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

September 18, 1964

United States

DEPARTMENT OF JUSTICE

Vol. 12 No. 19

UNITED STATES ATTORNEYS

BULLETIN

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MONTHLY TOTALS

The new fiscal year started off with a familiar pattern - an excess of filings over terminations. The gap between cases filed and cases terminated, however, was not as great as it was in the first month of fiscal 1964. Nevertheless, we enter the new fiscal year with an increase of almost 1,000 cases in the pending caseload. Set out below is a comparison of totals for the first month of fiscal 1964 and of fiscal 1965.

	July 1963	July 1964	Increase or Decrease Number	%
Filed				
Criminal	2,254	2,321	+ 67	+ 2.97
Civil	2,456	2,460*	+ 4	+ .16
Total	4,710	4,781	+ 71	+ 1.51
Terminated				
Criminal	2,311	2,230	- 81	- 3.51
Civil	2,129	2,391*	+ 262	+ 12.31
Total	4,440	4,621	+ 181	+ 4.08
Pending				
Criminal	9,935	10,250	+ 315	+ 3.17
Civil	22,873	23,495	+ 622	+ 2.72
Total	32,808	33,745	+ 937	+ 2.86

The number of civil cases filed in July was almost the same as the number filed in the first month of the previous fiscal year. Criminal cases filed showed a small increase over the prior year. The reverse was true with regard to terminations, where civil cases terminated outnumbered criminal cases terminated.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,321	2,460*	4,781	2,230	2,391*	4,621

For the month of July, 1964, United States Attorneys reported collections of $3,515,753. This is $397,403 or 12.74 per cent more than the $3,118,350 collected in July, 1963.

* Does not include July, 1964 Land Condemnation Cases Filed or Terminated for Alabama Middle, New York Northern, New York Western and Wisconsin Eastern.

During July $21,605,453 was saved in 91 suits in which the government as defendant was sued for $23,119,484. 54 of them involving $10,944,692 were closed by compromises amounting to $1,322,524 and 23 of them involving $548,098 were closed by judgments amounting to $191,507. The remaining 14 suits involving $11,626,694 were won by the government. Compared to July, 1963 the amount saved increased by $15,922,137 or 280.16 per cent from the $5,683,316 saved in July, 1963.

The cost of operating United States Attorneys' Offices for July, 1964 amounted to $1,565,394 as compared to $1,552,286 for July, 1963.

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ADMINISTRATIVE DIVISION

Assistant Attorney General for Administration S. A. Andretta

EXPENSES OF INDIGENTS ATTORNEYS

The "Criminal Justice Act of 1964," which was enacted on August 20, 1964, provides for representation of defendants who are financially unable to obtain counsel in criminal cases in United States Courts and before United States Commissioners. Each judicial council is given nine months from the enactment of this law to approve and transmit to the Administrative Office of United States Courts a plan for each district in its circuit to put this plan into operation. The Department of Justice is in no position to furnish information with respect to the details as to organization or payments under this law. It is suggested that inquiries received by the United States Attorneys Offices be referred to the Administrative Office of the United States Courts.

The following Memorandum applicable to United States Attorneys Offices has been issued since the list published in Bulletin No. 18, Vol. 12 dated September 4, 1964:

ORDERS	DATED	DISTRIBUTION	SUBJECT
323-64	8-26-64	U.S. Attorneys & Marshals	Designating Homer L. Benson of the Board of Parole as a member of the Youth Correction Division.

* * *

ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

CLAYTON ACT

Court Denies Government's Motion for Preliminary Injunction in Section 7 Bank Case. United States v. Third National Bank in Nashville, et al., (M.D. Tenn.) D.J. No. 60-111-759. A complaint under Section 1 of the Sherman Act and Section 7 of the Clayton Act was filed on August 10, 1964 against Third National Bank in Nashville ("Third National") and Nashville Bank and Trust Company ("Nashville Bank"), charging that the proposed merger of Nashville Bank into Third National would lessen and impair competition, and substantially increase concentration in commercial banking in the Nashville area.

Third National is the second largest commercial bank in Nashville in terms of assets, with total assets of $341,702,000. Nashville Bank is the fourth largest commercial bank in the area with total assets of $45,991,000. As of December 1963, Third National's share of commercial banking deposits in metropolitan Nashville was about 33.8% and its share of loans was about 35.6%. Nashville Bank's share of such deposits was about 5% and loans 4.6%. The complaint alleges that as a result of the proposed merger the resulting bank would control about 38.8% of deposits and 40.2% of the loans held by commercial banks in metropolitan Nashville, that it would become nearly on a par with the present largest bank in deposits and substantially larger in loans, and that the three largest banks, including the resulting bank, would hold about 98.1% of the deposits and 97.8% of the loans in metropolitan Nashville.

On the same day, the Government also filed a motion for an order enjoining the proposed merger pending final decision on the merits of the complaint. By stipulation the merger was not consummated by defendants pending a ruling by the Court on this motion, which was heard by District Judge William E. Miller on August 14 and 15, 1964.

