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UNITED STATES ATTORNEYS
BULLETIN

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UNITED STATES ATTORNEYS MANUAL

The following correction should be made on Page 4.1, Title 2, of the Manual. At the top of the page the following should be inserted in pen and ink:

Closing of the Prosecution

United States Attorneys are authorized to decline prosecution in any case of the type here under discussion, without prior consultation.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

The following Memoranda and Orders applicable to United States Attorneys' Offices has been issued since the list published in Bulletin No. 3, Vol. 10, dated February 9, 1962:

MEMO	DATED	DISTRIBUTION	SUBJECT
309 S1	2-1-62	U.S. Attys.	Federal Tax Liens.
193 S6	2-14-62	U.S. Attys.& Marshals	Absentee Voting Assistance and Information Program.
312	2-14-62	U.S. Attys.	Requested that files of cases and claims in which compromise or closing requires Civil Division approval be marked with distinctive colored label bearing the notation "D.J. Civil Division".
289 S1	3-5-62	U.S. Marshals	Prisoner record and reporting system - report of disposition to FBI on Form No. DJ-100.
249 S1	3-6-62	U.S. Attys.& Marshals	Contract Forms for Purchase of Services of Supplies. SF 32, General Provisions.
106 S3	3-8-62	U.S. Attys.& Marshals	Political Activity.
ORDER	DATED	DISTRIBUTION	SUBJECT
261-62	3-2-62	U.S. Attys.& Marshals	Appointing certain Federal Aviation Agency Inspectors as Special Deputy United States Marshals.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Grand Jury Starts When Jurors Are Sworn. United States v. North American Van Lines, Inc., et al. (D. Col.) On March 12, 1962, the District Court denied defendants' motion to dismiss the indictment on the ground that the legal existence of the grand jury had ended prior to the time the indictment was returned.

In support of their motion defendants contended that the term of service as set forth in Rule 6(g), F. R. Crim. P., commenced on December 22, 1959 when the members of the grand jury were selected. The Government contended that service by the grand jury began when its members were sworn on January 5, 1960 and that the indictment, which was returned on June 30, 1961, was returned within the requisite period of 18 months.

The Court held in denying the motion "that it is essential to the legal existence and competency of a grand jury that the jurors be sworn" and that the grand jury began its service when its members were sworn on January 5, 1960.

Staff: Willard Memler and Joseph V. Gallagher. (Antitrust Division)

CLAYTON ACT

District Court Renders Opinion and Final Judgment. United States v. E.I. du Pont de Nemours and Co., et al. (N.D. Ill.) On March 1, 1962 Judge LaBuy filed an opinion and final judgment in this case. The judgment requires du Pont to divest itself within three years of its 63 million shares of stock (23%) in General Motors which the Supreme Court found to be held in violation of Section 7 of the Clayton Act; and orders Christiana, the du Pont family holding company which controls du Pont, to divest itself of its present direct holdings in General Motors (535,500 shares) as well as its allocable portion of General Motors stock which it may receive on a distribution by du Pont.

The Court made the findings necessary to make applicable to the du Pont and Christiana divestitures the provisions of Public Law 87-403, providing for taxation of the General Motors stock received by shareholders on a capital gains basis, to the extent that its value exceeds the shareholder's basis for his underlying du Pont or Christiana stock.

The pass-through to Christiana shareholders is conditioned by judgment provisions requiring that certain Christiana shareholders agree to sell within ten years the General Motors stock received in respect of their Christiana holdings, or else such stock is to be transferred to a custodian who will sell the stock for their account. Included in this group are (1) the officers and directors of Christiana and their spouses,

(2) the officers and directors of du Pont who are members of the du Pont family and their spouses, (3) the brothers and sisters of Pierre S.du Pont and their spouses and children (including the beneficial holdings of this group where the Wilmington Trust Company or a member of the group is the trustee), and (4) the Longwood Foundation (basically the successor to the estate of Pierre S. du Pont), a tax-exempt foundation controlled by the du Ponts (holding over 500,000 shares of Christiana). The total number of General Motors shares required to be sold by Christiana stockholders is 8,375,000 or about 2.7 per cent of General Motors stock.

The Court found that the divestitures required by du Pont and Christiana were necessary and appropriate to effectuate the policies of the Clayton Act and required to reach an equitable order. In allowing a pass-through to Christiana stockholders the Court rejected the Government's argument that Christiana's divesting by sale or exchanges with its non-du Pont family affiliated stockholders would more effectively serve antitrust objectives, and that the pass-through was, therefore, not necessary to effectuate the policies of the Clayton Act. As noted above, however, the pass-through to Christiana stockholders is conditioned by requirement that certain Christiana stockholders in turn divest themselves of the General Motors stock received.

The more important aspects of the judgment in addition to the required divestitures include the following;

(1) The Court held that it had jurisdiction in rem over the illegally held General Motors stock and that by treating the stock as a res the Court could "control the manner of distribution by Christiana" and require the sale of the stock that would be received by certain controlling shareholders of Christiana and du Pont. Although the Court refused to pass upon the Government's contention that Christiana itself was in violation of the second paragraph of Section 7 of the Clayton Act by reason of its "indirect" (through du Pont) holdings of General Motors stock the Court held that it had jurisdiction over Christiana as a party litigant and that this fact in addition to its jurisdiction over the illegally held General Motors stock as a res provided the necessary jurisdictional basis for its orders. The Court, therefore, rejected Christiana's contention that the Court lacked power to compel it to divest.

(2) The Court also rejected General Motors argument that the Court lacked power over it. Accordingly, General Motors was subjected to various injunctive provisions and was directed "to cooperate with the shareholders receiving and acquiring General Motors shares... which form the res before the Court so as to effectuate the judgment."

(3) du Pont and Christiana are perpetually enjoined from acquiring any additional General Motors stock.

(4) Cross-employment of executives between du Pont and Christiana, on the one hand, and General Motors, on the other, is restricted: Simultaneous cross-employment is prohibited perpetually. Employment of executives who have served as such for the other corporation or corporations since 1960 is prohibited for ten years.

(5) du Pont and Christiana and their officers and directors are enjoined from proposing any person for election as a director or for a position as an officer of General Motors.

(6) During the three year period of the divestiture, the voting rights to the General Motors stock held by du Pont are to be voted by du Pont's stockholders, excluding Christiana. In addition, both du Pont and Christiana and their officers and directors are enjoined not only from exercising voting rights to General Motors stock, but also from using their stock ownership in General Motors to control or influence General Motors in any manner.

(7) As long as du Pont and Christiana continue to hold any General Motors stock they are enjoined from entering into any contracts requiring General Motors to purchase from du Pont any specified percentage of its requirements for any product. The Court relied on the adequacy of the required divestitures in refusing to incorporate in its judgment the more comprehensive injunctive provisions proposed by the Government which would have prohibited du Pont and General Motors from joint participation in any type of business enterprise and from dealing with each other on a preferential basis with respect to any product, patent process which they develop or in which they have a proprietary interest.

(8) Since the Supreme Court found that its determination of a violation of Section 7 of the Clayton Act made it unnecessary to decide the Government's appeal from the dismissal of the Sherman Act charges, the District Court, over the strenuous objections of defendants, vacated that part of its earlier judgment which dismissed the Sherman Act charges against du Pont and General Motors.

Staff: Paul A. Owens, Eugene J. Metzger, and Jerome A. Rabow. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

Taking of Depositions Conditioned Upon Payment of Expenses of Opposing Counsel. In the case of Glasspool v. United States (D.J. File 157-15-32) the United States District Court for the District of Delaware has made the Government's payment of certain expenses connected with the travel of plaintiff's counsel a condition precedent to the taking of certain depositions by the Government, reserving jurisdiction with respect to whether the Court will tax these items (travel expenses, per diem allowances and an attorney's fee) as a part of the costs in the proceeding. See Rule 30(b), F.R.C.P. The Comptroller General, in a decision (B-148069, dated February 12, 1962) rendered in response to an inquiry by the Administrative Assistant Attorney General, has ruled that these items of expense are to be considered as a part of the expense necessarily incurred by the Department of Justice in preparing its defense and as such are properly chargeable to appropriations made to the Department of Justice for carrying out its legal activities, rather than to the Administrative Office of the United States Courts as for the travel and subsistence of counsel for an indigent defendant pursuant to Rule 15(c) of the Federal Rules of Criminal Procedure.

Applications by opposing counsel for the allowance of their expenses as a condition for the taking of depositions should be vigorously opposed in order that such orders may be avoided and that such expenditures, when required, may be kept to a minimum. Additionally it should be noted that while such expenses are reimbursable and will be paid when the United States Attorney has submitted an appropriate form 25-B accompanied by the court's order and the claimant has completed a voucher, such expenses cannot lawfully be prepaid by the Administrative Division.

If it appears that the problem presented by the foregoing can be anticipated and the information sought by depositions can be obtained satisfactorily by other discovery procedures (written interrogatories, requests for admissions, stipulations, etc.) serious consideration should be given to using these alternative procedures.

