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DEPARTMENT OF JUSTICE

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UNITED STATES ATTORNEYS
BULLETIN

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MONTHLY TOTALS

1st 6 MONTHS FISCAL YEAR 1959 COMPARED WITH 1st 6 MONTHS FISCAL YEAR 1960

	1st 6 Months Fiscal Year 1959	1st 6 Months Fiscal Year 1960	% of Increase or Decrease
Criminal Cases Filed	14,713	15,111	+ 2.71
Civil Cases Filed	11,725	12,105	+ 3.24
Total Cases Filed	26,438	27,216	+ 2.94
Criminal Cases Terminated	13,556	14,247	+ 5.10
Civil Cases Terminated	11,022	10,452	- 5.17
Total Cases Terminated	24,578	24,699	+ 0.49
Criminal Cases Pending	8,469	8,410	- 0.70
Civil Cases Pending	19,743	19,783	+ 0.20
Total Cases Pending	28,212	28,193	- 0.07
Criminal Trials	1,257	1,503	+ 19.57
Civil Trials	759	613	- 19.24
Total Trials	2,016	2,116	+ 4.96
Criminal Complaints Received	51,094	51,702	+ 1.19
Civil Matters Received	15,336	15,979	+ 4.19
Proceedings Before Grand Jury	7,402	7,227	- 2.37
Collections After Suit	$10,135,383.76	$ 7,737,878.69	- 23.66
Collections Without Suit or Pros.	6,953,779.54	6,706,008.39	- 3.56
Total Collections	$17,089,163.30	$14,443,887.08	- 15.48

DISTRICTS IN CURRENT STATUS

As of December 31, 1959, the districts meeting the standards of currency were:

CASES

Criminal

Ala., N.	Ariz.	Colo.	Ga., S.	Ill., S.
Ala., M.	Ark., E.	Dist. of Col.	Hawaii	Ind., N.
Ala., S.	Ark., W.	Fla., N.	Idaho	Ind., S.
Alaska #1	Calif., N.	Fla., S.	Ill., N.	Iowa, N.
Alaska #3	Calif., S.	Ga., N.	Ill., E.	Iowa, S.

CASES

Criminal (Cont'd)

Kan.	Miss., N.	N.Y., W.	Pa., W.	Wash., W.
Ky., E.	Miss., S.	N.C., E.	P.R.	W.Va., N.
Ky., W.	Mo., E.	N.C., M.	R.I.	W.Va., S.
La., E.	Mo., W.	N.C., W.	Tenn., E.	Wis., E.
La., W.	Mont.	N.D.	Tenn., M.	Wis., W.
Maine	Neb.	Ohio, N.	Tex., E.	Wyo.
Md.	Nev.	Ohio, S.	Tex., W.	C.Z.
Mass.	N.H.	Okla., N.	Utah	Guam
Mich., E.	N.J.	Okla., E.	Vt.	V.I.
Mich., W.	N.M.	Okla., W.	Va., W.	
Minn.	N.Y., N.	Pa., E.	Wash., E.	

Civil

Ala., N.	Ind., N.	Miss., S.	N.D.	Tex., N.
Ala., M.	Ind., S.	Mo., E.	Ohio, N.	Tex., S.
Ala., S.	Iowa, S.	Mont.	Ohio, S.	Tex., W.
Alaska #1	Kan.	Neb.	Okla., N.	Vt.
Ark., E.	Ky., E.	Nev.	Okla., E.	Va., E.
Ark., W.	Ky., W.	N.H.	Okla., W.	Wash., E.
Calif., S.	La., W.	N.J.	Ore.	Wash., W.
Colo.	Me.	N.M.	Pa., W.	W.Va., S.
Dist. of Col.	Md.	N.Y., E.	P.R.	Wis., E.
Hawaii	Mass.	N.Y., N.	R.I.	Wis., W.
Idaho	Mich., E.	N.Y., W.	S.D.	Wyo.
Ill., E.	Mich., W.	N.C., M.	Tenn., W.	C.Z.
Ill., S.	Miss., N.	N.C., W.	Tex., E.	V.I.

MATTERS

Criminal

Ala., N.	Hawaii	Miss., N.	Ohio, S.	Va., E.
Ala., M.	Idaho	Miss., S.	Okla., N.	W.Va., N.
Ala., S.	Ind., N.	Mont.	Okla., E.	W.Va., S.
Alaska #3	Ind., S.	Neb.	Okla., W.	Wis., E.
Ariz.	Iowa, N.	N.H.	Pa., W.	Wyo.
Ark., E.	Ky., E.	N.J.	P.R.	C.Z.
Calif., N.	Ky., W.	N. Mex.	S.D.	Guam
Calif., S.	La., W.	N.Y., E.	Tenn., E.	V.I.
Colo.	Me.	N.C., E.	Tenn., W.	
Conn.	Md.	N.C., M.	Tex., E.	
Ga., S.	Mich., W.	N.C., W.	Utah	

MATTERS

Civil

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

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JOB WELL DONE

Assistant United States Attorney Norman Hubley, District of Massachusetts, has been commended by the FBI Special Agent in Charge for his thorough understanding of and excellent work done on a recent very involved matter. The Agent observed that Mr. Hubley's careful preparation prior to presentation to the Federal Grand Jury contributed much to the successful conclusion of the case.

The Chief Postal Inspector has expressed his appreciation for the splendid work done by Assistant United States Attorney Arlyne F. Hassett, District of Massachusetts, in a recent mail fraud case, and for the very able manner in which the Government's case was presented, resulting in a conviction and prison sentence for the defendant.

The General Counsel, Department of Commerce, has commended the diligent and vigorous work of the office of United States Attorney S. Hazard Gillespie, Jr., Southern District of New York, in a recent export control case. The General Counsel observed that the widespread interest evinced in this case by members of the export community indicates that it will contribute substantially to the effective enforcement of the Government's export control program. Assistant United States Attorneys Silvio J. Mollo and Kevin Thomas Duffy were particularly commended for their outstanding work in preparing and presenting the case, both before the Grand Jury and at the trial.

The Chairman, Securities and Exchange Commission, has expressed the sincerest congratulations and appreciation to United States Attorney S. Hazard Gillespie, Jr. and Assistant United States Attorneys Jerome J. Londin, Leonard Glass, and David Bicks, Southern District of New York, for their tremendous success in a recent case which the Commission considers one of the most important in its enforcement program. The Chairman observed that the depredations of these particular defendants in large publicly held corporations caused untold damage to the investing public, that their successful prosecution is of great significance, and that it will undoubtedly have a substantially deterrent effect upon others of their kind. In praising Messrs. Londin, Glass and Bicks for the extraordinarily skillful manner in which they conducted the Government's prosecution of this landmark case, the Chairman stated that the Commission is heavily indebted to them for their personal sacrifices and long hours of devoted and skillful service during the many weeks devoted to prosecution of this matter.

The Chief of Engineers, Department of the Army, has expressed to the Department his appreciation for the diligent efforts of United States Attorney Harlington Wood, Jr., Southern District of Illinois, in the presentation of a recent condemnation case, and particularly for the vigorous prosecution of the trial of the case by Assistant United States Attorney Edward F. Casey.

The Chief of Engineers, Department of the Army, has recently expressed his appreciation for the excellent handling of a case for the Barkley Dam and Lake Barkley Project by United States Attorney William B. Jones, Western District of Kentucky.

The Department of the Interior has expressed appreciation for the able assistance provided by United States Attorney Leon P. Miller, District of Virgin Islands, in presenting and successfully disposing of difficult cases relating to the Virgin Islands Corporation.

The Chief of Engineers, Department of the Army, has commended Assistant United States Attorney Norton L. Wisdom, Eastern District of Louisiana, for his many years representation of the Government in land acquisition matters. The commendation states, in part, "During his tenure, Mr. Wisdom has demonstrated a remarkable sense of fairness, and while sparing no effort to protect the Government's interest, he has at the same time shown an equal concern that the owners receive full compensation for their interests. * * * He has in all instances conducted himself in a manner which exemplifies the highest standards in the presentation of the Government's cases. This has reflected untold credit on the Government and on himself."

* * *

PERFORMANCE OF DUTY

The "Job Well Done" section of the Department is restricted to commendations received from sources outside the United States Attorneys' offices. The new "Performance of Duty" section will be devoted to examples of extraordinary performance of duty or of cooperation between United States Attorneys' offices.

From United States Attorney Harlington Wood, Jr. (Southern District of Illinois):

The principal witness and victim in a White Slave case, failed to respond to a subpoena on January 19, 1960, when the matter was being tried before a jury at Quincy, Illinois. We knew that she had been in Quincy the day before trial for the purpose of testifying. Since the case was in progress, there was an urgency about determining what had happened to her when she failed to appear. Mr. Edward F. Casey, Assistant United States Attorney trying the case, notified the Resident Agent of the Federal Bureau of Investigation and we contacted the local office here. It was soon determined that she had been last seen with the Defendant early on the morning of the trial, but her whereabouts were unknown. The Court continued the case from Tuesday morning and from time to time thereafter until Thursday morning of that same week. Late Wednesday afternoon the Bureau somehow located the victim in Cedar Rapids, Iowa. I called Phillip Loverine, Assistant United States Attorney, Cedar Rapids, Iowa, to assist us with returning the victim in time to testify in Court the following morning. As it was after hours he had no secretary and had to prepare the necessary papers himself which were determined to be necessary under the circumstances existing at that time. He also located the Judge who was still in town and conducted a short proceeding so that there would be no question about her removal. It was necessary for him to work well into the night to help us with this matter.

His response was so immediate and his cooperation was so complete and helpful to us under the circumstances where we were fearful the Court might dismiss our case if there was further delay, that I want to express our gratitude for his help. It certainly made a tremendous difference to us with that problem.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

Litigation Expenses of Indigent Persons

Whenever opposing counsel requests the court to authorize an expenditure in behalf of an indigent litigant, not chargeable to our appropriation in accordance with Memo No. 271 of September 29, 1959, United States Attorneys should immediately object. If the expense ordered by the court is one properly chargeable to the Department's appropriation but seems to be exorbitant, the United States Attorney should take the matter up with the court and advise that no commitment may be made without authority from Washington.

United States Marshals are being instructed to furnish monthly reports of all disbursements for indigents' expenses, and we hope United States Attorneys will cooperate in furnishing information required by Marshals in carrying out those instructions.

* * *

OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Bulgarian Foreign Exchange Control Laws in Effect in 1940, 1944, and 1945 Held to Prevent Legal Certainty of Payment of Proceeds of Inheritance in United States Which Oregon's Reciprocal Inheritance Statute Requires. Estate of John Christoff; Estate of Peter Chernacoff; Estate of John Michailoff (Sup. Ct. Ore., December 2, 1959). The three decedents died in 1940, 1944, and 1945, respectively, leaving heirs residing in Bulgaria. The Alien Property Custodian seized the interests of the heirs under the Trading With the Enemy Act. Under Sec. 61-107 O.C.L.A., before a non-resident alien may inherit property in Oregon it must be shown that at the time of the decedent's death the country of his residence granted a reciprocal right to United States citizens to inherit property and a right to receive the proceeds of such inheritance in the United States. If no such reciprocal right existed, the estate escheats. The State of Oregon claimed escheat of the property involved in the instant estates under this statute.

