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UNITED STATES ATTORNEYS

BULLETIN

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MONTHLY TOTALS

Totals in all categories of work, with the exception of pending civil matters, took an encouraging drop. The greatest decreases were registered in pending criminal cases and matters. The aggregate of all cases and matters pending at the end of the month was 2,385 items below the same date in 1959. This trend premises the speculation that fiscal year-end figures may establish an all-time low in the workload. During the last four months of fiscal 1959, the concerted drive by United States Attorneys resulted in cutting 5,519 items from the pending workload. If the same stepped-up activity occurs in the remainder of this fiscal year, all previous records will be broken and the aggregate of pending cases and matters will be the lowest in the history of the Department. The following comparison shows the workload pending on February 29 and at the end of the preceding month:

	January 31, 1960	February 29, 1960	
Triable Criminal	7,252	7,141	-111
Civil Cases Inc. Civil Tax Less Tax Lien & Cond.	14,309	14,240	- 69
Total	21,561	21,381	-180
All Criminal	8,888	8,772	-116
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	16,957	16,901	- 56
Criminal Matters	11,160	10,947	-213
Civil Matters	13,088	13,244	+156
Total Cases & Matters	50,093	49,864	-229

While filings for the first eight months of fiscal 1960 are up somewhat over the similar period of the previous year, terminations have decreased. There can, of course, be no control over the amount of new business received, i.e., filings, but the number of terminations can be increased if a concentrated drive is made to dispose of as many cases as possible between now and June 30. Criminal terminations have not only kept pace with last year's rate but have increased. Civil terminations, however, have dropped noticeably. Total civil terminations of 24,507 for fiscal 1959 were 1,565 more than for the previous year. To maintain even this rate of terminations, not to speak of surpassing it, 10,165 civil cases will have to be terminated between now and the end of the year, an average of 111 cases per each district, or 28 cases per month for the remaining four-month period. This would bring total civil cases terminated during the year to the same aggregate as that for fiscal 1959, or 24,507. If we aim at the same rate of increase as last year's, which was 6.8 per cent, a total of 11,831 civil cases will have to be terminated between now and June 30, an average for the 91 districts of 130

cases, or about 43 cases per month. The decrease in the total caseload on February 29 was an encouraging one and was accomplished despite an increase in filings and a decrease in terminations. The following table shows the comparative achievements of both years:

	1st 8 Months F. Y. 1959	1st 8 Months F. Y. 1960	Increase or Decrease Number	%
Filed				
Criminal	20,326	20,303	- 23	- .1
Civil	15,583	16,101	+ 518	+ 3.3
Total	35,909	36,404	+ 495	+ 1.4
Terminated				
Criminal	18,464	18,844	+ 380	+ 2.1
Civil	14,910	14,342	- 568	- 3.8
Total	33,374	33,186	- 188	- .6
Pending				
Criminal	9,156	8,753	- 403	- 4.4
Civil	19,713	19,759	+ 46	+ .2
Total	28,869	28,512	- 357	- 1.2

Collections for the first eight months of the fiscal year continue to trail those for the same period of fiscal 1959. However, the gap was narrowed somewhat during February, the percentage of decrease dropping from 13.5 to 10.8. For the month of February 1960, United States Attorneys reported collections of $2,726,334. This brings the total for the first eight months of fiscal 1960 to $19,444,371. Compared with the similar period of the preceding year, this is a decrease of $2,359,644 or 10.8 per cent from the $21,804,015 collected during that period. To equal last year's record, a total of $15,710,195 would have to be collected between now and June 30. This averages out to monthly collections of approximately $3,927,549, quite an increase over the monthly average of $2,430,546 collected to date. While the Department realizes that total annual collections depends upon the number of large cases terminated during the year, and that fewer such cases this year has had an adverse effect on collections, nevertheless a thorough review of all outstanding judgments would narrow the gap considerably and bring us within a respectable distance of last years record.

During January, $5,555,296 was saved in 113 suits in which the government as defendant was sued for $7,035,252. 53 of them involving $3,135,309 were closed by compromises amounting to $417,676 and 31 involving $1,821,319 were closed by judgments against the United States amounting to $1,062,280. The remaining 29 suits involving $2,078,624 were won by the government. The total saved for the first eight months of the fiscal year amounted to $24,431,956, a decrease of $3,296,234 or 11.9 per cent from the $27,728,190 saved in the first eight months of fiscal year 1959.

DISTRICTS IN CURRENT STATUS

As of February 29, 1960, the districts meeting the standards of currency were:

CASES

Criminal

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

Civil

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

MATTERS

Criminal

Ala., N.	Ark., E.	Colo.	Hawaii	Ky., E.
Ala., M.	Ark., W.	Conn.	Idaho	Ky., W.
Ala., S.	Calif., N.	Fla., N.	Ind., S.	La., W.
Ariz.	Calif., S.	Ga., S.	Iowa, N.	Me.

MATTERS

Criminal (Con't)

Md.	Nev.	Ohio, S.	S.D.	W.Va.,N.
Mich., E.	N.J.	Okla., E.	Tenn., E.	W.Va.,S.
Minn.	N.Mex.	Okla., W.	Tenn., W.	Wis., E.
Miss., N.	N.Y., E.	Pa., E.	Tex., E.	Wyo.
Miss., S.	N.C., E.	Pa., W.	Tex., S.	C.Z.
Mont.	N.C., M.	P.R.	Utah	Guam
Neb.	N.C., W.	R.I.	Wash., E.	V.I.

Civil

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

JOB WELL DONE

Assistant United States Attorney Lowell E. Grisham, Northern District of Mississippi, has been commended by the Chief Postal Inspector who conveyed his sincere congratulations for Mr. Grisham's excellent work in a recent mail fraud prosecution in which the defendant was convicted.

The Assistant General Counsel, Food and Drug Division, has expressed appreciation for the excellent work of Assistant United States Attorney Andrew A. Caffrey, District of Massachusetts, in a recent case, and particularly for his careful preparation and effective courtroom presentation of the evidence.

United States Attorney William C. Spire, District of Nebraska, has received expressions of appreciation and hearty congratulation from the General Counsel, Securities and Exchange Commission, for the very successful results achieved in a recent case, and for the splendid manner in which Mr. Spire has handled all cases referred to his office by the Commission.

The Director of Real Estate, Post Office Bureau of Facilities, has commended the work of Assistant United States Attorney James H. Williams,

Southern District of Ohio, in the negotiations concerning a large tract of land, which is under condemnation but upon which declaration of taking has not yet been filed. The Director stated that six of the parcels involved have been negotiated at very reasonable prices, and that this could not have been accomplished without the full cooperation, legal and technical advice, and hard work of Mr. Williams.

Assistant United States Attorney Robert S. Krieudler, Eastern District of New York, has been commended by the Assistant Regional Commissioner of Internal Revenue for his efficiency and cooperative spirit, and for his vigorous prosecution of two recent cases involving the illicit manufacture and sale of whiskey. The Assistant Commissioner stated that the successful conclusion obtained in one case will be a tremendous deterrent to those who might contemplate similar violations, and that in the other case, in which the seizure of the still broke the back of the mob operating it and destroyed the largest source of bootleg alcohol in Northeastern United States, Mr. Krieudler lived with the case from the time he prepared the search warrant until the defendants were sentenced.

The Assistant Chief, Immigration and Naturalization Border Patrol, has expressed to United States Attorney Russel B. Wine, Western District of Texas, his deep admiration for the fine address Mr. Wine made to the jury in a recent case involving assault on an immigration officer. The Assistant Chief stated that the address embodied everything that a sincere law enforcement officer feels, that it was timely and brought home to the jury with a powerful impact exactly how important good law enforcement is in these times, and that the weight of Mr. Wine's personality and the sincerity with which he presented his remarks convinced the jury where their duty lay.

In connection with the foregoing immigration case also, the District Director, Immigration and Naturalization Service, stated that he was impressed by the enthusiasm, untiring efforts, and professional skill of Assistant United States Attorneys Lawrence L. Fuller and James E. Hammond who spent several weeks in the preparation and trial of the case and did a fine job. The District Director also expressed appreciation to United States Attorney Wine for having come from San Antonio to El Paso to give guidance and direction in the trial of the case, and he observed that Mr. Wine's argument to the jury was very impressive.

Assistant United States Attorney Francis M. McDonald, Jr., District of Connecticut, has been commended by the Director of the FBI for the excellent manner in which he directed the prosecution of a recent case involving two Canadian bank burglaries totaling over $4 million. The Director stated that in spite of the many difficult obstacles involved, including the complicated international aspect of the case, Mr. McDonald's tireless and tenacious efforts contributed materially to the successful prosecution, and that the Director and his associates appreciate the cooperation extended to them by Mr. McDonald during the course of the investigation.

The Game Management Agent, Fish and Wildlife Service, Department of the Interior, has expressed to United States Attorney George E. Rapp and Assistant

United States Attorney John C. Fritschler, Jr., Western District of Wisconsin, his appreciation for their excellent cooperation in disposing of all of the wildlife refuge cases referred to them. The Agent stated that with an ever increasing pressure on our wildlife resources, such help and guidance is especially gratifying.

The Chief Postal Inspector has congratulated Assistant United States Attorney Lowell E. Grisham, Northern District of Mississippi, on his excellent work in a recent mail fraud case, and for the commendably vigorous and competent manner in which the case was handled.

Assistant United States Attorneys John M. Chase, Jr. and Orrin C. Jones, Eastern District of Michigan, have been commended by the United States Marshal of that District on the very able assistance rendered by them to his office. The Marshal stated that the legal advice given to him while a certain motor ship was in his custody was very helpful in bringing the case to a satisfactory conclusion.

The Chairman and Assistant General Counsel, Securities and Exchange Commission, sent congratulatory telegrams to United States Attorney S. Hazard Gillespie, Jr. and Assistant United States Attorneys Jerome J. Londin, Leonard R. Glass and David P. Bicks, Southern District of New York, expressing deep appreciation for their tremendous success in a recent case considered as one of the most important in the Commission's enforcement program. In commenting on the extraordinarily skillful manner in which they conducted the Government's prosecution, the wires stated that these Assistants are a credit to the United States Attorney's office and to the Government, that the prosecution was of great significance and will have a substantially deterrent effect, that the Commission is heavily indebted to these men for their personal sacrifice and long hours of devoted and skillful service during the many weeks devoted to the prosecution, that the jury's speedy verdict duly reflected the superb prosecution of the novel case, and that the verdict was a tribute to the most capable and skillful manner in which the case was handled.

Assistant United States Attorney John F. Grady, Northern District of Illinois, has been commended by the Chief Postal Inspector for his diligent work in the preparation and presentation of a recent mail fraud case to the grand jury, notwithstanding its complexity due to the magnitude of the operation and other obstacles, among which was the fact that 18 co-defendants were involved.

