Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.
March 11, 1960

United States
DEPARTMENT OF JUSTICE

Vol. 8 No. 6

UNITED STATES ATTORNEYS
BULLETIN

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MONTHLY TOTALS

Changes in the workload during the month of January were very small. The decrease in pending civil cases was cancelled out by the increase in pending criminal cases. Both civil and criminal matters pending increased during January, and the aggregate total of cases and matters pending rose from 49,999 to 50,093. The following comparison shows the workload pending on January 31, 1960, and at the end of the preceding month:

	December 31, 1959	January 31, 1960	
Triable Criminal	7,209	7,252	+43
Civil Cases Inc. Civil Tax Less Tax Lien & Cond.	14,364	14,309	-55
Total	21,573	21,561	-12
All Criminal	8,870	8,888	+18
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	16,998	16,957	-41
Criminal Matters	11,086	11,160	+74
Civil Matters	13,045	13,088	+43
Total Cases & Matters	49,999	50,093	+94

Substantially more cases were filed during the first seven months during fiscal 1960 than during the similar period of the previous year, and terminations rose during the same period. Despite the fact that a total of 2,621 more cases were filed than were terminated, the pending caseload was reduced, albeit very slightly, from the same period of the previous year. The following table shows the comparative achievements of both years:

	1st 7 Months F. Y. 1959	1st 7 Months F. Y. 1960	Increase or Decrease Number	%
Filed				
Criminal	17,204	17,649	+ 445	+ 2.6
Civil	13,796	14,156	+ 360	+ 2.6
Total	31,000	31,805	+ 805	+ 2.6
Terminated				
Criminal	15,960	16,654	+ 694	+ 4.3
Civil	13,131	12,530	- 601	- 4.6
Total	29,091	29,184	+ 93	+ .3
Pending				
Criminal	8,570	8,459	- 111	- 1.3
Civil	19,694	19,784	+ 90	+ .5
Total	28,264	28,243	- 21	- .1

Collections for the first seven months of fiscal year 1960 continue to compare unfavorably with those for the preceding year. For the month of January 1960, United States Attorneys reported collections of $2,274,151, which brings total collections for the first seven months of the fiscal year to $16,718,038. This total represents a decrease of $2,602,889, or 13.5 per cent, from the $19,320,927 recovered during the same period during the prior year.

During January, $3,858,405 was saved in 113 suits in which the government as defendant was sued for $4,764,978. 62 of them involving $2,292,653 were closed by compromises amounting to $379,783 and 29 involving $1,030,406 were closed by judgments against the United States amounting to $526,790. The remaining 13 suits involving $1,441,919 were won by the government. The total saved for the first seven months of the fiscal year amounted to $18,876,660, a decrease of $5,950,980 or 24.0 per cent from the $24,827,640 saved in the first seven months of fiscal year 1959.

DISTRICTS IN CURRENT STATUS

As of January 31, 1960, the districts meeting the standards of currency were:

CASES

Criminal

Ala., N.	Hawaii	Mass.	N.Y., W.	Tenn., W.
Ala., M.	Idaho	Mich., E.	N.C., E.	Tex., E.
Ala., S.	Ill., N.	Mich., W.	N.C., M.	Tex., N.
Alaska #1	Ill., E.	Minn.	N.C., W.	Tex., S.
Alaska #3	Ill., S.	Miss., N.	Ohio, N.	Tex., W.
Alaska #4	Ind., N.	Miss., S.	Ohio, S.	Utah
Ariz.	Ind., S.	Mo., E.	Okla., N.	Vt.
Ark., E.	Iowa, N.	Mo., W.	Okla., E.	Va., W.
Ark., W.	Iowa, S.	Mont.	Okla., W.	Wash., E.
Calif., N.	Kan.	Neb.	Pa., E.	W.Va., N.
Calif., S.	Ky., E.	Nev.	Pa., M.	W.Va., S.
Colo.	Ky., W.	N.H.	Pa., W.	Wis., E.
Del.	La., E.	N.J.	P.R.	Wis., W.
Dist. of Col.	La., W.	N.M.	R.I.	Wyo.
Fla., N.	Maine	N.Y., N.	S.D.	C.Z.
Fla., S.	Md.	N.Y., S.	Tenn., E.	Guam

Civil

Ala., N.	Ark., W.	Fla., S.	Iowa, S.	Md.
Ala., M.	Calif., N.	Idaho	Kan.	Mass.
Ala., S.	Calif., S.	Ill., E.	Ky., E.	Mich., E.
Alaska #1	Conn.	Ill., S.	Ky., W.	Mich., W.
Ariz.	Dist.of Col.	Ind., N.	La., W.	Minn.
Ark., E.	Fla., N.	Ind., S.	Me.	Miss., N.

CASES

Civil (Cont'd)

Miss., S.	N.C., W.	P.R.	Tex., S.	Wis., W.
Mo., E.	N.D.	R.I.	Tex., W.	Wyo.
Mont.	Ohio, N.	S.C., W.	Vt.	C.Z.
Neb.	Ohio, S.	S.D.	Va., E.	Guam
N.J.	Okla., N.	Tenn., E.	Wash., E.	V.I.
N.M.	Okla., E.	Tenn., M.	Wash., W.	
N.Y., N.	Okla., W.	Tenn., W.	W.Va., N.	
N.Y., W.	Ore.	Tex., E.	W.Va., S.	
N.C., M.	Pa., W.	Tex., N.	Wis., E.	

MATTERS

Criminal

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

Civil

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

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JOB WELL DONE

Assistant United States Attorney Leonard Glass, Southern District of New York, has been commended by the General Counsel, Securities and Exchange Commission, for his splendid cooperation and capable handling of a recent criminal case and for the speed with which the matter was processed to indictment.

The Commissioner of Customs has commended Assistant United States Attorney Robert B. Fiske, Jr., Southern District of New York, for his outstanding work in a recent narcotics case. The Commissioner observed that Mr. Fiske worked exceptionally hard and long in making a thorough study of the whole matter, and that this bore fruit in the very fine presentation he made in court.

The FBI Special Agent in Charge has expressed appreciation for the excellent contribution made by Assistant United States Attorneys Timothy F. O'Brien and Francis J. Robinson, Northern District of New York, to a Special Conference on Automobile Theft. The letter observed that their remarks concerning the functions of the United States Attorneys' office in automobile theft were extremely well received at each Conference.

United States Attorney Jack D. H. Hays, District of Arizona, has been congratulated by the Chief Postal Inspector for the expeditious and competent manner in which he suppressed a recent nefarious swindle on the public and brought about the conviction of an "advance fee" promoter.

The General Counsel, Securities and Exchange Commission, has expressed sincere thanks and appreciation for the splendid personal attention and excellent cooperation which United States Attorney Ralph Kennamer, Southern District of Alabama, gave to the prosecution of a recent case. In stating that the Commission was most impressed with the speed and thorough manner in which the case was brought to a successful conclusion, the General Counsel observed that the jury's quick verdict reflected great credit upon Mr. Kennamer.

Assistant United States Attorney John B. McFaddin, Northern District of Illinois, has been commended by the Deputy Commissioner of Customs for his effective assistance in a recent narcotics case. The letter stated that after the defendant had been taken into custody by State officers, Mr. McFaddin enlisted their cooperation to have the case carried on as a Federal matter. He devised a plan of procedure which resulted in the arrest of two additional important defendants, and arranged to have a customs agent introduced under cover in order to obtain admissible evidence which it is believed will be helpful in procuring convictions in the cases.