COURT OF APPEALS

ALIEN PROPERTY

Corporation Organized and Existing Under Netherlands law During German Occupation of That Country During World War II Remains "Enemy" Within Meaning of Section 9(e) of Trading With Enemy Act Until Hostilities Are Formally Ended. N. V. Handelsbureau La Mola v. Robert F. Kennedy (C.A. D.C., February 1, 1962.) Appellant was a corporation organized and existing by virtue of the laws of the Netherlands during the German occupation in that country in World War II. The Alien Property Custodian in 1950 vested property of appellant in the United States consisting of certain bank deposits. Appellant filed an action in the district court under Section 9(e) of the Trading with the Enemy Act to recover the property. The district court granted the Government's motion for summary judgment. The Court of Appeals

affirmed. It held that although the property was vested in 1950 after the German occupation of the Netherlands had ended and hostilities had ceased, the war technically had not ended until the joint resolution of Congress in October of 1951. Appellant was therefore still an "enemy" within the meaning of Section 9(e) of the Act and therefore could not maintain this action. The Court noted that the purpose of the Act would not be fulfilled if all vesting and seizure had to be accomplished during hostilities or enemy occupation, as the United States could then be deprived of property which had been of benefit to the enemy.

Staff: Joan Berry (Civil Division)

BANKRUPTCY

Government's Agreement to Sale of Mortgaged Property Does Not Waive Its Lien. In the Matter of Albert E. Forney and Juanita I. Forney, Bankrupts - United States v. Raymond A. Flynn, Trustee (C.A. 7, February 27, 1962.) The Government had consented to the sale of property mortgaged as security for a loan from the Farmers' Home Administration on condition that the proceeds be applied to satisfaction of the mortgage debt. The property was sold but the proceeds of sale were retained by the trustee in bankruptcy of Forney who had become bankrupt after the sale. The district court affirmed an order of the Referee in Bankruptcy granting the trustee's petition to have the Government's lien declared null and void.

The Court of Appeals reversed, holding that (1) the Government did not waive its lien under Illinois law by entering into the agreement for sale in the circumstances presented; (2) the agreement to transfer the proceeds of sale did not constitute a preference within the meaning of the Bankruptcy Act; and (3) the agreement for sale did not constitute an executory contract which could be rejected by the trustee. The Court of Appeals remanded to the referee to make a factual determination of how much of the proceeds of sale were attributable to the mortgaged property.

Staff: Jerome I. Levinson (Civil Division)

CIVIL SERVICE

Temporary Employee Not Entitled to Procedural Protections of Lloyd-La Follette Act. Bennett v. Udall (C.A. D.C., February 8, 1962.) Appellant was employed by the National Park Service as an architect GS-11. In accordance with the applicable regulations governing separation of temporary employees, he was given written notice that his employment would be terminated because of inadequate work performance. In a district court action he sought a declaratory judgment and a mandatory injunction requiring his reinstatement. The district court directed a reference to the Civil Service Commission to consider appellant's claims. The Commission concluded that, as appellant was merely a temporary employee, his separation was in accordance with the applicable regulations and no procedural rights had been denied. The district court then granted summary judgment for the Government. The Court of Appeals affirmed. It

held that appellant had not acquired classified Civil Service status merely because the position of architect GS-11 had been classified and the temporary employment had been accompanied by a memorandum which stated that his appointment was without time limitation. The Court stated that "An employee gains no status merely as the incumbent of a classified position. He still must qualify."

Staff: United States Attorney David C. Acheson, Assistant United States Attorney William H. Colling, (District of Columbia).

FALSE CLAIMS ACT

Burden of Proof Under False Claims Act Same as in Any Statutory or Common Law Fraud Action. United States v. Ueber (C.A. 6, February 27, 1962.) Ueber was president of Ueber Tool and Manufacturing Co., a subcontractor of two prime contractors for the furnishing of airplane parts for the Air Force. The Ueber Company presented vouchers to the contractors who in turn presented them for payment to the Government. The Government brought an action under the False Claims Act asserting that the Ueber Company with Ueber's knowledge and with intent to defraud, had charged certain items as reimbursable direct labor which were not of that category. The district court found that false claims totalling $25,450 had been presented. In its judgment under 31 U.S.C. 231, the court doubled this amount to $50,900, and awarded $2,000 for each public voucher submitted (equalling $108,000) for a total judgment of $158,900.

On appeal the Court of Appeals for the Sixth Circuit held that (1) the claim accrued for purposes of the statute of limitation when the voucher was presented for payment and therefore the claim was timely brought and (2) each voucher submitted was a separate claim justifying an assessment of separate forfeitures. The Court went on to hold, however, that it could not determine whether the lower court's findings were clearly erroneous on the present state of the record because the standard of proof applied by the lower court was not clear. That standard, according to the Court, was that the evidence must be "clear, unequivocal and convincing." The Court therefore remanded the case with instructions that the district court make appropriate findings of fact in light of that standard.

Staff: Marvin S. Shapiro (Civil Division)

FEDERAL TORT CLAIMS ACT

Federal Prisoners May Maintain Actions Under Tort Claims Act for Damages Sustained As Result of Alleged Negligence of Prison Personnel. Winston v. United States; Muniz v. United States (C.A. 2, February 27, 1962.) Both of these cases presented the same issue, i.e., whether a federal prisoner may bring an action under the Tort Claims Act to recover damages for injuries sustained as a result of the alleged negligence of prison personnel. In 2-1 decisions in both cases, the Court of Appeals went into conflict with every other federal court that has

considered this question, including the Seventh and Eighth Circuits, and held that a prisoner may maintain such an action. The majority opinions rejected the argument that Congress could not have intended to permit such suits because to do so would result in the impairment of prison discipline and disrupt the uniform administration of the prison system directed by Congress. Cf., Feres v. United States, 340 U.S. 135. Judge Kauffman dissented.

The unfavorable majority decisions have in effect been vacated because on March 15 the Court of Appeals decided sua sponte to reconsider the cases in banc.

Staff: Jerome I. Levinson (Civil Division)

GOVERNMENT CONTRACTS

Decision of Armed Services Board of Contract Appeals Final. Salem Products Corp. v. United States (C.A. 2, January 31, 1962.) Salem had a contract with the Government for the manufacture and delivery of a quantity of parka liners, according to detailed specifications. Salem requested permission to deviate from the specifications. The permission was granted provided there was no additional cost to the Government. As a result of the deviation, Salem realized a saving over the original contract price. The contracting officer acting pursuant to the changes clause of the contract then reduced the price in an amount corresponding to the realized savings. This action was affirmed by the contract appeal board acting pursuant to Salem's appeal under the disputes clause of the contract. Salem paid the amount of the savings to the Government under protest and then brought this suit to recover that amount.

The district court held that the Government had waived its right to claim the savings by its letter agreeing to the deviation provided it resulted in no additional cost to the Government, and therefore awarded judgment for plaintiff. The Court of Appeals reversed and directed judgment for the Government. It held that the letter did not waive the Government's right to have the benefit of any savings effected by the contractor and that "it is very doubtful that the contracting officer had the authority to waive the Government's right to recover a savings in the contract price." This question aside, the Court held, the dispute here was a factual one and the decision of the appeals board was conclusive since supported by substantial evidence.

Staff: John G. Laughlin (Civil Division)

LIBEL

Statements Made in Report Prepared for Internal Use Within Administrative Agency Absolutely Privileged. Jacob M. Poss v. Jerome Lieberman (C.A. 2, February 13, 1962.) Plaintiff, a lawyer, appeared before defendant, a claims representative of the Department of Health, Education and Welfare, in connection with his wife's claim for Social Security benefits based on employment by corporations owned and operated by plaintiff. In a report made on the case

in the agency, defendant stated that plaintiff had told him that he had been disbarred as a lawyer. In fact, no disbarment or disciplinary action had ever been brought against plaintiff. Plaintiff then brought a libel action in the state court for civil damages against defendant based upon the statement. The United States Attorney removed the case to the district court where the court upheld the removal and dismissed the action on the ground that the allegedly defamatory statement was absolutely privileged. The Court of Appeals affirmed. It first held that the case had been properly removed by defendant to the federal court from a state court under 28 U.S.C. 1442 because of the federal interest in the matter. Reaching the merits, the Court of Appeals further held that the defamatory statement was absolutely privileged since it was included in a report prepared for internal use within the agency, rather than for public dissemination through a press release.

Staff: United States Attorney Joseph L. Hoey; Assistant United States Attorney Malvern Hill, Jr. (E.D. N.Y.)

LONGSHOREMAN AND HARBOR WORKERS' ACT

United States Is Not Made Party by Virtue of Deputy Commissioner's Status As Party. United States and Jeanette E. Gondeck v. Pan American World Airways Incorporated and Travelers Insurance Company (C.A. 5, February 9, 1962.) Decedent was killed in a vehicular accident while returning to the base where he worked after a recreational excursion in town. The deputy commissioner found that the employee, at the time of his fatal injury, was pursuing reasonable recreational activity and that he was on call for emergency duty. An award was therefore made to his widow and child.