At the hearing the Government introduced in evidence the merger application filed by defendant banks with the Comptroller of the Currency as well as the advisory reports by the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Department of Justice, on the competitive factors involved in the merger. All three of these agencies had concluded that the proposed merger would have an adverse effect upon competition. In opposition to the motion, defendants submitted the decision of the Comptroller of the Currency approving the merger under the Bank Merger Act and the affidavits of the ailing president of Nashville Bank and of the head of a group which had purchased a controlling stock interest in that bank in January 1964. Defendants also offered the oral testimony of the president of Third National.

On August 18 in open court Judge Miller denied the Government's motion. Notice of appeal to the Court of Appeals for the Sixth Circuit was thereupon filed, and the Court was asked to enjoin the merger until the appeal could be heard. Judge Miller also denied this motion, relying on Mr. Justice Goldberg's opinion in United States v. FMC et al, that the appellate courts are without jurisdiction to review an order in a Government antitrust suit denying a preliminary injunction.

In his opinion Judge Miller held that the Government had not established a reasonable probability that it would ultimately prevail on the merits and that denial of the injunction would result in a substantial injury to the general public for which there is no means of redress. The Court quoted extensively from the decision of the Comptroller of the Currency approving the merger under the Bank Merger Act of 1960, to support this conclusion. It dismissed as "based primarily on cold statistics" the adverse reports on the merger by the Federal Reserve, the F.D.I.C., and the Department of Justice. The Court also relied on the testimony of the president of Third National and the affidavit of the president of Nashville Bank. Both contended that Nashville Bank was not a major or even a substantial competitive factor for a number of reasons: it lacked adequate management and, particularly, a prospective successor to its aged and ailing president, it had a sub-par salary scale and an inadequate employee pension plan, it lacked automated facilities, and it had but one branch office. The Court inferred that the "merger presented itself as a logical alternative to the expenditure of large sums of money to improve the facilities and services of the Trust Company and to place it in a position to compete successfully."

In Judge Miller's opinion, the Supreme Court's decision last year in the Philadelphia bank merger case was not controlling here because, unlike that case, the proposed merger would not create the largest bank in the community the defendant banks do not have an extensive merger history, the acquired bank is much smaller than the acquiring bank and "is met with a deteriorating managerial and personnel situation," and the merger would increase the two largest Nashville banks' share of the market by only 6% as contrasted with 33% in Philadelphia. The Court's opinion makes no reference to the undisputed fact that the merger would give the resulting bank approximately 38-40% of the commercial banking business in metropolitan Nashville, nor does it refer to the Supreme Court's statement in Philadelphia that a bank merger which would give the resulting bank 30% of the market clearly threatens undue concentration. The Lexington bank merger case is distinguishable, the Court said, because that decision is "based upon a variety of factors not controlling here, including the presence of a purpose to monopolize rather than to satisfy business requirements, the probable developments of industry, consumer demands, etc."

In denying the preliminary injunction the Court recognized that should the Government ultimately prevail, divestiture would be "fraught with many problems and difficulties." But it noted that defendants were willing to assume the risks and burdens involved and said that "such a willingness strengthens the belief that a substantial restoration of the status quo could be fairly brought about by divestiture should the merger finally receive judicial condemnation."

Within minutes after the District Court's denial of an injunction pending appeal, defendant banks consummated the merger pursuant to authorization obtained by them from the Comptroller of the Currency. On the same day, after the District Court had announced its decision but before we were informed that the merger had been consummated, the Government applied to Judge Cecil of the Court of Appeals for the Sixth Circuit in Cincinnati, Ohio for an order temporarily enjoining the merger until the appeal could be heard by that court. This request was denied by Judge Cecil after consulting by telephone with Chief Judge Weick. Judge Cecil stated he was not disposed to grant such a request ex parte

without giving defendants the usual five days in which to oppose our application, even though the merger would be consummated and the appeal thereby rendered moot before the five days were up.

On August 14 the Comptroller of the Currency, pro se, filed a motion under Rule 24, F.R. Civ. P., for leave to intervene as a defendant in this case. This motion is virtually identical to a similar motion filed by the Comptroller and denied by the court in United States v. Crocker-Anglo National Bank, et al. (N.D. Cal. Civ. #41808). It contends that judgment for the plaintiff would frustrate and completely defeat the Comptroller's statutory duty under the National Banking Act and the Bank Merger Act of 1960 to approve bank mergers which he finds to be in the public interest, and that the Department of Justice cannot adequately represent him in this case because its position with respect to the merger is directly opposed to the position taken by the Comptroller. On August 21 the Government filed a memorandum in opposition to Mr. Saxon's request to intervene. No date has been set for a hearing on the Comptroller's motion.

Staff: James L. Minicus, Charles A. Degnan, Robert C. Weinbaum, and Josef Futoran. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

AGRICULTURAL ADJUSTMENT ACT OF 1938

Class Action Does Not Lie For Judicial Review of County Committee's Determination Under Agricultural Adjustment Act of 1938. Allen, et al. v. David, et al. (No. 20169, C.A. 5, July 16, 1964). DJ No. 145-8-554. Plaintiffs, Texas rice farmers, brought this class action against a county committee seeking judicial review of the cancellation of plaintiffs' farm acreage allotments and the recall of their marketing quota because they were not engaged in the production of rice within the meaning of Agriculture's regulation. Jurisdiction was alleged under the federal question (section 1331) and the commerce and antitrust (section 1337) provisions of Title 28. The district court ruled that the actions sought to be reviewed arose under the Agricultural Adjustment Act of 1938, and that that Act, with its special review provisions (7 U.S.C. 1363-1367), provided the exclusive basis for judicial review. The court then dismissed the complaint for want of jurisdiction, holding that, under the statute, judicial review by the farmer had to be sought in an individual action, and that a class action does not lie.

