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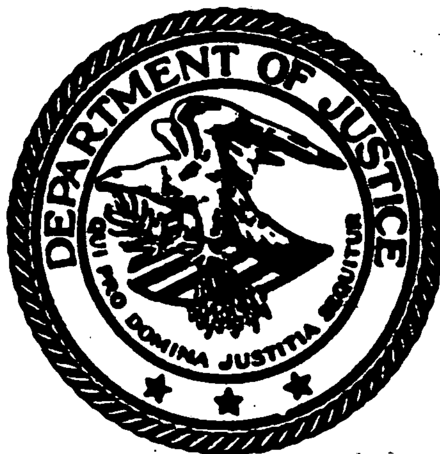

UNITED STATES ATTORNEYS
BULLETIN

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Vol. 8 April 22, 1960 No. 9

JOB WELL DONE

The United States Secret Service Special Agent in Charge has expressed sincere appreciation for the excellent assistance recently rendered by Assistant United States Attorney Frank J. Ferry, District of New Jersey. Mr. Ferry was successful in recovering for the Government the amount of an overpayment to a pensioner on the Veterans Administration rolls. The Special Agent stated that the individual concerned resisted efforts to effect recovery, and that it was only with Mr. Ferry's capable assistance that the matter was brought to a successful conclusion.

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Assistant United States Attorney Martin H. Kinney, Northern District of Indiana, has received congratulations from the General Counsel, Securities and Exchange Commission, on his successful prosecution of a case which involved an indictment in eight counts. The jury returned a verdict of guilty on seven of the eight counts. The General Counsel expressed his thanks for the excellent work Mr. Kinney performed in bringing this case to a successful conclusion.

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Assistant United States Attorney Richard J. Dauber, Southern District of California, has been commended by the Chairman of the Commission for the Success Dam and Terminus Dam Projects. The Chairman stated that on a recent trip to view properties it was very interesting to note Mr. Dauber's remarkable faculty for establishing harmonious relationships with persons whose property is being taken by the United States. The Chairman also observed that, in addition to being a very competent attorney, Mr. Dauber is an excellent ambassador of good will for the United States.

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The FBI Special Agent in Charge has thanked United States Attorney Hubert I. Teitelbaum, Western District of Pennsylvania, for the appropriate remarks he delivered at the opening of a recent conference on auto theft, and also for taking time out to get the conference off to a good start. The Special Agent also commended the fine presentation made at the conference by Assistant United States Attorney Daniel J. Snyder. The Special Agent, in stating that Mr. Snyder made a major contribution to the success of the conference, observed that he handled his topic in excellent fashion and remained throughout the day to answer technical legal questions as they arose during the conference.

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The work of Assistant United States Attorney Alfred Manion, Northern District of Illinois, in a recent case has been commended by the Chief Judge of the District. In commenting on Mr. Manion's magnificent and outstanding work, the Chief Judge said Mr. Manion and the agents under his supervision spent countless hours in the preparation of what the judge thinks is perhaps the finest stipulation of facts that has ever been presented in his court, that not only was the Government saved a great deal of expense in a lengthy and difficult trial, but a great deal of the judge's time was also saved, that due to Mr. Manion's tireless zeal and great legal ability many difficult legal issues have been resolved in such a way that a real contribution has been made toward the eventual delineation of the law in the field of income tax evasion, and that in the judge's opinion a real contribution has thus been made by the trial of the case. The judge concluded by saying that he could not commend Mr. Manion too highly for his effective and cooperative work in this most difficult matter.

* * * * * * * *

The Assistant Director, Food and Drug Administration, has expressed sincere appreciation for the very excellent handling of a recent case by Assistant United States Attorney Richard C. Casey, Southern District of New York. The letter stated that Mr. Casey was willing to work late into the night, on the week-end and on a holiday in order to thoroughly prepare the case which came on for trial at rather short notice, that all who worked with him were impressed by both his ability and zeal, that although it was his first food and drug case he showed that he understood all facets of the case, and that his presentation of the Government's case was effective and convincing.

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Assistant United States Attorney Lawrence P. McGauley, Southern District of New York, has been commended by the Director, Intelligence Division, Internal Revenue Service, for his excellent handling of a recent tax evasion case. After a three week trial the defendant was convicted. The District Director observed that the successful outcome of this prosecution was accomplished by Mr. McGauley's thorough understanding of the difficult and unique problems involved, and his diligent and energetic efforts in presenting the case to both the grand jury and trial jury, that its results represent an outstanding achievement of which the United States Attorney's office may justly be proud, that the whole-hearted cooperation of the office and Mr. McGauley's untiring and arduous work played an indispensable part in the important tax case, that this withholding tax evasion case was one of a few of its kind to be tried before a jury, and that the successful result and resultant publicity will contribute substantially to the effective enforcement of the Government's withholding tax program.

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The Regional Administrator, Securities and Exchange Commission, has congratulated and commended United States Attorney Ralph Kennamer, Southern

District of Alabama, on his successful prosecution of a recent case. The Regional Administrator observed that, insofar as he could recall, the case was tried quicker than any of the other cases presented in the region and that this was due to the efficient and capable manner in which it was handled by Mr. Kennamer and Assistant United States Attorney Alfred P. Holmes, Jr.

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Assistant United States Attorneys John L. Briggs and John E. Palmer, Southern District of Florida, have been commended by a visiting Federal judge who stated that during his assignment it was a privilege to become acquainted with these Assistants and to be associated with them almost daily, and that they were at all times helpful and cooperative. The judge observed that their cases were capably prepared and splendidly presented, that they worked long hours and were certainly conscientious, and that he felt the richer for having known them.

* * * * * * * * *

The Regional Commissioner, Immigration and Naturalization Service, has commended United States Attorney Theodore F. Bowes, Northern District of New York, on the unusual determination displayed by Mr. Bowes and his Assistants in the successful prosecution of an alien smuggler. The conviction was obtained despite the absence of the Government's principal witness who disappeared before the trial, and without a confession of guilt by the defendant or the smuggled alien. The Regional Commissioner stated that perhaps no single factor has more favorable effect on the morale of law enforcement officers than the knowledge that their efforts will be followed up by wise and forceful prosecution in bringing violators to justice.

PERFORMANCE OF DUTY

A recent letter to United States Attorney Fallon Kelly, District of Minnesota, from a former Assistant expressed appreciation and gratitude for the opportunity and experience which the period of service as an Assistant had afforded him. One paragraph in the letter expresses so well the satisfaction which Federal service brings that it is here reproduced.

"A person who has not worked in the Department of Justice cannot appreciate the good feeling which being a Federal man creates. Such a person cannot understand how this extra intangible something causes the Federal man to work a little harder, to conduct himself by a somewhat higher standard of discretion and conduct, to have a little extra spring in his walk and to turn out a much better work product. The Department of Justice is truly a great team, and includes an outstanding 'law firm'."

* * *

The following letter from the County Attorney of Ramsey County, Minnesota illustrates a fine example of Federal-State cooperation and the successful results which can derive therefrom.