The executive director of a large furrier's association has commended Assistant United States Attorney David R. Hyde, Southern District of New York, for the exemplary manner in which he handled a recent prosecution involving fraudulent bankruptcy, and obtained an indictment in still another such case.

The Chief Postal Inspector has expressed to United States Attorney Louis G. Whitcomb, District of Vermont, his appreciation for his excellent work and that of Assistant United States Attorney Thomas W. Lynch in obtaining a conviction in a recent mail fraud case involving operation of a knitting machine work-at-home scheme. Chief Inspector Stephens stated that the success

achieved in this case would be of material assistance in elimination of this type of fraud which has been perpetrated in districts throughout the country.

Chief Inspector Stephens also commended United States Attorney Kenneth G. Bergquist, District of Idaho, for his successful prosecution of a defendant who defrauded several church groups in the operation of an advance fee scheme. The Chief Inspector lauded the United States Attorney's "excellent preparation and presentation of this hard fought mail fraud case."

PERFORMANCE OF DUTY

United States Attorney Russell E. Ake, Northern District of Ohio, has reported that assistance rendered his office by the staff of United States Attorney Charles D. Read, Northern District of Georgia, contributed greatly to the conviction of all defendants on all counts in a Dyer Act conspiracy case which involved 64 witnesses and 299 exhibits (U. S. v. Carlton C. Helbig, Jr. et al, 18 U.S.C. 2312).

United States Attorney Read and Assistant United States Attorney J. Robert Sparks, having recently successfully concluded a similar Dyer Act conspiracy case, furnished to the Cleveland office pertinent material for use in such cases, including a comprehensive trial guide discussing preparation and organization of the case for trial as well as presentation of evidence.

Following the Helbig trial, United States Attorney Ake wrote to the Atlanta office praising Assistant United States Attorney Sparks' comprehensive analysis as being most helpful and commending him highly. United States Attorney Ake furnished a copy of his letter to the Criminal Division in order that "the great cooperation and assistance afforded ... this office in what we considered a most important criminal case" might be recognized.

* * *

The following letter was received from the FBI Special Agent in charge:

I feel I would be remiss if I did not drop you a note expressing my appreciation in connection with the cooperation which this office receives from Assistant United States Attorney Samuel D. Eggleston, Jr.

What prompted me to write you at this particular time was the action taken by Mr. Eggleston last Saturday night, March 12, 1960. A truck belonging to the Bonney Express Company, of Norfolk, was dynamited at approximately 7:00 p.m. on the evening of March 12, 1960. This office contacted Mr. Eggleston for an opinion as to whether the facts indicated a violation of a Federal statute. Mr. Eggleston immediately proceeded to his office in order to thoroughly review the various Federal statutes and actually left my office at 11:30 p.m. Saturday night. This type of cooperation on the part of Mr. Eggleston is certainly appreciated and is typical of the cooperation which he has afforded the agents of this office.

ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Court Rejects Nolo Pleas in Philadelphia Electrical Cases. United States v. Ohio Brass Company, et al., United States v. Lapp Insulator Company, et al., United States v. McGraw-Edison Company, et al., United States v. General Electric Company, et al., United States v. I-T-E Circuit Breaker Company, et al., United States v. A. B. Chance Company, et al., United States v. Westinghouse Electric Corporation, et al., (Cr. - E.D. Pa.). On March 24 Chief Judge J. Cullen Ganey rejected from the bench pleas of nolo contendere offered by 10 corporate and 8 individual defendants in these cases.

The indictments, returned on February 16 and 17, charged defendants with price fixing and rigging of bids to Federal, State and local governmental agencies, as well as private utilities, with respect to power switchgear, oil and air circuit breakers, low voltage power circuit breakers, bushings, insulators, lighting arresters, and open fuse cutouts. The indictments involved annual sales of more than $260,000,000.

Some of the defendants offered nolo pleas at the arraignment on March 16, and others offered similar pleas on March 22. Attorney General William P. Rogers filed a personal affidavit with the court in opposition to the acceptance of the pleas, and Acting Assistant Attorney General Robert A. Bicks argued for the Government.

The Government's opposition was based upon the serious nature of the violations charged, their duration and impact upon Governmental purchasers, and the knowledge of wrongdoing on the part of defendants, as disclosed by the indictments. Based upon these allegations, the Government argued that acceptance of the pleas here, if appropriate, would mean that, to the court's view, insistence on guilty pleas would never be appropriate in any antitrust case, regardless of its nature or impact.

In rejecting the pleas, after oral argument of a half hour, Judge Ganey noted the serious nature of the offenses, the impact on Governmental agencies, and the amount of commerce involved. He gave great weight to the affidavit of the Attorney General, which indicated there was substantial evidence to support each charge in the indictments. He then gave defendants 5 days (later expanded to 15) in which to decide whether to plead "guilty" or "not guilty".

According to the records, this was the first time that the District Court in Philadelphia has rejected pleas of nolo contendere in any criminal case.

Staff: Acting Assistant Attorney General Robert A. Bicks, Baddia J. Rashid, Charles L. Whittinghill, William L. Maher and Richard A. Solomon (Antitrust Division)

Criminal and Civil Contempt Action in Violation of Final Judgment. United States v. The A. B. Dick Company, (N.D. Ohio). On March 28, 1960 Judge Girard E. Kalbfleisch signed an order directing the A. B. Dick Company to show cause why it should not be adjudged in criminal and civil contempt of the final judgment entered March 24, 1948. The return day was fixed for April 20, 1960.

The alleged violations may be divided into three main categories, as follows:

The first relates to Dick's entering into and enforcing certain contracts and enforcement of a quota system with its distributors, the effect of which is to keep third parties from using those distributors as outlets for the sale of stencil duplicating products, particularly mimeograph impression paper, competitive with A. B. Dick products.

The second category relates to Dick's purchase of certain of the assets of fourteen concerns engaged in the sale of stencil duplicating machines, stencils or stencil duplicating supplies.

The third category relates to Dick's entering into and enforcing plans or programs with some of its distributors which foreclose those distributors from selling or attempting to sell stencil duplicating machines, stencils or stencil duplicating supplies to Government institutions, tax-supported organizations or educational institutions in competition with A. B. Dick.

Staff: Edward Kenney, Norah C. Taranto, Barbara Svedberg and William F. Costigan (Antitrust Division)

CLAYTON ACT

Complaint Filed Under Section 7. United States v. Von's Grocery Company, et al., (S.D. Calif.). A civil antitrust complaint was filed on March 25, 1960, charging that the proposed acquisition by Von's Grocery Company, Los Angeles, California, of all the assets and properties of Shopping Bag Food Stores, El Monte, California, both leading chains of grocery supermarkets in the Los Angeles area, would violate Section 7 of the Clayton Act.

According to the complaint, Von was the third largest retailer in dollar sales of groceries and related products in the Los Angeles area and Shopping Bag was the fifth largest in 1958. In terms of total number of markets operated, Shopping Bag was the sixth largest and Von the eighth largest. Combined, Von and Shopping Bag, with approximately 8% of total grocery store sales, will be the second largest chain of supermarkets in the Los Angeles area in terms of dollar sales and number of supermarkets.

The complaint charged that the acquisition may have the effect of substantially lessening competition or tending to create a monopoly in the following ways, among others: actual and potential competition between Von and Shopping Bag in the purchase, distribution, and sale of groceries and related products in the Los Angeles area would be eliminated; competition generally in the sale of groceries and related products in the Los Angeles area may be substantially lessened; Shopping Bag will be eliminated as a substantial independent competitive factor; Von's competitive advantages over smaller sellers of groceries and related products may be enhanced to the detriment of actual and potential competition; independent retailers of groceries and related products may be deprived of a fair opportunity to compete with the combined resources of Von and Shopping Bag; mergers and acquisitions on the part of other chains of supermarkets in the Los Angeles area may be fostered; and concentration of ownership, management, and control of supermarkets in a few large corporations may be increased.

The complaint requests the Court to issue orders necessary to prevent the consummation of the acquisition until final adjudication of the merits of the complaint.

Staff: James J. Coyle, Harrison F. Houghton and Theodore F. Craver (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General George S. Leonard

SUPREME COURT

FEDERAL POWER COMMISSION

Lands Owned in Fee Simple by Indian Nation Held Not "Reservation" Within Meaning of Federal Power Act; Condemnation Authorized by Section 21 Extends to Lands of Indians. Federal Power Commission v. Tuscarora Indian Nation (Supreme Court, March 7, 1960). In 1950 the United States and Canada entered into a treaty providing for a specified flow of water over Niagara Falls, and authorizing the equal division by the two nations of all excess water for power purposes. In consenting to this treaty the Senate imposed the condition that "no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress." The Power Authority of New York subsequently submitted to Congress its plan to construct a power station (near Lewiston, New York) designed to utilize all of the Niagara waters available to the United States under the treaty, together with a necessary storage reservoir covering about 2800 acres. By Public Law 85-159, 71 Stat. 401, Congress in 1957 authorized and directed the Federal Power Commission to issue a license to the Power Authority for the construction and operation of such a project. The Act further provided that the license should be granted "in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, provisions of this Act shall govern in respect of the project herein authorized."

Thereafter, the Commission issued an order granting the license to the Power Authority. Over the objections of the Tuscarora Indian Nation, the Commission's action approved that portion of the Power Authority's plan which proposes the reservoir as including 1,383 acres to which Tuscarora holds fee simple title. On Tuscarora's petition for review in the Court of Appeals for the District of Columbia Circuit, it was held that the Tuscarora lands sought to be taken for the reservoir constituted part of a "reservation" within the meaning of Sections 3(2) and 4(e) of the Federal Power Act and that the Commission could include those lands only upon making the finding required by Section 4(e) that the license "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired * * *."

On remand, the Commission found in a new order that the use of other lands for the reservoir would result in great delay, severe community disruption, and unreasonable expense. However, the Commission made a finding contrary to that required by Section 4(e). Upon transmittal of this order to the Court of Appeals, that court entered final judgment approving the license except insofar as it would authorize the taking of Tuscarora lands for the reservoir.

The Supreme Court reversed. It held, first, that the Tuscarora lands were not part of a "reservation" as that term is used in Sections 3(2) and 4(e). "Reservation" was interpreted as referring only to lands owned by the United States or in which it owns a proprietary interest. The Tuscarora Nation holds fee simple title to these lands and the United States has no interest therein.

Second, the Court held that the Tuscarora lands may be condemned by the licensee under the provisions and eminent domain powers of Section 21 of the Federal Power Act. It rejected Tuscarora's contention that American Indians are excluded from a general act of Congress unless specifically mentioned. The Court found that Congress intended this statute to encompass lands owned or occupied by any person or persons, including Indians. It also rejected Tuscarora's argument that 25 U.S.C. 177, prohibiting conveyances of Indian lands "unless the same be made by treaty or convention entered into pursuant to the Constitution * * *," applied to this situation. The statute was said to apply to a private person seeking to acquire Indian lands, but not to the sovereign United States or its licensees.