The Fifth Circuit affirmed the decision on this basis, thus making it unnecessary for it to reach other questions presented in the appeal. The Court brushed aside plaintiffs' reliance on the recent case of Morrow v. Clayton, 326 F. 2d 36, where the Tenth Circuit found federal jurisdiction of an action to compel members of a state ASC committee to revise marketing quotas, even though plaintiffs had failed to seek administrative relief in accordance with the statutory procedure. The Court noted that here, even though plaintiffs claimed that the administrative action taken was really action of the state ASC committee, the cancellation of the rice allotments was officially the action of the county committee. Since the Agricultural Adjustment Act is specific in setting forth the review procedure which must be followed in such a case, and that procedure was not followed by plaintiffs, the Court ruled that it was clearly deprived of jurisdiction, citing, inter alia, Weir v. United States, 310 F. 2d 149 (C.A. 8); Miller v. United States, 242 F. 2d 392 (C.A. 6); Corpstein v. United States, 262 F. 2d 200 (C.A. 10); and United States v. Jeffcoat, 272 F. 2d 266 (C.A. 4).

Staff: United States Attorney Woodrow Seals and Assistant United States Attorneys William B. Butler, James R. Gough, and Jack Shepherd (S.D. Tex.)

COMMODITY CREDIT CORPORATION - CONTRACTS

Meaning of Price Escalation Provision in Commodity Credit Corporation Contracts Determined by Resort to Parole Evidence; Government Defense of Violation of Antitrust Laws Not Sustained Because of Government's Role in Encouraging Allegedly Violative Action. Asheville Mica Company, et al. v. Commodity Credit Corporation (No. 28670, C.A. 2, August 4, 1964). DJ No. 120-51-62. In 1956, several importers entered into contracts with the Commodity Credit Corporation for the delivery of mica and mica splittings in exchange for surplus agricultural commodities owned by CCC. At the time, the importers were also parties to certain contracts for the sale of mica to the General Services Administration. The contracts with CCC specified the prices for the mica, and CCC's exchange of surplus commodities was based on the contract prices. However, each CCC contract contained an escalator provision by which the exchange value of the mica was also tied to the price GSA paid for mica under its contracts with the importers.

In 1957, GSA entered into a new contract with one of the importers which provided for higher prices for mica than had previously existed. The importers claimed that, because of the escalator provision, they were now entitled to higher prices for the mica provided under the CCC contracts. When CCC refused to give them such increased value, these suits for breach of contract were initiated. CCC defended on the ground that the escalator clauses had reference only to price changes under the existing contracts between GSA, and not to any new purchase contract, such as the 1957 one.

The district court ruled that, on their faces, the escalator clauses clearly applied only to existing GSA contracts. Following the usual rule that parole evidence may not be used to vary the clear terms of a written instrument, the court rejected extensive parole evidence offered by the importers to show that the clauses were not intended to be limited to changes in the existing GSA contracts. The court also rejected on the merits a defense made by CCC to the effect that the importers had violated the antitrust laws by, inter alia, conspiring to have the price escalator provision inserted in the contracts.

The Second Circuit reversed, disagreeing with the district court's conclusion that the escalator clauses were so clear that the consideration of parol evidence to determine their meaning would not be permitted. Looking at the parole evidence which had been proffered, the Court ruled that the price escalator provisions applied to new as well as to existing mica purchase contracts with GSA. The Court remanded the case to the district court for further findings on the question whether the clauses were to be interpreted as requiring increased payments to every contractor when only one of them received higher payments under a new GSA contract.

Regarding CCC's antitrust defense, the appeals court agreed with the trial court that it should be rejected on the merits since there was considerable evidence to show that it was GSA who had urged the importers to include

such a price escalator clause in the contracts in order to keep the mica purchase price to GSA and CCC at a parity.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorneys Eugene R. Anderson and Arthur M. Handler (S.D. N.Y.); Robert M. Bor, Department of Agriculture, of counsel.

DEFENSE BASES ACT - COMPENSATION AWARD

Employee's Death After Working Hours on Overseas Island Where He Worked and Resided Held to Have Arisen Out of and in the Course of His Employment. Pan American World Airways, et al. v. O'Hearne, Deputy Commissioner (No. 9340, C.A. 4, July 13, 1964). DJ No. 83-79-33. Decedent was employed as a powerhouse operator on the island of San Salvador by Pan American World Airways in connection with its performance of a Government contract there. P.A.A. provided his sleeping quarters and meals. In addition, the company furnished a number of recreational facilities in the area where he and other employees were quartered, but did not provide transportation for the workers to leave the site. On occasion, upon request, use of a jeep would be allowed by P.A.A. for recreational trips.