The three cases were consolidated for trial, and evidence showing the inheritance law and foreign exchange control laws of Bulgaria on the dates in question was presented by the deposition of a Bulgarian law expert. The expert testified that at the time of the deaths of the decedents an American citizen could inherit an estate in Bulgaria in like manner as a Bulgarian could inherit an estate in Oregon, and further, that a right to receive the proceeds of an inheritance in the United States also existed, although during the war transmission was not permitted.

The trial court held that the evidence did not meet the requirements of Sec. 61-107 O.C.L.A., and that the property of the three estates should escheat to the State of Oregon. The Attorney General appealed, and the Supreme Court of Oregon affirmed.

During oral argument, counsel for the State of Oregon conceded that the inheritance laws of Bulgaria conferred on American heirs and legatees the same "right to take" which Oregon law gives to Bulgarians. The Court, therefore, considered only the question of the existence of the right to receive payment required by the statute. The Court held that the statute contained two requirements: that a reciprocal right to take by inheritance must exist, and that there must be a right to receive a physical delivery of the inheritance within the boundaries and jurisdiction of the United States. The Court then held that the foreign exchange control laws in effect at the pertinent times, which required a license to transmit foreign exchange, made payments of the proceeds of a Bulgarian inheritance to persons in the United States a matter of grace or individual indulgence on the part of the Bulgarian National Bank, and hence prevented the certainty of payment imposed by Sec. 61-107.

Staff: Assistant United States Attorney Victor E. Harr (D. Ore.); Irving Jaffe and Lillian C. Scott (Alien Property)

Trading With the Enemy Act; Whether Under Property Law of Idaho Possibility of Reverter Is Interest in Property. Herrmann v. Rogers (C.A. 9, January 25, 1960). Fred Nagel, an Idaho resident, created an inter vivos trust in 1946 in favor of fourteen named persons, all of whom were residents and nationals of Germany. The trustees were directed to make annual payments of the income with discretion, however, to withhold payment; in the event any of the beneficiaries came to the United States, the trustees were required to pay such beneficiary his designated share of the trust res. None came. The trustees were also authorized to pay over the trust res at any time, "providing that said payment to said beneficiaries shall not be subject to confiscation by; [sic] or create sinews of war for any government antagonistic to the United States." If not sooner terminated, the trust was to terminate upon the death of the last of the named beneficiaries and the trust property was to be distributed as directed. In 1949 the Attorney General, acting under the authority of the Trading With the Enemy Act, seized all right, title and interest of all the beneficiaries in and to the trust. Demands were made upon the trustee to deliver over to the Attorney General the interests of the beneficiaries but the trustee refused to do so.

The District Court granted the Attorney General's motion for summary judgment finding that title to the property passed to the Attorney General by virtue of the vesting order and that the proceeding was a summary action for possession. The Court held that the Attorney General was entitled to such trust funds as remained in the hands of the trustee, but did not surcharge the trustee with the amount of the expenditures made to the beneficiaries after the date of the vesting order.

The Court of Appeals affirmed the lower court to the extent that it found the Attorney General entitled to immediate possession of the trust funds. The Court pointed out that the seizure provisions of the Act are "extremely comprehensive and all inclusive", and that contingent remainders are as vestible as vested remainders. The Court of Appeals reversed the lower court to the extent that it surcharged the trustee with the sum expended by her on behalf of the beneficiaries prior to the date of the vesting order and failed to surcharge the trustee with the expenditures made by her on behalf of the beneficiaries subsequent to the date of the vesting order.

The trustee petitioned the Supreme Court for certiorari, urging that the settlor had retained a property interest in the trust which was not subject to seizure and which in fact had not been seized by the Custodian. The trustee also urged that the trust was void because in violation of the rule against perpetuities because the condition precedent to payment had not occurred, and because confiscation by the United States had voided the trust. On January 26, 1959, the Supreme Court handed down the following specific mandate:

PER CURIAM.

> The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated, and the case is remanded to it, to consider whether, under the law of property of Idaho, it was possible, after the time of the making of the conveyance, for any person other than the named beneficiaries of the trust to acquire a property interest in it (other than through a named beneficiary), and, in the light of its determination as to this, to reconsider its holding that respondent was entitled to all the trust funds remaining in the hands of the trustee.

On remand the Court of Appeals adhered to its original decision, holding that the settlor had at best a possibility of reverter; that under the property law of Idaho, a possibility of reverter was an inalienable and unsalable expectancy; and assuming that the settlor had a possibility of reverter, his interest consisted of "such stuff as dreams are made on".

The Court, however, held that such possibility of reverter, if any there were, had been wholly extinguished by the happening of the event upon which payment to the beneficiaries was conditioned and that thereafter the beneficiaries possessed irrevocably vested interests in the trust res, the Court in this respect saying:

> Assuredly, it cannot be said the payment to the named beneficiaries in 1949, at a time when the Allied Forces still occupied Germany, was "subject to confiscation" by prostrate Germany, or would "create sinews of war" for that conquered nation. At that time, at least, the remainders vested finally and irrevocably in the named beneficiaries.

Staff: The case was argued by David Moses (Alien Property). On the brief were Irwin A. Seibel and Marbeth A. Miller

Injunction against Attorney General. I. G. Chemie v. Rogers (D.C. D.C.). By an order entered January 27, 1960, the Attorney General has been enjoined from voting vested stock in General Aniline & Film Corporation (GAF) in favor of a proposed amendment to its certificate of incorporation which would eliminate a provision making its Common A stock redeemable under certain conditions.

GAF has an authorized capital of 3 million Common A and 3 million Common B shares, of which 592,742 A and 2,050,000 B shares are outstanding. The Attorney General holds 540,894 A and all of the outstanding B stock. Of these, 455,624 A shares and all of the B, or 94.8% of all of GAF's voting stock, are claimed by plaintiff I. G. Chemie. The outstanding B shares alone represent voting control of GAF.

Under GAF's present charter the A stock may be redeemed at the option of the company at the then current market price "on any recognized stock exchange", but at not less than $110 per share. The A stock is not listed, and never has been listed, on any exchange. The management of GAF recommended that this redemption provision be eliminated in order to enable the company to acquire a paper company sorely needed to provide its Ansco Division with a future source of supply of a particular type of photographic paper-base stock. Sales of finished paper processed from this high quality paper-base stock represent almost half of all of Ansco's sales of photographic paper. The owners of the paper company, however, do not want to sell for cash. They want to exchange their stock for GAF A stock, but without the redemption provision.

The Government opposed the motions for injunction on the ground that the proposed amendment is necessary to preserve the earning potential of GAF and was, therefore, a valid act of administration authorized by Sections 5(b) and 12 of the Trading With the Enemy Act, and not a violation of Section 9(a) which requires that vested property be "retained" until final judgment or decree is entered or the case is otherwise terminated.

The District Court did not agree that the redemption provision is illusory and without any present value. It found, as contended by the movants, that the proposed amendment would substantially change the rights and incidents of the B shares and thus would seriously impair the rights of the movants as claimants to all of the B stock. It therefore held that the proposed action would violate the retention provisions of Section 9(a). Moreover, the Court was not persuaded that the purchase of this particular paper plant was the only solution to Ansco's problem, or even that Ansco would actually be forced to find a new source of supply. To the extent that it was permitted to weigh the equities in this case, the Court found that they "preponderate" in favor of the movants.

Staff: Irving Jaffe and Paul E. McGraw (Alien Property)

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ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Price Fixing - Tranquilizing Drugs; Sections 1 and 2 of Act. United States v. Carter Products, Inc., et al., (S.D. N.Y.). On January 27, 1960, a civil complaint charging violation of Sections 1 and 2 of the Sherman Act by Carter Products, Inc., and American Home Products Corporation in the field of meprobamate tranquilizing drugs was filed.

Carter, the holder of a patent on meprobamate powder, converts the powder into drug form and sells and distributes the drug through its Wallace Laboratories Division. Carter also sells the meprobamate powder to American Home Products Corporation, which converts the powder into drug form and sells the drug through its Wyeth Laboratories Division.

The complaint charges Carter and American Home Products Corporation with (1) agreeing to exclude all others from the manufacture and sale in the United States of tranquilizer drugs made with meprobamate as the sole active ingredient; (2) agreeing to fix prices for sale in the United States of meprobamate tranquilizers; and (3) when meprobamate is intended to be used with other ingredients to manufacture other than tranquilizing drugs, agreeing to mutually determine who will make and sell such combination drugs, which are used principally for treating arthritis, gastro intestinal, cardiac and other ailments.

Of all meprobamate tranquilizing drugs sold in the United States, the complaint asserts that American sells approximately two-thirds and Carter sells approximately one-third of a total volume in 1958 of about $40,000,000.

Staff: John D. Swartz, John J. Galgay, Bernard Wehrmann and J. Paul McQueen (Antitrust Division)

INTERSTATE COMMERCE COMMISSION

In Matter of Granting Leave to Commission to Examine Records of Certain Motor Carriers Under Grand Jury Subpoena. Interstate Dress Carriers, Inc., (S.D. N.Y.) During the course of the Grand Jury Investigation of possible antitrust violations in the ladies garment - trucking industry, documents, books and records of a large number of carriers were subpoenaed and are being kept in the custody of the Antitrust Division. The Interstate Commerce Commission, in connection with the enforcement of its regulations in the subject industry, requested permission from the Division to examine the subpoenaed materials of ten complaints. One of the ten carriers objected to the granting of such permission on the ground, among other things, that such examination would be in violation of the secrecy rule (Rule 6(e), Fed. R. Crim. Proc.).

Pertinent excerpts of the Court's Opinion follow:

By this application the Department of Justice seeks leave to permit representatives of the ICC to examine and make copies of certain books, records and papers now in custody of the department pursuant to grand jury subpoenas duces tecum, issued in the course of an investigation by the grand jury into criminal activities in the garment and trucking industries.

* * * * * * * *

Of ten carriers involved, only one, Interstate Dress Carriers, Inc., opposes the application . . . the carrier argues ... that it would violate Rule 6(e) of the Fed. R. Crim. Proc. by making a disclosure of matters occurring before the grand jury not countenanced by that rule.

* * * * * * * *

Under the present circumstances it is doubtful that the documents in question, by virtue of their being held under grand jury subpoena, are to be considered "matters occurring before the grand jury." Cf. In the Matter of Hearings Before The Committee On Banking And Currency of the United States Senate, 19 FRD 410, (N.D. Ill., 1956). They do not, in our opinion, come within the proscription of Rule 6(e), Fed. R. Crim. Proc.

Staff: John D. Swartz, Joseph T. Maioriello and Donald A. Kinkaid (Antitrust Division).

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

SUPREME COURT

ADMIRALTY

Strict Standard of Care Imposed by State Statute Giving Right of Recovery for Wrongful Death Applicable in Suit Based Upon Death Occurring on Navigable Waters Within Territorial Limits of State. Hess v. United States (Sup. Ct., January 18, 1960). This action was brought under the Tort Claims Act to recover damages for the drowning on the Columbia River in Oregon of an employee of a construction company which had contracted with the United States to perform repairs on the Bonneville Dam. In the Supreme Court, the principal question was whether, since the alleged tort occurred on navigable waters and was therefore within the admiralty jurisdiction, the wrongful death provisions of the Oregon Employers' Liability Law could be constitutionally applied. The Ninth Circuit had held in the negative on the ground that the Constitution precludes the application of state statutes which, like the Employers' Liability Law, impose a far stricter standard of care than that of the general maritime law. See United States Attorneys' Bulletin, Vol. 6, No. 20, p. 588.