In an action brought by Pan American and Travelers Insurance Company, the district court set aside the award, and denied the Government's motion for a new trial. The United States, but not the Deputy Commissioner, appealed the denial of the motion. The Court of Appeals held that the identity of the Deputy Commissioner and the United States are separate for appeal purposes, and therefore the United States, not being a party to the proceeding in the district court, had no right to appeal.

Reaching the merits, the Court further held that the injury was not compensable under the Act: The recreation engaged in by the employee was not sponsored by the company, did not take place on the company's property or during the employee's working day, and the company had prohibited the employee from using the company jeep.

Staff: United States Attorney Edward F. Boardman (S.D. Fla.)

POSTAL MONEY ORDERS

Government Is Chargeable With Notice That Bank is Acting as Agent for Collection Where It Presents for Payment Postal Money Order Carrying Prior Endorsement to Bank's Depositor. United States v. Cambridge Trust Company

(C.A. 1, March 6, 1962.) The Government commenced this action in the District Court for the District of Massachusetts to recover moneys allegedly erroneously and illegally paid to the Bank on 699 postal money orders which had been fraudulently raised in amount by the purchaser subsequent to issuance and prior to negotiation. By endorsement the payee transferred ownership to E.M.F. Electric Company, which in turn endorsed the money orders to the Bank "For deposit only." The Bank endorsed them with its regular clearing house stamp, and they were paid through the Federal Reserve Bank of Boston. Before notice of the alteration, the Bank made payment over to E.M.F. Both the statute, now 39 U.S.C. 5104, and the money orders, prohibited transfer of ownership more than once. By express provision on money orders, a bank stamp is not regarded as an endorsement. The district court, holding that the Government had notice of the Bank's agency, and also that money orders should be subject to the same rules as checks where the Government was both the drawer and the drawee, dismissed the complaint.

On appeal, the Court of Appeals affirmed. Ruling that it need not determine whether a postal money order is a negotiable or non-negotiable instrument, the Court held that, purely on principles of agency law, the Government could not recover. Without expressly passing on the Government's argument that the statutory prohibition against more than one endorsement was for the benefit of the United States and could be waived, the Court was of the opinion that, because of the endorsement prohibition, the last legal owner was E.M.F., and that the Bank and its correspondent could only be acting as agents for collection; that the Federal Reserve Bank was therefore chargeable with notice that it was making payment to an agent; and that on clear agency principles the Government could not recover from the Bank where, as here, there was payment over in good faith and without notice. The Court also held that, because of the express statement on the money order that a bank stamp is not regarded as an endorsement, the Bank was not liable to the United States as a guarantor.

Staff: Kathryn H. Baldwin (Civil Division)

POST OFFICE

Postmaster General Has Inherent Authority to Reconsider and Vacate Erroneous Decisions of His Predecessor. National Association of Trailer Owners, Inc. v. J. Edward Day, Postmaster General of the United States. (C.A. D.C., February 8, 1962.) Appellant was the publisher and distributor of the magazine, Mobile Living. In August of 1958, it applied to the Post Office Department for second-class mailing privileges for its publication. After being advised of a proposed denial of the application on the ground that the publication was designed primarily for advertising purposes, appellant in accordance with Post Office procedures, filed a petition for review of the proposed denial. The Hearing Examiner affirmed the denial on the proposed grounds. This decision was appealed to the Post Office Department's judicial officer, Ablard, who acts for the Postmaster General. Ablard reversed the Hearing Examiner and granted appellant second-class entry for its publication. Two days after the decision, Ablard resigned. After what the court described as some obscure procedures, a motion to vacate Ablard's

decision and reconsider the case was filed by the director of the Postal Services Division. Judicial Officer Kelly, Ablard's successor, granted the motion, reversed the ruling by Ablard and denied entry of the publication as second-class matter.

Appellant then brought an action in the district court seeking to reverse Kelly's decision. The district court affirmed the administrative decision, and this decision was affirmed by the Court of Appeals, which held that the Postmaster General has "the inherent authority to reconsider and vacate a prior erroneous decision" even in the absence of rules of procedure authorizing motions for reconsideration. The power to reconsider, however, "must be exercised both within a reasonable time after the issuance of a final departmental decision and without subjecting the parties affected to any undue or unnecessary hardships." Additionally, the Court found that there was substantial evidence to support the amended departmental decision.

Staff: John G. Laughlin (Civil Division)

SOCIAL SECURITY

Disability Benefits and Secretary's Determination Not Supported by Substantial Evidence; Scope of Review in Court of Appeals Not Limited to Question of Whether Lower Court Misapprehended or Misapplied Statutory Standard. Benton Roberson v. Ribicoff (C.A. 6, March 7, 1962.) This was an action for review of a determination of the Secretary of Health, Education and Welfare that plaintiff-appellant, who was suffering from an inoperable tumor on his knee, was not entitled to a period of disability and disability benefits. The district court affirmed the Secretary's determination, and plaintiff appealed. The Court of Appeals reversed, holding that, because there was no evidence to support the Secretary's finding that appellant could do some type of work (e.g., run an elevator, or act as a watchman) the finding that appellant was not disabled was not supported by substantial evidence. See also, Hall v. Flemming, 289 F. 2d 290 (C.A. 6), King v. Flemming, 289 F. 2d 808 (C.A. 6), Kerner v. Flemming, 283 F. 2d 916 (C.A. 2). Additionally, the Court ruled, contrary to the Government's assertion, that its scope of review of the district court's decision was not limited to the question of whether that court misapprehended or misapplied the standard of substantial evidence. It found, inter alia, that there was nothing to indicate that it was the intent of Congress that its review should be so limited.

Staff: Marvin S. Shapiro (Civil Division)

COURT OF CLAIMS

AGRICULTURE

Action for Breach of Contract, Fraud and Conspiracy on Part of Department of Agriculture Officials Dismissed After Trial On Merits. Nichols & Company v. United States (Ct. Cl., March 7, 1962.) Nichols & Company, one of the largest egg dealers in the Middle West, brought suit for over a million dollars as claimed damages for breach of contract and fraud, and an

alleged conspiracy by some of the highest officials in the Department of Agriculture to ruin plaintiff and drive him out of business.

Plaintiff's petition contained five causes of action. In the first, plaintiff claimed breach of contract in the sale of 58,000 cases of eggs to the Department of Agriculture for the school lunch program, alleging that the inspectors who graded the eggs were prejudiced, biased and acted in an arbitrary and capricious manner. Counts 2, 3, and 4 alleged wrongful refusal by the Department to approve plaintiff's plants for egg breaking and poultry products. Count 5 alleged that officials of the Department intimidated, harassed, and coerced egg graders who were doing an honest job in grading plaintiff's eggs, and replaced them with a dishonest grader, who on instructions, fraudulently and improperly graded plaintiff's products; that these officials discriminated against plaintiff in furnishing official services, and that they entered into a conspiracy to drive him out of business.

In a unanimous decision, the Court of Claims dismissed all five counts of plaintiff's petition. The Court in its opinion specifically absolved officials of the Department of Agriculture and its inspectors of any wrongdoing or improper conduct. In his report to the Court, the Commissioner, because of a misunderstanding of the motives of the Department of Justice in claiming executive privilege with respect to the production of raw F.B.I. reports, had inferred that there must have been improper conduct on the part of officials of the Department of Agriculture which might have been revealed by the reports. In its official findings the Court struck out all of the Commissioner's derogatory statements.

Staff: David Orlikoff (Civil Division)

DISTRICT COURT

ANTIGAMBLING STATUTES

Attempted Service on Attorney General and Director of Federal Bureau of Investigation Outside District of Columbia Quashed and No Injunction Will Lie Against United States. Universal Manufacturing Co. v. United States of America, et al. (N.D. Ill., January 29, 1962.) Plaintiff sought an injunction restraining enforcement of Public Laws 218 and 228 (18 U.S.C. 1952, 1953) with respect to certain merchandise printed by plaintiff, alleging that such enforcement would be unconstitutional, and requested a three-judge court pursuant to 28 U.S.C. 2282 and 2284. Defendants moved to quash service with respect to the Attorney General and the Director of the FBI and to dismiss as to the United States. A single judge (Judge Will) granted defendants' motions, holding that a single judge had authority to pass on these motions as a preliminary to the convening of a three-judge court. The district judge sustained the motion to quash on the authority of Rule 4(d)(5), F.R.C.P., holding that the official residence of both the Attorney General and the Director of the FBI was in the District of Columbia. He granted the motion to dismiss on the ground that there was no consent by the United States to the maintenance of the action.

