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UNITED STATES ATTORNEYS

BULLETIN

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MONTHLY TOTALS

As of December 31, 1960, the halfway mark in the fiscal year, total cases filed and terminated were less than for the same period in the preceding fiscal year. Criminal cases filed and terminated and civil cases filed decreased from last year's totals. The increase in civil cases terminated was not sufficient to offset the increase in filings, and the resulting increase in the pending civil caseload was substantial. A look at the cases filed and terminated during December shows that less civil cases were filed in this month than in any other month of the current fiscal year. Set out below is a comparison of the work accomplished during the first six months of fiscal years 1960 and 1961, as well as a breakdown of the work done in each of the first six months of 1961.

	1st 6 Months F. Y. 1960	1st 6 Months F. Y. 1961	Increase or Decrease Number	%
Filed				
Criminal	15,111	14,820	- 291	- 1.9
Civil	12,105	11,696	- 409	- 3.4
Total	27,216	26,516	- 700	- 2.6
Terminated				
Criminal	14,247	14,026	- 223	- 1.6
Civil	10,570	10,615	/ 163	/ 1.6
Total	24,817	24,641	- 60	- .2
Pending				
Criminal	8,410	8,416	/ 6	/ .1
Civil	19,783	20,346	/ 563	/ 2.8
Total	28,193	28,762	/ 569	/ 2.0

	July	August	September	October	November	December
Filed						
Criminal	1,709	2,346	3,201	2,551	2,479	2,534
Civil	1,863	2,304	1,897	1,990	1,889	1,753
Total	3,572	4,650	5,098	4,541	4,368	4,287
Terminated						
Criminal	1,600	1,772	2,328	2,977	2,832	2,617
Civil	1,463	1,906	1,798	2,005	1,627	1,816
Total	3,063	3,678	4,126	4,982	4,459	4,433

Collections for December were slightly above those for November, and aggregate collections for the first half of the fiscal year continue to register an increase over the same period of fiscal 1960, but the rate of increase dropped considerably from the 15.8 per cent of the preceding month. Collections during December totaled $2,944,385, bringing the aggregate for the first six months of fiscal 1961 to $15,756,213. This aggregate is $1,312,326, or 9.1 per cent, more than the $14,443,887 recovered during the similar period of fiscal 1960.

During November $2,883,479 was saved in 104 suits in which the Government as defendant was sued for $4,036,775. 49 of them involving $1,580,999 were closed by compromise amounting to $402,630 and 32 of them involving $1,331,139 were closed by judgment against the United States amounting to $750,666. The remaining 25 suits involving $1,124,637 were won by the government. The amount saved for the first five months of the current year was $14,229,835 and is a decrease of $788,420 from the $15,018,255 saved in the first five months of fiscal year 1960.

DISTRICTS IN CURRENT STATUS

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

CASES

Criminal

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

CASES

Civil

Ala., N.	Ark., W.	Hawaii	Kan.	Mich., E.
Ala., M.	Colo.	Idaho	Ky., W.	Minn.
Ala., S.	Dist. of Col.	Ill., E.	La., W.	Miss., N.
Ariz.	Fla., N.	Ind., S.	Me.	Mo., E.
Ark., E.	Fla., S.	Iowa, N.	Md.	Mo., W.
	Ga., M.	Iowa, S.	Mass.	Neb.

CASES

Civil (Cont'd.)

N. H.	Ohio, N.	Pa., W.	Tex., E.	Wash., W.
N. J.	Okla., N.	P. R.	Tex., [illegible]	W. Va., N.
N. M.	Okla., E.	R. I.	Utah	W. Va., S.
N. Y., N.	Okla., W.	S. C., W.	Vt.	Wis., E.
N. C., M.	Ore.	S. D.	Va., E.	Wyo.
N. C., W.	Pa., E.	Tenn., W.	Va., W.	C. Z.
N. D.	Pa., M.	Tex., N.	Wash., E.	V. I.

MATTERS

Criminal

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

Civil

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

JOB WELL DONE

The Postal Inspector has expressed appreciation and admiration for the thorough and highly capable manner in which Assistant United States Attorney Erwin A. Cook, Western District of Oklahoma, prosecuted a recent case which resulted in a guilty verdict. The letter stated that this was

an extremely difficult case involving conspiracy, mail theft and forgery of Government checks; the principal Government witnesses were ex-convicts whose mentality created a most difficult position for the prosecutor, and there was also question as to admissibility of some of the Government exhibits. The letter further stated that the defendant is a recidivist mail thief and check forger who organized gangs of mail thieves at Oklahoma City, and the successful prosecution of this case will, no doubt, prevent numerous additional violations of this kind.

Assistant United States Attorneys Philip C. Lovrien and William R. Crary, Northern District of Iowa, have been recently commended for their thorough and competent handling of a difficult case which resulted in a favorable outcome for the Government.

