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

May 6, 1960

United States

DEPARTMENT OF JUSTICE

Vol. 8 No. 10

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 8 May 6, 1960 No. 10

CONDUCT OF INVESTIGATIONS IN PARDON APPLICATIONS

The Pardon Attorney announces that effective May 1, 1960, a new policy of referring pardon applications to the Federal Bureau of Investigation for conduct investigations is being inaugurated. Under the new policy, the Pardon Attorney will refer all pardon applications to the central office of the F.B.I. and request that its field offices conduct the investigations into the conduct of the petitioners subsequent to their convictions. After these investigations have been completed and reports submitted, the petition will then be referred by the Pardon Attorney to the United States Attorney, along with a copy of the report of the investigation with a request that he be furnished with a statement of the facts, docket entries, comments and recommendations. It is felt that this procedure will save some time and will make the operations throughout the country more uniform and efficient.

* * *

JOB WELL DONE

A visiting district judge has commended Assistant United States Attorneys Robert F. Nunez, F. William Reeb and Don M. Stichter, Southern District of Florida, on their finesse and trial tactics. The judge observed that Mr. Nunez was most impressive in the trial of a condemnation proceeding in which he succeeded in holding the verdict to a fair and reasonable amount, and that Assistants Reeb and Stichter gained most favorable results in criminal trials which were of an involved and complicated nature.

United States Attorney Cornelius W. Wickersham, Jr. and his staff, Eastern District of New York, have been commended by the Director, Alcohol and Tobacco Tax Division, for the cooperation and assistance rendered in two recent cases in which all of the principal defendants were convicted and sentenced to imprisonment. The Director stated that such help was of material benefit in bringing the cases to a successful conclusion, and that the sentences imposed will have a salutary effect upon other violators in the area.

The F.B.I. Special Agent in Charge has commended Assistant United States Attorney William J. O'Neill, Northern District of Ohio, for the excellent manner in which he presented a recent case to the court and jury, securing a conviction in a most difficult and unusual situation. The Special Agent stated that despite the brief period of slightly more than a week in which Mr. O'Neill had to assimilate the facts, his grasp of such facts was immediate even though they included an understanding

of the accounting methods of the largest banking institution in Akron, that he was enthusiastic in his approach to the problem to the point of making two trips to acquaint himself with the witnesses from the bank and to become familiar with the situs of the offense, and that his most difficult problem came when insanity was pleaded after the Government had rested its case, thus requiring an unusual amount of research and ingenuity in preparation, since the burden of proof reverted to the Government to prove defendant was sane at the time the crime was committed.

The Director, Fruit and Vegetable Division, Agricultural Marketing Service, has expressed thanks and appreciation for the prompt, courteous, cooperative and efficient service rendered by Assistant United States Attorneys William C. Martin and William F. Murrell, Eastern District of Missouri, in a recent matter. The Director stated that from the time he first discussed the matter until the final disposition of the case by the judge, approximately three hours elapsed, that this expeditious handling brought the case to a prompt and successful conclusion, and that it prevented it from becoming just another docket on a possibly overcrowded court calendar.

Assistant United States Attorneys Richard J. Dauber and Melvin C. Blum, Southern District of California, have been congratulated by the Assistant Attorney General, Lands Division, on their excellent handling of a recent case involving mineral interests in 33 separate land tracts which resulted in a signal victory for the Government. With defendants' claims totaling $27,428,856, an award of "no damages" was awarded for each tract.

The Director, Bureau of Inquiry, Interstate Commerce Commission, has expressed appreciation for the cooperation received from Assistant United States Attorney George H. Lewald, District of Massachusetts, in securing the successful conclusion of a recent case. The Director stated that the results were most gratifying to the Commission, as the case involved a most flagrant violation of the Elkins Act.

Assistant United States Attorneys Morton J. Schlossberg and Joseph J. Marcheso, Eastern District of New York, have been commended by the District Supervisor, Bureau of Narcotics, on the successful conclusion of a recent case in which the tenuous nature of the evidence made the conviction more than gratifying. The District Supervisor stated that Mr. Schlossberg's legal astuteness and Mr. Marcheso's untiring efforts in the preparation of the case were responsible for the conviction of a major racketeer who had long flouted enforcement authority.

The Postal Inspector has commended Assistant United States Attorney Connor F. Schmid, District of Minnesota, on the able manner in which he prepared a recent case involving mail fraud and the mailing of obscene materials. The two defendants were each sentenced to three years in prison and fined $2,000. Both the Minneapolis Tribune and the St. Paul

Pioneer Press carried commendatory editorials on the outcome of the case.

United States Attorney Dale M. Green and Assistant United States Attorney Robert L. Fraser, Eastern District of Washington, have received heartiest congratulations from the General Counsel, Securities and Exchange Commission, on the excellent results achieved in a recent prosecution. In expressing thanks for the tireless efforts spent in developing and prosecuting the case, the General Counsel stated that the result gives nationwide impetus to the Commission's criminal enforcement program.

The Chief, United States Secret Service, has expressed sincere appreciation and commendation for the outstanding manner in which United States Attorney William B. Butler, Southern District of Texas, handled a recent case involving an individual who has been considered for many years a leader among the criminal element in Alabama and surrounding states. The Chief stated that defendant's method of counterfeit operations made it extremely difficult to obtain sufficient evidence for a successful prosecution either in state or federal courts, but that due to Mr. Butler's personal interest and aggressive action, the defendant was sentenced to eight years in prison and fined $2,500.

The District Legal Officer, Department of the Navy, has expressed thanks and gratitude on behalf of the personnel of a naval base for the excellent representation made by Assistant United States Attorney Leonard L. Ralston, Western District of Oklahoma, in a recent case in which he defended 7 employees of the base who had been sued for libel. Mr. Ralston was successful both in the district court and in the court of appeals where he briefed and argued the case.

United States Attorney Paul W. Cress and Assistant United States Attorney George Camp, Western District of Oklahoma, has received expressions of appreciation from the District Engineer, U.S. Army Corps of Engineers, for the assistance they have rendered through their prompt action in filing Atlas missile and other condemnation suits for national defense construction sites.

* * *

PERFORMANCE OF DUTY

The following situation is believed to be an unusual example of performance of duty. The Attorney-in-charge is Assistant United States Attorney Harold Lavien, District of Massachusetts.

> "In November of 1955, the United States Attorney's office in Boston created a miscellaneous Claims and Collection Unit which was staffed by one Attorney and two clerks. The first full year of operation, the fiscal year 1956/57, showed a total collection of $78,467.98 or an average monthly collection of $6,500.

"The Claims Unit now consists of three clerks and the Attorney-in-charge who devotes one-half of his time to the Unit. For the nine month period, July 1, 1959 through March 31, 1960, the Unit collected $142,078.77 or an average monthly total of $15,800 as compared to an average monthly collection of $13,300 for the fiscal year 1958/59.

