Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

May 17, 1963

United States
DEPARTMENT OF JUSTICE

Vol. 11 No. 9

UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 11 May 17, 1963 No. 9

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Circuit Court Of Appeals Remands Oil Case For New Trial. Standard Oil Co., et al. v. United States. (N.D. Ind.). On April 22, 1963, the Court of Appeals for the Seventh Circuit in an opinion written by Judge Duffy reversed the decision of the District Court for the Northern District of Indiana in the case of United States v. Standard Oil Company. The eleven appellants had been convicted after a jury trial of a criminal violation of Section 1 of the Sherman Act. The Court of Appeals reversed the convictions of ten oil companies and remanded the case for a new trial. The conviction of Phillips Petroleum Company was set aside with directions to dismiss the indictment as to it.

All of the appellants, seven major oil companies and four independents, had been charged with violating Section 1 of the Sherman Act by their conduct in terminating a retail gasoline price war which occurred in the South Bend, Indiana area from March 19 to May 1, 1957. The indictment charged that each defendant had conspired to raise and/or induce its dealers to raise retail gasoline prices. The trial extended for approximately seven weeks and a total of 65 witnesses were called. The evidence against defendants consisted mainly of records of telephone conversations between the two market leaders, Standard Oil and Central West Oil Corporation, and the other defendants and co-conspirators. In addition, there was direct testimony by certain dealers and employees of the oil companies, as well as evidence that the price war was halted by all of the defendants at the same hour on May 1, 1957.

On appeal the appellants raised many issues including assertions that the trial judge was biased in favor of the Government, that the jurisdictional requirement of interstate commerce had not been met, that the corporations could not be held criminally responsible for the actions of their minor employees, that numerous errors were made by the trial judge in the reception of certain evidence, that the trial judge had unduly limited appellants' cross examination, that there were errors committed in the trial court's instructions to the jury, that the Government had abused the subpoena process by requiring witnesses to appear at the United States Attorney's office prior to their appearance in court, that it was error to allow the jury to have notebooks during the course of the trial, and that it was error for the judge to send in a written copy of his instructions to the

jury for use in their deliberations. Each appellant filed its own brief and, in addition, a joint brief on the conduct of the trial was filed in which all the appellants joined. Oral argument was held in the Court of Appeals for six hours.

The decision of the Court of Appeals reverses the jury verdict on two narrow grounds: (1) The Court holds that the trial court's restriction on certain defense testimony regarding denial of the fact of agreement, conspiracy or understanding with their competitors is reversible error; (2) the Court holds that the trial judge had shown bias in favor of the Government sufficient to warrant reversal. The opinion of the Court of Appeals discusses some of the other alleged errors such as note taking by the jury and the number of questions asked by the judge but concludes "assuming we agree with the arguments of appellants in respect thereto we do not consider them as establishing prejudicial error per se".

Appellant Phillips was dismissed on the ground that of all the oil companies involved it alone had no direct dealings with retail dealers but instead sold gasoline to independent jobbers. On the basis of this fact, the Court of Appeals held that "there is no evidence that Phillips induced or persuaded any jobber to induce or persuade any dealer to raise prices. . . . All actions by Phillips were entirely consistent with its innocence".

Staff: Earl A. Jinkinson, Raymond P. Hernacki, Robert L. Eisen, Robert B. Hummel, Joel E. Hoffman and Michael I. Miller (Antitrust Division)

Defendants' Motions To Dismiss And Strike Denied. United States v. Chas. Pfizer & Co., Inc., et al. (S.D. N.Y.). On April 30, 1963, Chief Judge Ryan denied defendants' two joint motions: (1) to dismiss Count Three of the indictment, and (2) to strike as surplusage all references in the indictment to "unreasonably high profits" and "unreasonably high prices." The Court had heard oral argument on February 14, 1963 and called for supplemental memoranda on both motions.

The indictment, filed August 17, 1961, charged Chas. Pfizer & Co., Inc., American Cyanamid Co., Bristol-Myers Co., and their respective Chief executives, in three counts under Section 1 and 2, with conspiracy to restrain, conspiracy to monopolize and monopolization of trade and commerce in broad spectrum antibiotics. Defendants' motion to dismiss Count Three argued that the count failed to state a crime because it charged six defendants with monopolization without specifically alleging a concert of action among them. The Government argued that the allegations of the indictment necessarily implied an agreement among defendants to monopolize and that an express allegation that defendants had monopolized by conspiracy is not necessary. The Court adopted the Government's reasoning, stating: ". . . The circumstances described [in the indictment] . . . compel a conclusion that the acts were done pursuant to common agreement of all. They are the essential facts constituting the offense charged under Count III (Rule 7(c)). It is unnecessary that the count in specific language allege the conclusion that the monopoly was executed by combination or joint action."

With respect to the motion to strike, defendants had argued that all references in the indictment to defendants' "unreasonably high profits" and "unreasonably high prices" were prejudicial, unnecessary and immaterial and that the proof of such allegations would be difficult and time consuming.

The Government's position was that the allegations of "unreasonably high profits" and "unreasonably high prices" were relevant to the circumstantial proof of the crimes charged and should not be stricken even if they were prejudicial to defendants.

In denying the motion to strike, the Court stated: "Prejudice is assumed from the indictment itself and clearly from allegations of exaction of unreasonably high prices. But, if evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language, it may not be stricken. The Government may broadly allege what it expects to prove and what it may under applicable principles of law prove. Certainly the language of the indictment cannot be more prejudicial than the evidence offered to sustain it."

The Court further stated that: ". . . Certainly, uniformity of price may be and has been considered some evidence tending to establish an illegal agreement. Evidence of high or low prices and profits is also admissible as proof of a circumstance a jury may hear and weigh. From it, and other evidence, a jury may infer not only that an agreement exists among competitors to exclude others, to restrain trade and to control the market, but, supported by other evidence, the jury may infer that the alleged combination has power over the market and has exercised it with the intent to achieve a monopoly, thus establishing an offense under Sections 1 and 2."