The General Counsel, Department of Agriculture, has commended Assistant United States Attorney John F. Doyle, District of Columbia

for the very splendid and competent cooperation and assistance he rendered in a recent case which was of the utmost importance to that Department and to the complex marketing agreement and other programs which regulate and stabilize the handling of milk for the major milk consuming areas of the United States. The General Counsel referred specifically to Mr. Doyle's generous and unstinting contribution of time to the defense of the case, particularly during the weekend preceding Christmas and that following it, when he was called upon to resist a motion for a preliminary injunction.

Assistant United States Attorney Joseph S. Mitchell, District of Massachusetts, has been commended by the General Counsel, Securities and Exchange Commission, for his splendid work in a recent criminal case. The letter stated that Mr. Mitchell has been handling a number of important criminal cases for that agency, that the Commission is delighted with the effective and expeditious manner in which he has been disposing of them, and that the guilty plea and sentence in the instant case reflected the thorough preparation that was given to the case.

Both the Regional Commissioner and The Officer in Charge, Immigration and Naturalization Service, have commended Assistant United States Attorney George W. Kell, Southern District of California, for his outstanding performance in a recent case involving conspiracy to violate the immigration laws, in which 13 defendants were convicted. The letters referred to the many hours of overtime Mr. Kell voluntarily devoted to the case, to the aid he rendered in protecting the Government witnesses and diligently guarding their testimony, to his strong resistance to the considerable pressure brought by defense counsel and the court to stipulate certain evidence which stipulation might have jeopardized the Government's position; and to the excellent brief he prepared on the question of jurisdiction. The Office in Charge stated that Mr. Kell's spirited representations encouraged and inspired the immigration officers in the performance of their duties.

Assistant United States Attorney Dominick L. DiCarlo, Eastern District of New York, has been commended by private counsel for his work in a recent case. The letter stated that Mr. DiCarlo's presentation of evidence was skillful, logical and effective, that his poise, courtesy, and pleasing courtroom manner were very impressive, and that his summation was the finest the writer had ever heard. Mr. DiCarlo's performance was also commended by the presiding judge who praised his orderly presentation of over 50 exhibits, and who thought his summation was particularly good.

The Chief Postal Inspector has expressed to United States Attorney Edward L. Scheufler, Western District of Missouri, his appreciation for the successful prosecution of the operators of a knitting machine work-at-home swindle case in the Kansas City Area. In commending the excellent work of Assistant United States Attorney J. Whitfield Moody, the Chief Inspector noticed that the convictions

achieved would have a deterrent effect on others engaged in similar schemes throughout the country.

The Chief Postal Inspector also has extended his congratulations to United States Attorney Russell E. Ake, Northern District of Ohio, for the successful prosecution of a recent mail fraud case. Assistant United States Attorneys William J. O'Neill and George W. Morrison were commended for their handling of the case which involved a vending machine swindle.

Former United States Attorney James L. Guilmartin and Assistant United States Attorney Lloyd Bates, Southern District of Florida, have been commended by the Chief Postal Inspector for an "excellent job" in the successful prosecution of a recent mail fraud case. The Chief Inspector noted the national importance attaching to the case as the first conviction of operators of the "loans-for-business" version of the advance fee racket.

The Chief Inspector has also expressed his appreciation to United States Attorney Laughlin E. Waters, Southern District of California, in connection with the conviction of the operator of a mail fraud scheme involving sales of distributorships for fluorescent lighting fixtures. The Chief Inspector also lauded the "magnificently aggressive presentation" of the Government's case by Assistant United States Attorney Robert Hornbaker which resulted in a jury verdict on all eight counts of the indictment.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

SAVINGS IN SUITS AGAINST THE GOVERNMENT

Difficulty has been encountered in compiling accurate statistics on savings in suits against the Government because the amount of the compromise or judgment against the government has not been shown in the "Amount Recovered, Judgment, Compromise, etc." column of the IBM mark-sense cards. United States Attorneys are requested to advise docket clerks of the importance of reporting such amounts.

RECEIPT, FORM NO. USA-200

Personnel preparing receipts (Form No. USA-200) are again reminded of the importance of indicating on the form the Department File number and the name of the Civil Division section supervising the case. Failure to do this resulted in calls to the General Accounting Office which could have been avoided, if the forms had been properly filled in.

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 2, Vol. 8 dated January 15, 1960.

MEMO	DATED	DISTRIBUTION	SUBJECT
272	1-15-60	U.S. Attys and Marshals	Control and Reporting of Obligations and Disbursements.
273	1-20-60	U.S. Attys and Marshals	Closing Notice to United States Marshal and Disposition of Unexecuted Warrants and Unserved Summons issued in Criminal Actions or Cases which are dismissed or closed.
263-R	1-25-60	U.S. Attys and Marshals	Certification of vouchers in payment of long-distance telephone calls.
274	2-10-60	U.S. Attys and Marshals	Federal Employee Health Program-Field Service Training Sessions.
ORDERS			
199-60	2-16-60	U.S. Attys and Marshals	Assignment of Functions arising under the Labor-Management Reporting and Disclosure Act of 1959

ORDERS	DATED	DISTRIBUTION	SUBJECT
200-60	2-24-60	U. S. Attys	Delegating to the Director of the Federal Bureau of Investigation the Authority of the Attorney General to seize arms and munitions of war, and other articles, Pursuant to Section 1 of Title vi of the Act of June 15, 1917, as amended.
134-3	2-19-60	U.S. Attys and Marshals	Forms Control - Special Field Forms

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ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Price Fixing - Electrical Equipment; Indictments and Civil Suits Under Section 1. United States v. Ohio Brass Company, et al., (Cr. & Civ.), United States v. McGraw-Edison Company, et al., (Cr. & Civ.), United States v. A. B. Chance Company, et al., (Cr.), United States v. Lapp Insulator Company, et al., (Cr. & Civ.) (E.D. Pa.). A federal grand jury sitting in Philadelphia returned another series of four indictments on February 17, 1960 charging twelve manufacturers of electrical equipment with violations of the Sherman Act in connection with the sale and distribution of various electrical devices and accessories used therewith.

The indictments involve (1) bushings, (2) distribution lightning arresters, (3) intermediate lightning arresters, (4) station lightning arresters, (5) arrester-cutout combination units, (6) insulators, and 7 open fuse cutouts -- all of which are used in the generation, transmission and distribution of electricity throughout the United States. These products are sold to various federal, state and local governmental agencies, as well as to electric utility companies and other manufacturers of electrical equipment. Industry sales of these products, covered by the indictments, mount up to $55,000,000 each year.

Named as defendants in the bushings indictment were: General Electric Company, New York, New York; Westinghouse Electric Corporation, Pittsburgh, Pa.; and Lapp Insulator Company, Inc., LeRoy, New York, and Ohio Brass Company, Mansfield, Ohio. These defendants were charged with conspiring, at least as early as 1958, "(a) to fix and maintain prices, terms and conditions for the sale of bushings and bushing accessories; and (b) to quote to various public agencies, in submitting sealed bids in response to requests from these agencies, only the prices for bushings and bushing accessories as agreed upon and fixed."

The companies in addition to General Electric, Westinghouse and Ohio Brass named as defendants in the three-count indictment relating to lightning arresters were: McGraw-Edison Company, Elgin, Ill.; H. K. Porter Company, Inc., Pittsburgh, Pa.; and Hubbard and Company, Chicago, Ill., and Joslyn Mfg. and Supply Co., Chicago, Ill.