"The Claims Unit handles a case load of approximately 900 cases which includes pre-suit, in-suit, post-judgment and delinquent criminal fines. A tickler system causes each case record to be reviewed once a month and no case goes beyond three months without appropriate action.

"From the time the Unit was founded in November, 1955, through March 31, 1960, the total collections have amounted to $505,630.47 and each year has seen a sizable increase over the previous year. This year will be no exception."

* * *

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

VERIFYING ACCURACY OF OBLIGATION CONTROL ACCOUNTS

In reviewing the obligation control accounts Forms DJ-60b and DJ-60c prescribed in Memo 272, a number of mathematical errors have been noted. The totals of all columns should, if possible, be verified by another employee in the office or by preparing an adding machine tape. The following should be used as a guide in balancing and verifying the accuracy of accounts before sending them to the Department.

Form DJ-60b (Administrative Expenses-Obligation Control Account)

1. In Column 12, the amount of obligations brought forward at the beginning of the month plus the total obligations for the month should equal the amount shown opposite the entry "Total to Date".

2. The balance at the beginning of the month in Column 13, plus any authorizations received during the month, less "total obligations for month" in Column 12, should equal the amount shown opposite the entry "Total to Date" in Column 13.

Form DJ-60c (Litigative Expenses-Obligation Control Account)

1. In Column 13, the total obligations brought forward at the beginning of the month, plus the total obligations for the month should equal the amount shown opposite the entry "Total to Date".

SERVICE OF WARRANTS ON HOSPITALIZED PERSONS

Section 708.02c of the United States Marshals' Manual states the Department's policy relating to expenses of prisoners confined to a hospital at the time of arrest by the United States Marshal. United States Attorneys are requested to review such cases carefully and to not urge immediate service of the warrant unless there is an escape risk involved. In most instances, considerable hospital and medical expenses for the Government may be avoided if the arrest is deferred until circumstances require such action.

MEMOS AND ORDERS

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

MEMOS	DATED	DISTRIBUTION	SUBJECT
276	3-24-60	U.S. Attorneys	Disclosure of Information in FBI Reports
277	4- 5-60	U.S. Attorneys	Public Law 86-257 (Labor-Management Reporting and Disclosure Act of 1959)

INDEX TO ORDERS AND MEMOS ISSUED TO UNITED STATES ATTORNEYS

Please correct the Index distributed on March 15, 1960, to read as follows:

Page	Line	Item	Reference
1	17	AGRICULTURAL ADJUSTMENT ACT	M-119 & S-1
8	41	EMPLOYMENT Designation of Policy Officer	0-179
11	4	FUNDS CONTROL	M-228; M-272

* * *

ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT - WILSON TARIFF ACT

Spanish-Language Films; Restrictive Practices; Complaint and Final Judgment Filed Under Sections 1 and 2 of Sherman Act and Section 73 of Wilson-Tariff Act. United States v. Azteca Films, Inc., et al., (S.D. N.Y.). On April 13, 1960, a civil complaint was filed against three American corporations and one Mexican corporation, charging violations of Sections 1 and 2 of the Sherman Act and Section 73 of the Wilson-Tariff Act, in connection with the business of distributing Mexican produced Spanish language motion picture films in the United States. Defendants named in the action are: Azteca Films, Inc.; Clasa-Mohme, Inc.; and Mexfilms, Inc., each of which has its home office in Los Angeles, and Cinematografica Mexicana Exportadora, S. de R. L. de I. P. y C. V. (Cimex), of Mexico City. The first three named defendants are engaged in the business of distributing Spanish language motion pictures produced in Mexico to approximately 500 theatres located throughout the United States. The volume of business transacted by the distributors has exceeded $5,000,000 annually and the exhibition of the films concerned has generated over $12,000,000 per year in box office receipts.

Cimex is a non-profit Mexican corporation jointly owned by the leading film producers in Mexico and by Banco National Cinematografico. In exchange for financial assistance Cimex obtains the right to distribute Mexican motion pictures in the United States and the rest of the world aside from Latin America and Mexico. Since 1954 Cimex has acquired ownership and control of all three American distributors and thereby created a monopoly situation which this suit is intended to correct.

At the same time, a consent judgment successfully terminating this suit was entered by the Court. The judgment prohibits defendants from engaging in block-booking of Spanish language films; from imposing exclusive dealing requirements on theater owners; from attempting to fix or control minimum admission prices to be charged by exhibitors; from arbitrarily refusing to distribute in the United States, on reasonable and non-discriminatory terms, films produced in Mexico by a producer, whether or not a member of Cimex, and regardless of whether he has obtained production financing from a source or sources not affiliated with Cimex; from preventing any member of Cimex (1) from financing the production of a Spanish-language film outside the channels affiliated with Cimex, or (2) from distributing in the United States any such films financed through a distributor other than the defendant distributors; and enjoins defendants from acquiring ownership or control of any non-defendant distributor.

The judgment entered in this case aims at restoring competitive conditions in the distribution of Spanish language films in the United States while at the same time permitting the Mexican Government to continue to encourage and promote the development of this important industry.

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

Drafting Furniture; Restraint of Trade; Complaint Filed Under Section 1 of Sherman Act. United States v. Hamilton Manufacturing Company, et al., (E.D. Wisc.). A civil antitrust complaint was filed on April 25, 1960, charging Hamilton Manufacturing Company and its eight national distributors of drafting furniture with violation of Section 1 of the Sherman Act. The nine defendants in the complaint, are the same as in the indictment returned January 18, 1960.

Hamilton, a large manufacturer of a variety of products, is a leading manufacturer of drafting furniture. During the period of the conspiracy, the resale value of the drafting furniture sold by Hamilton and its distributors was well in excess of $38 million dollars.

The complaint states that beginning on or before January 1, 1954, the defendants engaged in a combination and conspiracy to restrain interstate trade and commerce in the distribution and sale of drafting furniture, in violation of Section 1 of the Sherman Act. Pursuant to said combination and conspiracy, it was charged, the defendants agreed: (a) to fix, maintain and stabilize the selling prices of Hamilton drafting furniture at all levels of distribution, including the selling prices to ultimate consumers; (b) to prevent the distributor defendants and another class of resellers from handling competitive products; (c) to boycott dealers failing to adhere to the practices mentioned above, and (d) to maintain a system requiring the mutual approval by all defendants in the selection of each defendant's dealers.

Staff: Philip L. Roache, Jr., Joseph J. O'Malley, and Allan J. Reniche (Antitrust Division)

Investigation into Insurance Industry; Motion to Quash Grand Jury Subpoena Denied. Aviation Insurance Industry, (S.D. N.Y.). On April 13, 1960, Judge John M. Cashin denied motions to quash grand jury subpoenas duces tecum in the investigation of the insurance industry being conducted.