The Assistant Secretary of the Navy (Material) has commended United States Attorney Joseph Mainelli, District of Rhode Island, for his excellent work in the prosecution of a group of defendants charged with defrauding the Government through rigged sales of surplus personal property at the Naval Construction Battalion Center, Davisville, Rhode Island. The investigation and prosecution were carried out over the past year by the Departments of Justice and Navy. To date, more than 75 per cent of the property has been recovered, eight defendants have pleaded guilty to one or more indictments, and two corporations and four persons have been tried by jury and convicted. As a result of the ultimate sale of recovered property the Government's loss will be minimized. The Assistant Secretary stated that Mr. Mainelli, in lawyer-like excellence, in vigor and in dedication to duty, demonstrated a high degree of competence which, in Navy parlance, deserves a "Well done!" He futher stated that the successful results obtained will show the press and public that the Government acting through Justice and Navy, was alert in enforcing the law and protecting Government property and procedures.

The Good Constitution and Fair Practices Committee, Local No. 1800, I.L.A., has commended United States Attorney M. Hepburn Many and former Assistant United States Attorney Norman Preudergast, Eastern District of Louisiana on their handling of a recent case involving malfeasance in office and violation of the Labor-Management Reporting and Disclosure Act of 1959.

Assistant United States Attorneys Robert A. Hall and Fred L. Hartman, Southern District of Texas, have been commended by the District Director, Internal Revenue Service, for their long hours of diligent work preparing a recent case for trial and for their masterful presentation of the case during the trial. The presiding judge also commented upon the excellent manner in which the case was presented.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

SALES TAX ON TELEPHONE SERVICES

It has come to our attention that some telephone companies are billing the United States Attorneys for a state sales tax on telephone services. The Department has determined that such a tax, even though it may be considered a tax on the telephone company, is not constitutional and is not payable by the Federal government. Any such billings should be reported to the Department and not paid.

The following Orders and Memorandum of interest to the United States Attorneys Offices have been issued since the list published in Bulletin No. 24 Vol. 8 dated November 18, 1960.

MEMO OR ORDER	DATED	DISTRIBUTION	SUBJECT
214-60	11-26-60	U.S. Attys & Marshals	Witness Fees
245-4	12-15-60	U.S. Attys & Marshals	Military Leave
215-61	1-3-61	General	Designating George S. Leonard Acting Assistant Attorney General in charge of the Civil Division.
216-61	1-3-61	General	Designating Abbott M. Sellers as Acting Assistant Attorney General in charge of the Tax Division.
217-61	1-3-61	General	Designating Assistant Attorney General Charles K. Rice as Acting Deputy Attorney General.
218-61	1-6-61	General	Amendment of section 15(c)(1) of Order No. 175-59, Relating to the Apportionment, Reapportionment, and Allotment of Appropriations.

MEMO OR ORDER	DATED	DISTRIBUTION	SUBJECT
221-61	1-18-61	General	Designating J. Lee Rankin to act as Attorney General in case of Vacancy in the Office of Attorney General.
222-61	1-18-61	General	Designating J. Edward Williams to act as Assistant Attorney General in charge of the Lands Division in case of Vacancy.
223-61	1-18-61	General	Designating John Doar to act as Assistant Attorney General in charge of the Civil Rights Division in case of Vacancy.
224-61	1-18-61	General	Designating William E. Foley to act as Assistant Attorney General in Charge of the Criminal Division in case of Vacancy.
225-61	1-18-61	General	Designating W. Wallace Kirkpatrick to act as Assistant Attorney General in charge of the Antitrust Division in case of Vacancy.
226-61	1-18-61	General	Designating Paul V. Myron to act as Director, Office of Alien Property, in case of Vacancy.
227-61	1-18-61	General	Designating Oscar H. Davis to act as Solicitor General in case of Vacancy in the Office of Solicitor General.

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ANTITRUST DIVISION

Acting Assistant Attorney General W. Wallace Kirkpatrick

SHERMAN ACT

Price Fixing-Retail Gasoline; Guilty Verdict Upheld, (C.A. 7, Jan. 12, 1961). United States v. Gasoline Retailers Association, et al. The Court of Appeals unanimously affirmed the judgment of the district court finding that defendants, Local 142 of the Teamsters Union, its chief executive officer, and an unincorporated association of gasoline station operators, were guilty of a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. Defendants did not deny that they agreed in their labor contracts to eliminate the use of price signs at the station sites and to prohibit the giving of premiums, largely of the trading stamp variety, in connection with retail sales, nor that the agreement was policed and enforced by Local 142 by threats to picket non-cooperating dealers and by occasionally making good on those threats. The Court of Appeals affirmed the district court finding that the evidence clearly showed that the purpose of the price sign and premium bans was to lessen the possibility of the eruption of "ruinous gasoline price wars," and to stabilize the retail market in the area of impact. This agreement it held was a price fixing device, illegal per se under the Sherman Act; as in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, it was immaterial that defendants had not agreed upon the specific price each conspirator would charge, since the Act condemns "any concerted scheme to affect prices."

With respect to interstate commerce, the Court noted the movement of substantial quantities of crude oil and gasoline from producing areas in the western states to refineries and bulk plants in Indiana and Illinois and thence to individual dealers in the "Calumet Region" in both Indiana and Illinois. The Court held that the conspiracy to stablize the local retail price of gasoline in the Calumet area "affected" interstate commerce to an extent prohibited by the Sherman Act.