The first count of the indictment charged that, at least as early as 1958, defendants conspired "(a) to fix and maintain prices for the sale of distribution lightning arresters and lightning arrester accessories used therewith; and (b) to quote to various public agencies, in submitting sealed bids in response to requests from these agencies, only the prices of distribution lightning arresters and lightning arrester accessories used therewith as agreed upon and fixed." The second count charged that,

at least as early as 1959, defendants General Electric, Westinghouse, and Ohio Brass conspired "(a) to fix and maintain prices for the sale of intermediate lightning arresters, station lightning arresters, and lightning arrester accessories used with each; and (b) to quote to various public agencies, in submitting sealed bids in response to requests from these agencies, only the prices for intermediate lightning arresters, station lightning arresters, and lightning arrester accessories used with each, as agreed upon and fixed." The third count charged that defendants General Electric, Westinghouse, McGraw-Edison, Joslyn, and Hubbard, at least as early as 1959, conspired "(a) to fix and maintain prices for the sale of arrester-cutout combination units; and (b) to quote to various public agencies, in submitting sealed bids in response to requests from these agencies, only the prices for arrester-cutout combination units as agreed upon and fixed."

Named as defendants in the insulator indictment in addition to General Electric, Ohio Brass, Lapp Insulator, McGraw-Edison, and H. K. Porter were: The Porcelain Insulator Corporation, Lima, N.Y.; I-T-E Circuit Breaker Company, Philadelphia, Pa.; and A. B. Chance Company, Centralia, Mo. These defendants were charged with conspiring, at least as early as 1955, "(a) to fix and maintain prices for the sale of insulators; (b) to enforce adherence to these prices in sales of insulators through agents, jobbers, and wholesalers; and (c) to quote to various public agencies, in submitting sealed bids in response to requests from these agencies, only the prices for insulators as agreed upon and fixed."

The fourth indictment relating to open fuse cutouts named the Southern States Equipment Corporation, Hampton, Ga. in addition to General Electric, Westinghouse, A. B. Chance, Hubbard, I-T-E, Joslyn, and McGraw-Edison as defendants. The indictment charged these defendants with conspiring, at least as early as 1958, "(a) to fix and maintain prices, terms, and conditions for the sale of open fuse cutouts and open fuse cutout accessories; and (b) to quote to various public agencies, in submitting sealed bids in response to requests from these agencies, only the prices for open fuse cutouts and open fuse cutout accessories as agreed upon and fixed."

As a result of these alleged conspiracies, the indictments charge that price competition has been eliminated in the sale and distribution of these products, and that various governmental agencies "have been denied the right to receive competitive sealed bids" and "have been forced to pay high, artificially-fixed prices" for these products. Such agencies include Tennessee Valley Authority, U. S. Department of Interior, U. S. Department of Commerce, Booneville Power Administration, U. S. Army Corps of Engineers, U. S. Navy, U. S. Air Force, U. S. Marine Corps, U. S. Coast Guard, and General Services Administration.

Companion civil actions were also filed, relating to bushings, lightning arresters, and insulators, charging the same defendants with the same Sherman Act violations, and seeking injunctive relief against the various practices alleged. The prayers for relief in these suits seek to require the companies to issue new price lists based upon costs independently

arrived at, to submit affidavits of non-collusion with future bids to governmental agencies, and to prevent any communications among the defendants with respect to future bids and price quotations.

Staff: William L. Maher, Donald G. Balthis, John E. Sarbaugh and John J. Hughes (Antitrust Division)

Allocation of Sales Territories - Foreign Cars; Complaint Filed Under Section 1. United States v. Hambro Automotive Corporation, et al., (S.D. N.Y.). On February 19, 1960 a civil complaint was filed against defendant and eleven distributors in the United States of motor vehicles and parts manufactured by British Motors Corporation, (BMC) charging a violation of Section 1 of the Sherman Act in connection with the sale and distribution of BMC automobiles and parts.

BMC automobiles (Morris, Morris Minor, MG, MG Magnettes, Riley, Austin and Austin-Healey), and parts are imported into the United States by Hambro Automotive Corporation and are distributed throughout the country by the eleven distributors who resell to over 570 dealers. In 1958, retail sales of new BMC automobiles and parts in the United States amounted to approximately $69,000,000 out of an estimated total of $700,000,000 for all new foreign cars.

The complaint charges that Hambro and its distributors and dealers have fixed wholesale and retail prices of BMC automobiles and parts, and that exclusive sales territories have been allocated to Hambro distributors and dealers.

With the filing of the complaint a consent judgment was entered against all of the defendants but two distributors, enjoining the continuation of the alleged illegal practices. The action is pending against the two non-consenting distributor defendants.

Staff: John D. Swartz, Morton Steinberg and John H. Clark (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEALS

TRANSPORTATION

Service Order 68; Suspension During World War II of Rule 34 of Consolidated Freight Classification Did Not Permit Railway Carriers to Furnish and Charge for Cars of Larger Size Than Those Ordered When Cars of Smaller Ordered Size Were Available. New York, New Haven, and Hartford Railroad Co. v. United States (C.A. 1, February 25, 1960). This action was brought by the carrier under the Tucker Act (28 U.S.C. 1346) to recover $1,756.97 for transportation services. The Government defended on the ground that, pursuant to Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, it had deducted the amount in question as overpayments made during World War II on prior bills. The sole issue at trial was whether the charges for the World War II shipments were correct. In these transactions, the carrier had furnished the Government with freight cars of a larger size than was ordered and had billed the Government for the larger cars. After post-payment audit, the Government deducted an amount equal to the difference between the charges applicable to the cars furnished and those applicable to the smaller, ordered cars.

At the trial, the carrier introduced no evidence as to the unavailability of cars of the size ordered by the Government. Instead, it contended that the Interstate Commerce Commission's war-time suspension of Rule 34 of the Consolidated Freight Classification permitted it to charge for the cars furnished irrespective of the availability of the ordered cars. The district court entered judgment for the Government and the First Circuit affirmed. The appellate court held that the Supreme Court decision in United States v. New York, New Haven, and Hartford Railroad Co., 355 U.S. 253, was dispositive.

Staff: Alan S. Rosenthal; Douglas A. Kahn
(Civil Division)

MORTGAGES

Relative Priority of SBA Chattel Mortgage Lien and Later Mechanic's Lien Governed by Federal Common Law Rule of "First in Time, First in Right." Southwest Engine Co. v. United States (C.A. 10, January 23, 1960). Small Business Administration made a loan to Manganese Corporation which was secured by a chattel mortgage covering specified personalty owned and used by Manganese in its mining operation. The mortgage was recorded in December 1956. In 1958, Southwest Engine Co. reconditioned an engine which was subject to the mortgage. When the repair bill was not paid, Southwest

retained possession of the engine in reliance on the New Mexico mechanics' lien statute. The Government then brought this replevin action and the district court determined that it was entitled to recover possession of the machine.

Southwest appealed on the ground that it had perfected a lien which was superior to the Government's under New Mexico law. The Court of Appeals rejected this contention and affirmed. It held that federal, rather than state, law controlled the relative priority of the two liens, and that "the federal decisions uniformly sanction the lien enforcement principle of 'first in time, first in right.'" E.g., United States v. New Britain, 347 U.S. 81. Since the SBA mortgage was prior in time, it took precedence over the lien later acquired by Southwest. The Court also held that SBA's lien would not be subordinated to Southwest's "even if New Mexico law were controlling." Under that law a mechanic's lien may take precedence only if the mortgagee authorizes the chattel repair; and no such authorization was given in this case.

Staff: United States Attorney James A. Borland (D.N. Mex.)