Dividing 6-3, the Supreme Court reversed the determination of the Court of Appeals on the authority of The Tungus v. Skovgaard, 358 U.S. 588. The majority held that, where the maritime law looks to a state statute to provide a remedy for a wrongful death occurring on navigable waters within that state (see Western Fuel Co. v. Garcia, 257 U.S. 233, 242), "the conduct said to give rise to liability is to be measured not under admiralty's standards of duty, but under the substantive standards of the state law." The court left open, however, the question as to whether a state wrongful death act might contain provisions "so offensive to traditional principles of maritime law that the admiralty would decline to enforce them," determining that the Employers' Liability Law presented no such problem. The case was remanded to the Court of Appeals for a determination regarding whether the Employers' Liability Law was applicable as a matter of state law. Justices Frankfurter, Harlan and Whittaker dissented.

Staff: Alan S. Rosenthal, Seth H. Dubin (Civil Division)

COURTS OF APPEALS

COMMERCIAL PAPER

Burden of Loss in Fictitious Payee Situation; Issuance of Check to "Imposter" by Government as Drawer-Drawee Defeats Recovery Against Cashing Bank. United States v. Bank of America; United States v. Security-First National Bank (C.A. 9, December 28, 1959). Income tax

returns in the names of non-existent persons, each showing that the fictitious taxpayer was entitled to a tax refund, were filed with the United States, and tax refund checks drawn upon the Treasury to the order of these non-existent persons were dispatched to the addresses given on the returns. These were collected by certain persons who had prepared the returns for the purpose of defrauding the United States, and were cashed by defendant banks. Defendants thereupon stamped the checks "All prior endorsements guaranteed", and upon presentation to the Treasury the checks were paid.

When the fraud was discovered, action was instituted against defendants on the guarantee of prior endorsements. The Government relied upon the principle that a drawer who pays a check upon a forged endorsement of a payee may recover from one who receives payment. The district court, however, following Atlantic National Bank of Jacksonville v. United States, 250 F. 2d 114 (C.A. 5), held that the payees' endorsements had not been forged because the payees were "imposters", and denied recovery.

On appeal, the Government argued that the district court's decision was inconsistent with the holding in National Metropolitan Bank v. United States, 323 U.S. 454 (1945), and that the imposter rule was inapplicable under federal law on these facts because the Government's conduct had imposed no unreasonable burden of inquiry upon the defendant cashing banks with respect to the identity of the payee. The Court of Appeals affirmed, however, holding that these were imposter rather than forgery cases. The Court said, contrary to the Government's contention, that the controlling factor was the intent of the maker, and that here the Government agents responsible did intend to issue the checks to the persons who actually received them and who cashed the checks with defendants.

Staff: Peter H. Schiff (Civil Division)

FALSE CLAIMS ACT

Fraudulent Use of "Within Quota" Marketing Card to Obtain Price Support Payments for "Excess Quota" Tobacco Constitutes False Claim Against United States Within Meaning of False Claims Act. United States v. Brown & Judge (C.A. 4, January 4, 1960). Defendant Judge was the holder of a "within quota" marketing card which certified that he had not exceeded his tobacco marketing quota as established pursuant to the Agricultural Adjustment Act of 1938, as amended, 52 Stat. 31 et seq. He was, therefore, permitted to receive price support payments for his tobacco. Defendant Brown held an "excess quota" card and, accordingly, could not participate in the price support program.

On October 3, 1956, Judge permitted Brown to use Judge's "within quota" marketing card to obtain price support payments for Brown's ineligible tobacco. Brown took his tobacco to an auction warehouse, where it was consigned to a grower's cooperative which served as an agent for the Commodity Credit Corporation in the Administration of

the price support program. The warehouseman paid Brown the price support amount. The cooperative, in turn, took the tobacco, reimbursing the warehouseman. The cooperative then received from CCC a non-recourse loan in the amount which it had paid for the tobacco, plus certain expenses.

The United States brought an action against Brown and Judge under the False Claims Act, 12 Stat. 696, 698, 31 U.S.C. 231, to recover forfeitures and double damages. The district court held that a false claim had been made, but dismissed the suit on the ground that the claim was not one against the United States within the meaning of the statute. The court reasoned that the claim had been too remote from the disbursement ultimately made by the CCC.

The Court of Appeals reversed, holding that defendant's false claim did not come within the scope of the statute. The Court emphasized that, although the claim had not been presented directly to CCC it was nevertheless, in its actual effect, one against the Government support funds administered by CCC. The Court pointed out that United States ex rel. Marcus v. Hess, 317 U.S. 537, had settled that a fraudulent claim was within the reach of the False Claims Act where it caused Government funds to be disbursed, notwithstanding the fact that the perpetrator of the fraud had no direct contractual relation with the Government.

Staff: Mark R. Joelson (Civil Division)

FEDERAL TORT CLAIMS ACT

Misrepresentation Exception, 28 U.S.C. 2680(h), Includes Negligent Misrepresentation and Bars Action Based on Misrepresentation of Facts Though Plaintiff Claims Negligence Only in Manner of Ascertaining Those Facts. Hall v. United States (C.A. 10, December 30, 1959). Plaintiff sued to recover damages for the alleged negligent testing of his cattle by a Government inspector. The complaint alleged that, after completing an inspection of the cattle for brucellosis, the inspector advised plaintiff that one or more of his cattle was suffering from the disease; whereas in fact plaintiff's herd contained no diseased cattle. Plaintiff further alleged that, as the result of this negligent testing, his cattle were subject to quarantine and he had to sell them at a reduced price.

The district court dismissed the complaint, holding that the damage alleged resulted from the imposition or establishment of a quarantine and that, under 28 U.S.C. 2680(f), liability for such damage was not recoverable. The Court of Appeals affirmed, disagreeing with the district court as to the applicability of the quarantine exception, but holding that the gravamen of the complaint stated a cause of action for misrepresentation which was excluded from the coverage of the Act by 28 U.S.C. 2680(h). In so holding, the Court rejected plaintiff's contention that he was complaining not of misrepresentation of the results of the test, but of negligence in the testing itself. The appellate court concluded that, in fact, appellant was complaining of misrepresentation by the inspector of the condition of the cattle. The Court also

held that, for the purposes of 28 U.S.C. 2680(h), "misrepresentation" includes negligent (as well as deliberate) misrepresentation.

Staff: Sherman L. Cohn (Civil Division)

GOVERNMENT EMPLOYEES

Civil Service Commission Decision, Denying Claim of Entitlement to Position Different from That Assigned After Reduction in Force, Upheld. Smithers v. Weeks (C.A.D.C., January 21, 1960). Plaintiff's position as a GS-13 in the Department of Commerce was abolished under a reduction in force in 1958, and he was offered reassignment to an available position at GS-11. On appeal to the Civil Service Commission, he claimed that he was entitled to be reassigned instead to a GS-12 position in another division. The Department of Commerce, in the course of the administrative proceeding, submitted material relating to plaintiff's lack of qualification for the position sought. Plaintiff claimed that he was not afforded an opportunity to examine this material. The Commission determined, however, that his rights had not been violated and denied his appeal.

In this action plaintiff sought review of that decision. The district court dismissed the complaint and the Court of Appeals affirmed holding that plaintiff had not in fact been denied access to the material submitted by the Commerce Department, and that the Commission's decision was not arbitrary.

Staff: United States Attorney Oliver Gasch; Assistant United States Attorneys Carl W. Belcher and William W. Greenhalgh (D.D.C.)

Insurance Policy Construed to Cover Government Employee for Accidents Arising Within Scope of Employment; Ambiguous Exclusionary Language of Policy Construed Against Insurer. Government Employees Insurance Co. v. Ziarno, et al. (C.A. 2, January 12, 1960). While driving a Government vehicle in the course of his employment, Ziarno, a Department of Interior employee, collided with a car driven by one Chamberlain. Chamberlain thereafter sued Ziarno in a state court for personal injury and property damages. Government Employees Insurance Company (GEICO), which had issued a personal injury and property damage policy to Ziarno, disclaimed any liability under the policy, relying principally on a special clause of the policy which recited that "[T]he insurance afforded by this endorsement shall not apply to any liability for which protection is afforded under the provisions of the Federal Tort Claims Act."

GEICO brought this declaratory judgment action in a federal district court in order to obtain judicial confirmation of its interpretation of the policy. It alleged that Chamberlain could and should have sued the United States and not Ziarno, "that such an action must be brought against the United States, and not against its employee, personally," and that

Ziarno was afforded protection by the Federal Tort Claims Act, which provides that a tort judgment against the United States constitutes "a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim." 28 U.S.C. 2676. Under United States v. Gilman, 347 U.S. 507, the Government could not obtain indemnification from Ziarno.

The district court agreed with GEICO and held that the limiting language of the policy "unmistakably" evidenced agreement to afford insurance coverage only when the insured drove a Government-owned vehicle outside the scope of his employment.

The Court of Appeals reversed. It held that the exclusionary language of the policy was ambiguous and certainly did not convey to a layman that he would be covered only while driving a Government vehicle in an unauthorized manner. The Court noted that nothing in the Tort Claims Act compelled the claimant to sue the Government, rather than the Government employee, and that the language of the policy fairly indicated to the Government employee that, if he were sued, he would be afforded protection under the policy.

The Court also observed that any "protection" afforded by the Tort Claims Act to the Government employee would arise only after the entry of a judgment against the United States in an action against the United States based upon the alleged negligence of the employee.

Staff: Seymour Farber (Civil Division)

Suit for Reinstatement Following Dismissal and Affirmance of Dismissal by Civil Service Commission; Commissioners Indispensable Parties. Adamietz v. Smith, Postmaster, Pittsburgh, Pa. (C.A. 3, January 8, 1960). Plaintiff, a postal employee with veteran's preference status, was removed from his position, on charges by the local postmaster. On administrative appeal, the dismissal was affirmed by the Regional Office of the Civil Service Commission, and, finally, by the Commission's Board of Appeals and Review. Plaintiff thereafter brought this action for reinstatement against the local postmaster charging, among other things, that the Commission had not accorded him the fair hearing required by the Fifth Amendment. The district court dismissed the suit for lack of jurisdiction, holding that the individual members of the Commission, who may be sued only in Washington, D. C., were indispensable parties. The Court also held that, inasmuch as the relief sought was in the nature of mandamus to compel reinstatement, it was without power to grant such relief.

The Third Circuit affirmed on the ground that the Commissioners were indispensable parties. The Court held that Blackmar v. Guerre, 342 U.S. 512 - "a strikingly similar case" - was controlling, and had not been overruled sub silentio by subsequent Supreme Court decisions. The Court noted "that the question of indispensability of parties is dependent not on the nature of the decision attacked but on the ability and authority

of the defendant before the court to effectuate the relief which the party seeks." Here, the defendant postmaster is not in a position to reinstate the plaintiff in the face of a contrary holding by the Commission since "the very statute under which /plaintiff/ grounded his appeal to the Civil Service Commission makes binding upon /defendant/ its rulings." Section 14 of the Veterans' Preference Act of 1944, 5 U.S.C. 863; see also, 5 U.S.C. 868. The Court ruled also that the defendant postmaster was without power to grant that portion of plaintiff's prayer for relief which sought a rehearing before the Commission under rules of procedure other than those presently established by the Commission.

In view of this disposition of the case, the Court deemed it unnecessary to discuss the trial court's additional ground for dismissing the complaint.