The Court rejected defendants' argument that the allegations should be stricken because proof thereof would be difficult and time consuming. The Court stated: "Unquestionably, evidence of the unreasonableness of prices will tend to prolong the trial; this alone is not sufficient reason for depriving the Government of what may be important items of circumstantial proof. Problems arising from proof of this nature can be cared for by the trial judge.

Staff: John J. Galgay, Herman Gelfand, Gerald R. Dicker and Stanley W. Nathanson (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

AGRICULTURAL MARKETING AGREEMENT ACT

Prior to Exhaustion of Administrative Remedies, Milk Handler May Not Challenge Secretary of Agriculture's Assessment for Producer Settlement Fund in Action to Enforce That Assessment, and Is Not Entitled to Stay of Enforcement Proceedings Pending That Exhaustion. United States v. Yadkin Valley Dairy Cooperative, Inc. (C.A. 4, April 8, 1963). The Dairy, located in North Carolina, sold milk to the Quantico, Virginia, Marine Base situated within the Washington, D.C., Milk Marketing Area established by the Secretary of Agriculture. The Secretary assessed the Dairy for sums asserted to be due from it to the producer settlement fund of the Washington, D.C., Milk Marketing Area. When the Dairy declined to pay, the United States brought an enforcement action against it under Section 8a(6) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601. The district court entered summary judgment for the United States and awarded to the Government the sums claimed to be due from the Dairy to the producers settlement fund and enjoined the Dairy from continuing its operations in violation of the Washington, D.C., Milk Marketing Order. The district court also held that the language of 7 U.S.C. 608c(15(B), to the effect that pendency of the administrative proceedings shall not impede, hinder, or delay the United States or the Secretary from obtaining enforcement of a Marketing Order under 7 U.S.C. 608a(6), precluded the Dairy from raising as defenses the enforcement action matters which must first be presented for administrative review before the Secretary, citing United States v. Ruzicka, 329 U.S. 287 and Willow Farms Dairy v. Benson, 276 F. 2d 856 (C.A. 4). The district court refused to stay its judgment pending the completion of pending administrative review before the Secretary. On the Dairy's appeal, the Fourth Circuit affirmed for the reasons given by the district court. The Fourth Circuit noted with approval that "on the authority of 7 U.S.C.A. sec. 608c(15) the District Court properly refused the Dairy's request to stay the enforcement of the order pending the outcome of administrative proceedings instituted under the Agricultural Marketing Agreement Act, 7 U.S.C.A. 601, et seq."

Staff: Richard S. Salzman (Civil Division)

ALIEN PROPERTY

Debt Claims Asserted Against Foreign Governmental Agency Whose Assets Have Been Vested Not Allowable by Office of Alien Property Under International Claims Settlement Act of 1949. Kennedy v. Chemical Bank New York Trust Company, et al. (C.A. D.C., May 2, 1963). In 1956, the assets of the National Bank of Hungary were vested by the Attorney General, with the result that $168,158.07 was available for the payment by the Office of Alien Property of debt claims asserted against the National Bank. Shortly thereafter, the appellees, the Chemical Bank New York Trust Company and the Manufacturers Trust Company filed claims of $684,142.98 and

$159,883.04, respectively, against this sum available in the account of the National Bank of Hungary. Appellees' claims were based upon the alleged breach by the National Bank of a contract said to have been entered into in August, 1931, between the National Bank and appellees' predecessor and assignor, the New York Trust Company. During 1931 the National Bank of Hungary performed functions as the Hungarian Governments Central Authority for Foreign Exchange. The claimed contract was a 1931 letter from the National Bank to the New York Trust Company permitting the exportation from Hungary of foreign currencies in order that a revolving credit arrangement between the New York Trust Company and several other Hungarian banks could continue. This permission was revoked in January, 1932, by the National Bank.

Appellees argued that the letter from the National Bank in 1931, plus the New York Trust Company's reliance thereon, constituted a contract, which was breached in 1932, causing damage to the New York Trust Company. The Office of Alien Property, however, denied appellees' claims on the general ground that there had been no debt due and owing from the National Bank of Hungary to the New York Trust Company. After appellees sought judicial review, the district court reversed the administrative ruling, holding that the letter did amount to a binding contract. The Government appealed, arguing: 1. that the August, 1931, letter did not rise to the dignity of a contractual obligation but amounted to a mere revocable governmental license; 2. that even if the letter did give rise to a contract, appellees' claims were barred by Section 208(a) of the International Claims Settlement Act of 1949, 22 U.S.C. 1631g(a), disallowing claims filed with the Office of Alien Property if they are asserted against an agency of the Hungarian Government. The Court reversed, with directions to remand the case to the Office of Alien Property. The Court of Appeals did not reach the question of whether the 1931 letter amounted to a contract. Rather, the Court held that the Office of Alien Property should be allowed to determine whether or not the National Bank was an agency of the Hungarian Government, as an explicit finding that the bank was not a governmental agency is a pre-condition for the allowance of any claim.

Staff: John C. Eldridge (Civil Division)

ATOMIC ENERGY ACT

Review of AEC Order Denying Petitioners' Claims for Awards and Just Compensation Under Atomic Energy Act. N. V. Philips' Gloeilampenfabrieken v. Atomic Energy Commission (C.A. D.C., March 21, 1963). The Atomic Energy Act of 1946 declared the production of fissionable materials to be a Government monopoly. To accomplish this purpose, the Act revoked all existing patents useful in the production of fissionable materials, and prohibited the issuance of new patents. The Act provided for payment of just compensation for any patent revoked by the Act, and for financial awards for new inventions in this field used by the AEC. Petitioner, a foreign corporation, applied for just compensation and awards under the Act. The Patent Compensation Board and the AEC dismissed their various claims as time barred because not filed within 6 years, and for various other reasons set forth below.