Staff: Solicitor General J. Lee Rankin; Lionel Kestenbaum (Civil Division)

COURTS OF APPEALS

AGRICULTURE

Secretary of Agriculture's 1959 Wheat Acreage Allotment Regulations Upheld as Valid Exercise of Statutory Authority. Review Committee v. Harold Willey (C.A. 8, February 18, 1960). Plaintiff is a Nebraska farmer whose principal crop is alfalfa. He plants wheat for rotation purposes and alleges that hereafter a proper rotation program requires him to keep one-third of his land - approximately 100 acres - planted to wheat at all times. However, in the period 1954-1957 his greatest amount of wheat acres in one year was 65, planted in 1956.

Pursuant to the 1959 wheat acreage allotment regulations, issued by the Secretary of Agriculture under the Agricultural Adjustment Act of 1938, 7 U.S.C. 1281, et seq., the County Committee determined plaintiff's "adjusted average acreage" to be 65 acres. This figure was arrived at by eliminating all but the year 1956 from plaintiff's "historical average acreage" for the period 1954-1957, which the Committee had authority to do under 7 C.F.R. (1959 Supp.) 728.917(c)(1)(iv). The Committee could have eliminated all four years, but in that event the adjusted average acreage could not have been raised above "the acreage indicated by cropland," 7 C.F.R. (1959 Supp.) 728.917(c)(3)(i), which in plaintiff's case was considerably lower than 65 acres.

Plaintiff brought this suit under 7 U.S.C. 1365 to challenge the Committee's determination. He argued that the "acreage indicated by

cropland" restriction was invalid as being in excess of the Secretary's statutory authority. He further argued that a different provision, applicable where "a definitely established crop-rotation system /is/ being carried out on the farm," 7 C.F.R. (1959 Supp.) 728.917(c)(1)(v), should have been applied. If this had been applied, plaintiff's adjusted average acreage could have been raised as high as the total cropland of his farm. The district court reversed the Committee's decision and remanded for further proceedings.

On the Committee's appeal, the Court of Appeals reversed the district court and reinstated the Committee's determination. It held that the Secretary's regulations, including the "acreage indicated by cropland" restriction, are "a reasonable administrative interpretation of the statute, that they are not arbitrary or unreasonable, and that they are valid." The Court went on to uphold the Committee's refusal to apply the provision applicable where a "definitely established crop-rotation system" is in effect, since plaintiff has never previously devoted as much as one-third of his cropland to wheat.

Staff: Seth H. Dubin, William A. Montgomery (Civil Division)

COMMODITY CREDIT

Section 4(c) of Charter Act Prohibits Counterclaim of Commodity Credit Corporation in Suit To Be Tried With Jury; Commodity Has Burden of Proving that Deterioration of Stored Grain Was Due To Warehouseman's Negligence. Cargill v. Commodity Credit Corporation (C.A. 2, February 23, 1960). Cargill, a warehouseman who had stored corn for the Commodity Credit Corporation in facilities at Norris City, Illinois, and Albany, New York, sued Commodity to collect over $500,000 in unpaid storage charges. Commodity counterclaimed for more than $1,200,000 for damage to certain of the corn which was allegedly caused by Cargill's negligence. The corn at Norris City was stored "identity preserved" and Cargill's obligation as to it admittedly did not go beyond that of due care. Eight months after delivery of this corn commenced, it was learned that some of it had begun to deteriorate. Cargill then began to withdraw it from the storage tanks but Commodity asserted that Cargill failed to accomplish this removal with sufficient speed and efficiency.

The corn at Albany was stored commingled and Cargill's liability for its condition was initially that of an insurer. However, the storage agreement contained a provision whereby, on giving notice after inspection, Cargill could reduce its responsibility from that time forward to one of due care. About a year after this corn was stored, it showed signs of deterioration. Cargill claimed that it gave the required contractual notice at that time. Commodity denied this and alleged that even if the notice given was sufficient, Cargill had not thereafter exercised due care.

The district court ordered a jury trial on Commodity's counterclaim, over the latter's objection that trial by jury was prohibited under Section 4(c) of its Charter Act, 15 U.S.C. 714b(c), which provides that "All suits against the corporation shall be tried by the Court without a jury." The jury found (1) that Commodity had failed to establish that the damage to the Norris City corn resulted from Cargill's failure to exercise due care; (2) that the notice given by Cargill as to the bad condition of the Albany corn was sufficient under the terms of the contract; and (3) that Commodity had failed to establish that the damage to the Albany corn resulted from Cargill's failure to exercise due care. After this verdict, Cargill's claim for storage charges - involving substantially the same issues as tried to the jury - was tried to the district judge, who found that Cargill had performed its contract as to the unpaid charges at Norris City, that it had given the requisite notice under the contract as to the Albany corn, and that there was no specific evidence that Cargill had thereafter failed to exercise due care. Accordingly, judgment was entered for Cargill and Commodity's counterclaim was dismissed.

The Court of Appeals reversed. It held, first, that the grant of a jury trial on Commodity's counterclaim was in violation of Section 4(c), which imposes a condition on the Government's consent to suit, and, as interpreted by the Court, applies to Commodity's counterclaims as well as claims against it. The Court further held that this error was not harmless, since the district judge's findings on Cargill's claim had apparently been influenced by the jury's verdict, at least in his failure to make detailed findings of fact.

To aid the district court on remand for the purpose of making such findings, the appellate court further determined that Commodity had the burden of proving its claim for deterioration of the corn, no matter whether federal law, the law of New York or that of Illinois governed. Finally, it concluded that Cargill's notice as to the deteriorated condition of the Albany corn was sufficient under the contract, if in fact there was first an inspection in accordance with the contract terms. The Court of Appeals noted that on remand additional evidence could be taken on this question, if deemed necessary.

Staff: Lionel Kestenbaum (Civil Division)

FEDERAL TORT CLAIMS ACT

No Liability for Injuries Sustained When Tree Unexplainedly Fell on Truck Traveling on Public Highway Through National Forest. Dewey J. O'Brien v. United States (C.A. 9, February 24, 1960). Plaintiff, while riding in a panel truck as it traveled along a little-used public highway through a sparsely-settled area in Willamette National Forest in Oregon, sustained serious injuries when a tree fell on the truck. He brought this suit for damages on the theory that the Government, as owner of the forest land, negligently failed to fulfill its responsibility to travelers upon the adjacent highway. After a trial on the segregated issue of liability, the district court held the Government blameless.

On plaintiff's appeal, the Court of Appeals affirmed. Noting that the parties disagreed as to whether the district court had applied the usual standard of reasonable care, or the rule that a landowner under Oregon law has no duty to inspect his timber for the purpose of protecting passersby, the appellate court stated that, either way the decision below was interpreted, it was correct. If the district court applied the standard of reasonable care, the decision was not "clearly erroneous" under F.R.C.P. 52(a). Alternatively, the judgment was sustained because, although there was no Oregon decision in point, the appellate court thought that Oregon would not impose liability on a landowner in this factual situation. The Court emphasized that it was not defining the general duty of an owner of land adjoining a highway, but only "the duty of the owner of forest land in a sparsely-settled area adjoining a little-used highway * * *."

Staff: United States Attorney C. E. Luckey (D. Ore.)

TRANSPORTATION

Competitive Bids for Military Air Charters Not Controlling Under Terms of Carriers' Tariffs on File With Civil Aeronautics Board. United States v. Associated Air Transport, Inc. (Cross-appeals) (C.A. 5, March 8, 1960). Between 1951 and 1955, Associated Air Transport, Inc., an irregular air carrier, and other irregular carriers performed a large number of domestic charter flights of military personnel and freight for the several armed services. The charters were arranged through competitive bids submitted by associations representing their member carriers. The bids referred to two elements: charter mileage -- the distance the aircraft was to fly carrying passengers and freight; and ferry mileage -- the distance the aircraft was to fly in order to reach the starting point of the charter flight or to proceed from the ending point of a charter flight to its next operation. The rates and conditions for the charter service to the military were set forth in tariffs filed with the Civil Aeronautics Board. It frequently happened that the ferry mileage estimated in the carriers' bids was more or less than the ferry mileage which the carrier actually flew at the time the charter was performed. The Government paid the carriers for the amount of direct ferry mileage actually flown, up to the limit stated in the carrier's competitive bid, but refused to pay for mileage in excess of that bid.

Associated sued the United States in 1955 under the Tucker Act, demanding payment for ferry mileage flown which was in excess of the mileage bid. The district court held that the carrier was not entitled to recover for ferry mileage actually flown in excess of the amount bid unless the United States knew or should have known that the estimate contained in the bid was in error. It charged the Government with such knowledge for all flights after June 25, 1953 -- the date on which the Government began to require that carriers submit documents to support their claims for payment.

Both the United States and the carrier appealed from this ruling. The Court of Appeals held that the terms of the tariff on file with the Civil Aeronautics Board completely control the charter arrangements. These tariffs make no reference to any bidding procedures. Under their terms, as construed by the Court, the carrier is entitled to full payment for all direct ferry mileage. The Court rejected the Government's contention that the bids constituted an agreement by the parties as to the itinerary which the aircraft was to follow in its charter which was necessary before the tariff could be applied. It ruled that only the charter mileage, not the ferry mileage, could be the subject of agreement under the tariff. It also rejected the Government's contention that the carriers were estopped to repudiate their bids, which misrepresented a matter not ascertainable from the terms of the tariff -- the starting and ending points of ferry flights.

By a special order of the Civil Aeronautics Board, irregular carriers performing military air charters are now temporarily exempted from the tariff requirements of the Federal Aviation Act, insofar as these requirements would compel payment for ferry mileage flown in excess of mileage bid. This decision, therefore, will not affect future transportation so long as the exemption remains in operation.

Staff: Howard E. Shapiro (Civil Division)

DISTRICT COURTS

FEDERAL TORT CLAIMS ACT

Employee of Independent Contractor Injured While Working at Air Force Base Denied Recovery; Use of FBI Surveillance to Discredit Witness. Charles Smith v. United States (E.D.N.Y., December 23, 1959). Plaintiff, an electrician's helper for an independent contractor doing work at Mitchell Air Force Base, was allegedly injured while walking on a beam in the attic space of barracks. In this suit he sought damages for injuries which were said to have resulted when a knot in the beam gave way, causing his right foot to slip off the beam and through the sheet rock ceiling. The injuries complained of were a stutter in speech, a tic throughout his body and a pronounced limp, all said to result from an alleged conversion hysteria.

At the trial, Government counsel had plaintiff demonstrate his walking gait and testify to the constancy of the limp since the time of the accident. He then called FBI agents who testified that on five separate occasions they had plaintiff under surveilance and, at those times, he demonstrated no limp or other irregularity in his gait. On two of these occasions motion pictures had been taken of plaintiff, and these films were shown at the trial.

