debtor, Where No No Supersedeas Bond Has Been Posted.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Sherman Act

Monopoly; Restraint of Trade - Ophthalmic Goods; Complaint Under Sections 1 and 2. United States v. American Optical Company, et al. (N.D. Ill.). On December 29, 1961 this complaint was filed which charges the American Optical Company and Bausch & Lomb, Inc., the two largest manufacturers of ophthalmic goods in the United States, with engaging in a combination and conspiracy to restrain and to monopolize interstate trade and commerce in the manufacture of such goods and in the wholesale laboratory business in violation of Sections 1 and 2 of the Sherman Act. Each defendant is also charged with monopolizing these two areas of business.

American Optical and Bausch & Lomb are the only companies in the optical business which operate at two distinct levels, one involving the manufacturing of ophthalmic lenses, frames, and supplies, and the other involving the operation of over 400 wholesale optical laboratories where glasses are processed to the prescription of doctors and optometrists. The magnitude of the operations of these two companies at these two levels of the ophthalmic industry has given them the power to manipulate the spread between the two levels of prices--the manufacturer's price and prescription prices--in such a manner as to lessen the profitability of the operation of independent wholesale laboratories and thereby also destroy the market of independent manufacturers of lenses, frames, and other ophthalmic supplies. There are approximately 600 independent wholesale laboratories, many of whom are franchised distributors of American Optical or Bausch & Lomb products so that the defendants compete with their own customers.

The complaint charges that defendants have conspired to fix industry-wide prices at both the manufacturing and prescription levels and manipulate these two levels of prices in such a manner as to put a squeeze on the profit margins of competitors. The exclusionary effect of these tactics is heightened by the fact that defendants engage in predatory price cutting on their Rx sales in selected areas of the country subsidizing their losses in these areas by higher prices in other areas and by manufacturing profits. The status of independent manufacturers and laboratories is further threatened by the American Optical and Bausch & Lomb program of buying up independent laboratories and the business of large retail customers of independents and by arbitrarily cancelling the franchises of numerous independent wholesale laboratories.

The complaint prays that American Optical and Bausch & Lomb be required to divest themselves of their wholesale laboratory operations and be enjoined from engaging in such business as well as from engaging in the business of functioning as dispensing opticians.

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

Price Fixing - Prescription Drugs; Drug Association Found to Have Violated Section 1 of Sherman Act. United States v. Utah Pharmaceutical Association. (D. Utah). The trial in this matter was held in Salt Lake City, Utah, on November 21 and 22, 1961, before Judge A. Sherman Christenson. The complaint had been filed on March 7, 1961, and charged the defendant Association with a violation of Section 1 of the Sherman Act by the adoption, distribution and revision of a prescription pricing schedule and by urging and inducing members and co-conspirator local pharmaceutical associations to determine and fix uniform retail prices for prescription drugs by using this schedule.

Pre-trial conferences were held with the Court and an extensive set of fact stipulations were filed prior to the trial. The Government relied solely on documents and these stipulations, and did not call any witnesses. Defendant called one witness. Accordingly, the greater part of the trial time was taken up with summation of the facts and arguments on the legal issues involved.

On January 3, 1962, Judge Christenson decided in favor of the Government and in his memorandum decision carefully negated each of the defenses put forth by the opposing party. In essence, the Court found:

(1) That the charged combination and conspiracy affected interstate commerce and that the prescription drugs involved were in the flow of interstate commerce at the time of sale to consumers;

(2) That the fact that a pharmacist in filling a prescription is engaged in the practice of a learned profession does not immunize the defendant from the application of Section 1 of the Sherman Act;

(3) That the defendant Association adopted a pricing schedule and distributed it and urged and induced its members to use the schedule in pricing prescription drugs;

(4) That the officers of defendant Association agreed to foster and promote the schedules as a part of the Association activity and to utilize the schedule in their own businesses; and

(5) That the activity of the Association amounted to a per se violation and therefore no "rule of reason" could excuse the violation.

Staff: Lyle L. Jones, Don H. Banks and Gilbert Pavlovsky (Antitrust Division).

CLAYTON ACT

Acquisition of Flexible Coupling Company Held Violation of Clayton Act. United States v. Koppers Company, Inc., et al. (W.D. Pa.). On January 9 1962, Judge Joseph P. Willson handed down an opinion holding that the acquisition of the Thomas Flexible Coupling Company by Koppers on January 3, 1961 violated Section 7 of the Clayton Act.

This complaint was the first one authorized by Attorney General Kennedy after he assumed office. The complaint was filed on February 17, 1961. On March 28, 1961, the Government served interrogatories on defendants which were answered on June 9, 1961. The Government filed a General Outline of Government's Contentions at the request of the Court on June 21, 1961. On July 5, 1961 the defendants served interrogatories on the Government which were answered on July 25th. On August 4th the Government served the defendants with a Motion to Produce, and production was completed by September 7th. On September 8th the Government served a Request to Admit under Rule 36 and the defendants served their admissions on September 14th.