On the statute of limitations question, the Board took the position that the filing of a claim with the Board is equivalent to the commencement of a "civil action" within the meaning of 28 U.S.C. 2401(a), and therefore is subject to the six year statute of limitations provided by that Section. The Court of Appeals rejected this theory on the ground that a civil action constitutes the filing of a complaint with a court, and not with an executive agency such as the Board. And since the Act contained no express limitations period during which such claims must be filed, the Court determined that it would apply a doctrine of reasonableness. The Court held that there was no unreasonable delay in this case because (a) it involved an exercise by the Government of the power of eminent domain, for which it is obligated under the Constitution to pay just compensation; (b) the members of the Board were not appointed until more than 3 years after the property was allegedly taken; and (c) the Board itself delayed seven years in passing upon the Government's motion to dismiss the claims.

The Court, however, affirmed the Board's ruling that petitioner was not entitled to either just compensation or awards for foreign patents or for domestic patents which had expired prior to the passage of the Act. It further held that the Board was correct in denying compensation to petitioner because it held a non-exclusive license in a patent revoked by operation of the Act, as the Act only makes provision for the payment of just compensation for the revocation of patents. Finally, the Court held that where an invention had actually been disclosed to the AEC by petitioners and used by the AEC, the Board could not deny a claim for an award for the invention upon the ground that petitioners did not comply with the section of the Act requiring the formal reporting of inventions before awards could be made.

Staff: Edward A. Groobert (Civil Division)

FEDERAL TORT CLAIMS ACT

South Carolina Law Permits No Presumption of Pecuniary Loss to Parent From Death of Minor Child. Patrick v. United States (C.A. 4, April 1, 1963). Plaintiff brought this action to recover damages for the death of his minor son who was struck and killed by a United States Post Office truck in South Carolina. The district court, in holding that the Government was liable, awarded damages for, inter alia, pecuniary loss, by presuming the existence of such loss. In so doing, the Court relied on South Carolina cases which invoked the presumption for the benefit of the spouse and minor children of a decedent. The Court of Appeals reversed and remanded for correction of the award, upholding the Government's argument that the presumption of pecuniary loss is applicable only to actions by dependents for the death of the family breadwinner, and is inapplicable in the converse case, i.e., where the decedent is a minor child. The Court of Appeals also sustained the Government's argument that an award of interest at 6% from the date of judgment was in excess of the district court's authority pursuant to 28 U.S.C. 2411(b) and 31 U.S.C. 724a.

Staff: Stephen B. Swartz (Civil Division)

V.A. Hospital Not Charitable Institution Under State Law; Discretionary Function Exception Not Applicable to VA Doctors' Decisions as to Amount of Personal Freedom to Be Allowed Mental Patient; Summary Judgment Inappropriate on Issue of Negligence Where Conflicting Inference May Be Drawn from Record. Luther W. White, III, Adm. v. United States (C.A. 4, April 22, 1963). Plaintiff's decedent, a veteran being treated for mental illness at the Roanoke Veterans Hospital in Virginia, was killed by a train near the hospital grounds. He had a history of mental illness and had previously attempted suicide. When first admitted to the hospital he had been confined in a locked ward and kept under observation, but later was considered to have improved sufficiently to be allowed freedom of the grounds. The day before his death, he complained to his ward physician of nervousness and anxiety, and was given a tranquilizer. Shortly before he was killed, when he had again asked for help, the medical officer on duty increased his dose of tranquilizer and ordered a sedative. He was later found dead on the railroad tracks behind the hospital.

In an action by his estate charging that the VA had failed to exercise due care for the veteran's safety in the light of his known mental condition, the district court granted summary judgment for the United States. It held that: (1) Virginia's rule immunizing charitable hospitals from tort liability applied to VA hospitals; (2) the degree of freedom to be allowed a mental patient in a VA hospital is a question of administrative discretion within the discretionary function exception in 28 U.S.C. 2680(a); and (3) evidence developed by the Government at a preliminary hearing on the discretionary function defense showed that the estate could not prove negligence.

On the administrator's appeal, this ruling was reversed on all three grounds. First, the Government admitted that a VA hospital is not a charitable institution. Second, the Court held that the manner of treating a particular mental patient is an operational, not a discretionary decision, whether it involves malpractice or simple negligence in custodial care. Finally, it held that the record disclosed genuine issues of fact and mixed questions of law and fact respecting negligence as to which plaintiff should have been permitted to offer proof.

Staff: Howard E. Shapiro (Civil Division)

SELECTIVE SERVICE

No Jurisdiction in District Court to Entertain Complaint for Damages Against Chairman of Draft Board Because of Alleged Abuse in Administration of Selective Service Act. Koch v. Zuieback (C.A. 9, March 21, 1963). Plaintiff, apparently lacking diversity of citizenship, brought an action in the district court against the chairman of his local draft board, seeking damages because the chairman and members of the board had allegedly kept plaintiff in a state of "uncertainty" regarding his draft status for a period of ten years. The district court dismissed the complaint for lack of jurisdiction and the Court of Appeals affirmed. In answering plaintiff's contentions with respect to the alleged federal jurisdictional basis of his suit, the Court held: (1) that federal jurisdiction could

not rest upon the Fifth Amendment to the Constitution, as the plaintiff was suing the Chairman as an individual, and the Fifth Amendment only reaches governmental action; (2) that jurisdiction could not be based upon the 1861 Civil Rights Statute, 42 U.S.C. 1985(3), because the Chairman was not acting under color of State law; and (3) that the Selective Service Act itself furnished no basis for an action for damages against a member of a local board.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney Donald A. Fareed (S.D. Calif.)