RIVERS AND HARBORS ACT

Injunction for Removal of Negligently Created Obstruction to Navigation Held Not Available Under Statutory Terms; District Court's Refusal to Exercise General Equitable Jurisdiction Sustained. United States v. M. H. Bigan (C.A. 3, February 3, 1960). Defendant, engaged in stripping coal from the top of a hill, deposited the excavated earth on an abandoned mine road running above and parallel to the river. Heavy rain subsequently washed this loose material, together with brush and trees in its path, into the river, thereby creating a bar which projected fifty feet from the shore at a point where the river is 1000 feet in width. Pleasure craft and small boats navigate that portion of the river.

Alleging violations of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151, 33 U.S.C. 401, et seq., the United States brought this civil action for a prohibitory injunction and for a mandatory injunction directing defendant to remove the material from the river. The district court held that defendant had not committed any violation for which the statute prescribed an injunctive remedy, and that the obstruction would not constitute a sufficient interference with navigation to warrant the exercise of its general equitable powers by ordering defendant to remove the material from the river. The court denied a prohibitory injunction on the ground that defendant did not intend to resume his stripping operation.

The Court of Appeals affirmed. It deemed it unnecessary to consider the Government's contention that defendant had violated Section 10 of the Act. It held that Section 12, the provision requiring

the "removal of any structures" erected in violation of Section 10, authorizes injunctive relief only with respect to structures purposefully created, "construction work in the conventional sense." Thus, the Government could in no event obtain relief under Section 12, since the obstruction in question had been created by defendant's negligent, rather than deliberate, conduct. Further, the Court held that the district court had not abused its discretion in refusing to exercise its general equitable jurisdiction in favor of the Government.

Staff: Mark R. Joelson (Civil Division)

TRADE AGREEMENTS EXTENSION ACT OF 1951

Tariff Commission Required to Make "Escape Clause" Investigation of Barbed Wire Upon Application of Domestic Producer Talbot, et al. v. Atlantic Steel Company (C.A.D.C., February 4, 1960). Appellee, a producer of barbed wire, filed application for an "escape clause" investigation of the importation of barbed wire under Section 7 of the Trade Agreements Extension Act of 1951 (19 U.S.C. 1364). Section 7 provides that, upon application of any interested party, the United States Tariff Commission shall make investigation and report on whether any product upon which a concession has been granted under a trade agreement is being imported into the United States in such increased quantities as to cause or threaten serious injury to the domestic industry producing like or directly competitive products. The Commission dismissed the application on the ground that, under an historic policy of Congress, barbed wire has been admitted free of import restrictions for the special and particular purpose of benefiting the American farmers, and that therefore the "escape clause" protective principle is inapplicable to that product.

Appellee brought this suit seeking declaratory and mandatory relief against the Tariff Commission and the Commissioners for their refusal to consider its application. On cross-motions for summary judgment, the district court granted appellee's motion, denied the Government's and directed the Tariff Commissioners to institute an "escape clause" investigation of barbed wire. See United States Attorneys' Bulletin, Vol. 7, No. 10, p. 279.

The Court of Appeals affirmed. It held that the language and history of Section 7 made it "quite clear" that it was applicable to barbed wire, regardless of the previous Congressional policy with respect to that product. The Court ruled that, in light of the plain statutory mandate, the Tariff Commission was required to institute an escape clause investigation of barbed wire, and that the Commission had no authority to exercise discretion in determining whether the escape clause procedure was intended to apply.

Staff: Seymour Farber (Civil Division)

DISTRICT COURTS

ADMIRALTY

Suits in Admiralty Act; Limitation Period on Claim for Charter Hire Held to Have Commenced Upon Charterer's Submission of Invoice. Isbrandtsen Company, Inc. v. United States (S.D.N.Y., February 5, 1960). Libelant sought recovery of some $31,000 allegedly due under a charter party. Part of the claim was for $21,000 earned during February 5 through February 20, 1953. Suit was filed in September, 1955. The Government excepted to this portion of the claim on the ground that suit was not commenced within the two years prescribed by the Suits in Admiralty Act, 46 U.S.C. 745.

The libel set forth an article of the charter which stated that charter hire was to be paid "upon submission of properly certified invoices," and alleged that libelant's invoice for the period in question was presented on February 25, 1953. The libel also alleged various attempts of the libelant to collect the withheld charter hire by administrative action. The District Court ruled that the money sought to be recovered became due and that the libelant's claim accrued upon its submission of the invoice. It also determined that the efforts to collect the charter hire administratively did not toll the statute. The Government's exceptions were accordingly sustained.

Staff: Louis E. Greco (Civil Division)

Penalty Held Payable for Failure to File Report of Marine Casualty Under 33 U.S.C. 361. United States v. Red Star Barge Line, Inc. (S.D.N.Y., February 4, 1960). Red Star's scow SEABOARD NO. 61, while moored to a pier, sustained damage when struck by the tow of the Pennsylvania Railroad Company tug CLEVELAND. Thereafter, Red Star libeled the CLEVELAND, claiming $6,500 damages. Attorneys for the railroad informed the United States Coast Guard of the accident, enclosing copies of the libel and answer. The Coast Guard then wrote Red Star, enclosing necessary forms, and requested the submission of a marine casualty report required by 33 U.S.C. 361. No reply to that letter or to subsequent Coast Guard inquiries was received. Accordingly, suit was brought against Red Star to recover the penalty imposed by 33 U.S.C. 361 for failure to file a casualty report.

This was a test case, since the applicable statute is approximately 75 years old and there are no reported cases dealing with the collection of penalties thereunder. At the trial, defendant contended that the statute did not apply to moored scows or to damage such as the SEABOARD NO. 61 had sustained. The evidence, however, established that the damage affected the scow's seaworthiness, and the trial court held that the accident was of such a nature as to oblige defendant to file a report with the Coast Guard. Judgment was entered for the amount of the penalty.

Staff: Louis E. Greco (Civil Division)

FEDERAL TORT CLAIMS ACT

No Liability for Deaths and Injuries Caused by Tree Unexplainedly Falling Across Highway in National Park. Gretchen Guerin v. United States (W.D. Wash., February 8, 1960). This action under the Tort Claims Act sought recovery for the death of three people, and injuries to a child, which resulted when a 100-foot Douglas fir tree fell on their automobile as it traveled on a highway in Mount Rainier National Park. Plaintiffs alleged that the accident was caused by the failure of the responsible Government employees to remove the tree when they knew, or should have known, of the likelihood of its falling.

The evidence showed that in this densely forested area, where there was a heavy natural undergrowth, neither the National Park Service nor the Washington State Highway Department had done any clearance of trees. The Court found that the tree which fell had not had any previous noticeable lean and that on the routine inspection by both these Government agencies, for the purpose of determining which trees were dangerous and should be removed, this tree had not been particularly noticed. It also found that, despite an extensive investigation, there was no explanation as to why the tree had fallen at this particular time. In this connection, the Government argued that res ipsa loquitur did not apply, since the mere falling of a tree does not raise any inference of Government employees' negligence.

The District Court granted the Government's motion for summary judgment, holding that there was no proof of negligence and "none can be * * * inferred * * *."

Staff: United States Attorney Charles A. Moriarty and Assistant United States Attorney Richard F. Broz (W.D. Wash.)

