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BULLETIN

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UNITED STATES ATTORNEYS BULLETIN

Vol. 5 February 15, 1957 No. 4

DISTRICTS IN CURRENT STATUS

As of December 31, 1956, the half-way mark in the fiscal year, the following districts were in a current status. The standards of currency applicable are those set out in 5 United States Attorneys' Bulletin 1, Page 1.

C A S E S

Criminal

Calif., N.	Ind., S.	N.C., M.	Tenn., E.	W. Va., N.	Guam
Conn.	La., W.	Ohio, N.	Utah	W. Va., S.	
Ga., M.	Mo., W.	Ore.	Wash., E.	C.Z.	

Civil

Ala., N.	Calif., S.	Ill., S.	Mass.	N. C., M.	Tenn., E.	Va., W.
Ala., M.	Colo.	Ind., N.	Minn.	N. C., W.	Tenn., W.	Wash., E.
Ala., S.	D. of Col.	Ind., S.	Miss., N.	Ohio, N.	Tex., N.	Wash., W.
Alaska #1	Fla., N.	Iowa, S.	Mo., E.	Okla., N.	Tex., E.	W. Va., S.
Alaska #2	Ga., N.	Kan.	Neb.	Okla., E.	Tex., S.	Wyo.
Ark., E.	Ga., M.	Ky., E.	N. H.	Okla., W.	Tex., W.	C. Z.
Ark., W.	Hawaii	La., E.	N. M.	R. I.	Utah	Guam
Calif., N.	Idaho	La., W.	N. Y., N.	S. C., W.	Va., E.	V. I.

M A T T E R S

Criminal

Alaska #3	Conn.	Ky., W.	Neb.	Okla., N.	S. D.	Wash., W.
Alaska #4	Ind., N.	La., W.	N. M.	Okla., E.	Tenn., M.	W. Va., N.
Ariz.	Ind., S.	Md.	N. Y., N.	Okla., W.	Tex., E.	W. Va., S.
Ark., E.	Iowa, N.	Miss., S.	N. C., M.	Pa., W.	Utah	Wyo.
Ark., W.	Ky., E.	Mont.	Ohio, S.	R. I.	Va., E.	C. Z.

Civil

Ala., N.	Colo.	Ind., N.	Mich., W.	N. M.	Pa., E.	Wash., W.
Ala., M.	Conn.	Iowa, N.	Miss., N.	N. Y., N.	Pa., W.	W. Va., N.
Alaska #1	Fla., N.	Iowa, S.	Miss., S.	N. C., E.	P. R.	Wis., E.
Alaska #2	Ga., M.	Ky., E.	Mo., E.	N. C., M.	R. I.	Wis., W.
Alaska #4	Ga., S.	Ky., W.	Mo., W.	N. C., W.	Tenn., E.	Wyo.
Ariz.	Hawaii	La., E.	Mont.	Ohio, N.	Tenn., M.	C. Z.
Ark., E.	Idaho	La., W.	Neb.	Okla., N.	Tex., E.	Guam
Ark., W.	Ill., N.	Me.	Nev.	Okla., E.	Utah	
Calif., N.	Ill., E.	Md.	N. H.	Okla., W.	Va., E.	
Calif., S.	Ill., S.	Mass.	N. J.	Ore.	Wash., E.	

ACCURACY OF MACHINE LISTINGS

Proper credit for currency of matters and cases in any district is only possible if the machine listings submitted by such district are completely accurate. Accuracy in the compilation of status reports is most important and United States Attorneys are urged to impress their professional and clerical staffs with the need for complete accuracy.

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PROPER ACCOUNTING FOR GOVERNMENT PROPERTY

The attention of all United States Attorneys is directed to 44 U.S.C. 92 which provides that "All Government publications furnished by authority of law to officers (except members of Congress) of the United States Government, for their official use, shall be stamped "Property of the United States Government," and shall be preserved by such officers and by them delivered to their successors in office as a part of the property appertaining to the office. * * *" United States Attorneys should insure that all property in this category be accounted for and delivered to their successors in office.

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OVERTIME

It is not the policy of the Department of Justice to authorize overtime, night differential, or holiday pay for United States Attorneys or Assistant United States Attorneys. Compensatory time for Assistant United States Attorneys may be authorized in accordance with the instructions set out in Title 8, pp. 14.1 and 24 of the United States Attorneys Manual. United States Attorneys are not eligible for compensatory time.

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FORM USA-151

A supply of Form USA-151 (Conscientious Objector Docket) is maintained in the Department and may be obtained from the Conscientious Objector Section, Office of Legal Counsel, by United States Attorneys who desire to use it. A sample of Form USA-151 will be made a part of the Appendix to Title 7, in the April 1 correction sheets for the United States Attorneys Manual.

* * *

JOB WELL DONE

United States Attorney C. E. Luckey, District of Oregon, is in receipt of a letter from the District Office of the General Counsel, Department of Agriculture, thanking him and Assistant United States Attorney Robert R. Carney for their work in effecting full collection in

a recent complicated foreclosure proceeding. In commenting on the letter, Mr. Luckey observed that Mr. Carney's patient and tactful handling of the matter, which presented a number of difficult problems, undoubtedly served the best interests of the Government.

In commending Assistant United States Attorneys Emmanuel D. Rosen and Richard R. Booth, Southern District of Florida, on their skillful handling of a recent food and drug case, the Assistant General Counsel, Food & Drug Division, Department of Health, Education and Welfare, stated that Mr. Rosen's questioning on deposition was so ably conducted that it enabled the Government to obtain judgment solely on the admissions made in the deposition, without going to trial. The Assistant General Counsel also stated that the presentation by Mr. Booth of the Government's Motion for Summary Judgment was extremely skillful and competent.

The Solicitor, Department of Labor, has written to the Attorney General, expressing appreciation for the outstanding efforts of United States Attorney C. E. Luckey, District of Oregon, in the prosecution of a recent Fair Labor Standards Act case. The letter stated that in pursuing the case aggressively to its successful conclusion, Mr. Luckey and his staff uncovered defendants' violations of the Court's restitution requirement for probation, and secured for the employees payment of back wages.

The January 23, 1957 issue of the Better Business Bureau Bulletin, published in Kansas City, Missouri, carries a commendation of the work of United States Attorney Edward L. Scheufler and Assistant United States Attorney Otto J. Taylor, Western District of Missouri, in a recent mail fraud case in which the public was mulcted of over $100,000.

Opposing counsel in a recent case has written to Assistant United States Attorney Joseph F. McPherson, Southern District of California, expressing sincere appreciation for the many courtesies extended during the litigation and stating that in 25 years of practice he had never had the pleasure of dealing with a more fair and courteous individual, and that it had been a distinct pleasure to have worked with Mr. McPherson in the case.

The sentiments expressed by the General Manager, Better Business Bureau, in a recent letter to United States Attorney F. E. Van Alstine, Northern District of Iowa, in connection with the successful conclusion of a recent case, should be of interest to all United States Attorneys. "As a lawyer myself, I am always impressed with the wonderful service we get from offices like your own. I am one of that small minority of taxpayers who would be willing to pay more taxes if we could be assured that they could be earmarked for salaries! I don't know a group that is underpaid any more than federal employees of your classification." The case was handled by Assistant United States Attorneys Philip C. Lovrien and Theodore G. Gilinsky.

An employee of the Immigration and Naturalization Service has written to Assistant United States Attorney Harry D. Steward, Southern District of California, complimenting him upon his well-prepared presentation of a recent case involving an I & N Service employee, his demeanor in court and

his closing argument to the jury. The letter expressed thanks for Mr. Steward's attitude toward employees of the Service and appreciation for his diligent efforts to assist them. The letter further observed that not only were the employees satisfied and happy with the outcome of the case, but that the presiding judge was pleased with the manner and method of presentation, and so commented at the close of the trial.

The ability displayed by Assistant United States Attorney William K. Zinke, Southern District of New York, in a recent mail fraud case has been commended by the Postal Inspector in Charge. The letter observed that Mr. Zinke devoted long hours and numerous weekends to preparation of the case, as well as during the trial, and that the many legal issues involved were contested by a defense counsel of many years' experience, but that Mr. Zinke presented the Government's case in such a highly competent manner that defendant was convicted on four of the five counts charged.

The District Trial Attorney, Civil Aeronautics Administration, Department of Commerce, in commenting on the successful compromise of a recent case, stated that such results were due to the fine cooperation received from Assistant United States Attorney Edwin R. Holmes, Jr., Southern District of Mississippi, and expressed thanks and appreciation for the cooperation which brought about victory for the Government in an important case in the field of civil aviation.