"In October 1958, the United States District Attorney for the District of Minnesota, Mr. Fallon Kelly, successfully prosecuted Rocco Lupino for unlawful flight to avoid prosecution for a kidnapping which occurred in the State of Minnesota. At the time of sentence, the Honorable Edward J. Devitt, District Judge, indicated that further prosecution by the state officials certainly was to be desired.

Having taken office subsequent to the federal trial, I would have been completely at a loss to know how to fulfill the judge's desire without the wholehearted cooperation of the district attorney and of his first assistant, Mr. Clifford Janes. They spent many hours in reviewing the testimony and advising me as to the strength and weaknesses of the various witnesses.

I found in the conduct of the case their advice to have been most wise and extremely helpful. I used as one of the key witnesses Mr. Harry Berglund, the agent assigned to much of the investigation while the case was pending as a federal matter. His testimony was well received because of the excellent appearance on the stand and his manner was most convincing. Even more important, was his advice to me concerning conversations which he had had with various hostile witnesses so that I was able to draw from such witnesses evidence corroborating the testimony of an accomplice to the crime of kidnapping.

The trial ended with a verdict of guilty and Mr. Lupino has been sentenced according to law. The results could not have been achieved without the cooperation received from these federal law enforcement officials. While Mr. Lupino had been according to the reports available to us, arrested on an annual basis since the time he was sixteen and participated in a murder in Minneapolis, his greatest sentence in Minnesota was a $500.00 fine. With the help of these federal officials he has now received a sentence which can run up to eighty years."

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ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

CLAYTON ACT

Complaint Filed Under Section 7. United States v. Aluminum Company of America, et al., (N.D. N.Y.). A civil complaint was filed on April 1, 1960 charging that the acquisition, on March 31, 1959, by Alcoa and a newly formed wholly-owned subsidiary, of the assets, properties, business, contract rights, and good will of Rome Cable Corporation violates Section 7 of the Clayton Act.

Alcoa, according to the complaint, is the largest aluminum producer in the United States, constituting, together with its subsidiaries and affiliates, an integrated producer of aluminum raw materials and numerous aluminum end products, including wire and cable, conduit, and cable accessories. Alcoa's assets as of December 31, 1958 amounted to about one-and-a-third billion dollars; its consolidated net sales and operating revenues in 1958 exceeded three-quarters of a billion dollars; and its net domestic sales of aluminum wire and cable, conduit, and cable accessories in 1958 exceeded 32 million dollars.

Rome was at the time of the acquisition a leading independent manufacturer of a broad line of wire and cable products made from aluminum and copper, as well as conduit and cable accessories; and in addition was a supplier to other wire and cable manufacturers of copper rod, and to some extent aluminum rod, used in the fabrication of wire and cable. Rome's net sales for the fiscal year ended March 30, 1958, exceeded 40 million dollars, and its assets as of that date amounted to about 24 million dollars.

The complaint charges that the effects of the acquisition may be to enhance Alcoa's position, both as an aluminum supplier and as a wire and cable manufacturer, to the detriment of competition; to lessen competition in the production and sale of various wire and cable products, conduit, and cable accessories; to increase the concentration of production and sale of various wire and cable products in the hands of a relatively few companies; and to foster additional acquisitions in the wire and cable field with a consequent increase in economic concentration.

The complaint seeks divestiture by Alcoa of the business, assets, properties and good will acquired from Rome, and such other equitable relief as may be necessary to eliminate the anti-competitive effects of the acquisition. The complaint further requests the issuance of a preliminary injunction prohibiting any consolidation or intermingling of the assets, personnel or businesses of Alcoa and Rome, and any changing of the corporate structure of the Alcoa subsidiary which is presently conducting the Rome business. On April 1, 1960, Chief Judge Stephen Brennan, on the basis of the verified complaint and an affidavit, signed an order to show

cause why a preliminary injunction should not issue prohibiting the defendants, pending determination on the merits, from intermingling the businesses of Rome and Alcoa and from effectuating a corporate consolidation of Alcoa and its new subsidiary, also named Rome. The hearing on the motion for preliminary injunction is set for April 26, 1960.

Staff: Samuel Karp, Michael H. Gottesman and Roy C. Cook (Antitrust Division)

Complaint Filed Under Section 7 of Clayton Act and Section 1 of Sherman Act. United States v. Gamble-Skogmo, Inc., et al., (W.D. Mo.) A civil complaint was filed on April 1, 1960 charging that the recent acquisition by Gamble-Skogmo, Inc., and Bertin C. Gamble (President and Chairman of the Board of Directors of Gamble-Skogmo, Inc.) of a controlling stock interest (about 46%) in Western Auto Supply Company, has brought to fruition a course of conduct designed to acquire, merge, and otherwise unify the defendant corporations and eliminate the actual and potential competition existing between them, and the effect of which may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act and to unreasonably restrain trade and commerce in violation of Section 7 of the Clayton Act and to unreasonably restrain trade and commerce in violation of Section 1 of the Sherman Act.

Gamble-Skogmo, Inc., and Western Auto Supply Company are engaged in the operation of chain and retail stores and in the supplying of lines of merchandise to associate retail stores having a franchise with these corporations. In 1958, Gamble-Skogmo had 370 retail stores and 1,874 franchised dealers, and Western Auto had 376 retail stores and 3,632 franchise dealers which specialize in retailing of so-called "hard lines" of merchandise such as auto and bicycle supplies and accessories, sporting goods, electrical appliances, radios, light hardware and other similar products. The stores and franchised dealers of Western Auto and Gamble-Skogmo are located throughout the United States and Canada. Both companies also own and operate warehouses in several cities, which are utilized in the distribution and supplying of merchandise to their retail stores and franchised dealers. Western Auto is the largest company in the United States engaged in the operation of these types of specialized retail stores and franchised dealers. Gamble-Skogmo is the second largest company. In 1958, Western Auto's net sales were over $223 million and its assets listed at over $94 million. For the same year, Gamble-Skogmo's net sales were over $119 million and its total assets listed at over $78 million.

Staff: Earl A. Jinkinson, Ralph M. McCareins and Bill G. Andrews (Antitrust Division)

SHERMAN ACT

Court Holds Common Sales Agency Violates Section 1 of Sherman Act. United States v. American Smelting and Refining Company, et al., (S.D.N.Y.).

The original complaint in this case was filed on October 9, 1953 and charged defendants American Smelting and Refining Company (ASR) and St. Joseph Lead Company (St. Joe), both of New York City, with violations of Sections 1 and 2 of the Sherman Act in the mining smelting and refining, and sale of primary (virgin) lead in interstate and foreign commerce. On October 11, 1957 a consent judgment was entered against ASR, terminating the case as to that Company.

On March 4, 1958 the plaintiff filed an amended complaint adding The Bunker Hill Company (Bunker Hill) of Kellogg, Idaho as an additional party defendant. Pretrial proceedings were instituted before Judge David N. Edelstein on February 3, 1959. At the Court's suggestion a second amended complaint was filed on February 17, 1959 against defendants St. Joe and Bunker Hill. This complaint eliminated features of the case disposed of by the earlier consent judgment against ASR, and charged that "Beginning in or about 1922 and continuing to date the defendants St. Joe and Bunker Hill have been parties to a combination and conspiracy and a succession of contacts in unreasonable restraint of interstate and foreign commerce in primary lead, in violation of Section 1 of the Sherman Act."