STATE APPELLATE COURTS

STATUTE OF LIMITATIONS

Equitable Estoppel; Fraud. Flink v. Remington Rand, Inc. (Illinois Appellate Court, First District, February 1, 1960). In December 1946 Flink obtained a $3,000 judgment against Export Container Corporation, a subcontractor of Remington on a Government contract. Remington had earlier agreed to reimburse Export up to $2,000 on Flink's claim. In May 1947, the Government, in settlement of its contract with Remington, agreed to assume Remington's obligation to Export. Export then assigned its claim against Remington to Flink and Flink released its judgment against Export. Flink made several demands on Remington, but was informed each time that, as the Government had assumed the liability, the matter was

out of its hands. His inquiries directed to the Government elicited replies that the matter was under investigation. The last inquiry of this nature was made in January 1952. Finally, in July 1958, Flink again wrote Remington which responded that it understood Flink's claim had not been paid because it had not been certified as valid.

Flink instituted the present action against Remington in an Illinois court, seeking (1) the $2,000 which Remington had agreed to pay Export plus interest and (2) $10,000 punitive damages because Remington had continued to defraud Flink on this claim. The Government defended the action, under a contract right to do so and, inter alia, alleged the statute of limitations as an affirmative defense. The Circuit Court granted the Government's motion for summary judgment on the fraud claim, but granted Flink summary judgment on the contract claim.

The Illinois appellate court reversed the judgment on the contract claim, holding that the statute of limitations had run. In so doing, the Court rejected Flink's argument that the letters of Remington and the Government from 1946 through January 1952 contained promises to pay and representations that estop Remington from raising the statute. The Court affirmed the judgment against Flink on the fraud claim, holding that the record contained no evidence of fraud.

Staff: United States Attorney R. Tieken; Assistant United States Attorneys John Peter Lulinski and Charles R. Purcell, Jr. (N.D. Ill.)

* * *

CIVIL RIGHTS DIVISION

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

Court Martial of Civilian Dependents and Armed Forces Employees Stationed Overseas. Kinsella v. Singleton, No. 22, Grisham v. Hagan, No. 58, McElroy v. Guagliardo, No. 21 and Wilson v. Bohlender, No. 37 (Sup. Ct. January 18, 1960.) Decisions unfavorable to the Government were handed down in four cases concerning the power of Congress to provide for the court-martial of civilians. The cases all involved the application of Art. 2(11) of the Uniform Code of Military Justice, which provides that, subject to any treaty, the Code (and, therefore, court-martial procedure) is applicable to all "persons serving with, employed by or accompanying the armed forces" overseas. One case involved a non-capital crime by a civilian dependent, one a capital crime by a civilian employee, the other two non-capital crimes by civilian employees, one of whom was serving in occupied Berlin.

In Kinsella v. Singleton, No. 22, the Court extended the Covert rule (354 U.S. 1), which had denied the existence of court-martial jurisdiction over a civilian dependent charged with a capital offense, to apply to a non-capital offense as well. In this case the daughter of appellee Singleton, Mrs. Joanna Dial, who had accompanied her soldier husband serving with the United States Army in Germany, was charged with involuntary manslaughter in connection with the death of her child, under Art. 119 of the Uniform Code of Military Justice. She challenged the jurisdiction, pled guilty to the charge, and was convicted and placed in the Women's Reformatory at Alderson, West Virginia. From the granting of a writ of habeas corpus by the United States District Court for the Southern District of West Virginia, 164 F. Supp. 707, the Government appealed.

The Covert case, supra, had established that the only power of Congress to provide for court-martial jurisdiction in peacetime is granted by Art. I, Sec. 8, Cl. 14 -- "to make Rules for the Government and Regulation of the land and naval Forces". The Court held that such power, even if read in connection with the Necessary and Proper clause of §8, did not, in view of Art. III and the Fifth and Sixth Amendments, permit the trial by court-martial of civilian dependents in capital cases. In Singleton, Mr. Justice Clark, delivering the opinion, stated that the Necessary and Proper Clause "is not itself a grant of power but a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of §8 and all other powers vested by this Constitution . . .'". Thus the Court framed the issue in terms of clause 14, and its "expandability" to include non-capital offenses by civilian dependents. Following Covert, the majority held that such expansion would be unconstitutional in the light of the Fifth and Sixth Amendments and Article III and affirmed the lower court.

In Grisham v. Hagan, No. 58, a civilian employed at a U. S. Military installation in France, accused of premeditated murder, was convicted by a court-martial of unpremeditated murder. His petition for writ of habeas corpus, filed while serving his sentence at Lewisburg, was dismissed. 161 F. Supp. 112, (M.D. Pa.), affirmed, 261 F.2d 204 (C.A. 3). Certiorari was granted, 359 U.S. 978, with the Government's acquiescence. The Court found no valid distinction between civilian employees and civilian dependents accused of capital crimes as to applicability of the Covert rule and reversed on these grounds.

McElroy v. Guagliardo, No. 21, and Wilson v. Bohlender, No. 37, involved non-capital offenses by civilian employees stationed overseas. Guagliardo was convicted by court-martial in Morocco of larceny of Government property. His petition for writ of habeas corpus, alleging lack of military jurisdiction, was dismissed by the District Court of the District of Columbia. 158 F. Supp. 171. The Court of Appeals held Article 2(11) non-severable and on the basis of Covert, supra, invalid in toto, 259 F. 2d 927. Certiorari was granted, 359 U. S. 904, in view of the conflict with Grisham, supra. The Court, while rejecting the non-severability holding, affirmed on the basis of Covert, Singleton and Grisham, supra.

In No. 37 Wilson, a civilian auditor stationed in Berlin, was convicted by general court-martial of sodomy, on a plea of guilty. The District Court for the District of Colorado dismissed his petition for habeas corpus, 167 F. Supp. 791 (D. Colo.) and appeal was perfected to the Court of Appeals for the Tenth Circuit. Prior to hearing, however, certiorari was granted, with the concurrence of the Government (359 U.S. 906). The Government's argument that Wilson was amenable to military jurisdiction under the war powers (on the theory that Berlin is occupied territory) was rejected because the court-martial had been convened on the theory that Wilson was subject to such jurisdiction as a civilian employee, not as a resident of an area under military government. Reversal of the District Court was based on the Covert case as followed in Singleton and Grisham, supra.

In a concurring opinion Justices Harlan and Frankfurter based their reversals of No. 58 on the fact that a capital crime was involved. In the three non-capital cases they dissented, rejecting the majority analysis of the Necessary and Proper Clause and the "status approach to the power of Congress to make rules for governing the Armed Forces." Justices Whittaker and Stewart concurred in No. 22 (Singleton) on the basis of the civilian dependent status of Mrs. Dial. They dissented in the three civilian employee cases, relying on the historical precedents for military trials of civilians, as set forth by the Government, and the de facto military nature of the services performed by these civilians.

These decisions pose the problem of establishing alternate procedures whereby civilian personnel overseas may be brought to trial by the United States. (There is, of course, the alternative of local foreign

jurisdiction where applicable). The Guagliardo and Wilson opinion suggests that civilian employees be actually enlisted and given military status.

Staff: Oscar H. Davis, Assistant to the Solicitor General; Harold H. Greene, William A. Kehoe, D. Robert Owen, Irving R. Tranen (Civil Rights Division).

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CRIMINAL DIVISION

Assistant Attorney General Malcolm R. Wilkey

FINGERPRINTS

Authority of U. S. Marshal to Fingerprint Violator of Motor Carrier Act. United States v. Howard Krapf, d/b/a/ Krapf Trucking Service (D.N.J.). On July 15, 1959, an information in 12 counts was filed against the defendant charging violations of the Interstate Commerce Commission's safety regulations applicable to Motor Carriers, knowing and willful violations of which are petty offenses. Defendant pleaded guilty under seven counts, and was sentenced to pay total fines of $250 and to probation for three years. The remaining five counts were dismissed.