The work of United States Attorney Duncan W. Daugherty and Assistant United States Attorney Frank Eaton, Southern District of West Virginia, in a recent case involving disobedience of an Internal Revenue Service summons has been commended to the Attorney General by the Acting Chief, Intelligence Division, Internal Revenue Service. The letter stated that the contempt attachment was an unusual type of case, that complete compliance with the summons was secured through the efficient efforts of Mr. Daugherty and Mr. Eaton, and that both men should be commended for their handling of a case which was of great value to the Internal Revenue Service. Reference also was made to the cooperation and excellent handling by Mr. Daugherty, Mr. Eaton and Assistant United States Attorney Percy H. Brown of a group of wagering tax cases recently presented to the grand jury.

Assistant United States Attorney Joseph F. McPherson, Southern District of California, has received from opposing counsel in a recent case a letter expressing appreciation for the fair and courteous treatment received and noting the competent manner in which Mr. McPherson represented the Government.

The Assistant General Counsel, Public Housing Administration, has expressed to Assistant United States Attorney Edwin R. Holmes, Jr., Southern District of Mississippi, appreciation for his excellent cooperation in the handling of housing cases in that district.

Private counsel has written to Assistant United States Attorney Arline Martin, Southern District of California, expressing pleasure at the manner in which she handled a recent case and stating that she had been cooperative and considerate and had shown great ability.

On January 23, 1957, the Grand Jury sitting at Grand Rapids, Michigan expressed to the Court its pleasure at working with United States Attorney Wendell A. Miles, Western District of Michigan, and his Assistants Robert J. Danhof and Roman J. Snow.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General William F. Tompkins

SUBVERSIVE ACTIVITIES

Foreign Agents Registration Act - Espionage. United States v. Jack Soble, et al (S. D. N. Y.) On January 25, 1957, Jack Soble, his wife, Myra Soble, and Jacob Albam were arrested in New York City under a complaint and warrant issued in the Southern District of New York, charging them with conspiring to violate 18 U.S.C., 793(c) and 951. On the same date bail for each of the defendants was fixed by the United States Commissioner in the amount of $100,000.

On February 4, a six-count indictment was returned by a Federal grand jury in the Southern District of New York. The first count charged the three defendants with violation of the peace time provisions of the Espionage Statute, 18 U.S.C. Section 794(c). In this count the indictment alleges defendants' participation in a conspiracy to transmit to the Soviet Union and its agents documents, writings, photographs, and other information relating to the national defense, particularly to intelligence activities of the United States and the United States armed forces. It is further charged that defendants so conspired with the intent that such information would be used to the advantage of the Soviet Union and that the Government of the Soviet Union and the named co-conspirator Soviet agents would make personal contact with these defendants for the purpose of receiving and communicating this information.

Count Two alleges a conspiracy by defendants and their Soviet co-conspirators to obtain documents, writings, etc., relating to the national defense of the United States in violation of 18 U.S.C. 793(c). It is distinguished from Count One in that it alleges a conspiracy to obtain such information, whereas Count One charges a conspiracy to transmit to a foreign government, i.e., the Soviet Union, such information.

Count Three alleges a conspiracy among defendants and their co-conspirators to act as Soviet agents within the United States without prior notification to the Secretary of State.

Count Four charges Jack Soble with the substantive offense of being a Soviet agent without having prior thereto notified the Secretary of State in violation of 18 U.S.C., Section 951.

Counts Five and Six charge Jack Soble and Jacob Albam, respectively, with failure to register with the Attorney General as agents of a foreign principal, namely the Soviet Union, in violation of the Foreign Agents Registration Act, 22 U.S.C. 612, 618.

The first three counts named as co-conspirators, but not as defendants, ten Soviet officials, including Vassili Mikhailovich Molev, who until recently served on the Soviet Embassy Staff in Washington. Molev

was entitled to diplomatic immunity, and he left the United States on January 26.

Staff: Assistant Attorney General William F. Tompkins; United States Attorney Paul W. Williams, Chief Assistant Thomas B. Gilchrist, Jr. and Assistant United States Attorney John T. Moran. (S.D.N.Y.) Kevin T. Maroney, William S. Kenney, Nathan B. Lenvin, Edward Schoen, Jr. (Internal Security Division).

False Statement. United States v. Homer Edward Evans (D.N.J.) On January 30, 1957, a Federal grand jury in Newark, New Jersey, returned a three-count indictment charging Homer Edward Evans with a violation of 18 U.S.C. 1001. The indictment alleged that Evans falsely represented that he had not been a member of the Communist Party, that he had not attended any meetings of the Communist Party and that he had never engaged in any Communist Party activities, in a Loyalty Certificate for Personnel of the Armed Forces (DD Form 98) which he filed with the Department of the Army on February 7, 1952.

A bench warrant was issued and the defendant was taken into custody in Philadelphia, Pennsylvania.

Staff: United States Attorney Chester A. Weidenburner (D.N.J.)

Perjury. United States v. Joseph Springer (S.D.Calif.) On September 19, 1956, a Federal grand jury in Los Angeles, California, returned a one-count indictment charging Joseph Springer with a violation of 18 U.S.C. 1621. The indictment charges that during the course of his testimony before the House Committee on Un-American Activities on March 25, 1953, he falsely denied that he had used any other names than Joseph Springer. A trial date has not been set.

Staff: United States Attorney Laughlin E. Waters (S.D.Calif.)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

SUPREME COURT

DEFENSE PRODUCTION ACT OF 1950

Emergency Court of Appeals - Exclusive Jurisdiction to Determine Validity of Regulations and Orders Preserved Despite Termination of Substantive Controls. United States v. Schneer's Atlanta, Inc. (Supreme Court, January 21, 1957). The district court entered judgment for the Government on March 25, 1955, in this action to recover treble damages for violations of a price control regulation committed during the period of price control. That court, while rejecting Schneer's contention that the termination of the price control provisions of the Defense Production Act of 1950 gave that court jurisdiction to hear and determine Schneer's challenge to the validity of the regulation, granted leave to file a complaint in the Emergency Court of Appeals. Schneer's complaint in the Emergency Court of Appeals, however, was dismissed as untimely. On appeal to the Court of Appeals for the Fifth Circuit, the judgment of the district court was reversed. The Court of Appeals ruled that the exclusive jurisdiction of the Emergency Court with respect to the validity of regulations and orders expired with the termination of the Act, and was not preserved by any savings provision. Holding further that this expiration gave rise to district court jurisdiction to determine the validity of regulations, the Court of Appeals remanded for such determination. The Supreme Court reversed per curiam and reinstated the judgment of the district court, citing the savings provision of Section 706(b) of the Act, 50 U.S.C. App. 2156(b).

Staff: Samuel D. Slade, B. Jenkins Middleton (Civil Division).

HOUSING ACT OF 1954

Injunction Against Enforcement of Statute - Requirement of Three-Judge Court. Federal Housing Administration v. The Darlington, Inc. (Supreme Court, January 21, 1957). Appellee is the owner of an apartment building, the construction of which was made possible by the insurance of its mortgage by the Federal Housing Administration pursuant to Section 608 of the National Housing Act. The Housing Act of 1954 declared that it always had been the intent of Congress that housing built with the aid of Government-insured mortgages was to be used principally for residential use and not for transient and hotel purposes, and directed the Federal Housing Administration to enforce this statutory purpose with all appropriate means at its disposal. Appellee, having been unable to find permanent tenants for a substantial number of its apartments, had rented many of them to transients. When the appellant, FHA, threatened to enforce the 1954 Act with respect to appellee, the latter brought an action seeking an injunction on the ground that the 1954 Act was unconstitutional. FHA filed a counter-claim to enjoin appellee from violating the statute. A three-judge court, convened pursuant to 28 U.S.C. 2282, dissolved itself holding that appellee was seeking an injunction to restrain the issuance of an injunction

and that the granting of an injunction to appellee in these circumstances would be improper. In addition, it held that the rights of the parties could be fully determined in the decision on appellant's counterclaim, without consideration of appellee's prayer for an injunction; hence, no three-judge court was required. Upon remand to the district court, a single district judge, while granting the Government partial relief, granted an injunction to appellee, holding that the 1954 Act unconstitutionally added a new burden to appellee's contract with the Government. Upon direct appeal to the Supreme Court pursuant to 28 U.S.C. 1252, the Supreme Court noted probable jurisdiction and summarily reversed the decision of the district judge on the ground that under 28 U.S.C. 2282 he lacked jurisdiction to issue an injunction restraining the enforcement of an Act of Congress for repugnance to the Constitution, and remanded the proceedings for a hearing before a three-judge court.