SOCIAL SECURITY ACT

Secretary's Determination That Claimant Was Not Disabled Within Meaning of Social Security Act Held Supported by Substantial Evidence. Celebrezze v. Herbert B. Bolas (C.A. 8, April 29, 1963). Claimant brought this action to review a determination of the Secretary that he was not so disabled as to be unable to engage in any substantial gainful activity. At the time of his application, claimant was 56 years old, had the equivalent of a high school education, and had been employed as a salesman and a district office agent for an insurance company. The medical evidence showed that he suffered from arthritis of the hip and spine as well as osteoporosis. Claimant and his family doctor testified that the resultant pain precluded him from engaging in any substantial gainful activity. However, three specialists who examined claimant on behalf of the Secretary concluded that his condition was not unusually severe and was compatible with light sedentary work. The district court reversed the Secretary's determination, concluding that the testimony of the three specialists was not substantial evidence to support the Secretary's decision since the testimony of these witnesses must be viewed in light of their limited opportunity to observe and examine the claimant.

The Court of Appeals reversed. The Court concluded that the testimony of the three medical witnesses was substantial evidence to support the Secretary. Therefore, although there was also substantial evidence to support a finding for claimant, the Secretary's determination could not be upset. The Court also noted that there was evidence disclosing claimant's ability to engage in light sedentary work; and thus the Secretary's finding to this effect was warranted.

Staff: Terence N. Doyle (Civil Division)

DISTRICT COURT

ENFORCEMENT OF JUDGMENTS

Mandamus Available to Compel Payment of Judgment; Judgment Creditor Can Reach Bank Account Containing Trust Funds if Notice Not Given to Bank. United States v. Housing Authority of City of Derby (D. Conn., April 26, 1963). Seeking to enforce an old judgment against a state housing authority, the United States Attorney learned of an account which the authority had in a savings bank. Following a Connecticut statute, he sought

mandamus to compel the housing authority to turn over the funds. Defendant argued that federal courts lack jurisdiction to issue writs of mandamus. The District Court held this rule inapplicable to a proceeding in aid of a valid judgment, where permitted by state law, as incorporated into federal practice by Rule 69(a), F.R.Civ.P. The State of Connecticut intervened and claimed to be equitable owner of the money, which had been withdrawn from a sinking fund for redemption of obligations of the housing authority to the State. Resorting again to state law, the District Court held that no trust or lien could be imposed on a savings account, as against third persons, except by notice to the bank.

Staff: United States Attorney Robert C. Zampano and Assistant United States Attorney Irving H. Perlmutter (D. Conn.); Robert Mandel (Civil Division)

FEDERAL TORT CLAIMS ACT

Res Ipsa Loquitur Inapplicable to Mistake in Medical Diagnosis or to Results of Operation and Post-Operative Care; Malpractice Must Be Proved by Expert Testimony. Rogers v. United States (S.D. Ohio, April 12, 1963). Plaintiff, the minor child of a serviceman, underwent an appendectomy at the Lockbourne Air Force Base Hospital, Columbus, Ohio. After the operation, diverse symptoms resulted in a diagnosis by Government doctors of intraperitoneal bleeding, paralytic ileus, and bowel obstruction. Treatment for these illnesses failed to result in improvement in the boy's condition. After remaining six days at the Government hospital, the child was transferred to a children's hospital in Columbus, where he underwent five additional surgical operations. At the children's hospital the real cause of the boy's difficulty was discovered to be a rare and obscure bacteria, bacteroides bacteremia, which, although a normal inhabitant of the lower intestinal tract in most humans, seldom becomes pathogenic, or disease-causing. This bacteria is immune to all but a few choice antibiotics, which the average general practitioner cannot be expected to know. At some point post-operatively, this bacteria escaped into the child's blood stream and caused severe brain damage.

Plaintiff's principal reliance was not upon specific acts of negligence but upon the doctrine of res ipsa loquitur. However, the District Court held that, under Ohio law, the doctrine of res ipsa loquitur was inapplicable to malpractice cases such as the instant one. The Court further held that the Government doctors were not negligent in performing the appendectomy or during the period of post-operative treatment when the child was confined in the Government hospital. The Court found that the failure to diagnose peritonitis was not negligence since testimony revealed that this bacteria, as a pathogenic agent, would present diffuse symptomology to a general practitioner and that its escape into the blood stream from the intestinal tract is medically feasible without negligence. In the course of its opinion, the Court pointed out that malpractice had to be established by expert testimony; and that, where the expert testimony was conflicting, it was necessary for negligence to be shown by a preponderance of such testimony. The Court also pointed out that ordinary

practicing doctors are not held to the same standard of care as are specialists in the particular field involved.

Staff: United States Attorney Joseph P. Kinneary and Assistant United States Attorney Robert H. Bell (S.D. Ohio); Robert E. Long (Civil Division)

GOVERNMENT CONTRACTS

Contracting Officer's Notice of Default Under Disputes Clause of Contract Must be Clear and Unequivocal. United States v. Hammer Contracting Corporation (E.D. N.Y., April 4, 1963). Defendant contracted to supply labor and materials and to perform certain landscaping work for the Veterans Administration Hospital in Brockton, Massachusetts. Pursuant to the terms of the contract, the work was guaranteed for one year from the date of completion. Within the one-year period certain portions of the landscaped area failed to grow grass, and the Government called upon the contractor to re-seed these areas. The contractor claimed that he had fully performed under the contract and if any area became barren during the guarantee period, it was due to failure of the Government to maintain the land. After a series of letters between the parties, the Contracting Officer advised the contractor that because of his refusal to re-seed barren areas the work would be contracted elsewhere and he would be charged with the cost thereof. The lawn was re-seeded by another party and the Government sued defendant for the cost thereof. As to the finality of the Contracting Officer's decision under the disputes clause the Court stated that

> if the Government wished to take advantage of a clause of this nature it was obligated to notify the contractor in clear and unequivocal terms that its opinion letter was the final and conclusive one, referred to in the contract. Otherwise the Government subjects the contractor to a substantial risk of an inequitable cut-off date and forfeiture without notice, which was not in the contemplation of the contractor when it signed the contract. The letters relied upon by the Government as containing the final and conclusive opinion of the Contracting Officer are insufficient.