The District Court dismissed the complaint on the merits, noting that plaintiff's testimony was "unworthy of belief."

Staff: United States Attorney Cornelius W. Wickersham, Jr.; Assistant United States Attorney Irving L. Innerfield (E.D.N.Y.)

FEDERAL TORT CLAIMS ACT

No Liability Where Scrap Dealer's Truck Driver Injured While Directing Air Force Personnel In Loading Operation. Ervin Jupiter v. United States (E.D. La., February 17, 1960). Plaintiff, an employee of a New Orleans scrap metal firm, was sent to the Brookley Air Force Base in Alabama in an open bed semi-trailer truck, with steel sides, to pick up aluminum airplane scrap for which the firm was successful bidder. Pursuant to the contract of sale, Air Force personnel assisted in loading the scrap on the truck by means of a crane. While plaintiff was seated on one of the sides of the truck, 12 feet above the ground, he was knocked off and struck the concrete below on his head. He sustained serious and permanent injuries to the head, ear and right leg.

Plaintiff brought this action for damages on the theory that his injuries had been caused by negligence of the Air Force personnel. The District Court found that he was guilty of contributory negligence, and that he had assumed the risk by sitting on the side of the truck while loading was in progress. It stated that the danger was apparent and that plaintiff's conduct was a dangerous practice which was the proximate cause of the accident.

Staff: United States Attorney M. Hepburn Many; Assistant United States Attorney Lloyd C. Melacon (E.D. La.); Irvin M. Gottlieb (Civil Division)

FOREIGN LITIGATION UNIT

Republic of Turkey v. Kindem, Director of Civilian Personnel, TUSLOG; agent of United States as "Employer". (First Criminal Court of First Instance, Ankara, Turkey (September 1959 - February 1960)). Arthur J. Kindem, Director of Civilian Personnel of the U. S. Logistics Command in Turkey (TUSLOG), was charged with violation of Turkish social security laws in that, as Chief of Personnel, he did not pay certain social security taxes of TUSLOG employees to the Turkish Government, as required by law. The litigation had both criminal and civil aspects. While substantively it was a civil tax dispute, adjectively, it was a criminal prosecution because under Turkish legal structure the criminal courts are used to enforce payment of civil obligations owing the Government.

The United States, through local counsel, contended that under U. S. governmental concepts, defendant could not be the agent or representative of the Air Force, nor an "employer" within the purview of the municipal statutes of Turkey. The Court agreed to the use of our governmental concept to limit Kindem's responsibility and dismissed the charges. A number of similar charges are expected to be dropped.

Staff: Acting Assistant Attorney General George S. Leonard; Joan T. Berry (Civil Division) (Yilmaz Oz, Esq., Ankara, Turkey)

COURT OF CLAIMS

GOVERNMENT EMPLOYEES

Reinstated Civilian Employee's Claim for Back Pay; Mitigation of Damages. Edward Schwartz v. United States (Ct. Cls., March 2, 1960). Plaintiff was dismissed on security grounds in March 1954, and reinstated in September 1956, as a result of the decision of the Supreme Court in Cole v. Young, 351 U.S. 536. He brought this suit to recover salary lost during the period of separation. The Court held that a separated federal employee who is reinstated on the ground that his separation was unjustified or unwarranted is under a duty during the period of separation to mitigate damages by making reasonable efforts to secure other employment. Accordingly, plaintiff was permitted to recover only for a period of some six months, during which time he was pursuing his remedies before the Hearing Board; he could not recover for the remainder of the separation period because he admittedly had made no effort to secure other employment.

Staff: Kendall M. Barnes (Civil Division)

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CIVIL RIGHTS DIVISION

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

Voting and Elections; Civil Rights Act of 1957. United States v. Thomas, No. 667, Supreme Court. In June 1959 the Government brought suit under the Civil Rights Act of 1957 against the Citizens Council of Washington Parish, Louisiana, four of its members, and the Registrar of Voters of that parish, sub nom U.S. v. McElveen, et al. The complaint charged defendants with depriving certain Negro citizens of the right to vote because of race.

The Citizens Council, professing to purge the rolls of illegally registered voters, had filed with the Registrar, as provided by state law, approximately 1387 affidavits which challenged the right of 1377 Negroes and 10 white persons to remain on the registration rolls. The Registrar removed all the challenged names from the list. The District Court for the Eastern District of Louisiana refused to dismiss the complaint (177 Fed. Supp. 355) and on January 11, 1960, issued a preliminary injunction (180 Fed. Supp. 10) ordering the Registrar to restore the Negroes to the rolls.

The Court found that the same types of defects in the registration records for which Negroes were challenged were present but ignored on the registration cards of more than half of over 12,000 white registered voters. The Court also found that examination of Negro records was assiduously pursued by the defendants while only a token examination was made of white records. The Court held that the White Citizens Council and individual citizens who had challenged Negro votes were acting under color of state law, that their challenges had a massive discriminatory effect and purpose and that defendant Registrar, Thomas, in "purging" the lists as a result of the challenges had violated his duties under the Fifteenth Amendment. The individual citizens and Council were enjoined from filing challenges for racially discriminatory reasons and the Registrar was enjoined from giving any legal effect to such challenges. The Registrar also was ordered to reinstate the names of the 1377 Negroes by January 21, and to submit reports, after February 1, at three-month intervals, if more than 5% of the registrants of any one race were challenged.

On January 21, 1960, the Court of Appeals for the Fifth Circuit granted defendant Registrar's motion for a stay of the District Court order pending appeal. This would have made it impossible for the Negro voters to participate in the April 19, 1960, elections. The Government therefore requested the Supreme Court to vacate the stay. The Court found that the issues in the pending case of United States v. Raines, No. 64, were pertinent to this case, and in view of that fact and the imminence of the state election announced that it would entertain a petition for writ of certiorari and hear argument on the application to vacate, the petition for certiorari, and the merits on February 23, 1960.

The case was argued by the Solicitor General on February 23, 1960. On February 29 the Court handed down its opinion upholding the action of the District Court for the Eastern District of Louisiana in enjoining discriminatory challenges of Negro voters and restoring them to the rolls. The per curiam opinion follows:

> The petition for certiorari is granted. Upon the opinion, findings of fact, and conclusions of law of the District Court and the decision of this Court rendered today in No. 64, United States v. Raines, the aforesaid stay order of the Court of Appeals is vacated, and the judgment of the District Court as to the respondent Thomas is affirmed. 28 L. W. 4163.

This case has previously been discussed in the Bulletin for July 17 and October 23, 1959, and February 12, 1960.

Staff: Solicitor General J. Lee Rankin; Henry Putzel, Jr., David L. Norman, and J. Harold Flannery, Jr. (Civil Rights Division)

Voting and Elections; Civil Rights Act of 1957. United States v. Raines, No. 64, Supreme Court. On February 29, 1960, the Supreme Court rendered a unanimous opinion favorable to the Government in the first case brought under the Civil Rights Act of 1957. The complaint, filed September 4, 1958, against registrars of Terrell County, Georgia, charged that defendants, in the administration of the literacy test provided by the Georgia Constitution and laws, applied more stringent standards to Negro applicants than to whites and arbitrarily rejected the applications of certain qualified Negroes, including several school teachers, thereby preventing them from registering and voting. The complaint also charged defendants with intentionally delaying the processing of the applications of Negroes. The Government sought to enjoin defendants from engaging in these racially discriminatory practices, as reported in the Bulletin for October 10, 1958.

On April 16, 1959, the District Court for the Middle District of Georgia dismissed the complaint, holding 42 U.S.C. 1971(c) unconstitutional in that it could permit the Government to enjoin purely private action, although the complaint was directed to state action only. United States v. Raines, 172 F. Supp. 552.

Direct appeal was taken to the Supreme Court. The Court postponed determination of jurisdiction to hear the case on the merits. 360 U.S. 926. The case was argued by the Attorney General on January 11, 1960.

The Court held that defendant registrars had no standing to attack the constitutionality of the statute on the ground that it might impliedly apply in situations in which it might be unconstitutional. In the words

of the Court, ". . . if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality." The Court reviewed the cases which may be called exceptions to the rule that a litigant may assert only his own constitutional rights and concluded that the situation presented in Raines was not covered by any of the examples. In conclusion, the Court stated:

> The parties have engaged in much discussion concerning the ultimate scope in which Congress intended this legislation to apply, and concerning its constitutionality under the Fifteenth Amendment in these various applications. We shall not compound the error we have found in the District Court's judgment by intimating any views on either matter. 28 L. W. 4147.

Justices Frankfurter and Harlan concurred on the basis of presumptive validity of acts of Congress and the duty of the Court to save the statute wherever possible.

Staff: Attorney General William P. Rogers; Harold H. Greene and David L. Norman (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

FEDERAL HOUSING ADMINISTRATION TITLE I HOME MODERNIZATION LOANS

Simplified Referral Procedure: In the Bulletin dated November 7, 1958 (Vol. 6, No. 23, p. 666) the simplified referral procedure of certain types of "direct-to-borrower" FHA loan cases was initialed to expedite the handling of a large volume of these cases in your offices as well as in the Housing and Home Finance Agency. Your comments and the experience of the Criminal Division and HHFA during the trial period indicate that it is effective and practicable. In fact, the results have encouraged us to examine other types of FHA Title I loan cases to be included in the FHA Form FH-17 coverage. After conferring with representatives of the Housing and Home Finance Agency and the Federal Housing Administration, it was concluded that the procedure should be extended to cover the following "dealer-originated" loans.

1. Prior Insured Loan(s) Omitted from Borrower's Credit Application - The credit application covering the second or third loans did not list under "Debts" the prior Title I loan or loans which were outstanding, providing the prior loan or loans were not negotiated by the same dealer.

2. Other Debt(s) Omitted from Borrower's Credit Application - The credit application did not list certain of the borrower's other obligations which were in existence at time he applied for the loan.

3. Income Erroneously Reported on Borrower's Credit Application - The credit application shows income in excess of amount received at the time of making the loan.

4. Incorrect Ownership of Property Reported on Borrower's Credit Application - The application states the borrowers own the property, whereas, in fact, they do not have the interest represented, limited to cases where the borrowers are related to the property owner.

5. Other. Occupancy less than 90 days - dependency improperly reported.

In any case where there is indication of improper, irregular or fraudulent practices or acts involving the dealer and/or his representatives, or where there may be a pattern of fraudulent activities, the matter will be fully documented and referred to the FBI directly by HHFA for investigation. Further, where Federal Housing Authority records disclose that over a period of time, e.g. 12 months, a dealer has originated several matters wherein the "borrower-dealer" type of violation is involved and which have been processed under the simplified procedure (Form FH-17), FHA will review the transactions to determine whether a

full investigation of the dealer is warranted, and will submit the entire series of transactions to the FBI for investigation. Of course, United States Attorneys, may at any time request additional investigation where deemed necessary.