Beginning in May, 1961, the Government conducted a survey of all manufacturers of flexible couplings in the United States, contacting approximately 127 different companies of whom 61 reported that they made flexible couplings. This survey was completed on October 1st. During the course of a pretrial hearing held in Pittsburgh on September 14th it was agreed between the parties that defendants would not object to the use of the responses to this survey but reserved the right to object to its admission on the ground that it was irrelevant since it did not correspond to the lines of commerce involved in the litigation. A similar position was taken with regard to the use of the data obtained by the Census Bureau in the 1958 Census of Manufacturers.

Trial was begun in Erie, Pennsylvania on October 16, 1961. The Government called 6 witnesses and offered 99 exhibits including a chart book in which all the statistics compiled by the Government on the flexible coupling industry were presented. The Government rested on October 17th, and defendants moved to dismiss but the Court denied the motion and requested that defendants present their defense. Defendants presented 8 witnesses and approximately 20 exhibits and rested on October 19th. Briefs were exchanged in November and on December 20th final argument was held in Pittsburgh.

On January 9, 1962 the Court ruled that the acquisition violated Section 7 of the Clayton Act. In so ruling, the Court pointed out that Thomas, the acquired company, had been a substantial factor in competition and that as a result of the acquisition, it had been eliminated and the competition existing between Koppers and Thomas had been destroyed. The Court cited with approval and adopted Judge Weinfeld's discussion of the legislative history of the amended Section 7 in the Bethlehem Steel case. The Court also adopted the Government's survey of

the flexible coupling industry and found that in 1960 Koppers had 23% of the industry and Thomas had 5.8%. The Court found that Koppers was the largest manufacturer of flexible couplings in the United States and that Thomas was the largest exclusive manufacturer of flexible couplings in the United States in that Thomas was the largest company making only flexible couplings. In discussing the line of commerce, the Court pointed out that every witness and every document recognized flexible couplings as having sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other products to make them a line of commerce within the meaning of Section 7. The Court disposed of defendants' contention that the two companies made products so different from each other as to justify placing them in different lines of commerce by pointing out that they both performed the same functions, both were flexible couplings, both could be used interchangeably on many installations although recognizing that in some cases they could not be so used, and finally that both companies prior to the acquisition considered the other to be a substantial competitor. He cited documents in the record from the files of the defendants in which each referred to the competitive activity of the other as being strong evidence to support the Government's contention that the two companies were in direct and active competition with each other. The Court pointed out that during the three year period, 1958 to 1960, the two companies had 195 common customers and in 1960 Thomas sold in excess of 70% of its couplings to these customers and Koppers sold them 48% of its total sales. The Court, in discussing the effects that the acquisition would have on the flexible coupling industry, pointed out that because of Koppers' size, it would be able to expend more money for research and development and that "the entire engineering and manufacturing services of the Koppers organization is now available in the industry for not only the [Koppers] coupling but to promote the Thomas coupling as well." The dominant advantage that Koppers now has over its competitors in the marketing of flexible couplings would inevitably squeeze the smaller manufacturers, the Court declared.

The Court found that the Government had clearly established that flexible couplings were a line of commerce within the meaning of Section 7. Since the parties had agreed that the products were sold nationwide, and since both companies had sales offices throughout the country, the appropriate section of the country was the entire United States. The Court held, therefore, that the acquisition of Thomas by Koppers would substantially lessen competition or tend to create a monopoly in the manufacture and sale of flexible couplings.

The Court did not enter an order regarding the relief to be granted but did indicate that the divestiture which the Government had requested was the only appropriate remedy. At the outset of the opinion the Court declared "Upon consideration of all the evidence and the law, this Court has come to the conclusion that the merger is in violation of Section 7 of the statute and must be set aside."

Staff: William H. McManus, Zachary Shimer, Julius H. Tolton (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURT OF APPEALS

DELEGATED AUTHORITY

Government Not Estopped From Asserting Levy for Back Taxes Due Where Authority of Agent to Bind Government Not Shown. United States v. Mack J. Davenport (C.A. 4, December 29, 1961). The Government brought suit in the district court for back taxes and damages for breach of contract. Davenport did not deny the tax indebtedness but claimed as an offset to the Government's suit that the Government was indebted to him in an amount greater than the Government's claim because it had withheld a monthly payment under the contract which had forced him into receivership (the Government had levied on the monthly payment for the taxes owed). The district court rendered judgment for the Government in the amount of $3,713.24 for back taxes, penalties and interest, and $5,139.44 for damages for breach of contract.

Davenport contended that the Government had breached an agreement with him not to levy upon the monthly payments. The Court of Appeals, in affirming the district court, held that since the evidence did not disclose the nature of the position held in Internal Revenue by the agents who had agreed not to levy, the Government was not precluded from levying on the monthly payments: "an officer or agent of the United States to whom no administrative authority has been delegated cannot estop the United States even by an affirmative undertaking to waive or surrender a public right."

Staff: United States Attorney John C. Williams (W.D. S.C.)

