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UNITED STATES ATTORNEYS BULLETIN

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COMMUNITY SERVICES

In a recent letter to United States Attorney Raymond Del Tufo, Jr., District of New Jersey, the Men's Club of the All Saints Episcopal Church, Millington, New Jersey, expressed its appreciation of the United States Attorney's courtesy in providing the services of Assistant United States Attorneys Everett T. Denning and James C. Pitney as speakers at a recent meeting of the club. The letter stated that the program was the best yet presented by the club and that the question and answer period held by Messrs. Denning and Pitney was extremely interesting.

The above incident is an excellent example of that identification of the United States Attorney's office with the life of the community which is such an important factor in fostering mutual cooperation.

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A recent innovation instituted in the office of United States Attorney Robert Tieken, Northern District of Illinois, is a constructive step in the direction of making the younger citizens of the community aware of the achievements of the United States Attorney's office in their locality. Under the plan, tours are arranged for sophomore, junior and senior students of the Chicago public and parochial high schools. The tour includes visits to the offices of the United States Attorney and the United States Marshal, the main post office, and the local offices of the F.B.I., United States Secret Service, Bureau of Narcotics, and Immigration and Naturalization Service. There is also a visit to the local Federal District Court to observe an actual judicial proceeding. The tour service is operated by the liaison officer between the United States Attorney's office and the Chicago Police Department. Groups of 25 students or less are handled on each tour which begins about 9:30 in the morning and ends about 4:30 in the afternoon. In inaugurating this program Mr. Tieken sent a letter of invitation to the Superintendent of the public and parochial high schools of the city, outlining the purposes of the program and the points of interest to be covered. A news release in the Chicago Daily News also directed attention to the program. At the close of the year the United States Attorney's office had some 40 schools listed for tours to be conducted during the early part of 1955.

At this time when public attention is centered on the causes of juvenile delinquency and the establishment of methods to combat this social problem, the foregoing program designed to acquaint young people with the nature of the law and the retributive processes which follow its violation, should prove a most constructive step in the campaign against delinquency among minors.

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PUBLISHED ARTICLES

In recent issues of the Bulletin the work of various United States Attorneys and their Assistants in preparing for publication in law reviews and other periodicals articles on the recent changes in Section 6325(b)(2) of the Internal Revenue Code of 1954, has been commended. Another approach in acquainting local practitioners with such changes was taken by United States Attorney B. Hayden Crawford, Northern District of Oklahoma, who prepared an informative letter on the subject and forwarded it to the members of each County Bar Association in the district with the request that they publicize the contents thereof to all lawyers in their particular county. As a further step in disseminating this important information, the contents of the letter were published in "Bench and Bar," a local publication mailed to all lawyers in Tulsa County.

The Department is gratified to note this response on the part of the United States Attorneys to its request that the changes in the foregoing section be published as widely as possible to local practitioners.

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CORRESPONDENCE

The attention of the United States Attorneys is directed to the necessity for proper addressing of correspondence to other United States Attorneys. Letters should be addressed to "United States Attorney" rather than to the particular individual who is the current incumbent of the office. This will eliminate any confusion which might arise upon the resignation of one individual and the appointment of another. The list of United States Attorneys' addresses as set out in the Manual is a current one, and this list should be consulted for the proper forwarding of mail.

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SALARIES

The attention of all United States Attorneys is directed to the fact that the provisions of Section 202, Public Law 195, relating to the arbitrary fixing of salaries, have been repealed by Public Law 471, 83rd Congress, approved July 2, 1954.

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COMMENDATION TO EMPLOYEE

The Department joins with United States Attorney Clifford M. Raemer, Eastern District of Illinois, in the tribute recently paid to the untiring efforts and devotion to duty of Miss Amelia Bareis who has served 26 years in the United States Attorney's office. During that period Miss Bareis has

accumulated 1017 hours of sick leave. In commending Miss Bareis on this record, Mr. Raemer stated that she had consistently placed duty above personal interests, that her record of accumulated leave did not reflect the innumerable hours of overtime performed by her without compensation, and that the record she has established is in the highest tradition of the Federal Civil Service.

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JOB WELL DONE

In three recent editorials in the Cleveland Press and the Plain Dealer the work of United States Attorney Sumner Canary, Northern District of Ohio, and his staff, notably Assistant United States Attorney Eben H. Cockley, in a recent case which resulted in the conviction of a dozen narcotics violators, was lauded. In discussing the elimination of these criminal elements from the community and the effective disruption of a large scale dope ring, the editorials gave special commendation to Mr. Canary and Mr. Cockley for the energy, enthusiasm, and shrewdness which they displayed in the case and deemed it not only an exceptional performance but a promising pattern for the future.

The Regional Administrator of the Securities and Exchange Commission has written to the Attorney General commending United States Attorney Anthony Julian, District of Massachusetts, and Assistant United States Attorney James P. Lynch, Jr. for the excellent manner in which they prepared and presented to a grand jury a case involving violations of the laws relating to securities and mail fraud. The letter stated that the case involved complex accounting problems and that the work of Mr. Julian and Mr. Lynch in the proceedings was especially commendable.

In a letter from the Regional Counsel of the Internal Revenue Service, United States Attorney Raymond Del Tufo, Jr., District of New Jersey, and his staff were commended for their splendid cooperation in a recent Internal Revenue prosecution. The work of Assistant United States Attorney Charles H. Nugent was singled out for particular attention in connection with the successful conclusion of the case.

In a recent report to the Department on the status of R.F.C. disaster loan matters in litigation, the General Counsel of the Small Business Administration paid tribute to the wholehearted support and cooperation received from Departmental representatives in working out the details involved in the transfer of jurisdiction over such cases to the Department of Justice. The General Counsel stated that, according to reports from the Regional Offices, the United States Attorneys in the various districts have given their full cooperation, with the result that the transition process has operated smoothly and without any set-back to the interests of the Government.

The Under Secretary of the Department of Agriculture has written to United States Attorney Robert Tieken, Northern District of Illinois, commending the outstanding service which Assistant United States Attorney Edward J. Calihan rendered in connection with 21 criminal proceedings

against dealers and weighmasters charged with weight fraud under the Packers and Stockyards Act at the Union Stock Yards in Chicago. The letter conveyed the sincere gratitude of the Department of Agriculture for Mr. Calihan's splendid cooperation, and stated that his work, which contributed substantially to the successful prosecution and conviction of the defendants, reflects great credit upon the United States Attorney's office. The Under Secretary observed that the results obtained will be of great help to the Department of Agriculture in the future administration of the Act.

United States Attorney Raymond Del Tufo, Jr., District of New Jersey, has received a letter from counsel for the Federal Reserve Bank of New York expressing his appreciation and that of the Bank for the splendid help rendered by Assistant United States Attorney Herman Scott in securing the successful conclusion of certain proceedings in a recent bankruptcy case.

In a letter to Assistant United States Attorney George J. Rossi, District of New Jersey, the State Supervisor of the Cigarette Tax Bureau conveyed his gratitude for the cooperation and assistance rendered by Mr. Rossi and the United States Attorney's office in the successful elimination of the illegal mail order cigarette business in that district.

United States Attorney George E. MacKinnon, District of Minnesota has forwarded to the Department a copy of a letter from Chief Post Office Inspector D. H. Stephens congratulating Assistant United States Attorney Keith Kennedy for the excellent manner in which he presented a very difficult mail fraud case involving operators of "work-at-home" schemes (United States v. Richard P. Wilson, reported at p. 7 , infra). Mr. Stephens commented that the results achieved should be of great significance to operators of "work-at-home" schemes.

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INTERNAL SECURITY DIVISION

Assistant Attorney General William F. Tompkins

SUBVERSIVE ACTIVITIES

Smith Act - Conspiracy to Violate. United States v. Flynn, et al. (S.D. N.Y.) Elizabeth Gurley Flynn and twelve other Communist Party leaders were convicted on January 21, 1953 under 18 U.S.C. 371 for conspiracy to violate the Smith Act. On October 14, 1954, the Court of Appeals for the Second Circuit unanimously affirmed the conviction of the defendants. A petition for writ of certiorari was filed in the Supreme Court on November 15, 1954. On January 10, 1955, certiorari was denied by the Supreme Court and subsequently bail was revoked as to all defendants except Louis Weinstock who is now on trial in the District of Columbia in a false statement case. The defendants who were taken into custody in addition to Flynn were: Pettis Perry, Claudia Jones, Alexander Bittelman, Alexander Tractenberg, Victor Jeremy Jerome, Albert Francis Lannon, Arnold Samuel Johnson, Betty Gannett, William Wolf Weinstone, Jacob Mindel, and George Blake Charney. On January 12, 1955, Justice Frankfurter, acting on an application by petitioners for withholding of the order denying the petition of certiorari, declared that the order denying certiorari would automatically issue at noon on Monday, January 17, 1955, pending substantiation of a petition for rehearing. No further action staying the order was taken by Justice Frankfurter.