Staff: Melvin Richter, Herman Marcuse (Civil Division).

STATUTE OF LIMITATIONS

No Wartime Suspension of Statutes of Limitations in Suits Against Sovereign - Suspension for "War" Disability in Tucker Act Suit. Jose Soriano v. United States (Supreme Court, January 14, 1957). Soriano sued in the Court of Claims to recover for supplies allegedly furnished to Filipino guerrillas during Japanese occupation of the Philippines. The Court of Claims dismissed the action, relying on its prior holding in Logronio v. United States, 132 C. Cls. 596, that Filipino guerrillas were not part of the Army of the United States and could not bind the United States on procurement contracts. Soriano sought and obtained certiorari on this issue. While the case was pending before the Supreme Court, the Court of Claims in an unrelated case (Campagnia Maritima v. United States, No. 50165, decided November 7, 1956, reversing its prior holding in Marcos v. United States, 122 C. Cls. 641, 650), held that the six year limitation governing suits in the Court of Claims (28 U.S.C. 2501) was suspended by war only as to enemies, and that persons in enemy-held territory such as Soriano whose claims had accrued during the Japanese occupation had only three years in which to bring suit after termination of the occupation under the savings provision of the statute of limitations. Fearing that he would be barred by limitations (his suit having been filed more than six years after his claims accrued and more than three years after the liberation of the Philippines, and the Government having moved to dismiss on this ground), Soriano sought and obtained leave to brief and argue the limitation issue.

The Court decided only the limitation question. It held that petitioner was not required as a matter of law to exhaust his remedy before the Army Claims Service prior to bringing suit in the Court of Claims, and that petitioner's claims accrued at the time the alleged requisitionings took place, not, as petitioner had argued, at the time his claim was finally rejected by the Claims Service. On the question of wartime suspension of the limitations period which the courts apply as common law to suits between private parties, the Court adopted the broad ground urged by the Government that in a suit against the United States, war does not toll the

statute as to any one. It pointed out that the literal language of the statute contained no provision to that effect, and the statute, being a waiver of sovereign immunity, "must be strictly observed and exceptions thereto are not to be implied". It followed that petitioner's claim was time-barred. Justices Douglas, Black and Frankfurter dissented.

This decision overrules by implication holdings, such as Osbourne v. United States, et al., 164 F. 2d 767 (C.A. 2), that limitations governing suit against the United States are suspended during the period litigants are denied access to the courts by war or hostilities.

Staff: Roger Fisher (Solicitor General's Office); William W. Ross, Hershel Shanks (Civil Division).

TORT CLAIMS ACT

Liability for Alleged Negligence in Fighting Forest Fire. Rayonier v. United States; Arnhold, et al. v. United States (Supreme Court, January 28, 1957). Petitioners in these cases were owners of forest which was destroyed by a fire that originated and spread from the adjoining Olympic National Forest. Their complaints under the Federal Tort Claims Act, which were dismissed by the district court for failure to state a cause of action, alleged that (1) the Port Angeles Western Railroad's right of way across the National Forest was covered with inflammable debris which the Government negligently failed to require it to remove; (2) the Government lands adjoining the right of way were also negligently maintained; (3) a spark from a defectively operated locomotive started a fire on the right-of-way which spread over a 1600 acre area; (4) the Forest Service undertook to fight the fire; and (5) by reason of numerous negligent acts and omissions in the course of the firefighting activities on the 1600 acre tract, the fire after smouldering for more than a month spread to petitioners' land and caused property damage. The Court of Appeals affirmed the judgment of dismissal. It held that (1) under the allegations of the complaint the sole proximate cause of the damage was the purported negligence of the Forest Service in fighting the fire after it spread to the 1600 acre tract; (2) the Forest Service was then acting in the capacity of a public fireman; and (3) under the decision of the Supreme Court in Dalehite v. United States, 346 U.S. 15, 43-44, liability may not be imposed under the Tort Claims Act for negligence in the conduct of public firefighting activities. The Court of Appeals further rejected, on state law grounds, other asserted bases for Government liability, as owner of the servient estate on the right-of-way and of adjoining property across which the fire passed. The Supreme Court reversed. Addressing itself to the question of the Government's liability for the asserted negligence of the Forest Service in fighting the fire, the Court held that the courts below had erroneously relied on Dalehite: "As we recently held in Indian Towing Co. v. United States, 350 U.S. 61, the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. We expressly decided in Indian Towing that the United States' liability is not restricted to the

liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when it acts in a 'proprietary' capacity and its negligence when it acts in a 'uniquely governmental' capacity. To the extent that there was anything to the contrary in the Dalehite case it was necessarily rejected by Indian Towing." With respect to the Government's argument that to hold actionable the alleged failure of public firemen to extinguish a fire would be to visit the United States with a "novel and unprecedented" liability (see Feres v. United States, 340 U.S. 135, 142), the Court stated that the purpose of the Act was "to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." The Court concluded there was no justification "to read exemptions into the Act beyond those provided by Congress." The cases were remanded to the district court for a determination as to whether the allegations of the complaint would be sufficient to impose liability on a private person under Washington law.

Staff: Assistant Attorney General George Cochran Doub, Alan S. Rosenthal (Civil Division).

COURT OF APPEALS

IMMIGRATION AND NATIONALITY ACT OF 1952

Mere Payment of Earned Wages in Full Without Intention to Discharge not Prohibited by Section 256 Banning "Pay Off or Discharge" of Alien Crewmen in American Ports. Fine Imposed Under Section 256 is Liability of Vessel and Its Management and Imposable Upon Any Individuals Having Interest in Vessel. United States v. Seaboard Surety Company and National Surety Corporation v. United States (C.A. 4, December 17, 1956). The United States brought three suits, consolidated by the district court, against two surety companies to recover on bonds given as security for fines imposed under Section 256 of the Immigration and Nationality Act of 1952 prohibiting the "pay off or discharge" of alien crewmen in American ports without the prior consent of the Attorney General. In one of the cases (Seaboard Surety Company) the alien crewmen, upon arrival of his vessel in an American port, was paid his earned wages in full although he was not signed off the vessel and there was no intention to discharge him; in the other two cases (National Surety Corporation) the alien crewmen were paid their earned wages in full and were signed off the vessel. In two of the cases the crewmen were paid by the master of their vessel and in the third case by the British consul acting as an agent of the vessel. In all three cases notice of an intention to fine was served on the local agent. The local agent posted bonds with defendant companies as sureties. In each case, the Immigration and Naturalization Service imposed a $500 fine which the principals and sureties on the bond refused to pay.

The district court held in the Seaboard case that payment of the alien crewman's wages in full without intention to terminate his employment on the vessel was not a "pay off" within the meaning of the Act, and, in the

National cases, that notice to fine could be served and the fine imposed upon the local agent of the vessels for the illegal acts of the master or British consul, since a fine imposed under Section 256 is a liability of the vessel and its management rather than of the particular individual who did the illegal paying off or discharging. On appeal by the Government from the Seaboard decision and by the surety companies from the National decisions, the Circuit Court affirmed.

Staff: Lino A. Graglia (Civil Division).

PRIORITY OF INVENTION IN PATENT APPLICATION

In Overruling Determination of Priority of Invention by Patent Office, Plaintiff Must Establish Priority by Testimony Which Carries Thorough Conviction. United States v. Joseph Szuecs (C.A.D.C., January 10, 1957). In an interference proceeding in the Patent Office plaintiff's claim to priority of invention was denied. The district court's judgment overruling this decision and ordering the Commissioner of Patents to issue plaintiff letters patent was based on a finding that plaintiff's priority was established "by a preponderance of the evidence". On appeal, the decision of the district court was reversed and the case remanded on the ground that, while the plaintiff was entitled to try the question of priority de novo in the district court, his contention must be established "by testimony which in character and amount carries thorough conviction" (Morgan v. Daniels, 153 U.S. 120, 125) in the face of the ruling adverse to the plaintiff by the Patent Office.