FOREIGN LITIGATION

Sovereign Immunity Recognized in Suit on Contract to Provide Housing for United States Military Dependents in France. United States of America v. Societe Immobiliere des Cites Fleuries Lafayette (Court of Appeals of Paris, November 22, 1961). On August 9, 1957 Societe Immobiliere des Cites Fleuries Lafayette filed an action in the Civil Tribunal of the Seine against the United States for breach of an alleged contract with the U.S. European Command to provide housing for members of the U.S. Forces and their families. The Court of its own motion dismissed the suit on the ground of sovereign immunity. Plaintiff appealed. The Avocat General of France filed briefs on the jurisdictional question, arguing that such a contract was private in nature and thus the United States was not entitled to sovereign immunity. The Court of Appeals, in granting the appeal, stated that even if the contract was entered into for a public purpose, absent express language in the contract removing it from the realm of private law, the United States would not be entitled to immunity. Since there was no direct reference to the NATO Agreement in the contract, the Court ruled that the United States was acting for private interests, or in other words jure gestionis, and was subject to the

jurisdiction of French courts. The Court of Appeals thereupon reversed the ruling of the lower court and went on to decide the case on the merits, non-suiting the plaintiff.

The United States, which had not been represented in the proceedings thus far, petitioned for a rehearing on the question of jurisdiction. It took the position that French courts lacked jurisdiction to hear the suit against the United States, that our forces were in France pursuant to an international treaty obligation, that providing housing for the troops was a necessary consequence of that obligation and, therefore, a purely governmental or imperii function. The Court of Appeals granted the petition and reversed its earlier decision. In its final ruling the Court of Appeals declared that a contract to provide housing for American forces stationed in France pursuant to the North Atlantic Treaty is necessarily in the public interest, and an exercise of sovereign authority for which the United States is immune from suit in French courts.

Staff: Joan T. Berry (Civil Division), John J. Hutchins and Maitre Yves Merle (Paris, France).

MILITARY DISCHARGE

Plaintiff Not Entitled to Hearing Before Discharge as Due Process Requirement. Milton C. Reed v. Honorable W. B. Franke, et al. (C.A. 4, November 7, 1961). The Court of Appeals affirmed a district court order denying plaintiff a permanent injunction against his separation from Naval Service with a general discharge under honorable conditions. The reason for the discharge was unsuitability due to chronic alcoholism. Reed contended that an honorable discharge is a valuable property right and that, under the Constitution, he could not be deprived of this right without due process of law in accordance with the Fifth Amendment, including a hearing before discharge. The Court of Appeals held that (1) where there is a substantial claim that military procedures violate constitutional rights the district courts have jurisdiction to resolve the constitutional questions: and (2) provision for a full hearing after discharge before a Review Board which has power to nullify a discharge under 10 U.S.C. 1553 satisfies due process requirements of fairness in discharge proceedings.

Staff: Former United States Attorney Joseph S. Bambacus, Assistant United States Attorney Roger T. Williams, (E.D. Va.)

TORTS

Non-appropriated Fund Instrumentality Employees Given Workman's Compensation Under State Law Are Federal Employees Not Entitled to Sue Federal Government Under Tort Claims Act. Leonard F. Rizzuto v. United States (C.A. 10, December 20, 1961). The Court of Appeals affirmed the district court holding that an employee of a non-appropriated fund instrumentality (Central Base Fund) who was injured in the course of his employment and has collected workman's compensation benefits under Wyoming law cannot recover additional damages for his injuries from the United States under the Tort Claims Act. The Court stated that (1) a non-appropriated fund instrumentality is an instrumentality of the United States; (2) those employed by it are

Federal employees; and (3) in providing that such instrumentalities should provide their employees with workman's compensation, Congress intended that remedy to be exclusive.

Staff: Jerome I. Levinson (Civil Division)

DISTRICT COURT

ADMIRALTY

Admiralty Claim Transferred from Court of Claims to District Court Under Act of Sept. 13, 1960, 74 Stat. 912 (amending 28 U.S.C. 1506) and Subsequently Dismissed by District Court as Time-Barred Under Suits in Admiralty Act, 46 U.S.C. 745. Hellenic Lines, Ltd. v. United States (S.D. N.Y., November 20, 1961). Plaintiff, an ocean carrier, sought demurrage and detention charges alleging breach of a shipping contract. Suit was initially commenced in the Court of Claims but was transferred to the Southern District of New York, the Court of Claims holding that the claim was in the exclusive jurisdiction of the District Court. It was subsequently dismissed by the District Court as time-barred under the Suits in Admiralty Act. This is the first case to have been transferred from the Court of Claims under the Act of September 13, 1960, 74 Stat. 912.

Staff: Douglas M. Fryer (Civil Division [before the Court of Claims]); Louis E. Greco and Clare E. Walker (Civil Division [before the District Court]).

LIBEL - ABSOLUTE IMMUNITY

Statements by State Department Official Identifying Plaintiff as Communist Passport Applicant Held Absolutely Privileged Without Need of Showing Beyond Dispute Clearance for Use of Classified Material from Department Which Had Classified It. Benjamin Steinberg v. Roderic L. O'Connor (D. Conn., December 21, 1960). Plaintiff, alleging that he was libeled by defendant in a speech delivered before certain committees of the VFW on November 8, 1958, and in testimony given December 15, 1958, to a subcommittee of the Senate Committee on the Judiciary when defendant identified him as one of the passport applicants of whom the Department of State had some evidence of activities in support of the Communist movement, brought this action to recover from the defendant, the former Administrator, Bureau of Security and Consular Affairs, Department of State, the total sum of $500,000 for the two defamations.