The Court further proceeded to point out that the guarantee article of the contract was poorly drawn and perhaps was never intended for a project of this type but was, notwithstanding its wording, a guarantee for a period of one year for the work done by the contractor.

Although the Government was not entitled to a summary judgment upon the Contracting Officer's determination, nevertheless a trial of the issues on the evidence presented resulted in a judgment for the Government.

Staff: United States Attorney Joseph P. Hoey and Assistant United States Attorney Martin R. Pollner; Peter C. Charuhas (Civil Division)

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

Court Enforces Administrative Subpoena of Bureau of Labor-Management Reports. W. Willard Wirtz, Secretary of Labor v. Local 875, International Brotherhood of Teamsters (E.D. N.Y., March 27, 1963). The Secretary of Labor filed a motion for an order directing Local 875 of the Teamsters Union (Queens County, N.Y.) to produce and deliver membership dues cards to the Bureau of Labor-Management Reports in New York City. Involved were 3,500 record cards. The Union opposed the Government's application on the ground that removal of the cards would unduly disrupt the routine of its record keeping. In addition, the Union contended that some of the information recorded on the cards pre-dated the effective date of the statute which was September 14, 1959. The Union requested that, in any event, the records which antedated the Act be physically covered by tape so that such information would be unavailable to the Secretary. The Government contended that, due to the commingling of the information, all of the cards and all of the information thereon were essential for the Secretary's purposes, and that the Government was entitled to the cards notwithstanding some inconvenience to the Union.

The Court granted the Secretary's motion enforcing the subpoena and rejected the Union's objections as "insubstantial, obstructionist and dilatory." Citing the decision of W. Willard Wirtz v. Local 502, International Hod Carriers and Common Laborers' Union, AFL-CIO, 4 C.C.H., Labor Relations cases, No. 17951, the Court held that any inconvenience which the Union might here suffer must yield to the public interest. In rejecting the request for covering some of the records, the Court stated: "If * * * the pre-Landrum-Griffin fiduciary accounting should exhibit less than perfection in that unpoliced era, this circumstance should not be kept as light under a bushel, but resorted to for its illumination in helping to discover in the subsequent period of the Secretary's statutorily mandated supervision, violations which might otherwise escape detection."

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney George V. O'Haire (E.D. N.Y.)

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshal

SUPREME COURT

COLORADO ANTI-DISCRIMINATION ACT

Colorado Anti-Discrimination Act, as Applied to Hiring of Flight-crew Personnel of Interstate Air Carrier Within Colorado, Not Burden on Interstate Commerce, Nor Preempted by Federal Legislation or Executive Orders. The Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines Inc.; Marlon D. Green v. Continental Air Lines, Inc. (U. S. Sup. Ct., April 27, 1963). Petitioner Marlon D. Green, a qualified Negro pilot, filed a complaint with the Colorado Anti-Discrimination Commission against respondent Continental Air Lines, an interstate air carrier, alleging that Continental violated the Colorado Anti-Discrimination Act of 1957 by refusing to employ him, after an interview conducted in Denver, solely because of his race. The Commission ordered Continental to hire Green. Upon review of the proceedings and order of the Commission, the District Court in and for the City and County of Denver, Colorado held (1) that the Colorado Anti-Discrimination Act, as applied, constituted an unconstitutional burden on interstate commerce, and (2) that such application of the Colorado Act was preempted by the Railway Labor Act, the now-repealed Civil Aeronautics Act, and the now-revoked Executive Order of President Eisenhower establishing the Government Contracts Committee. On appeal, the Supreme Court of Colorado affirmed on the ground that the Colorado law, as applied, unconstitutionally burdened interstate commerce. The Supreme Court of the United States granted certiorari and the United States, which had participated as amicus curiae in the Supreme Court of Colorado, and had urged the Supreme Court of the United States to review the case, filed an amicus brief urging reversal. The Court reversed and remanded the case for further proceedings, holding, in accord with the views expressed by the United States, that the Colorado Act, as applied, did not burden interstate commerce and was not preempted either by the Civil Aeronautics Act, the Railway Labor Act, or any Presidential Executive Order. On the question of burden, the Court emphasized the importance of a particularized inquiry into whether the state law would interfere, as a practical matter, with the flow of commerce, and found no such interference in the case of the Colorado Act. On the question of preemption by the Civil Aeronautics Act, the Court assumed arguendo that such Act prohibited racial discrimination by a carrier against an applicant for employment, but held that Congress had no intent to bar state legislation in the field of hiring discrimination and that at least so long as any power the Civil Aeronautics Board might have remained "dormant and unexercised", the Colorado Act would not frustrate the purpose of the federal legislation. With respect to the Railway Labor Act, the Court concluded that nothing in the Act placed upon an air carrier a duty to engage in only non-discriminatory hiring practices. With respect to the Executive Order the Court, without reaching the question

of whether an Executive Order can foreclose state legislation, stated that it could not believe that the Executive intended for its orders to regulate air carrier discrimination among employees so pervasively as to preempt state legislation intended to accomplish the same purpose.