Staff: E. R. Weisbender, Albert K. Geer (Civil Division)

REVIEW OF MILITARY DISCHARGE

Discharge from Military Service - Jurisdiction of Civil Courts to Review Military Discretion Re Type of Discharge Certificate to be Issued. Harmon v. Brucker (C.A.D.C., January 31, 1957). Plaintiff was given an Undesirable Discharge from the Army as a security risk, pursuant to a Directive issued by the Secretary of Defense which established a security program for military personnel comparable to the civilian employees' security program prescribed by Executive Order 10450. The basis for the security risk determination was that plaintiff had been associated prior to his induction with organizations on the Attorney General's list or was otherwise believed to be under Communist control. After plaintiff instituted suit to compel the issuance to him of an Honorable Discharge, the Army reviewed his discharge and gave him a General Discharge under honorable conditions. The Court of Appeals held that on the basis of both separation of powers considerations and congressional intent in providing a system of administrative post-discharge review, the civil courts have no jurisdiction to pass on the exercise by the Secretary of the Army of his discretion to decide what type of discharge a soldier should be given. The Court also held there was no lack of either substantive or procedural due process, in that the Army, in determining whether a soldier is a security risk, is entitled to consider his pre-induction activities, and he

was given adequate notice and hearing on the charges. The Court recognized that a General Discharge was less valuable to a soldier than an Honorable Discharge, but held that it was not punishment in a legal sense so as to permit judicial review.

Judge Bazelon dissented.

Staff: Donald B. MacGuineas, Howard E. Shapiro (Civil Division).

SOCIAL SECURITY ACT

Under New York Law, Child Born Out of Wedlock in Jurisdiction Where Subsequent Marriage Is Only Method of Legitimating Offspring, May not Inherit Father's Intestate Personal Property in Absence of Parent's Subsequent Marriage and Therefore Is not Entitled to Social Security Benefits. Robert Robles, by his guardian ad litem Pablo Robles v. Folsom (C.A. 2., December 10, 1956). Plaintiff sued to recover insurance benefits under the Social Security Act after the death of his father. The Act (42 U.S.C. 416 (h)(1)) makes the child's right to inherit intestate personal property in the state in which the father was domiciled at the death determinative of the child's right to Social Security benefits. Plaintiff was born out of wedlock while his father and mother were domiciled in Puerto Rico. Subsequently they moved to New York. The wage earner had recognized and acknowledged the child as his own since birth.

The Court of Appeals affirmed the judgment of the district court summarily dismissing the complaint. Under New York law, an illegitimate child may be legitimated by the subsequent marriage of his parents in the state where they were then domiciled, the child's status as legitimate following him to an after-acquired domicile. Applying New York law, the Court of Appeals held that since the parents had never married, the child could not inherit the father's intestate personal property in New York. It rejected plaintiff's contention that, since the Puerto Rican Code allows a child born out of wedlock to inherit his portion of his father's property if his father has "recognized" him as his own, the status of "recognized" or "acknowledged" under Puerto Rican law should be treated as "legitimate" under New York law.

Judge Clark dissented.

Staff: Assistant United States Attorney Elliott Kahaner (S.D. N.Y.)

DISTRICT COURT

EMERGENCY PRICE CONTROL ACT OF 1942

Subsidies - Limited Jurisdiction of District Court Under Emergency Price Control Act of 1942 - Finding in Preliminary Injunction Sufficient Basis for Administrative Determination. United States v. Marcel Darche, t/a Paris Abattoir (D. N.J., December 28, 1956). This was a suit to recover livestock slaughter subsidies paid to the defendant during World

War II. Section 7(b)(2) of Directive 41 of the Office of Economic Stabilization provided that, upon a finding by a court of first instance that a slaughterer had violated price regulations, and upon the Office of Price Administration's certification thereof, the subsidy administrator (Reconstruction Finance Corporation) shall recapture the subsidy paid for the period involved. RFC issued its letter-order requiring subsidy restitution. Defendant contended that since the finding of violation was contained in a preliminary injunction, it was not such a finding under Directive 41 as warranted forfeiture of the subsidy. The injunction proceedings had been dismissed after the end of the price control program.

The Court held it had no jurisdiction to consider the validity of Reconstruction Finance Corporation's letter-order. 50 U.S.C. App. 924(d). By way of dictum, and in accord with United States v. A-1 Meat Company, Inc., (November 8, 1956, Bulletin, Vol. 5, No. 1), the Court stated that the findings in the injunction proceeding satisfied the requirement of Directive 41. The Court also held the suit was not barred by laches or by any statute of limitations.

Staff: Assistant United States Attorney Herman Scott (D. N.J.); Maurice S. Meyer (Civil Division).

FALSE CLAIMS ACT

Arrest of Defendant in Civil Actions for Forfeitures and Double Damages. United States v. T. Y. Fong (N.D. Calif., December 31, 1956). United States v. George Mayo Crump (E.D. Va., November 15, 1956.) Two United States Attorneys have recently invoked the rarely used civil arrest and bail provisions of 31 U.S.C. 233. In each case defendant executed a bond for appearance and for payment of any judgment against him.

The False Claims Act first enacted in 1863 and reinacted in 1943, provides that persons liable to suit under the Act "may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of Two Thousand Dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit."

In the Crump case the defendant is a citizen of the United States and maintains an office within the jurisdiction of the court. Moreover, he had been served in the suit and was represented by counsel at the time the United States moved for the issuance of a warrant and to fix bail. The motion was supported by a separate affidavit relating to the concealment of assets. At a hearing, District Judge Hutcheson rejected the argument of defendant's counsel and signed the warrant. Bail was fixed at $10,000, the sum requested by the United States Attorney. The complaint alleges one forfeiture and double damages for a total of $30,000. Trial date has not been set.

In the Fong case defendant is a citizen of the Republic of China and visits the United States infrequently for short stays. This fact, plus defendant's use of corporate devices to conceal assets in this country,

justified a civil arrest if Fong could be found. With the cooperation of the FBI and NIS Fong was located in San Francisco. Thereupon the United States moved quickly and obtained a bench warrant with bail of $50,000 in an ex parte hearing before Chief Judge Michael J. Roche on December 31, 1956. The Government's claim is for 7 forfeitures and double damages in a total sum of $764,000. Fong was served with the warrant, summons and copy of the verified complaint, and deposited cash bail on January 2, 1957 with his personal bond for appearance and payment of any judgment against him. The court relied on United States v. Griswold, 11 F. 807 (D. Oregon, 1880) for the rule that a verified complaint satisfies the statutory requirement of an affidavit of the amount of the damages.

The Griswold case is the only known reported decision involving the arrest provisions of Section 233, 31 U.S.C. 231. However, that case does not furnish any guide as to approved procedural steps. Where time permits it is advisable to execute an affidavit setting forth on information and belief the special facts which justify the issuance of a warrant, i.e., intent to evade service, to depart from the United States, concealment of assets, prior bad faith, etc., notwithstanding that under the statutory language the court's discretion appears to be restricted to the amount of the bail, and the affidavit appears to relate only to the amount of the damages.

Staff: United States Attorney Lloyd H. Burke, Assistant United States Attorney James B. Schnake (N.D. Calif.); Katherine H. Johnson (Civil Division)

United States Attorney Lester S. Parsons, Assistant United States Attorney R. R. Ryder (E.D. Va.); Jess H. Rosenberg (Civil Division).

FALSE CLAIMS ACT AND SERVICEMEN'S READJUSTMENT ACT

Application for Free Hospitalization Based on Financial Inability to Pay is False Claims Notwithstanding Disclosure of Adequate Assets. United States v. Petrik (D. Kansas, December 19, 1956). This is the Government's first suit under the False Claims Act, 31 U.S.C. 231-235, to recover damages against a veteran for falsely applying for hospitalization for the reason that he could not pay the cost. In an addendum to his application, defendant disclosed total assets of $50,000 together with adequate income and ready assets. Under statutory provision that veteran's sworn statement "shall be accepted as sufficient evidence of inability to defray necessary expenses" (38 U.S.C. 706), the Veterans Administration considered no other evidence, including the veteran's own disclosure of assets, for the purpose of disallowing the application.

The Court ruled that the "* * * 'Addendum' is merely given to prompt the veteran into telling the truth as to his financial ability, because it is the Veterans Administration policy not to become the judge of the veteran's eligibility for treatment, but to rely on the veteran's statement

that he is unable to pay for medical service". Thus, in spite of the disclosure there was a false claim. Judgment was for one forfeiture of $2,000, plus double the hospital bill.

Staff: Assistant United States Attorney Royce D. Sickler (D. Kansas); Maurice S. Meyer (Civil Division).