Smith Act - Conspiracy to Violate. United States v. Bary, et al. (D. Colo.) On August 9, 1954, seven Communist Party leaders were indicted under 18 U.S.C. 371 for conspiracy to violate the Smith Act. Following a motion for reduction of bail and a hearing thereon, the District Court fixed bail in the following amounts: Arthur Bary $30,000; Anna Bary $25,000; Lewis Martin Johnson $15,000; Harold Zepelin $15,000; Joseph Scherer $5,000; Maia Scherer $5,000 and Patricia Blau $10,000. (Patricia Blau's bail was later reduced to $5,000 by the District Court.) All defendants except Mr. & Mrs. Scherer and Patricia Blau appealed the bail question to the Circuit Court of Appeals for the Tenth Circuit which on November 16, 1954, upheld the order of the District Court fixing bail in the amounts indicated above. Zepelin was released on bail in the amount of $15,000. On December 17, 1954, Anna Bary, Arthur Bary and Lewis Martin Johnson, the three defendants who have not been released on bail, requested Justice Clark of the Supreme Court to set bail in a less sum than provided by the District Court. On December 27, 1954, the three defendants filed in the Supreme Court a petition for writ of certiorari in connection with the order of the Circuit Court of Appeals affirming the order of the District Court denying petitioners' renewed motion for reduction of bail. On January 10, 1955, the Supreme Court denied the petition for writ of certiorari and also denied the motion to set bail in a less sum.

Espionage. United States v. Joseph Sidney Petersen, Jr. (E.D. Va.) As reported in the last issue of the Bulletin (Jan. 7, 1955), Petersen had pleaded guilty on December 22, 1954 to the second count of an indictment which charged him with having used in a manner prejudicial to the safety or interest of the United States classified information concerning the communications intelligence activities of the United States and foreign governments in violation of 18 U.S.C. 798. On January 4, 1955, Judge Albert V. Bryan heard pre-sentence evidence from the Government as to the gravity of the offense to which Petersen pleaded guilty, and in addition, heard evidence from the defense in mitigation. At the Government's request and with the consent of the defendant, part of the testimony was taken in chambers to prevent unnecessary compromise of security information. At the conclusion of the hearing, Petersen was sentenced to serve seven years.

Staff: United States Attorney Lester S. Parsons, Jr. (E.D. Va.) John F. Reilly (Internal Security Division).

False Statement - Interview with Agents of Federal Bureau of Investigation. United States v. Wilma Lucille Bond (S.D. Ohio). On June 16, 1953, Bond was indicted in Dayton, Ohio, for making a false statement to agents of the Federal Bureau of Investigation in violation of 18 U.S.C. 1001 in denying membership in the Communist Party. The interview with Bureau agents was in connection with a non-Communist affidavit filed by Bond under the Labor Management Relations Act of 1947 as an officer of Local 755, United Electrical, Radio and Machine Workers of America. After entering a plea of not guilty, the defendant subsequently changed her plea to guilty. On November 12, 1954, defendant appeared before Judge Cecil, United States District Court at Dayton, Ohio, at which time she restated her plea of guilty and was sentenced to eighteen months in the custody of the Attorney General.

Staff: Assistant United States Attorney James Rambo (S.D. Ohio)

CRIMINAL DIVISION

Assistant Attorney General Warren Olney III

MAIL FRAUD

Work-at-Home Scheme. In United States v. Richard P. Wilson, aka Dick Wilson (D. Minn.), an indictment was returned charging defendant in 16 counts with having devised a scheme to defraud, in the furtherance of which the mails were used in violation of 18 U.S.C. 1341. The scheme was to defraud persons who were interested in obtaining part-time employment in their homes as sorters, assemblers and addressers of mail for the defendant, operating under the style of "International Enterprises." The defendant placed advertisements in various magazines representing that his business was a large mail-order concern in Chicago, Illinois, and that he wished to employ persons to assemble, sort and address mail on a part-time basis, payment to be made on a piece-work rate. Those who responded to the advertisements were requested to remit the sum of $5 to the defendant, who would then issue instructions as to the manner in which the work was to be performed, and by which the victims would be able to earn $25 weekly. After the receipt of the payment of $5 made by the victims, the defendant failed to supply them with any instructions or to furnish any material to be assembled.

A verdict of guilty was returned by a jury on 11 counts of the indictment. On December 21, 1954, the defendant was fined $1,000 on each of 10 counts, totalling $10,000, and on the 11th count imposition of sentence was suspended, the defendant being placed on probation for 5 years.

Staff: Assistant United States Attorney Keith Kennedy (D. Minn.).

FOOD AND DRUG

Indiscriminate Dispensing of Habit-Forming Drugs. United States v. Homer N. Archambault (D. Colo.). The defendant was charged in a 3-count information with the dispensing of Sodium Pentobarbital tablets without a physician's prescription. The case was tried to a jury, and a verdict of guilty returned. The court sentenced the defendant to serve 10 months in jail on counts 1 and 2 concurrently, to pay a $500 fine on these counts, and a $1,000 fine on count 3. Defendant was placed on probation on count 3 for a period of three years. Notice of appeal has been filed. The drug involved is habit-forming and widely used by unstable individuals with suicidal tendencies.

Staff: Assistant United States Attorney James W. Heyer (D. Colo.).

Intervention. United States v. The Wilhelm Reich Foundation et al. On March 19, 1954, a decree was entered in the District Court for the District of Maine under the Federal Food, Drug, and Cosmetic Act enjoining the defendants, their officers, agents, servants, employees, attorneys, etc., and all persons in active concert or participation with any of them from the distribution in interstate commerce of certain devices designated as "Orgone Energy Accumulators," which were falsely represented in the labeling as beneficial in the cure, mitigation, treatment and prevention of innumerable diseases and conditions. (See United States Attorneys' Bulletin, Vol. 2, No. 9, page 10.) Thereafter, and on May 5, 1954, a number of practicing psychiatrists filed an application for intervention contending that Orgone Energy Accumulators were necessary in their practice and petitioned the court to set aside the injunction decree and to permit them to intervene and contest the action. These intervenors alleged that they were not adequately represented in the proceeding; that they are bound by the decree because it was designed to and actually does interfere with basic functions of their practice of medicine which is a right they should have the opportunity to protect, and that, therefore, they had the absolute right to intervene under Rule 24 (A)(2) of the Federal Rules of Civil Procedure, and, further, that their claims and defenses involved questions of law and fact identical with those of the original proceeding, and that permission to intervene should be granted under Rule 24 (B)(2).

In a well-considered written opinion, dated November 17, 1954, the petition was denied. The court pointed out that the crucial prerequisite to intervene under Rule 24 (A)(2) is whether the applicant may be bound by the judgment in the action; that it is generally held an applicant may be bound within the meaning of the rule only when he may be subject to res judicata, and as a general rule no person is bound by an in personam judgment arising from an action in which he was neither served with process nor given an opportunity to litigate his claims or defenses. Since the applicants were not parties to the suit, did not claim to be engaged in the manufacture and distribution in interstate commerce of Orgone Energy Accumulators, and were not in any respect legally associated with the named defendants, they would not be bound by the decree or liable for acts done contrary thereto. The fact that the applicants may subject themselves to contempt proceedings if they act in concert with the named defendants in violating the decree does not alter the basic nature of the original proceeding. They are subject to contempt proceedings only in the event that they may "enable the defendants to circumvent its terms by performing activities through them." Accordingly, it was held that applicants did not have an absolute right to intervene under Rule 24 (A)(2) because the decree was not and could not be res judicata as to them. It was also held that in the circumstances shown the application was not timely made so that intervention should not be permitted under Rule 24 (B)(2).

Staff: United States Attorney Peter Mills (D. Maine).

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

False Reports and Records. United States v. Edward J. Dostal (D. Mass.). The defendant handler, doing business under the Springfield Milk Marketing Order, issued under the Agricultural Agreement Act of 1937, as amended, was charged in a 14-count indictment with the submission of false and fraudulent reports to the Marketing Administrator with respect to the receipt of milk handled, in violation of 18 U.S.C. 1001. Upon a plea of guilty, the court imposed a fine of $7,500 and a suspended sentence of one year. The defendant paid the fine and also paid the sum of $10,187.61 to the Marketing Administrator to meet the civil liabilities arising in connection with the transactions complained of. The case presented a complicated situation requiring extensive investigation and thorough preparation with respect to innumerable transactions involving purchase of milk from producers.