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

FEDERAL HOUSING ADMINISTRATION

Court of Claims Judgment Res Judicata of Issues in District Court Action. United States v. Magnolia Springs (S.D. Fla.) This case involved foreclosure of a $2,500,000 FHA insured mortgage on a Wherry Housing Project built for the Navy. Defendant defaulted on the mortgage and FHA assumed the mortgage under its contract of insurance. The United States Attorney instituted foreclosure proceedings and obtained the appointment of a receiver. Defendant interposed an answer and counterclaim, alleging (1) "unclean hands," (2) breach of warranty and (3) misrepresentation by the Navy which led it to construct the project. The counterclaim asked for an affirmative money judgment. Defendant had previously brought suit in the Court of Claims, making identical allegations. The Court of Claims action was dismissed, with prejudice, on June 5, 1961. Since under Rule 49(b) of the Court of Claims rules the dismissal operated as an adjudication upon the merits (28 U.S.C., 1958 Ed., p. 5258), the United States Attorney moved for summary judgment in the District Court action on the ground that all matters in issue were now res judicata. The District Court entered summary judgment for the Government, holding that the Court of Claims' decision was res judicata of all the issues before it.

Staff: Eli A. Glasser (Civil Division)
Assistant United States Attorney Edith House (S.D. Fla.).

LANDRUM-GRIFFIN

Suit by Secretary of Labor to Set Aside Union Election and Have New Election Conducted Under his Supervision Results in Election of Insurgent Slate of Candidates. Goldberg v. Banana Handlers International Longshoremen's Association - Local Union No. 1800. (E.D. La., January 2, 1962.) On October 14, 1960, the Secretary of Labor instituted a suit against Local Union 1800 under Title IV of the new Labor-Management Reporting and Disclosure Act (29 U.S.C., 401, et seq.) (the "Landrum-Griffin Act"), to set aside its election of officers. The complaint alleged that the union had violated the Act's election safeguards in that, inter alia, it did not afford its members a reasonable opportunity for the nomination of candidates and arbitrarily disqualified certain candidates. Relief was prayed for, declaring the past election to be null and void and ordering a new election held under Labor Department supervision, as provided in the Act.

On September 13, 1961, after a motion to dismiss the complaint on jurisdictional grounds was denied, defendant consented to the entry of a judgment granting the Government all the relief sought. A new election of officers was held under Government supervision the following month. The second election resulted in a complete victory for the union members whose complaint to the Secretary of Labor was the basis for this suit. Though other actions under Title IV have been concluded by consent decrees and new elections have been run, this was the first such re-run election to result in a complete change of administration for a union.

Staff: Donald B. MacGuineas and Charles Donnenfeld (Civil Division)

STATE COURT

ABSOLUTE PRIVILEGE

Federal Employee Entitled to Absolute Privilege Under Applicable Federal Law When Sued in State Court. Carr v. Watkins, et al. (Court of Appeals of Maryland, February 20, 1962.) This suit was commenced in the Circuit Court for Montgomery County, Maryland, by Carr, a former employee of the Naval Ordnance Laboratory, against Watkins and Whelan, two Montgomery County police officers, and Gould, the Deputy Security Officer of NOL, for allegedly communicating to Carr's new employer information concerning certain conduct charges preferred against Carr at NOL. The declaration sounded in defamation, invasion of right of privacy, and conspiracy. Although not clearly shown in the declaration, Gould had communicated only with the two defendant police officers; and because the Navy considered that this limited communication was within the scope of his official duties, the United States Attorney defended Gould. Demurrers to the declaration were sustained by the Montgomery County Circuit Court on the ground of absolute privilege.

The Maryland Court of Appeals reversed and remanded. However, it did so with respect to Gould only because the necessary facts as to his limited communication and the scope of his official duties did not sufficiently appear from the declaration to warrant the application of absolute privilege. Significantly, the Court ruled that Gould, unlike the county police officers, was entitled under federal law, which was applicable in his case, to absolute privilege on all counts in accordance with the principles established in Barr v. Matteo, 360 U.S. 564, upon a proper showing that his action was within the scope of his official duties. To our knowledge, this is the first time that a state appellate court has applied these principles to a federal officer sued in a state court.

Staff: Kathryn H. Baldwin (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Criminal Prosecution for Conspiracy Against Rights of Citizens. United States v. Donald Solomon Brown, Jr., and Elmore Hungerpillar. (E. D. S. C.). Donald Solomon Brown, Jr., and Elmore Hungerpillar were charged with conspiring to injure Elizah Isaac White because he had reported violations of the Internal Revenue Liquor Laws by Brown and Hungerpillar to officials of the Alcohol and Tobacco Tax Division, Internal Revenue Service.

By accident, the wife of Brown overheard White telephoning the agents to report that the subjects were operating an illicit still. Shortly thereafter, the victim was severely beaten by the subjects, at which time they told him they knew he had informed on them.

Indicted for violating the civil rights conspiracy statute (18 U.S.C. 241) as well as substantive and conspiracy liquor violations, the defendants pleaded guilty to a superseding information charging only the violation of 18 U.S.C. 241, a felony. On March 7, 1962, the Court sentenced each of the defendants to two years.

Staff: United States Attorney Terrell L. Glenn and Assistant United States Attorney Klyde Robinson (E.D., S.C.).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959

Investigation of Possible Violations of LMRDA, 1959; 29 U.S.C. 401-531. In Title 2, pages 85-86.1 of the United States Attorneys' Manual the investigative responsibilities under the LMRDA, 1959 are set forth. It has come to the attention of the Criminal Division that from time to time the Bureau of Labor Management Reports, Department of Labor, has in the course of its own investigations, uncovered and referred to the United States Attorneys possible violations of the Sections of the LMRDA, 1959, which fall within the investigative jurisdiction of the F.B.I. (This would appear to be especially applicable to violations of 29 U.S.C. 501(c).) Inasmuch as the memorandum of understanding between the Attorney General and the Secretary of Labor vests in the F.B.I. primary investigative responsibility under these statutes, all such referrals should be forwarded to the F.B.I. for appropriate investigation.

BANK ROBBERY ACT
18 U.S.C. 2113(b)

Theft from Night Depositories. Although the issue is not free from doubt, there is substantial authority that a theft from a night depository constitutes a violation of Section 2113(b), Title 18, United States Code. The crucial issue involved in applying Section 2113(b) to a theft from a night depository is whether or not the money placed in the depository is in the care, custody, control, management or possession of the bank during the period of time beginning with the deposit of the money in the night depository until the money is credited to the depositor's account.

No reported cases involving this issue have been brought to our attention, and the legislative history of Section 2113 throws no light on the subject. There have been two cases construing the phrase "care, custody, control, management or possession" as it is used in 2113(b) which are inapplicable to the instant problem. White v. United States, 85 F. 2d 268 (C.A. D.C., 1936), held that property carried by bank messenger is in the care, custody, etc., of the bank, and United States v. Jakalski, 237 F. 2d 503 (C.A. 7, 1956), cert. den. 353 U.S. 939, reh. den. 353 U.S. 978, held that property in an armored car hired by a bank is in the care, custody, etc., of the bank.

Several cases involving theft from a night depository have been prosecuted to conviction under this section. However, in these cases the defendants entered pleas of guilty, thus precluding a judicial determination of whether the offense constituted a federal crime. There is, however, a recent unreported case, United States v. Jeff Collins, Criminal No. 22,764 (N.D. Ga. April 7, 1961), reported in Vol. 9 United States Attorneys' Bulletin, p. 309, May 19, 1961, in which the defendant was indicted under Section 2113(b) for stealing a deposit from a night depository of an FDIC insured bank. The District Court, overruling defendant's motion to dismiss the indictment, held that the indictment charged an offense in violation of Section 2113(b).

In several civil cases involving suits by depositors against banks to recover money which the depositors allegedly placed in night depositories, the courts have held that while the money was in the night depository, the bank was the bailee of the depositor's funds. Bernstein v. Northwestern Nat'l Bank in Philadelphia, 157 Pa. S. 73, 41 A. 2d 440 (1945); Kolt v. Cleveland Trust Co., 156 Ohio St. 26, 99 N.E. 2d 902 (1951), affirming 89 Ohio App. 347, 93 N.E. 2d 788 (1950); and Ramsey Outdoor Store, Inc. v. Chase Manhattan Bank, 169 N.Y.S. 2d 772 (City Court of New York, 1957); contra Irish and Swartz Stores v. First Nat'l Bank of Eugene, 220 Ore. 362, 349 P. 2d 814 (1960), but see, the court's alternative holding. Since an essential element of a bailment is that the property be taken into the possession of the bailee, or that custody thereof be entrusted to him (8 C.J.S. 248 and cases cited therein), the civil cases cited above demonstrate that the money so deposited is in the care, custody, or possession of the bank. It should be noted that in these civil cases the bank has been considered a bailee and hence a custodian of the funds, irrespective of its contractual liability. Thus, contractual arrangements between the bank and the user of the night depository which exculpate the bank from liability do not negate the fact of custody and control over the funds within the provisions of Section 2113(b).