JURISDICTION OF MILITARY PERSONNEL

Petition for Writ of Habeas Corpus by Air Force Enlistee Denied - State Decree of Incompetency not Determinative of Validity of Enlistment. In the Matter of the Petition of Austin T. Judge for a Writ of Habeas Corpus, Etc. (S.D. Calif., December 14, 1956). Petitioner sought a writ of habeas corpus from the district court while in military custody for military offenses at Long Beach Air Force Base. He attacked the military jurisdiction over him by virtue of an outstanding decree of guardianship and incompetency rendered by a state court which, he contended, invalidated his enlistment in the Air Force. The District Court, in denying the petition, held that the state court decree was at most prima facie evidence of incompetency and was rebutted by other evidence.

Staff: United States Attorney Laughlin E. Waters and Assistant United States Attorney Jordan A. Dreifus (S.D. Calif.)

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CRIMINAL DIVISION

Assistant Attorney General Warren Olney III

EXPEDITING APPEALS IN CRIMINAL CASES

United States v. Max Waldman (C.A. 2). Defendant, a trucker was convicted under 18 U.S.C. 641 and 659 of stealing 106 bales of crude rubber owned by the General Services Administration, Treasury Department. Immediately upon his conviction on March 15, 1954, Waldman was admitted to bail. Although the last day for filing the record on appeal was September 30, 1954, the record was not actually filed until October 26, 1956. During the intervening period, defendant requested and was granted extensions by agreements of counsel. The Second Circuit, in affirming the conviction on January 16, 1957, noted that defendant had been "the recipient of unusual, if not undue favor." The Court stated: "We think the United States would be well advised to agree to such extensions requested by prisoners out on bail only for pressing reasons and, if nothing better is adduced than convenience or engagements of counsel, should refuse such requests or refer them to the court for action. Such unexcused delay may suggest a need to revoke bail. Under the newly amended rule, F.R. Cr. P., rule 46(a)(2), bail should not be allowed where it appears that the appeal is 'taken for delay'; this would imply that a grant may be recalled when the delay has become quite apparent."

In this connection attention is also directed to the opinion of Mr. Justice Frankfurter on August 9, 1956, in Ward and Bowers v. United States, not yet reported, in which he referred to the "habit of acquiescence", expressing the view that "a more drastic procedure for the early disposition of a criminal appeal than agreement among the parties is required" and that the government should be "the active mover for an early hearing, thus putting upon the convicted defendant the responsibility for setting forth sound reasons for postponing such a hearing."

All United States Attorneys are urged to heed these admonitions in line with the Department's policy and efforts to expedite the prompt disposition of criminal cases.

FRAUD

False Statements to Federal Savings and Loan Associations in Violation of 18 U.S.C. 1014. United States v. Max Rosmarin and Henry Rosmarin (W.D. Ky.). Max and Henry Rosmarin, German immigrants recently naturalized, were indicted for conspiring to make false statements to secure loans. They were also charged substantively with making false statements on a loan application. Max Rosmarin was charged individually in fourteen counts with making false statements on other loan applications. They submitted to the lending associations false survey sketches showing houses to have been built on unimproved lots. The associations lent the defendant builders money, having been misled into believing they were secured by lots improved by newly erected houses when in fact the lots were vacant.

After pleading guilty on December 17, 1956, Max Rosmarin was sentenced to four years and Henry Rosmarin was sentenced to eighteen months.

Staff: United States Attorney J. Leonard Walker (W.D. Ky.)

INTERNAL REVENUE

Forfeiture of Money and Other Property Used in Wagering Tax Violations. United States v. $5,542.34, etc; United States v. $1,218.51, etc. (M.D.N.C.) The Court has handed down judgments in these cases forfeiting to the government sums of money and other property used in carrying on wagering businesses on which the special occupational tax imposed by 26 U.S.C. 4411 and the excise taxes on wagers imposed by 26 U.S.C. 4401 had not been paid. The libels were founded on section 7302 of the Internal Revenue Code, which subjects to forfeiture any property intended for use in violating the provisions of the internal revenue laws, or which has been so used. The forfeiture of the money by the Court in these cases is significant in that it indicates that the application of section 7302 to wagering tax cases constitutes a potent force in the suppression of illicit wagering operations by depriving the violators of the necessary capital used in the conduct of such businesses. It is necessary, of course, that the government in such forfeiture proceedings establish that the money was used in or derived from the wagering business.

In the associated criminal cases brought for willful failure to pay the taxes in violation of section 7203 of the Code -- willful failure to make a return and pay tax -- defendants pleaded guilty and were sentenced to serve three and two years in prison, respectively. Fines of up to $1,000 were also imposed.

SLOT MACHINE ACT OF 1951

Trade Boosters. United States v. Robert J. Ansani, et al. (C.A. 7). The conviction of the appellants on January 26, 1956 on a charge of failing and refusing to register as dealers in gambling devices in violation of 15 U.S.C. 1173 was affirmed on January 15, 1957. (See United States Attorneys' Bulletin, Volume No. 4, February 17, 1956, Page 102.) Numerous points were raised by appellants, the most substantial of which was whether the devices in question, certain "Trade Boosters", are gambling devices within the definitions of 15 U.S.C. 1171(a)(3). Briefly described, the "Trade Booster" is an electrically operated device which is attached to the conventional slot machine in place of the coin-insert and coin-discharge mechanisms of the original machine. As pointed out in the Court of Appeals' opinion, a slot machine from which the coin slots had been removed was mechanically inoperable until the "Trade Booster" mechanism had been inserted and connected. After the slot machine had been altered to operate with the trade booster, it was inoperable without the trade booster.

The Court stated: "* * * A slot machine is not a gambling device merely because it has coin slots or an automatic pay off mechanism. It is a gambling device because its function and design are to allow one to stake money or any other thing of value upon the uncertain event of achieving the

winning combination of insignia. Essentially the game is played as it was before the alteration or modification; and we cannot believe that a player would classify the machine differently after the conversion.* * *."

Appellants argued that the trade booster must be a subassembly or essential part in the original design of the slot machine without conversion. The Court stated: " It is, of course, true that a trade booster is not a subassembly or essential part of a slot machine as the latter was initially designed and manufactured. But the trade booster performs precisely the same function as the coin slots and pay off mechanism previously performed in an unaltered slot machine. Therefore, to the extent that the coin slots and pay off mechanism were subassemblies or essential parts of an unaltered machine, the trade booster is equally a subassembly or essential part in the machine's altered or deslotted condition because the altered slot machine cannot be operated without the trade booster.* * *."

Appellants also argued that the trade booster could be employed with any type of device, gambling or non-gambling. In this connection the Court said: "* * * If this be true it furnishes no defense because the trade boosters here in question were shipped to be used and were used in connection with so-called slot machines.* * * The fact that the various parts of a slot machine may be employed in a nongambling appliance does not render such parts any less subassemblies or essential parts of a slot machine. It is sufficient for the purpose of Section 1171 that any subassembly or essential part is "intended to be used in connection with any such machine or mechanical device." * * *."

Appellants next urged that the registration provisions of Section 1173 violate the Fifth Amendment by compelling a defendant to give evidence against himself which may be used in a criminal proceeding. With regard to this contention the Court stated: "* * * This registration requirement is obviously prospective. It contemplates the filing of required information before the dealer commences business. Defendants are not compelled to confess to acts already committed, they are merely informed of the conditions upon which they may do business in the future.* * *."

It is felt that this decision by the Court of Appeals for the seventh circuit should do much to dispel some of the uncertainty in enforcement of the slot machine act.

Staff: United States Attorney Robert Tiekin; Assistant United States Attorneys John P. Lulinski and Edwin A. Strugala (N.D. Ill.).

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TAX DIVISION

Assistant Attorney General Charles K. Rice

New Second Assistant

Andrew F. Oehmann, formerly Assistant Chief of the Trial Section, has been designated Second Assistant in the Tax Division. Mr. Oehmann's federal service includes a tour of duty in the office of the United States Attorney for the District of Columbia and as Executive Assistant in the Criminal Division of the Department.

CIVIL TAX MATTERS
Appellate Decisions

Partial Amortization Certificates Under World War II Statute Held to Preclude Taxpayer from Amortizing Full Costs of Facilities. United States v. Allen-Bradley Co. and National Lead Co. v. Commissioner (U.S. Supreme Court), January 22, 1957. Under legislation applicable during World War II, taxpayers who received certificates of necessity became entitled to amortization deductions which, in effect, permitted property to be depreciated during a period of 5 years or during the actual period of the emergency, whichever was less. During the latter period of the war, certifying officials adopted a policy of issuing certificates for less than 100% of cost in situations where it appeared that the property would have post-war utility.