Staff: Seymour Farber (Civil Division)

PRACTICE AND PROCEDURE

Complaint Naming United States as Plaintiff in Action to Enforce Federal Statute Held Not Subject to Dismissal. United States and White County Bridge Comm'n. v. White County Bridge Comm'n; Ray Clippinger, et al. (C.A. 7, January 11, 1960). The Government instituted this action on its own behalf and on behalf of the White County Bridge Commission to recover for the Commission certain sums of the Commission which the defendants, including a Commissioner and the commission manager, were alleged to have wrongfully appropriated for their own benefit. The Government further sought the removal of one of the Commissioners.

The Commission was created by Congress for the purpose of acquiring, maintaining, and operating a bridge in interstate commerce. Act of April 12, 1941, 55 Stat. 140. It was authorized to charge tolls for its expenses in maintaining and operating the bridge and for the servicing and retirement of bonds issued to finance the acquisition of the bridge. The Act of Congress created the Commission as a body corporate and politic with power to sue and be sued. Congress also provided that the Act could "be enforced or the violation thereof prevented by mandamus, injunction, or other appropriate remedy" brought by, inter alia, "the United States District Attorney for any district in which the bridge may be located in part." This action was instituted by the United States Attorney for the Eastern District of Illinois.

The district court dismissed the complaint on the grounds that (1) the action could not be maintained in the name of the United States as it had no authority under the statute to bring this suit and had no interest of its own in the matter; (2) the action could not be maintained on behalf of the Commission without first bringing an action for mandamus against the Commission in an attempt to have it protect its own interests, and the district courts have no jurisdiction in mandamus; and (3) a court has no power to dismiss a public official.

The Court of Appeals reversed, holding that the United States is the proper party plaintiff when the United States Attorney brings an action to enforce the statute. The appellate court rejected the contention of appellees that, as the jurisdiction of the district court under the statute creating the Commission was limited to the granting of "mandamus, injunction," or a like extraordinary remedy, under the principle of ejusdem generis it had no jurisdiction over the complaint in this case which sought a money judgment. The Court noted that F.R.C.P. 8 requires a pleader to demand "judgment for the relief to which he deems himself entitled," and that Rule 54(a) authorizes a court to grant the relief to which a party is entitled, "even if the party has not demanded such relief in his pleading."

Therefore, the Court held, if the Government could, upon trial, establish its allegations of wrongful appropriation, it would be entitled to an injunction against further misdeeds and, incidental thereto, to accounting and restitution. On this basis, it determined this action to be authorized by the statute.

The Court also held that the Bridge Commission was a proper party defendant but not a proper party plaintiff, and that the district court could, in equity, restore misappropriated funds to the proper party regardless of whether that party is lined up as plaintiff or defendant. Finally, the appellate court affirmed the district court's dismissal of that part of the complaint which sought the removal of a Commissioner, holding that courts have no power to remove public officers which they have not appointed. In so doing, the Court followed the common-law presumption that the power to appoint public officers carries with it the power of removal.

Staff: Sherman L. Cohn (Civil Division)

RENEGOTIATION

Government Contractor Held Not Entitled to Partial Exemption from Renegotiation Act. Vaughn Machinery Company v. Renegotiation Board (C.A. 6, December 31, 1959). Vaughn claimed partial mandatory exemption of sales of durable productive equipment (machine tools) under the provisions of the Renegotiation Act of 1951 (50 U.S.C. App. 1216(c)(1)). These provisions partially exempt the sales of new durable productive equipment if the equipment has a useful life of more than five years. The exemption is intended to benefit producers of equipment which has foreseeable commercial use after its military use. However, sales of new durable productive equipment acquired "for the account of the Government" are excepted from the exemption.

Vaughn, in 1952, sold and delivered wire drawing machinery to customers who had Army Signal Corps prime contracts for the production of military wire. The customers' contracts with the Government (1) provided that title to the machines would vest in the Government upon

acquisition or installation in the customers' plants, and (2) permitted, under certain conditions, the lease of the machines by the Government to the contractors for commercial production. Such leases were executed for most of the machines. Vaughn argued that, in spite of the fact that its contracts fit within the literal terms of the exception to the exemption, the Government's main purpose in acquiring the machines was to lease them for commercial production. It urged that the taking of title by the Government was a mere formality which should be ignored. The Renegotiation Board and the Tax Court both determined that Vaughn was not entitled to the partial exemption.

The Court of Appeals rejected Vaughn's argument, holding that the evidence showed that (1) the Government's primary purpose in acquiring title to the machines was to insure the production of military wire, (2) the use of the machines for commercial production was permissive and subject to unilateral termination by the Government, and (3) there was very slight use of the machines for commercial purposes. It stated that the case was not one "where the form of the contract incorrectly reflects the substance of the agreement." Accordingly, the decision of the Tax Court was affirmed.

Staff: James H. Prentice (Civil Division)

SCHOOL AID PROGRAM

Public Law 815; School District Not Entitled to Federal Financial Assistance for Construction of School Facilities Because of Increase In Number of "Federally-connected" Pupils Where Facilities Can Be Constructed Without Undue Financial Burden to District by Use of Other Financing Method Available Under State Law. School City of Gary v. L. G. Derthick, Commissioner of Education, Department of Health, Education and Welfare (C.A. 7, December 31, 1959). Public Law 815, 81st Congress, as amended, 20 U.S.C. Ch. 14, makes financial assistance for construction of minimum school facilities available to local educational agencies which have "had substantial increases in school membership as a result of new or increased Federal activities." Eligibility and the amount of payment is geared to the estimated increase, since the base year, in the number of children in each of three categories.

The School City of Gary, Indiana, filed an application for such aid based on an increase in its school enrollment attributable to so-called Category (C) children, i.e., children whose parents neither live nor work on federal property but whose federal connection derives instead from such other federal activities as the performance of Government contracts by private employers of the parents. Where an application is predicated solely on the (C) Category, a grant is authorized by the statute only when the construction of additional facilities would impose an "undue financial burden on the taxing and borrowing authority" of the applicant school district.

After a formal administrative hearing, the Commissioner of Education denied the school district's application on the ground that its school building needs could be met without "undue financial burden" if the district would utilize the financing method available under the Indiana Schoolhouse Holding Corporations Act (Burns Ind. Stat., 1948 Repl. Vol. Sec. 28-3220, et seq.). This statute provides for the organization of school building corporations to construct needed school facilities and lease them to the school districts. At the end of the lease period, the school district becomes owner of the facilities.

On appeal by the school district from the administrative decision, the Seventh Circuit affirmed. The Court rejected the district's contention that, under P.L. 815, the single permissible inquiry is whether the school district can itself afford to construct the requisite facilities, and held that the Commissioner, in determining whether the "financial burden" test has been met, can take into consideration other methods by which the school district might obtain facilities, such as that provided by the Indiana statute. The Court held also that obligating itself for annual rentals for facilities would not cause the school district to violate the state constitutional debt limit for municipal corporations, and rejected various other alleged impediments to use of the school building corporation method.

Staff: Alan S. Rosenthal; Mark R. Joelson (Civil Division); Harry J. Chernock (Department of Health, Education and Welfare).

SOCIAL SECURITY

Under Social Security Act, Secretary Not Required to Accept Claimant's Characterization as Wages of Funds Paid by His Wholly Owned Corporation. Flemming v. Lindgren (C.A. 9, January 20, 1960). Plaintiff, a chicken farmer, was self-employed through 1952, at which time he incorporated his farming business. The corporation then hired him to manage the business. Plaintiff's sole purpose in incorporating was to establish a wage record for six quarters and thereby to obtain social security coverage.

The corporation paid plaintiff a salary of $300 per month for almost two years, even though the corporate earnings during that period, excluding plaintiff's salary, were considerably less than that amount. It was necessary for plaintiff to loan the corporation $2,900 during that period so that it would have enough money to pay his salary. When he reached the age of 65, plaintiff's salary was reduced to $75 per month and he thereupon applied for social security benefits.

The Secretary found that plaintiff was a bona fide employee of the corporation. However, he refused to treat all of the payments made to plaintiff as wages, allowing only that amount which reflected the profit of the corporation prior to payment of plaintiff's salary. The Secretary characterized the remainder of the money paid to plaintiff as a return of capital.

In this action for review of the Secretary's decision, the district court held that the Secretary was required to treat all of the payments as wages since there was a bona fide employment relationship between plaintiff and the employing corporation. The court held, in effect, that the Secretary could not inquire into whether any of the alleged "salary" payments made to plaintiff were a sham, even though plaintiff controlled the corporation that employed him.

The Ninth Circuit reversed. It held that the Secretary was not obligated to accept plaintiff's and his corporation's characterization of transactions between themselves, but could "look through form to substance." The Court further held, however, that the net profit of the business was only one factor to be considered by the Secretary and findings should be made on other considerations as well, e.g., prior financial history of the business, and wages of those who were similarly employed. The Court ordered the cause remanded to the Secretary for redetermination.

Staff: Douglas A. Kahn (Civil Division)

DISTRICT COURTS

ADMIRALTY

Sea-Going Navigated Upon High Seas, Even Though Not Regularly So Employed, Are Sea-going Vessels Within Meaning of 46 U.S.C. 395. United States v. Gahagan Dredging Corp. (S.D.N.Y., January 5, 1960). Defendant owned a dredge and two barges which were navigated upon the Gulf of Mexico while traversing the Florida coast. A complaint to recover penalties under 46 U.S.C. 398 alleged navigation of the vessels upon the high seas in violation of 46 U.S.C. 395, which requires periodic inspection and certification by the Coast Guard of every sea-going barge of 100 gross tons or over.

The vessels were not regularly employed in navigation at sea. However, it was held that such employment even on a solitary occasion, without first having obtained the necessary Coast Guard certification, was in violation of the statute. In awarding the Government the statutory penalty of $500 for each of the three vessels, the Court observed that in "dealing with a statute intended to save lives and property, no reason appears for constricting its clear statement by interpretation or forced construction."

Staff: Walter L. Hopkins (Civil Division)

CIVIL RIGHTS

Constitution Does Not Prohibit Federal or State Governments from Furnishing Utility Services to Real Estate Developer Refusing to Sell House to Negro. Hackley v. Art Builders, et al. (D. Md., January 5, 1960). Plaintiff, a Negro employee of the Army Chemical Center at Edgewood, Maryland,

instituted this action against the Commanding Officer of the Chemical Center, officials of Harford County, Maryland, and a real estate developer and broker who are constructing a private subdivision of houses near the Chemical Center and have refused to sell one to plaintiff because he is a Negro. The Army Chemical Center maintains its own water and sewage disposal system which has a capacity in excess of the needs of the center. Pursuant to 10 U.S.C. 2481, which authorizes the secretaries of the armed services to sell utility services in the immediate vicinity of a military installation, when they are not available from another source and when sale is determined to be in the interest of national defense or of the public, the Army agreed to supply water and sewage services to the Harford County Metropolitan Commission, a municipal agency. The Commission in turn provides water and sewage services to inter alia, the developer of the real estate subdivision.

Plaintiff contended that the refusal of the real estate developer to sell him a house because he is a Negro was a violation of his rights under the Constitution and the Civil Rights Acts, on the theory that the county officials and the Federal Government, insofar as they have made water and sewage services available to the developer, have acted in concert with him to deny plaintiff his constitutional rights. Plaintiff sought an injunction against the Commanding Officer of the Chemical Center to prevent him from making the Center's water and sewage facilities available to the Metropolitan Commission as long as plaintiff was denied an opportunity to purchase a home from the developer.