Although the bank has no knowledge that a specific deposit is made, by providing a night depository the bank has invited and allowed its customers to use the device as a facility for making a general deposit. As a result, notice to the bank and acceptance of the deposit is to be presumed. An analogy can be made to cases in which garage owners have been held to be bailees of cars parked on their premises, despite the fact that the car is parked at night when the garage is unattended and there is no actual notice that the car is being parked. See generally, 43 A.L.R. 2d 403, 408-9; 61 C.J.S. 867-875; and cases cited therein. Under the holdings of such cases the elements of custody and control would not be so readily identifiable where no formal night depository apparatus has been provided by the bank, as for example where the slot intended for the insertion of United States mail addressed to the bank is used by a depositor for banking purposes.

Where the usual night depository is furnished and used it is immaterial whether the depositor must come to the bank the next day to complete the deposit or whether placing the money in the night depository is the final act of the depositor. Once the money is placed in the depository, only the bank or its designated agent has lawful access and custody of the funds for the period during which it is in the depository.

As a matter of public policy, the same protection should be afforded money placed in night depositories as is afforded by the Federal criminal statutes to money deposited in the regular manner during banking hours, by furnishing to the banks the additional investigative facilities of the Federal Bureau of Investigation, and the additional forum of the Federal courts in which to prosecute persons who steal from these depositories. The United States Attorneys are requested to evaluate complaints of this type in light of the views expressed above.

CORAM NOBIS

Petition to Set Aside Judgment of Conviction Long After Service of Sentence; Particulars Required. United States v. Carlos Marcello (E.D. La., March 9, 1962). On April 25, 1938, Marcello was indicted in the United States District Court for the Eastern District of Louisiana on two counts of transferring marihuana in violation of the Marihuana Tax Act of 1937. On May 2, 1938, he pleaded "not guilty." On October 29, 1938, he withdrew his plea of "not guilty," pleaded "guilty" to both counts and was sentenced to a year and a day in the penitentiary, which he served. The conviction is the basis for a subsequent deportation order now pending against Marcello.

In September 1961, Marcello filed in the same court and bearing the same criminal docket number, a petition in the nature of a petition for writ of coram nobis. In it he alleged that he had been entrapped and was not guilty of the criminal charges; that he had been represented by an attorney when he pleaded "not guilty"; that on October 29, 1938, when he appeared in court and changed his plea and was sentenced, he was without an attorney; that there was no discussion as to why his counsel was not present; that he was not permitted to explain why his plea was being changed, what circumstances surrounded the alleged offense, etc. The petition concluded that the conviction was invalid because Marcello was not represented by counsel and did not waive such right.

Without filing an answer, the Government moved to dismiss unless Marcello filed an amended petition setting forth the particulars of his allegation. The Government pointed out that the Court's own records, including the clerk's minute entries and the judgment and commitment signed by the judge (now deceased) all affirmatively recited that Marcello was represented by counsel when he changed his plea and was sentenced. The Government argued that Marcello's sworn allegation that he appeared without counsel is insufficient to impeach the recitals of the judgment; and that unless he comes forward with specific allegations which would be sufficient, if proved, to warrant the Court to conclude that the record is incorrect and to correct the record, the Court is entitled to give that record conclusive effect and deny a hearing. The Government also pointed out that it would be unfair to require it to proceed to a hearing without further particulars, especially since petitioner had waited twenty-three years after the conviction before attacking it and many of the persons having first-hand knowledge of the facts had died in the interim.

In an opinion filed March 9, 1962, Judge Ainsworth granted the Government's motion. The Court held that the petition was a step in the criminal proceeding, available to petitioner under the All Writs Section, 28 U.S.C. 1651(a); that since Rule 60(b) of the Federal Rules of Civil Procedure had expressly abolished writs of coram nobis in civil proceedings, discovery under the civil rules is not authorized. The Court required petitioner to amend his petition to set forth a full disclosure of the specific facts relied on; otherwise the petition will be denied. Petitioner was given ten days to amend his petition and the

Government ten days thereafter to answer.

Staff: United States Attorney Kathleen Ruddell; Assistant United States Attorney Peter E. Duffy (E.D. La.); Maurice A. Roberts (Criminal Division).

DENATURALIZATION

Concealment of True Name in Naturalization Proceeding and in Visa Application; Necessity of Establishing Materiality; Quantum of Proof Required. United States v. Cesare Rossi, also known as Ricardo Luis Rossi (C.A. 9, February 15, 1962). The Government appealed from an adverse judgment in a proceeding initiated in the district court under Section 340(a) of the Immigration and Nationality Act of 1952 (66 Stat. 260, 8 U.S.C. 1451(a)), to revoke the order admitting Cesare Rossi, under the name of Ricardo Luis Rossi, to citizenship and to cancel the certificate of naturalization on the ground that the order and certificate were procured by concealment of a material fact or by willful misrepresentation. (The opinion of the district court is reported at 171 F. Supp. 451).

The uncontradicted evidence before the district court reflects that Rossi, a native of Italy, entered the United States illegally about 1927, but thereafter voluntarily departed to Tacna, a town on the border between Chile and Peru. During his stay there these two countries submitted the question of sovereignty over that region to a vote of the local citizens, and Rossi, apparently importuned by relatives, assumed the identity of his deceased brother Ricardo Luis Rossi, who had been born in Tacna, and Cesare Rossi participated in the plebiscite. He then returned to Italy, and afterwards in 1929 applied for permission to enter the United States for permanent residence. Knowing that the immigration laws of the United States imposed an annual quota on Italian nationals but placed no such limitation on the immigration of natives of South American countries and in order to avoid the Italian quota restrictions, Rossi again used the name and nationality of his brother when applying for a visa. He was issued a non-quota visa by a United States Consular Officer and thus gained entry into this country. Thereafter, he continued to impersonate his brother and in 1935 after the usual proceedings, he was admitted to citizenship in his brother's name.

The Court below found that denaturalization in the case was warranted only if the facts misrepresented by Rossi were essential to the validity of his entry into this country and if he intended them to deceive immigration officials. The Court concluded that the Government had failed to prove both issues and dismissed the action.

Although implying that the result would have been different if the Government had introduced evidence to establish that the Italian quota was oversubscribed, the Court of Appeals affirmed the judgment of the lower court. It held that the entire evidence relating to the condition of the Italian quota at the time of Rossi's application for entry consisted of a brief passage appearing in Rossi's pretrial deposition.

The Court of Appeals held that this lone statement on this vital issue failed to meet the evidentiary test required in denaturalization cases.

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

DENATURALIZATION

Concealment of Arrests; Proof of Arrests; Laches and Materiality. United States v. John Oddo a/k/a Johnny Bath Beach, etc. (E.D. N.Y.). John Oddo, alias Johnny Bath Beach, a leading racketeer, was admitted to United States citizenship on December 1, 1931. Denaturalization proceedings were instituted under Section 340(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1451(a)) on the ground that his naturalization was procured by concealment of material facts and by willful misrepresentation in that he stated during his naturalization proceedings that he had not been arrested when, in fact, he had been arrested on 11 occasions prior thereto, 9 of which were within the five-year probationary period in which he was required to prove good moral character. The case presented difficult questions of proof since the two naturalization examiners who examined Oddo in the naturalization proceeding are deceased and the fingerprints as to the most serious of the arrests (including arrests for homicide, assault and robbery and burglary) had been expunged from the police records. In reliance on Chaunt v. United States, 364 U.S. 350, Oddo argued, inter alia, that the arrest record was immaterial because he had been convicted on only four minor charges (two traffic violations and two for disorderly conduct). Oddo also argued that the action was barred on the ground of laches. In an opinion filed on March 6, 1962, Judge Bruchhausen held that defendant had procured his naturalization fraudulently in that he had concealed arrests; that the arrests, even those for which he was discharged, were legal arrests; that laches does not apply in denaturalization suits, and that the questions asked were material.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorneys Lawrence J. Galardi and Peter H. Ruvolo (E.D. N.Y.); and Rita Walsh (Criminal Division).

JURY

Formal Education as Criteria in Selection of Prospective Jurors. United States v. Martin Henderson (C.A. 7, January 22, 1962). A questionnaire sent to prospective jurors asked, among other things, occupation, ability to read, write and understand English and number of years of formal education. On return the questionnaires were examined by the jury commissioner and the clerk of court. In determining whether to place the name of the person in the jury box they considered the spelling, grammar and penmanship demonstrated in the writer's answers, the nature and length of his employment, and his years of formal education. The questionnaire formed the sole basis for estimating the intelligence of the prospective juror. If relatively few names were needed to fill the jury box, the clerk and commissioner, hoping to obtain more intelligent jurors, selected those with more than an eighth grade education.

Defendant contended that whether a juror has completed eight grades of formal education is not the test for jury selection. He argued that the 1957 Congressional amendment of 28 U.S.C. 1861 imposed a uniform "literacy" standard and did away with the use of various state qualifications for jury service. The provision of 28 U.S.C. 1861 reads in part:

> "Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless -
>
> . . . . . .
>
> (2) He is unable to read, write, speak, and understand the English language."