We are limiting the extension of this simplified procedure to a trial period and would appreciate the comments and appraisals of United States Attorneys to determine its efficacy and practicability. We reiterate that the procedure does not preclude any further action or investigation by United States Attorneys to effect civil recovery. It is again noted that the civil aspects of such matters, even where fraud is involved, are within the authority delegated to United States Attorneys under Supplement 1, Revision No. 1, Order 103-55.

NATIONAL MOTOR VEHICLE THEFT ACT

Application of National Motor Vehicle Theft Act to Smuggling Act. United States v. William Joseph Maynard (D. Vt., February 25, 1960). United States District Judge Ernest W. Gibson rendered a decision on February 25, 1960 which should prove of considerable value to United States Attorneys in border states in combatting car theft rings which steal vehicles in Canada or Mexico and transport them into this country. Members of such rings who receive stolen vehicles after they have crossed the border into this country are, of course, indictable under 18 U.S.C. 2313 . However, if the vehicle is received in this country and then disposed of in the same state to another person who knows that it is stolen, the latter recipient is not within the reach of Section 2313 since he has received the vehicle after it has ceased moving in commerce. The opinion opens the way to indicting such recipients for violation of the Smuggling Act, 18 U.S.C. 545, which prohibits the knowing importation, receipt, or facilitation of the transportation, concealment or sale of merchandise brought into this country contrary to law. Bringing a stolen motor vehicle into this country is "contrary to law" in that it is a violation of 18 U.S.C. 2312, and any person who receives, transports, or conceals it after its importation with knowledge that it was stolen in a foreign country violates the Smuggling Act, even though he does so after it has ceased moving in commerce.

Judge Gibson's precise decision was a denial of defendant's motion to dismiss the indictment, two counts of which charged that he "knowingly bought and received and facilitated the transportation of a stolen motor vehicle . . . after the importation of the same, knowing the same to have been brought into the United States contrary to law". Defendant contended that those counts were void for vagueness because they did not set forth the law to which the importations were alleged to be contrary. The Court held, however, that the counts, by describing the vehicles as "stolen", gave adequate information that the law violated was the Dyer Act. Implicit in this holding is the further holding that an importation of a vehicle which violates the Dyer Act is "contrary to law" within the meaning of the Smuggling Act.

Defendant contended also that the Dyer Act applies only to vehicles in foreign commerce which were stolen in this country and transported into foreign countries, and not to vehicles stolen in foreign countries and transported into this country. In this respect it was held, upon authority of Londos v. United States, 240 F. 2d 1, 6 (C.A. 5, 1957), that "foreign commerce" includes both commerce into and out of the United States.

Staff: United States Attorney Louis G. Whitcomb; Assistant United States Attorney Thomas W. Lynch (D. Vt.).

MAIL FRAUD

Knitting Machine Scheme, 18 U.S.C. 1341. United States v. Edmund J. C. Geigle (D. Vt.). After a second jury trial, Edmund J. C. Geigle was convicted of mail fraud in a knitting machine promotion featuring the typical misrepresentation to the housewife-victim that purchase of the machine was an incidental step to her establishing a profitable manufacturing operation in her home. Trading as Vermont Home Service, Geigle, with his associate, bought the machines for a little over $100 and sold them to the housewives for $638, including charges of a local finance company, representing that he would buy back all garments knitted by them at twice the cost of the yarn. This arrangement, according to the "pitch" in a kit which Geigle supplied to his salesmen, would not only pay for the machine but would yield $50 to $100 per month additional earnings.

Geigle's defense was based on the claim that he had been only an employee of his associate in the business who, he said, had overdrawn the checking account forcing closing of the enterprise. His associate had committed suicide on the day after his interview by the investigator.

Though the jury disagreed at Geigle's first trial, the second jury returned a guilty verdict in approximately two hours. The trial judge, commenting on defendant's previous good reputation, war record and wife and children, observed that he would not ordinarily impose a prison term, but that the scheme portrayed was a "vicious and cruel scheme" and "an outrageous mean performance." He sentenced Geigle to a year and a day on Count One, with similar concurrent sentences on the other 5 counts. Sentences were suspended on the latter 5 counts, with defendant placed on probation for a period of 5 years, to commence upon his release from the penitentiary. One of the terms of Geigle's probation was to be that he "make an honest effort to reimburse . . . losses of these nine women . . ."

Staff: United States Attorney Louis G. Whitcomb; Assistant United States Attorney Thomas W. Lynch (D. Vt.).

Vending Machine Mail Fraud Scheme. United States v. Sol Cutler et al. (E.D. Mo.). Defendants in this case, who entered pleas of guilty to a mail fraud indictment charging them with operating a swindle

in which victims were sold TV tube testing machines at highly inflated prices through the misrepresentation that they were purchasing a vending machine route capable of yielding substantial profits for part-time employment (see Bulletin dated January 29, 1960, Vol. 8, No. 3, p. 66) were sentenced on March 11, 1960. Cutler was sentenced to two years' imprisonment and fined $2,000. Finke was sentenced to two and one-half years' imprisonment and fined $2,000. Costs in the amount of $550 were assessed against each defendant.

Staff: United States Attorney William H. Webster; Assistant United States Attorney William C. Martin (E.D. Mo.).

FRAUD

Conspiracy; Falsification of Carbon Copies of Sales Slips. United States v. James Theodore Garrick, Raymond Henry Paquin, Joseph Mandy Belardi and Kenneth Michael Smith (N.D. Calif.). Garrick, Paquin and Belardi each pleaded guilty to one count of an indictment charging them with conspiracy, and to one count of the indictment charging violations of 18 U.S.C. 1001. Defendants were employees at the Retail Sales Store, Disposal Section, McClellan Air Force Base, California, and falsified the carbon copies of sales slips to show sales in an amount less than the actual cash prices.

On the conspiracy count, each defendant was sentenced to 5 years, 90 days to be served and the balance suspended with probation for 5 years, fined $150, and ordered to make restitution. On the substantive count, each defendant was placed on probation for 5 years and fined $150. Belardi must restore $1,614.30, Garrick $1,586.95, and Paquin $659.35.

Smith, who had been indicted in one count under 18 U.S.C. 1001, was acquitted.

Staff: United States Attorney Lynn J. Gillard; Assistant United States Attorney Robert E. Woodward (N.D. Calif.).

AUTOMOBILE INFORMATION DISCLOSURE ACT

Removal of Manufacturer's Labels of Information from New Automobiles. United States v. Elmer J. Jonnet, Jr. (W.D. Pa.). Defendant, a new and used car dealer, had been charged in a two-count information with violation of the Automobile Information Disclosure Act by unlawfully altering and removing from two automobiles the labels containing information as to the manufacturer's 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 26, 1960, defendant, after pleading guilty, was sentenced to pay a maximum fine of $1,000 and costs of prosecution on count one, and placed on probation for a period of one year on the second count.

Staff: United States Attorney Hubert I. Teitelbaum; Assistant United States Attorney John F. Potter (W.D. Pa.).

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Declaratory Judgment Refused for Lack of Justiciable Controversy; Food Additives Provisions of Act. Los Angeles Smoking & Curing Company v. George P. Larrick, et al. (Dist. Col.) On March 17, 1960, the Court found for defendants (the Government), dismissing the complaint for a declaratory judgment. The dispute began when the plaintiff corporation in response to its specific inquiry to the Food and Drug Administration was advised by letter that the substances sodium nitrite and sodium nitrate are "food additives" under the recently enacted Food Additives Amendment to the Federal Food, Drug, and Cosmetic Act, when such substances are used in the curing of fish even though the residues would be 200 parts per million or even less. The Food and Drug Administration suggested to plaintiff that the safety of these substances should be established through the tolerance setting provisions of the Food Additives Admendment. However, plaintiff filed the action for a judgment declaring that these substances are not food additives, but rather that they are generally recognized as having been shown to be safe under the conditions of their intended use. The Government moved for dismissal of the complaint and for summary judgment on the ground that plaintiff had not stated a justiciable controversy appropriate for declaratory judgment, since the Food and Drug Administration had rendered an advisory, informal administrative opinion only. Further, affidavits were submitted to establish as a matter of law that sodium nitrate and sodium nitrite are not generally recognized as having been shown by qualified experts to be safe under the conditions of their intended use. The Court ordered the complaint dismissed on the ground that a justiciable controversy was not presented, citing Helco Products Co., Inc. v. McNutt, 137 F. 2d 681 (C.A. D.C. 1943).

Staff: Assistant United States Attorney Robert K. Asman (D.C.).

Amphetamine and Barbiturate Peddling; Physician to Serve Prison Sentence after Violation of Probation. United States v. Harry G. Williams (D. Neb.). On October 29, 1959, defendant was fined a total of $1,000 and, upon suspension of a sentence of imprisonment for one year, was placed on probation for three years. Upon receiving evidence that Dr. Williams had, subsequent to sentencing, made additional sales of prescription drugs (amphetamines) in circumstances clearly not warranted for medical reasons, the Court, on January 6, 1960, revoked his probation. He must now serve the one-year sentence of imprisonment orginally imposed.

Staff: United States Attorney William C. Spire; Assistant United States Attorney Dean W. Wallace (D. Neb.).

Five Prosecutions for Unauthorized Sales of Amphetamines Initiated in Indiana. United States v. Lawson, etc. (S.D. Ind.). In the continuing crackdown on non-prescription sales of amphetamine sulfate tablets and other such "pep" pills and "bennies," the United States Attorney for the Southern District of Indiana recently filed informations in five

cases against operators and employees of truckstops and highway restaurants. In all cases defendants had freely made sales of "bennies" to undercover Food and Drug Administration Inspectors.

The importance of effective law enforcement in relation to uncontrolled sales of amphetamines, particularly for use by operators of trucks and other potential instrumentalities of violent death on the highways, was recently illustrated, with tragic effect, by an accident in Arizona. On December 22, 1959, a "bennie"-using truck driver who had been on the road for 48 consecutive hours (amphetamines having been used to enable him to deny to his mind and body the recuperative benefits of sleep) was, by his apparent loss of control of the truck, responsible for the wasting of nine human lives, including his own and those of eight innocent bus occupants. His truck, traveling at 70 miles per hour on the wrong side of a clear and unobstructed highway, collided head-on with a Greyhound bus, causing in addition to the wholesale slaughter, injuries to 31 innocent persons.

It is hoped that this Department's policy of taking prompt and aggressive action in cases of this kind, as manifested by the current activity in Indiana, can help in solving the health and public safety problems created by the illicit amphetamine trade.

Staff: United States Attorney Don A. Tabbert (S.D. Ind.).

SEARCH AND SEIZURE

Affidavit for Search Warrant Based on Hearsay; Persons Who May Complain of Illegal Search. Jones v. United States (Supreme Court, October Term, 1959, No. 69, March 28, 1960.) The opinion in this case clarifies a number of problems in the field of search and seizure.