Upon imposition of sentence, the Marshal attempted to fingerprint defendant, whereupon counsel for defendant immediately moved the Court (Judge Richard Hartshorne) to restrain the Marshal from doing so. Judge Hartshorne took the matter under advisement after directing both parties to submit briefs.

On February 10, 1960, Judge Hartshorne filed a written opinion holding in favor of the Government. The Court's opinion is expected to be published in the Federal Reporter System.

Staff: United States Attorney Chester A. Weidenburner; Assistant United States Attorneys Frederic C. Ritger, Jr., and John Jay Mangini (D. N.J.).

INSANITY

Deviation from Mental Normality; Dual Personality and Intoxication Not Legal Insanity; Bank Robbery (18 U.S.C. 2113). United States v. Edward John Jansen (D. Conn., January 5, 1960). In this case, defendant's alleged mental condition, supported by expert psychiatric testimony as to his dual personality was held not to constitute an absolute defense. Defendant, an 18 year-old soldier with an excellent military record, was charged with entry of a bank with intent to commit a felonious larceny therein, and larceny of more than $100 from a bank insured by the F.D.I.C. He admitted the robbery and offered to make restitution to the bank. Having waived jury trial, he was found guilty by the Court on both counts and received a suspended sentence with probation for 3 years, to follow termination of his military service.

It appeared that on the day of the offense, Jansen attended a wedding where he consumed liquor, to which he was not accustomed. Later, he went to Manchester, Connecticut for the purpose of attending a movie, but changed his mind. He contended his mind went blank at that point and that the next thing he remembered was climbing a fire escape, entering the

second floor of a building, and being downstairs gathering up bags of coins amounting to about $1,060 and weighing over 55 pounds, which he placed in two larger bank bags.

A psychiatrist testified that defendant had a dual personality and that his course of conduct had been intensified by the excessive consumption of alcohol and emotional strain over parental conflict in his home and the parents' impending divorce. The Court placed great stress on the expert psychiatric opinion and recognized that some deviation from mental normality or mental illness less than what is termed "insanity" probably plays a large part in the motivation of many persons who commit crimes. However, the Court believed that such deviation cannot be considered completely exculpatory in all cases, particularly where, as here, its effect on the individual is brought into operation by voluntary intoxication.

Although conceding that defendant might be a sick person to the extent of needing psychiatric treatment, the Court was nevertheless of the view that Jansen was not so mentally ill as to be considered insane, nor was he drunk to the point of insensibility or inability to form a plan, purpose or intent. It was held that this was not legal insanity so as to be a defense either under the M'Naghten rule (8 Eng. Rep. 718) or the more liberal rules of some jurisdictions (Durham v. United States, 214 F. 2d 862; Carter v. United States, 252 F. 2d 603); hence defendant could not be absolved of all accountability for his actions. The opinion noted that while the M'Naghten rule has been much criticized, there is danger that in attempting to avoid injustice to the mentally ill the rules of criminal responsibility, which have on the whole worked well in practice, may be thrown overboard to substitute vague and even less workable standards.

Staff: United States Attorney Harry W. Hultgren, Jr., (D. Conn.)

AUTOMOBILE INFORMATION DISCLOSURE ACT

Removal of Manufacturer's Labels of Information from New Automobiles. United States v. Bonded Motors, Inc., et al. (N.D. Calif.). The corporation and two of its officers were charged jointly in a nine count information with violation of the Automobile Information Disclosure Act by unlawfully altering and removing from different automobiles the labels containing information as to the manufacturers suggested list price thereof, prior to the time of the delivery of the cars to the actual custody and possession of the purchasers.

On February 3, 1960, the corporate defendant, a used car dealer, was sentenced to pay a maximum fine of $1,000 on each of two counts, to which the Court accepted its plea of nolo contendere. The information as to the individual defendants and the remaining counts against the corporation were dismissed on motion of the Government.

Staff: United States Attorney Lynn J. Gillard; Assistant United States Attorney Bernard Petrie, (N.D. Calif.)

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Old-Time "Medicine Man" Placed on Probation for Misbranding Violations. United States v. Napier (N.D. Iowa). The defendant, Don A. "Chief" Napier, was placed on probation for four years after having been found guilty of violations of the Food, Drug, and Cosmetic Act. Napier, who is half Cherokee Indian, has for some forty years been successfully selling his vitamins, special formulas, oils and salves at various state and county fairs and has claimed wondrous cures for his products for practically all maladies known to mankind. Napier's long and highly entertaining "spiel" left his audiences more than enthusiastic to buy his medicines. The medicines, which were made up for the chief by a pharmaceutical firm, were to some extent useful and the labeling on the bottles, as far as it went, was not improper. However, defendant grossly overstated his products' value and merits. There were no adequate directions for use in treatment of the various ailments referred to in the oral sales pitch, and the drugs therefore became misbranded while held for sale after shipment in commerce.

In placing Napier on probation, the Court imposed the conditions that he refrain in the future from any direct or indirect connection with items to be used for, or which are represented to be usable for human medication, and that he restrict his business activities to the State of Oklahoma, where he resides. Thus, the "last of the old-time 'medicine men,'" as Napier was described by the Court, appears to have faded into obscurity.

Staff: United States Attorney Francis E. Van Alstine; Assistant United States Attorney William R. Crary, (N.D. Iowa)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Meaning of "Country" Under Deportation Provisions of Immigration and Nationality Act (Section 243, 8 U.S.C. 1253). In Cheng Fu Sheng v. Rogers (177 F. Supp. 281, D.C.D.C.) (see bulletin Vol. 7, No. 22, p. 623) Judge Holtzoff held on October 6, 1959, that Formosa is not a "country" within the meaning of this Section. In Peter Ying v. Rogers (D.C.D.C.) (see bulletin Vol. 8, No. 5, p. 144) Judge Matthews found on February 10, 1960, that Hong Kong is a "country" under the same statutory provision.

Two additional courts have since ruled on this vexing problem. In Chan Chuen v. Esperdy and Hung Shui v. Esperdy (S.D.N.Y.) Judge MacMahon held on February 2, 1960, that both Formosa and Hong Kong are "countries". (Order pending) In so ruling the Court stated that the word "country" as used in Section 243 means "any geographical place having sufficient sovereignty and government to accept or reject an alien". He further stated that the design of the statute is to strengthen deportability of aliens and that the construction which Judge Holtzoff placed on it seemed to him to defeat that purpose and to resolve the plain meaning of the statute "into diplomatic niceties which may very well concern the State Department but have no place in the application of this deportation statute."

In Chao-Ling Wang v. Pilliod (N.D. Ill) Judge Miner ruled on February 19, 1960 that Formosa is a "country" to which an alien may be deported. No reasons were given in the opinion for this finding.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to Violate National Firearms Act and Federal Firearms Act. United States v. Stanley J. Bachman, et al. (D. D.C.) On February 26, 1960, Judge Charles F. McLaughlin entered sentences against defendant Stanbern Aeronautics Corporation under an indictment charging willful attempt to evade payment of taxes on transfer of automatic weapons in violation of 26 U.S.C. 7201 (see Bulletin, Vol. 6, No. 8) and against defendant, Stanley J. Bachman, under an information charging him with knowingly delivering a fraudulent document to the Treasury Department in violation of 26 U.S.C. 7207 (see Bulletin, Vol. 8, No. 2) Judge McLaughlin suspended sentencing of defendant Stanley J. Bachman and placed him on probation for one year on the condition he pay a fine of $500 during the probation period. The Corporation was placed on probation for three years during which time the Corporation must pay a fine of $2,500. The Court then granted the Government's motion to dismiss the indictment as to all defendants, individually, and in all respects except so much of Count Two as pertained to the Corporation.