The Court ruled that the criteria employed did not constitute an arbitrary exclusion, nor did it violate the spirit or letter of the law. Lack of a formal eighth grade education merely put the clerk and commissioner on notice to scrutinize more closely the writer's other responses for indications of responsibility, ability or experience that would evidence a degree of intelligence equivalent to that required to complete an eighth grade education. This method of selection served only to confirm the ability to read, write, speak and understand the English language as required by 28 U.S.C. 1861.

In replying to the second contention of the defendant that this method excluded a large segment of the community, the Court stated that the theory that a juryshould be a "cross-section" of the community must be taken with some reservations, and that the statute presupposes some separation of those called for jury duty.

The necessity for strict compliance with 28 U.S.C. 1861 was brought to the attention of all United States Attorneys in a circular letter dated July 26, 1961, citing the experience in United States v. Hoffa, 196 F. Supp. 25, where the jury commissioner limited selection to persons registered to vote and women who had volunteered for jury duty in the state court. The Court dismissed the indictment on the basis that such a jury panel was not a fair representation of the community and did not comply with a uniform method of selection intended by 28 U.S.C. 1861.

Staff: United States Attorney James B. Brennan; Assistant United States Attorney William J. Mulligan (E.D. Wis.).

FOOD, DRUG, AND COSMETIC ACT

Successful Seizure Action against Misbranded "Air Purifier" Device. United States v. 24 Devices . . . Sunflo Flowing Air Purifier (D. N.J.). On February 20, Judge Reynier J. Wortendyke, Jr., at Newark, N.J., found the labeling on the Sunflo Flowing Air Purifier Device to be false and misleading in certain material respects and entered a decree of condemnation against the device as being misbranded. The labeling of the device

represented it to be effective in the treatment of asthma and other serious respiratory diseases or in relieving the symptoms of such diseases.

This is the first air purifier case to have been contested and tried. The two week trial before the Judge was vigorously fought, and included testimony from eight Government witnesses in the fields of medicine, physics, bacteriology, engineering and mathematics. The decision is expected to prove valuable in other air purifier cases now pending.

In this case, the Court found the device to be ineffective in eliminating the symptoms of any of the diseases mentioned in its labeling, e.g. asthma, sinus, hay fever. The Court further found that the "device does not purify as it filters the air; nor does it deodorize or recirculate a whole roomful of enriched air every few minutes" as claimed. Since the labeling was, therefore, false and misleading, the Court concluded that the device was misbranded and entered a decree of condemnation.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Jerome D. Schwitzer (D. N.J.).

FORFEITURE

Libel for Forfeiture Not Barred by Prior Acquittal of Conspiracy to Violate Internal Revenue Laws. United States v. Burch (S.D. Ga.). In the libel proceeding to forfeit sugar allegedly used in the manufacture of illicit liquor the District Court granted Burch's motion for summary judgment on the ground that he had been acquitted in another district (on a directed verdict) of conspiracy to violate the internal revenue laws by manufacturing, possessing and selling illicit whiskey.

On appeal the Government contended that whether Burch possessed the sugar with intent to use it to make nontaxpaid liquor, upon which issue the forfeiture proceeding was necessarily predicated, was not adjudicated in the criminal conspiracy case. The Fifth Circuit concurred (294 F. 2d 1). While stating that the conspiracy indictment against Burch alleged the identical acts made the basis of the libel against the goods, the Court pointed out that it did so only as overt acts in furtherance of the conspiracy, not as substantive crimes themselves; that the Government's case failed because there was no evidence to connect Burch with the conspiracy, and that the question of the truthfulness of the alleged overt acts or the sufficiency of the evidence to establish them was never reached. The Court concluded that the critical facts in the libel of forfeiture had not previously been determined; that neither on principles of res judicata nor collateral estoppel could the libel be barred, and remanded the case for trial. The Court of Appeals' opinion contains an especially lucid discussion of the issues involved. Compare Coffey v. United States, 116 U.S. 436.

A trial before a jury resulted in a verdict favorable to the United States and a decree was entered condemning and forfeiting the sugar to the United States.

Staff: Assistant United States Attorney William T. Morton (S.D.Ga).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Judicial Review of Denial of Suspension of Deportation and of Collateral Issues; Transfer of "Pending Unheard" Case Under P.L. 87-301. Pezzulich v. Esperdy (S.D. N.Y., February 23, 1962.) Plaintiff commenced this action in the District Court seeking a review of the denial of his applications for relief under section 4 of the Displaced Persons Act of 1948, under section 6 of the Refugee Relief Act of 1953, for a temporary stay of deportation on the grounds of physical persecution under 8 U.S.C. 1253 (h), and for suspension of deportation under 8 U.S.C. 1254(a)(1).

While this action was pending unheard P. L. 87-301 became law on September 26, 1961 and made final orders of deportation exclusively reviewable by an appropriate court of appeals. Section 5(b) of that Act provides for the transfer of such cases from the district courts.

Defendant moved for such a transfer of this case on the grounds that since the complaint seeks a judicial review of the denial of suspension of deportation P.L. 87-301 confers exclusive jurisdiction on the Court of Appeals, and that that court should also assume jurisdiction over the entire case and consider and decide all the issues raised.

The Court held that insofar as it seeks a review of a denial of suspension of deportation and remains "pending unheard" the case requires transfer to the Court of Appeals. This had been settled in the same court in Walters v. Esperdy, Civ. 138-347, on December 18, 1961.

It also held that the other challenges contained in the complaint are also transferrable to be determined together with the challenge to the denial of suspension of deportation.

That holding was under the doctrine of pendent jurisdiction which says that a federal court which properly has jurisdiction over one claim in a case may take jurisdiction over other claims in the case over which it ordinarily would not have jurisdiction, provided that the claims are closely enough related factually as to be regarded as distinct grounds in support of a single claim (citations).

Defendant's motion to transfer granted.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to Defraud United States; Hearsay; Sufficiency of Evidence. Dennis et al v. United States (C.A. 10, March 5, 1962). On November 16, 1956, 14 officers, former officers, and employees of the International Union of Mine, Mill and Smelter Workers were indicted for conspiracy to file with the National Labor Relations Board false non-Communist union officer affidavits under the Taft-Hartley Act. 4 U. S. Attorneys Bulletin 777. Three defendants pleaded nolo before trial, the district judge entered judgments of not guilty in favor of two, Lawrence and Mariotti, and the jury in December, 1959, found the remaining 9 defendants guilty. 8 U. S. Attorneys Bulletin 40.

On appeal the Court of Appeals for the Tenth Circuit held that the indictment stated an offense against the United States, that the conspiracy had been proved against 7 of the defendant-appellants, that the instructions on Communist Party membership were adequate, that defendants' motions for severance, continuance, and change of venue on the ground of adverse publicity had been properly denied, that inspection of the grand jury minutes had been properly denied as a matter of discretion, and that the 5 year statute of limitations applied. It directed dismissal of the indictment against 2 defendants, Durkin and Powers, on the ground of insufficient evidence, and ordered a new trial for the other 7 defendants because inadmissible hearsay evidence had been admitted of statements of a Communist Party official at a meeting at which none of the defendants were present and that evidence had not been sufficiently "connected up" with the defendants and was highly "devastating" in its prejudicial effect.

Staff: The appeal was argued by George B. Searls (Internal Security). On the brief were Lawrence M. Henry (U. S. Attorney, Colorado), and Robert L. Keuch and Carol Mary Brennan (Internal Security).

Subversive Activities Control Board: Remand to Adduce Additional Evidence. Kennedy v. American Committee for Protection of Foreign Born (S.A.C.B., March 8, 1962). On June 27, 1960, the Subversive Activities Control Board issued a report determining that the American Committee for Protection of Foreign Born was a "Communist front organization" and ordering it to register as such under the Internal Security Act of 1950. At the hearing, which was held in 1955, 1959, and 1960, a witness for the Attorney General (in 1955) was Barbara Hartle, who had been convicted in the Seattle Smith Act trial (see Huff v. United States, 251 F. 2d 342 (C.A. 9), had withdrawn her appeal, served part of her sentence, and then been paroled.

In 1960 during the Board hearing on the Attorney General's petition to have the International Union of Mine, Mill & Smelter Workers determined to be a "Communist infiltrated organization" Mrs. Hartle testified again as a witness for the Attorney General. The "Mine-Mill" proceeding had no connection with the American Committee hearing, but at the 1960 hearing counsel for the Attorney General produced under 18 U.S.C. 3500 an 88 page signed statement Mrs. Hartle had given the F.B.I. in March of 1954, and which contained this reference to the American Committee:

"It is my understanding that for many years the national organization, or the American Committee for the Protection of Foreign Born, has been under Communist Party leadership. I am unacquainted with the local Committee [Northwest Committee] as of before my return to Seattle in 1952."

In the 1960 Mine-Mill hearing Mrs. Hartle explained the statement that "I am unacquainted with the local Committee" by saying that the F.B.I. had asked her about people who were on the Committee and its activities in 1951 and 1952, and that she did not have that information because during that period she had been "underground as a Communist Party member.