Plaintiff contended that defendant's statements were beyond the scope and range of his duties because he may have, in the course of making them, disclosed certain classified material obtained from another Department without showing beyond dispute that he had secured clearance for the use of such material. The Court granted the Government's motion for summary judgment citing Barr v. Matteo, 360 U.S. 564, and Howard v. Lyons, 360 U.S. 593. It stated that defendant had no duty to do more than to ascertain from his staff

that the customary procedure for declassification of the material had been followed, and moreover, plaintiff had no standing to invoke an inadequate fulfillment or breach of an internal regulation of the State Department by some subordinate in carrying out his function. Preble v. Johnson, 275 F. 2d 275 (C.A. 10); Gaines v. Wren, 185 F. Supp. 774 (N.D. Georgia).

Staff: Andrew P. Vance, (Civil Division)

MILITARY

Except as Authorized by Constitution or Statute Armed Forces Forbidden to Execute Civil Laws, 18 U.S.C. 1385; Air Force Personnel So Engaged Not in Line of Duty Within Meaning of Federal Tort Claims Act. Dennis Wrynn, an infant, etc. v. United States (E.D. N.Y., December 12, 1961). Plaintiff, a seventeen year old boy, and others were attracted to the scene of a hunt for two escaped state prisoners in Suffolk County, New York. The local Sheriff asked the Air Force Base at nearby Shoreham for men to join in the search party. The Base Commander permitted three men, using a helicopter, to engage in the manhunt. The Sheriff did not act in the belief that he could command such help or could give orders to the military. The men were not formally deputized but nevertheless worked in close collaboration with the local officers. After traversing the search area several times the helicopter pilot, by arrangement with local officers on the ground, undertook to come down on a mall in a highway. In so doing, his rotor blades struck a sapling and a piece of the blade or wook sailed through the air and struck plaintiff and other bystanders. After finding that the pilot was not negligent and the plaintiff not contributorily negligent, the Court also held that the "Posse Commitatus" statute of 1878, now codified as 18 U.S.C. 1385, would preclude recovery against the United States in any event. In noting that the members of the crew were not acting within the scope of their office or employment or "in line of duty" (the basis of Government liability under the Federal Tort Claims Act (28 U.S.C. 1346(b); 2671), the Court said that the statute "still expresses 'the inherited antipathy of the American people to the use of troops for civil purposes'", as it did when originally enacted, and despite the innocence and harmlessness of the use of the Air Force in the present case, the continuing vitality of the statute made the deployment of the helicopter and its crew for use in enforcing the laws of New York a forbidden use.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Carl Golden (E.D. N.Y.); M. M. Heuser (Civil Division)

TAX COURT

RENEGOTIATION ACT

Claimed Renegotiation Costs Disallowed; Excessive Profits of $13,000,000 Determined. Boeing Airplane Company v. Renegotiation Board. (T.C., January 10, 1962). The Renegotiation Board determined that Boeing realized excessive profits of $10,000,000 for 1952. In the de novo Tax

Court renegotiation proceeding, Boeing contended that its 1952 profits were reasonable and not excessive; the Government urged that the excessive profits were $20,000,000. The Tax Court determined that the excessive profits amounted to $13,000,000.

The Court held that (1) overhead attributable to institutional advertising, entertainment and commercial selling expenses were not proper charges against renegotiable contracts; and (2) expenditures for design and development of commercial jet airplanes were capital expenditures and not cost items, although Internal Revenue had approved their treatment as cost items. The Court further found that where a contractor primarily employs Government capital and rent-free plant and equipment in performing Government contracts, the net worth factor should be used to a large degree in determining the reasonableness of profits.

Staff: James H. Prentice and David L. Rose (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Injunctive Proceedings to Prevent Racial Discrimination at Airport Used by Federally Certificated Carriers; United States v. City of Montgomery, et al., (M.D. Ala.) On July 26, 1961, suit was brought to enjoin the City of Montgomery and its private lessee, Ranch Enterprises, Inc., from operating the facilities at the municipal airport, Donnelly Field, on a racially segregated basis.

Plaintiff's motion of December 8, 1961, for summary judgment was granted on January 2, 1962. The Court held that: (1) defendants are "air carriers" within the meaning of the Federal Aviation Act (49 U.S.C. 1301 et seq.) and therefore obliged not to discriminate racially by Section 1374(b) of the Act; (2) defendants are bound by Section 1374(b) on the rationale of Boynton v. Virginia, 364 U.S. 454 (1960); and (3) defendants' racial discrimination unconstitutionally burdens interstate commerce.

The District Court's order became effective on January 5, 1962, and on January 4, the District Court and the Court of Appeals denied defendants' motions for a stay of the desegregation order pending appeal.

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

Destruction of Motor Vehicle Engaged in Interstate Commerce, Alabama. United States v. William O. Chappell, et al. (N.D. Ala.). This case, involving the indictment of nine persons for the burning of a Greyhound bus in interstate travel at Anniston, Alabama on May 14, 1961, was previously discussed at Bulletin, Vol. 9, No. 20, page 598; No. 23, page 672.