Staff: Assistant United States Attorney Jerome Medalie (D. Mass.)..

LIQUOR REVENUE

Forfeiture of Vehicles -- Grant of Remission to Intervening Claimant -- 18 U.S.C. 3617. In United States v. Interstate Securities Company, Inc. and One 1952 Dodge Convertible etc., the Court of Appeals for the Tenth Circuit reversed a decision of the United States District Court for the Northern District of Oklahoma which had granted remission of the forfeiture of a vehicle used in connection with a violation of the internal revenue laws relating to liquor. The Court held that where the claimant failed to make the inquiries required by 18 U.S.C. 3617(b) (3), mere absence of any record or reputation of the purchaser of the vehicle with any of the local law enforcement agencies in the Tulsa area, where the sale was made and where the purchaser resided, did not authorize the Court to grant remission where it appeared that the records of the principal office of the Alcohol and Tobacco Tax Division at Oklahoma City, where that agency's records were maintained, reflected the fact that the purchaser had a record as a violator of federal liquor laws.

In deciding that the lower court had erred when it interpreted the statute as not requiring a claimant to go beyond the answer it would have received from the sheriff of Tulsa County, the chief of police of the City of Tulsa, or the principal federal internal revenue officer or federal law enforcement officer in the Tulsa locality, the court indicated that if inquiry had been made of any of such officers, a negative answer from any one would have been sufficient; but in the absence of any such inquiry, the claimant was bound by the record as it was maintained by any of the law enforcement agencies designated in the statute.

It was noted that if inquiry at the headquarters of the principal federal internal revenue officer is inconvenient and burdensome, it can be obviated by appropriate inquiry from the designated local agencies.

Staff: United States Attorney B. Hayden Crawford; Assistant United States Attorney Charles H. Froeb on the brief (N.D. Okla.).

In United States v. The Chieftain Pontiac Company and One 1950 Oldsmobile, etc., decided December 21, 1954, the Tenth Circuit likewise reversed a decision of the District Court for the Western District of Oklahoma granting remission of forfeiture to a claimant holding a lien on a vehicle used in a liquor violation. In this case the claimant had sold the vehicle to one Henry James, who at the time of the purchase used the name Jesse Nichols. Noting that the testimony of an employee of General Motors Acceptance Corporation, who allegedly made the statutory inquiry of the Alcohol and Tobacco Tax Division on behalf of the dealer, to the effect that he always made inquiry of the Alcohol and Tobacco Tax Division and a notation of "No Record" in his records (admittedly not made by the witness) warranted his assuming that an inquiry had been made of that agency, amounted only to pure speculation where the records of the Alcohol and Tobacco Tax Division showed no inquiry as to either record or reputation, the court determined that the claimant had failed to sustain its burden of showing that it had made the necessary inquiry.

In view of the fact that in this case both the actual purchaser, Henry James, and the person whose name he assumed had records and reputations as liquor violators, the court apparently did not deem it necessary to decide whether inquiry as to the record and reputation of the nominal purchaser would have been sufficient to satisfy the statutory prerequisite, or whether it would have been incumbent upon the dealer to ascertain the true identity of the person with whom it dealt and make inquiry as to his record and reputation.

Staff: United States Attorney Paul W. Cress; Assistant United States Attorney H. Dale Cook (W.D. Okla.).

CONNALLY "HOT OIL" ACT

United States v. Texas Gulf Producing Company (W.D. La.). An information filed on July 23, 1954, charged the Texas Gulf Producing Company in three counts with shipping and transporting and causing to be shipped and transported contraband oil in interstate commerce in violation of the Connally "Hot Oil" Act (15 U.S.C. 715 et seq.). The defendant entered pleas of guilty on January 4, 1955, and was fined in the total sum of $2700.

Staff: United States Attorney T. Fitzhugh Wilson (W.D. La.).

CITIZENSHIP

Expatriation - Section 401(a), Nationality Act of 1940. John Foster Dulles v. Marietta Grazzia Carmela Iavarone (C.A.D.C., December 16, 1954). Appellee filed a complaint against the Secretary of State on April 8, 1952, under Section 503 of the Nationality Act of 1940 (formerly 8 U.S.C. 903) seeking a declaratory judgment that she was a citizen of the United States. She was born in the United States on February 1, 1922. Her father, a native and citizen of Italy, was naturalized here on June 18, 1928. She and her father took up residence in Italy in 1931 and continued to reside there until after her 23rd birthday. The Secretary of State contended that appellee was a dual national of the United States and Italy at birth; that under Italian law, she lost her Italian nationality when her father became an American citizen in 1928; that under Italian law, both she and her father re-acquired Italian nationality after two years residence in Italy; and that, under Section 401(a) of the Nationality Act of 1940 (formerly 8 U.S.C. 801(a)), she was expatriated by failure to return to the United States by her 23rd birthday. The district court granted her motion for summary judgment, construing Mandoli v. Acheson, 344 U.S. 133, as evincing a Congressional policy not to subject native-born citizens to the hazard of election at majority. The Court of Appeals reversed and remanded, pointing out that the Mandoli case arose under the Expatriation Act of 1907, not here involved, and concerned a dual national at birth who had never subsequently acquired foreign naturalization.

Staff: Assistant United States Attorneys
Carl W. Belcher and Lewis A. Carroll
(District of Columbia).

PASSPORTS

Appealability of Order Dismissing Information for Lack of Venue - Defendant's Standing to Appeal. United States v. James Shelley (C.A. 2, December 29, 1954). Shelley was charged by information with misuse of a passport in violation of 18 U.S.C. 1544 in the Eastern District of New York. The case was tried to the court on a stipulation of facts that he had delivered his passport to one Claflin in the Southern District of New York, knowing that the latter intended to use it in obtaining the illegal entry of an alien named Koch. The passport was transmitted to Koch in Europe, who used it in effecting entry into the United States at Idlewild Airport in the Eastern District of New York. Shelley moved for dismissal and for a judgment of acquittal. The district court dismissed for failure to show commission of the offense in the Eastern District of New York, but refused to rule on the other motions going to the merits. Shelley appealed from such refusal and the Government moved to dismiss the appeal, contending (1) that the order below was interlocutory and hence unappealable; and (2) that Shelley had no standing to appeal.

In dismissing the appeal, the Court of Appeals held (1) that an order of dismissal for lack of venue is final and appealable; and (2) that Shelley, as a successful litigant below, has no appealable interest. The court found it unnecessary to consider the Government's contention that Shelley should be held under 18 U.S.C. 2 to have committed a crime in the Eastern District as an aider and abettor of Koch's action at Idlewild, adding, significantly: "He is not injured, and -- luckily for him -- may not appeal."

Staff: Assistant United States Attorney Edgar G. Brisach (E.D. N.Y.).

DENATURALIZATION

Affidavit Showing Good Cause Not Jurisdictional Prerequisite. United States v. Charles Augustine Collins (S.D. N.Y.). Complaint was filed to revoke the defendant's naturalization under Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1451(a). The defendant moved to dismiss the complaint and to vacate a notice to take the defendant's deposition, on the ground that the complaint was not supported by the "affidavit showing good cause" referred to in the statute. There has been a cleavage among the judges in the Southern District of New York on this issue. Such an affidavit had previously been held not to be a jurisdictional prerequisite in United States v. Lustig, 110 F. Supp. 806; United States v. Jerome, 115 F. Supp. 818; United States v. Radzie, 14 F.R.D. 151; and United States v. Ronch (unreported). More recently other judges of that court had concluded that such an affidavit is jurisdictional under the 1952 statute, and that failure to append it to the complaint renders the latter vulnerable on motion to dismiss. United States v. Candela (unreported) October 14, 1954, adhered to on reargument, November 24, 1954; United States v. Zucca (unreported), November 16, 1954. On January 4, 1955, Judge Murphy denied the motion to dismiss, concluding that the issue was settled by the Supreme Court's per curiam affirmance (311 U.S. 616) of Schwinn v. United States, 112 F. 2d 74.

Staff: Assistant United States Attorney George C. Mantzoros (S.D. N.Y.).