Movants based their motions primarily on the ground that the court, grand jury and Attorney General lacked jurisdiction over the subject matter because the aviation insurance business was fully regulated by the states and therefore exempt from the antitrust laws by the McCarran Act. The Government argued that (1) the movants' jurisdictional challenge at the grand jury level was premature; (2) Section

3(b) of the McCarran Act reserved jurisdiction under the Sherman Act where agreements or acts of boycott, coercion and intimidation were involved regardless of state regulation of insurance; (3) aviation insurance was not regulated by the states and therefore not exempt by the McCarran Act; and (4) Congress did not intend that the McCarran Act immunize combinations and conspiracies to monopolize or the monopolization of any part of the insurance business conducted in interstate or foreign commerce.

In his opinion, Judge Cashin considered that the only question before him was whether the federal antitrust laws were completely inapplicable to the aviation insurance industry. After ruling in the negative, he added that the denial of the motions was "without prejudice to any motions movants may address to the scope of the subpoenas."

Staff: Edward R. Kenney and Herbert F. Peters (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEAL

ADMIRALTY

Shipyard Repairman Not Covered By Warranty of Seaworthiness from Vessel Withdrawn from Navigation; Shipowner Does Not Owe Duty of Reasonable Care When Not in Control of Vessel; Vessel Not Liable In Rem When Failure to Exercise Reasonable Care Was That of Third Party Non-owner. Latus v. United States v. Todd Shipyards Corp. (C.A. 2, April 11, 1960). Libelant, a painter employed by Todd Shipyards, sustained severe injuries in a fall through a hatch of the Government vessel ROBERT FULTON. The FULTON had been withdrawn from navigation and dismantled in 1947, and at the time of the accident was undergoing reactivation repairs being performed by Todd Shipyards.

Following the district court's dismissal of his libel in rem and in personam to recover damages for his injuries, libelant appealed. His argument that he was covered by a warranty of seaworthiness was rejected by the Court of Appeals on the authority of West v. United States, 361 U.S. 118, the Court viewing that decision as authoritatively settling that, "when a ship has been withdrawn from navigation and while she is being reconditioned, she does not warrant her seaworthiness to those who work aboard her until she returns to active service."

The Court likewise found that the United States was not charged with a duty to use reasonable care to furnish libelant with a safe place to work. Such a duty is owed only when the owner is in control of the vessel, Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, and not in the situation where, as here, libelant's employer was in control of the vessel.

Further, the Court rejected libelant's contention that, "even if the United States was under no personal duty to use such reasonable care, in any event a liability in rem arose independently." The Court found that no such lien could be imposed on a vessel "for the fault of another person than the owner, when that fault is not that of a 'bare-boat' charterer, or of some specified class of person like a compulsory pilot." Accordingly, the Court affirmed the decree below, dismissing the libel.

Staff: Robert D. Klages (Civil Division)

Stevedoring Firm Held Obligated to Indemnify United States for Injuries to Longshoreman. Santomarco v. United States and American Stevedores, Inc. (C.A. 2, April 5, 1960). Libelant longshoreman walked three times through a patch of oil on the deck of a Government vessel and on the third passage fell, sustaining injuries. The oil had been observed by other longshoreman employees of the impleaded stevedore during the afternoon, but none had

reported its presence or attempted to clean it up. The district court held that the vessel was unseaworthy due to the presence of the oil, that libelant was contributorily negligent to the extent of 50% for walking through the obviously dangerous patch of oil, and awarded the Government full indemnity, plus attorney's fees, from the stevedore for libelant's negligence and that of his fellow longshoremen.

The Court of Appeals affirmed. It agreed that the vessel was unseaworthy, that the longshoremen were at fault for failing to report or remove the oil, and that libelant was contributorily negligent since he freely elected to pass through the dangerous area. Whether it was customary for longshoremen to walk through similar dangerous areas was held irrelevant since a negligent custom is no defense. Libelant's request for an increase in his damages by the appellate court was denied, since the evidence did not warrant such an unusual exercise of appellate power.

Staff: Walter L. Hopkins (Civil Division)

AGRICULTURAL MARKETING AGREEMENT ACT

Failure to Resort to Administrative Remedy Specifically Provided by Act Bars Judicial Review of Milk Marketing Order. Willow Farms Dairy, Inc. v. Ezra T. Benson, Secretary of Agriculture, et al. (C.A. 4, April 12, 1960). After extensive hearings, the Secretary of Agriculture promulgated an order regulating the handling of milk in the Upper Chesapeake Bay, Maryland, marketing area. Appellant, a milk handler who had been an interested party in the hearings leading to the formulation of the milk order, brought suit in the district court seeking to challenge the legality of the order. Section 8c (15) of the Agricultural Marketing Agreement Act provides, however, that a milk handler who is allegedly aggrieved by a milk order must first file a petition with the Secretary challenging the order "as not in accordance with law" and the district court's jurisdiction is thereafter limited to a review of the "ruling" of the Secretary on that petition. See, also, United States v. Ruzicka, 329 U.S. 287. In this case, appellant urged that compliance with the statutory administrative remedy would be a needless formality inasmuch as it had participated in the proceedings leading to the formulation of the order and, in the course of those proceedings, had unsuccessfully excepted to various terms and provisions of the order.

The district court dismissed the complaint for lack of jurisdiction for failure to resort to the statutory administrative remedy. The court held that the only "ruling" it had jurisdiction to review under the statute was the "ruling" of the Secretary on a petition filed by a milk handler subsequent to the promulgation of a milk order, and that this procedure had not been followed by the milk handler in this case. The court, in a detailed opinion, noted that the Department of Agriculture's proceedings incident to the formulation of a milk order were wholly different in nature than the quasi-judicial proceedings conducted, pursuant to Section 8c (15), subsequent to the promulgation of the order. In a per curiam decision, the Court of Appeals affirmed on the opinion of the district court.

Staff: Alan S. Rosenthal and Seymour Farber (Civil Division)

AVIATION

Primary Responsibility to Avoid Collision in Visual Flight Rule Conditions Is on Pilots. United States v. Schultetus, et al. and United States v. Aero Enterprises, Inc., et al. (C.A. 5, April 18, 1960). Shortly after noon on April 9, 1957, in ideal flying conditions, a Cessna 170 and a Cessna 140 collided over Meacham Field, Texas. Four persons were killed and both aircraft totally destroyed. The accident occurred when the Cessna 170, which was making a simulated instrument approach, changed course and began a climbing left turn into the Cessna 140. The Cessna 170 received three radio warnings of the 140's presence from Civil Aeronautics Administration's employees in the control tower. The 140 could not be warned by radio because its set was not in operation.

Beneficiaries of the two instructor-pilots in the planes and the owners of the aircraft filed various claims against each other and against the United States under the Tort Claims Act. They claimed that the United States was liable for the accident because of negligence on the part of the control tower operators. The district court found that the proximate cause of the accident was the negligent failure of the control tower personnel to warn and instruct the aircraft adequately, and their failure to maintain proper control over them. Judgments totalling $147,000 were entered against the United States.