The Court also held on a number of subsidiary issues that: (1) the indictment's failure to specify the names of all of the co-conspirators did not render it fatally defective since such names are not "essential facts" within the meaning of Criminal Rule 7(c) in charging the offense of a conspiracy in restraint of trade; (2) the chief executive of the union did not acquire immunity from prosecution under the Immunity of Witnesses Statute (15 U.S.C. 32-38) by voluntarily appearing before the grand jury solely for the purpose of producing and identifying subpoenaed union documents; and (3) where a conspiracy in restraint of trade is formalized, as here, in an official labor contract negotiated by the chief executive officer of a local union who is personally charged with negotiating and enforcing all of the local's contracts in all industries, the fact that the local includes members other than those engaged in the particular industry will not insulate the entire local union from liability for the illegal conduct.

Staff: Richard A. Solomon and Donald L. Hardison
(Antitrust Division)

Price Fixing - Electrical Resistors. United States v. Allen-Bradley Company, et al., (S.D. Ohio). On January 19, 1961, an indictment was returned against four manufacturers of composition electrical resistors and two employees of such manufacturers. A companion civil complaint named as defendants the manufacturers only. It was alleged in both pleadings that defendants combined and conspired to fix and maintain uniform prices for the sale of resistors in commercial packaging; to fix and maintain uniform prices for the sale of resistors in military packaging; and to require certain distributors to adhere to the prices fixed and agreed upon in sales to the armed forces, all in violation of Section 1 of the Sherman Act.

Composition resistors are used in the construction and operation of radio, television and other communications equipment. Defendant companies are the only manufacturers of composition resistors in the United States. Their combined sales in 1959 were alleged to amount to more than $43,000,000.

The relief prayed for in the civil complaint includes, among other injunctive relief, a requirement that defendant manufacturers re-establish new price lists based on their individual costs and judgment, and a requirement that defendants submit sworn affidavits of non-collusion to public agencies to whom bids are submitted.

Staff: Robert B. Hummel, Norman H. Seidler and Lester P. Kauffmann (Antitrust Division)

Elimination of Competition - Sodium Chlorate and Other Chemicals; Complaint Filed Under Section 7 of Clayton Act and Section 1 of Sherman Act. United States v. Penn-Olin Chemical Company, et al., (D. Del.). On January 6, a complaint was filed against the joint venture in which Pennsalt Chemicals Corporation and Olin Mathieson Chemical Corporation formed Penn-Olin Chemical Company to produce sodium chlorate and other chemicals. The complaint charges that the concurrent acquisitions by Pennsalt and Olin Mathieson of the stock of Penn-Olin violate Section 7 of the Clayton Act, and that the contract by which the two parent companies undertook to establish their joint subsidiary and the combination in which the three companies have pooled their resources violate Section 1 of the Sherman Act.

The complaint alleges that Olin Mathieson, one of the 41 largest industrial corporations in the United States, and Pennsalt, a large chemical company, compete with one another in the production and sale of close to $90,000,000 worth of chemicals; and that in February 1960 they entered into an agreement providing for the establishment of Penn-Olin as their joint company at Calvert City, Kentucky to build and operate a $6,500,000 plant for the production and sale of sodium chlorate and other chemicals.

The complaint asserts that sodium chlorate is an important chemical used in the bleaching of pulp and paper and also in the production of solid propellant fuels for rockets and missiles; that this industry is highly concentrated, with Pennsalt and two other companies presently

accounting for virtually all of the sodium chlorate produced in the United States; that Olin Mathieson, while not a producer, is a leading customer and seller of sodium chlorate and also occupies a leading position in the technology of sodium chlorate applications; and that its patented process for generating chlorine dioxide from sodium chlorate for pulp and paper bleaching purposes is reported as being used in over 20 of 55 chlorine dioxide generation plants in North America.

The complaint states that following Penn-Olin's incorporation in Delaware on February 25, 1960, its common stock was issued in equal shares to Pennsalt and Olin Mathieson. In addition, high officials of the two parent companies have been made the officers and directors of Penn-Olin, and Pennsalt and Olin have agreed to disclose to Penn-Olin all technical and operating information relating to its operations or contemplated operations which either company possesses or may develop prior to the end of 1964.

Among the effects listed by the complaint as flowing from the Clayton and Sherman Act violations are: (1) the elimination of potential competition between Pennsalt and Olin Mathieson in the production of sodium chlorate; (2) the substantial lessening of actual and potential competition between them in the production and sale of a variety of chemicals; (3) the preservation of concentration and the enhancement of barriers to the entry of newcomers in the sodium chlorate industry; (4) the elimination of Olin Mathieson as an independent customer for sodium chlorate produced by competitors of Pennsalt; and (5) the encouragement of competitors in the chemical and other industries to participate in joint ventures as a means of avoiding or lessening competition. The complaint asserts that the violations and anticompetitive effects will continue unless the Penn-Olin joint venture is declared unlawful and injunctive relief is granted against it.