ADMINISTRATIVE SUBPOENAS

Authority to Compel Naturalized Citizen to Testify in Denaturalization Investigation. Application of Barnes, etc. (C.A. 2), January 10, 1955 (reported below Matter of Falcone, 116 F. Supp. 464 (N.D. N.Y.); In re Oddo, 117 F. Supp. 323 (S.D. N.Y.)). In the lower courts the power of immigration officials to issue subpoenas under Section 235(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1225(a), was held limited to inquiries concerning aliens.

Despite the expanded language of the 1952 Act, which authorized such compulsion "concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service," the District courts concluded that it did not contemplate the use of the subpoena power in investigations to determine whether good cause exists for the institution of denaturalization proceedings under Section 340 of the Act, 8 U.S.C. 1451. In re Minker, 118 F. Supp. 264 (E.D. Pa.), the opposite conclusion was reached and the court held in contempt a recalcitrant naturalized citizen, the validity of whose naturalization was under scrutiny by the immigration officials. That decision was reversed by the Court of Appeals for the Third Circuit on December 1, 1954 (see Bulletin, Volume 2, No. 26, p. 21) on the ground that the subject of such an inquiry was not a "witness" within the meaning of Section 235(a). Now, to complete the cycle, the Court of Appeals for the Second Circuit has reversed the Falcone and Oddo judgments, and has held that the increased administrative investigatory powers conferred by that section were intended to relate to the enforcement of the 1952 Act as a whole, including the ascertainment of such facts as may tend to support a petition for denaturalization.

Staff: United States Attorney Theodore F. Bowes, Assistant United States Attorney Charles J. Miller (N.D. N.Y.); Herman I. Branse, Immigration and Naturalization Service.

United States Attorney J. Edward Lumbard, Assistant United States Attorney Harold J. Raby (S.D. N.Y.); Lester Friedman, Immigration and Naturalization Service.

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CIVIL DIVISION

Assistant Attorney General Warren E. Burger

COURT OF APPEALS

BANKRUPTCY

Arrangements Under Chapter XI--Jurisdiction Over Claims Informally Scheduled Before Confirmation. In The Matter of Seeley Tube and Box Company (C.A. 3, January 11, 1955). Debtor filed with its petition a list of its executory contracts as required by § 324 of the Bankruptcy Act. The Government terminated two of these contracts for default, and notified debtor that it would be liable for any excess cost on reletting, but filed no proof of claim in the Court. At the confirmation hearing, debtor brought these claims to the referee's attention orally, and mistakenly stated that jurisdiction to allow them would be retained after confirmation under § 369(3) (contracts rejected by debtor). The referee limited the time for filing the Government's proofs of claim and confirmed the arrangement. After the Government filed proofs, debtor moved to bar them under § 367(4). The referee denied the motion but the district court on review granted it. The Court of Appeals reversed and held that jurisdiction had been retained under § 369(2) (claims scheduled but not proved). The debtor had been under a duty, said the Court, to amend his schedules to include these claims, and his oral remarks to the referee had this effect; moreover, the referee was under a duty to correct the schedules, and it is to be assumed he accepted the remarks as an amendment thereto. In the circumstances, the informal scheduling served all of the purposes that a more formal one might have accomplished.

Staff: John J. Cound (Civil Division)

TORTS

Federal Tort Claims Act - Excessive Awards - Power of Court of Appeals to Modify. United States v. Guyer; United States v. Snyder (C.A. 4). In a very significant decision, the Fourth Circuit Court of Appeals has unanimously ruled that the findings of a district court as to damages in suits under the Federal Tort Claims Act constitute "findings of fact" which may be modified on appeal for excessiveness under the "clearly erroneous" test of Rule 52(a) of the Federal Rules of Civil Procedure. The Court, in a per curiam opinion, reduced by $64,750 judgments of the Maryland District Court totaling $180,606.89.

The cases arose as a result of the crash of a B-25 bomber on a home near Andrews Air Force Base in Maryland. In the home at the time, in addition to Sergeant Snyder, the owner, were his wife and two young children, his sister, Mrs. Violet S. Guyer, and Mrs. Guyer's husband, Irvin N. Guyer. Two Snyder children and Mr. Guyer were killed.

Mr. and Mrs. Snyder and Mrs. Guyer were seriously injured. Liability was not contested by the Government. Judgments in the eight cases totaling over $234,000 were awarded to the plaintiffs by the district court, and six of these judgments were appealed by the Government for excessiveness in the amount of the awards. The Court of Appeals modified certain of the awards as follows:

Injured Person	Trial Award	Modified Award
Irvin N. Guyer	$131,250.00	$ 87,500.00
Violet S. Guyer	33,061.89	18,061.89
Snyder's daughter age 8 weeks	8,147.50	5,147.50
Snyder's daughter age 6-1/2 years	8,147.50	5,147.50

The other three judgments appealed from were not disturbed by the Court of Appeals.

This case should be an important precedent in future cases involving excessive awards, for it is a clear expression by the Court of Appeals that it will modify findings as to damages when clearly erroneous. This is especially significant in view of some of the very high awards made in recent years under the Tort Claims Act.

Staff: United States Attorney George Cochran Doub, Assistant United States Attorney Herbert F. Murray (D. Md.)

ADMIRALITY

Operation Under Foreign Registry of Vessel Sold by Maritime Commission to Foreigners on Condition That It Not Be Operated At All, Held Not Violation of Shipping Act of 1916, As Amended. United States v. Tito Campanella Societa di Navigazione (C.A. 4, No. 6822, December 23, 1954). The Samsylarna, a Liberty cargo vessel, built for the Maritime Commission and lend-leased to the British, was torpedoed and sunk off Alexandria, Egypt in 1944. It never was documented under the laws of the United States. In 1949, the Maritime Commission sold the vessel to a Greek citizen on the condition that he scrap or dismantle the vessel and not operate it. The contract further provided heavy liquidated damages for breach of this condition. Thereafter, when the vessel, by this time renamed the Tito Campanella, appeared in Norfolk Harbor under Italian registry, it was seized by the Collector of Customs, and a libel for forfeiture under Section 9 and 41 of the Shipping Act of 1916, as amended (46 U.S.C. 808,839)

was filed in the District Court. The District Court sustained the owner-claimant's exceptive allegations and, on appeal, the Fourth Circuit affirmed.

Noting, in passing, that the third paragraph of Section 9 relating to transfer of vessels owned "* * * by a citizen of the United States and documented under the laws of the United States or the last documentation of which was under the laws of the United States" was inapplicable, the Court held that the second paragraph of that section was likewise inapplicable. The Court read this paragraph, which prohibits operation of vessels purchased from the Commission except under American registry or enrollment and license unless otherwise authorized by the Commission, as limited to sales to American citizens. The Court held 46 U.S.C. 839 also inapplicable on the ground that the approval of the sale by the Maritime Commission was not required.

On the owner's cross-appeal attacking the certificate of reasonable cause because entered without trial on the merits, the Court held that the certificate was properly entered here on the dismissal of the complaint, since the effect of the dismissal was to put an end to the proceeding.

Staff: Melvin Richter (Civil Division)

DISTRICT COURT

DEFENSE PRODUCTION ACT

Multiple Damages, and Award of Attorney's Fees, for Violation of OPS Price Regulations. Water-Rate Issue. United States v. Heggie Corporation. The Government brought suit to recover multiple damages for violation of OPS regulations in sale of steel scrap. The jury found that defendant had acted in bad faith in making the overcharges. The court, however, limited recovery of treble damages for overcharges prior to July 31, 1951, by applying, with respect to such charges, a statutory $10,000 penalty limitation (repealed on the above date), holding that the repeal should not be given retroactive effect. The court also decided that defendant could not compute his ceiling price by deducting a water-borne rate, rather than the rail transport rate, from the standard price, where defendant did not employ water transport in his scrap shipments. The court awarded the Government attorney's fees pursuant to Section 409(c) of the Defense Production Act of 1950.

Staff: Assistant United States Attorney David E. Place (D. Mass.).

SOCIAL SECURITY

Social Security Act -- Finality of Administrative Determination--Effect of State Court Proceedings. Marjorie R. Brenner, Natural Tutrix of Elizabeth S. Brenner v. Oveta Culp Hobby (W.D. La.). Plaintiff sued

under Section 205(g) of the Social Security Act to review a determination of the Department of Health, Education and Welfare as to an adopted child's eligibility for child's-insurance benefits. The Department contended that the child was not entitled to benefits, since it had been adopted pursuant to state court order subsequent to the death of the wage earner, and was not the legally adopted child of the wage earner under state law. The District Court reversed the Department's ruling, relying heavily on the fact that the birth certificate and adoption papers had been signed by both parents, and that the adoption proceeding had been delayed because of medical treatment to the child.