The Court of Claims, in Wickes Corp. v. United States, 108 F. Supp. 616, had held that the certifying officials lacked any statutory authorization to issue certificates for less than 100% of cost and that a taxpayer who received a partial certificate was, nevertheless, entitled to amortize the full cost of the property since, as the Court of Claims viewed the situation, the issuance of a certificate, even a partial certificate, represented a determination by the certifying officials that the facilities were necessary in the interest of the national defense. It followed that position in the present Allen-Bradley case.

In the National Lead case, 230 F. 2d 161, the Second Circuit held that a taxpayer who failed to institute a direct judicial attack on the issuance of a partial certificate was precluded from claiming, in a tax proceeding, that it was entitled to amortization deductions just as though it had received a certificate for 100% of cost when the certifying officials had, in fact, seen fit to issue a partial certificate.

The Supreme Court granted certiorari to review these conflicting decisions. A unanimous Court upheld the Government in its contention that the statutory authority of the certifying officials (1939 Code Section 124(f)) was broad enough to authorize the issuance of partial certificates. Although the opinion observes that the statute was sufficiently ambiguous to have permitted either construction, the Court held that the construction contemporaneously adopted by the administrative officials and never rejected

by Congress was permissible. Justice Harlan concurred on the grounds relied on by the Second Circuit, namely, that a taxpayer could not make a collateral attack on the validity of a certificate in a tax proceeding.

It is estimated that these decisions will affect approximately $60,000,000 of revenue involved in other cases pending in this Department and in the Internal Revenue Service.

Staff: Hilbert P. Zarky and Joseph F. Goetten (Tax Division)

Deductions - Business Versus Non-Business Bad Debts - Unrecovered Advances to Corporation by Stockholder Who Had Guaranteed Corporation's Completion of Contract. Commissioner v. George J. Schaefer (C.A. 2, January 10, 1947). Since 1914 taxpayer had been connected with the motion picture industry as a corporate executive and more recently on his own account as supervisor of the distribution of pictures of independent producers. In 1946 he organized a corporation to produce a single picture at an estimated cost of $175,000. The total capital of the corporation was $25,000, all of which was paid in by the taxpayer who became its president, dominant executive, and, for the time being, its sole stockholder. In obtaining loans of $170,000 for the corporation, taxpayer was required to execute a personal guaranty to complete the picture's production in the event corporate funds available for its production should prove insufficient. Taxpayer had never before engaged in the business of producing or financing the production of a motion picture. Pursuant to his guaranty, taxpayer advanced to the corporation approximately $53,000, none of which he was able to recover. The Tax Court sustained taxpayer's contention that these advances were fully deductible as business bad debts under Section 23(k)(1) of the Internal Revenue Code of 1939.

On appeal the Second Circuit reversed and sustained the Commissioner's contention that taxpayer was not engaged in a trade or business of his own to which the claimed bad debt losses were incident. Accordingly, the Court held that taxpayer's advances constituted non-business bad debts which must be treated as short-term capital losses under the provisions of 1939 Code Section 23 (k)(4).

Staff: Joseph F. Goetten (Tax Division)

District Court Decisions

Income Tax - Guarantor Without Standing to Sue for Recovery of Monies Allegedly Paid as Offer to Compromise Liability of Taxpayer. Dynamic Service, Inc. v. Granquist (D. Ore.). Taxpayer-corporation, delinquent in returning certain withholding and employment taxes, found itself in financial difficulty and negotiated a sale of its business to plaintiff. Thereafter, taxpayer submitted an offer to compromise its liability by payment of $7,000, accompanying the offer with a certified check for $1,000 drawn by plaintiff payable to taxpayer and endorsed to the District Director. The balance was to be paid in installments. Attached to and as a part of the offer was

plaintiff's guarantee to pay taxpayer's account to the extent of $7,000. The guarantee provided that in the event the offer was accepted, plaintiff agreed to be bound, while in the event the offer was rejected the $1,000 payment should be returned to plaintiff. Before final action was taken on the offer by the Internal Revenue Service plaintiff advised that it was withdrawing any and all offers made on behalf of taxpayer and demanded return of the $1,000 payment to plaintiff. Two months later the offer in compromise was accepted and the Internal Revenue Service refused to refund the $1,000 to plaintiff. No claim for refund was filed, plaintiff instead bringing suit against the District Director allegedly for money had and received.

The case was submitted on stipulated facts in the pretrial order with oral argument. The decision concluded that the $1,000 in dispute was, for purposes of this case, taxpayer's money and Dynamic does not have standing to sue to recover it.

Staff: Assistant United States Attorney Edward J. Georgeff (D. Ore.)
Allen A. Bowden (Tax Division).

Enforcement of Internal Revenue Summons - Right of Government to Compel Production of Books and Records for Examination to Determine Whether Taxpayer, Alleged Non-resident Citizen, Is Liable for Income Taxes. Matter of United States v. Earl Carroll (S.D. N.Y., January 2, 1957). Respondent was served with a summons under Section 7601 and 7602 of the 1954 Code, and upon his appearance before the revenue officer, refused to answer certain questions relating to financial matters between himself and others during the years 1944 through 1954, and declined to produce for examination his books and records or to furnish any information concerning income earned or realized in foreign countries during those years. Thereafter, an application for an order to compel compliance with the summons was filed in the District Court, and after entry of the order respondent filed a motion to vacate, on the ground that since his income was earned as an international lawyer while he was a bona fide resident of Germany, he was exempt from filing a return under Section 116 of the 1939 Code, and therefore an inquiry into the details of his income for the above years was neither relevant nor material. Taxpayer thus argued that the only inquiry which the Revenue Service could make is whether he could establish a bona fide foreign residence.

The District Court, denying the motion to vacate its previous order, stated that taxpayer's contention was without merit; that the inquiry called for by the summons was not a judicial proceeding where rights are finally determined; that the Court did not have power at the time to decide the issue of the foreign residence of the taxpayer to determine his possible exemption from taxation under the revenue laws; that Congress has conferred upon the Secretary of the Treasury the power and duty to administer the revenue laws, including exemptions from taxation, the final decision being one for appropriate administrative authority, which the Court could not pass upon in the present proceeding, and which issue would be a matter for a court to determine later in a refund suit; and that the inquiry by summons

may be made merely upon a conclusive allegation by revenue agents that there is a suspicion of a false or fraudulent tax return, without the necessity of proof of the facts showing reasonable grounds to believe that the returns are fraudulent, even though here the statute of limitations had run against the assessment of taxes for some of the years. Falsone v. United States, 205 F. 2d 734 (C.A. 5); United States v. United Distillers Products Corp., 156 F. 2d 872 (C.A. 2).

The Court continued that the Government has no burden of showing probable cause to justify the inquiry by means of the summons served upon the taxpayer (First National Bank of Mobile v. United States, 160 F. 2d 532 (C.A. 5)); that a requirement of a prior showing or determination of tax liability would defeat the purpose of Section 7601, and that a taxpayer may not refuse to disclose details of his income merely because he believes that it is not taxable. The Court concluded that although income earned by a bona fide foreign resident is exempt from tax under Section 116, the Government, in determining tax liability, is entitled to inquire as to source of all income, including earned income and income from other sources, and therefore a taxpayer cannot be the judge of what books and papers are relevant and material and thus restrict the examination of his financial affairs to papers of his own selection. This, the Court said, was a determination in the first instance to be made by the Commissioner, who is charged with the duty of verifying the correctness of a taxpayer's returns. In re International Corporation, 5 F. Supp. 608, 611.

Staff: United States Attorney Paul W. Williams and Assistant United States Attorney Foster Bam (S.D. N.Y.).

CRIMINAL TAX MATTERS
Appellate Decisions

Supreme Court Action. On January 28, 1957, certiorari was granted in Frank Costello v. United States (C.A. 2). The question presented relates to the legality of a sentence imposed under Section 145(b) of the Internal Revenue Code of 1939 upon a conviction for income tax evasion when it exceeds the maximum which could have been imposed under Section 3616(a) of the Code. (See Bulletin, February 1, 1957, pp. 69-70). The Court has set the case down for argument during the week of April 22, 1957.