On appeal by the United States the district court's ruling was reversed and the case was remanded with instructions to enter judgment for the United States. The Court of Appeals held that the district court had misapprehended the effect of the evidence and that its ruling was clearly erroneous. It further held that the district court had a misconception of the functions and duties of control tower operators. As a matter of law, the primary responsibility for the operation of aircraft in visual flight rule conditions is on the pilots.

Staff: Howard E. Shapiro (Civil Division)

OBSCENITY

D. H. Lawrence's "Lady Chatterley's Lover" Held Not Obscene. Grove Press, Inc. v. Robert K. Christenberry (C.A. 2, March 25, 1960). Plaintiff, Grove Press, Inc., published an unexpurgated edition of "Lady Chatterley's Lover" to sell for $6.00. The book was to be distributed through the mails by Readers' Subscription, Inc., but the Post Office Department refused to accept it on the ground that it was obscene and, therefore, nonmailable matter within the meaning of 18 U.S.C. 1461. Thereafter, administrative proceedings were conducted by the Post Office Department for the purpose of making a final determination as to the mailability of the book. The case was referred by the Department's Judicial Officer to the Postmaster General, who decided after careful consideration that the book was obscene.

This suit was filed by the publisher and distributer of the books, to restrain the Postmaster at New York, New York, from treating the book as a

nonmailable, obscene publication. The district court held that the book was not obscene. The Court of Appeals unanimously affirmed this ruling, one judge concurring in a separate opinion. The majority stated that "Examined with care and 'considered as a whole' the predominant appeal of 'Lady Chatterley's Lover' in our judgment is demonstrably not to 'prurient interest' * * *" as defined in Roth v. United States, 354 U.S. 476, 487.

Staff: United States Attorney S. Hazard Gillespie and Assistant United States Attorney Robert J. Ward (S.D.N.Y.)

DISTRICT COURTS

ADMIRALTY

Government Not Liable for Failure or Refusal of Secretary of Army to Mark Abandoned Vessel Under 14 U.S.C. 86. Wheeldon v. United States (N.D. Cal., April 4, 1960). Plaintiff, as owner of the cabin cruiser SAN SOUCI II, sued the United States under the Tort Claims Act for damage suffered by the vessel when she allegedly struck the submerged hulk of the cabin cruiser ALOHA in San Francisco Bay. The ALOHA had burned and sunk several months before and been abandoned to the Army Engineers, but had never been marked by the Coast Guard or her owner before abandonment and the Army Engineers did not mark her thereafter. The District Court rejected the Government's contention that 14 U.S.C. 86 did not require marking in the circumstances, and interpreted that statute as directing the Secretary of the Army to mark or keep marked abandoned vessels in every case. Summary judgment was granted the Government, however, the Court accepting the Government's position that the failure to mark does not impose liability on the Government since no private party is under similar duty to mark a vessel in perpetuity after abandonment.

Staff: Graydon S. Staring (Civil Division)

Government Vessel Not Unseaworthy by Reason of Construction of Stairway and Its Overhead. Philip Nichilo v. United States (S.D.N.Y., April 4, 1960). Libelant, a longshoreman, was injured when his head hit the overhead on board a military transport while he was jogging up an enclosed stairway, marked "Emergency Exit." Libelant claimed that the construction of the stairway, as well as the lack of signs, precautionary painting or protective padding rendered the ship unseaworthy. After noting the height of the libelant and the distances between the steps of the stairway and the overhead, the District Court dismissed the libel, holding that the stairway was reasonably safe and did not constitute an unsafe place to work, and that the construction of the stairway did not render the vessel unseaworthy.

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

FALSE CLAIMS STATUTE

Claims of United States Employee for Full Salary Are False Where Employee Neglects Duties for Extended Time Periods; Proof of Damages by Estimation Allowed. United States v. Leo V. Mortell (S.D. Ill., March 24, 1960). Defendant was a Group Supervisor with the Internal Revenue Service at Rock Island, Illinois. On the basis of information that he had been spending an inordinate amount of time playing cards at the Elks Lodge, instead of attending to official duties, a surveillance was conducted by Internal Revenue Service agents in September, 1954. During the two pay periods covered by this surveillance it was found that defendant spent a considerable portion of his regular duty hours on activities not connected with his employment.

The first count of a civil complaint filed pursuant to the False Claims Statute, 31 U.S.C. 231, charged that defendant falsely certified two Time and Attendance Reports relative to the period in 1954 when he was under surveillance. In the second count, it was alleged that from 1950 to 1954 he had received salary payments in excess of those to which he was entitled, by reason of his frequent and prolonged absences from his official duties. Common law restitution of these overpayments was demanded.

The case was tried to a jury. Proof of the overpayments under the second count was predicated upon a retroactive application of the absence revealed by the surveillance in 1954, and other circumstantial evidence. The jury found that defendant had falsified the two Time and Attendance Reports and was liable for single damages in the sum of $126.00 under the first count. It found, further, that he was liable for $3,000 under the second count.

The District Court entered judgment for one statutory forfeiture, i.e., $2,000, and for double $126.00 under count 1, and for $3,000 under count 2; an aggregate judgment of $5,252. The Court later denied defendant's motion for a new trial and denied the Government's motion to increase the number of forfeitures to two, one for each false Time and Attendance Report.

Staff: United States Attorney Harlington Wood, Jr., and Assistant United States Attorneys Edward F. Casey and John M. Dougherty (S.D. Ill.); Louis S. Paige (Civil Division)

FEDERAL TORT CLAIMS ACT

Duty of Care to Post Office Patron Who Fell; No Liability Even Though No Handrails and Marble Steps Worn. Edward Stayments v. United States (W.D.N.Y., February 26, 1960). Plaintiff fell and was injured while descending a stairway from the second floor in the United States Post Office Building, Elmira, New York. An elevator was available, and signs on the first floor directed its use but persons transacting business were not limited to it. Significantly, the stairway was without handrails and the

marble steps were roughened by wear, as was understandable since the building had been erected in 1902. In this suit to recover damages for the injuries, the District Court dismissed the complaint. The Court noted that there had been no prior accidents on the stairs, and that the Government was not negligent in the construction, equipping or maintenance of the building. The Court found plaintiff to be a business invitee; that the steps were not worn in such a manner as to make the Government guilty of negligence in permitting them to remain that way; that there was no duty to provide handrails; and that neither the lack of a handrail nor the steps' condition was a proximate cause of plaintiff's fall.

Staff: Acting United States Attorney Neil R. Farmelo and Assistant United States Attorney William I. Schapiro (W.D.N.Y.)

No Liability for Injuries Sustained in Unloading Operation Controlled by Contractor's Foreman, Even Though Government Crane and Cable Used. Patrick Amabile v. United States and John Engravido (D. N.J., March 31, 1960). Plaintiff, a longshoreman employed by Morace, was injured while assisting in the unloading of large wire reels at an Army Terminal in New Jersey, pursuant to a contract between Morace and the Army. To aid the unloading, the Army had supplied a crane and crane operator, a civil service employee named Engravido, as well as rigging cables. A Morace foreman directed the operation.