The most important aspect of the decision, from our point of view, is that the Court squarely held that an affidavit for a search warrant may be legally sufficient although based on hearsay, if the totality of the circumstances set forth amount to probable cause. Specifically, the Court held sufficient an affidavit by a police officer which recited that a confidential informant--unnamed--who had given reliable information in the past, had reported that defendant kept a ready supply of narcotics on hand, stating where the narcotics were kept; that the informant said he had made purchases at the apartment, including one the day before the affidavit was executed; and that information concerning the use of the apartment to sell narcotics had come to the police from other sources. It will be noted that the affidavit was held sufficient even though the name of the informant was not disclosed.

In addition, the Court clarified the law with respect to the persons who have standing to complain of an illegal search. It reaffirmed the general rule that one seeking to challenge the legality of a search as the basis for suppressing evidence must establish that he himself was the

victim of an invasion of privacy. However, it modified the application of that rule, as it had been applied in the lower courts, in two respects. (1) The Court held that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." Thus invitees, employees, licensees, and the like, now have standing to object. (2) The Court held that, as to particular offenses where possession is in reality the basis of the charge--such as most narcotic cases--if the Government intends to rely on the possession of the defendant to prove its case, defendant need not allege that possession in order to have standing to move to suppress.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Alienage. D'Alessio v. Lehmann, (N.D. Ohio, February 26, 1960). This case is somewhat unusual in that no matter to what provision of law this petitioner turned, he remains an alien, though born abroad of citizen parents.

Petitioner's grandfather was naturalized on July 1, 1899. His father was born abroad in 1900. By virtue of provision of R.S. 1993, his father was born a citizen. Petitioner's mother became a citizen upon her marriage to his father in 1921. R.S. 1994. Petitioner was born in Italy in 1922. His citizen father first came to this country in 1923. Petitioner and his citizen mother entered the country in 1929, he being admitted for permanent residence as a nonquota immigrant. Since his entry he has remained continuously here. He registered for selective service and was inducted into the army in 1943. He was dishonorably discharged in 1946. He was convicted of the crime of burglary in 1952, but execution of sentence was suspended and probation granted. In 1955 he was convicted of burglary and sentenced for a term of one to five years.

If petitioner is an alien he is subject to deportation, 8 U.S.C. 1251(a)(4). If he is a citizen, the deportation order is a nullity. During his 27 years in this country he believed at all times that he was a citizen. The armed forces apparently believed him to be a citizen as also did his various employers.

The claim of citizenship rested firstly upon R.S. 1993. 8 U.S.C. 6. That section in effect provided that children born abroad to a United States citizen father are citizens of the United States provided the father had previously resided in the United States. Weedin v. Chin Bow, 274 U.S. 657 (1927). The facts show, however, that petitioner was born to a citizen father who had never previously resided in the United States. Consequently his claim to citizenship status under R.S. 1993 failed.

Petitioner sought also to rely upon 8 U.S.C. 7 (R.S. 2172) and 8 U.S.C. 8 (34 Stat. 1229).

The first of these sections, the Court pointed out, was derived from the Act of April 14, 1802 and that section as well as its predecessor relates only to children born abroad whose parents were citizens prior to the enactment of the Act of 1802 or the later adoption of R.S. 2172. Since the parents of petitioner obviously were not citizens at either of the times indicated, petitioner acquired no right of citizenship under that section. (Quoting from Mr. Justice Gray in United States v. Wong Kim Ark, 169 U.S. 649, 673 and Weedin v. Chin Bow, supra, p. 663).

Also, the Court held that 8 U.S.C. 8 is of no aid to the petitioner. That section provided in substance that a child born outside of the United States to alien parents shall be a citizen upon the naturalization of or resumption of citizenship by the parent, where either of these acts takes place during the minority of the child and the minor child begins to reside permanently in the United States. But the petitioner's parents at his birth were both citizens. Obviously, he therefore was not born of alien parents. But petitioner argued that since his mother continued to reside in Italy for eight years after she acquired citizenship through marriage to his father, the presumption arose that she ceased to be a citizen and presumably resumed her citizenship status upon her entry into this country in 1929. This contention rested on the Act of March 2, 1907, (34 Stat. 1228) which provided in effect that a woman who becomes a citizen by marriage to a citizen and who resides continuously outside of the United States for five years is subject to the same presumption of loss of citizenship as a naturalized citizen, and Title 8, Section 17, which in substance provided that when a naturalized citizen has resided for two years in the foreign State from which he came, or for five years in any other foreign State, it shall be presumed that he has ceased to be an American citizen but such presumption may be overcome by the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe. The Court disposed of this contention by citing Gay v. United States, 57 Ct. Cl. 424, which held that the purpose of the provision was to authorize this Government to refuse to extend protection to naturalized citizens remaining in foreign countries. This decision was affirmed by the Supreme Court, 264 U.S. 353. The latter Court referring to the presumption, stated " * * * it is a presumption easy to preclude and easy to overcome. It is a matter of option and intention". Moreover, the Court pointed out that when petitioner came to the United States with his mother, she had travelled on a United States passport and evidently had satisfied the appropriate diplomatic and consular officers of her retention of United States citizenship.

Upon the record made at the hearing the Court held that petitioner is an alien and therefore deportable as charged. Petition was dismissed.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Oral Hearing Not Necessary for Denial of Initial Merchant Marine Radio Officers Licenses. Edward Homer, et al. v. Alfred C. Richmond (D.C. D.C.) Plaintiffs, Homer and two others, initially applied to the Coast Guard in 1948-49 for original licenses as Radio Officers in the United States Merchant Marine under 46 U.S.C. 229. These applications and subsequent requests for reconsideration in 1956-57 were denied by the Coast Guard on security grounds. After their suit was instituted in 1958 a Coast Guard board of officers found additional grounds for the denial of two of the applicants but the denial of Homer's application continued to rest upon security considerations. In a motion for summary judgment, plaintiffs alleged lack of authority to deny clearance because of political beliefs, and deprivation of rights guaranteed by the First and Fifth Amendment. Denying plaintiffs' motion and granting the Government's cross-motion for summary judgment on March 23, 1960, District Judge Burnita Matthews said in part: "Thus each plaintiff, although not afforded an oral hearing, was afforded an opportunity to meet the findings on which defendant's adverse action was based. Under the circumstances of this case as shown upon the record as a whole, I am of the view that there was no denial of due process or violation of constitutional guarantees."

Staff: Oran H. Waterman, DeWitt White, and Herbert E. Bates (Internal Security Division)

Conspiracy to Commit Espionage. Searches and Seizures Pursuant to Immigration Administrative Warrant. Rudolf Ivanovich Abel v. United States (Supreme Court). Abel, a Colonel in the Soviet State Security Service, was convicted in 1957 in the Eastern District of Brooklyn on charges of conspiracy to violate the espionage statutes and was sentenced to thirty years' imprisonment. After his conviction was upheld by the Court of Appeals, the Supreme Court granted certiorari limited to the question of the validity of the searches and seizures of the hotel room he occupied at the time of his arrest. The FBI was originally unable to proceed with an arrest of Abel on espionage charges because of the then refusal of the principal witness in the case, who was a co-conspirator of Abel, to testify in a public proceeding. The Immigration Service then determined to arrest Abel on an administrative warrant pending determination of his deportability. Abel was taken into custody on an administrative warrant issued by the Acting District Director in New York City. As an incident to the arrest, the Immigration officers searched his luggage and personal effects which were in the hotel room, for documents pertaining to nationality, and five items which were among these effects were subsequently offered in evidence at Abel's criminal trial on espionage. (These included two spurious birth certificates, a bank book, a vaccination certificate and a coded message, the latter of which he tried to slip up his sleeve

while repacking one of his suitcases). After Abel had checked out of the hotel and left the room in the custody of the Immigration officers, the room was searched by FBI agents with permission of the hotel management. In a waste basket into which Abel had abandoned certain property during the packing process were a hollowed pencil and a microfilm and a sanding block containing a cipher pad. These items were also offered in evidence at the criminal trial. The principal contentions considered by the Supreme Court were petitioner's claim that the administrative arrest was used by the Government in bad faith as a subterfuge; that administrative arrests as preliminaries to deportation are unconstitutional; and that, in any event, searches and seizures are not lawful ancillaries to such administrative arrests. In a 5-4 decision the Supreme Court, in an opinion by Mr. Justice Frankfurter, held that the record fully supported the findings of the courts below that the administrative arrest was in good faith and that the cooperation between the FBI and the Immigration Service was proper; that petitioner had not challenged the validity of the Immigration arrest in the lower courts and that in the face of the "impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation," the matter need not be considered by the Court in light of petitioner's disavowal of the issue below; and that the Government and the lower courts were justified in relying on the Supreme Court's decisions in Harris v. United States, 331 U.S. 145 and United States v. Rabinowitz, 339 U.S. 56 for guidance at the trial on the question of the validity of the searches conducted. The Court also concluded that "government officers who effect a deportation arrest have a right of incidental search analogous to the search permitted criminal law-enforcement officers."

Staff: The case was argued by the Solicitor General, J. Lee Rankin; with him on the brief were Assistant Attorney General J. Walter Yeagley; Assistant to the Solicitor General John F. Davis; William F. Tompkins; Kevin T. Maroney; Bruce J. Terris; Anthony A. Ambrosio and Elizabeth F. Defeis.

Contempt of Congress. United States v. Bernard Silber (D. D.C.) On March 23, 1960, Judge Joseph C. McGarraghy, sitting without a jury, found defendant Bernard Silber guilty as charged on three counts of an indictment charging contempt of Congress, in violation of 2 U.S.C. 192. Sentencing was deferred pending pre-sentence investigation. Silber, a member of the American Communications Association, a union which the CIO expelled in 1950 as Communist-dominated, acknowledged previous Communist Party membership in an appearance before the House Committee on Un-American Activities in July 1957, but refused to state who had recruited him into the Party or to name individuals known by him to be Party members. Trial on the three remaining counts of the indictment was held following Judge F. Dickinson Letts' dismissal of one count on January 29, 1960 (see Bulletin, Vol. 8, Nos. 6 and 7).

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

Contempt of Congress: Refusal to Produce Records. McPhaul v. United States (Supreme Court, March 21, 1960). The House Committee on Un-American Activities had information that McPhaul was an official or executive of the Civil Rights Congress, which had been designated as a Communist Front organization by the Attorney General. A subcommittee subpoenaed McPhaul to testify at a hearing in Detroit in February,1952, and to produce records of the Civil Rights Congress pertaining to its organization, affiliation with other organizations, and receipts and expenditure of money. At the hearing, McPhaul claimed his privilege under the Fifth Amendment and refused to answer questions about the possession of custody of the books and records. In response to the question whether he would produce the records, he answered, "I will not". He was indicted under 2 U.S.C. 192 for wilful failure and refusal to produce the records. The District Court charged the jury that if defendant refused to make any explanation about the existence of the records or whether they were under his possession or control, it did not have to consider whether the records were actually in existence or under his possession or control, but that it had to find whether defendant wilfully failed or refused to produce the records. Defendant was convicted and the Court of Appeals for the Sixth Circuit affirmed. Defendant petitioned for certiorari on 3 grounds: that the Government had to prove the existence of the records or their possession by petitioner; that the subpoena was so broad as to constitute an unreasonable search and seizure; and that it was not proved that the records were pertinent to the Committee inquiry and that petitioner was fairly apprised of such pertinency. The Government opposed certiorari mainly on the ground that under Barenblatt v. United States, 360 U.S. 109, petitioner could not assert at the trial objections he failed to raise before the Committee, but the Court granted the petition.