On January 8, 1962, the Court of Appeals for the District of Columbia Circuit granted a motion under Section 14(a) of the Act for leave to adduce additional evidence, and remanded to the Board for the limited purpose of taking additional evidence as to whether Mrs. Hartle's testimony in 1955 was false and of reconsidering its report and order in the light of its re-evaluation of her testimony.

The Board held a hearing on January 23, 24, and 25, and February 1, 1962, and the matter was argued on the last date stated. The 88 page 1954 statement was put in evidence, also a June 1954 F.B.I. report covering interviews with Mrs. Hartle at that time as to the American Committee and nothing else, a written note furnished the F.B.I. in March, 1954, by Mrs. Hartle, and the transcript of part of her testimony in the Mine-Mill case. The two F.B.I. agents who interviewed her in 1954 testified, as did Mrs. Hartle, and the attorney who had been chief counsel for the F.B.I. in the 1960 Mine-Mill hearing.

On March 8, 1962, the Board issued a "Report of the Board on Reconsideration". It found that the evidence that Mrs. Hartle had testified falsely in 1955 was "not persuasive", and that there was "no real basis for discrediting her as a witness", that her original testimony was credible, but that on examination in the Mine-Mill case in 1960 she might have confused her interviews with the F.B.I. in March, 1954, with those in June of the same year. It recommended to the Court that the Report and Order of June 27, 1960, be affirmed.

Staff: George B. Searls (F. Kirk Maddrix with him)
(Internal Security)

Grand Jury Investigation of Possible Violations of Subversive Activities Control Act of 1950 - Immunity Proceedings Under Immunity Act of 1954. In re Bart (District of Columbia) and In re Jackson (District of Columbia). Philip Bart, National Organizational Secretary of the Communist Party of the United States, on February 28, 1962 appeared in response to a subpoena to testify and produce evidence before a Federal Grand Jury investigating possible violations of Sections 784, 785, 786(h), 787, 789, and 790 of Title 50, U.S.C., and Sections 2 and 371 of Title 18, U.S.C. Upon Bart's refusal, on the basis of his privilege against self-incrimination under the Fifth Amendment to the Constitution, to answer questions propounded to him before the Grand Jury, an application was made to grant him immunity under 18 U.S.C. 3486(c). Following his refusal to testify, after being granted immunity, in accordance with an order of the Court, Holtzoff, J., entered February 28, 1962, he was ordered committed to the District of Columbia Jail until such time as he should answer the questions put before him, but for no longer

than six (6) months. Commitment was stayed to permit an application for stay of commitment to be heard by the Court of Appeals, which denied the application for stay on March 6, 1962. On March 7, 1962 Bart surrendered to the custody of the U.S. Marshal of the District of Columbia. Thereafter, he applied to the Chief Justice of the Supreme Court of the United States for a stay of commitment, pending appeal, which stay was granted on March 13, 1962 and Bart was released from custody on $1500 bail. Bart's brief on the merits of his appeal is due in the Court of Appeals for the District of Columbia on March 26, 1962. The Government's reply brief must be submitted by March 29, 1962.

In a similar case, James Jackson, the Editor of The Worker and a member of the National Board of the Communist Party, on February 15, 1962 appeared before this same Grand Jury in response to a subpoena to testify and produce evidence concerning possible violations of the same Sections of the Internal Security Act of 1950 and the Criminal Code. Upon Jackson's refusal, on the basis of his privilege against self-incrimination under the Fifth Amendment to the Constitution, to answer questions propounded to him before the Grand Jury, an application also was made on March 9, 1962, to grant him immunity under 18 U.S.C. 3486(c). Following his refusal to testify after being granted immmunity in accordance with an order of the Court, Holtzoff, J., entered March 9, 1962, he was likewise ordered committed to the District of Columbia Jail, until such time as he should answer the questions put before him, but for no longer than six (6) months. The commitment was stayed to permit an application to be made to the Court of Appeals for stay of commitment. The Court of Appeals granted Jackson's application on March 12, 1962.

Staff: United States Attorney David C. Acheson and Assistant United States Attorney Nathan J. Paulson (D. D.C.) and Oran H. Waterman and James A. Cronin, Jr. (Internal Security Division)

Subversive Activities Control Act of 1950; Registration of Communist Organizations. United States v. Gus Hall and United States v. Benjamin J. Davis. (Dist. Col.). On March 15, 1962, a Grand Jury in the District of Columbia returned separate six-count indictments against Gus Hall, General Secretary of the Communist Party and Benjamin J. Davis, National Secretary of the Communist Party, charging that each failed to register and file a registration statement for and on behalf of the Communist Party of the United States with the Attorney General as required by the Internal Security Act and in violation of 50 U.S.C. 786(h) and 794 after the Communist Party had failed to register. (See December 15, 1961 Bulletin) The first five counts against each man charged failure to register for the Party on specific dates since November 30, 1961 and the sixth count charged failure to file the required registration statement for the Party, listing officers, members, financial and other data.

Staff: United States Attorney David C. Acheson (D. D.C.); Oran H. Waterman and James A. Cronin, Jr. (Internal Security Division)

False Statement (18 U.S.C. 1001). United States v. Lloyd Oswell Sutton, Jr. On February 27, 1962, a Federal grand jury at Denver, Colorado returned an indictment charging that Sutton had falsified his Application for a Bonus Payment filed with the Atomic Energy Commission at Grand Junction, Colorado. Specifically, Sutton represented that the uranium ore upon which he based his application for a bonus payment came from one certified mining claim when he knew that a portion of the uranium ore on which his claim was based was derived from another source in violation of 18 U.S.C. 1001.

Staff: United States Attorney Lawrence M. Henry (D. Colo.);
Vincent P. MacQueeney (Internal Security Division)

Atomic Energy Act (42 U.S.C. 2274(a)). United States v. George John Gessner. On March 16, 1962, a complaint was filed before the United States Commissioner for the District of Kansas charging Pvt. George John Gessner with violating Section 2274(a) of Title 42, U.S. Code.

The complaint charged that from in or about December 1960 and continuously thereafter up to and including January 13, 1961, George John Gessner, a member of the United States Army stationed at Fort Bliss, Texas, and having possession of information involving Restricted Data, did, at Mexico City, Mexico, unlawfully, knowingly and wilfully communicate Restricted Data information to an agent of a foreign government, to wit, the Union of Soviet Socialist Republics, with intent to secure an advantage to the said Union of Soviet Socialist Republics.

This marks the first prosecution initiated by the Government under this Section of the Atomic Energy Act.

Staff: United States Attorney Newell A. George (D. Kans.)
John H. Davitt and Joseph T. Eddins, (Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Public Lands; Jurisdiction of Actions Against Secretary of Interior to Review Administrative Decisions; Sovereign Immunity of U.S. Not Waived by Mining Laws, Administrative Procedure Act, or Declaratory Judgment Act. Chournos v. United States, et al. (D. Utah, January 9, 1962). Prior to the Act of July 23, 1955 (30 U.S.C. 611 et seq.) plaintiffs located several mining claims on public lands near the Great Salt Lake asserting the discovery of valuable deposits of sand and gravel. The Department of the Interior initiated a contest against the claims charging that the sand and gravel deposits had no commercial value. After the usual administrative hearings in such cases the Secretary held the claims to be null and void for want of discovery of a commercially valuable deposit of minerals. Plaintiffs then brought suit in the District of Utah against the United States asking for judicial review of the Secretary's decision on a trial de novo, reversal of the decision and "for an order of this Court requiring defendant, its officers, agents and employees to note and record the official records of defendant to the effect that said mining claims are valid mining claims." The Government moved to dismiss the action on the grounds that the sovereign immunity of the United States had not been waived and that the Secretary of the Interior was an indispensable party to an action for the relief which plaintiffs were seeking. At the request of plaintiffs the United States Attorney then stipulated for the dismissal of the action without prejudice and an order was entered pursuant to the stipulation.

Plaintiffs then instituted a new action identical in every respect with the first except that the Secretary of the Interior was joined as a defendant. Shortly thereafter the Secretary was personally served with process in Utah while he was physically present in that State. The defense moved (1) to quash service upon the Secretary on the ground that he can be sued and served only in the District of Columbia; (2) to dismiss the complaint as to the Secretary or to transfer the action to the District of Columbia as provided in 28 U.S.C.1406(a) because under existing law there is no way in which the U. S. District Court for the District of Utah can obtain jurisdiction over the Secretary; and (3) to dismiss the complaint as to the United States because its sovereign immunity had not been waived.

The Court sustained the motion to quash service upon the Secretary and to dismiss the action as to both defendants.

Staff: United States Attorney William T. Thurman
(D. Utah)

Public Lands; Judicial Review of Administrative Decisions; Mines and Minerals. United States v. Adams (S.D. Cal., January 29, 1962).

In Adams v. Witmer, 271 F. 2d 29 (C.A. 9, 1958), the Court of Appeals held that, on the facts of that case, a decision of the Secretary of the Interior rejecting an application for a placer mining patent for lack of a sufficient discovery could be reviewed by a federal district court in an action brought for that purpose under the Administrative Procedure Act (5 U.S.C. 1001 et seq.) against a locally resident subordinate of the Secretary whose only function was to maintain a record of the Secretary's decision in the local land office. While the litigation was pending the nominal defendant retired but the Department of Justice was not informed until too late to substitute his successor.