Staff: Solicitor General Archibald Cox and Bruce J. Terris (Office of the Solicitor General); Assistant Attorney General Burke Marshall, Harold H. Green, and David Rubin (Civil Rights Division)

Voting and Elections: Civil Rights Act of 1957. United States v. Edwards (S. D. Miss.). This action brought under the Civil Rights Act of 1957 (42 U.S.C. 1971 (a)(b)(c))was filed on May 6, 1963 against Jonathan R. Edwards, Jr., Sheriff of Rankin County, Mississippi, seeking to enjoin him from attempting to discourage Negro voter registration efforts by threats or violence. It is alleged that at least 6,865 of 13,245 eligible white persons are registered in Rankin County, a suburban and rural county adjacent to Jackson, while only 43 of the 6,944 Negroes of voting age are registered. The complaint alleges that on February 1, 1963, the defendant and two men believed to be his deputies entered the office of the circuit clerk in the Rankin County Courthouse. In the office at the time were four young Negro men, three of whom were filling out voter registration forms and the fourth waiting for his turn. It is alleged that without warning the sheriff struck one Negro several times with a blunt instrument while the other men struck two of the applicants. All four Negroes were ordered out of the Courthouse without completing the forms.

The complaint seeks both preliminary and permanent injunctions against the Sheriff and his agents, forbidding them to interfere with Negro registration efforts through threats, intimidation or coercion.

Staff: United States Attorney Robert E. Hauberg; John Doar, D. Robert Owen and Rupert J. Groh, Jr. (Civil Rights Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

COINS

Circulation of Privately Issued Coins. This Department has recently had called to its attention an increasing number of privately issued coins and tokens which are being circulated in various parts of the country. In many instances, these coins are used as mediums of exchange in substitution for lawful money, an undesirable situation which in most cases is in violation of specific statutes.

The experience last summer with the Century 21 Trade Dollar issued in connection with the Century 21 Exposition, Seattle, Washington, illustrates the difficulties that can be caused if even an apparently limited circulation of private coins is permitted. The original plan in that instance called for circulation of the trade dollars primarily upon the grounds of the exposition, with the coins additionally being redeemable for merchandise with a limited number of "participating merchants." Eventually, the number of participating merchants grew to unmanageable proportions; and it was found that the coins were being redeemed for cash as well as merchandise and that change in lawful money was being given for purchases made with the trade dollars, so that the coins became, in effect, substitute dollars throughout the state. The full cooperation of the United States Attorney and the Treasury Department became necessary to halt the program prior to the close of the exposition. Other sponsors of private coins have since attempted to justify their actions on the basis of the Century 21 Trade Dollar.

The Treasury Department is attempting to halt circulation of privately issued coins wherever their use is discovered. All United States Attorneys are requested to give their full cooperation to the Treasury Department in this endeavor.

The statute that in most cases is applicable is 18 U.S.C. 486, which prohibits the making, uttering or passing of metal coins "intended for use as current money." The key determination to be made is whether the coins are usable in only two party transactions (as for example bus tokens), which is permissible, or whether they are usable in multi-party transactions in similar fashion to lawful money, which is prohibited. In arriving at this determination, consideration should be given to whether the coins are redeemable in lawful money, whether change in lawful money is given for purchases made with them, and whether they are redeemable for goods and services at more than one business establishment. The presence of one or more of these elements imbues the coins with the forbidden characteristic of usability in general circulation or multiparty transactions, regardless of any disclaimer that might appear on the face of the coins.

Section 486 applies only to metal coins or tokens. A non-metallic token constituting an "obligation for a less sum than $1", may, however, violate 18 U.S.C. 336, which prohibits the issuance of such obligations "intended to circulate as money or to be received or used in lieu of lawful money." The test for determining a violation of Section 336 is the same as for Section 486.

It should be noted that there is now no statute covering the issuance of non-metallic circulating tokens of a value of $1 or greater. There is a possibility, however, that such tokens might be subject to ad valorem taxes pursuant to 26 U.S.C. 4881, and such possibility should be called to the attention of anyone who inquires as to the legality of issuing tokens.

If you receive any inquiries on this subject as to which there is any area of doubt, please consult the General Crimes Section, Criminal Division, Department of Justice, before arriving at any final conclusion.

NATIONAL STOLEN PROPERTY ACT

Interstate Transportation of Stolen Property; Knowledge That Stolen Merchandise Would Be Transported in Interstate Commerce Not Essential Element of Offense. United States v. Anthony Robert Kierschke, (C.A. 6, April 5, 1963). The Court of Appeals for the Sixth Circuit recently upheld a conviction for causing the interstate transportation of stolen property of a value in excess of $5,000 as against the contention that knowledge by the defendant that the property was to be transported in interstate commerce was not proved. Defendant participated in the theft of the property in question (automobile tires) from a warehouse in Detroit, Michigan, and in the transportation of the tires to the place of business in Detroit of certain other participants in the venture. The latter, acting as agents for all of the participants, arranged for disposition of the tires to out-of-state purchasers, and conveyed the proceeds to defendant's superior, who in turn paid defendant. There was no proof that defendant knew that the tires were eventually to be disposed of out-of-state.

The Court of Appeals, speaking through District Judge Darr, followed the holding of United States v. Tannuzzo, 174 F. 2d 177 (C.A. 2, 1949), certiorari denied 338 U.S. 815, that theft of goods and disposition of them to an agent for ultimate disposition, without limitation on the ultimate disposition, "causes" the interstate transportation of such goods if they are in fact transported interstate, and that knowledge of the place of ultimate disposition is not necessary for such causation. Additionally, the Court analogized knowledge of the intended interstate transportation to knowledge that the stolen merchandise is of a value of $5,000 or greater, which, on the basis of United States v. Schaffer, 266 F. 2d 435 (C.A. 2, 1959), affirmed 362 U.S. 511, does not have to be shown to prove an offense under the statute. The Court held, in short, that criminal intent is supplied by the intent to steal the merchandise and that the

value of the merchandise and the use of interstate commerce are merely jurisdictional, and form no part of the requisite intent.

Staff: United States Attorney Lawrence Gubow; Assistant United States Attorney Paul J. Komives (E.D. Mich.)