On October 31, 1961, the Court directed a verdict of acquittal as to one defendant, and a mistrial was declared as to the seven defendants then tried. On January 16, 1962, the six remaining defendants (charges were dropped against two defendants) changed their pleas to nolo contendere. District Judge Harlan Hobart Grooms placed five of them on probation for a year and sentenced the sixth to a year and a day.

Staff: United States Attorney Macon L. Weaver (N.D. Ala.); John Doar (Civil Rights Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FRAUD

False Statements to Federal Housing Administration re Home Improvement Loan. Moses v. United States (C.A. 8). On December 28, 1961, the Court of Appeals for the Eighth Circuit affirmed the judgment of conviction in the United States District Court for the Northern District of Iowa of appellant Moses under a two-count indictment charging violations of 18 U.S.C. 1010. Appellant received a sentence of 18 months.

Appellant, the owner of a home repairing and remodeling business, in one transaction induced home owners to apply for an FHA loan for improvements in an amount including $1,800 to cover the borrowers' other outstanding obligations. The borrowers signed the documents in blank, and they were completed by the appellant and his associates. The home owners actually received only $290 of the $1,800; the balance was listed as a debt by appellant in his bankruptcy proceeding. The work called for under the contract was not finished, but a completion certificate was signed by the home owners and filed with the lending agency.

In the second transaction, the home owner received a rebate of $500, a part of which was to cover work performed by him. Here, too, a completion certificate was signed before the work was done.

On appeal appellant urged that since he was charged with falsifying the completion certificates, it was error to admit the testimony of another party who had received a rebate but who had not signed a fraudulent completion certificate. The Court of Appeals held that the testimony was properly admitted to prove guilty intent and knowledge on the part of the appellant, and was so limited by the trial court's instruction to the jury. The Court also held that appellant was properly convicted for "causing" the filing of the fraudulent completion certificates, even though it was not established that he, rather than his associate (who pleaded guilty), made them out, and that he was not present when they were signed.

Staff: Former United States Attorney F. E. Van Alstine; Assistant United States Attorney William Crary (N.D. Iowa).

PROCEEDINGS UNDER 28 U.S.C. 2255

Petitioner Attacking Sentence on Basis of Insanity at Time of Trial Is Entitled to Hearing. James Edward Corbett v. United States (C.A. 5). On November 29, 1961, the Court of Appeals for the Fifth Circuit remanded for hearing after reversing an order of the trial court, which, following an in camera analysis of the record, denied petitioner's motion under 28 U.S.C. 2255 to set aside his sentence on the ground of his alleged insanity at the time of his trial. The Court

held that "the allegations of the petitioner, taken together with the evidence before the Court touching upon appellant's mental and neuro-psychiatric history, made it incumbent on the trial court to hold such hearing as is required by Section 2255."

This ruling is based on the Court's opinion in Gregori v. United States, 243 F. 2d 48, supported by the ruling in Bishop v. United States, 350 U.S. 961, wherein it held that, if the issue of insanity were not considered at the trial, a proceeding under Section 2255, with the type of hearing contemplated thereunder, is available as a vehicle for collaterally attacking a sentence on the basis of the insanity of the prisoner at the time of the trial, even though the prisoner had been represented at the trial by counsel. The Court held in the Gregori case that a motion under Section 2255 predicated on grounds of insanity was particularly available where the prisoner is unable to obtain the requisite certification of probable cause that he "was mentally incompetent at the time of his trial" so as to be entitled to a hearing under 18 U.S.C. 4245 afforded to prisoners whose mental incompetency was undisclosed at the trial.

Staff: United States Attorney Edward F. Boardman; Assistant United States Attorney Edith House (S.D. Fla.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Stay of Deportation - Physical Persecution - Yugoslavia; Denial of Employment and Punishment for Ship Desertion as Physical Persecution. Diminich v. Esperdy (C.A. 2, December 29, 1961.) This was an appeal from the district court's order granting defendant's motion for summary judgment in an action by a Yugoslav crewman to annul a denial of his application to withhold his deportation to Yugoslavia on physical persecution grounds (8 U.S.C. 1253(h)).

The Court of Appeals held, following a line of cited cases, that punishment in Yugoslavia for desertion of his vessel and "difficulties" that would interfere with religious observance and freedom of association, repugnant as they may be, are not the "physical persecution" which Congress chose to make the sole factor warranting a stay of deportation.

Appellant relied on a pilot administrative decision (Matter of Kale, A-9 555 532) which he contended stood for the proposition that economic sanction by the complete withdrawal of all employment opportunity in Yugoslavia would not be physical persecution for purposes of 8 U.S.C. 1253(h). The Court could not so read Kale, for the statement there "that 'economic sanctions' are not physical persecution, when read in context, does not go to the extent of saying that complete withdrawal of employment opportunities would not be". (Cf. Dunat v. Holland, 183 F. Supp. 349 (Bulletin: Vol. 8, No. 13, p. 413) rev. C.A. 3, May 29, 1961; motion for rehearing en banc granted, C.A. 3, August 3, 1961).