It was apparent that any judgment which might be entered by the district court after remand would be meaningless. Therefore, it was decided to bring suit in the name of the United States against Adams to eject him from the land in question on the basis of the Secretary's decision that the mining locations upon which Adams based his patent application were invalid. Such an action was instituted and consolidated with the original case. At a pre-trial conference the court ruled that whatever judicial review was available to Adams in the original case would be available to him in the action brought by the United States. In reliance upon that ruling Adams voluntarily dismissed his action.

The Government then moved for summary judgment. It took the position that findings of fact made by the Secretary were conclusive upon the court if supported by evidence and that there was adequate evidence to support the findings which had been made. Adams contended that he was entitled to a trial de novo on the questions of fact decided by the Secretary and that, in any event, the decision of the Secretary was contrary to the evidence and the weight of the evidence before him.

The district court (Judge Mathis) sustained the Government's motion. While it did not write an opinion, it made extensive findings of fact and conclusions of law. While it did not deal explicitly with the point, by granting the motion it necessarily held that defendant was not entitled to a trial de novo to review the findings of the Secretary. It did hold that the findings of the Secretary were supported by evidence in the administrative record before him and were, therefore, immune to reversal by the courts. Accordingly judgment for the United States was entered but subject to the condition that Adams should have thirty days in which to remove any improvements or other property which he had on the land.

Staff: United States Attorney Francis C. Whelan and Assistant United States Attorney Jordan A. Dreifus (S.D. Calif.); Ralph S. Boyd (Lands Division)

Indians; Occupancy of Tidelands; Grant of Tidelands to State of Alaska. United States v. State of Alaska, et al., (D. Alaska, February 6, 1962). The United States filed an action to quiet title to

certain tidelands within the City of Juneau adjacent to the Juneau Indian Village, claiming to be the fee owner and asking that the State of Alaska and its assignees be enjoined from asserting any right thereto and from filling and construction work on the tidelands. A temporary restraining order and a preliminary injunction were obtained.

After trial, the Court dissolved the preliminary injunction and ordered the complaint dismissed because the evidence failed to show use and occupancy by the Indians sufficient to bring the lands within the exception from lands granted the State in the Tidelands and Statehood Acts of lands in Indian occupancy. The Court held that the only right of Indian occupancy protected by the exception in the Tidelands and Statehood Acts was that defined in the Organic Act of May 17, 1884 and that Indian occupancy preserved by that Act applied to tidelands as well as other lands. The Court then held that in order to be protected by the 1884 Act the occupancy of Indians must be notorious, exclusive, continuous and of a nature to put strangers upon notice. The Government had contended that the 1884 Act was not applicable and that Indian use and occupancy as of the date of the Tidelands and Statehood Acts were sufficient to defeat the grant of tidelands to the State by those Acts.

Staff: United States Attorney Warren C. Colver and Assistant United States Attorney Joseph H. Shortell, Jr. (D. Alaska); Floyd L. France (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Court Decision

False Statements: Corroboration, Unsworn Oral Statements Made to Revenue Agent; Meaning of "wilful" Under Title 18, Section 1001 USC. Neely v. United States (C. A. 9, February 26, 1962). The Ninth Circuit unanimously affirmed appellant's jury conviction on two counts charging violation of 18 U.S.C. 1001 by (1) concealing a material fact by trick, and (2) making a false unsworn oral statement to an Internal Revenue agent.

Neely orally represented that there was no purchase option in a lease, during an unwitnessed conversation with the revenue agent. Neely then furnished the agent a "copy" of a lease agreement which copy failed to include a purchase option clause contained in the original. The purported "copy" was prepared for presentation to the agent upon Neely's specific instructions.

Appellant contended, inter alia, that the uncorroborated testimony of the revenue agent to whom the statement was made was insufficient to establish that he had in fact made the false statement, appellant's own testimony being directly contrary to that of the agent. The Court rejected this contention, holding that "the perjury corroboration rule does not apply to prosecutions under 18 U.S.C.A., Sec. 1001," and, further, that "The making of a false statement which is covered by section 1001 can be proved by the testimony of the person to whom the statement is made even though such testimony is uncorroborated by other witnesses and even though such testimony is contrary to that of the defendant."

Appellant's second major contention was that the district judge erred in his charge regarding the definition of wilfulness for Section 1001 purposes. The district judge instructed that the Government had to prove that a false statement had been submitted wilfully and knowingly, and that "The word 'wilful' means no more than that the forbidden act is done deliberately and with knowledge". The Court rejected appellant's contention that there should be proof of "evil intent." Noting the continued vitality of McBride v. United States, 225 F. 2d 249 (C. A. 5, 1955), the Court limited its own holding in Abdul v. United States, 254 F. 2d 292 (C. A. 9, 1958) to cases involving violations of income tax statutes.

Staff: United States Attorney C. A. Muecke and Assistant United States Attorney Sheldon Green (D. Ariz.); K. William O'Connor (Tax Division)

CIVIL TAX MATTERS
District Court Decisions

Injunction: Preliminary Injunction Against Second Sale of Taxpayer's Property Brought by Alleged Purchaser at First Sale. Bartell v. Riddell, et al. (S.D. Cal., February 5, 1962.) Stock was seized by the defendant Riddell to satisfy the tax liabilities of the taxpayer. Defendant offered stock for public sale, to be conducted by sealed bid and a twenty per cent payment of the bid offer was to be made at the time bid was tendered. Plaintiff's bid was accepted together with a cashier's check for twenty per cent of the bid price, balance to be paid within 30 days. Prior to expiration of the 30 day period, plaintiff tendered the balance but was refused by defendant Riddell. Refusal of tender was based on the fact that formal written notice of the sale was not given to the taxpayer. Plaintiff thereafter procured a waiver notice from taxpayer but defendant Riddell published notice of another sale and over plaintiff's protests purported to sell the stock in issue to defendant Rosenberg. Plaintiff brought this action to restrain defendant Riddell from issuing a certificate of sale to defendant Rosenberg. The Government moved to dismiss plaintiff's suit on the grounds that (1) the Court had no jurisdiction of the subject matter in view of 26 U.S.C. 7421 prohibiting injunctive proceedings to restrain the collection of a tax, and (2) that the complaint failed to state a claim upon which relief could be granted in that the notice requirements of 26 U.S.C. 6335 not having been complied with, the first sale was void and could not convey title to plaintiff.

The Court held that the notice requirements of 26 U.S.C. 6335 were intended to protect the taxpayer and there is nothing to suggest that these notice requirements were intended to protect the United States. The first sale was voidable by the taxpayer but not by the Government, and further that the plaintiff is a third party asserting illegality of a tax sale and illegal detention of property of which plaintiff is the rightful owner. Therefore, the question is one of title in dispute rather than one pertaining to assessment and collection of a tax, and 26 U.S.C. 7421 is no bar to the resolution of this issue by the Court. The preliminary injunction was thereby granted and the motion by the defendant Riddell was denied.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney Robert H. Wyshak (S.D. Cal.)

Liens: Assignment by Contractor to Materialman of Funds Due Under Construction Contracts With City of New York Places Assignee in Position of Purchaser; Government's Tax Liens Against Defaulting Contractor Are Inferior to Mechanic's Liens Under Trust Fund Theory. Davis & Warshow, Inc. v. S. Iser, Inc. (N.Y. Sup. Ct., New York County, Part 1, Oct. 20, 1961) CCH 62-1 USTC Par. 9291. This was an action to determine priority of claims by an assignee-materialman against the stakeholder (City of New York), the debtor, mechanics lienors and judgment creditors of the debtor, and the United States as holder of tax liens against debtor. Debtor assigned his interest in specific contracts to plaintiff to satisfy claims for material furnished.

The Court denied cross motions for summary judgment except as to the Government's motion against judgment creditors. Where a judgment creditor has not perfected his lien by execution prior to the filing of the tax lien, the Government's lien is determined to be superior. Relying on Aquilino v. United States, 10 N. Y. 2d 271, 219 Supp. 2d 254, the Court reiterated "The Trust Fund Theory" in New York under both the old (N. Y. Lien Law §36-b) and new (N. Y. Lien Law §71, effective September 1, 1959) statute. This precludes all tax liens until mechanics liens are satisfied and extends Aquilino to include liens on public funds. The Government contended that since debtor is a mere trustee, plaintiff was merely a resulting beneficiary, entitled to only the remainder of the fund after distribution to all claimants. The Court rejected this argument and deemed that taxpayer's assignment "of monies due or to become due," if valid, puts plaintiff in the position of a purchaser. Under the New York statute plaintiff would have been entitled to a priority over the Government's liens if the assignment was not made and his position was not subrogated by acceptance of the assignment.

Staff: United States Attorney Robert M. Morgenthau (S.D.N.Y.)

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