After four pre-trial conferences, formal trial began on May 4, 1959 with the defendants' case in chief, and was completed on May 20, 1959.

At a post-trial hearing on June 15, 1959 plaintiff submitted additional requested findings of fact supplementing those submitted in pretrial, and defendants submitted their requested findings. The parties were given until July 15, 1959 to comment upon the requested findings of the opposing party. Final argument was held November 4, 1959.

On April 7, 1960 Judge Edelstein handed down a 73-page opinion, including 266 findings of fact, in which he adopted the plaintiff's requested conclusion of law that "Since 1922 and continuing to date the defendants St. Joe and Bunker Hill have been parties to a combination and conspiracy and a succession of contracts in unreasonable restraint of interstate and foreign commerce in primary lead, in violation of Section 1 of the Sherman Act".

The basic arrangement under attack was a so-called sales agency contract between Bunker Hill, second largest miner and third largest refiner of primary lead in the United States, as Producer, and St. Joe, largest miner and second largest refiner of primary lead in the United States, as Agent, whereby St. Joe was the exclusive marketer of Bunker Hill lead east of the 95th meridian in the United States and Canada and in certain foreign countries. Plaintiff contended that this exclusive sales agency was in effect a division of sales territories between competitors, since both Bunker Hill and St. Joe were engaged in the mining, refining and sale of primary lead. Plaintiff further contended that the arrangement operated not only to prevent Bunker Hill from competing with St. Joe in the eastern territory allocated to St. Joe by the contract, but also operated to prevent St. Joe from competing with Bunker Hill in the western territory reserved to Bunker Hill.

Plaintiff further urged that from 1922, when the initial Bunker Hill-St. Joe contract was entered into, to date the defendant St. Joe determined the price not only for its own lead sold in the East but also for Bunker Hill lead sold in the East, and that consequently the case involved an illegal price-fix between competitors.

Judge Edelstein sustained all of the plaintiff's contentions. In particular he noted that the effect of the relationship between Bunker Hill and St. Joe had been to foster stabilization of the premium charged for corroding grade lead, the grade of lead primarily involved in the St. Joe-Bunker Hill relationship. This grade of lead, Judge Edelstein pointed out, had been sold for years at a constant premium of $2 a ton over the price of common lead.

Judge Edelstein rejected defendants' argument that they lacked the power to control prices because of competition from other primary lead producers, imported lead, and secondary lead produced from scrap, stating:

> Nor is there any concern in this case with the factors, upon which defendants have laid heavy stress, of the competition from other producers of primary lead, the competition from secondary lead and the competition from imported lead. For the inability of the defendants to control the market is irrelevant in a Section 1 conspiracy case. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, note 59 at p. 225; United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310. The defendants have combined to fix prices on the common and corroding lead which is sold by St. Joe east of the 95th meridian, and the combination is illegal under Section 1 of the Sherman Act. United States v. Socony-Vacuum Oil Co., supra.

While the defendants contended that the terms of their written contract did not prevent St. Joe from selling its own lead in the west, Judge Edelstein held that their arrangement in practical effect accomplished this result. Judge Edelstein stated:

> It is true that the current contract between the defendants in terms only applies to the exclusive sale of Bunker Hill lead by St. Joe in the East, and to the sale of Bunker Hill lead by Bunker Hill in its reserved territory, but their agreements have in fact operated, and were intended to operate, to divide the United States lead market between the defendants on a territorial basis.

The Court concluded its opinion by stating that "the plaintiff is entitled to an order prohibiting Bunker Hill from marketing its lead through St. Joe or any other competitor".

Staff: Allen A. Dobey, Joseph W. Stanley and John C. Fricano
(Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

Government Held Responsible Under New York Law for Serviceman's Operation of Personal Automobile En Route to New Permanent Duty Station. Joanne Cooner, et al. v. United States (C.A. 4, March 1, 1960). The orders assigning an Army officer to a new duty post in Ottawa, Canada permitted him to utilize whatever form of transportation he desired with expenses to be paid by the Government. He elected to drive his personal automobile, and while en route on a New York highway, he collided with plaintiff's car.

Plaintiffs brought this suit under the Tort Claims Act to recover for the injuries sustained by them as a result of the officer's allegedly negligent operation of his automobile. The district court entered summary judgment for the United States on the ground that the officer had not been acting within the scope of his employment at the time of the accident.

The Court of Appeals reversed, 2-1, and remanded the cause for further proceedings. It held that, under the applicable respondeat superior law of New York, the officer was operating his automobile in the course of his employment for the Government while he was traveling to Ottawa. It stated the crucial question under New York law to be whether the person causing the injury is the defendant's servant and whether he is, at the time of the accident, engaged in his own or his master's business. The Court emphasized that the Army officer, who was a servant of the United States, made the journey because his orders so directed, and not for any personal reason.

Notwithstanding its professed reliance on New York law, the majority decision seems to turn on the effect of the 24-hour-a-day control exercised by the Army over soldiers. For that reason consideration is being given to seeking certiorari.

Staff: Mark R. Joelson (Civil Division)

GOVERNMENT CONTRACTS

Contract Appeals Board Findings Final Unless Unsupported by Substantial Evidence or Made Fraudulently, Capriciously, or in Bad Faith; Contractor Has Burden of Proving Unreasonableness of Reprocurement Contract Price. Hoffmann v. United States (C.A. 10, February 28, 1960). Hoffmann contracted to supply the Government with

certain goods. When he failed to make delivery within the contract period, the Contracting Officer advised him that the Government was considering termination of the contract for default unless he could show that the default was excusable. Hoffmann replied that his delay was due to the default of a subcontractor and his difficulty in locating another supplier to take the place of the defaulting subcontractor. The contract provided that a default was excusable only if it "arises out of causes beyond the control and without the fault or negligence of the Contractor" and that a default by a subcontractor was excusable only if due to a cause which would excuse the prime contractor. The Contracting Officer decided that Hoffmann's reason for default was not excusable and terminated the contract. This decision was affirmed by the Board of Contract Appeals. The supplies were then reprocured at a cost higher than the price under Hoffmann's contract. The Board of Contract Appeals again affirmed.

The Government instituted this action to recover the excess cost of reprocurement. Hoffmann denied liability, claiming that his failure to deliver within the contract period was beyond his control and therefore excusable, and that the price of the second contract was exorbitant. The district court entered judgment for the Government, finding that Hoffmann's default was due to the default of his subcontractor, for which no excuse was offered, that he could have obtained the needed material elsewhere, and that the price of the reprocurement contract was not excessive.