Staff: Daniel J. Freed (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General George S. Leonard

SUPREME COURT

SURPLUS PROPERTY ACT

United States, Not Court, Makes Election of Alternative Remedies; Change in Election Subject Only to Rule 15, F.R.C.P.; Remedy of "Twice the Consideration Agreed to be Given" Applies to Fully Executed Transactions. United States v. Hougham, et al., (Sup. Ct., November 7, 1960.) Hougham, a non-veteran, conspired with the three veteran defendants to obtain numerous trucks and other articles of war surplus for his own business by misuse of each veteran's priority, contrary to the terms of Section 26 of the Surplus Property Act of 1944 (58 Stat. 765) and the regulations implementing the statute. The case is of prospective importance since these same terms are found in the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 489) which governs current dispositions of surplus property.

The Government first filed a complaint under Sec. (b)(1) of the 1944 Act for double damages plus $336,000 in forfeitures (168 forfeitures at $2,000). The Government later moved for leave to file a first amended complaint under Sec. 28(b)(2), an alternative remedy for twice the consideration agreed to be given for the items. Since the consideration was $79,512.66, twice that amount, or $159,025.32 was prayed for. The district court denied the motion to amend on the ground that the Government had made an irrevocable election of remedies in filing the initial complaint. After expressly reserving its rights to appeal this question by statements included in a pre-trial order, the Government then filed a second amended complaint under Sec. 26(b)(1), similar to the original complaint.

The trial court found that defendants had been guilty of fraud and gave judgment for the Government. In its view there were only four forfeitures - one for each fraudulent application for veteran's priority, instead of one for each false purchase, and it awarded judgment for only $8,000. Both sides appealed. The court of appeals affirmed the finding of fraud (270 F. 2d 290) and rejected the trial court's holding that the Government was estopped by election of remedies. In affirming the judgment for four forfeitures under Section 26 (b)(1), the court held that the district court could select from the statute's three alternatives whichever remedy best suited the facts in the case. Finding the district court's selection of the 26(b)(1) remedy to be reasonable, the court rejected the Government's demand for application of the 26(b)(2) "twice the consideration" remedy.

The Supreme Court reversed and "remanded to the District Court with directions to enter judgment for the United States under 26(b)(2)." The Court held, inter alia, that there was nothing in the wording or legislative history of Sec. 26(b) indicating that a first election of an alternative remedy was irrevocable; that the liberal amendment provisions of Rule 15 F.R.C.P. were applicable to the pleadings; and that the view of the court of appeals that the district court should determine the proper remedy for the Government collided "with the express language of Sec. 26(b) which provided for recovery under any one of the three subsections 'if the United States shall so elect.'" The Court also held that Sec. 26(b)(2) applies to fully executed transactions, and is not limited merely to situations where the parties have agreed upon a price, but have not effected payment.

Staff: Wayne G. Barnett (Office of the Solicitor General)
Anthony L. Mondello (Civil Division)

COURTS OF APPEALS

CONTRACTS

Inaccurate Description of Real Property in Prospectus May Constitute Breach of Warranty. Krupp v. Federal Housing Administration (C.A. 1, January 16, 1961). FHA advertised a garden-type apartment project for sale. Its "prospectus and request for offers" contained information as to, among other things, the number of apartment sites and garages, rental rates, and percentage of apartment occupancy, and stated that the property included 100 garages. Actually the so-called garages were in fact groups of carports with continuous roofs, and between each set of walls were two numbers, indicating capacity for two automobiles, but dual occupancy by standard size cars resulted in so close a fit that none of the doors of either car could be opened. As a practical matter there were only one-half as many rental garages as stated in the prospectus.

In response to the prospectus and after inspecting the property, plaintiff submitted a bid which was accepted. Plaintiff thereafter brought this suit for breach of warranty. FHA's motion for summary judgment was granted by the district court, apparently on the ground that the prospectus contained disclaimers which removed any inference as to a warranty of the truth of the statements made.

The Court of Appeals reversed. It found the statement in the prospectus that the project had rental garage space for 100 cars was a positive statement of known fact, and not an estimate or approximation. Noting that the disclaimer provisions are to be construed against the FHA, which drafted them, the Court held that they were not sufficient to place a duty upon the purchaser as a matter of law to inspect the premises and verify all of the facts set forth in the prospectus. It found that the invitation to inspect was only one of

the considerations in determining whether a particular statement was an affirmation of fact or only an estimate. It further held that the disclaimer that the purchaser was expected to accept the property in its present condition without warranty by FHA as to physical condition went to the state of repair, or present condition of the property, rather than to the size or capacity of the property. It therefore reversed and remanded the case for a trial as to whether in fact the purchaser knew or should have known that the carports could only house 50 automobiles.

Staff: United States Attorney Elliot L. Richardson and Assistant United States Attorney James W. Noonan (D. Mass.)