Wilfulness - Income Tax Evasion. United States v. George Cindrich, Jr. (C.A. 3), January 22, 1957.) Appellant was indicted for attempted evasion of his income taxes for 1948, 1949 and 1951, in violation of Section 145(b) of the 1939 Code. He was acquitted on the first two counts, which were based largely on indirect (bank deposits) evidence, and convicted with respect to the 1951 count, which was established by proof of ten specific omissions from reported income, totalling $4,680.60. Appellant argued on appeal that (1) the evidence was insufficient, there being no independent proof of wilfulness in 1951 and the omissions from income being comparatively small; and (2) since the jury acquitted for the years before 1951 the evidence of wilful acts of evasion committed in those years cannot be invoked in support of the verdict as to 1951.

On appeal the Court pointed out that there was a sharp conflict between appellant's statements to the Treasury agents as to his alleged unfamiliarity with the books and records, and the testimony of his bookkeeper. In addition it was shown that (1) the amounts omitted from income were nevertheless entered in the accounts receivable ledger; (2) none of the "errors" were in favor of the Government; and (3) there was a consistent pattern of omissions over a period of four years, continuing even after an adequate accounting system had been set up. With regard to this pattern of evasion in years prior to 1951, the Court stated:

> Any seeming jury inconsistency acquitting the defendant for the earlier years could have been attributable to the fact that the deficiencies for those years were based primarily on evidence of bank deposits from which diverse inferences might have been drawn, while for 1951 the government relied entirely on specific income particulars. The acquittals on the other counts may also of course have resulted from simple leniency. Factually the verdict is sound. Legally on the minor question here of the possible inconsistency of the verdict *** rational consistency between the verdicts of a jury is never necessary.

Staff: United States Attorney D. Malcolm Anderson and Assistant United States Attorney Thomas J. Shannon (W.D. Pa.)

* * *

ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT

Conviction of Newspaper for Monopolization Upheld. The Kansas City Star Company and Emil A. Sees v. United States (C.A.8). On January 23, 1957, the Court of Appeals in a lengthy opinion unanimously affirmed the convictions of the Kansas City Star and Emil A. Sees, its advertising manager, for violating Section 2 of the Sherman Act. The Star was convicted of attempting to monopolize, and of monopolizing, interstate trade and commerce in the dissemination of news and advertising in metropolitan Kansas City, and Sees was convicted of attempting to monopolize such trade and commerce.

The Court held that the evidence tended to show, and the jury was justified in concluding, that the Star had a "dominant" position in the newspaper field in metropolitan Kansas City; that such position gave it the power to exclude competition and that, through Sees and others, "it exercised such power for the purpose and with the intent of excluding competition," by employing various coercive tactics against advertisers who used competing advertising media; and that there was evidence to justify the jury in concluding that the Star's morning and evening newspapers were two separate newspapers, and that the Star had used unit combination advertising and joint subscriptions "with the intent and effect of excluding competition."

The Court rejected appellants' contention that, under the decision in United States v. duPont, 351 U.S. 377, the Star as a matter of law could not be held to have monopolized the dissemination of news and advertising in metropolitan Kansas City. The Court, noting that the indictment charged the Star with monopolizing the dissemination of news and advertising in metropolitan Kansas City, concluded that, "with due regard to the realities of newspaper advertising," such other media of news and advertising as radio and television stations located outside the area, magazines, newsreels, topical books, etc., were not "effective substitutes" for the Star in that market.

The Court also held that the trial judge had not erred in his instructions to the jury, in permitting introduction of evidence relating to events occurring prior to the three-year period covered by the statute of limitations, or in imposing a 1936 cut-off date for such evidence.

Staff: Earl A. Jinkinson, Joseph E. McDowell, Daniel M. Friedman, Willis L. Hotchkiss and Raymond P. Hernacki. (Antitrust Division)

Allocation of Customers. United States v. Blaw-Knox Company, et al., (W.D. N.C.). An indictment was returned on February 4, 1957, at Charlotte, North Carolina, charging twelve manufacturers and distributors of automatic sprinkler systems with a violation of Section 1 of the Sherman Act.

The indictment charged that defendants engaged in a conspiracy to allocate customers in the States of North and South Carolina; that they appointed a committee to handle the allocation scheme, held periodic meetings to arrange for the allocations, and then agreed to protect the price quoted by the defendant to whom the customer was allocated; and that, under a quota system established, each defendant was guaranteed a fixed percentage of the total business done in these areas.

The combined sales of defendants in these two states in sprinkler systems amounted to approximate $5,000,000 in 1956. Five of the defendants operate nationally, while the remaining seven defendants operate in North and South Carolina.

Staff: Earl A. Jinkinson, Bertram M. Long and Ned Robertson (Antitrust Division)

Violations of Sections 1 and 2 of the Sherman Act. United States v. Union Carbide & Carbon Corporation, et al., (D. Colo.). This is a criminal information charging Union Carbide & Carbon Corporation, Vanadium Corporation of America, and a Union Carbide subsidiary with conspiring to monopolize vanadium oxide and ferro vanadium, and with fixing prices on those products and on vanadium bearing ore. The information has been pending since 1948.

Trial commenced before Judge Knous and a jury at Denver on January 7, and continued on a day to day basis, except for Fridays. The Government's case and the defense case took about six trial days for the presentation of evidence. The jury deliberated for more than 48 hours, was instructed on four separate occasions, and was finally discharged on January 26 because of its apparently hopeless disagreement. A speedy retrial is being sought by the Government.

Staff: Charles L. Whittinghill, Raymond M. Carlson and Richard Shadyac. (Antitrust Division)

INTERSTATE COMMERCE COMMISSION

Power of Commission to Remove Prejudices to Localities Resulting from Intrastate Rate Differentials. The Cleveland Electric Illuminating Co. v. USA and ICC, (N.D. Ohio). For a number of years rates on bituminous coal to the Cleveland area have contained finely adjusted differentials in order to maintain the competitive equilibrium between the coal mines in Ohio, West Virginia, and Pennsylvania. In 1954 certain carriers operating intrastate within Ohio lowered the rates by 40 cents per ton for the

alleged purpose of meeting truck competition. On a petition by the interstate carriers operating in the territory, the Interstate Commerce Commission held a hearing under Section 13 of the Interstate Commerce Act and, after finding that the lowered rates resulted in discrimination and prejudice to interstate commerce, entered an order directing that the historical differentials be maintained. The Cleveland Electric Illuminating Company and various Ohio coal associations attacked the order. On December 17, 1956, the Court dismissed the action on the ground that there was substantial evidence to support the Commission's finding that the lowered intrastate rates prejudiced the mines in the West Virginia and Pennsylvania area.

Staff: E. Riggs McConnell (Antitrust Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Federal Courts - Injunction in Aid of Jurisdiction. The Leiter Minerals, Inc. v. United States (Sup. Ct.) In this case the court of appeals sustained a preliminary injunction restraining prosecution of the state court proceeding obtained by the Government under facts set out at length in 3 U. S. Attys Bul. 31. The Supreme Court granted certiorari. 350 U.S. 964.

The Supreme Court held (1) that the anti-injunction statute, 28 U.S.C. 2283, does not apply to the United States, and that the suit brought by the United States in the federal district court is the only one which can finally determine whether the Government's title to the minerals is affected by Louisiana Act No. 315 of 1940. The Court, however, noting that a question of constitutionality of the state law might be involved, stated that Act No. 315 has not been interpreted by the Louisiana Supreme Court, the only court able to do so with finality, and that in such situations federal courts should not decide constitutional questions on "guesses regarding state law." It accordingly modified the injunction against Leiter to the extent of permitting an interpretation of the Louisiana law to be obtained in the state courts, stating, however, that in such a proceeding the state court could decide definitively only "questions of state law that are not subject to overriding federal law."

Staff: Assistant Attorney General Perry W. Morton (Lands Division)

Condemnation - Oral Option to Purchase Property Condemned - Statute of Frauds. Texeramics, Inc. v. United States (C.A. 5). The Government condemned a large area in Texas for military purposes and settled by stipulation with the record fee owner the amount of compensation. Thereafter Texeramics, Inc., a defendant which had by initial answer alleged ownership of an unexpired lease on a small area, by amended answer alleged ownership of this area under an oral agreement with the fee owner, and alternatively a claim for compensation for the unexpired term of the leasehold. The trial court sustained the Government's motion to strike the answer as to the claimed purchase on the ground that the Statute of Frauds of Texas rendered it void.