The District Court found that the Commanding Officer of the Chemical Center was not acting in concert with the developer or broker in their refusal to sell to plaintiff; that all housing which is under control of the Commanding Officer, accommodating both civilian and military personnel at the Center, is integrated; that the County Metropolitan Commission makes water and sewage facilities available to all residents in the area irrespective of race or color; and that if the Commanding Officer were enjoined from making the Center's water and sewage facilities available to the Metropolitan Commission, approximately 180 private home owners, one-half of whom are employees of the Chemical Center, would be deprived of their only means of obtaining water and sewage facilities for their homes.

The Court held that the Fifth and Fourteenth Amendments prohibit discriminatory federal and state action but not private conduct; and that the fact that the Army and the County Metropolitan Commission make the water and sewage services available to the private developer did not convert his refusal to sell a home to plaintiff into state or federal action. Accordingly, it rendered judgment for all defendants. The Court found it unnecessary to rule on the defense advanced by the Government that an injunction against the Commanding Officer would constitute an unconsented suit against the United States.

Staff: United States Attorney Leon H. A. Pierson; Assistant United States Attorney William J. Evans (D. Md.); Donald B. MacGuineas (Civil Division)

GOVERNMENT CONTRACTS

Auction Sales of Surplus Property; Government's Liability For Sale and Delivery to Person Other Than Successful Bidder Limited to Refund of Purchase Price. Carl A. Boy, Jr., and James Boy, d/b/a Carolina Aircraft Co. v. United States (M.D.N.C., December 9, 1959). Plaintiff attended an auction sale of surplus Air Force property and was a successful bidder on certain items. However, the Air Force mistakenly listed another vendee as having bought these items. When the other vendee called for the articles that he had purchased, he was also advised that he had purchased the plaintiff's items. While he informed the Air Force representative of the mistake, he nevertheless accepted the goods at the bid price and took delivery of them.

Plaintiff had made a bid deposit prior to the auction and following the sale had forwarded a check for the remainder of the purchase price. Upon learning of the mistake, he contacted the other vendee, who agreed to ship the items to plaintiff upon payment of the purchase price and transportation costs.

The Government refunded the purchase price to plaintiff, but refused to honor his claim for the excess transportation costs. This position was based on the general sales terms and conditions, which were contained in a catalogue furnished plaintiff prior to the auction, providing in part: "Limitation on Government Liability--In any case where liability of the Government to the Purchaser has been established, the extreme measure of the Government's liability shall not, in any event, exceed refund of the purchase price or such portion thereof as the Government may have received."

Plaintiff then brought this suit, seeking reimbursement for transportation costs amounting to about $2250. The court granted the Government's motion for summary judgment on the basis of the limitation of liability provision. It held that the provision was not void for lack of mutuality and constituted a reasonable condition for the Government to impose at an auction sale of surplus property.

Staff: United States Attorney James E. Holshouser (M.D.N.C.); William E. Nelson (Civil Division)

STATE SUPREME COURTS

VETERANS AFFAIRS

Term "Funds" in 38 U.S.C. 3202(e) Extends to Bonds as Well as Cash; Government Held Entitled to All Assets in Estate of Insane Veteran Who Died Intestate and Without Heirs. In the Matter of the Estate of John Plich, United States v. American National Bank of Denver (Sup. Ct. Col., January 18, 1960). Plich, an insane veteran residing in Colorado, died intestate and without any known heirs. At the time of his death, his

conservator held United States Series E and Treasury Bonds, two municipal bonds, and some cash -- all of which were derived from gratuitous veterans' benefits paid pursuant to federal statute. The Government filed a claim for these assets, based on 38 U.S.C. 3202(e), in the proceeding for the administration of Plich's estate. Section 3202(e) provides that any "funds" in the hands of a deceased beneficiary's guardian or conservator, derived from veterans' benefits, which under the law of the state of the beneficiary's last legal residence would escheat to the state, shall "escheat" to the United States instead.

The State of Colorado opposed the Government's claim, asserting that the bonds in the estate were not "funds" within the meaning of Section 3202(e), and also urging that the statute was in violation of the Tenth Amendment which reserves the power of escheat to the states. The trial court held that the term "funds" included only cash. On the Government's appeal, the Supreme Court of Colorado decided that the term should be broadly construed to encompass "pecuniary resources which are readily converted into cash," and, consequently, to include these bonds. Further, the Court upheld the validity of Section 3202(e). It characterized the statute as merely attaching a valid condition -- a "right of reversion in the donor" -- to the federal gratuity. Accordingly, the Court ordered all the assets in Plich's estate to be paid over to the United States.

A single dissenting justice thought Congress intended "funds" to mean only cash.

Staff: William A. Montgomery (Civil Division)

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CIVIL RIGHTS DIVISION

Acting Assistant Attorney General Joseph M. F. Ryan, Jr.

Voting & Elections; Civil Rights Act of 1957. United States v. McElveen, et al. (E.D. La.). On January 11, 1960, the District Court ordered the restoration to the registration rolls of the names of 1377 Negroes of Washington Parish, Louisiana, in the case of United States v. McElveen, et al. See previous discussions of this case in United States Attorneys' Bulletins, July 17, 1959, and October 23, 1959, and the Court's opinion overruling the defendants' motion to dismiss at 177 F. Supp. 355.

The defendants in this case are the Citizens Council of Washington Parish, Louisiana, four of its members, and the Registrar of Voters of Washington Parish. The Court found that between February and June 1959 the defendants, who are members of the Citizens Council, acting under the authority of Louisiana law, filed approximately 1387 affidavits of challenge with the defendant Registrar challenging the right of 1377 Negroes and only 10 whites to remain on the registration rolls. The names of all the persons thus challenged were subsequently removed from the registration rolls by the defendant Registrar.

The Court found that the affidavits of challenge filed by the individual defendants purported to be based on defects in the registration records, such as misspellings, deviations from printed instructions, failure to compute age with exact precision, and illegible handwriting. The same defects existed in at least half of the registration cards of the white citizens of that parish who were not challenged. In examining the registration records for the purpose of making the challenges, the individual defendants limited their examination almost exclusively to the registration records of Negro voters, while making only a token examination of the records of white voters. The defendants made no examination of the records in those wards in which no Negroes were registered and no voters were challenged in those wards.

These acts, the Court found, were committed for the purpose and with the effect of depriving Negroes, solely because of their race or color, of the right to register and vote in violation of the Constitution and the Civil Rights Act of 1957. The Court also found that the defendant Citizens Council approved and endorsed the illegal acts of the individual defendants.

The Court held that these challenges were null, void, and ineffective for any purpose, and that the voters taken off the registration rolls as a result of the challenges were accordingly illegally removed.

The Court enjoined the individual defendants and the Citizens Council of Washington Parish, together with their agents and any persons acting in concert with them who have actual notice of the decree, from

causing or initiating challenges or filing any affidavits of challenge which have as their purpose or effect discrimination based on race or color against registrants of Washington Parish, Louisiana.

The defendant Registrar was enjoined from "giving any legal effect whatsoever to the approximately 1377 challenges . . . against Negro registrants . . ., or from giving any legal effect to any prior proceedings or orders based directly or indirectly upon such challenges." He was also enjoined from "permitting the names of any of the approximately 1377 persons challenged . . . to remain off the present and current rolls of qualified voters . . ., or from a legal supplement thereto, longer than ten days from the date of this decree," and from giving effect to any challenges which might in the future be filed and which have as their purpose or effect racial discrimination.

In effectuation of the decree, the registrar was ordered to file with the Clerk of the Court within ten days a detailed report of his full compliance with the decree, and to maintain in his office a tabulation showing the number of registrants of each race who may be challenged in the future and if more than 5% of the registrants of any one race have been challenged at the end of any three-month period, the registrar is required to submit a detailed report concerning such challenges to the Court.

In further effectuation of the decree, the parties were authorized to apply to the Court for an order for the inspection and photographing of any of the records in the office of the Registrar of Voters of Washington Parish.

The Court retained jurisdiction for the purpose of issuing any additional orders which may become necessary for the purpose of modifying the decree.

On January 21, 1960, the Court of Appeals for the Fifth Circuit granted the defendant Registrar's motion to stay the injunction pending disposition of the appeal taken by him to that Court. The request for a stay order was based primarily on the assertion that the decree would require the defendant Registrar to violate state law.

On the following day, January 22, 1960, the Government applied to the Supreme Court of the United States for an order vacating the stay order of the Court of Appeals. The Government's principal contention is that the Registrar failed to show that he would suffer irreparable injury by obeying the injunction, and that the approximately 1377 Negroes who were illegally challenged should be restored to the status quo as it was prior to the contested challenges, that is, restored to the voter registration rolls. A state-wide general election will be held in Louisiana on April 19, 1960.

The Supreme Court took no immediate action on the Government's application but invited the Government to file a petition for certiorari so that the case could be decided on the merits. The Government filed its petition for certiorari on January 29th and under the Court's order will file its brief on the merits on February 10th. The case will be heard by the Supreme Court on February 23rd, the day the Court reconvenes.

Staff: United States Attorney M. Hepburn Many (E.D. La.)
Henry Putzel, David Norman, J. Harold Flannery,
(Civil Rights Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm R. Wilkey

MEMORANDUM OF UNDERSTANDING

Between Attorney General and Secretary of Defense. Violations of Federal Law by Military Personnel. The "Memorandum of Understanding" entered into between the Attorney General and the Secretary of Defense with reference to the investigation and prosecution of military personnel committing violations of federal criminal statutes has been operative since the fall of 1955, copies having been distributed to all United States Attorneys on November 25, 1955. We are pleased that most United States Attorneys have complied with the agreement and asserted jurisdiction over such offenders. However, some instances have been observed where United States Attorneys relinquished jurisdiction in matters which should have been prosecuted in the district courts. We urge strongly that there be no relaxation of civil authority over military personnel and the attention of United States Attorneys is directed to the provisions of the "Memorandum of Understanding." To that end, United States Attorneys should comply with the "Memorandum of Understanding" relinquishing jurisdiction only when permitted by the Agreement. If there be any question in a particular situation, please communicate with the Criminal Division.

LIQUOR

Forfeiture; Property Intended for Use in Violation of Internal Revenue Laws (26 U.S.C. 7301, 7302). United States v. One 1956 Ford Fairlane (C.A. 10, November 27, 1959). The libel in this case was tried on the theory that the property was intended for use in violation of the Internal Revenue laws (26 U.S.C. 7301, 7302). The libel was dismissed by the court below on the ground that the claimant, the owner of the vehicle, had been found not guilty on a charge of violating 26 U.S.C. 5688(b), citing Coffey v. United States, 116 U.S. 436. Relying on Helvering v. Mitchell, 303 U.S. 391, the Government argued to the Court of Appeals that Sections 7301 and 7302 were not penal in nature and that the case was, therefore, distinguishable from the Coffey case. The Court of Appeals, however, affirmed the judgment below on the sole ground that it could not distinguish the instant case from the Coffey case.

It is the Government's view that the affirmation of this judgment in no way expands the scope of the Coffey decision. The decision of the Court of Appeals points out that the question involved is discussed in a comprehensive manner in United States v. One 1953 Oldsmobile 98 4 Door Sedan, C.A. 4, 222 F. 2d 668; see also 27 ALR 2d 1137. In substance the cases hold that the Coffey doctrine is applicable to a very narrow class of cases in which property is sought to be confiscated because of its intended use in violation of the Internal Revenue laws and where the claimant is the owner of the vehicle who was criminally charged and

acquitted of an offense amounting to possession of property with intent to violate the Internal Revenue laws.

Staff: United States Attorney Frank D. McSherry; Assistant United States Attorneys Paul M. Brewer and Harry G. Fender (E.D. Okla.).