One evening after decedent had finished his regular assignment, he and some other employees went out on an excursion in one of P.A.A.'s jeeps -- whether with the company's consent was not clear. On the way back to their residence, the vehicle overturned and decedent and another employee were killed. A compensation proceeding followed, in which the Deputy Commissioner made an award to decedent's widow and orphans, ruling that the death had arisen out of and in the course of his employment. The Commissioner found that, considering the distant place of employment, and the sparsity of the population and the limited area of the island, decedent was justified in looking for recreation beyond the confines of his habitat. In this action for judicial review, the district court vacated the award. The Court of Appeals reversed.

The appeals court, citing O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, and Self v. Hanson, 305 F. 2d 699 (C.A. 9), ruled that the Commissioner had used the correct standard of law, and that there was substantial evidence to support his findings of fact. The Court noted that the death of decedent's companion had been the subject of United States v. Pan American World Airways, Inc., 299 F. 2d 74 (C.A. 5), which had refused an award. But the Court said that if the evidence adduced before the Fifth Circuit was the same as that offered here, they would simply have to disagree with the Fifth Circuit's conclusion.

Staff: Leavenworth Colby (Civil Division)

FEDERAL TORT CLAIMS ACT

United States Held Not Liable For Injuries Resulting From Apparent Defect on Premises of Its Tenant at Sufferance. Maudie Weaver; et al. v. United States (No. 7563, C.A. 10, July 9, 1964). DJ Nos. 157-59N-40 and 157-59N-41. Plaintiff and her husband brought suits against the United States under the Federal Tort Claims Act to recover damages for personal injuries sustained by her when she fell on property in Oklahoma owned by the Government but in the possession and under the control of tenants at sufferance, who were operating the cafe where she fell. There was a question of whether the woman slipped on a loose brick in a brick-covered area in front of the cafe, or whether she tripped because her shoe came off. Assuming that the accident occurred because of a loose brick, the district court found that the United States had never taken actual possession of the property, did not know and had no reason to know of any defective condition of the bricks, and therefore, under Oklahoma law, had not committed an act or omission which caused or contributed to the fall.

The Tenth Circuit affirmed, noting that the evidence in the case clearly showed that there was no hidden danger or anything inherently dangerous about the brick-covered area which would have made it incumbent upon the owner of the property to warn plaintiff, who had walked over the same area about once a week for some 15 years that she had been going to the cafe.

Staff: United States Attorney John M. Imel (N.D. Okla.) and Assistant United States Attorney Phillips Breckinridge

SOCIAL SECURITY ACT

Finding by Hearing Examiner That Claimant Could Perform Substantial Gainful Work Held Not Supported by Evidence. Thompson v. Celebrezze (No. 15568, C.A. 6, July 22, 1964), DJ # 137-30-138. This was an action for judicial review of the denial of disability benefits under the Social Security Act. Plaintiff who was 54 years old at the time of his application, had a third-grade education, but could not read. For most of his life he had worked in the Kentucky clay mines. After the mine in which he was employed went out of business in 1953, he bought and operated a small store for two years. In 1960 he sold the store, allegedly because he no longer was physically able to take care of it, due to disabling rheumatoid arthritis of the thoracic lumbar and cervical parts of the spine. There was medical testimony that he could not perform any type of work requiring the use of his back.

The hearing examiner found that claimant had not established that his impairments precluded him from engaging in certain sedentary jobs, such as timekeeper or weigh master, and on this basis denied him benefits. The district court affirmed.

The Court of Appeals reversed and ordered the award of benefits. It held that claimant need only establish his inability to do the type of work in which he could profitably seek employment in light of his physical and mental capacities and his education, training and experience. The Court stated that under the evidence in the case there was no reasonable expectation

that claimant could obtain or perform the kind of jobs which the hearing examiner held that he could perform.

Staff: Sherman L. Cohn, Patrick McKeever (Civil Division)

DISTRICT COURT

SHIPPING ACT OF 1916

Government's Complaint Upheld in Action to Recover Penalties From Foreign Shipping Corporations for Alleged Violations of Shipping Act of 1916. United States v. Anchor Line, Ltd., et al. (S.D. N.Y., 62 Civ. 2034, July 17, 1964). DJ No. 61-16-49. Section 15 of the Shipping Act of 1916, 46 U.S.C. 814, requires common carriers by water to file immediately for approval with the Federal Maritime Commission copies of all anti-competitive agreements that fix rates or fares, allocate ports, establish working arrangements and the like, or in general, control, regulate, prevent or destroy competition. The section also makes it unlawful to carry out any non-competitive agreement that has not been thus filed, and further provides for a penalty against anyone who violates the section's provisions.

Acting on the complaint of certain competing lines, the Commission held administrative hearings and found that defendants, who were carriers operating in foreign commerce, had violated Section 15. A cease and desist order was entered and was upheld on appeal. Anchor Line, Ltd. v. Federal Maritime Commission, 299 F. 2d 124 (C.A. D.C.), certiorari denied, 370 U.S. 922. Thereafter, this suit by the Government for penalties was initiated.

Defendants moved to dismiss on the ground that the Court did not have jurisdiction over the subject matter because the action involved acts of foreign corporations committed outside the territorial jurisdiction of the United States. In addition, they claimed that the complaint was defective in any event because it failed to allege that (1) the agreements or arrangements were entered into in the United States, (2) shippers in the United States were affected by any of the agreements or arrangements, and (3) ports in the United States were affected thereby.