FEDERAL TORT CLAIMS ACT

Conflicts of Law: Government's Liability Measured by Law of Place Where "Act or Omission Occurred" Rather Than Place of Injury; /Oklahoma Wrongful Death Act Provides No Remedy for Death Resulting from Injury Occurring Outside Oklahoma./ Richards v. United States, (C.A. 10, November 25, 1960). An American Airline plane crashed in Missouri while on a flight from Tulsa, Oklahoma, to New York City. Plaintiffs, survivors of legal representatives of passengers on the plane, instituted this action under the Federal Tort Claims Act, alleging (1) negligence on the part of Government inspectors in allowing American Airlines to employ and use unsafe practices and procedures at its overhaul depot in Tulsa in overhauling and inspecting its aircraft, aircraft engines, and component parts; and (2) that, as a result of this negligence, the crash occurred. Plaintiffs asserted a right to recover under the wrongful death act of Oklahoma which placed no maximum on the amount of permissible recovery. Each plaintiff had already received $15,000 from American Airlines, the maximum amount recoverable under the law of Missouri.

The district court dismissed each of the complaints, holding that under either the law of Oklahoma, the place where occurred the act or omission resulting in the injury, or that of Missouri, the place where the injury occurred, plaintiffs possessed no cause of action. As for the law of Oklahoma, the court held that its wrongful death act (the only portion of Oklahoma substantive tort law applicable) provided no relief for a death resulting from an injury occurring outside of Oklahoma. Missouri law provided no basis for relief as plaintiffs had already received the maximum amount recoverable thereunder.

The Court of Appeals affirmed, holding that the Tort Claims Act subjects the Government to liability "according to the tests and standards of the substantive law of the state in which the act

or omission occurred," in distinction to the normal conflict-of-laws rule which would apply the law of the place of injury. In so holding, the Court followed Eastern Air Lines v. Union Trust Co., 211 F. 2d 62 (C.A.D.C.), and Voytas v. United States, 265 F. 2d 786 (C.A. 7), and rejected the contrary view of United States v. Marshall, 230 F. 2d 183 (C.A. 9). The Court examined the substantive tort law of Oklahoma and concluded that the Oklahoma wrongful death act provided no remedy for a death occurring outside the state and therefore could not supply a remedy for the plaintiffs here. Since the Oklahoma courts would entertain an action for wrongful death occurring in another state under the wrongful death statute of that state, however, the Court examined plaintiffs' rights under the Missouri death statute. It held that where wrongful death occurs in one state and suit is brought in another, the law of the state of death controls the maximum amount of damages which may be recovered. The Missouri statute would supply no remedy, therefore, since plaintiffs' receipt of the maximum amount recoverable thereunder extinguished any cause of action that might otherwise have existed.

Staff: Sherman L. Cohn (Civil Division)

Release of One Joint Tortfeasor Releases All Unless There is Express Reservation of Rights in Release Instrument. Millicent K. Matland, et al. v. United States v. United Airlines and Trans World Airlines, Inc. (C.A. 3, January 10, 1961). Plaintiff's husband was killed in a United Airlines -- TWA air collision over the Grand Canyon in 1956. She brought suit against the airlines, ultimately settling it for $75,000, and through her attorney, executed a general release of the airlines without reserving rights against the United States. A few days prior to execution of the release plaintiff had filed suit against the United States under the Tort Claims Act. In that suit she also sought damages for the death of her husband in the crash, alleging as the basis for liability the negligence of Government employees in Air Route Traffic Centers in Utah and California, in permitting the airliners to converge and collide. The Government moved for summary judgment on the ground that the general release of the airlines, without express reservation of rights against the United States in the release agreement, also released the Government. The district court agreed and granted summary judgment.

On appeal, the Third Circuit affirmed, noting that whatever view it might otherwise have of the common-law release rule, it must take the law as it finds it, and the law applicable under any of the states involved here was that contained in Section 885 of the Restatement of Torts. That Section provides that the release of one releases all others allegedly liable for the same harm unless there is an express reservation of rights in the release instrument. As to determination of the pertinent law involved, the Court ruled that, under the Tort Claims Act, it was either that of Utah or California (where the crash and death occurred) and not federal law. The Court also ruled that under the

common-law release rule, as stated in Section 885, no technical concept of joint tortfeasorship was necessary to operation of the rule. In rejecting another of appellant's contentions, the Court observed that her attorney's intentions to reserve rights against the United States, as evidenced by certain affidavits, were of no avail unless such intentions were expressly incorporated in the release instrument.

Staff: Herbert E. Morris (Civil Division)

RENEGOTIATION ACT OF 1951

Jurisdiction of Court of Appeals: Court of Appeals Cannot Review Allocation of Receipts and Expenses Between Renegotiable and Non-Renegotiable Business, Since Tax Court Has Exclusive and Non-Reviewable Jurisdiction to Determine Amount of Excessive Profits. Grannis & Sloan v. Renegotiation Board (C.A. 4, January 12, 1961). Upon a trial de novo contesting the correctness of an order of the Renegotiation Board, the Tax Court determined that petitioner realized excessive profits of $75,000 from its renegotiable business for the fiscal year ending December 31, 1952. Petitioner sought review of the Tax Court's findings with respect to allocation of receipts and expenses between renegotiable and non-renegotiable business, and also the Tax Court's ruling that certain receipts were equipment rentals subject to renegotiation, rather than payments under a conditional sales contract, which would not be so subject.