MAIL FRAUD

Advance Fee Swindles. United States v. John C. Heil; United States v. Garford E. Pinson (D. Ariz.). Arrests of the principal promoters have halted the operation in the District of Arizona of two advance fee swindles reported to have netted more than $75,000 in fees obtained from small businessmen by misrepresentations of purported services to be rendered in obtaining loans for their enterprises.

John C. Heil, doing business as United States Finance Service Corporation, reportedly obtained fees in the gross amount of $40,000 from ninety businessmen between April and September, 1959, although at the time of the arrest no loans had been obtained and allegedly he possessed no facilities for obtaining them.

Garford E. Pinson, who left Heil's employ to launch his own advance fee firm styled Kon-Tax & Associates, was similarly reported to have misrepresented proposed "services" to be rendered for advance fees; again no loans were obtained nor did Pinson possess any sources for such loans.

Staff: United States Attorney Jack D. H. Hays (D. Ariz.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

NATURALIZATION

Eligibility; Effect of Enforced Military Service After Application for Exemption and Relief from Service. United States v. Hoellger, (C.A. 2, January 13, 1960.) The case involved the application of section 315(a) of the Immigration and Nationality Act, 8 U.S.C. 1426(a). The appeal was from an unreported decision of the United States District Court for the Southern District of New York, granting appellee's petition for naturalization over objection by the Government.

Appellee, a native and former citizen of Germany, entered this country for permanent residence in December 1951, and shortly thereafter registered for selective service as required by law. He was classified I-A. On September 11, 1952, his Local Board, on its own initiative, reclassified appellee IV-C which indicated that appellee was an alien exempt from service by virtue of a treaty in force between his country and the United States. In May 1953, following the effective date of the Immigration and Nationality Act on December 24, 1952, his Local Board, again acting on its own initiative, sent appellee a form application for exemption together with an explanatory statement that if the form were filled out and returned the exempt status previously given him would continue in effect. Appellee filled out the form and returned it to the Local Board. His exempt classification continued until February 9, 1955, when, because of the abrogation of the treaty arrangement with Germany pertaining to military service, his Board reclassified him as I-A. Very shortly thereafter he was inducted and, after nearly two years of service, was honorably discharged on April 6, 1957. He filed his petition for naturalization on August 8, 1957.

It was agreed that appellee's eligibility for citizenship was to be determined by section 315(a) of the Immigration and Nationality Act, 8 U.S.C. 1426(a). That section provides that an alien shall be permanently ineligible to become a citizen of the United States if he has applied for exemption from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien and is or was relieved or discharged from such training or service on such ground.

The Court said a careful reading of that provision seemed to require the conclusion that to be permanently ineligible for citizenship an alien must not only apply for exemption, but also must be relieved from military service. If there was any uncertainty as to such interpretation, the Court thought it had been dispelled by Ceballos v. Shaughnessy, 352 U.S. 599, 606, (1957). The Court,

without dwelling upon the question of whether the alien had in fact applied for exemption, thought it had become obvious from the facts in the case that appellee had not been relieved from military service. Accordingly, it deemed him to be eligible for citizenship.

The Court said the Government's argument seemed to be that one who serves is "relieved from service" if his involuntary induction is delayed. The Court found this difficult to reconcile with the normal meaning of section 315(a). It seemed more reasonable to conclude that Congress meant he should be "effectively relieved." One who had served in the Armed Forces under compulsion of the Government could not be said to have been effectively relieved from service. The cases cited by the Government, the Court found, would not support the proposition that eligibility for citizenship is lost under section 315(a) despite the fact that military service resulted later from involuntary induction. Whatever might have been the case prior to the coming into effect of section 315(a), when under section 3(a) of the Selective Training and Service Act of 1940 the application for exemption alone made permanently ineligible the applicant for citizenship, the "two-pronged requirement" of section 315(a) of the applicable law as described in Ceballos, supra, required a different result. Holding that appellee had not been relieved from service within the meaning of section 315(a), as well as the possibility that the principle of "elementary fairness" suggested in Moser v. United States, 341 U.S. 41, 47 (1951) may be applicable, the judgment of the District Court was affirmed.

In a concurring opinion, Circuit Judge Moore thought that the appellee had applied for exemption and fully understood the consequences of his election to accept relief from service in trade for ineligibility to become a citizen. However, the Government by its own act had destroyed appellee's exempt status by changing its arrangements with Germany thereafter making its nationals subject to service in our Armed Forces and then compelling him to serve. The Government had thus taken away the consideration for the original bargain. It therefore was in no position to insist on enforcement of citizenship ineligibility, the price appellee was paying for that which he did not receive.

Staff: Special Assistant United States Attorney Roy Babitt (S.D. N.Y.)
Former United States Attorney Arthur H. Christy

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Contempt of Congress; Duty of Member of Congress to Respond to Subpoena. United States v. Peter Seeger; United States v. Elliot Sullivan; United States v. George Tyne (S.D. N. Y.) On January 28, 1960, Judge Edward Weinfeld denied a Government motion to quash a subpoena served on Representative Francis E. Walter, Chairman of the House Committee on Un-American Activities, by Peter Seeger. Seeger together with Elliot Sullivan and George Tyne are scheduled to be tried together on March 21, 1960 on indictments charging contempt of Congress for refusal to answer questions before the Committee in 1955 while it was investigating Communist infiltration in the field of entertainment in New York. Seeger said that he sought to question Congressman Walter on the subject matter of the inquiry, the pertinency of the questions asked, the authority of the Committee to conduct the inquiry and the legislative purpose of the hearings. The Government contended that these matters were all deducible from documents, records and minutes and consequently there was no need for oral testimony from the Chairman and that his appearance as a defense witness would therefore be unreasonable and oppressive. Additionally, the Government indicated its intention to call at the trial a staff representative from the Committee to give testimony on these same matters. In his decision, Judge Weinfeld said: "Under the Sixth Amendment to the Constitution a defendant accused of a crime is guaranteed the right to compel the attendance of witnesses. Who these witnesses shall be is a matter for the defendant and his counsel to decide. It does not rest with the prosecution or the person under subpoena. The defendant may not be deprived of the right to summon to his aid witnesses who it is believed may offer proof to negate the Government's evidence or to support the defense. The fact that the witness under subpoena is a member of Congress does not submerge the basic question -- the right of the defendant in a criminal prosecution to compulsory process."

Staff: Assistant United States Attorney Lawrence P. McGauley (S.D. N.Y.)

False Statement. United States v. Rufus Frasier (D. Mass.) On January 29, 1960, the Court accepted, over the Government's objection, a plea of nolo contendere to both counts of a two-count indictment which charged him with a violation of Title 18, U.S.C., Section 1001, based on his false denials of membership in and attending meetings of the Communist Party in a Loyalty Certificate for Personnel of the Armed Forces which he executed while serving with the United States Army. Previously, on June 25, 1958, Frasier had been convicted of the same offense after a jury trial. However, this conviction was reversed by the Circuit Court of Appeals because of the trial court's refusal to allow defense counsel to voir dire the jury panel as to possible bias by virtue of the defendant's being colored. Frasier was placed on probation for one year.

Staff: Assistant United States Attorney George Lewald (D. Mass.)

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LANDS DIVISION

Assistant Attorney General Perry W. Morton

Condemnation; Trial; Reference to Commissioners Under Rule 71A(h). United States v. Peirson Hall (C.A. 9). Of his own motion Chief Judge Peirson Hall referred to three commissions 21 proceedings embracing some 300 tracts, representing all of the land condemned for a Naval Air Station, a reclamation project and two river improvement and flood control projects. These constituted practically all the condemnation cases pending in the Northern Division of the Southern District of California and substantially all of the active condemnation cases on the docket of Judge Hall under the assignment system of that district, whereby each judge has his individual docket of cases.

The United States sought a writ of mandamus to vacate these references on the ground that they were not permitted by Rule 71A(h). The judge made no response. Three attorneys filed briefs supporting the references and two appeared at the oral argument. Four days after argument, the court filed its per curiam opinion denying the petition.

The orders of reference had primarily relied upon the alleged crowded condition of the Court's docket as the reason for the references. The appellate court said that crowded condition of the docket, standing alone, would not justify a reference but that the orders show that the judge had in mind other factors, such as nature of the property, complexity, etc.

It summarized the Government's contention as follows: -

> The United States asserts that, while mention is made of these considerations, they are not shown to apply to any specific parcel or ownership, but are mentioned generally as applying to all lands included within each order. Further, it asserts that the orders wholly failed to show wherein the circumstances as to any of the considerations mentioned are extraordinary or unusual. The United States contends in this regard that a burden is upon the judge in each order of reference to show facts justifying his exercise of discretion under the Rule; that the orders are therefore insufficient to support an exercise of discretion.

The opinion then said "This contention we reject". The question whether to seek Supreme Court review is under consideration.

Staff: Roger P. Marquis (Lands Division)

Condemnation; Rule 71A(h); Facts Justifying Appointment of Commission; Trial by Commission; Necessity of Detailed Findings of Fact and Conclusions of Law. United States v. Cunningham (C.A. 4). Proceedings were brought to condemn several parcels of land near Nags Head, North Carolina, for the

Cape Hatteras National Seashore Recreational Area. One tract consisted of 1,858 acres which the owner claimed was valuable in part for ocean front development purposes, another part as a base for fishing operations, and another part as a wildfowl hunting area. Value was also claimed because of the alleged presence of the mineral ilmenite. The trial court denied the Government's demand for a jury trial and referred the case to three commissioners under Rule 71A(h). Those commissioners made no rulings upon evidence, receiving everything offered by the parties. They inspected the property on foot, by motor vehicle, boat, and helicopter. Their report contained no findings of fact, simply stating that they found value to be $488,000. The district court judge, while expressing the opinion that the award was too high, concluded he could not say it was "clearly erroneous" and, therefore, entered judgment for the stated amount.

The Court of Appeals reversed. It first held that the trial court did not abuse its discretion in referring the case to commissioners, saying: "The quantity of the land, its availability for beach residential development, the elements of value presented by its availability for hunting and sport fishing, the question as to whether the discovery of ilmenite added to its value, the importance of its being carefully gone over by those who were to value it and the impracticability of having a jury do this in view of its distance from the place where the nearest federal court was held,--all these things taken together certainly justified the appointment of a commission, which would not only serve the convenience of parties and witnesses and make a personal examination of the premises, but which, composed as it was of a distinguished lawyer and two experienced real estate dealers, would bring to the difficult questions of valuation presented an expertness which could not be expected of a jury."

The Court held, however, that the failure of the commissioners to make a full report was reversible error, saying: "The very reasons which justify the appointment of the commission, however, demonstrate the inadequacy of the commission's report. The justification of the appointment is the variety and complexity of the matters to be considered on the question of valuation and the importance of having these adequately set forth in a report so that they may be subjected to the scrutiny of the District Court and of this court upon review and the proper principles of valuation applied to them. Any adequate review of the facts or of the legal principles followed in basing valuations on the facts is defeated if a report by the commission is of such a character that it amounts to no more than a general verdict by a jury. The verdict of a jury of twelve men may reasonably be dispensed with if commissioners make a report which furnishes an adequate basis of review by the trial judge and the appellate court, but not if the report furnishes no such basis. Just as a judge in a trial without a jury is required to make adequate findings so that his conclusions may be reviewed by the appellate court so a master, in an action to be tried without a jury, is required to make findings of fact so that his conclusions may be adequately reviewed by the trial judge, who is required to accept them "unless clearly erroneous" (Rule 53(e)(2)), and this practice with respect to the report of a master is prescribed by Rule 71A(h) with respect to reports of commissioners in condemnation proceedings."