The Court of Appeals affirmed. It held that, as the factual determinations of the Board of Contract Appeals were supported by substantial evidence, and as no allegations were made that the Contracting Officer had acted fraudulently, capriciously, or in bad faith, the Board's findings of fact were final. It further held that, as the contract permitted the Government to reprocure "supplies or services similar to those" in the terminated contract "upon such terms and in such manner as the Contracting Officer may determine appropriate," the contractor had the burden of proving that the cost of reprocurement was unreasonable. The Court agreed with the district court that Hoffmann had failed to sustain this burden.

Staff: Sherman L. Cohn (Civil Division)

MORTGAGES

SBA Chattel Mortgage Held Void for Failure to Comply With State Bulk Sales Law; State Bulk Sales Law Adopted As Applicable Federal Rule. A. J. Bumb, Trustee v. United States (C.A. 9, March 18, 1960). On November 9, 1956, Dinsmore delivered its promissory note for $10,000 to Small Business Administration, together with a chattel mortgage covering its machinery and equipment. On the same date a "Notice of Intention to Chattel Mortgage" was filed in the Los Angeles County recording office, as required by the California bulk sales law. Cal. Civ. Code §3440.1. The notice stated that the consideration for the mortgage would be paid at SBA's Los Angeles Office on November 21. On that date $5,850 of the consideration was paid. The remainder was subsequently paid in two separate installments.

Dinsmore was adjudicated a bankrupt on May 13, 1957. The trustee in bankruptcy claimed that SBA's mortgage was void as against him for non-compliance with Section 3440.1, asserting, inter alia, that SBA's failure to pay all the consideration on November 21 was a violation of that statute. The district court held that the mortgage was valid.

On the trustee's appeal, the Court of Appeals reversed. It held, first, that SBA's payment of consideration for the mortgage in installments violated Section 3440.1 since the recorded notice of intention did not indicate that payment would be made in this fashion. Second, it rejected the Government's contention that, in any event, the state statute was inapplicable because federal law controls the validity of mortgages taken by SBA in the exercise of its Congressionally-authorized lending activities. The Court recognized that federal law was controlling, but concluded that Section 3440.1 should be adopted as the applicable federal rule in order "to further federal policy." In so deciding, the Court emphasized that "Section 3440.1 regulates only the manner of acquisition of a valid security interest" rather than its enforcement after default. This distinction had previously been given weight by the same Court in United States v. View Crest Garden Apts., 268 F. 2d 380 (C.A. 9), certiorari denied, 361 U.S. 884.

A petition for rehearing will be filed on the state law question.

Staff: William A. Montgomery (Civil Division)

SOCIAL SECURITY ACT

Appeals Council's Decision Not to Extend Time for Review of Referee's Decision Held No abuse of Discretion. Florine W. Langford v. Flemming (C.A. 5, March 22, 1960). In 1951 plaintiff, as guardian of her adopted daughter, applied to the Social Security Administration for child insurance benefits based on the wage record of her recently deceased husband. The referee rejected her claim on the ground that the adoption had not been consummated prior to the husband's death. In a letter so notifying plaintiff, he advised her of her right to appeal to the Appeals Council "within thirty days from the date of this letter * * *." Nearly six years thereafter, plaintiff sought review by the Appeals Council. She relied on 20 C.F.R. 403.711 (a)(2), permitting an extension of the 30-day period, after its expiration, for "good cause shown * * *." In this connection, she alleged that her prolonged failure to take action was due to her distraught state of mind at the time of the referee's decision, and her belated learning of her right to seek an extension. The Appeals Council rejected her application for extension.

Plaintiff thereupon brought this suit under 42 U.S.C. 405(g) for review of the administrative decision. The district court dismissed the complaint and the Court of Appeals affirmed. The appellate court stated initially that the issue was solely whether the denial of

plaintiff's application for an extension was an abuse of discretion, and did not concern the merits of her claim for benefits. On this question it held that the Appeals Council's determination, that plaintiff had not shown the requisite "good cause" for an extension, was not arbitrary or unreasonable.

Staff: United States Attorney William C. Calhoun and Assistant United States Attorney William T. Morton (S.D. Ga.)

DISTRICT COURTS

ADMIRALTY

F.R.C.P. 4(f); Jurisdiction over Commandant of United States Coast Guard May Be Obtained Only in District of Columbia. William Provenzano v. Alfred C. Richmond (S.D. N.Y., March 7, 1960). In this action brought pursuant to the Administrative Procedure Act, 5 U.S.C. 1001 et seq., against defendant as Commandant of the United States Coast Guard, plaintiff sought to have the District Court review and declare null and void the suspension of his Merchant Marine license. Defendant moved to set aside the attempted service of the summons and complaint pursuant to F.R.C.P. 12(b). In granting the motion, the Court held that F.R.C.P. 4(d)(5) requires personal service of the summons and complaint and that attempted service in the District of Columbia, of process issued out of the District Court for the Southern District of New York, was contrary to F.R.C.P. 4(f). That rule states that summons may only "be served anywhere within the territorial limits of the state in which the district court is held." The Court further held that, since defendant was officially domiciled in the District of Columbia, he was not subject to suit in the Southern District of New York.

Staff: Captain Morris G. Duchin, USN (Civil Division)

No Mandamus Power in District Courts Outside District of Columbia. George Alfred Popham v. Arzt (S.D. N.Y., March 9, 1960). Plaintiff, suing defendant as Officer in Charge, Merchant Marine Investigation Section, United States Coast Guard, brought this action demanding the return of Merchant Marine documents previously surrendered to defendant because of alleged misrepresentations made by him. Defendant moved to dismiss the complaint pursuant to F.R.C.P. 12(b). The District Court granted the motion, holding (1) that the burden was on plaintiff to allege essential jurisdictional facts; (2) that Congress has not conferred mandamus powers on the federal courts outside the District of Columbia, and that the court therefore lacked jurisdiction because the relief sought was in the nature of mandamus; (3) that no claim was stated against defendant, since only the Commandant of the Coast Guard has authority, if any, to take the action sought to be compelled; (4) that since the Commandant is officially domiciled in the District of Columbia,

he is not subject to suit in New York; and (5) that the Commandant is not subject to process issued by the District Court for the Southern District of New York under F.R.C.P. 4(f).

Staff: Captain Morris G. Duchin, USN (Civil Division)

United States Not Subject to Statute of Limitations; Issue of Laches Reserved for Trial. United States v. John Livanos (S.D. N.Y., March 15, 1960). The United States sued upon a contract of sale to the defendant, a non-citizen purchaser of a surplus Liberty ship under authority granted by the Merchant Ship Sales Act of 1946, 50 U.S.C. 1735 et seq. The Government subsequently moved to strike from defendant's answer the affirmative defenses of the statute of limitations and laches. The District Court held that the defense of limitations was improper. See United States v. Summerlin, 310 U.S. 414 (1940). While observing that, as a general rule the United States is not subject to the defense of laches, the Court nevertheless noted decisions requiring the United States to conduct its business affairs "on business terms" despite the "largeness of its dealings" and its necessary reliance on its agents and employees. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). On this reasoning, it determined that the defense of laches was not absolutely precluded and reserved the issue for decision after full consideration of the statute, the contract and the situation of the parties.