Plaintiff's injuries were sustained when one of the rigging cables broke and a reel fell against him. In this suit against both the United States and Engravido, plaintiff claimed that the Government was negligent in supplying defective cable and that both defendants were negligent in directing the use of an unsafe method of unloading. After a trial, the District Court denied recovery. It held that res ipsa loquitur did not apply because of expert testimony to the effect that the breaking of the cable was not due to any defect in it, but, instead, to excessive stress during the unloading. The Court further found that the responsibility for the method used in the unloading rested upon Morace's foreman, who had control of the operation.

Staff: United States Attorney Chester A. Weidenburner and Assistant United States Attorney Steward G. Pollock (D. N.J.); Joseph Langbart (Civil Division)

Suit Barred by Limitations Where Plaintiff's Administrative Claim Was Nullity. George Leeder v. United States (D. N.J., March 2, 1960). Plaintiff was injured on February 20, 1956, while visiting a regional office of the Internal Revenue Service. He filed his first civil suit on February 21, 1958, one day after the statute of limitations had run. However, on June 11, 1956, he had filed a Form 95 (administrative claim for damage or injury) which referred to the accident but did not set out any amount claimed for damages. Soon after, the form was returned to plaintiff

with the statement that it could not "be processed in its present form." Plaintiff's civil suit was dismissed on June 4, 1958, without prejudice, by consent of the parties. No grounds for the dismissal appeared in the record.

Thereafter, on February 24, 1959, more than 3 years after the accident, plaintiff filed a second Form 95, specifying damages in an amount of $5,000. This administrative claim was returned on March 13, 1959, being in excess of the statutory limit for settlement administratively. Plaintiff formally withdrew his second claim on April 14, 1959, and instituted this suit on May 26, 1959.

The District Court dismissed this suit as barred by the statute of limitations. It stated that plaintiff could only rely on his second administrative claim, if it was one, to sustain the suit. The Court said that since a claim in excess of the then statutory settlement limitation of $1,000 must be regarded as a nullity (citing Siciliano v. United States, 85 F. Supp. 726 (D. N.J.)) plaintiff's $5,000 claim was of no legal effect.

This decision is at variance with that rendered in Patitucci v. United States, 178 F. Supp. 507 (E.D. Pa.), where the administrative claim was inappropriate, not being on Standard Form 95. However, the Court, in that case held that letters discussing the claim were sufficient to satisfy the requirements of 28 U.S.C. Sec. 2401(b). A liberal reading was given the statute in Patitucci, whereas the Court stated here that no authority was found calling for a liberal construction of the Federal Tort Claims Act "insofar as the procedure for filing an administrative claim or the time limitations applicable thereto are concerned."

Staff: United States Attorney Chester A. Weidenburner and Assistant United States Attorney Harold Weideli, Jr. (D. N.J.); Alice K. Helm (Civil Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

TRIAL

Test to Determine Competency to Stand Trial. The per curiam decision of the Supreme Court on April 18, 1960, in Dusky v. United States, No. 504 Misc., represents in large part an interdepartmental solution of the problem of the standard to be applied by trial courts in determining whether a defendant is competent to stand trial. The district court had refused to accept the unanimous conclusion of the Government psychiatrists at Springfield that defendant was incompetent to stand trial, and its determination had been affirmed by the Court of Appeals. When the case came into the Department on the petition for a writ of certiorari, there was an extended conference on the matter among representatives of the Solicitor General's office, the Criminal Division, and the Bureau of Prisons, in order to evolve a policy with respect to the prosecutive position in such a situation. The result was a memorandum submitted to the Court which took the position that, while a court is not bound by the expert opinion of psychiatrists, in this particular case the district court may have applied too narrow a standard in determining competency to stand trial. The Supreme Court, in its per curiam order, stated that it agreed "with the suggestion of the Solicitor General that it is not enough for the district judge to find that 'the defendant /is/ oriented to time and place and /has/ some recollection of events,' but that the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him.'"

AIRCRAFT BOMB HOAX

False Report as to Attempted Destruction of Aircraft (18 U.S.C. 35); Nine Months' Imprisonment Imposed on Plea of Guilty. United States v. James Oscar Clark (S.D. Texas). On February 16, 1960, the defendant reported by telephone to personnel at the Houston International Airport that a bomb had been placed aboard a commercial aircraft departing for New York, and asked to be paid $10,000 for assistance in locating the bomb. Apprehended in connection with this call, defendant was indicted in one count for knowingly making a false report as to an attempt to destroy a commercial aircraft, in violation of 18 U.S.C. 35. He pleaded guilty, and was sentenced to nine months' confinement. The Houston Chronicle for March 24, 1960, remarking generally on the case in an article on page one, began " A FINE START has been made in Houston toward putting an end to a costly nuisance--the telephoning of fake bomb warnings, especially to airlines." The article concluded: "The fact that one of the hoaxers has now been trapped, tried and convicted in federal court * * * and sent to prison, may seep through to the dim intelligence of other potential hoaxers with a message far more potent than any moral suasion could ever exert."

Staff: United States Attorney William B. Butler and
Assistant United States Attorney Charles D. Cottingham, Jr.
(S.D. Texas)

VISA FRAUDS

Extraterritorial Effect of Federal Criminal Laws; Prosecution of Alien for Offense Committed Outside United States; False Statement in Immigration Application (18 U.S.C. 1946). United States v. Rodriguez, et al. (S.D. Calif., March 29, 1960). Defendant aliens were charged with making false statements of material facts before consular officers of the United States to secure immigration visas to the United States. Defendants contended that the offense charged was committed outside of the United States and, therefore, outside the jurisdiction of any court of the United States. The Government argued, inter alia, that the protective theory of jurisdiction applied. The Court found for the Government, holding that the offense was not against the country where the consulate was located but against the sovereignty of the United States. This decision followed the ruling handed down in United States v. Archer, 51 F. Supp. 708 (S.D. Calif.), but disagreed with the decision reached in United States v. Baker, 136 F. Supp. 546 (S.D. N.Y.). The Court in stating that it had jurisdiction, also relied upon the case of United States v. Curtiss-Wright Corp., 299 U.S. 304, reiterating that the powers of the Government and the Congress in regard to sovereignty are broader than the powers possessed in relation to internal matters and that the investment of the Federal Government with the powers of external sovereignty does not depend upon the affirmative grants of the Constitution.

A notice of appeal has been filed.

Staff: United States Attorney Laughlin E. Waters and Assistant United States Attorney George W. Kell (S.D. Calif.)