Staff: United States Attorney T. Fitzhugh Wilson, Assistant United States Attorney William R. Veal (W.D. La.).

PUBLIC WORKS

Recovery of Funds Advanced By Bureau of Community Facilities for Public Work Plans. Interpretation of 58 Stat. 791, Sec. 501 (former 50 U.S.C. App. 1671, expired). United States v. The Board of Education of the City of Bismarck, (D. N.D.). This was an action to recover $1,330.00 advanced to defendant by the Bureau of Community Facilities pursuant to 50 U.S.C. App. 1671, which authorized the Bureau to make advances to local governments to defray the expenses of preparing plans for the construction of public works. The statute provided that when the construction of the public work was undertaken the advance made by the Bureau would be repaid. In this case, the Board of Education applied for and received an advance, and employed a firm of architects to draw plans for a school addition. However, as a result of insufficient funds, new plans were drawn, and the building was constructed from the latter plans. The Board of Education refused to repay the United States on the ground that the plans used were different from those for which the advance was made. The Government argued that the two plans were substantially similar.

The Court, looking to the purpose and intent of the statute, which was to aid in financing the cost of plans preliminary to the construction of public works, concluded that the determining factor was whether the construction was related to the general plan contemplated by the applicant when requesting an advance from the Government. It held in this case that it was.

This is the first decision obtained on a troublesome question which is raised frequently in cases of this kind.

Staff: Assistant United States Attorney William R. Mills (D. N.D.) and George H. Vaillancourt (Civil Division).

TORTS

Tort of Texas Air National Guard--Suit Under Federal Tort Claims Act. Fay Slagle and The Service Mutual Insurance Co. v. United States (N.D. Tex).

Plaintiff brought suit against the United States under the Federal Tort Claims Act for the wrongful death of her husband who was killed in his place of employment by a crashing Texas Air National Guard plane.

The Court dismissed the action on grounds that the Texas Air National Guard had not, at the time of the tort, been called into the Federal Service and hence the pilot was not an "employee of the Government" under 28 U.S.C. Sec. 2671. Accord: McCranie v. United States, 199 F. 2d 581 (C.A. 5); Dover v. United States, 192 F. 2d 431 (C.A. 5); Williams v. United States, 189 F. 2d 607 (C.A. 10).

Staff: United States Attorney Heard L. Floore, Assistant United States Attorney John C. Ford (N.D. Tex.); Irvin M. Gottlieb (Civil Division).

Liability Under Federal Tort Claims Act for Release of Waters Impounded Behind Dam Causing Overflow of Plaintiffs' Farm Lands and Damage to Crops. O. Clark Webster and Anna R. Webster v. United States (S.D. Ga.). Plaintiffs sought recovery for damage to farm lands which were inundated because of the release of impounded water from a Government dam. The court dismissed the suit for lack of jurisdiction on the grounds that the release of waters by the Corps of Engineers came within the "discretionary function" exception of 28 U.S.C. Section 2680(a).

Accord: Coates v. United States, 181 F. 2d 816 (C.A. 8); Olsen v. United States, 93 F. Supp. 150 (N. Dak.); Thomas v. United States, 81 F. Supp. 881 (W.D. Mo.).

Staff: United States Attorney William C. Calhoun, Assistant United States Attorney W. Reeves Lewis (S.D. Ga.); Irvin M. Gottlieb (Civil Division).

Suit Against Non-Appropriated Fund Agency - Availability of Insurance Benefiting United States. Belinda Jo Bacon v. United States (E.D. Mo.). A settlement was effected in this case without participation by the United States. Plaintiff sustained burns of both hands as a result of touching a steam radiator on the restaurant premises of a Navy Exchange located at a United States Naval Air Station.

Since it is the Justice Department's position that Military Service Exchanges are not "Federal agencies" within the meaning of the Federal Tort Claims Act, but that such facilities are, instead, non-appropriated fund agencies, the United States was prepared to contest liability. It was ascertained, however, that the Navy Exchange Department carried insurance to cover liability for this type of accident and the policy in question named as an additional insured, "The United States of America." Accordingly, the defense of this proceeding was tendered to the insurance carrier which ultimately effected a compromise with plaintiff without any payment by or contribution from the United States.

The outcome of the case results from representations made by the Civil Division early last year to non-appropriated fund instrumentalities of this type that the insurance coverage carried by them should include as a party insured the United States of America.

Staff: United States Attorney Harry Richards (E.D. Mo.); Joseph M. LeMense (Civil Division).

FEDERAL EMPLOYEES COMPENSATION ACT

Federal Employees Compensation Act -- Exclusive Remedy. Ralph N. Stiffler v. United States, (N.D. Pa.). Plaintiff, an employee of an ordnance depot, was injured in a collision with a Government ambulance while he was riding in the car of a fellow worker on the way home from work after regular hours, on a street within the depot. Plaintiff contended that the accident was after working hours and, hence, he was not covered by F.E.C.A. The Court granted the Government's motion to dismiss and in a memorandum opinion cited the following language of the Supreme Court in Erie Railway Company v. Winfield, 244 U.S. 170:

> In leaving the carrier's yard at the close of his day's work, the deceased was but discharging a duty of his employment * * * like his trip through the yard to his engine in the morning, it was a necessary incident to his day's work and partook of the character of that work as a whole, * * *.

Staff: United States Attorney J. Julius Levy (N.D. Pa.); Joseph M. LeMense (Civil Division).

COURT OF CLAIMS

ADMIRALTY

Admiralty - Just Compensation - Evidence as to Valuation by Experts Who Have Not Seen the Vessel. SS LOUISE; Cavalliotis v. United States (C. Cls, January 11, 1955). The Louise, a fishing trawler which had previously been declared unseaworthy by the Coast Guard, was requisitioned by the Government in 1942. The Government repaired the vessel and sent her to sea where she was lost on her first voyage. The owner in suing for just compensation in the Court of Claims relied on the testimony of marine surveyors who had never seen the vessel. Five marine surveyors who had actually inspected the trawler testified on behalf of the Government that the ship was unseaworthy at the time of requisitioning and of very little value as a vessel. The Court accepted the testimony of the witnesses who had

actually seen the vessel, discounting the valuation made by the plaintiff's experts based on reproduction cost, earning power and depreciation, etc., and awarded plaintiff $50,000.00, which was substantially the Government's prior valuation.

Staff: Thomas F. McGovern (Civil Division).

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LANDS DIVISION

Assistant Attorney General Perry W. Morton

PUBLIC HOUSING

Validity of Orders Directing Tenants to Vacate Temporary Public Housing. Shanks Village Residents Association, et al. v. Albert M. Cole, Administrator of the Housing and Home Finance Agency (C.A. D.C.). Section 604 of the Lanham Act directs the Administrator (1) on or before March 31, 1954, to notify tenants of temporary housing to vacate before July 1, 1954, (2) promptly after July 1, 1954, to bring actions to vacate tenants still remaining, and (3) remove all dwellings as soon as practicable after they become vacant. In January 1954 the Administrator gave the requisite notice to vacate to residents of "Shanks Village," temporary housing on land controlled by the Administrator.

Some of them and a corporation created by them sued to enjoin the eviction proceedings on the ground there was a particularly acute housing shortage in the area and that under section 313 of the Lanham Act the Administrator was required to spare housing in such an area. The Administrator contended inter alia that section 313 did not apply to housing on land controlled by him, and consequently refused to determine whether or not in that area there was an acute housing shortage. The Court of Appeals for the District of Columbia Circuit, affirming the trial court's judgment in favor of the Administrator, held that, as he contended, section 604 governed and section 313 was inapplicable.

Staff: John F. Cotter and Edmund B. Clark (Lands Division)

CONDEMNATION

Res Judicata. Caprito v. United States (C.A. 5). The United States in 1943 condemned two leasehold estates in land for use as an airfield and gunnery range. Both terms were for a year with the right to renew. The Government exercised this right through 1946. The owner in 1945 stipulated that $2,000 should be satisfaction for all claims prior to the stipulations and that compensation for additional extensions should be $945 per year. Judgments were entered in accordance with the stipulations. In 1947 the owner filed petitions alleging waste and seeking $54,430 for damages to the leased land and some adjacent land. The damages alleged were due to normal use of the land as an airfield and gunnery range and the Government contended that they were within the contemplated use. The district court held that all the claims were barred by res judicata. The owner appealed.