As to conduct of the hearing, the Court said: "It was not necessary that the Commission rule on the admissibility of testimony and exclude that which was incompetent or that it state that it was admitting for a limited purpose testimony which was admissible only for such purpose; but, for any intelligent review of its findings to be made, it was necessary that the commission indicate what use, if any, it had made of such testimony in arriving at its valuations."

The Court reversed the judgment and directed that the case be remanded to the commissioners "to the end that proper findings as to the basic facts may be made and that the commission may set forth the principles of law which it applies in arriving at its conclusion as to value." See 5 U.S. Attorneys' Bulletin, No. 17, pp. 531-532.

Further findings were made by the commissioners which divided the area into four parts as to highest and best use but did not allocate values to the various areas. The district court rejected the report on the grounds that it was inadequate and clearly erroneous. The court then made its own findings reducing the award by some 30%. The Court of Appeals reversed and re-instated the commissioners' award. It held that the report need not show the separate values of the separate parts because the reason for the difference between the district judge and the commissioners was clear. The Court then took some of the judge's figures and some of the commissioners' and produced a result approximating the commissioners' award. It concluded that the commissioners' findings were not clearly erroneous. One claim of value for fishing purposes was based in part on the prospect of Government dredging of a channel. The Congressional authorization of this dredging alone, the Court held, "created a substantial prospect of accomplishment of the improvement."

Staff: Roger P. Marquis (Lands Division)

Condemnation; Review of Administrative Inclusion of Alleged Non-Blighted Commercial Buildings in Housing Redevelopment Project. Olga F. Donnelly v. District of Columbia Redevelopment Land Agency, et al. (U.S. Sup. Ct. No. 580). The Supreme Court, on January 25, 1960, denied the landowner's petition for a writ of certiorari to review the court of appeals' decision reported in this Bulletin, Vol. 7, No. 16, p. 485.

Staff: S. Billingsley Hill (Lands Division)

Condemnation; Restoration Cost Refused as Part of Compensation for Term Taking When Government Returned Altered Building as Valuable as Original Building When Taken. James Flood, et al. v. United States, (C.A. 9, January 25, 1960). The United States condemned a term for years in a San Francisco building. Extensive alterations were made by the Government to convert the building from its former use by doctors and dentists to use for federal offices. This included removal of large quantities of expensive plumbing, wiring, partitions, doors, etc. The owners had previously contracted with F. W. Woolworth & Co. to surrender the building vacated of

tenants, on the same date as that of the federal taking, so that Woolworth could demolish the building and erect and occupy under lease a new one more suitable to its needs.

The amount of compensation for the federal use and occupancy was agreed upon. However, the owners contended that the Government owed an additional $600,000 because it failed to return the building restored to its former condition, less ordinary wear and tear. The amount represented the cost of replacing the removed or altered materials and equipment. The Government urged that it was liable only for any diminution in market value of the premises upon return and that, since it had returned a building suitable for general office use which was of greater value than the building when taken, it owed no compensation above the value of its use and occupancy.

This issue was presented and tried to the district court which, after hearing evidence of the relative values of the building for medical and general office use, found that the highest and best use of the building was for general office use and that there had been no diminution in value. Accordingly, following the Government's theory as to the measure of damages, it allowed no compensation for restoration.

On appeal by the owner, the judgment was affirmed. The Court of Appeals stated that "To allow such recovery here [cost of restoration] would put the owners in a better pecuniary position" than before the taking. It did not pass upon the issue of "any possible liability of the United States for the salvage value of the fixtures taken by the Government" because the case was not presented on the basis of salvage value but of restoration cost.

Staff: S. Billingsley Hill (Lands Division)

Condemnation; Reimbursement of Expenses by Local Beneficiaries of Navigation Projects. Police Jury of Plaquemines Parish v. United States (C.A. 5). A navigation project was authorized under the Rivers and Harbors Act requiring that local interests furnish the necessary right of way. At the request of the Louisiana parish (i.e. County) the United States filed condemnation proceedings and, under the Act, the district court required the parish to post a bond to pay the awards and expenses. The awards were paid but not the fees of Rule 71A(h) commissioners which had been used, nor interest which was owing on the awards. Upon motion of the United States the court entered judgment for the fees and interest against the parish and the surety on the bond. The Court of Appeals affirmed per curiam. As to the principal claim, which was that a separate action should have been brought, the Court said:

> The appellants would have had no further rights had there been an independent action. The proceeding by motion accorded every right and advantage to the surety and principal. No possible harm could have resulted. F.R. Civ. P. 61. We find no basis for any of the other objections raised.

Staff: Roger P. Marquis (Lands Division)

Condemnation; Provision in Chattel Mortgage That Machine Will Not Become Part of Freehold Until Purchase Price Is Paid in Full Does Not, as Between Condemnor and Landowner, Fix Character of Property Annexed to Land; Judgment Must Be Supported by Evidence. F. L. Carmichall and Ruth Carmichall v. United States (and reverse title) (C.A. 5, January 6, 1960). The United States condemned the fee title to 5.06 acres of land in Tarrant County, Texas, for use in connection with the Carswell Air Force Base. The property was improved by a number of buildings used in the manufacture of concrete blocks. The buildings contained machinery and equipment necessary to such uses. All of the heavy machinery, except one machine manufactured by Stearns Manufacturing Company, was conceded by the Government to be so affixed to the realty as to be a part of it. As a basis for its contention that the Stearns machine was personalty, the Government relied upon a provision in a chattel mortgage that the machine would not become a part of the freehold until the purchase price was paid. It also contended that the molds and conversion parts necessary to the operation of the Stearns machine and with a similar machine made by another manufacturer were personalty. The district court ruled that the Stearns machine and both sets of accessories were personalty. The landowners appealed from this ruling.

Each item of the machinery was valued on a basis of reproduction less depreciation. In giving a total of the valuations of the separate items, the landowners' witness, whose values were the highest given, made an error of $17,000 above the actual total. The jury's award was identical with the erroneous total. The trial court denied the Government's motion to set aside the verdict and judgment for lack of sufficient evidence to support them. The Government appealed on the same ground.

The Court of Appeals reversed and remanded the case, holding that the provision in the chattel mortgage applied only between the mortgagor and mortgagee, and was not applicable in fixing the character of the property in a condemnation proceeding. It also held that the doctrine of constructive annexation applied to the accessories for both of the blockmaking machines, since the machines could not be operated without them, and they could not be used on similar machines without alteration.

The Court of Appeals also held that there was no evidence to sustain the amount of the verdict and judgment, and a different award must be made which has evidence to support it.

Staff: Elizabeth Dudley (Lands Division)

Government Leases; United States as Lessee; Right to Remove Buildings Erected by Government After Termination of Lease. United States v. City of Columbus, et al. (S.D. Ohio) The United States, acting through the Department of the Navy, leased certain airport lands which are part of the airport owned by the City of Columbus. The lease provided, among other things, that the United States shall have the right to erect buildings and improvements upon the leased premises and that the buildings and

improvements so erected would remain the property of the United States and could be removed by it prior to or at the expiration of the lease. The lease also provided that the Government would restore the premises from which buildings or improvements were removed to their original condition.

The Government remained in possession of the premises from 1942, when the original lease was executed, until June 30, 1959. While in possession the Government erected buildings at a cost to it in excess of $2,000,000. The Government notified the city that the lease would not be renewed after June 30, 1959. On June 29, 1959, the defendants informed the Government that the city would consider that any improvements remaining on the property as of June 30, 1959, had been abandoned by the Government and that the Government would have no right to occupy or work in the leased area after that date.

This action was brought to obtain a declaratory judgment adjudging that the United States is the owner of all the buildings erected by it and to obtain an injunction forbidding the defendants from interfering with the removal of the buildings by the Government and prohibiting them from using, removing or otherwise exercising ownership or dominion over the buildings. The Court in its opinion noted that ordinarily a tenant's personal property remaining upon leased premises after the expiration of the term becomes the property of the landlord. The Court held, however, that in this case the parties declared unequivocally by contract that title shall remain in the lessee and that the lessee may remove the buildings and restore the premises or, in lieu of removal and restoration, shall have the right to abandon any and all buildings to the lessor. On the basis of those provisions of the lease, the Court held that it was the intention of the parties that title to the buildings should remain in the Government unimpaired by the expiration of the lease; and that, furthermore, having agreed upon and granted the Government the right of removal and restoration or abandonment in lieu thereof, without having fixed a time for the exercise of that right, it was the intention of the parties that a reasonable time be granted for removal regardless of the expiration of the lease.

Staff: United States Attorney Hugh K. Martin (S.D. Ohio); Herbert Pittle (Lands Division)

Condemnation; Date of Taking Cannot Be Changed Because Prior Announcement of Federal Project Depressed Property Values; Jury Should Value Property as of Date of Taking But Unaffected by Impact of Project. Parcel 5099, Being Lot 831 in Square 544, in the District of Columbia, and Charles R. Goddard v. District of Columbia Redevelopment Land Agency (C.A. D.C., January 21, 1960). This case sought to establish just compensation for the taking of one of many tracts of land in the southwest area of the District of Columbia. The land was condemned pursuant to an extensive urban renewal program which sought the elimination of slum conditions in the Nation's Capital. Because of the enormous scope of the redevelopment program, there was a considerable time lag between the date when the program was announced and the date when the instant proceedings were undertaken. The former

owner of the tract contended that the impact of the program served to severely depress realty values in the area, and that the delay prevented the owner from receiving the fair value of the property; accordingly, he sought to have the date of taking changed to a date before the program's impact. Secondly, he contended that his property had fallen into a poor state of repair both before and after the date of taking, due mainly to rampant vandalism in the area when the inhabitants had moved out, and that it was error not to have instructed the jury to disregard that deterioration at the time it viewed the property.

The Government argued that the date of taking could not be altered for valuation purposes. The Government's entire case was directed towards valuing the property on the basis of values before the project's impact, using earlier comparable sales which were unaffected by the program. Thus, a fair market value as of the date of taking was estimated uninfluenced by the depressive effect of the redevelopment program. As to the jury view, the Government argued that it was required by statute. Moreover, the former owner had failed to interpose any objection to the view or request a qualifying instruction. In any event, although the jury was carefully instructed to value the property as of the date of taking, it also heard the oft-repeated admonition that the program factor was to be disregarded in arriving at fair market value. Thus, the instruction (relied on by the owner) to "use their powers of observation" would not likely have resulted in a valuation based on the property's condition in its depressed condition.

The District Court, agreeing with the Government's contentions, upheld the verdict and the Court of Appeals affirmed summarily.

Staff: Robert S. Griswold (Lands Division)

Motion for Relief from Judgment Under Rule 60(b); Recorded Deed as Newly Discovered Evidence; Timeliness of Allegations of Fraud. Webb v. United States (C.A. 4, January 18, 1960). Invoking Rule 60(b), F.R. Civ. P., defendant-appellant Webb filed a motion for relief from a condemnation judgment (as to property which he had formerly owned) two weeks before the expiration of one year from the date of judgment, alleging "newly discovered evidence" as the sole ground for granting the motion. The evidence relied on was that the sale of a farm next to Webb's land (used at the condemnation trial as a sale of comparable property) had actually been at the rate of $700 an acre rather than $516 an acre, as one of his witnesses had testified at the trial. To support this contention, Webb produced a deed reflecting this higher price; the deed had been recorded six months before trial, but Webb had been unaware of its existence. Some six months after filing his motion, Webb attempted to amend it by adding allegations of fraud on the part of the Assistant United States Attorney who had tried the condemnation suit.