The Court denied the motion, holding that an examination of Section 15 revealed quite clearly that Congress intended that the statute reach the activities and operations of persons such as these foreign shipping companies even beyond the territorial limits of the United States. Although the Government has not alleged in haec verba that performance of the contracts has "effect" here, the court noted that the pertinent allegations of the amended complaint nevertheless specifically referred to the commerce "from the United Kingdom to United States Great Lakes ports." Clearly, said the court, the defendants' alleged activities in the Great Lakes trade, if proved at trial, could be held to have had an operative effect on the foreign commerce of the United States, thereby subjecting defendants, who acted pursuant to unfiled agreements and arrangements, to the regulatory provisions of Section 15.

In advance of oral argument, Government counsel presented to the Court a document entitled "Aide Memoire" which had been prepared by the British Embassy in Washington, D.C., and which protested the proceedings insofar as they related to six private British and Canadian shipping companies. The Court stated the general rule, citing National City Bank v. Republic of China, 348 U.S. 356 (1955); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); Compania Espanola de Navigacion Maritima v. the Navemar, 303 U.S. 68 (1938), that where a case involves sovereign immunity the Courts would generally follow a suggestion of the Attorney General of the United States and grant immunity to the foreign sovereign if its claim is recognized and allowed by the Executive Branch of the Government. However, since no claim of sovereign immunity had been made in the suit and the Aide Memoire was submitted to the Court solely as a matter of comity, it was held to have no legal or binding effect. Lamont v. Travelers Insurance Co., 281 N.Y. 362, 24 N.E. 2d 81 (1939). All motions made by the defendants were denied.

Staff Gilbert S. Fleischer (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

IMMIGRATION PROSECUTION

Sham Marriage to United States Citizen to Enable Alien to Obtain Permanent Residence in United States. United States v. Stavros Pantelopoulos (C.A. 2, August 19, 1964). D.J. File 39-017-51. Appellant was found guilty, after a jury trial, on four counts of a multicount indictment, charging (1) a conspiracy between appellant and several other individuals to violate 18 U.S.C. 1001 by defrauding the United States of its right to have the administration of the immigration laws conducted honestly and free from fraud, deceit, misrepresentation, concealment, interference, and obstruction, and (2) substantive violations of Section 1001. It was alleged to be part of the conspiracy that appellant would arrange for a marriage between Margaret McCaffery and George Panagiotidis, an alien, which would not be consummated and which would be terminated when the alien had been admitted to this country as a nonquota immigrant as the spouse of a citizen of this country. The substantive counts on which appellant was convicted charged him with aiding and abetting the alien unlawfully to conceal and misrepresent the material facts of the marriage in affidavits and in a visa petition filed with the Immigration and Naturalization Service.

Appellant did not challenge the sufficiency of the evidence that he conspired to obtain permanent American residence for the alien. Instead, the argument was that the Government's proof failed to show appellant's knowledge that a merely formal marriage was not the kind of marriage contemplated by the immigration laws. In this respect, appellant asserted that there was no evidence that he took part in the falsification or concealment of material facts, such as noncohabitation and the antenuptial divorce agreement, knowing that such facts would have a bearing on the alien's efforts to remain in this country.

The Court of Appeals rejected the argument, stating that the jury was warranted in finding that the conspirators knew that the alien's chances for permanent residence would be seriously threatened if the immigration authorities were apprised of the details of the sham marriage. The court pointed out that initially appellant had informed Margaret that the sole purpose of the marriage was to enable the alien to remain in the United States, that she would have to represent that she lived with the alien, and that they would have to wait two years before obtaining a divorce. "This," said the court, "was sufficient indication of appellant's awareness that such antenuptial agreements were more than frowned on by the Immigration Authorities." The court observed that the various false representations and concealments of the alien, Margaret, and her mother in furtherance of the plan raised the inference that appellant knew why the misstatements had been made.

The Court of Appeals distinguished this case from United States v. Diogo, 320 F. 2d 898 (C.A. 2, 1963), discussed at pp. 393-394 of the Bulletin for July 26, 1963 (Vol. 11, No. 14), on the ground that the conspirators in that case were charged with falsely representing the aliens' marital status, whereas the validity of the marriage was irrelevant here, because the instant conspirators were charged with having made false representations that the alien and Margaret lived together and concealed the fact of the antenuptial agreements. This case, according to the court, was closely akin to Lutwak v. United States, 344 U.S. 604 (1953).

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Hugh C. Humphreys, James M. Brachman, and John S. Martin, Jr. (S.D. N.Y.)

RIGHT TO COUNSEL

Sixth Amendment Held Not to Require Suppression of Otherwise Voluntary Confession Made Subsequent to Presentment before Commissioner But before Defendant Is Represented by an Attorney. Jackson v. United States (D.C. Cir., decided August 13, 1964). Appellant was arrested in New York at 3:20 a.m. on September 15, 1961, on a Federal warrant charging him with felony-murder in the District of Columbia. He was immediately advised by the arresting agents "that he did not have to make any statement, that any statement he did make would be used against him in a court of law, and that he was entitled to an attorney." At 11:00 a.m. that morning he was taken before the United States Commissioner, who informed him of the charges against him and of his rights to remain silent and to have an attorney. A removal complaint was prepared, and the next afternoon at about 1:30 p.m. two officers of the District of Columbia Metropolitan Police arrived in New York. Appellant consented to see these officers, who advised him that he did not have to speak to them. Appellant "sat there for a few minutes and then said he would like to tell [the officers] about it." The resulting confession was used by the prosecution at the trial.