Staff: Kevin T. Maroney and George B. Searls
(Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Condemnation; Wherry Housing; Evidence of Reproduction Cost Not Admissible; Rent Controls Mean Owner Is Entitled to Return on Original Cost Not Inflated Present Value or Reproduction Cost. United States v. Benning House Corporation (C.A. 5, March 25, 1960 reversing M.D. Ga.). Proceedings to condemn two "Wherry" housing projects resulted in a jury verdict awarding the beneficial owners $2,171,487 above the outstanding balances of mortgages assumed by the United States of $5,964,005.53. The district court had admitted as comparable, sales of three Wherry projects at Barksdale, Louisiana, Quantico, Virginia and Fort Devens, Massachusetts. The Government also employed the capitalization of income method. Over the Government's objection, the court had admitted evidence of cost of reproduction, the condemnees having argued that that was the proper measure of compensation.

The prime ground for reversal was the admission of reproduction cost evidence. The Court said first that, absent some special showing, reproduction evidence is inadmissible because it "almost invariably tends to inflation." Recognizing that there was some disagreement of view as to the showing that must be made for reproduction evidence to be admissible, the opinion continued that there were three factors as to which there was substantial, if not complete, unanimity: These were "(1) that the interest condemned must be one of complete ownership; (2) that there must be a showing that substantial reproduction would be a reasonable business venture; and (3) that a proper allowance be made for depreciation."

Turning to the facts of this case, it held that the fact there were a few comparable sales did not mean that there was an abuse of discretion in admitting reproduction evidence. The opinion then continued:

> The Government's second contention raises a more serious difficulty. That contention, i.e., that reproduction cost evidence was inadmissible because the condemnees' interest did not constitute complete ownership, is rested upon two separate grounds: first, that the Government was the real owner subject only to condemnees' leasehold; and, secondly, that condemnees' rights with respect to the property were limited by the fact that the projects were subject to rent control by the F.H.A. The condemnees, on the other hand, contend: first, that their leasehold interest is tantamount to complete ownership; and, secondly, that, even though the F.H.A. had the power to set rents, it could do so only in such a way as to guarantee the Wherry sponsor a fair return on the value of his property, and, therefore, that such a power in the F.H.A. could not diminish the value of the property.

The Court held that the Government's ownership after the 65 years of the leases under which the condemnees occupied the property was of negligible value. It agreed with the Government's contention, however, concerning rent controls. After summarizing the purposes, history, etc., of the Wherry Act, it concluded:

> It is clear that the policy has consistently been one of allowing a return based upon original cost rather than reproduction. Rent increases were sanctioned only to offset rising operating costs and not to compensate for increased reproduction costs. The Act did not contemplate that sponsors would recover reproduction costs on a sharply rising market. And there was nothing unfair in its failure to do so. By insuring the mortgages on the projects, the Government assumed the risk of loss on a declining market. In such a situation, respect for the public interest practically required that no benefit should accrue to the sponsors as a consequence of inflation.

After finding that there was no evidence in the record to show that projects would be reproduced by private investors at the risk of private capital it stated:

> We conclude, therefore, that this is not a proper case for valuation on the basis of reproduction cost. This means, of course, that the case must be tried on the basis of comparable sales, capitalization of income and original cost. * * *

The Court further held that a purported rent increase after the Government took this housing, consisting of forfeiture by assigned personnel of quarters allowances, had nothing to do with rent and the evidence should have been excluded.

The reasoning of this case would seem to apply to all Wherry projects. Copies of the opinion may be obtained by writing to the Appellate Section, Lands Division.

Staff: Roger P. Marquis (Lands Division).

Condemnation; Trial; Reference to Commissioners Under Rule 71A(h). United States v. Peirson Hall (C.A. 9). See U. S. Attys. Bulletin, Vol. 8, No. 4, p. 112. The Solicitor General has determined that a petition for a writ of certiorari will be filed in this case.

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). See U. S. Attys. Bulletin, Vol. 8, No. 4, pp. 112-114. The Solicitor General has determined that a petition for a writ of certiorari will be filed in this case.

Condemnation; Valuation of Clearance Easement Where Hilltops Removed and Used by Government for Fill; Appellate Court Will Not Re-Weigh Evidence. Glanat Realty Corp. and Eastern Suffolk Concrete and Asphalt Corp. v. United States (C.A. 2, March 15, 1960). The United States condemned a clearance easement near the end of an airfield runway. This imposed a height limitation over the lands involved above which structures, trees, ground, etc. could be "removed." The Government removed the tops of several hills which extended above the height limitation and carried the material away for fill in lengthening the runway. At the trial it valued the loss to the landowners in terms of the difference in value for residential uses before and after imposition of the easement. Two landowners (appellants) insisted on a separate value for the sand and gravel (hilltops) removed. To that value one of them added the diminution in value to the land for residential uses and the other added diminution in value of the land as an operating sand-and-gravel plant. The district court adopted the Government's valuations.

The Court of Appeals affirmed. It held that the easement entitled the Government to carry away and use the material from the hilltops and that appellants received compensation for that material, which was in place at the effective date of the taking, by the awards of the differences in the values of the lands before and after the taking. It further held that there was ample evidence to support the Government's valuations so that the fact that the district court adopted the Government's valuations, rather than those of appellants, presented nothing for appellate review.

Staff: S. Billingsley Hill (Lands Division).

Condemnation; Whether Land Can Be Valued for Hydroelectric Purposes in Absence of Evidence That All Lands Necessary for Project Can Be Combined in One Ownership; Effect of Unsupported Opinion of Hydroelectric Expert That There Was "A Good Probability" of Combining Lands Necessary for Hydroelectric Project. United States v. Cooper, et al. (C.A. 5, March 24, 1960). The United States here condemned land which was used in a Government project for one end of a dam on the Etowah River. The issue was submitted to the jury, over the Government's objection, whether the land had any market value as a commercial hydroelectric damsite. The jury returned alternate verdicts at the instruction of the trial court that the land had a market value including hydroelectric power value of $100,000 and a market value of $57,500 if hydroelectric power value was not to be considered. The trial court, after ruling the Etowah was a non-navigable stream, awarded the landowners $100,000.

On appeal by the United States the Fifth Circuit reversed the trial court, and held that the lower verdict which excluded hydroelectric value must be accepted. The Court held there was a complete failure of proof that there was a reasonable probability this land would be used for a damsite within the reasonably near future. It was noted that the landowners claimed the land was valuable for a dam 100 feet high and that

such a dam would require a reservoir of approximately 10,000 acres. The only evidence that this land would be used as a commercial damsite was the unsupported opinion of defendants' hydroelectric engineer. He stated "there was a good probability" of using the Cooper lands in connection with other lands for the purpose of building a hydroelectric dam. The Court stated an expert witness may give his opinion based on assumptions stated by him. However, the Court held that if the assumptions needed to support the opinion are not proved, or at least testified to, and are not otherwise taken to be true, the opinion is worthless.

It was pointed out that there was no testimony as to how many tracts were involved in the 10,000 acres, and nothing to show at what price such property could be acquired or whether it could be acquired by private negotiations at all. There was no evidence as to what roads, bridges, public utilities, municipal facilities and the like would be flooded. The Court concluded that there was nothing before the jury that would permit it to find the lands could be assembled without the use of eminent domain. Of course, the fact that the eminent domain power might be used could not be considered under United States ex rel. T.V.A. v. Powelson, 319 U.S. 266. "The unsupported opinion of the hydraulic engineering expert that there was 'a good probability' of using these lands in connection with others for the purpose cannot supply the basis for such a finding by the jury," the Fifth Circuit held.

The Court declined to rule on the Government's other arguments (1) that the Etowah was a navigable river and therefore the doctrine applied in United States v. Twin City Power Co., 350 U.S. 222, controlled, or (2) even if non-navigable, it was subject to regulation by virtue of the Federal Government's control under the Commerce Clause of the Constitution, and therefore the principle of the Twin City case still applied. The Court did state, however, in discussing another point that "It was, of course, a matter of great significance in any valuation of the land in question as a potential power site that the Federal Power Commission had the undoubted power to refuse the grant of a license."

The Court held that it was not error to admit an opinion of these lands as a special use for "washer ponds" used in connection with surface mining. The Court said it was true that the witness initially indicated that he arrived at the value of the lands for this purpose under the hypothesis that the total estimated income over the next 10 years equaled the present value. It was held that, however unrealistic this hypothesis was, it was not the sole basis of his opinion. Therefore, since the opinion was admissible, its weight was for the jury to assess.

The Court also held it was not error to exclude a witness' opinion on what action the Federal Power Commission might take in an application for a license to build a private dam at this site.

Staff: A. Donald Mileur (Lands Division)

Condemnation; Refusal of Trial Court to Authorize Deficiency Deposit on Judgment Without Prejudice to Right of United States to Appeal Is Not Appealable. United States v. Cooper, et al. (C.A. 5, March 24, 1960). This is a companion case to the case just reported. Because the United States had appraised the land taken on a different basis than the one on which the trial court allowed the case to go to the jury there was a substantial deficiency. To stop the running of interest the United States sought to deposit the deficiency, but at the same time reserving to itself the right to appeal, and recover any overpayment if the appeal was successful.

The Government made a motion to deposit, setting forth the conditions stated. The trial court entered an order stating only "The said motion is denied." From this order, entered after entry of final judgment, the United States took a separate appeal. The Fifth Circuit held that the order did not decide anything as to the correctness of the Government's contention, but it merely declined to rule on the effect of such action. Therefore, it was held that the appeal was not taken from a final and appealable order.

Although the Court refused to rule on whether the Government had the right to pay the judgment and take an appeal, it noted that in the recent case of Carmichall v. United States, 273 F.2d 392, the Fifth Circuit, in an unreported order, had refused to dismiss an appeal where the motion was based on the contention that the Government's payment of the judgment destroyed its right to appeal. The opinion thus creates a published authority that the United States can deposit and appeal.