Staff: Gilbert S. Fleischer (Civil Division)

FEDERAL TORT CLAIMS ACT

Binding Effect of Contractual Provisions Exculpating Government from Liability; Misrepresentation Exception. Lon Massey d/b/a Massey Equipment Company v. United States (D. Guam, March 2, 1960). Plaintiff was successful bidder for some surplus incendiary bombs from an Air Force facility on Guam. Among the "Special Conditions" in the invitation for bids were provisions noting the nature of the items as explosives, and stipulating that the purchaser agreed to assume all risks and save the Government harmless from liability to others. Plaintiff, being interested only in the scrap steel in the bombs, was obliged to "demilitarize" them. In the course of this demilitarization process, a fire of undetermined origin broke out and damaged plaintiff's property and that of adjoining occupants. Plaintiff then brought this suit to recover for its own damages and for those it might be held to owe the other property owners, who had brought suit against him.

The Government moved for summary judgment on various grounds, including speculative damages, assumption of risk, and the exculpatory provisions of the sales agreement. Plaintiff sought to avoid the express contractual provisions by asserting that oral modifications had been made. He relied on alleged misrepresentations by Government agents that the active ingredient in the bombs - napalm gel-was not dangerous. The District Court granted the Government's motion holding

that the conditions of the contract were clear, and that plaintiff could not avoid them on a theory of misrepresentation, since claims arising out of deceit or misrepresentation are expressly excluded from the Tort Claims Act by 28 U.S.C. 2680(h).

Staff: United States Attorney H. G. Homme, Jr. (D. Guam)

Complaint Dismissed on Plaintiff's Failure to Appear for Medical Examination. Lloyd Lairson v. United States (N.D. Cal., April 5, 1960). Plaintiff, injured when a stove in an Officers' Mess blew up, brought this suit for damages under the Tort Claims Act. The pretrial order directed him to submit to a physical examination by a doctor chosen by the Government, no less than five days prior to trial (which was set for April 5, 1960). The Government designated the doctor and the time of examination, but plaintiff failed to appear. The Court accordingly dismissed the action with prejudice.

Staff: United States Attorney Lynn J. Gillard; Assistant United States Attorney Frederick J. Woelflen (N.D. Cal.)

Indirect Attempt to Obtain Review of Veterans' Administration Decision of Forfeiture of Benefits; Libel Exception. Joseph W. Di Silvestro v. United States (E.D. N.Y., March 21, 1960). Plaintiff's pension and disability benefits were determined by the Veterans Administration to have been forfeited, in a decision which is not judicially reviewable by virtue of statutory finality provisions, e.g., 38 U.S.C. 211(a). He has persistently sought judicial review of this decision, without success. See cases reported at 132 F. Supp. 692 (E.D. N.Y.), affirmed, 228 F. 2d 516 (C.A. 2), certiorari denied, 350 U.S. 1009, rehearing denied, 351 U.S. 928; and 151 F. Supp. 337 (E.D. N.Y.), certiorari denied, 355 U.S. 935, rehearing denied, 355 U.S. 968.

In this suit, brought ostensibly under the Tort Claims Act, five counts were pleaded. The District Court dismissed three of them as "another attempt" to obtain review of the VA decision of forfeiture. The other two counts were based on alleged wrongful disclosure by VA employees of confidential, privileged, and false information to New York Senators Javits and Keating. The Court also dismissed these counts, holding that plaintiff himself had instigated the Senatorial inquiries which impelled the disclosure, that the information was neither privileged nor confidential and that the charge of falsity was in any event not actionable. The Court characterized the latter charge as a claim for libel, and noted that libel is excepted from the coverage of the Tort Claims Act by 28 U.S.C. 2680(h).

Staff: United States Attorney Cornelius W. Wickersham, Jr., and Assistant United States Attorney Malvern Hill, Jr. (E.D. N.Y.); Joseph Langbart (Civil Division)

United States Not Liable for Negligence of Contract Mail Carrier. Ervin Smick, et al. v. United States (D. Nev., February 18, 1960). Plaintiffs brought suit against the United States for damages sustained in a head-on collision with a pickup truck owned and operated by a rural route mail carrier, who was transporting mail pursuant to a contract let by the Postmaster General. See 39 U.S.C. 429.

The District Court dismissed on the ground that the mail carrier was not an agent, employee, or servant of the United States, but was, rather, an independent contractor for whose actions the Government was not responsible. It held, first, that the question turned on local instead of federal law. Under the applicable Nevada law, the existence of a master-servant relationship depends on whether the alleged master has the power to select the alleged servant, and whether he has a right of subsequent control over the actions of the servant. Here, the Court held, no such relationship existed because (1) the Postmaster General was obligated by statute to contract with the "lowest responsible bidder," and (2) the Government did not have the requisite control over the manner in which the carrier performed the contract, notwithstanding the fact that his duties were specified in some detail in the contract.

Staff: United States Attorney Howard W. Babcock; Assistant United States Attorney Arthur M. Taylor, Jr. (D. Nev.); E. Leo Backus (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

MAIL FRAUD

Check Tear-up Scheme (18 U.S.C. 1341, 2314). United States v. Doran (N.D. Ill.). After a four-week trial seven persons were found guilty under a 37-count indictment charging mail fraud in a scheme which preyed upon visitors to Chicago who were in search of entertainment. Convicted of mail fraud and interstate transportation of falsely altered securities were: David Doran, Aleck Harris, Nate Schulman, Dominick Abbrescia, Joseph LoCelso, Julius Joseph Grieco and Amedeo DiDomenico. The scheme operated in the following fashion:

Taxi drivers would convey the tourist-victims to taverns operated by defendants where women employees would induce them to purchase maximum amounts of drinks both for themselves and the women, the drinks of the victims being fortified with extra alcohol to induce rapid inebriation. The women employees would then surreptitiously obtain the wallets of the tourists, removing cash and blank checks and returning the wallets to their persons without being detected. When all the cash of the victims had been spent or stolen by the women operators the tourists would be induced to sign checks on the representation that they could be cashed on the premises. These checks were taken to another part of the premises where copies of the checks were made and the signatures of the victims forged by tracing the signatures on the copies. The copies were returned to the victims' booths where the women operators would manage to spill drinks on them, the copies being then torn up in the presence of the victims who were unaware that their original checks had been kept and would be negotiated after their departure. The scheme, known as the "tear-up", had several variations, each of which resulted in no checks being cashed on the premises.

The purloined checks were later put through business enterprises in which the operators of the scheme had interests, the amounts often being raised. Because of the character of the taverns in which the victims had been defrauded the operators of the scheme were confident that they would seek to avoid publicity in their home towns by complaint to the authorities. Sentencing in the case has been set for April 28, 1960.

Staff: United States Attorney Robert Tieken; Assistant United States Attorneys Paul D. Keller and James B. Parsons (N.D. Ill.).

SECURITIES ACT OF 1933

Use of Mails in Scheme to Defraud. United States v. Charles F. Newell, et al. (D. Neb.). After a two-week trial, a jury on March 21, 1960, found Charles F. Newell, Chauncey Allen and Charles Johnson guilty on all twenty

counts of an indictment charging violations of the Securities Act of 1933.