The Court of Appeals dismissed the petition for review on the ground that it was without jurisdiction. The Court held that the question whether or not specific items of receipts or disbursements were renegotiable went to the question of the amount of excessive profit, and not to the jurisdiction of the Tax Court. Since the Renegotiation Act provides that there shall be no review of the Tax Court's determination of excessive profits, the Court of Appeals held that it was without jurisdiction.

Staff: Hubert H. Margolies (Civil Division)

RESTITUTION

Money Erroneously Paid by Commodity Credit Corporation is Recoverable by United States Under Federal Law, Which Governs. Stone v. United States (C.A. 8, January 13, 1961). Defendant was in the wool producing business on farms owned and leased by him. He also was a wool buyer, and operated a cordage company. In 1955, he inquired of a Department of Agriculture county agent as to what he would have to do in order to qualify for payments under the wool program conducted by that Department. The agent informed him that he could sell wool from sheep on his farms to his wool house and that such sales would qualify, provided that evidence of bona fide sales were produced.

Defendant made application for incentive payments under the wool program, and offered sales documents showing the sale of wool from himself as farmer to himself as wool buyer. Although the sales did not constitute sales within the meaning of the Wool Act and the implementing regulations, the incentive payments were made to him through the Commodity Credit Corporation. In an action to recover the monies erroneously paid to defendant, the district court granted the motion of the United States for summary judgment.

Upon defendant's appeal, the Court of Appeals affirmed. Relying upon Rainwater v. United States, 356 U.S. 590, 591, 592, it held that the CCC was an agency of the United States which was merely an administrative device for the purpose of carrying out federal farm programs. It therefore found that the monies erroneously paid were monies of the United States, and that the United States may recover such payments under federal law, which governs. The Court also rejected defendant's argument that he should be allowed to interpose the defense of estoppel, since it is settled law that the United States is not bound or estopped by the facts of its officers or agents.

Staff: United States Attorney Roy W. Meadows; Assistant United States Attorneys Richard J. Wells and Conrad A. Amend (S.D. Iowa)

DISTRICT COURTS

FALSE CLAIMS ACT

Judgment Includes, in Addition to Double Damages and Forfeitures, Interest on Single Damage Portion of Recovery. United States v. Nathan R. Carb (E.D. N.Y., December 21, 1960). The complaint, containing counts under the False Claims Act and for breach of contract, was predicated on defendant's alleged supply to the Air Force in 1953 of defective steel office chairs. After the jury's verdict finding that the False Claims Act had been violated and that the Government's single damage amounted to $36,955.85, the Court entered judgment for the United States in the sum of $95,991.70, made up of double the aforesaid single damage plus eleven forfeitures of $2,000 each. Thereafter, on motion by the United States, the Court amended the judgment by adding to the Government's recovery, interest at the rate of 6 per cent from 1953 on the single damage component of the judgment. This is believed to be the first direct precedent on the allowability of interest in a False Claims Act suit.

Staff: Assistant United States Attorney Margaret E. Millus (E.D. N.Y.); Theodore J. Himmelberg, Jr. (Civil Division)

FEDERAL TORT CLAIMS ACT

Statute of Limitations - Duty to and of Independent Contractor. Inez Humphreys Dixon and Ruby Humphreys v. United States (E.D. Ark., December 27, 1960). Richard Humphreys had been employed by the Forest Service to clean

out a well at a tower site on Forest Service lands. Under the informal contract, the Forest Service furnished certain equipment and Richard furnished the labor and other equipment. Experienced in well cleaning, he arrived without any help, and his father-in-law, William Humphreys, a Forest Service employee at the tower site - agreed to provide service and certain materials. Richard knew of possible danger from damp gas, but was assured by William that the well was free of such gas. Richard refused the offer of a coal oil lantern for use in testing for gas, fell into the well as he was being drawn up to avoid the gas, and William tried to rescue him. Both died of gas poisoning on May 24, 1956.

In the suit for William's death the Government prevailed on its renewed motion to dismiss because of limitations (suit was instituted on May 27, 1958). The Court in this respect relied on admissions and findings as to the date of the accrual of the cause of action in Humphreys v. United States, 272 F. 2d 411 (C.A. 9), where an unsuccessful attempt was made to reinstitute suit after a voluntary dismissal to file the instant suit.

The Dixon suit was premised on a contention that Richard was a Government employee entitled to safe appliances and a safe place to work, that safe means of egress and ingress were to be furnished, and that there was Government negligence in failing to inspect the well. The Court held that Richard was an independent contractor to whom the Government was not liable for negligence in prosecution of the work contracted for, and more particularly that there was no negligence in supplying faulty equipment or in failing to inspect and discover the condition of the well.