FALSE STATEMENTS

False Statements to Obtain Veterans Administration Guaranteed Home Loans. United States v. Jack Stewart, et al. (E.D. N.Y.) Stewart was engaged in the real estate business operating through the defendant firm, Rudsha Realty Corp., and Ian-Liz Realty Corporation. Stewart conspired with the co-defendant Corbitt to obtain long term, low interest bearing Veterans Administration guaranteed mortgages on properties owned by Rudsha and Ian-Liz by persuading eligible veterans who had not used their eligible V.A. mortgage rights, to take title, as "dummies" to these properties without occupying them and to leave the actual control, management and dominion over the properties to defendants and their corporations.

Pursuant to this scheme, defendant Corbitt recruited veterans by promising to pay them approximately $200 each to transfer their V.A. mortgage rights to the defendants. Defendants then obtained, or caused to be obtained, the veteran's signature on a blank V.A. "Application For Home Loan Guaranty or Insurance," Form No. 1802, which contained the certification that the "purpose" of the "proposed loan" was to finance the purchase of residential property in which the veteran actually resided or intended to occupy as a home. After defendants filled in or caused the application to be completed, defendant Stewart submitted same to a lending institution, Republic Investors Corp., for a "G.I." mortgage loan, which was granted. The loan was guaranteed by the Veterans Administration on the basis of the 1802 form.

On the day set for closing title to the property, defendants would accompany the veteran to Republic Investors Corp., deed the property to the veteran, obtain the purchase price in cash from Republic Investors, pay the veteran about $200 for his trouble, and immediately after the closing have the veteran deed the property back. After closing the titles herein involved, defendants then successfully rented or sold three or four of the properties to others.

On April 1, 1963 after jury trial, Stewart and the Rudsha firm were found guilty of violating 18 U.S.C. 1001 and 1002 and Stewart was convicted of conspiracy in the submission of the false Forms No. 1802. Corbitt entered a plea of guilty before trial.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Gilbert A. Bond (E.D. N.Y.)

BANKRUPTCY

False Oath in Bankruptcy Proceeding; Two-Witness Rule Usually Required in Perjury Cases Not Applicable to Offense Under 18 U.S.C. 152. United States v. Curry, 313 F. 2d 337 (C.A. 3, 1963). Defendant was found guilty under a three-count indictment charging him with having knowingly and fraudulently made false oaths in relation to a bankruptcy proceeding in violation of 18 U.S.C. 152. Defendant testified that he did not have any assets which had not been turned over to the trustee. He also denied in his Statement of Affairs that he held property in trust for any other person and that he transferred or disposed of any property within the year preceding the filing of the petition.

From August, 1957, through August, 1958, defendant bought and sold securities in his name as custodian for his two minor children. As a result of these transactions, there were outstanding on the date he was examined under oath at a meeting of his creditors, 1020 shares in defendant's name as custodian for his children.

The Court, inter alia, held that the two-witness rule usually required in perjury cases did not apply to proof of an offense under Section 152. United States v. Marachowsky, 201 F. 2d 5 (C.A. 5, 1953).

The Court of Appeals overruled defendant's contention that a portion of the trial judge's charge to the jury that the Government had the burden of proving a wilful intent to defeat and defraud creditors allowed the jury to speculate over the whole range of what might be a fraudulent transfer under the Bankruptcy Act. The Court stated that in fact the charge was actually more favorable than defendant was entitled to receive; that all that was necessary for the Government to prove was that defendant testified falsely for the purpose of forestalling the Trustee from inquiring into his transactions, irrespective of whether the transactions were in fraud of creditors.

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

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

NATURALIZATION

Conduct During World War II Considered in Determination of Present Attachment to Constitutional Principles. Edward Vieth Sittler v. U.S.; (C.A. 2, April 12, 1963.) This is an appeal from an order of the district court denying appellant's petition for naturalization.

Sittler, the appellant, a native of the United States, went to Germany in 1937 and enrolled in a university. In 1940 he was naturalized a German citizen and thereby lost his United States nationality. From 1940 until 1945 he was employed in the Information Office of the Nazi Government and from 1943 to 1945 broadcasted Nazi propaganda to the United States. He returned to the United States in 1954 and was admitted for permanent residence.

The lower court, after consideration of Sittler's conduct while in Germany and his testimony in open court, found that he had failed to establish, as required by Section 316 of the Immigration and Nationality Act, 8 U.S.C 1427, that he had, for the period of five years prior to filing his petition for naturalization in 1961, been attached to the principles of the Constitution and well disposed to the good order and happiness of the United States.

Circuit Judge Hays, writing for the majority of the Court, approved the judgment of the lower court, reasoning that subdivision (e) of Section 316 permits consideration of conduct outside the five year period, that from Sittler's conduct in Germany the lower court could properly conclude that Sittler at one time was attached to Nazism, that before admission to citizenship Sittler could be required to repudiate Nazism completely and that in this respect the lower court correctly found Sittler's evidence lacking.

Circuit Judge Kaufman wrote a concurring opinion in which he emphasized that the affirmance by Judge Hays and himself of the lower court's judgment did not rest upon proof of Sittler's past misconduct but rather upon the light which that misconduct shed upon petitioner's present devotion to our Constitutional principles. Circuit Judge Clark registered a strong dissent upon the basis that Sittler was denied citizenship because of his World War II conduct and not on his conduct during the statutory period of five years prior to the filing of his petition.

Staff: U.S. Attorney Robert M. Morgenthau and Assistant U.S. Attorney Patricia A. Garfinkel (S.D. N.Y.); Special Assistant U.S. Attorney Roy Babitt.