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Prosecution of Medical Supply Company (Wholesaler) for Illicit Distribution of Amphetamine Sulfates; Heavy Sentences Imposed. United States v. A. C. D. Medical Supply Inc., and Vincent J. Zuckerman (E.D. Mo.). Following extensive investigation into widespread illegal sales of amphetamine sulfate pills in the area, on February 16, 1960 an information was filed charging A. C. D. Medical Supply, Inc., and Vincent J. Zuckerman, its manager, and others, with substantive and conspiracy violations under the Federal Food, Drug, and Cosmetic Act. It was found that the corporation, a medical supply firm, was the principal source of "bennies" and "goof balls" to dealers who sold them illegally to truck drivers in southwest Missouri. Continued use of this stimulant drug is considered to be dangerous and has been found to have caused serious highway accidents. When sentencing the defendants following their pleas of guilty on April 8, 1960, Judge Roy W. Harper commented that the Government's campaign against indiscriminate sales of amphetamine drugs has cut such sales substantially. The corporation was sentenced to pay a fine of $3,000 and Zuckerman was sentenced to serve six months on each of the three counts of the information,

the prison terms to run consecutively for a total of eighteen months to be served.

Staff: United States Attorney William H. Webster (E.D. Mo.)

MAIL FRAUD

False Financial Statement. United States v. Vernon and Lewis Autrey (E.D. Wash.). On November 19, 1959, Vernon and Lewis Autrey were indicted for violations of the mail fraud statute, 18 U.S.C. 1341, in that they mailed a false financial statement to Dun and Bradstreet, Inc., to induce subscribers to extend credit. Upon conviction after trial, defendants were each sentenced to a term of two years' imprisonment.

During the past several years defendants have been engaged in their scheme to obtain merchandise upon credit, using false financial information submitted to credit agencies to deceive their creditors. When pressed for collection, they moved their base of operation to another area.

Staff: United States Attorney Dale M. Green and Assistant United States Attorney Robert L. Frazer (E.D. Wash.)

FRAUD

False Statements to Veterans Administration; One Defendant Convicted of Conspiracy. United States v. Gilbert D. Koritan, et al (E.D. Pa.). Gilbert D. Koritan, Paul Lee Adams, and Wallace Trusty were indicted and charged in Count I with conspiracy and in Counts II to VII inclusive with substantive offenses in connection with the submission of false statements to the Veterans Administration for the purpose of securing an insured loan. Koritan pleaded guilty to two substantive counts and not guilty to the conspiracy counts and the remaining substantive counts.

The case was tried only as to Paul Lee Adams and Wallace Trusty. At the conclusion of the case, which was tried without a jury, the Court acquitted defendant Adams of conspiracy but found defendant Trusty guilty under Count I. Trusty then made a motion for a new trial, contending that he could not be found guilty of conspiracy since Adams was acquitted and Koritan was not tried; particularly since the Government made no motion for a severance.

On March 29, 1960, the Court held that where two persons are charged with conspiracy and only one is tried and the other defendant's case is undisposed of, the remaining defendant cannot take advantage of any rights of his co-defendant in the matter. This situation, the Court said, is different from one where two defendants are charged with the offense of conspiracy and an acquittal of one necessarily operates as an acquittal of the other.

Staff: United States Attorney Walter E. Alessandroni and Assistant United States Attorneys Robert J. Thompson and Joseph J. Zapitz (E.D. Pa.)

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Current Address; Failure to Report Not Excusable on Claimed Belief of Citizenship. Bufalino v. Holland, (C.A. 3, April 1, 1960). Appeal from order for summary judgment in favor of respondent and dismissal of petition for review. Affirmed.

Appellant was ordered deported on the grounds that he had twice entered the United States without inspection in April and May, 1956, after temporary absences in Cuba and Bimini, by representing himself to be a citizen of the United States; that he had failed to register his current address as required by 8 U.S.C. 1305; and that he did not possess a valid visa or other entry document at the time of his entries above mentioned. He contested only the second of these charges.

Although the Court passed upon several different contentions on behalf of appellant, the principal question at issue was whether he could escape deportation pursuant to 8 U.S.C. 1251(a)(5) under the second charge because he had established that his failure to comply with 8 U.S.C. 1305 was"reasonably excusable or was not willful." This issue had been determined adversely to him in the administrative proceeding and had been upheld by the lower court.

Appellant argued that his failure had been reasonably excusable because he had always thought that he had been born in Pittston, Pennsylvania and was therefore a citizen not required to register his address as an alien.

Evidence was introduced from school records, a former employer, voting registrations, and his application for marriage license and oral testimony was taken from his wife, a brother and two sisters. This evidence varied as to the dates which were ascribed to his birth. Some of the evidence gave his birthplace as Buffalo, New York, other as Pittston, Pennsylvania. There was also evidence of an attempt to have his birth registered in the records of the Clerk of the Orphans' Court of Luzerne County, Pa., and that the record was later impounded by the President Judge of that court. A certificate of appellant's birth showing that he was born in Montedoro, Italy on September 29, 1903, was in evidence. The correctness of this certificate was conceded by appellant. Consequently, that he was not born as he claimed to have thought, in Pittston, Pennsylvania, was foreclosed against him. Remaining, was whether the evidence so far showed that he had reason to believe his birth to be in this country, and that the Attorney General improperly concluded he had not established that his failure to furnish his current address was reasonably excusable and was not willful.

Appellant attacked the introduction in evidence of the various records mentioned. He contended they failed to meet the requirements of judicial admissibility. The Court found that they need not meet such a test as they were admitted in administrative and not judicial proceedings. The more strict rules of judicial evidence do not obtain in administrative proceedings. Navarette-Navarette v. Landon, 223 F. 2d 234, 237 (C.A. 9, 1955).

The Court also examined with care the evidence introduced, pointing up its deficiencies and improbabilities to justify his claim. Among the matters of record was an application for preexamination in which appellant had given inaccurate responses and lacked required honesty and frankness. In support of his application and in order to prove himself a person of good moral character he introduced 13 witnesses and 161 affidavits. The affidavits were on printed forms with blank spaces for the insertion of certain information. Appellant then argued that it was an abuse of discretion to find that he had failed to show that he was a person of good moral character in the light of such a volume of uncontradicted testimonials. But the Court found that even such a volume of evidence of this character did not necessarily establish appellant's moral character. The Special Inquiry Officer was free to consider both the witnesses and the affidavits in terms of association or knowledge upon which they testified or were based and to weigh this evidence together with all the other evidence in the case. Some of the affidavits he found were based upon a "nodding acquaintanceship." The officer was within his province in determining that notwithstanding its large volume the evidence did not overcome the unfavorable aspects of other evidence against appellant. Moreover the Special Inquiry Officer had found that appellant gave false testimony in these proceedings with regard to his business connections and income and as to his belief relative to his place of birth, etc. 8 U.S.C. 1101(f)(6) provides that an alien who testified falsely to procure benefits under the Act is estopped from demonstrating himself to be a person of good moral character. Having found appellant to have testified falsely in the proceedings in order to avoid deportation, the Special Inquiry Officer was required to find that appellant was not of good moral character.