Staff: United States Attorney Osro Cobb; Assistant United States Attorney James W. Gallman (E.D. Ark.); Joseph Langbart (Civil Division)

SURPLUS PROPERTY ACT

Conversion of Government Property and Bribery. United States v. Harry A. Schmidt, William J. Lutes, W. J. Lutes Import and Export, Inc. (E.D. Mich.). In November 1955, the Air Force offered for sale in England a large quantity of excess motor vehicle parts, included among which were 1,110 differentials. Former T/Sgt. Schmidt entered into a fraudulent conspiracy with William Lutes, an American dealer, to purloin the differentials. Schmidt thereupon wrongfully informed all bidders that the differentials had been withdrawn from the sale. Consequently, none of them included an amount to compensate for the differentials in their bids. The award was made to Lutes on an overall basis. Thereafter, Schmidt gave instructions that the differentials were to be turned over to Lutes along with the other materials. Lutes thereby fraudulently obtained the differentials. He sold them in France within the next two months for more than $36,000.

In December of 1955, Schmidt went to Zurich, Switzerland, as a guest of an agent of Lutes. On the day after their arrival, Schmidt opened a new bank account with a deposit of $14,000. Lutes' agent had carried to

Zurich at least $7,000 drawn from an account of Lutes in London and Lutes wired $6,800 to the agent in Zurich from New York.

On trial to the court without jury, Judge Picard found that the Government had proved "beyond a reasonable doubt" that the defendants had conspired to steal the differentials and that Lutes, through his agent, paid Schmidt a bribe of $14,000. The Government claimed entitlement to the full $36,000 realized by Lutes as single damages and to several forfeitures. However, an issue arose whether all the parts in question were differentials and the court allowed single damages only for those parts that were clearly designated as such. Hence single damages of $16,500 were allowed, which were doubled by virtue of Title 40 U.S.C. §489(b), and the court assessed one forfeiture of $2,000 against the defendants. In addition, judgment was entered against Schmidt for the $14,000 bribe. The Judge took under consideration plaintiff's contention that Lutes and the corporation are jointly liable with Schmidt for the amount of the bribe.

An important holding in the trial was that a search of Schmidt's private residence by New Scotland Yard officers at the behest of Air Force OSI agents was a legal search and that evidence so obtained was admissible. The Government's proof consisted in large part of depositions taken in England and Europe pursuant to Rule 28(b), Fed. Rules of Civ. Pro.

Staff: United States Attorney George E. Woods, Jr.; Assistant United States Attorney Herbert M. August (E.D. Mich.); Louis S. Paige (Civil Division)

* * *

CIVIL RIGHTS DIVISION

Acting Assistant Attorney General John Doar

Voting, Production of Records; Civil Rights Act of 1960. In re Crum Dinkens and Gallion v. Rogers (M.D. Ala., C. A. 5). The appeal of a district court judgment in these cases, 187 F. Supp. 848, upholding Title III of the Civil Rights Act of 1960 and ordering inspection of voting records in Montgomery County, Alabama was argued on January 16, 1961, and affirmed on January 23. The cases, discussed in the Bulletin for August 26, 1960, involved the validity of an injunction issued by an Alabama state court purporting to restrain the Attorney General from inspection of voting records under Title III of the 1960 Act, and the state's challenge of the constitutionality of the Act.

The District Court held that the state court was without jurisdiction since the Act confers exclusive jurisdiction on federal courts and a state court lacks power to review a discretionary act of a federal official. The Court further concluded that the contested section of the Act was appropriate legislation, clear and unambiguous, and stated that "the constitutional authority of Congress to pass Title III of the Civil Rights Act of 1960 cannot be seriously questioned." The Court of Appeals per curiam decision affirmed these judgments "on the basis of the well reasoned opinion by the trial court."

Staff: Assistant Attorney General Harold R. Tyler, Jr.,
Harold H. Greene, Howard A. Glickstein
(Civil Rights Division)

Voting, Production of Records; Civil Rights Act of 1960. In re MacDonald Gallion, et al.; U.S. v. Emmett F. Hildreth, et al. (M.D. Ala.). On June 6, 1960, a written demand for production of voting records, in accordance with section 303 of Title III of the Civil Rights Act of 1960 was made on the Board of Registrars of Sumter County, Alabama, and inspection was suspended by virtue of an order issued on June 6, 1960, by Judge Walter B. Jones, of the Circuit Court of Montgomery, Alabama, temporarily enjoining the Attorney General and his agents from inspecting or copying records in the custody of the several Boards of Registrars in the various counties of Alabama. (Gallion v. Rogers discussed in preceding item.)

On August 11, 1960, the United States Court for the Middle District of Alabama, to which the state court case had been removed from the Montgomery County Court, dismissed the complaint in the Gallion case. (Alabama ex rel. Gallion v. Rogers et al., C. A. 1616-M, M.D. Ala. See Bulletin for August 26, 1960.)