Defendants were officers of Unity Insurance Company, which was incorporated in Nebraska in 1956. They were also operators of Unity Insurance Agency, which acted as a sales organization to sell stock of Unity Insurance Company to the general public and was to retain the funds raised until $100,000 was obtained for deposit with the State Insurance Department, which was necessary to obtain a license to write insurance.

Forty percent of the authorized stock of the Company was optioned to the officers and directors, and was sold by them at prices substantially higher than they paid, the officers keeping the profits for their own personal accounts. The investors were told that a large portion of the money secured from the sales of the stock had been deposited with the State in an escrow or safekeeping account, but no funds were in fact set aside as a reserve. The proceeds, which were well over $100,000, were used to pay high salaries to the officers and directors and for investments in business ventures unrelated to Unity Insurance Company.

Staff: United States Attorney William C. Spire; Assistant United States Attorney Thomas J. Skutt (D. Neb.).

SECURITIES ACT OF 1933

Sale of "Limited Associates Agreements"; Use of Mails in Scheme to Defraud. United States v. George J. Werner (N.D. Ind.). George J. Werner was found guilty on six counts of a seven count indictment charging violations of the Securities Act of 1933 and was sentenced on March 1, 1960 to 3 years on each of the six counts, the sentences to run concurrently.

Werner engaged in the selling of "Limited Associates Agreements," which were preorganization subscriptions in Werner Oil Development Company. No registration statement was filed with respect to these securities and the company was never formed.

Werner misrepresented to the investors that he was a geologist who had invented a number of oil-finding instruments, by which he could unerringly locate oil and gas pools, that he had acquired leases in Indiana and that tests thereon showed the presence of a considerable amount of oil.

Staff: United States Attorney Kenneth C. Raub; Assistant United States Attorney Marvin H. Kinney (N.D. Ind.).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Alienage; Prior Deportation; Application of Section 242(f). Mesina v. Hoy, (C.A. 9, April 4, 1960). Appeal from judgment denying declaratory and injunctive relief.

Appellant, born in the Philippines in 1903 and at birth a national of the United States, first came to this country in 1924 where he resided from that year to 1936. By Section 8(a)(1) of the Act of March 24, 1934, Congress provided that pending the full independence of the Philippines, Filipinos, for purposes of the immigration laws, were henceforth to be treated as if aliens. On June 25, 1935, appellant was arrested under an immigration warrant upon charges that he had been found managing a house of prostitution, or music hall or other place of amusement where prostitutes gather. In February 1936, he was ordered deported on the grounds that he had been found managing a house of prostitution, and had been found receiving, sharing in, or deriving benefits from the earnings of a prostitute. He was deported to the Philippines April 18, 1936.

Thereafter, appellant entered the United States on several occasions being landed temporarily as a seaman and on each occasion departed. Lastly, appellant entered the United States as a crewman on December 31, 1956, under a landing permit which was extended to February 27, 1957. On this occasion he remained. In June, 1957 he was ordered to show cause why he should not be deported for having remained longer than permitted. After the usual hearings the Special Inquiry Officer found appellant deportable under Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2). On appeal the Board of Immigration Appeals in December 1957, directed a reopened hearing in order to include the record of the deportation proceeding in 1935. Again the Special Inquiry Officer found appellant deportable and the order of deportation was affirmed by the Board of Immigration Appeals in August 1958. On October 16, 1958, he filed the suit which resulted in this appeal. (See Bulletin Vol. 7, No. 6, p. 153).

The Court found the law to be well settled that an alien crewman who overstays his permitted time or fails to comply with the conditions of his landing permit is subject to deportation. Appellant contended that the only appropriate charge against him should be pursuant to Section 242(f), 8 U.S.C. 1252(f). That provision authorizes deportation by reinstatement of a previous order of deportation where one has unlawfully made reentry following a previous deportation. He contended that the reinstatement of the deportation order made in 1936 was mandatory and that his deportation must be tested upon the proceedings leading to that order before the present order could be sustained. The Court found this contention to have been decided adversely to appellant in DeSouza v. Barber, (C.A. 9) 263 F. 2d 470, cert. den. 359 U.S. 989. It was immaterial, therefore, that the proceedings in this case did

not follow Section 242(f), if appellant is properly deportable as charged under Section 241(a)(2). Appellant sought to distinguish the DeSouza case by pointing out that DeSouza was an alien at the time of his original deportation whereas the appellant was an American national when previously deported.

To this the Court pointed out that appellant clearly was an alien when he last entered in 1956 and with respect to his being a national rather than an alien when deported in 1936, adverted to the Supreme Court decision in Rabang v. Boyd, 353 U.S. 427, where the Court stated Congress had and exercised the power to exclude or deport Filipinos by Section 8(a)(1) of the Independence Act of March 24, 1934, by providing that citizens of the Philippine Islands who were not citizens of the United States shall for purposes of the immigration, exclusion, or expulsion of aliens be considered as if they were aliens. Appellant argued that Section 8(a)(1) of the Philippine Independence Act did not become effective until May 14, 1935 and that the acts for which he was charged in that year and deported the following year had been committed prior to that section's effective date. The Court held, however, that the effective date was May 1, 1934, the date on which the Philippine Legislature in accordance with the provisions of the Act accepted its provisions by a concurrent resolution and that the provision under which the prior deportation was effected, did not involve the limitation as to "entry" applied in Barber v. Gonzales, 347 U.S. 637.

The Court found it unnecessary to consider alleged infirmities in the proceedings held preceding the alien's prior deportation. For more than 20 years appellant had not sought any review of the order of deportation resulting from those proceedings or questioned its validity. He had not sought lawful entry under the provisions of existing immigration laws. Although he had landed on numerous occasions as a crewman between 1946 and his last entry he had made no attempt to attack the prior deportation order until 1956. After this long period of acquiescence the prior proceedings are no longer open to collateral attack.

Judgment affirmed.

Physical Persecution; Scope of Judicial Review. Batistic v. Pilliod, (N.D. Ill., March 22, 1960). Suit for declaratory judgment under Administrative Procedure Act to review denial of withholding of deportation.

Plaintiff, a Yugoslav, legally entered the United States in April, 1958, as a nonimmigrant and was ordered deported pursuant to Section 241(a)(2), 8 U.S.C. 1251(a)(2), on the ground that he had remained beyond the time for which temporarily admitted. He did not contest his deportability. He did apply pursuant to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h) for a stay of deportation on the ground that he would be subject to physical persecution in Yugoslavia. His principal claim was predicated upon the fact that he is a Roman Catholic and anti-Communist and, therefore, would be persecuted in that country. The Court quoted at length from the administrative decision denying his application which found that he had

never been physically persecuted in Yugoslavia, had always attended religious services there, and it had been well known that he and his family were anti-Communists. His father had returned to Yugoslavia and there was no claim that he had been physically persecuted since his return.

Plaintiff further urged that he would be physically persecuted while undergoing military training in Yugoslavia by being assigned to some obscure post or camp. This had been rejected administratively as pure conjecture.