Affirmed.

Staff: United States Attorney Robert M. Morgenthau and
Special Assistant United States Attorney
Roy Babitt (S.D. N.Y.)

Declaratory Judgment; Motion for Remand and for Stay. Langhammer v. Hamilton (D. Mass., December 27, 1961.) Plaintiff's petition for declaratory relief to block his deportation was dismissed by the District Court, 194 F. Supp. 854, and the Court of Appeals affirmed 295 F. 2d 642. (See Bulletin: Vol. 9, No. 24, p. 699).

Through new counsel he filed a motion in the District Court for remand for further administrative proceedings on the ground that the administrative order to show cause not only contained a factual error which prejudiced him but also that it was not made a part of the administrative record. Alternative motions were for a stay pending petition for certiorari and an application to adjust status under 8 U.S.C. 1255.

The Court found counsel's representations to be false and that plaintiff had had ample opportunity in the prior actions to call to the Court's attention (and that of the Court of Appeals) the arguments now being urged at this late date.

All motions denied. (C.A. 1, on same date, denied an application for stay.)

Staff: Assistant United States Attorney John J. Curtin, Jr. (D. Mass.)

Judicial Review of Denial of Application for Suspension of Deportation; Transfer of Suit to Court of Appeals. Walters v. Esperdy (S.D. N.Y., December 18, 1961.) Plaintiff sought a judicial review of the administrative determination which refused to suspend his deportation so as to relieve him from a final order of deportation outstanding against him. Defendant moved for an order transferring the suit to a court of appeals under section 5(b), P.L. 87-301, effective October 26, 1961.

While plaintiff did not oppose the motion to transfer, defendant requested a ruling on the motion since the question was one of first impression under the new statute. It was urged that suspension of deportation and the granting or withholding of voluntary departure by the Special Inquiry Officer form an integral part of the deportation proceedings and if an application for either is granted, deportation would not be carried out; this case necessarily involved the judicial review of a final order of deportation, and that therefore under section 5(a) of P.L. 87-301 (8 U.S.C. 1105a) the case is cognizable only by a court of appeals.

The Court said that while the question is not free from doubt, because it is a case of first impression, the court of appeals should have the opportunity to pass on the question of its own jurisdiction and the granting of the motion to transfer will place this question before it.

Motion granted.

Staff: United States Attorney Robert M. Morgenthau and Special Assistant United States Attorney Roy Babitt (S.D. N.Y.)

Judicial Review of Order of Deportation; Transfer to Court of Appeals Under P.L. 87-301. Dentico and Lahtinen v. Esperdy (S.D. N.Y.), December 8, 1961. A suit seeking judicial review of an order of deportation is "pending unheard" and transferrable to a court of appeals under section 5(b), P.L. 87-301, when it is unheard on the merits in the District Court on October 26, 1961, the effective date of that section.

Staff: United States Attorney Robert M. Morgenthau and Special Assistant United States Attorney Roy Babitt (S.D. N.Y.)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Public Lands: Conclusiveness of Decision by Secretary of Interior Affirming Decision of Manager. Shuck v. Helmandollar (D. Ariz., Dec. 11, 1961). This action was brought against the Manager of the Land Office in Phoenix, Arizona, the Bureau of Land Management, and the Arizona State Supervisor of the Bureau of Land Management, to obtain review of decisions by those officers which cancelled mining claims of the plaintiffs.

The Secretary of the Interior was not a party to the suit but plaintiffs also sought review of his decision affirming the decisions of the officers of the Bureau of Land Management. Plaintiffs asserted that the decisions cancelling their mining claims were invalid and wrongfully interfered with possessory rights which they owned.

The mining claims were cancelled after contests were filed and after hearings before an examiner who heard the testimony of witnesses and considered documentary evidence which was adduced.

Both parties filed motions for summary judgment. The Court granted defendants' motion for summary judgment and held that the findings made by the Secretary of the Interior in his decision affirming the decision of the officers of the Bureau of Land Management were supported by substantial evidence; that the Secretary applied proper standards in determining the validity of the claims involved, and applying the ruling in Foster v. Seaton, 271 F. 2d 836, 839 (C.A. D.C. 1939), his determination is conclusive and not subject to judicial review.

Staff: United States Attorney Charles A. Muecke (D. Ariz.); Herbert Pittle (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Court Decisions

Summons; Internal Revenue Service; Judicial Enforcement; Sufficiency of Evidence Supporting Suspicion of Fraud so as to Warrant Investigation Into Otherwise Time-Barred Years. Eberhart v. Broadrock Development Corp.; Eberhart v. Steel Equipment Co. (C.A. 6, December 14, 1961). Following enforcement proceedings under Section 7604 of the Internal Revenue Code of 1954, the United States District Court (N.D. Ohio) ordered the taxpayer-corporations to comply with summonses requiring production of certain of their records for the years 1950-1957. On appeal the corporations complained that the investigations were unnecessary (Section 7605(b)) and that absent fraud, the statute of limitations had run with respect to 1955 and previous years. The Court of Appeals rejected the contention that additional inspection of the records was not necessary, since requisite notification for additional inspection had been transmitted by the Secretary or his delegate, as required by Section 7605. As to the question of limitations, the Court of Appeals found that there was evidence in the case supporting the special agent's suspicion that there was fraud in the handling of certain travel expenses. More specifically, the Court concluded (a) that as to all years involved there was testimony of lack of records to support the deductions claimed for travel expenses and (b) that while there appeared to be specific evidence of fraud only with respect to 1956 and 1957, "there was at least an inference that fraud extended into some of the previous years". Cf. McDermott v. Baumgarth, 286 F. 2d 864 (C.A. 7); Bulletin, March 24, 1961.