The Court held first that there was no evidence that the confession had been compelled, and noted that there is no requirement that counsel be appointed at the preliminary hearing. It then determined that neither Massiah v. United States, 377 U.S. 201 (1964) nor Escobedo v. Illinois, U.S. , 32 U.S.L. Week 4605 (June 22, 1964) requires the exclusion of otherwise voluntary confessions made before an accused has expressed any desire for an attorney but after he has been thoroughly advised of his rights to counsel and to remain silent. The Court held the rule of Escobedo to be limited, as stated by the express language of the Supreme Court, that, when the purpose of the questioning is to elicit a confession and when the accused states that he wishes to consult with his previously retained attorney, the Sixth Amendment requires exclusion of subsequently obtained confessions. Massiah was distinguished on the ground that the defendant in that case had been indicted

and had retained counsel, and that his co-defendant, secretly cooperating with the Government, deliberately enticed him into an unwitting confession. The court noted that while many lawyers believe that in no case should any statement by a defendant be used to convict him, no such proposition has yet been announced by the Supreme Court. Neither has the Court held that no statement by any uncounseled defendant may be used against him. Therefore, since appellant had no absolute right to counsel at the preliminary hearing, had not requested counsel and was not represented by counsel, and had been warned of his rights three times, once by the United States Commissioner, there was no violation of a constitutional right in permitting his voluntary confession to be used at his trial.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Frank Q. Nebeker, Gerald A. Messerman and Frederick G. Smithson (Dist. of Col.)

MAIL FRAUD
18 U.S.C. 1341

Admissibility of Testimony Concerning Written Complaints Made about Defendants' Operations. United States v. Isidore Press, et al. (C.A. 2, August 11, 1964). D.J. File 36-78-14. Press and others were convicted by a jury in the United States District Court, Burlington, Vermont, of mail fraud and conspiracy by inducing membership in a mail order club through misrepresentations and failing to furnish catalogs, merchandise, or refunds to members. The defendants urged on appeal among other things that the trial court erroneously admitted testimony of witnesses to the effect that they had received numerous letters from members expressing dissatisfaction with various facets of the defendants' operation and that they had brought these letters to the attention of the defendants. (The letters themselves were never received in evidence.)

The Court of Appeals held that although evidence that complaints had been received would not have been admissible to show that members had in fact not received catalogs, merchandise, or refunds, "evidence that there had been complaints which were called to appellants' attention was relevant on the issue of appellants' intent and good faith." The inference might readily be drawn, said the court, that since the appellants knew that members were being misled by the solicitation literature and that there was general dissatisfaction with the way they were conducting their affairs, continued operation despite this knowledge showed the existence of a scheme to defraud. The evidence was held not to be hearsay, "since it was not offered to show the truth of the charges in the complaints."

Staff: United States Attorney Joseph F. Radigan; Assistant United States Attorney John H. Carnahan (D. Vt.); Michael T. Epstein (Criminal Division).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Alien Held Deportable Because of Fraudulent Marriage to United States Citizen and Ineligible for Discretionary Relief Because of Commission of Adultery. Giacomo D'Andrea v. INS; CA 6, No. 15744; August 17, 1964.

Petitioner sought review of an order for his deportation and the denial of his application for voluntary departure. He is an Italian national admitted to the United States on a non-quota immigrant visa issued to him on the basis of his marriage to a citizen of the United States. After an administrative hearing he was found deportable on the ground that his immigrant visa had been procured by fraud, it appearing that he had failed to fulfill his marital agreement which was entered into for the purpose of procuring his entry as an immigrant. He was ruled ineligible for the privilege of voluntary departure because he was not a person of good moral character, having committed adultery.

Petitioner challenged the sufficiency of the evidence to support the order of deportation and the finding that he was not eligible for voluntary departure. The Sixth Circuit was convinced that there was abundant evidence to support the deportation order even though some of it was conflicting. The Court pointed out that the facts, that the petitioner and his wife never lived together after the marriage ceremony was performed, that he never supported her and that he later obtained a divorce from her, supported the administrative finding that the sole purpose of the petitioner's marriage to a United States citizen was to evade the immigration laws. The Court also sustained the administrative finding that petitioner had committed adultery, observing that while married he had sexual relations with a single woman and that from this relationship one child was born and another conceived. Judgment was entered in favor of the respondent.

Staff: United States Attorney Joseph P. Kinneary, Assistant United States Attorney Charles Heyd (S.D. Ohio) Kenneth C. Shelver and Eric J. Byrne (Criminal Division)

IMMIGRATION

Court of Appeals Refuses to Review Deportation Order and Denial of Waiver of Foreign Residence Requirement. Ricardo Vallejo Samala v. INS; CA 5, No. 20777, August 26, 1964.

The petitioner, an alien, requested review of an order for his deportation and an administrative action taken by a District Director of the Immigration and Naturalization Service prior to the deportation hearing.