The Court stated that under Section 243(h), the withholding of deportation was clearly vested in the discretion of the Attorney General. Quoting from United States ex rel. Cantisani v. Holton (C.A. 7), 248 F. 737, 738, the Court concluded that plaintiff was afforded procedural due process; that his application had received fair consideration, and that there was no showing of arbitrariness nor capriciousness.

Moreover the Court quoted at length from Anderson v. Holton (C.A. 7), 242 F. 2d 596, involving a denial of suspension of deportation. That is a statutory privilege within the discretion of the Attorney General. The court had found it to be an "Agency action by law committed to agency discretion" and that accordingly judicial review was not available under Section 1009 of the Administrative Procedure Act. This Court then stated as its view that the discretion vested in the Attorney General by section 243(h) to withhold deportation was also an agency action committed to agency discretion and another instance of judicially nonreviewable discretion.

The Court, therefore, was without jurisdiction to review the order. The defendant's motion for summary judgment was granted.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Authority of Executive to Impose Restrictions Against Travel to Communist China and to Deny Passports in Exercise of Power to Conduct Foreign Affairs. Charles O. Porter v. Christian A. Herter. On April 14, 1960, the United States Court of Appeals for the District of Columbia upheld the right of the Secretary of State to refuse to validate Congressman Porter's passport to travel to Communist China, one of the geographic areas in the world in which travel by American citizens is currently proscribed because of foreign policy considerations.

Congressman Porter had brought suit in the District Court urging that because of his status of a Congressman he was entitled to travel to Communist China to secure information which would be useful to him in connection with his legislative duties. The suit sought to raise a constitutional question of separation of powers, in addition to reopening the questions decided by the Court of Appeals in Worthy v. Herter, 270 F. 2d 905, certiorari denied, 361 U.S. 918 and Frank v. Herter, 269 F. 2d 245, certiorari denied 361 U.S. 918. (See Bulletin, Volume 7, Nos. 19, 21 and 26).

The per curiam opinion of the Court of Appeals noted that, although Mr. Porter had been authorized to travel on Committee business to Okinawa and Japan to investigate personnel problems of American overseas employees, he "had no comparable authorization from Congress or from any of its committees to travel in Communist China. Although he is a member of Congress, that status alone does not entitle him to be exempted from regulations or orders of the Executive Department in matters within the latter's constitutional competence." Since he proposed to visit Communist China in his individual capacity as a Congressman, the Court held the case involved no conflict between the legislative and executive branches, and that Mr. Porter must conform to passport regulations applied to all citizens.

Staff: Kevin T. Maroney, Oran H. Waterman and Bruno A. Ristau (Internal Security Division)

Contempt of Congress. United States v. Frank Grumman; United States v. Bernard Silber (D.D.C.) On April 14, 1960, Judge Joseph C. McGarraghy sentenced Frank Grumman and Bernard Silber each to four months in jail and a fine of $100 for contempt of Congress. On March 15, 1960, Judge McGarraghy, sitting without a jury, found Grumman guilty of contempt for refusing to answer a question at a hearing before the House Committee on Un-American Activities in July 1957 (see Bulletin, Vol. 8, No. 7, p. 200). On March 23, 1960, Silber was convicted on three counts of contempt by Judge McGarraghy, without a jury, for his refusal to answer questions at the same hearings (see Bulletin, Vol. 8, No. 8, p. 242).

Staff: Assistant United States Attorney William Hitz (Dist. Col.)

Revocation of Security Clearance to Enter Naval Installation. Cafeteria and Restaurant Workers Union et al. v. McElroy et al. (C.A.D.C., April 14, 1960). Rachel Brawner and the union of which she was a member sued the Secretary of Defense and other officials officially and individually and the M & M Restaurants, Inc., her employer, for a declaratory judgment and injunction and other relief because her employer, on instructions of the Security Officer of the Naval Gun Factory, required her to surrender the identification badge which she had to have to enter the Gun Factory, where she had been employed as a cook in a cafeteria operated by her employer as a concession. Bulletin, Vol. 5, No. 21. The District Court granted summary judgment dismissing the complaint.

On appeal the Court of Appeals by a 2 to 1 vote reversed, holding that the revocation of the employee's security clearance without a hearing and without the right of confrontation and cross-examination in effect denied her access to her work and deprived her of her job contrary to the holding of the Supreme Court in Greene v. McElroy, 360 U.S. 474. Bulletin, Vol. 7, No. 19. A petition for rehearing by the Court en banc was filed and granted and the appeal was re-argued November 9, 1959. Bulletin, Vol. 7, No. 24.

The full bench of nine judges affirmed the judgment of the District Court by a vote of 5 to 4, in an opinion by Chief Judge Prettyman, with a concurring opinion by Circuit Judge Danaher. Edgerton, Fahy, Bazelon and Washington, Circuit Judges, dissented.

The majority opinion held that the Commander of the Gun Factory had, under the statutes and regulations, complete discretion to deny access to the Gun Factory to any private person for reasons of security, that the taking away of the employee's identification badge did not infringe her right to employment, because she had no right to work at the Gun Factory except in accordance with the regulations, and that on the facts the action of the Commander did not amount to a discharge of the employee or inflict a "stigma," which would give rise to a claim for relief. The Court pointed out that, in distinction from the Greene v. McElroy situation, a wide variety of opportunities for employment are open to a cook. The nub of the decision seems to be that the Government can deny access by the public to Government property and that in the case of a naval installation the requirements of national security have controlling importance.

As indicated, the dissenting judges took the position that the decision in Greene v. McElroy forbade the exclusion of the employee from her work without a hearing and confrontation of witnesses and cross-examination. The minority also took the position that the petition for re-hearing en banc should not have been granted because it was not filed until after the panel which originally heard the appeal had rendered its decision. To this opinion Circuit Judge Danaher took vigorous exception in his concurring opinion.

Staff: On the reargument the appeal was argued by Assistant Attorney General J. Walter Yeagley. With him on the brief were De Witt White, Jerome L. Avedon, Leo J. Michaloski and Justin R. Rockwell (Internal Security Division).

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decision

Assessment and Collection: Priority of Liens; Priority Between Tax Liens and Mechanic's Liens; Order of Distribution Where Prior Mortgage Involved; United States Right of Redemption on Mortgage Foreclosure. River Rouge Savings Bank v. Victor Building Co., et al., (Sup. Ct. of Mich., February 26, 1960). River Rouge Savings Bank brought this action in the Circuit Court of St. Clair County, Michigan, to foreclose some 70 mortgages on properties of S. & M. Building Company and three of its wholly owned subsidiaries (Victor Building Company, Gilbert Construction Company and Le Blanc Construction Company), naming as additional defendants Kerr Lumber Company and Raymond Excavating Company, both of which had furnished materials or performed services in connection with the construction of houses on various of the mortgaged properties for which they claimed valid mechanic's liens, and also the United States, which had filed notices of tax lien against S. & M. Building Company subsequent to execution of the mortgages on its properties.