Staff: William F. Friedlander and Meyer Rothwacks (Tax Division).

Pre-Indictment Motion To Suppress Evidence; Failure to Warn Taxpayers Of Constitutional Rights During Investigation; Need For Expeditious Treatment Of Pre-Indictment Motions. A. Cheney Greene and Evelina S. Greene v. United States (C.A. 2, December 5, 1961). Petitioners appealed from an order of the United States District Court for the Western District of New York which denied their pre-indictment motion, under Rule 41(e) of the Federal Rules of Criminal Procedure, for the suppression as evidence in any future proceeding and return of records which had been obtained by a special agent of the Internal Revenue Service, allegedly in violation of their constitutional rights. The District Court, after denying petitioners' motion without a hearing, granted their request for a stay of criminal proceedings pending appeal, but provided that the stay would not prevent the United States Attorney from filing a complaint Section 6531, Internal Revenue Code of 1954) in order to toll the statute of limitations.

The Court of Appeals affirmed the District Court's denial of petitioners' motion to suppress, in reliance on its own previous opinion in

United States v. Sclafani, 265 F. 2d 408 (C.A. 2), certiorari denied, 360 U. S. 918. The Court also vacated the stay granted by the District Court, and made the following comments as to the desirability of speedier handling of these matters, comments which should be brought to the attention of other courts when appropriate.

> We think the staying of criminal proceedings pending this appeal, without any time limitation on such stay, raises a serious question regarding the proper administration of criminal justice. The district court in its show cause order of November 23, 1960, stayed all criminal proceedings by the government pending the determination of the motion to suppress and the service of notice of entry of an order thereon. The record also discloses a new stay issued on July 17, 1961, pending the final determination of the appeal, which provided that the stay would not prevent the United States Attorney from filing a complaint "if necessary, in the month of March, 1962, in order to toll the Statute of Limitations." At any rate the result was that by the time this appeal was heard the government had already been stayed almost one year.
>
> If any stay was appropriate, and we do not say that it was not, then it was incumbent on the court to see that the entire matter, including the prosecution of the appeal, was disposed of without undue delay. Although the government's answering affidavit was filed December 13, 1960, it was not until March 30, 1961 that the district court's order, as amended, was entered. Thereafter the Greenes filed their notice of appeal, and the record in the case was not filed in this court until June 16, 1961. While these actions of appellants were not untimely under the applicable rules, 1/ the district judge, in his discretion, might well have conditioned his stay upon condition that the appeal be prosecuted speedily. Instead, in granting the further stay on July 17, he did no more than to provide that the government's right to bring an indictment before the running of the statute of limitations in March 1962 should not be prejudiced. The command and spirit of Rule 50 of the Federal Rules of Criminal Procedure, which gives precedence to criminal proceedings as far as is practicable, surely require a consideration of the delays involved when the district court is asked to stay the government from proceeding.
>
> If an expedited appeal had been requested in this court, it would in all probability have been granted. We have frequently given special treatment to cases having to do with criminal proceedings, see, e.g. Pugach v. Dollinger, 277 F. 2d 739 (2 Cir. 1960) aff'd 365 U.S. 458 (1961), and we are always ready to do so upon application. Moreover for good cause we have convened panels of the court during the summer, see United States v. National Marine Engineers' Beneficial Ass'n, 294 F. 2d 385 (2 Cir. 1961) (argued August 17, 1961; decided August 22, 1961); Taylor v. Board of

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1/ Presumably proceedings under Rule 41(e) are governed by the Federal Rules of Civil Procedure when, as here, no prosecution has yet been begun. See Russo v. United States, 241 F. 2d 285 (2 Cir.), cert. denied, 355 U.S. 816 (1957). Since the government is a party to the action, appellants had 60 days to file their appeal under Civil Rule 73(a); the record on appeal was required to be filed in this Court within an additional 40 days under Rule 73(g).

Education, 294 F. 2d 36 (2 Cir. 1961) (argued July 18, 1961; decided August 2, 1961). Here the appeal has taken its course as if it were a civil dispute between private parties. We take this occasion to remind the bar and the district courts that every effort should be made to speed the dispensation of criminal justice. Cf. Cobbledick v. United States, 309 U. S. 323 (1940).

Staff: Former United States Attorney Neil R. Farmelo and Assistant United States Attorney C. Donald O'Connor (W.D. N.Y.)