Considering that the Special Inquiry Officer had the benefit of appraising the credibility of the appellant and witnesses, the appellate court was not disposed to disturb the district court's acceptance of the determination that appellant was not reasonably excused in failing to file his current address reports as required by section 1305.

* * *

TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decisions

Validity of Levy on Salary of Municipal Employee Determined in Government's Suit in Intervention to Enforce Levy, Not in City Controller's Suit to Quash Levy; City Controller Not Personally Liable if Levied Salary Is Safely Withheld Pending Determination of Validity of Lien. Dan O. Hoye v. United States (C.A. 9, March 17, 1960). A tax levy upon the accrued salary of an employee of the City of Los Angeles was served on Hoye, the city controller. Hoye filed a suit for a declaratory judgment and an injunction to quash the levy on the ground that it did not comply with the California procedure for garnishment of salaries of public employees. Unlike Sims v. United States, 359 U.S. 108 (7 Bull. 220) the controller here did not pay out the levied salary, but held it pending a legal determination of the validity of the levy. The Government moved to dismiss the Hoye complaint and also filed a motion to intervene and for leave to file a complaint in intervention, in two counts, one against Hoye personally under Section 6332 of the Internal Revenue Code and the other against the City to enforce the lien under Section 7401 and 7403. The district court dismissed the Hoye complaint and authorized the complaint in intervention.

Hoye appealed from the order dismissing his complaint but in the meantime the case proceeded in the district court on the Government's complaint in intervention. This suit was decided in favor of the Government, the court holding on the authority of Sims v. United States, supra, that the accrued salaries of state and local officials are subject to federal tax levy, without regard to state law. 169 F. Supp. 174 (S.D. Cal.). It held, further, that the controller was not personally liable, unless the City failed to pay the accrued salary over to the United States, since Hoye was entitled to seek a legal adjudication of the validity of the levy, without incurring personal liability, so long as he did not in any way dissipate the levied funds. The court also reaffirmed its dismissal of Hoye's complaint. 172 F. Supp. 532. (S.D. Cal.). The Government did not take any appeal from the final decision of the district court. On appeal by Hoye, the Court affirmed the ruling below with respect to the merits of the case, that the levy was valid, and dismissed as moot Hoye's appeal from the dismissal of his complaint for a declaratory judgment and injunction, since the merits of the case had been determined in the Government's suit.

Staff: Joseph Kovner (Tax Division)

Business Expense Deductions; Dues of Business-Social Clubs and Campaign Expenses for Election to Board of Governors of Business-Social Club. Charles D. Long and Gertrude G. Long v. Commissioner (C.A. 8, April 13, 1960). Taxpayer practiced law as a senior partner in a St. Louis, Missouri firm. He was a member of two prominent clubs in Missouri, which he used for both business and personal purposes. A number of taxpayer's clients were members of the clubs and often ate lunch with him at one of the clubs. A client of the law firm implored taxpayer to accept a nomination for election to the Board of Governors of this club, and after consultation with other members of his law firm, he accepted and waged a successful campaign. Taxpayer deducted the full amount of the dues paid to the clubs and the campaign expenses. The Commissioner disallowed as deductions one-third of the membership dues and the entire amount of the campaign expenses. The Tax Court sustained the Commissioner's determinations and the Court of Appeals affirmed the decision of the Tax Court.

Taxpayer contended that his membership in the clubs and the campaign expenses were ordinary and necessary in his practice of law and resulted in increased fees. The Court of Appeals applied the settled principle that the determination of whether or not expenditures are ordinary and necessary business expenses is a question of fact. The Court decided that although membership in the clubs may have enhanced taxpayer's business, he failed to show that the use of the clubs for business purposes exceeded the two-thirds percentage determined by the Commissioner.

In resolving the question of whether the campaign expenses were deductible, the Court said: "Taxpayer was a lawyer, a professional man as distinguished from a business man. The Missouri Athletic Club was not an association of lawyers, nor is it conceivable that an election to its Board of Governors would enhance either his skill, usefulness, or reputation as a lawyer." The relation with existing clients may have been incidentally uninjured because of taxpayer's campaigning for election, but this was not enough to establish the requisite direct relation between the expenses and the business to constitute a deductible business expense. Analogous expenses which are not proximately related to the conduct of a business and which are nondeductible are those incurred in campaigning for public office (McDonald v. Commissioner, 323 U.S. 57) and in attempting to defeat adverse legislation (F. Strauss & Son, Inc. v. Commissioner, 251 F. 2d 724 (C.A. 8)).

Staff: Charles B. E. Freeman (Tax Division).

District Court Decisions

Assessment and Collection; Federal Tax Lien Superior to Taxpayer's Homestead Exemption Rights. United States v. W. Monroe Smith, et al. (E.D. S.C., December 23, 1959). In this lien foreclosure action it was necessary to set aside a conveyance of real property made by taxpayer

to his wife at a time when his tax liabilities had accrued and were debts due and owing to the United States. The conveyance, which was prior to the assessment of the taxes and the attendant accrual of liens therefor, was made for a recited consideration of "Five and no/100 Dollars and love and affection." The Court, finding that the conveyance left taxpayer without money or other property with which to satisfy his debts, held that it was made in fraud of creditors and was, therefore, null and void. Taxpayer asserted a homestead exemption which the Court held was valid as against all the judgment creditor defendants but not as against the Government's tax liens. The cases on the subject of the effectiveness of a homestead exemption against federal tax liens are collected in Plumb, Federal Tax Collection and Lien Problems, 13 Tax L. Rev. No. 3 at p. 262 (March, 1958).

Staff: United States Attorney N. Welch Morrisette, Jr., and Assistant United States Attorney George E. Lewis (E.D. S.C.); Morton L. Davis (Tax Division).

Statute of Limitations on Collection of Taxes: Limitations Extended by Waivers Contained in Offers in Compromise. United States v. Anthony J. J. A. Wilson, (D. N.J., March 31, 1960). This is a suit to enforce tax liens against the cash surrender value of taxpayers' insurance policies and to obtain a deficiency judgment against taxpayers for the remaining unpaid taxes. The Government moved for a summary judgment against taxpayers on the premise that the only issue was the legal effect of waivers of the statute of limitations contained in two offers to compromise the tax liabilities. The earliest assessments were made on June 6, 1947 for which the statute of limitations on collection would run in six years from that date unless the period was extended by waivers. The first offer in compromise contained the usual clause waiving the statute of limitations for the period the offer was pending and for one year thereafter. The parties stipulated that this waiver suspended the running of the statute for the period of one year and two days during which the offer (which was rejected) was pending plus the additional one year for a total of two years and two days. Four months after the rejection of the first offer, taxpayers submitted a second offer on March 24, 1953 calling for the payment of weekly installments of $50 each for a period of 100 weeks. This offer was later amended to call for the immediate payment of $500 and the balance of $6500 payable in installments of $50 per week commencing upon the notice of acceptance of the offer. The offer provided that in the event of default the Commissioner of Internal Revenue had the option of proceeding to collect the unpaid balance of the offer or of disregarding the offer and proceeding to collect the amount of the original assessment. It also provided that the statute would be stayed for the period during which any installment remained unpaid and for one year thereafter. This offer as amended was accepted by the Commissioner on May 11, 1954 but the taxpayer failed to pay any of

the weekly installments called for by the agreement. By letter dated April 18, 1956, he was advised by the Internal Revenue Service that the compromise arrangements were terminated.