Issues before the trial court were: (1) as between the bank and the mechanic's lien claimants, whether either or both claimants had established valid mechanic's liens against the properties under Michigan law; and (2) as between the United States and the mechanic's lien claimants, whether the perfected tax liens of the United States were superior to prior inchoate mechanic's liens under state law. The Superior Court held the mechanic's liens valid, and that under Michigan law they took priority over the bank's mortgages. It also seemed to recognize that the Government's tax liens were superior to the mechanic's liens, but held that since the latter took precedence over the prior mortgage liens the tax liens followed the mortgage liens in order of priority. It ordered the mortgaged property sold and the proceeds applied in that order, and gave all interested parties, including the United States, a six-month's period of redemption as provided by Michigan law.

The bank appealed, maintaining the validity of the mechanic's liens under Michigan law had not been established; and the United States appealed, urging priority in payment of its tax liens ahead of mechanic's liens, and also that the United States was entitled to the one year period of redemption provided by 28 U.S.C. 2410(c). On the bank's appeal the Michigan Supreme Court upheld the validity of the mechanic's liens. On the Government's appeal it reversed the Superior Court, holding that the federal tax liens were entitled to priority over the mechanic's liens and since the latter took priority under Michigan law over the mortgage liens the Supreme Court ordered the proceeds of sale applied first to the mortgage liens, second, to the payment of tax liens of the United States,

and third, to the mechanic's liens, with any deficit in the amount available for mechanic's liens to be made up from the amount set aside for mortgage liens.

The Supreme Court also held that the United States is entitled to its one-year period of redemption under 28 U.S.C. 2410(c) regardless of any provision of state law.

Staff: Fred E. Youngman (Tax Division)

District Court Decisions

Jurisdiction; State Court Has No Jurisdiction Over Action to Enjoin Federal Officer in Performance of Official Duty. Pennsylvania Turnpike Commission v. McGinnis, et al. (E.D. Pa.) The Pennsylvania Turnpike Commission brought an action in the Court of Common Pleas, Philadelphia against Edgar McGinnis, the District Director of Internal Revenue, Manu-Mine Research Development Corp. and the Seaboard Surety Company seeking to have the District Director enjoined from paying a refund of taxes to the Manu-Mine Corp. on the grounds that the latter had defrauded the plaintiff out of monies and that it in fact was entitled to the refund. After the action was removed to the Federal District Court by the District Director, the remaining defendants filed a motion to dismiss for lack of jurisdiction which was not opposed by the District Director.

The District Court (Judge Clary) held that there was no jurisdiction over this action. However, the action was remanded to the state court to pass on the relief requested by plaintiff against the remaining defendants.

In holding that the Court of Common Pleas of Philadelphia had no jurisdiction to enjoin a federal officer in the performance of his duties the Court although noting that the issue had never been presented squarely to the Supreme Court cited Tarbles case, 13 Wall. 397 (U.S. 1872) and Albeman v. Booth, 21 How. 506 (U.S. 1858). The Tarbles case involved whether a state commissioner had jurisdiction to inquire into the validity of the enlistment of soldiers and to discharge them. The Supreme Court found no such power to exist.

The Court cited numerous cases involving whether a state court had jurisdiction to issue a writ of mandamus against a federal official pointing out that there was no jurisdiction. However, the Court did not conclude that the instant action was one for mandamus against the District Director.

Staff: United States Attorney Walter E. Alessandroni; and
Assistant United States Attorney James J. Phelan, Jr.
(E.D. Pa.)
Stanley F. Krysa (Tax Division)

Statute of Limitations; Suit to Reduce Assessment to Judgment; Effect of Compromise Offers in Extending Statute of Limitations. United States v. Israel M. Bosk, et al. (S.D. Fla., 5 A.F.T.R. 2d 864). On September 17, 1947, timely assessments were made against taxpayer for unpaid income taxes for the years 1944 and 1945. Thereafter, taxpayer executed Tax Collection Waivers, Form 900, on June 9, 1952 which extended the period during which suit could be commenced to December 31, 1957 and December 31, 1958 for the respective 1944 and 1945 liabilities. On August 15, 1952 taxpayer filed an offer in compromise of these liabilities on Treasury Form 656. According to the terms of this form, taxpayer agreed to waive the benefit of any statute of limitations applicable to the collection of the liability sought to be compromised during the period the offer was pending and for one year thereafter. This offer was rejected on October 7, 1954. Taxpayer then submitted another offer of compromise on Form 656 on February 26, 1957, but withdrew this offer on July 18, 1957. Thereafter, this action was commenced on September 28, 1959.

In a detailed opinion, the Court held that the various offers made by taxpayer operated to extend the statute of limitations until July 15, 1962 for the 1944 taxes and until July 15, 1963 for the 1945 taxes. Further, relying upon Shambaugh v. Scofield, 132 F. 2d 345 (C.A. 5), it was held that the fact that the Commissioner did not sign the waiver agreement contained in the first offer was unimportant since it was clear that the compromise offer was considered on its merits and was rejected by a letter signed by the Commissioner. It held that the rejection letter must be considered in connection with the offer containing the waiver. "It was not contemplated that while Bosk negotiated to better his position the statute should continue to run, so that even though the compromise offers were rejected collection of the tax would be barred by limitation."

The Court also held in this case that the Government could enforce its tax lien upon the cash surrender values of certain policies of life insurance which were owned by the taxpayer. In doing so, it relied at great length upon the opinion of the Fourth Circuit in United States v. Metropolitan Life Insurance Co., 256 F. 2d 17.

Staff: United States Attorney E. Coleman Madsen (S.D. Fla.);
George Elias and Martin A. Coleman (Tax Division)

Summary Judgement Granted on Ground That Government Was Barred from Enforcing Taxpayer's Assignment of Funds Due Against Debtor Where Government Had Participated in Prior Litigation Dismissed on Merits. United States v. Bush Construction Company, (E.D. N.Y.) 4 A.F.T.R. 2d 5250. The Government brought an action against defendant to recover funds due under a service contract on an assignment to the District Director on July 15, 1948 from taxpayer who had performed the services. On March 28, 1947 prior to the assignment an action was brought by taxpayer against Bush Construction Company to recover the debt due that was later assigned. Taxpayer died on December 14, 1948. A motion

to dismiss the action brought by taxpayer was argued on March 19, 1951 at which hearing the assignment was raised. Present at this hearing was a legal representative of the Collector of Internal Revenue who asked the Court for time to ascertain the position of the Government on the assignment. The motion to dismiss was reargued on January 7, 1952 at which time the United States Attorney's office made an appearance for the Government. The Court then dismissed the complaint under Rule 25 (a)(1). An appeal was later dismissed on stipulation by all parties including the United States.

The Court found that the United States was bound by the dismissal of the former action originally brought by the assignor-taxpayer, that the prior dismissal under Rule 25 (a)(1) was an adjudication on the merits; hence it granted defendant's motion for summary judgment. Rule 41 (b).

Staff: United States Attorney Cornelius W. Wickersham, Jr., and Assistant United States Attorney Alfred Sawan (E.D. N.Y.) Stanley F. Krysa (Tax Division)

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