The court of appeals, without passing on the nature of the damages, affirmed the judgment as to the leaseholds. It held that the judgments on the stipulations were res judicata "as to any claims for damages to the land within the scope of the condemnation proceedings" but declined to decide in the condemnation proceeding whether appellant in an independent proceeding could recover for waste to the condemned leaseholds or damages to land not condemned. Thus appellant is not precluded by this affirmed judgment from filing a separate suit for waste during the terms nor damages to other land. However, it is believed that such a suit would be barred by the statute of limitations. Appellant has filed a petition for rehearing on that ground.

Staff: Edmund B. Clark (Lands Division)

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TAX DIVISION

Assistant Attorney General H. Brian Holland

CIVIL TAX MATTERS

Appellate Decisions

Priority of Federal Tax Liens Over Prior Attachment and Garnishment Liens and Over Landlord's Distress for Rent. United States v. Acri; United States v. Scovil; United States v. Liverpool & London Co. (U.S.Sup. Ct., January 10, 1955.) The Supreme Court has once again afforded priority to the federal lien for unpaid taxes over prior liens which are inchoate and unperfected. The Acri case involved a prior attachment lien filed in connection with a damage suit which ultimately resulted in a judgment against the debtor, the judgment being rendered after the tax lien had been imposed on the property. The Court held that the issue was identical with that decided in the Government's favor in United States v. Security Trust Co., 340 U.S. 47, where the federal tax lien was held entitled to priority over a prior attachment lien. The Court emphasized that the question whether the competing lien is sufficiently perfected as to be entitled to priority over a subsequent federal tax lien is always a federal question on which the federal courts are not bound by a State's characterization of the locally created lien. Here, although the Ohio courts call the attachment lien "an execution in advance" and consider it a perfected lien at the time of attachment, the Supreme Court said that it was free to examine the substance of the situation. Since "at the time the attachment issued the fact and the amount of the lien were contingent upon the outcome of the suit for damages," it was ruled that the attachment lien was an inchoate as the one involved in the Security Trust case and that the subsequent tax lien was entitled to priority.

The Liverpool & London case, which involved a garnishment lien, was held to be indistinguishable from the Acri case on the question of the relative priority of the garnishment lien and the subsequent tax lien. In the Liverpool case the lower court had also authorized the payment of costs and an attorney's fee out of the fund. The Supreme Court ruled that, since the United States had a prior interest in the money, the costs and fees in the garnishment proceeding could not be paid out of that fund prior to the satisfaction of the Government's claim.

The Scovil case involved a landlord's distress for unpaid rent which was made after the time when the federal tax liens arose but before the time when the liens were recorded. The Supreme Court held that the landlord did not have a perfected lien because, among other reasons, the tenant could have filed a bond and reacquired any interest the landlord might have obtained by the distraint. "Therefore, such a lien was only a caveat of a more perfect lien to come * * *." See United States v. Waddil Co., 323 U.S. 353.

The Court also held, contrary to the trial court, that the landlord could not be considered a purchaser within the meaning of Section 3672 of the Internal Revenue Code of 1939 (such purchaser being protected against prior, unrecorded liens). The Court said "A purchaser within the meaning of Section 3672 usually means one who acquires title for a valuable consideration in the manner of vendor and vendee."

The outcome of each of these three cases represented a reversal of the court below (Liverpool & London, C.A. 5; Acri, C.A. 6; Scovil, Sup. Ct. of South Carolina). As United States Attorneys may have noted, many state courts and some of the lower federal courts appear to have interpreted the Supreme Court's prior decision in Security Trust as not laying down any general rule but rather as being limited to situations arising under the law of California. Such courts have distinguished Security Trust on the ground that attachment or garnishment procedures in their states differ from those in California or on the ground that state court decisions in their states have, unlike the California decisions, characterized attachment and garnishment liens as perfected and choate as soon as served or recorded. The instant cases demonstrate that neither variations in procedure nor state court decisions are controlling of the matter. If, in fact, the attachment or garnishment lien has not been perfected in the sense that something remains to be done to establish the amount of the lien or the identity of the lienor or the property covered by the lien, the lien is imperfect and inchoate and cannot be given priority over a federal tax lien, regardless of the fact that the state courts may have described it as a specific and perfected lien. It is hoped that the instant decisions will remove much of the confusion in this field and reverse the present trend of according priority to competing liens which are not, in fact, perfected liens.

Staff: Fred E. Youngman, Charles K. Rice (Tax Division)
John R. Benney (Office of Solicitor General).

Estate Tax - Deduction Denied for Contingent Charitable Bequests. Commissioner v. Estate of Louis Sternberger (U.S. Sup. Ct., January 10, 1955). Decedent, by will, created a trust of his residuary estate, the income to be paid to his wife and daughter during their lives and after the death of the survivor, the principal to be paid to the daughter's surviving descendants. If she left no descendants, one-half of the estate was to go to certain relatives of the decedent and the rest to designated charities. If these relatives were not in existence, the entire corpus of the trust was to be paid to the charities. The daughter was 27 years old, was divorced and had not remarried and had not had a child.

Decedent's estate claimed a deduction in computing the estate tax under Section 812(d) of the Internal Revenue Code of 1939 for an amount claimed to be the present value of the conditional bequest to the charities. The Commissioner denied the deduction, but the Tax Court (18 T.C. 836) and the Second Circuit (207 F. 2d 600) ruled against the Commissioner. The Supreme Court, reversing the decisions below, upheld the Commissioner by deciding that no deduction was allowable.

The Court's decision rests principally on the long-standing Treasury Regulations which were found to embody a permissible interpretation of the statute. While the Regulations permit a deduction of the present worth of the gift of a deferred payment to a charity, such as the gift of a remainder interest, the Regulations also state that a

conditional bequest to a charity is not deductible unless the possibility that the charity will not take is so remote as to be negligible. The Court found no inconsistency between these two regulatory provisions, and pointed out that there was a decided difference between a deduction, based on its present worth, for a postponed but assured gift to a charity and a deduction for a conditional bequest which, as a matter of fact, might never be paid to the charity. No matter how accurately the latter might be valued (a point not decided with respect to the valuations made by the taxpayer in the circumstances of this case), the Court concluded that the Regulations represented a valid interpretation of the statute in specifying that the deduction was not allowable for such a conditional bequest except if the condition is so remote as to be negligible. The Court concluded that Congress intended the deduction to be permitted only where the gift to the charity is almost certain to be paid.

Justice Reed, joined by Justice Douglas, filed a dissenting opinion on the ground that the Regulations were opposed to the fundamental intent of Congress which was to encourage charitable bequests. The dissenting opinion voices the view that the majority is giving too much weight to the Commissioner's Regulations which do not have the same safeguards as attend the enactment of a statutory provision.

Staff: Melva M. Graney (Tax Division)

Exemption From Income of Gift - Automobile Won at Drawing Open to Visitors at Dealer's Showroom. Glenn, Collector v. Bates (C.A. 6, December 23, 1954.) A Ford dealer advertised in local newspapers that the 1949 Ford would be on display at his place of business on June 18, 1948. The general public was invited to visit his showroom, inspect the new models, and register for the drawing of an automobile to be awarded on the evening of that day. In response to the advertisement taxpayer went to the showroom and gave her name and address which one of his employees wrote on a card and deposited in a barrel. Twenty-seven thousand other persons also visited the showroom and were similarly registered. At the drawing taxpayer was declared the winner of the automobile. The dealer charged the value of the automobile on his income tax return as a deduction for advertising. The Commissioner added the value of the automobile to taxpayer's income for the year 1948.

The Court of Appeals, affirming the District Court, held that the receipt of the automobile under these circumstances constituted a "gift" excluded specifically from gross income under Section 22(b)(3) of the Internal Revenue Code of 1939, since in its view there was no contest involved, no labor, no skill, nor personal service on the part of taxpayer. The Court noted, however, that for later years Section 74 of the Internal Revenue Code of 1954 appears to include such awards in taxable income.

Staff: I. Henry Kutz (Tax Division).

Burden of Proof Rule Applicable in a Refund Suit Where Theory Upon Which Deficiency Determination is Made is Invalid. Rose Ella and Norman Roybark v. United States /two cases/ (C.A. 9, December 20, 1954.) These cases were consolidated because they involved community income of the taxpayers, husband and wife, reported on their returns for 1945 and 1946. The returns were investigated because the Government learned that taxpayer Norman Roybark, a used car dealer, had bought automobiles at prices in excess of the maximum ceiling schedule. The records made available by taxpayers showed cars bought and sold, but such records reflected only legal selling prices. The separate records which were kept on over-ceiling receipts and disbursements were not produced. In this situation the agent estimated the amount paid for automobiles in excess of over-ceiling prices and determined deficiencies in these amounts.