Staff: Paul C. Vincent, Victor C. Woerheide and Joseph T. Eddins (Internal Security Division)

Contempt of Congress. United States v. Frank Grumman; United States v. Bernard Silber (D. D.C.) On January 29, 1960 Judge F. Dickinson Letts dismissed three contempt of Congress counts against Frank Grumman and one count against Bernard Silver. Indictments were returned by a federal grand jury in the District of Columbia on August 4, 1958 against both Grumman and Silber for their refusal to answer questions before the House Committee on Un-American Activities in July 1957. At that time, the Committee, through a subcommittee, was conducting an inquiry into "the extent of the penetration and control exercised by members of the Communist Party over the communications industry. Both Grumman and Silber were members of the American Communications Association, which was expelled from the CIO in 1950. The defense motions to dismiss the counts were based on the argument that questions by the committee relating to "Communism," being a "Communist" or knowing "Communists" were too vague to sustain a criminal indictment. In refusing to strike those counts of the indictments which comprised questions relating to the Communist Party membership of the defendants and officers of their union, Judge Letts left standing as valid counts, by distinction, those charges in which the Committee used the term "Communist Party." A motion to vacate the order was filed by the Government and denied by Judge Letts. On March 1, 1960 the Government filed notice of appeal from the initial order, although the Solicitor General has not yet decided whether the appeal should be pursued.

Staff: Assistant United States Attorney William Hitz (D.C.)

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LANDS DIVISION

Assistant Attorney General Perry W. Morton

Administrative Law; Rules and Regulations; Strict Enforcement of Time Limitations Relating to Taking of Administrative Appeal. Pressentin v. Seaton (D.C., January 15, 1960). The validity of a mining claim within the confines of a national forest in the State of Washington was challenged by the Forest Service. Thereafter, a hearing was held by a Hearings Officer under authorized Department of Interior procedure. The Hearings Officer held the claim invalid. The regulations of the Department of the Interior provided (a) that an appeal to the Director, Bureau of Land Management, should be taken within thirty days by filing a notice of appeal with the Hearings Officer and (b) that within thirty days thereafter a statement of the reasons for the appeal should be filed with the Director, Bureau of Land Management, in Washington. Plaintiff filed a timely notice of appeal. However, because he used regular mail rather than air mail in sending his statement of reasons to the Director, the statement was two days late when received in Washington. At the time plaintiff mailed his statement to the Director he also mailed a copy to the Hearings Officer (although not required to do so by the regulations). This copy was received within the thirty-day period because of the shorter distance involved.

The Director, Bureau of Land Management, dismissed the appeal as untimely and the Secretary of the Interior affirmed. Plaintiff brought this proceeding under Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, relying on Dayton Power and Light Co. v. Federal Power Com'n, 251 F. 2d 875 (C.A. D.C., 1957). A motion for summary judgment filed on behalf of the defendant was sustained by Judge Matthews. Plaintiff has filed a notice of appeal.

Since the Secretary's ruling seems harsh on its face, there was filed in support of defendant's motion an affidavit listing the number of administrative appeals that arise yearly in the Department of the Interior and pointing out that, in recent years, the Department has consistently required exact compliance with its procedural regulations in order to permit orderly administration of the public land laws. The Dayton case was distinguished on the ground that it involved an interpretation of a time limitation imposed by an ambiguous statute, whereas the regulations of the Secretary of the Interior relating to appeals contained no ambiguities and had been specifically called to plaintiff's attention in the Hearings Officer's opinion. The case is considered significant in view of the number of other appeals which it may affect.

Staff: Thos. L. McKevitt (Lands Division)

Claim for Taking Under Fifth Amendment; Improvement of Navigation; Effect of 33 U.S.C. 702(c). B. Amusement Company v. United States (C. Cls. No. Cong. 1-54). This case was instituted pursuant to a Resolution of the

83rd Congress which directed the Court to report to the Congress its findings of fact and conclusions as to the nature and character of plaintiffs' demands against the United States and the amount, if any, legally or equitably due from the United States.

The case arose by reason of an ice jam which occurred on the Missouri, River between Atchinson, Kansas, and St. Joseph, Missouri, and backed the ice up for approximately 100 miles. The ice first formed in December 1948 and remained in place until March of 1949 at which time plaintiffs' properties were flooded, causing considerable damage. Plaintiffs contended that the ice jam was caused by the work of the Army Engineers in installing pile dikes and revetments in the river in carrying out its flood control and navigation improvement program. Plaintiffs sought to recover $279,031.

The Court found that there was no taking under the Fifth Amendment because there was no intention to take or to do an act the natural consequences of which would result in appropriation of property. It said "One flooding does not constitute a taking ***." It also found that there was no right to recover under a tort theory because Congress had directed that no liability of any kind will attach to the United States by reason of floods or flood waters. 33 U.S.C. 702(c). The Court also found that claimants had no equitable claim because the work of the United States did not cause the ice jam and the United States has a constitutional duty to improve navigation and to protect against floods and it will not be held liable for damage in attempting to carry out its duty.

Staff: Howard O. Sigmond (Lands Division)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decision

Intergovernmental Immunity; Discrimination in State Taxation of Federal Lessees. Phillips Chemical Company v. Dumas Independent School District (Sup. Ct., February 23, 1960). The Supreme Court reversed the decision of the Supreme Court of Texas, and held that Article 5248 of the Revised Civil Statutes of Texas, as amended, discriminates unconstitutionally against the United States and those with whom it deals. Appellant, Phillips Chemical Company, leased an industrial plant from the United States and used it in the commercial manufacture of ammonia. The lease was for a term of 15 years but was terminable by the Government in the event of national emergency. The appellee, Dumas Independent School District, assessed a tax upon Phillips measured by the full value of the premises, in accordance with its ordinary and valorem procedures. Appellant thereupon commenced this action to enjoin the collection of the tax.

Prior to 1950 Article 5248 provided a general tax exemption for property owned and used by the United States for public purposes. A 1950 amendment provided for the taxation of private property located on federal lands and provided that any portion of the United States land or improvements being used in the conduct of private business by any person or company should be subject to taxation.

Article 7173, Revised Civil Statutes of Texas, the only other statute authorizing a tax on lessees, provides that lands owned by the state or other tax-exempt owners should be subject to taxation if the lease were for a term of 3 years or more. As construed by Texas courts the tax under Article 7173 is measured only by the value of the leasehold, not the full value of the property where the property belonged to the state or its subdivisions. Further, a lease terminable at the option of the lessor was not subject to taxation, it not being considered a lease for a term of 3 years or more.

The Supreme Court found that Article 5248 discriminates against federal lessees by segregating and imposing a heavier burden on them than was imposed on lessees of other tax-exempt owners, and emphasized that the imposition of this heavier tax burden must be justified by significant differences between the two classes. In determining whether the classification is justified the Court will examine the whole tax structure of the state to determine how other taxpayers similarly situated are treated. The state cannot, the Court emphasized, single out those who deal with the United States for a tax burden not imposed on others similarly situated. The Court specifically noted that it had not been asked to decide whether the statutes involved in the Michigan cases of 1958 were discriminatory and

that issue was therefore not considered in those cases (United States v. City of Detroit, 355 U.S. 466; United States v. Township of Muskegon, 355 U.S. 484; City of Detroit v. Murray Corp., 355 U.S. 489).