Staff: A. Donald Mileur (Lands Division)

Mutual Mistake in Deed of Land to United States; Statute of Limitations and Laches Not Available to United States as Plaintiff in Absence of Pleading Seeking Affirmative Relief for Defendant and Where Defendant Had No Judicial Remedy Because of Immunity of United States from Suit. Northern Pacific Railway Co., et al. v. United States (C.A. 10, March 12, 1960). The United States brought suit to clear its asserted title to the minerals in a strip of land obtained by warranty deed from the railroad in 1916, purporting to convey the fee title. Judgment for the United States was reversed by the Court of Appeals. The strip of land had been needed by the Government for the construction of a reclamation project canal. The strip of land was part of a larger tract patented to the railroad in 1908 but without the reservation to the United States of a right-of-way for reclamation canals required to be inserted in patents by the Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. 945. The Court of Appeals concluded from a review of the evidence of the negotiations between the railroad and the United States at the time the deed was executed that the United States intended to receive and the railroad to give only the

right-of-way which the Government would have had if such had been reserved in the original patent and, therefore, the execution, delivery and acceptance of the deed without reservation of minerals to the railroad constituted a mutual mistake of the parties in carrying into effect their agreement. If the right-of-way had been reserved to the Government in the original patent it would have had no claim to the minerals.

The Court of Appeals said that since the United States had obtained the dismissal of the railroad's counterclaim seeking reformation of the deed, the railroad was left without any pleading for affirmative relief against which the United States could plead the state statute of limitations, or that the railroad was guilty of laches. The Court also said upon this point, without mention of the contrary holding in Stanley v. Schwalby, 147 U.S. 508, 517 (1893), that limitations and laches did not foreclose the railroad from defeating recovery by the United States because due to the United States' immunity from suit the railroad was without judicial remedy and therefore the statute did not run and laches did not apply.

Staff: Claron C. Spencer (Lands Division)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decision

Full Payment of Income Tax Deficiency Assessed as Jurisdictional Prerequisite for Refund Suit. Walter W. Flora v. United States. (Supreme Court, March 21, 1960.) At the 1957 Term the Supreme Court decided that full payment of an income tax assessment is a jurisdictional prerequisite to suit, 357 U.S. 63. Subsequently the Court granted a petition for rehearing, 360 U.S. 922. Setting forth its reasoning in some detail, a majority of the Court concluded that the reargument had but fortified their view that Section 1346(a)(1) of 28 U.S.C., correctly construed, requires full payment of assessment before an income tax refund suit can be maintained in federal district court. Four Justices dissented. (See p. 425, Vol. 6, United States Attorneys Bulletin, July 3, 1958.)

Staff: Charles K. Rice (Tax Division)

District Court Decisions

Levy Upheld; Plaintiff's Claim for Return of Monies Seized from Another Denied Where, After Trial, Court Concluded That Plaintiff Had Not Sustained Burden of Showing Seized Monies Belonged to Him. William A. Brooks, Jr. v. Burton, (N.D. Ohio.) Brooks brought an action against Melvin Burton, District Director, for the return of $1,900 which had been seized by levy from the Cleveland Police Department and applied to the tax liabilities of Elijah Abercrombie. Abercrombie at the time of his arrest by the Cleveland Police in connection with lottery operations was carrying $1,900 in cash which was taken into custody by the police. A notice of levy for taxes due from Abercrombie was served upon the police on March 19, 1958 the day after the arrest. On April 16, 1958 a final demand was served upon the police. On April 28, 1958 the police honored the levy and final demand by turning the $1,900 over to the District Director who applied it to Abercrombie's taxes. Although Brooks knew of Abercrombie's arrest the very day it happened, he never made a claim for the $1,900 to the Cleveland Police.

At the trial Brooks, an accountant of 15 years experience, testified he had given the money to Abercrombie for delivery to a real estate agency in connection with a transaction he was making. He stated he had the money hidden in a can in his cellar since he had no bank account. Abercrombie's testimony corroborated that of Brooks. Two other witnesses back up the testimony of Brooks and stated they saw the money change hands.

At the conclusion of the trial the Court observed that plaintiff presented no witnesses from the real estate agency and that Brooks never claimed the money from the Cleveland Police. The Court stated that it did not believe that a person would pass $1,900 to Abercrombie without requiring some receipt.

In holding for the defendant District Director, the Court found that in judging the credibility of the witnesses, plaintiff had failed to sustain his burden and had not shown by a preponderance of credible evidence or testimony that the $1,900 was his property.

Staff: United States Attorney Russell E. Ake and Assistant United States Attorney James E. Sennett (N.D. Ohio); Stanley F. Krysa (Tax Division)

Summons; Enforcement of Internal Revenue Summons; Examination of Books and Witnesses. In the Matter of the Application for Enforcement of a Revenue Service Summons Against Crane Fulview Glass Door Co., Inc. (N.D. Ill. December 16, 1959.) An administrative summons was served upon taxpayer by an internal revenue agent, directing taxpayer to produce all corporate books, records, minutes, invoices and related papers pertaining to its income tax returns for the years 1957 and 1958. The Government filed a petition to enforce the summons and the taxpayer countered with a petition to quash the summons on the grounds that: (a) the summons was issued pursuant to information acquired by agents of the Treasury Department in the course of an unlawful search and seizure, violative of the taxpayer's rights under the Fourth Amendment; and (b) that taxpayer's return for 1957 had already been investigated and its books and records already produced and inspected by the Treasury Department's agents.

Thereafter, taxpayer was advised by letter from the United States Attorney that the tax case was being conducted as a routine civil audit and was not the subject of joint investigation by the Intelligence Division and the Audit Division. On the basis of this letter, the Government moved for judgment on the pleadings.

The Court entered judgment in favor of the Government directing compliance with the summons. The Court's ruling was based upon the ground that inasmuch as the examination was solely for the purpose of determining civil liability, the position of taxpayer, which was based primarily upon the alleged conducting of a criminal investigation, was without merit and constituted no defense to the Government's petition for enforcement.

Staff: United States Attorney Robert Tieken and Assistant United States Attorney Harvey Silets (N.D. Ill.); Clarence J. Nickman (Tax Division)

Assessment and Collection of Taxes; Relative Priority of Liens Against Cash Surrender Value of Insurance Policy as Between Government Who Had Filed Timely Notice of Lien in County of Taxpayer's Domicile and Defendant-Bank Who Held Policy as Pledgee and Was Located in Different County Unaware of Government's Lien. United States v. Theodore Ullman, United Benefit Life Insurance Company and Fidelity-Philadelphia Trust Company (E.D. Pa., December 17, 1959). On August 31, 1951 the Commissioner of Internal Revenue made deficiency assessments of income taxes in respect to taxpayer totalling approximately $90,000. On February 9, 1951, taxpayer had pledged the

insurance policy in question with a Philadelphia bank to secure a loan for $3,000, surrendering physical possession of the policy to the bank. The Collector of Internal Revenue received the assessment list on September 4, 1951 and issued notice and demand for payment to taxpayer on the same day. Taxpayer failed to pay.

On September 12, 1951 the Collector filed a notice of the federal tax lien with the Prothonotary of Berks County, Pennsylvania where taxpayer resided and also with the Clerk of the United States District Court for the Eastern District of Pennsylvania. On September 27, 1951, taxpayer borrowed an additional $20,000 from the bank on the pledged policy, which policy remained with the bank in Philadelphia. No part of the bank's loans were ever repaid.

The Government brought suit to recover the cash surrender value of the policy ($34,362.50) whereupon the insurance company interpleaded the fund which was paid into the Registry of the Court. The Government contended that it was entitled to the fund less only the $3,000 secured by the original pledge which had been made prior to the time the federal tax lien was filed. The bank, on the other hand, asserted a further right to $20,000 secured by the later pledge, on the ground that the Government had failed to file its notice of federal tax lien at the proper place, thus making it subordinate to the "pledgee" bank under Title 26 U.S.C. Section 3672(a). Under this section a tax lien is not valid against a pledgee until notice thereof has been filed by the Collector---

> (1) Under State or Territorial Laws
>
> In the office in which the filing of such notice is authorized by the law of the State * * * in which the property subject to the lien is situated, whenever the State * * * has by law authorized the filing of such notice in an office within the state.

The basic issue was whether the Government had filed its lien in the proper place, i.e., whether the notice filed in Berks County, Pennsylvania was proper.

The Court observed that the issue was controlled by Pennsylvania law (Reiter v. Kille) 143 F. Supp. 590 (E.D. Pa.), the applicable Pennsylvania statute being the Act of May 1, 1929, P.L. 1215. This statute provides that notice of federal tax liens are to be filed by the Collector in the office of the Prothonotary of the County in which the property subject to the lien is situated.

The Government's position was that the taxpayer's domicile in Berks County, was the proper filing place. In opposition, the bank contended that the situs of the written certificate (Philadelphia) which embodied the rights under the policy was the proper interpretation to be given the Pennsylvania statute.

Although there were no Pennsylvania decisions on the issue and no federal decisions involving the Pennsylvania statute, the Court nevertheless adopted the domicile theory advanced by the Government pointing out that it was supported by a considerable body of authority. West Coast Credit Corp. v. Renfro, 167 F. Supp. 480, (W.D. Wash.); In re Cle-land Co. Inc., 157 F. Supp. 859 (D. Mass.); United States v. Royce Shoe Co., 137 F. Supp. 786, (D. N.H.); Grand Prairie State Bank v. United States, 206 F. 2d 217 (C.A. 5); Investment & Security Co. v. United States, 140 F. 2d 894 (C.A. 9); United States v. Metropolitan Life Ins. Co., 256 F. 2d 17 (C.A. 4); Citizens State Bank v. Vidal, 114 F. 2d 380 (C.A. 10); United States v. Jane B. Corp., 167 F. Supp. 352 (D. Mass.); and Weir v. Corbett, 158 F. Supp. 198 (W.D. Wash.). The Court was careful to note, however, that although these cases afforded weight to the Government's theory, they were not necessarily controlling and their value was somewhat impaired by the fact that they involved statutes of other states.

The Court went on to observe that the bank could cite no authority directly supporting its "locus of the certificate" theory, and rejected as not applicable certain cases involving support orders against absconding husbands.

In a well-considered opinion the Court indicated that the law concerning the situs of a chose in action is presently unsettled, particularly with regard to the situs of an insurance policy. In this connection the Court stated:

> What may be found to constitute situs for tax purposes may not be so found for the purpose of applying a conflict of law rule or for the exercise of jurisdiction in a support proceeding.

The defendant bank conceded that the choice of the owner's domicile was the rule favored at common law. Observing that this common law rule could, of course, be changed by statute, the Court concluded that there was no evidence to show that the Pennsylvania statute supra had intended to do so and therefore the property interest in the policy in question was situated at the taxpayer's domicile in Berks County where the Government had filed its lien. The Court therefore upheld the priority of the Government's lien, and its right to the interpleaded fund (minus the $3,000 advanced by the bank which had been loaned by the bank prior to the Government's lien.)

Staff: United States Attorney Walter E. Alessandroni and Assistant United States Attorney Michael L. Temin (E.D. Pa.) Clarence J. Nickman (Tax Division)

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