The District Court denied the motion for the following reasons: (1) the motion had not been filed within a reasonable time; (2) the "newly

discovered evidence", being a matter of public record, could have been discovered by due diligence before trial and was in fact known to appellants before trial; (3) the difference in value shown by the "newly discovered evidence" would probably not have produced a more favorable valuation for the property owners if it had been advanced at the trial because the jury apparently did not accept the neighboring farm's sale as a comparable sale; (4) the new grounds contained in the amended motion were not presented to the court within the year allowed by Rule 60(b); (5) the matters alleged to constitute fraud by the Assistant United States Attorney in the trial of the case amount to nothing more than a further specification of alleged misconduct by the Assistant United States Attorney, and the ground of misconduct was presented and ruled on in the motion for new trial and in the first appeal; and (6) there is nothing in this case so unusual or extraordinary as to bring it within the provisions of Rule 60(b)(6), which allows relief from judgment for "any other reason justifying relief" within a reasonable time. 23 F.R.D. 635. The Court of Appeals affirmed per curiam on the opinion of the District Court.

Staff: Hugh Nugent (Lands Division)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS

Judgments and Cost Bills in Refund Suits

In connection with cost bills forwarded to the Department under the revised procedure for satisfying adverse judgments in refund suits, your attention is again invited to the restrictions contained in Rule 54(d) of the Federal Rules of Civil Procedure (also see 81(f) added in 1948), and 28 U.S.C., Section 2412(b). Where the refund suit names the United States as defendant, costs are limited to those allowed by the trial court and may include only witness fees and fees paid to the Clerk after joinder of issue; other costs, e.g., filing fee, Marshal's fee for service of summons and docket fees paid prior to joinder of issue are not recoverable against the United States. When these latter costs are taxed, a motion should be filed, under Rule 54(d), within five days to have the costs retaxed by the court to eliminate the improper costs.

Where the refund suits names the District Director as defendant, it is the Department's position that the only costs allowable are the same as those recoverable in suits against the United States, with the exception of suits filed in district courts of the Sixth Circuit where the Lichter Foundation case is controlling.

The Department should be promptly furnished with one certified and two uncertified copies of judgments (and in suits against Director, certificates of probable cause) together with certified copies of cost bills to enable the Internal Revenue Service to expedite payment and hold the Government's liability for interest to a minimum.

Appellate Decisions

Jurisdiction: Action to Quiet Title by Purchaser at Mortgagee's Sale. Remis v. United States (C.A. 1, January 6, 1960.) This case originated as an action by the purchaser at a mortgage foreclosure sale to quiet title to the property purchased as against the United States in whose favor there existed against the property tax liens, junior in time to the mortgage lien, for taxes due by the owner-mortgagor. The United States was named as the sole party defendant and the complaint recited that the action was brought pursuant to the provisions of 28 U.S.C. 2410. The First Circuit held that the District Court properly dismissed the complaint since Section 2410 merely waived sovereign immunity, and did not authorize suit unless there were independent grounds of jurisdiction. Accord: Peacock v. United States, 175 F. Supp. 645 (Idaho); Tompkins v. United States, 172 F. Supp. 204 (S.D. Tex.); cf. Coson v. United States,

169 F. Supp. 671 (S.D. Cal.), pending on appeal to the Ninth Circuit; and Bank of America Nat. Tr. & Sav. Assn. v. United States, 265 F. 2d 862 (C.A. 9), pending before the Sup. Ct.; and see First Nat. Bank of Brownsville, Texas v. United States, 172 F. Supp. 757 (S.D. Tex.).

The Court of Appeals also rejected appellant's further contention, first raised on appeal, that the district court had jurisdiction under 28 U.S.C. 1340, pointing out that the "quiet-title" issue raised was not concerned with either the validity or priority of the federal tax liens, but only with their extinguishment in a manner not permitted by federal statutes.

In conclusion, the Court pointed out that appellant was not without remedy, as Congress had provided administrative and jurisdictional procedures by which federal tax liens may be discharged -- Sections 6325, 7403 and 7424 of the Internal Revenue Code of 1954.

Staff: George F. Lynch (Tax Division)

Fee for Services Rendered by Attorney in Connection With Client's Assignment for Benefit of Creditors Takes Precedence Over Debts Owed United States and Agreement to Pay Such Fee Does Not Constitute Void Preference Under State Law. Harold J. Abrams v. United States (C.A.8, January 15, 1960.) The Harber Products, Inc., being in jeopardous financial condition employed Barken, an attorney, to review its situation and paid him a small retainer. After considering the matter Barken concluded that the situation was hopeless and conferred with Abrams (appellant in this case) who agreed to act as trustee under an assignment by Harber Products. Barken than furnished Abrams information about the company and helped him in drafting the assignment deed. Afterwards Barken helped in rounding up some of the company's equipment for sale and also effected a settlement in two suits which were filed against Harber Products. In carrying out his duties, Abrams employed another attorney and also an auditor but their fees are not involved here. Thus the only question is whether the fee of $650 which Abrams paid Barken pursuant to a provision in the assignment deed could be legally paid before payment of taxes due the United States. The Government argued that it was entitled to priority under Section 3466, Revised Statutes and the district court, in agreeing, held that Barken's services were for the sole benefit of the assignor and that he should be treated as a general creditor of the assignor. The Eighth Circuit, however, reversed the district court on the ground that Barken's fee was actually an expense of administering the assignment and pointed out that it has long been the general rule that expenses in administering an assignment take precedence over the Government's priority under Section 3466. In this connection the Court referred to bankruptcy cases but it admitted that this is the first time a court has been asked to decide whether payment of a fee to the attorney of an assignor under a general assignment (not connected with bankruptcy) violates Section 3466, and it then stated that the test in cases like the instant one should not be by

whom the attorney has been employed but for whose benefit he has acted. In applying that test the Court found that Barken had rendered substantial services in support of the assignment proceeding and was entitled to payment before the United States. The Eighth Circuit also held that the provision in the assignment deed authorizing payment of Barken's fee did not constitute a void preference under the law of Missouri where this case arose.

Staff: Louise Foster (Tax Division)

Tax Liens: Priority of Mortgage Does Not Extend to Payments of Local Property Taxes and Water Charges Voluntarily Made by Mortgagee After Federal Tax Lien Arose and Notice Thereof Was Filed. Metropolitan Life Insurance Company v. Guerlain White, Inc., et al. (N.Y. Supreme Court, Appellate Div., First Dept., November, 1959). To secure a loan, plaintiff received a bond and mortgage from the owner of the subject property which was recorded on May 7, 1946. The mortgage contained the usual provision requiring the mortgagor to pay all taxes, assessments, and water charges, and in default thereof, the mortgagee had the option to make such payments and add them to the balance due on the obligation. The property was conveyed by the original mortgagor and his grantee defaulted on the mortgage. On July 21, 1954, a notice of lien for unpaid taxes assessed against the owner was filed in the Office of the Register of the City of New York, Bronx County. On June 27, 1958, the mortgagee began paying the City real estate taxes and water charges. On September 28, 1958, the mortgagee commenced an action to foreclose the mortgage; the United States was named a party defendant pursuant to 28 U.S.C. 2410. The lower court held that the payments made by the mortgagee for local taxes and water charges had priority over the federal tax lien. The United States appealed. On appeal, plaintiff argued that Section 254(6) of the Real Property Law of the State of New York directs that if payments of taxes, assessments, and water rates are made by the mortgagee they become secured by the mortgage and become a part of the debt or unpaid balance secured by the mortgage. The Court properly recognized the question as being a federal one and rejected plaintiff's argument as being essentially one that the doctrine of relation back should be applied, which doctrine had been held inapplicable as against federal tax liens in United States v. Security Trust & Saving Bank, 340 U.S. 47. The Court concluded that the rule that "first in time is first in right" was applicable to the instant case, and, consequently, held that the federal tax lien was entitled to payment prior to payment to the mortgagee for sums expended by him for payment of local taxes and water charges. This instant case is in accord with the recent decision in United States v. Christensen, 269 F. 2d 624 (C.A. 9).

Staff: United States Attorney S. Hazard Gillespie, Jr., and Assistant United States Attorney Stephen Kurzman (S.D. N.Y.) Morton L. Davis (Tax Division)

District Court Decision

Levy and Distraint on Funds Taken from Possession of Taxpayer; Claim of Ownership by Third Party. M. A. Riddle v. Robert A. Riddell, District Director (S.D. Calif. Sept. 17, 1959). The issue here was whether a portion of funds taken from taxpayer's possession by narcotics agents, and levied upon and seized by the District Director, belonged to the plaintiff in this action.

On May 14, 1958, Louis Fiano, the taxpayer, was arrested by federal agents for charged violation of federal narcotics laws for which he was later convicted. Immediately after his arrest his car and apartment were searched in his presence and a total sum of $17,844.71 in cash was found in the car and in two places in his apartment, $7,000 of which was in $500 bills, the balance in smaller denominations. On May 16, 1958, a jeopardy assessment for income taxes in an amount in excess of $30,000 was made against Louis Fiano, and on the same date notice and demand was issued, notice of the tax lien filed, and notice of levy for the taxes was served upon the Los Angeles Office of the Bureau of Narcotics of the Treasury Department, which was holding the funds taken from Fiano upon his arrest. Pursuant to the levy the funds were delivered to the Internal Revenue Service. On May 20, 1958, the funds were deposited and the sum shown as a credit on the District Director's books against the tax assessment.

Immediately following the levy and seizure of the funds, M. A. Riddle, the plaintiff in this case, made claim upon the District Director for $15,000 of the seized funds which he claimed was his money which he had given to the taxpayer for safekeeping the evening of about May 13, 1958. Upon the District Director's refusal to turn the funds over to the claimant, this suit was filed for recovery of the $15,000. The complaint contained allegations of several causes of action, the first being that by mistake or inadvertence property of the plaintiff had been applied to the tax liability of another, jurisdiction being alleged under 28 U.S.C 1340. Claiming jurisdiction of the court under 28 U.S.C 1346, plaintiff alleged as further causes of action that there was an implied contract for defendant to return plaintiff's money, and that defendant would be unjustly enriched if allowed to keep plaintiff's money; and finally it was alleged that plaintiff had been deprived of his property without due process of law, in violation of the Fifth Amendment to the United States Constitution.

The Court found that the $7,000 in $500 bills which had been taken from taxpayer was part of $10,000 in $500 bills which taxpayer had obtained from a branch of the City National Bank of Beverly Hills on May 9, 1958, by exchanging therefor smaller bills, and that this money belonged to taxpayer and not to plaintiff; that plaintiff had failed to sustain his burden of proving that any part of the sum found in possession of taxpayer at the time of his arrest was money or property of the plaintiff.

As to the additional alleged causes of action, the Court held that this was not an action against the United States, and therefore it did not have jurisdiction under 28 U.S.C. 1346, or any other statute, and there was no basis for the alleged second and third causes of action since plaintiff failed to prove that any part of the fund belonged to him. The Court held that the entire fund found in taxpayer's possession belonged to the taxpayer, and that it was seized by defendant according to due process of law.

Staff: United States Attorney Laughlin E. Waters, and Assistant United States Attorney Edward R. McHale (S.D. Calif.) Mamie S. Price (Tax Division)

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