District Court Decision

Statute of Limitations - Effect of Extensions of Time to File Individual Returns. United States v. Jerome Alper (D. N.J., December 14, 1961). The original information charging defendant with wilful failure to file his 1954 return on or before April 15, 1955, was filed January 4, 1961. This did not consider the two extensions of time within which to file this return granted the taxpayer, the latter being until September 15, 1955. A motion to dismiss the information for failure to include this was denied with leave to renew it against a new or amended information. On August 19, 1961, another information was filed charging the same offense but setting the time of failure to file as of the date of the second extension, September 15, 1955. Taxpayer moved that the statute of limitations had run and prosecution was barred. The Court held that regardless of the extension of time the statute began to run as of the original due filing date, April 15, 1955. This was based on the Court's interpretation of Section 6531 and Section 6513(a), 26 U.S.C., the latter of which states in part that for "purposes of this subsection the last day prescribed for filing the return * * * shall be determined without regard to any extension of time granted the taxpayer." The Court denied the taxpayer's motion, holding that the second information merely amended the first one as it did not charge a new or additional offense or otherwise prejudice any substantial rights of the taxpayer (Rule 7(e), Federal Rules of Criminal Procedure).

Though we agree with the result, we cannot subscribe to the Court's reasoning. No duty to file was created until September 15, 1955, the extended date. Further, in view of this extension, there could be no wilful intent not to file until the duty was created. In holding that the statute commenced to run from April 15, 1955, rather than from the extended date, September 15, 1955, we feel that the Court misapplied Section 6513(a), supra. That section, in terms, deals with returns already filed and taxes already paid and has no application in failure-to-file cases. For specific authority that in failure-to-file cases the statute of limitations begins to run from the date of any extension granted, see Haskell v. United States, 241 F. 2d 790, 793 (C.A. 10), certiorari denied, 354 U.S. 921. In view of this, it is immaterial as to whether the second information was an amended one or a new one where it was filed prior to six years from the extended date.

Staff: United States Attorney David M. Satz and Assistant United States Attorney Robert R. Blasi (D. N.J.).

CIVIL TAX MATTERS
District Court Decisions

Substance v. Form; Corporation and Boxer's Employment Contract With Corporation Held to Be Sham and Monies Paid to Corporation for Appearances of Boxer Held to Be Taxable as Income to Boxer and Not to Corporation. United States v. Ingemar Johansson, et al., (S.D. Fla. Dec. 15, 1961). Defendant Ingemar Johansson caused to be formed a Swiss corporation named Scanart, S. A., in January of 1960, and at the same time entered into an employment contract with Scanart, whereby Scanart was allegedly entitled to all monies paid for Johansson's public appearances and whereby the corporation paid Johansson's expenses and 70% of its gross receipts annually. Johansson also claimed to have become a Swiss resident in 1960. Scanart claimed that the monies paid for Johansson's appearances in this country were income to Scanart, and that it was exempt from United States income taxes under the terms of a United States-Swiss treaty as a Swiss corporation not having a permanent establishment in the United States. Further, Johansson claimed that the compensation paid to him by Scanart was exempt from United States income taxes under the terms of a United States-Swiss treaty as he was a Swiss resident employed by a Swiss enterprise.

The Court held that Johansson during the relevant time periods was not a Swiss resident as he had maintained the center of his personal and business life in Sweden and not in Switzerland. Further, the Court applied the doctrine of substance versus form and held that the employment contract between himself and Scanart was a sham and that Scanart had no legitimate business purpose but was a device which was used by Johansson as a controlled depositary and conduit by which he attempted to divert, temporarily, his personal income earned in the United States so as to escape taxation thereon by the United States; and further that Johansson retained the full economic benefit of and exercised complete control over the creation and disposition of the involved income. Accordingly the Court concluded that the monies paid for the appearances in the United States of Ingemar Johansson in 1960 and during the periods January 1, 1961 to and including March 13, 1961, were income to Johansson and not to Scanart and was taxable as such by the United States.

Staff: United States Attorney Edward F. Boardman;
Assistant United States Attorney Levinia Redd (S.D. Fla.);
John J. McCarthy (Tax Division)

Injunction; Taxpayers' Amended Complaints Dismissed for Failure to Allege Facts Showing Illegality of Taxes Assessed and Other Special Circumstances. Botta v. Scanlon, 61-2 USTC par. 9754 (E.D. N.Y.). The Second Circuit Court of Appeals had reversed the District Court's dismissal of the taxpayers' original complaints which sought to restrain the collection of assessments made under Section 6672, Internal Revenue Code of 1954, for the failure to collect and pay over withholding and social security taxes, and had remanded the case to the District Court to permit the taxpayers to amend and allege facts to show the illegality of the assessment and other special circumstances of an unusual character sufficient to require equitable relief in spite of the Section 7421 prohibition of such suits.

The taxpayers' amended complaints were once again dismissed because allegations of "financial hardship" and "irreparable harm" did not show

"special circumstances." However, the Court granted leave to file amended complaints conforming to the requirements of Steele v. United States, 280 F. 2d 89, which held that a taxpayer need pay withholding and social security taxes for only one employee for one quarter to be permitted to make a claim for refund and to institute suit for recovery.

Staff: United States Attorney Joseph P. Hoey and
Assistant United States Attorney Jon W. Hammer (E.D. N.Y.).

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