Petitioner was admitted to the United States as an exchange visitor under the United States Information and Educational Exchange Act of 1948. After entry he sought to acquire permanent residence status. To qualify for this status he had to satisfy certain provisions of the Information and Educational Exchange Act. Under this Act an exchange visitor may not obtain permanent residence unless he has departed from the United States and resided for an aggregate of at least two years in a cooperating country, or unless he obtains a waiver of the foreign residence requirement. A waiver may be granted upon the favorable recommendation of the Secretary of State pursuant to the request of a District Director of the Immigration and Naturalization Service if the Director determines that the departure from the United States of the exchange visitor would impose exceptional hardship upon the exchange visitor's citizen or resident alien spouse or child.

Petitioner has a citizen wife and child. He applied to a District Director for a waiver of the foreign residence requirement and it was denied. After an administrative deportation hearing an order was entered permitting him to depart voluntarily but providing that in the event he did not so depart an order for his deportation would be entered. Petitioner did not appeal from this order and refused to depart from the United States. When an order for his deportation was entered he initiated this review proceeding.

The Fifth Circuit found that petitioner was not entitled to review of his deportation order under Section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a, because he had failed to exhaust his administrative remedies by appealing to the Board of Immigration Appeals. Petitioner argued that his failure to appeal was due to the denial to him in the deportation hearing of the assistance of counsel. The Court answered this argument by finding that he was fully advised in the hearing as to his right to counsel and voluntarily waived it.

As to petitioner's request that the Court review the District Director's denial of his application for waiver of the foreign residence requirement it was held that this administrative order was not reviewable under Section 106 even under the liberal construction of such section in Foti v. INS, 11 L. ED. 2d 281. The petition for review was dismissed.

Staff: Herbert J. Miller, Jr., Assistant Attorney General
Kenneth C. Shelver and Don R. Bennett (Criminal Division)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Passport Replevin Action. United States v. Lillian Redfern (W.D. N.C.) Charlotte Civil No. 1920. D.J. File No. 146-1-51-17736. Lillian Redfern was one of the fifty-nine Americans who traveled to Cuba in 1963 under the sponsorship of the Student Committee for Travel to Cuba in violation of the travel restrictions promulgated by the State Department. Public Notice 179 dated January 16, 1961, 26 F.Reg. 492, entitled "Restrictions on Travel to and in Cuba." Upon her return the State Department initiated administrative proceedings to invalidate her passport because of her illegal travel. Miss Redfern did not contest this administrative action nor did she return her finally withdrawn passport in compliance with the demand made on her by the State Department.

In response to a request by the State Department that we replevy her passport for physical cancellation, a summons and complaint in the nature of replevin and an order and affidavit for claim and delivery proceedings were served on Miss Redfern on July 27, 1964, at which time she surrendered her passport to the United States Marshal. She posted no bond for the return of her passport.

Miss Redfern did not answer the complaint and a motion was made for judgment by default. Judgment based thereon was entered on August 20, 1964 by Chief District Judge Craven and her passport has been forwarded to the State Department for physical cancellation.

Staff: United States Attorney William Medford and Assistant United States Attorney James O. Israel, Jr. (W.D. N.C.) and Benjamin C. Flannagan (Internal Security Division).

Conspiracy, Misuse of Passport and Unlawful Departure from the United States. United States v. Morris and Mollie Block (E.D. N.Y.) D.J. File 146-1-51-2696.

On June 25, 1964, the defendants, Morris and Mollie Block, pleaded not guilty to a ten-count indictment charging them in Count I with conspiracy to violate Sections 1542 and 1544 of Title 18, and Section 1185(b) of Title 8, United States Code, and charging Morris Block in the other nine counts with the substantive violations of these statutes. On September 3, 1964, before United States District Judge Leo F. Rayfiel, the defendant, Morris Block, entered a plea of guilty to Count II of the indictment which charged him with an attempt to use a United States passport issued by reason of false statements in violation of 18 U.S.C. 1542. The defendant was continued on bail pending the imposition of sentence on October 8, 1964. The case against the defendant, Mollie Block, was likewise adjourned to that date.

Staff: United States Attorney Joseph P. Hoey (E.D. N.Y.); John H. Davitt, Roger P. Bernique (Internal Security Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Internal Revenue Summons; District Court In Civil Suit Orders Permanent Suppression of Illegally Seized Evidence For Criminal and Civil Purposes Even Though No Criminal Action Had Even Been Contemplated at the Time the Evidence Had Been Voluntarily Turned Over to an Internal Revenue Agent by the Taxpayer's Accountant. Dorothy Hinchcliff v. James M. Clarke, et al. (N.D. Ohio, May 13, 1964). (CCH 64-2 U.S.T.C. ¶9548). A Revenue Agent, in auditing income tax returns filed by a taxpayer who had died after the returns were filed, discovered evidence of fraud in earlier years which had been previously examined and obtained from the taxpayer's accountant, without a summons, copies of the income tax returns for these years and work papers of the accountant. Later, the agent returned to the accountant's office to obtain additional records and, at that time, served a summons for all such records. After being advised by the attorney for the taxpayer's estate, the accountant refused to comply with the summons.