The Court of Appeals reversed, holding that if the facts set up in the answer be taken as true, as under the Government's motion they must be, appellant was entitled (1) to contest the Government's standing to plead the statute, and, if so, (2) the question of whether the facts took the agreement out of the operation of the statute. The Court remanded for a full trial of "all the issues tendered and to be tendered by the pleadings."

Staff: Fred W. Smith (Lands Division)

Validity of State or Federal Appropriation of Lands to Highway Purposes Assailed on Due Process Grounds. Charles O. Martin, et al. v. United States (C. A. 4). This was an action, commenced by the United States, to enjoin a trespass on federal property forming a scenic approach road into and through the Guilford Courthouse National Military Park. The property, already subject to a state road easement, was acquired in fee simple by the State of North Carolina under the provisions of ch. 2, Public Laws of 1935, Gen. Stats. 136-19, by the filing of a map outlining the right of way appropriated. It was subsequently conveyed to the United States. Martin, defendant in the cause, owned the land originally as well as a large tract adjacent to it. Several years after the alleged taking he built an access road from his land onto the park approach road without the permission required of park authorities. In the trial of the cause Martin denied the efficacy of the original appropriation by the state and the title derived thereunder by the United States and, therefore, the right of the Government to restrain his conduct in building an access road. The district court held that the ownership of the approach road right of way was in the United States, and enjoined defendant from further trespass upon said right of way without permit. The appeal presented the question of the validity of the original state appropriation. Martin assailed it, alleging that he had been denied due process of law in that he had no knowledge of the appropriation and, furthermore, the state had not accorded him an opportunity to appear and demand compensation within the applicable period of the statute of limitations. The Government argued that the acts of appropriation by the state, and thereafter by the United States, constituted sufficient notice to apprise defendant that his land was being taken for highway purposes under the provisions of the state statute heretofore mentioned.

The Court of Appeals reversed, holding that to conform to due process there had to be something more than merely filing a map. It remanded the matter for further proceedings to determine whether the state or the United States ever exercised, by their respective actions, such dominion and control over the lands involved as to constitute a valid taking when coupled with the action of the State in filing the map following the provisions of ch. 2, Public Laws of 1935. Such proceedings "we think," said the Court in its opinion, "would furnish a sufficient basis for a holding that title had been acquired and the Government would be entitled to injunctive relief," otherwise the granting of such injunctive relief should be conditioned upon the commencement of condemnation proceedings or the payment of compensation.

Staff: Richard C. Peet (Lands Division)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Visa Obtained by Fraud or Misrepresentation - Materiality of Facts Concerning Identity. Landon v. Clarke, (C.A. 1, December 17, 1956; petition for rehearing denied January 10, 1957). Appeal from order granting petition for habeas corpus in deportation case. Reversed.

In this case the alien was ordered deported on the ground that she was excludable from the United States at the time of her entry because the visa she presented had been obtained by willful misrepresentation of material facts. Among other things, she allegedly obtained a Costa Rican passport by concealing her marriage to a British subject, and obtained an immigrant visa from an American Consul at which time she failed to reveal her married name (although using her maiden name), and concealed the place of her last permanent residence, her true marital status, and the existence of her spouse and four minor children. The lower court held that these false statements were not material misrepresentations which justified the deportation order and granted the petition for habeas corpus in her case (139 F. Supp. 113).

The appellate court rejected the contention of the alien, which had been adopted by the district court, that a misrepresentation made in procuring immigration papers becomes material only when inquiry resulting from the true facts would have been enough to justify the refusal of a visa or exclusion upon entry. On the contrary, the Court held that a misrepresentation concerning identity by an incoming alien which results in entry into this country without the proper statutory investigation by immigration authorities is material, justifying deportation, no matter what the outcome of the investigation would have been if it had been made.

The Court further said that admittedly the present case is unique in that the alien falsely gave her once true name and not that of another or a totally false fact. But the misrepresentation was not any less deceptive to the authorities entrusted with the execution of our immigration laws. This employment of fraud precluded investigation of ten years of the alien's life, thus thwarting any inspection as to her possible inadmissibility to the United States as a member of the excludable classes of aliens. The district court's view, necessitating, as it does, proof of whether an alien would have been excludable if he had told the truth, or if the proper investigation had been held, in order to decide the materiality of a misrepresentation, would force the courts into the realm of conjecture and speculation, in trying to make a decision only the proper authorities could have capably made.

The Court also rejected the alien's claim that she was denied a fair hearing.

Staff: Assistant United States Attorney Andrew A. Caffrey (D. Mass.) (United States Attorney Anthony Julian also on the brief).

Evidence - Credibility and Use of "Professional Witnesses". Schleich v. Butterfield (E.D. Mich., January 16, 1957). Proceedings for judicial review of order of deportation.

The alien in this case was ordered deported on the ground that after entry he had been a member of the Communist Party of the United States and of the Young Communist League. Neither the alien nor anyone else offered themselves as witnesses in his behalf.

The entire evidence of the Government against the alien was given by two informers, one who stated he testified in "5 or 6" similar cases and the other who testified that he appeared as a witness in "25 or 30" similar cases. They also stated that they were paid by the Department of Justice for such services. Plaintiff urged that the testimony given by such "professional witnesses" should not be given any weight, particularly in a proceeding which may result in the banishment from the United States of a man who has lived here for thirty-three years and who, even under the Government charges, has not been identified with the Communist Party or its affiliates for over twenty years. The Court said, however, that the examining officer and the reviewing authorities considered the evidence of such witnesses credible and that the Court may not set aside the finding of credibility.

The Court also overruled the alien's contentions that he had been denied due process of law because the officers conducting his hearing had not been designated according to the Administrative Procedure Act; because both the hearing and examining officers were subject to common control by the same governmental agency and because of the retroactive nature of the deportation charge. Also rejected was a claim that the alien had been only a "nominal" member of the Communist organizations.

NATURALIZATION

Effect of Outstanding Finding of Deportability - Naturalization Court May not Review Validity of Deportation Order. Petition of Windmeier (S.D. N.Y., January 14, 1957). In this naturalization proceeding the petition, filed in 1946, was opposed on the ground that there was outstanding against petitioner a final warrant of deportation pursuant to a warrant of arrest. Section 318 of the Immigration and Nationality Act precludes naturalization under such circumstances.

Petitioner contended that his right to naturalization was preserved by section 405, the savings clause of the Immigration and Nationality Act. Under the circumstances here present, this contention was held invalid.

It was also urged on petitioner's behalf that the warrant of deportation outstanding against him was invalid because he was not afforded a fair hearing and was denied due process of law. The Court said that under section 318 the only question before him was whether there was outstanding a final finding of deportability. It is plain that there is a warrant of deportation presently outstanding which is valid on its face and the Court, sitting as a naturalization court, cannot set aside a deportation order valid on its face on a petition for naturalization. The Court stated that petitioner's remedy against the warrant of deportation lies in declaratory judgment proceedings which would bring before the Court the full record in the deportation proceedings and permit adjudication of their validity.

The Court therefore refused to grant the naturalization petition, but directed that it be held in status quo pending a determination of the validity of the warrant of deportation, at which time petitioner may renew his application for consideration of his naturalization petition if it should then become appropriate to do so.

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OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Effect of Treaty of Friendship, Commerce and Consular Rights with Germany on Rights of German Heir Negating Conditions Imposed by State Statute of Reciprocity. Estate of Henry Peter Ronkendorf, Deceased, Superior Court of California in and for County of San Joaquin (January 23, 1957). Findings of fact and conclusions of law and a decree determining the right of the Attorney General to real property left by decedent were entered January 23, 1957. The decree was based upon the determination that a state statute requiring proof of reciprocal rights of inheritance (§259 of the Probate Code of California) was subservient to a treaty between the United States and Germany (41 Stat. 2132) guaranteeing nationals of either treaty party the right to freely dispose of real property acquired by testament or succession situate under the jurisdiction of the other treaty party. The failure of an alien to dispose of such real property interest within the three-year period provided in said treaty did not terminate the heir's interest since the treaty contemplated a full and fair opportunity to sell the property and remove the proceeds within the three-year period or a necessary extension thereof. Decedent died May 6, 1943, leaving a maternal aunt residing in Germany as his sole heir. She died in 1948 leaving a husband whose interests were vested by the Attorney General as her sole heir. The property involved is valued at $85,000. By its action the Court directed distribution to be made to the Attorney General of the United States upon termination of administration proceedings.

Staff: George B. Searls, Irving Jaffe, William H. Arkin
(Office of Alien Property)

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