Staff: John F. Davis, Assistant to the Solicitor General; Myron C. Baum (Tax Division)

District Court Decisions

In Action by Taxpayer to Permanently Enjoin Revenue Officers from Examination of Taxpayers' Records, Defendants' Motion for Summary Judgment Based Upon Supporting Affidavit Showing Reasonable Belief of Fraud Denied. Arend v. DeMasters, et al. (D. Ore.) Taxpayers, husband and wife, brought an injunction action against the District Director and certain agents and the United States National Bank of Portland after a summons had been served upon the bank requesting the production of all records of deposits, withdrawals, transfers, etc., of the taxpayers. Taxpayers contend that the investigation is barred by limitations, that in a prior examination they had been cleared of any further liability, and being informed that the bank would comply with the summons, they seek a permanent injunction enjoining the investigation into their pre-1955 tax liabilities and enjoining the bank from complying with the summons.

A motion for summary judgment on behalf of all defendants other than the bank on the grounds of fraud in these years based upon a supporting affidavit was denied. The Court stated that the affidavit of Agent DeMasters which imparts fraud to the taxpayers is countered by the taxpayers' affidavit, hence raises an issue of fact. Summary judgment cannot be granted where a fact issue remains.

The Court pointed out that the only issue of law under which the case could be decided without determining the factual issue would be whether the Court has jurisdiction to enjoin the Commissioner and his agents to prevent certain conduct which might be arbitrary or in excess of their authority. The Court in stating that it had jurisdiction relied upon the case of Zimmerman, et al. v. Wilson, et al., 81 F. 2d 847 pointing out that this case establishes that information contained in a third party's books concerning a taxpayer is a "property right of the taxpayer." The Court distinguished the case of Hubner v. Tucker, 245 F. 2d 35 relied upon by the Government for the proposition that notification by the Secretary for a second examination does not apply except where the Commissioner seeks to examine the books of the taxpayer. The Court distinguished that case by stating that there, the complainant was a third party whose records concerning the taxpayer were summoned, and that party did not have any proper interest in the outcome of the investigation.

Staff: United States Attorney C. E. Luckey; Assistant United States Attorney Harold E. Patterson (D. Ore.); Stanley F. Krysa (Tax Division)

Quiet Title Action; Doctrine of Marshalling of Assets Not Applicable Where Life Insurance Policy Loans Have Priority Over Federal Tax Liens. Janet Flax v. United States and Joseph F. J. Mayer, District Director. (Taxpayer: Edward A. Kleinman, deceased.) D.C. N.J., January 13, 1960). Plaintiff brought this action to quiet title to a certain fund in which she claimed an interest superior to federal tax liens. Prior to October, 1954, her brother, Edward A. Kleinman, obtained loans against insurance policies issued on his life by Metropolitan Life Insurance Co., and on December 8, 1954, he designated the plaintiff beneficiary of these policies.

Various assessments of income taxes were made beginning November 30, 1954. After the taxpayer's death on March 3, 1958, an agreement was reached as to the distribution of the bulk of the gross proceeds of the policies. Pursuant thereto, a division was made among Metropolitan in payment of its loans, for which Kleinman had assigned the policies as security, the United States and the plaintiff beneficiary. This distribution left a balance of $3,565.98, consisting of cash surrender dividends of $779.88 and the sum of $2,786.10 representing a portion of the proceeds of the policies in excess of the cash surrender values. Since distribution of this balance was contested, it was deposited in an escrow account, subject to Court disposition.

The Court held, inter alia, that the amount of the surrender dividends was part of the insured's rights to property, since he would have received this sum in addition to the cash surrender values of the policies had he opted to receive such cash surrender values just prior to his death. Hence, the surrender dividends, as well as the cash surrender values, were rights to property subject to the tax liens, rather than part of the proceeds payable to the beneficiary and unaffected by the tax liens. It further held that the remainder, being proceeds, was payable to the beneficiary pursuant to the rule in United States v. Bess, 357 U.S. 51 (1958), which separates gross proceeds into two funds, cash surrender value and proceeds in excess of cash surrender value. The Court rejected the marshalling of assets doctrine applied in United States v. Behrens, 230 F. 2d 504, ("When one creditor has a claim against two funds as security and another creditor has a claim against only one of them, the loan of the first will be marshalled against that fund which is security for his loan only"), distinguishing the Behrens case, where loans were made by a bank on assignment of insurance policies, from the instant situation of policy loans made by an insurer.

The Solicitor General has decided against appeal.

Staff: United States Attorney Chester A. Weidenburner and Assistant United States Attorney Barbara A. Morris (D. N.J.) Mary Jane Burruss (Tax Division)

CRIMINAL TAX MATTERS
District Court Decision

Income Tax Evasion; Whether Offense of Wilful Attempted Tax Evasion by Filing False Return Necessarily Includes Offense of Wilful Failing to Supply Information. United States v. Abraham Chaifetz (D.C.) A memorandum decision denying a motion for judgment of acquittal or, alternatively, for a new trial was filed in this case on February 12, 1960. It is called to the attention of the United States Attorneys because it appears from the memorandum that the Court permitted the jury to find a defendant charged with several counts of wilful attempted income tax evasion guilty on one count as charged, and, on another, guilty of the "included" offense of failing to supply information required by law, 26 U.S.C. 7203.

The Department feels that it was clearly erroneous to submit an evasion charge (26 U.S.C. 7201) to the jury as an offense with lesser included offenses. And, certainly, the alleged manner of attempted evasion, by filing a return falsely stating income and resulting tax should not be susceptible of translation to a mere act of omission; i.e., failure to supply information. The matter was discussed at some length in the August 15, 1958, issue of the Bulletin, Vol. 6, No. 17, at page 528. Any defense attempts to water down felony evasion charges to some supposed lesser included offense should be vigorously resisted.

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State Court Decision

Tax Liens; Where Tax Liens Attached to Property Prior to Taxpayer's Death, Widow's Dower Rights Disallowed but Right to Homestead Granted Priority Over Tax Liens. Chandler v. Pilley, et al. (U.S. Invervenor), (Probate Court, Shelby County, Tennessee, December 18, 1959). On September 17, 1955, the taxpayer died, and by will left his estate to his wife. The estate consisted of lands which were later sold, as well as other assets. Claims against the estate included claims for federal taxes and interest, the liens for which taxes were perfected against the land a few months prior to the taxpayer's death. The widow did not dissent from the will, but affirmatively elected to take under its terms. With the approval of counsel, the lands were sold and the proceeds paid into court. After the sales were consummated, the widow filed a petition with the Court for dower and homestead.

Dower was disallowed on Court's finding that at the time of taxpayer's death there were liens on all of the real property in favor of the Government for an amount in excess of the proceeds from its sale. The Court reasoned that taxpayer could have sold or encumbered his property during his lifetime without his wife's consent, and that the tax liens were such an encumbrance as the law permitted. The Court concluded that the widow's

right to dower in said lands was subject and subordinate to the liens on said lands securing the payment of federal taxes, and since the amount of the liens exceeded the value of the lands, there existed no surplus to which her dower could attach. Petitioner's request for homestead was granted. The Court found that the right to homestead arose at the time of the marriage and that it was independent of any rights that the widow may have under a will. (Presumably, the taxpayer acquired the lands prior to the date of marriage.) Therefore, the right to homestead was entitled to priority over the federal liens, and was not divested by virtue of the widow's election to take under the will.

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