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Public Lands; Mineral Leasing Act; Determination by Interior That Lease Assignment Is Void Cannot Be Collaterally Attacked; Secretary's Interpretation of His Regulations Is Controlling Unless Plainly Erroneous. McGarry v. Udall (C.A. D.C., April 25, 1963). The prior lease term ended on October 31, 1959. On September 24, 1959, an assignment was filed which, when approved by the Secretary, would have extended the lease term for two years beginning October 1, 1959. On November 2, 1959 (November 1, being a Sunday) Mrs. Graham filed a new lease offer. The assignment on that date was pending unapproved. On November 10, 1959, Interior approved the assignment. Subsequently, it was discovered that the rentals had never been paid under the prior lease. Such rentals could have been paid until the close of business on November 2, 1959. On November 19, 1959, Interior declared the assignment null and void. Neither of the parties to the assignment appealed from this decision. McGarry filed his lease offer on November 20, 1959. In administrative proceedings before the Secretary, McGarry attacked the Graham offer as invalid because premature. The Secretary held the Graham offer was timely. In this suit to review the administrative proceedings, the district court granted summary judgment for the Secretary, and the Court of Appeals affirmed.

McGarry argued that there was an outstanding lease on the land on the date Mrs. Graham filed her offer. An offer filed on land in an outstanding lease is invalid. The Secretary held there was no lease outstanding on November 2, 1959, but merely a pending unapproved assignment. The assignment was subsequently found to be void because the rent was not paid under the prior lease on or before November 2, 1959. Since no appeal from this decision was taken by the parties directly involved, it was held that Mr. McGarry had no standing in this case to argue that the assignment was, in fact, valid.

McGarry also argued that payment under the prior lease could have been made through the close of business November 2 and this would have kept the prior lease alive under the pending assignment. It was held that this was immaterial in view of the fact that such payment was not made. In any event, the effect of the pending assignment on the new lease offer was governed by the rules and regulations of Interior, and the Secretary's determination under them, that the Graham offer was not premature, would be of controlling weight unless it was plainly erroneous or inconsistent with the regulations.

Staff: A. Donald Mileur (Lands Division).

* * * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS

Notification to Department of Decisions in Tax Cases

Tax Division attorneys report that an increasing number of judges are commenting on the time taken by the Department to arrive at a firm decision whether to appeal from adverse decisions. Many judges are balking at granting extensions of time to docket the appeal, and cite instances in which such extensions are granted and the final decision by the Department is not to appeal. All United States Attorneys are requested to check their office procedures to insure that notices of decisions and copies of opinions in tax cases are forwarded to the Division promptly - the day of receipt whenever possible. This will assist the Department and the Internal Revenue Service in meeting the tight schedules necessary for making a timely determination whether to appeal.

District Court Decisions

Jurisdiction: No Jurisdiction Over United States in Interpleader Action Removed to Federal District Court. David Jacobs v. District Director of Internal Revenue, et al. (February 15, 1963, S.D. N.Y.), CCH 63-1 USTC ¶9324. This interpleader action, commenced in the Supreme Court of the State of New York, was removed to the Federal District Court, Southern District of New York. The United States moved to dismiss the complaint against the District Director and at the same time moved for leave to intervene as a party plaintiff. The Court held that interpleader actions are not within the purview of 28 U.S.C. 2410, thereby precluding jurisdiction over the District Director or the United States. Since the state court lacked jurisdiction, the removal to the federal court was improper. All motions were denied and the case was remanded.

Staff: United States Attorney Vincent L. Broderick; Assistant United States Attorney Clarence M. Dunnaville, Jr. (S.D. N.Y.)

Suit For Failure to Honor Levy; Government Held Not Entitled to Absolute Priority Under Section 3466, Revised Statutes, When Levy Served on Executors of Deceased's Estate. United States v. Exchange National Bank, et al. (March 11, 1963, W.D. N.Y.), CCH 66-1 USTC ¶9403. Taxpayer instituted suit against one Finlay for breach of contract but Finlay died insolvent prior to the time judgment was entered. Notices of levy were served on the executors of Finlay's estate and suit was instituted when they were not honored. On cross motions for summary judgment, the Court denied the Government's claim of absolute priority under Section 3466, Revised Statutes, which provides that debts due the United States shall be paid first when the estate of a deceased is insufficient to satisfy

all debts. The Court based its ruling on the ground that at the time of Finlay's death, there was no debt due to the Government since the levies had not yet been served. The Court did, however, allow the Government's claim as a general debt of the estate.

Staff: United States Attorney John T. Curtin; Assistant United States Attorney C. Donald O'Connor (W.D. N.Y.)

Filing of Criminal Indictment Against Taxpayer Served as Rejection of His Offer to Compromise His Tax Liabilities, Thereby Causing Statute of Limitations to Bar This Action. United States v. J. Robert D. Smith. (January 18, 1963, N.D. Ohio), 11 AFTR 2d 1261. On April 9, 1947, defendant-taxpayer made an offer to compromise outstanding tax liabilities for four years. On April 16, 1947, a criminal indictment charging him with income tax evasion for two of the four years for which assessments were outstanding was filed. Taxpayer's offer was rejected on July 16, 1947 with respect both to his civil and criminal liabilities. Two questions were presented: (1) was taxpayer's offer meant to include both civil and criminal liabilities? and (2) did the criminal indictment act as a rejection of taxpayer's offer so as to start the running of the statute of limitations for bringing a subsequent action? This action would be timely brought if the statute of limitations were suspended until the formal rejection of taxpayer's offer was made; this action would not be timely brought if the filing of the criminal indictment acted as a rejection.

The Court held as a matter of law that taxpayer's offer was meant to include both civil and criminal law tax liabilities. He based this conclusion on the probability that taxpayer, knowing of the criminal investigation, so intended his offer to cover both liabilities and on the fact that the Government's rejection of the offer was for both liabilities. The Court also held that the criminal indictment had the effect of rejecting the offer with the result that this action was not timely brought. Defendant's motion to dismiss was granted. The Solicitor General has decided against appeal.

Staff: United States Attorney Merle M. McCurdy; Assistant United States Attorney Harland M. Britz (N.D. Ohio)