At the trial, the Government conceded that the original theory upon which the deficiency determination was made -- disallowance of the over-ceiling prices paid for cars as part of the cost of goods sold -- was no longer valid in view of recent decisions. The Government, however, contended that the invalidity of the assessment theory did not, standing alone, establish taxpayers' right to the refunds since the basic issue framed by the pleadings was whether taxpayers had in fact overpaid their taxes. Thereupon, the Government produced evidence showing taxpayers' records were not accurate and that they failed to report sizeable gains from over-ceiling sales. Taxpayers did not produce any rebuttal evidence. Taxpayers offered no testimony on the point, and the books and records of the business were not placed in evidence. The District Court, on the basis of all the evidence, found that taxpayers failed to record the over-ceiling payments and receipts in their books of account and concluded that they failed to establish overpayment of their taxes.

In the Court of Appeals, the taxpayers contended that the Government had the burden of proof to justify retention of the taxes on any ground differing from the theory on which the deficiency was determined. The appellate court, however, affirmed the decision, pointing out that "whether they /taxpayers/ overpaid their taxes for the years in question is problematical. They may in fact have paid less than they actually owed. In any event it was in their power, had their records truly reflected all aspects of their financial affairs, to have set the matter at rest. In this situation they cannot now be heard to say that a rule is harsh, which was invoked only because of their own dereliction."

Somewhat similar burden of proof questions were recently decided in United States v. Harris (C.A. 5, November 16, 1954, and are now before the Tenth Circuit in excise tax cases styled Decker, Eldredge and Williams v. Korth; Wesley F. Mullett v. Korth; Frank J. Mullett v. Korth; Harold Comer v. Korth; and Leo Weibel v. Korth.

Staff: Alonzo W. Watson, Jr., and Harry E. Marselli (Tax Division).

Employee's Contributions to Civil Service Retirement and Disability Fund - Includibility in Gross Income of Capitalization of Real Estate Taxes and Mortgage Interest. Megibow v. Commissioner (C.A. 3, January 4, 1955.) Taxpayer was a Civil Service employee, enjoying permanent tenure, and was subject to the provisions of the Civil Service Retirement Act. During the year in question $375.28 was withheld from his salary and deposited in the Treasury of the United States as his contribution to the Civil Service Retirement and Disability Fund. Taxpayers in their joint income tax return filed for 1949 failed to report as income the amount deposited to his credit with the retirement fund. They also claimed the right to capitalize upon the sale of their residence in 1949, the real estate taxes and mortgage interest paid during the period of their occupancy, despite the fact that in previous years they had elected to use the standard deduction allowed by law instead of itemizing deductions. The Tax Court sustained the deficiency determined by the Commissioner.

In support of the appeal, taxpayers argued first that the amount withheld from taxpayer's salary should be treated as a contribution by the employer (under Section 165(b) of the Internal Revenue Code of 1939) to a fund which meets the requirements of Section 165(a) and as such is not taxable as income to the employee under the Code. Secondly, that the Commissioner is required to treat all types of property alike and so could not allow taxes and carrying charges on unimproved property to be charged to capital account unless similar treatment was accorded taxes and carrying charges on all types of property, including a personal residence.

The Court of Appeals, in affirming the decision below, held that the $375.28 was a part of taxpayer's fixed salary for 1949, and was deducted because he was deemed by law to have consented and agreed to its withholding as his contribution to the Civil Service Fund. Therefore, since taxpayer consented to the deduction, the latter cannot be considered the employer's contributions. The Court also pointed out that the identical question was considered in Miller v. Commissioner, 144 F. 2d 287 (C.A. 4), and the same result was reached. It quoted with approval the opinion in the Miller case which stated that it would not be assumed that Congress would, if it could, change the retirement law to deprive an employee of rights acquired under the statute.

As to the taxpayers' second contention, the court held that the Commissioner's determination of his authority should stand unless plainly inconsistent with the language of the Code. The Regulations involved were not considered invalid since Section 24(a)(7) of the Code can be read as the Commissioner has read it and is a correct interpretation of Congressional intent as evidenced by the applicable House and Senate Reports.

Staff: John J. Kelley, Jr. (Tax Division.)

DISTRICT COURT DECISIONS

Valuation - Evidence of Subsequent Sales as Proof to Support Commissioner's Prior Determination of Value. Harold W. and Elizabeth Miller v. United States (W.D. Ky.) In this case taxpayers sought to recover $23,135.54, plus interest, for deficiency income taxes and interest paid during the years 1946 through 1950. Harold W. Miller was the sole stockholder of a corporation, which owned and rented houses to defense plant workers. During the fiscal year 1946-1947 most of the houses were sold under a twenty-five year F.H.A. first mortgage plan, the corporation taking a second mortgage for the balance, averaging about 20% of the sale price. The corporation was dissolved April 30, 1947. All of its assets, including its second mortgages amounting to $66,734.56 at that date, were distributed to its sole stockholder, Harold W. Miller, on March 26, 1947.

The Commissioner determined that on the date of distribution to Miller, the second mortgage notes had a fair market value of 25% of their face value and assessed the deficiency against the corporation for the amounts of taxes and interest sought to be recovered. Miller admitted that he, as sole transferee, was liable for any deficiency in tax the corporation owed, but insisted that there was no such deficiency because the second mortgage notes had no fair market value during 1946 or on March 26, 1947, the date they were distributed to him by the corporation. He testified that the notes had been offered for sale by letters written to various brokers and agents who handled such securities and that each and all of them replied to the corporation that there was no market for the sale of such securities. The defendants insisted that such exchange of letters did not constitute any offer to sell. Other witnesses testified for the taxpayers to the effect that there was no market for such securities. On cross-examination Miller stated that there was collected on the second mortgage notes through the year 1950 $50,000 (which was far in excess of the value put thereon by the Commissioner).

In his Conclusions of Law, the Judge quoted from the cases of Dorie v. Commissioner, 94 F. 2d 895; Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689; and H. H. Miller Industries Co. v. Commissioner, 61 F. 2d 412, and stated "When the Commissioner made the assessment here involved in 1952, he had the advantage of the experience of the second mortgage notes and knew that substantially $50,000 had been paid. With this information, it could not be said that his estimate of value of twenty-five per cent of the face amount of the securities was not a fair appraisal. Certainly, it could not be held to be clearly erroneous, because in 1947, the witnesses who testified in this case thought that the securities had no fixed or fair market value.

The Court's opinion strengthens the Government's position in cases such as this where sales made after the taxable year involved sustain the Commissioner's estimate of fair market value.

Staff: Henry L. Spencer (Tax Division).

Statute of Limitations on Assessment - Effect of Issuance of 90-Day Letter Prior to Expiration of One Year Period for Assessment Provided in Section 3801, 1939 Code. Estelle Bishop v. Reichel (N.D. N.Y.). This case involved the applicable statute of limitation for a Section 3801 assessment (under the 1939 Code). Section 3801 relates to the adjustment of another taxable year where a determination has been made for a taxable year which determination is inconsistent with the position taken in the other year. The narrow issue was whether, notwithstanding the statutory language requiring assessment to be made within one year of the applicable determination, the period of limitation thus provided could be extended by the issuance of a 90-day letter prior to the expiration of the one-year period. Section 277 provides only that the mailing of the notice shall suspend the statute of limitations set forth in Sections 275 or 276 and does not specifically refer to Section 3801. The case was decided for the Government, and appears to be the only case decided on that point.

Staff: Edmund C. Grainger, Jr. (Tax Division)

CRIMINAL TAX MATTERS

Net Worth Cases - On January 10th, the Supreme Court remanded the following cases to their respective Courts of Appeals for consideration in the light of the four net worth cases (Holland, Friedberg, Smith and Calderon), which had been previously decided by the court on December 6, 1954:

Hy Goldbaum v. U. S. - (C.A. 9)
Thomas W. Banks v. U. S. - (C.A. 8)
Austin F. McFee v. U. S. - (C.A. 9)
C. Maxwell Brown v. U. S. - (C.A. 6)
Robert Maxwell Watts v. U. S. - (C.A. 10)
Keith M. Beaty v. U. S. - (C.A. 4)
Jacob Strauch, etc. v. U. S. - (C.A. 6)
Lester H. Burdick v. U. S. - (C.A. 3)
David H. Mitchell v. U. S. - (C.A. 8)
Elmer F. Remmer v. U. S. - (C.A. 9)

The court's opinion states, "We have not considered the merits of these cases, nor have we determined their relation to our recent opinions, supra, believing that reexamination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the net worth decisions."