An action was then commenced by the Government before the United States Commissioner to enforce the summons requirements. Later, the wife of the deceased taxpayer, who was the executrix of his estate, brought suit in the District Court to restrain investigation of the joint liability of herself and her deceased husband for the "earlier years"; to restrain the Revenue Agent from acquiring the summoned records; and to quash the summons.

This complaint of the taxpayer's wife was dismissed, but she was allowed to intervene in the enforcement suit pending before the United States Commissioner, and, later, this action was transferred to the District Court.

Apparently, although there is no docket record of this, the Court assumes that an "oral motion to suppress" the evidence originally received by the Revenue Agent had been made. Such a motion would be in the nature of a motion under Rule 41(e) of the Federal Rules of Criminal Procedure.

In its memorandum, the Court holds that the documents obtained shall be suppressed from use for any purpose either criminal or civil. The Court's rationale is based upon the judicially constructed exclusionary rule which bars the Government from introducing evidence at a criminal trial and which is designed to effectuate the mandate of the Fourth Amendment against unlawful searches and seizures. In so holding, the Amendment against unlawful searches and seizures. In so holding, the Court reasoned that its jurisdiction was not limited to the cases specifically enumerated in Rule 41(e) of the Federal Rules of Criminal Procedure but that such jurisdiction encompasses all instances in which evidence was obtained in violation of the Fourth Amendment. The Court relied upon Lord v. Kelley, 223 F. Supp. 684 (D. Mass.), in which the District Court enjoined the Government from using in any proceeding information or clues derived from certain records while held by the Government illegally. However, there, the Court refused to rule that the Government would be precluded from requiring production of the same records in a

lawful manner, and an appeal by the taxpayers and the accountant from this portion of the order was dismissed by the First Circuit Court of Appeals for want of jurisdiction. Lord v. Kelley, 64-2 U.S.T.C. ¶9622.

The Court has not yet entered an order in this suit. When the order is entered an appeal will be considered by the Government.

The Tax Division should be promptly advised of any suits or motions in which the suppression of evidence for civil as well as criminal purposes is sought.

Staff: United States Attorney Merle McCurdy; Assistant United States Attorney Harry E. Pickering (N.D. Ohio); Frank Violanti and Robert A. Maloney (Tax Division).

Statute of Limitations; Form 900 Waivers Extending Statute of Limitations to a Date Certain Held Not to Reduce Extension Already in Effect as Result of Waivers Contained in Rejected Offers in Compromise. United States v. Charles E. Heyl, Jr., et al. (S.D. N.Y., April 22, 1964). (CCH 64-2 U.S.T.C. ¶9588). In this suit, the Government sought to foreclose tax liens against certain real property of the taxpayer. The only issue concerned the statute of limitations upon instituting such a suit. The taxpayer had submitted two offers in compromise each of which contained a provision extending the applicable statute of limitations for the period of the consideration of that offer and one year thereafter. Subsequently, the defendant filed two Form 900 Waivers, the second of which extended the statute of limitations to December 31, 1960. The question which arose was whether the extension of the statute of limitations to a date certain, effected by the waivers; supplanted the extensions contained in the two offers in compromise. The taxpayer contended that the Form 900 extension to December 31, 1960, was controlling and that the commencement of the action on June 29, 1962, was, therefore, untimely. The Court disagreed, holding that the Government in no way relinquished its rights under the rejected offers in compromise, which had extended the statute until well after the commencement of this action, and that the Form 900 Waivers were merely unilateral acts of the taxpayer which could not operate to derogate the rights of the Government. The Government's Motion for Summary Judgment was granted.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Stephen Charnas (S.D. N.Y.); and Arnold Miller (Tax Division).

Jurisdiction of District Courts; Extra-Territorial Service of Summons Pursuant to New York "Long-Arm" Statute Upheld. United States v. The Montreal Trust Company, et al. (S.D. N.Y., May 1, 1964). (CCH 64-1 U.S.T.C. ¶9477). This action was commenced by the United States against the executors of the estate of Isidor J. Klein, a citizen and resident of Canada, who died on June 14, 1955, to recover federal income taxes allegedly owed by Klein for the years 1944, 1945 and 1946, which, together with penalties and interest, totalled $9,862,053.34. The executors are a Canadian banking firm and an individual resident of Canada.

On September 9, 1963, pursuant to Sections 302 and 313 of the Civil Practice Law and Rules of New York, the so called "long-arm" statute, the United States Vice-Consul in Vancouver, B.C., delivered a copy of the summons and complaint in Vancouver to the Montreal Trust Company's Vancouver branch and Tillie V. Lechtzier, a resident of Canada. The Montreal Trust Company moved to set aside the purported service on the ground that the New York statute had no application in a federal court and that its application in this case so as to validate service beyond the boundaries of the United States would be unconstitutional.

The Court in a far reaching decision, in which the amendments of July 1, 1963, to Rules 4(e) and 4(f) of the Federal Rules of Civil Procedure were thoroughly analyzed, concluded that, as a matter of construction of the rules, the effect of amended Rules 4(e) and 4(f) is to permit service of summons upon a defendant in a foreign country in a case in which the New York statute authorizes such service. The court further held that such a construction of Rule 4 did not deprive the defendants of due process of law in violation of the Fifth Amendment.

Staff: United States Attorney Robert M. Morgenthau and
Assistant United States Attorney Thomas Baer
(S.D. N.Y.).

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