The Court granted the Government's motion for a summary judgment holding that the statute of limitations had not run in that it should be computed by accumulating the six years statutory period, the two years and two days under the first offer and the period from the date the second offer was submitted to the date of the letter terminating the arrangements plus one year thereafter. The Court disposed of taxpayers' claim, that the statute of limitations began running against the Government on the date the offer was accepted, by stating that it was not in accord with the terms of the agreement signed by the taxpayer.

Staff: United States Attorney Chester A. Weidenburner and Assistant United States Attorney Harold Weideli, Jr. (D. N.J.) John J. Gobel (Tax Division)

Liens; Priority; Government's Liens Superior and Prior to Claim of Plaintiff-Creditor on Promissory Note Where Final Judgment Had Not Been Rendered on Note, Notwithstanding That Debtor-Taxpayer Had Conveyed All Property to Trustee, Prior to Assessment and Filing of Tax Liens, to Secure to Plaintiff-Creditor Any Judgment Rendered in Action on Note. Empire Standard Life Insurance Company v. Arlin Anderson, United States, et al. (E.D. Texas). Plaintiff brought an action for judgment on a note against Arlin Anderson, and three corporations in which Anderson owned the majority interest. The note was executed by Anderson on behalf of Underwriters Fund, one of the defendants. On February 28, 1958 prior to the assessment of taxes and filing of tax liens against Arlin Anderson and Underwriters Fund, two of the defendants, and before the United States was joined as a party-defendant a trustee was appointed by agreement of all the parties. All of the property of defendants except exempt property of Arlin Anderson was transferred to the trustee to be conserved and to be used to satisfy any judgment which plaintiff might obtain on its note.

The United States which was thereafter named as a defendant removed the action from the State to the Federal Court and filed a counterclaim against plaintiff and cross claim against its co-defendants praying for the foreclosure of its tax liens against the property of Arlin Anderson and Underwriters Fund. The taxes claimed from Arlin Anderson and Underwriters Fund were assessed and tax liens were filed after the agreement by the other parties to the appointment of the trustee. The stipulation providing for the appointment of the trustee provided for an express lien in favor of plaintiff against all the property of defendants who participated in the stipulation. Plaintiff contended that it had a prior lien which became effective as of February 28, 1958, the date of the appointment of the trustee. The United States contended that any lien which plaintiff had as a result of the agreement with the other parties was

inchoate because the amount of the lien had not been established and further that the United States was entitled to priority pursuant to Section 3466 of the Revised Statutes.

The Court allowed judgment for plaintiff in the sum of $181,900.40 plus interest against defendant Underwriters Fund on the note. However, the Court denied plaintiff's claim of priority against property involved pointing out that until the amount is determined by the judgment to be entered in this case for plaintiff, its lien on the properties of defendants is inchoate insofar as the tax liens of the United States are concerned. United States v. New Britain, 347 U.S. 81; Illinois v. Campbell, 329 U.S. 362, 375.

Staff: United States Attorney Paul N. Brown and Assistant United States Attorney Lloyd W. Perkins (E.D. Texas); Stanley F. Krysa (Tax Division).

CRIMINAL TAX MATTERS
District Court Decisions

Propriety of Jail Sentences in Tax Fraud Cases. United States v. Edward O'Melia (N.D. Okla.) At the time of sentence on April 19, 1960, following defendant's pleas of guilty to four tax evasion charges, District Judge Savage gave the following statement of his reasons for imposing a /six months/ period of imprisonment (paralleling the views expressed by Judge Bolt (W.D. Washington) at a recent judicial conference on sentencing):

> In most of these cases the defendant is a person of considerable standing and bearing a good reputation in the community. He is ordinarily a first offender and there is every probability that he will never offend again. Considered from that viewpoint alone, few of such violators would be imprisoned.
>
> I have come to the conclusion that in these cases a more important factor to be considered is the deterring effect that imprisonment would have upon others who might be tempted to cheat and defraud.
>
> The very life of the nation requires the protection of its revenue. A large part of that revenue is derived from income taxes, either directly or indirectly personal to the taxpayer. Our laws provide for a system of self-assessment by the taxpayer and are based primarily upon the honor and integrity of the individual. It is assumed, and I think rightly so, that relatively few individuals will deliberately and intentionally cheat. But the system could easily collapse if fraud by individuals in their self-assessment of tax liability is not adequately discouraged by the courts.

> Each case must, of course, be considered in the light of its particular facts. But I have become entirely convinced that the gravity of the offense demands that some sentence of imprisonment be imposed, at least in an aggravated tax fraud case.

Then, speaking of the size of the tax deficiencies involved in the defendant's attempts to defraud, Judge Savage observed:

> True it is not a big case as tax cases go. The total amount of money involved is somewhat small compared to many cases, but I believe the record would indicate that a great majority of our revenue is derived from income taxes from people whose returns reflect a taxable income of less than $10,000.00. So these cases are of importance beyond the amount of money involved in the fraud practiced in the particular case.
>
> I have concluded that this is a case that calls for the imposition of an institutional sentence and it will be the judgment of the court that the defendant serve a term of six months and pay a fine of $500.00. The six months sentence will be imposed on each of the four counts, the sentence on each count to run concurrently with the other, the fine to be $125.00 on each count.

Staff: United States Attorney Robert S. Rizley (N.D. Okla.)

Statute of Limitations; Computation of Time; Situs of Filing. United States v. Mahler (S.D. N.Y., March 10, 1960)(1960 P-H Fed. para. 60-521).

Defendant filed a motion to dismiss two counts of the tax evasion indictment in this case on the ground that the specified counts were barred by the statute of limitations. The indictment had been returned September 16, 1958, more than six years after the allegedly fraudulent returns described in the two challenged counts were claimed by the defendant to have been mailed on September 15, 1952. The returns were found to have been received in the office of the District Director on September 16, 1952.

The District Court denied the motion. The Court reiterated the rule that mailing is not filing, and that a filing occurs on delivery of the required return to the office of the official designated in the statute to receive it. As the indictment charged the filing of the false returns as the consummation of the attempted evasion, the offenses were committed on September 16, 1952, the date the returns were received. The Court found that the indictment six years to the day later was timely by invoking the long standing rule of computation

of time in criminal cases, i.e., day of the event [September 16, 1952] is excluded and the last day [September 16, 1958] is included.

Staff: United States Attorney S. Hazard Gillespie, Jr. and Assistant United States Attorney Herbert F. Roth (S.D. N.Y.)

* * *

INDEX