It is imperative that the Government adopt a consistent position before the Courts of Appeals in all the above cases. Consequently, if the Courts of Appeals request further briefs, it is requested that drafts of the Government's briefs be submitted to the Tax Division for review before printing and filing.

Net Worth Instructions - As was mentioned in the last issue of the Bulletin, the Criminal Section of the Tax Division is preparing a set of

suggested instructions on the net worth theory which it hopes to have in the hands of all United States Attorneys within the near future. In this connection, United States Attorney Blue in the Eastern District of Louisiana has suggested that all United States Attorneys be asked to forward to the Tax Division copies of the instructions which they have used in this type of case. This is an excellent idea and one which will be of very considerable assistance in preparing such instructions. The Division will be happy to receive any such material which United States Attorneys may have in their files.

Other Supreme Court Decisions - In addition to remanding the ten net worth cases on January 10th, the Supreme Court also denied certiorari in the following cases:

Clark v. U.S., 211 F. 2d 100 (C.A. 8)
Stayback v. U.S., 212 F. 2d 313 (C.A. 3)
Monroe v. U.S., 215 F. 2d 81 (C.A. 5)
Vaughn Mitchell v. U.S., 213 F. 2d 951 (C.A. 9)

The Clark and Stayback cases involve a distinction between "gross receipts" and "gross income." Petitioners in these two cases contend that the Government had based its proof improperly upon gross receipts rather than upon gross income. The Monroe case involved an alleged voluntary disclosure by the taxpayer. The Vaughn Mitchell case involved questions too numerous to mention here. However, the attention of United States Attorneys is invited to the decision cited, particularly because the Court of Appeals had found no error in the use of instructions which have recently been condemned in Berkovitz v. U.S., 213 F. 2d 268 (C.A. 5) and Hartman v. U.S., July 26, 1954, (C.A. 8).

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

DEPARTMENTAL ORDERS AND MEMORANDA

The following list is published for the information of U. S. Attorneys. It contains the number of all Orders of the Attorney General and Departmental Memoranda issued since January 23, 1953 which relate to the functions of your offices. The missing numbers pertain to other offices or bureaus of the Department such as the Marshals' offices and Bureau of Prisons. If any numbers on the list are not in your files, copies may be obtained by writing to the Records Administration Officer, Department of Justice, Washington 25, D. C.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Release on Court Bond During Pendency of Action Attacking Deportation Order Refused. Ocon v. Landon (C.A. 9). This was an appeal from a district court order dismissing a petition for habeas corpus in which petitioner sought to be released on bail bond, pending termination of another action in the district court wherein he alleges that an administrative order to deport him is wholly illegal.

Prior to the filing of the petition for habeas corpus, Ocon had been arrested under an Attorney General's warrant issued in the proceeding to deport him as an alien Communist. Before the hearing, he was released on bail and later, but before the issuance of the deportation order, he was retaken into custody and held without bail. The administrative hearing resulted in the issuance of an order for his deportation and he was continued in custody.

After the order of deportation had issued, Ocon filed an action in the district court for an injunction against carrying out the final order of deportation, alleging in his complaint that he was not afforded due process of law in the deportation proceedings, and other matters.

The district court issued an order to show cause why respondent should not be enjoined from deporting plaintiff and from requiring the surrender of plaintiff or taking him into custody for deportation. It further ordered that, pending hearing on the show cause order, plaintiff should not be removed from the Southern District of California.

Ocon contended that the pendency of the declaratory case rendered respondent powerless to deport him; that therefore his custody was and is illegal; and that since the pending declaratory case attacks the administrative procedure which resulted in the deportation order, and substantial issues are presented, he is entitled to be released on bail while that case is being litigated.

Ocon contended that respondent's action in revoking bail and holding him in custody was arbitrary, void and capricious, and argued that section 242(c) of the Immigration and Nationality Act did not justify the re-arrest. The court held, however, that the case was governed by section 242(c) of the Act which provides that the Attorney General's power and discretion to permit and deny bail is not exhausted when he once permits bail, and, referring to the ruling in United States ex. rel. Yaris v. Esperdy, 202 F. 2d 109, 111, that in the case of a revocation

and re-arrest, the test on habeas corpus of the legality of the detention is whether under the prevailing circumstances the Attorney General exercised sound discretion, stated that this test applies throughout the deportation and court proceedings until the alien is deported or finally declared non-deportable.

In reply to Ocon's contention that this principle does not permit repetitive rulings based on the same information and that revocation of bail and re-arrest must be based on new information, the court cited Carlson v. Landon, 186 F. 2d 183, 187 F. 2d 991, aff'd 342 U.S. 524, as final authority for the principle that an alien charged, in deportation proceedings, with being, or having been, a Communist, may be taken into custody and held without bail if the Attorney General has good cause to believe his presence at large is dangerous to the United States, and that this principle is not vitiated by the prior admission of the alien to bail as in this case. The appellate court affirmed the lower court's ruling that the keeping of Ocon in custody, during the pendency of the action to test the regularity of the deportation proceedings, was valid.

ADMINISTRATIVE SUBPOENAS

Court Order Requiring Compliance Is Final and Appealable. United States v. Vivian (C. A. 7). Served with a subpoena, under section 235(a) of the Immigration and Nationality Act, to appear before the District Director to testify relative to the right of certain aliens to remain in the United States, defendant refused to comply. The Government then sued for an order to compel defendant to comply, whereupon the court ordered defendant to appear before the court to give such testimony. Served with this order, defendant moved to dismiss the complaint on various grounds and for an order quashing the earlier one. These motions were denied, although the prior order was modified to command defendant to appear before the appropriate administrative officer rather than before the court. By order of the trial court, the appeal was made a supersedeas.

The Government moved to dismiss on the ground that the order complained of was not final within the meaning of 28 U.S. 1291; and that an order of the district court, under the pertinent provisions of the Act, is not final action by the court until and unless the defendant recusant witness is cited in contempt of court.

In denying this contention, the appellate court stated that, under section 235(a), on refusal of a witness to respond to a subpoena issued thereunder, the courts are empowered to "issue an order requiring such person" to appear, and disobedience to such an order may be punished "by the court as a contempt thereof." The court interpreted the statute as not making the initial order and subsequent contempt proceeding part

and parcel of the same action, and held that when the court has entered its order compelling the recusant witness to testify, the original proceeding comes to an end; that a contempt proceeding, if necessary, would require a separate petition; that in this proceeding, the jurisdiction of the district court extends only to the issue of compliance or non-compliance with the administrative subpoena; that contempt is not in issue until and unless the defendant fails to comply with the order of the court; and that even then the issue becomes one of contempt of the court, an inquiry which is separate and distinct from the issues joined on the merits of the enforcement proceeding. Accordingly, the order of the district court was held to be final and appealable.

EXPATRIATION

Effect of Service in Mexican Federal Police Corps. Elizarraraz v. Brownell (C.A. 9). Appeal from a decision granting judgment against Elizarraraz in an action for declaratory judgment of citizenship under former section 503 of the Nationality Act of 1940.

The appellate court pointed out that the complaint contained no allegation that Elizarraraz had been denied any specific right or privilege as a national of the United States by any Department or agency thereof and that in view of that fact alone the judgment below could be affirmed on the ground that there was neither allegation nor proof that he was denied any right or privilege as a national upon the ground that he was not a national. However, the court considered the merits of the case since it was agreed by the parties that as a matter of fact appellant had been denied the right to enter the United States from Mexico upon the ground that he was not a United States national.

The Government contended that when he joined the Mexican police force on April 1, 1943, and served until 1947, Elizarraraz lost his American nationality under former section 401(d) of the 1940 Act, which provided for such loss by a United States citizen who accepted or performed the duties of any office or employment under the government of a foreign state for which only nationals of that state were eligible.

Article 32 of the Political Constitution of Mexico provided that no alien may serve in the police corps during times of peace and Elizarraraz contended that since Mexico was at war when he joined the police force he was therefore removed from the scope of the expatriation provision. The court held, however, that the Constitutional provision went no further than to require Mexican citizenship for members of the police force in peace time; that it did not make non-Mexican citizens eligible for duty in war time; that a Presidential decree had been issued which supplemented the Constitutional provision and declared that members of the police force must be citizens of Mexico by birth; that such decree required members to be Mexican citizens without regard to whether Mexico was at war or in peace; and that the Constitutional provision therefore did not aid appellant. The judgment of the lower court was affirmed.

I N D E X