Thereafter, on October 11, 1960, two agents of the FBI prepared to resume inspection of the voting records in Sumter County, Alabama, with

the apparent cooperation of the registrars and Probate Judge Dearman. Before actual inspection was begun, however, the registrars were informed by the Circuit Solicitor for the 17th Judicial Circuit that the Attorney General of Alabama, MacDonald Gallion, had requested that inspection be deferred until his arrival. This request was complied with. Later that day Mr. Gallion arrived and showed the agents an order issued by Judge Emmett F. Hildreth, Judge, 17th Judicial Circuit of Alabama, in a case styled State of Alabama ex rel. MacDonald Gallion, Attorney General of the State of Alabama, Petitioner, which order placed constructive custody of said records in the hands of the Attorney General of Alabama, and enjoined all persons except the Attorney General of the State of Alabama, the members of the Board of Registrars, and the Probate Judge of Sumter County, Alabama, in their official capacitites, from inspecting, reproducing or copying the records. One of the FBI agents then requested Mr. Gallion, who had shown him the order, to allow inspection of the records, and was refused.

Demand letters were then sent to Attorney General Gallion, Judge Hildreth, and Probate Judge Dearman, in addition to those originally sent to the Registrars. These were not honored and a second request by the agents of the FBI was likewise refused.

The Government then applied for an order enforcing the demands and an injunction against enforcement of the state court order. A member of this Division argued the cases on January 23, 1961. The Court forthwith ruled in favor of the Government in both cases and inspection of the records was resumed.

Staff: Harold H. Greene, Gerald P. Choppin
(Civil Rights Division)

Publication and Distribution of Unlabeled Political Literature. United States v. Vondra (N.D. Ill.). On January 12, 1961, a Grand Jury in Chicago, Illinois, returned a one-count indictment charging Miles Michael Vondra, Jr., with willfully publishing and distributing and causing to be published and distributed copies of an anonymous political circular concerning Tyler Thompson, the Democratic candidate for Congress from the Thirteenth Congressional District of Illinois, at the November 8, 1960, general election in violation of 18 U.S.C. 612. Vondra was arraigned on January 17, 1961, and entered plea of not guilty. Trial date was set for February 15, 1961.

Staff: United States Attorney Robert Tieken and Assistant United States Attorney Donald S. Manion (N.D. Ill.).

* * *

CRIMINAL DIVISION

Acting Assistant Attorney General William E. Foley

JENCKS ACT

Production of Interview Report in Hands of Government Agents. Campbell v. United States (U.S. Sup. Ct. No. 53, January 23, 1961). Important in its general impact on criminal trials, this case deals with the duty of the trial judge in determining whether an interview report in the hands of Government agents is a producible document under 18 U.S.C. 3500, the so-called Jencks Act. The witness involved thought that, when the F.B.I. agent interviewed him, the agent had read back his notes or report and that the witness had signed or approved them. Whatever document the agent then had was not in the hands of the Government at the time of trial. All that the Government had was the agent's report of the interview written some time later. At a hearing outside the presence of the jury, the trial judge declined to call the F.B.I. agent or to require the Government to do so, but presented the interview report to the witness and asked him whether it represented a substantially verbatim account of what he had said. When the witness said that the report was not exactly as he had told the story to the agent, the trial judge refused to turn it over to the defense on the ground that it was not a statement of the witness or a substantially verbatim record.

The Supreme Court was unanimous in holding (1) that the judge acted properly in holding a hearing outside the presence of the jury; (2) that the judge was in error in submitting the interview report to the witness himself to determine whether it was a substantially verbatim account of what he had said; and (3) that the judge was in error in requiring the defense, rather than the Government or the court itself, to call the F.B.I. agent to determine the nature of the document. The ruling was that the proceeding to determine the nature of the document should not be deemed adversary in character and that the legal significance of the interview report, a document actually in existence, should be determined by the judge on the basis of the most appropriate means available, which in this case would be by calling the F.B.I. agent. The Supreme Court split 5-4 on the question of whether it was also the duty of the trial court to call the F.B.I. agent to determine the nature and disposition of the original notes--the majority expressing the view that the judge should have explored this issue as well.

The Supreme Court did not reverse the conviction, but remanded the cause to the district court for further hearing on the question of the nature of the document in order to determine whether a new trial was required.

FRAUD

False Representations to Rural Electrification Administration. Materiality as Element of Offense in Violations of 18 U.S.C. 1001. Leo C.

Gonzales v. United States (C.A. 10). The Court of Appeals affirmed the conviction of Leo C. Gonzales, manager of Kit Carson Electric Cooperative, Inc., Taos, New Mexico, on 4 counts of an indictment charging offenses under 18 U.S.C. 1001, which arose out of false representations to the Rural Electrification Administration.

Kit Carson Electric Cooperative, Inc. borrowed almost $3,000,000 from REA pursuant to the Rural Electrification Act of 1936, and with the proceeds of the loans constructed an electric distribution system in New Mexico and Colorado. It also made loans to its members for installation of electric and plumbing appliances and equipment. The Cooperative was required to submit monthly statements to REA and Gonzales, as manager, falsely reported the financial condition of the Cooperative, concealing his own mismanagement and misappropriations of funds and property. His conviction resulted in a sentence of ten years, and fines totalling $4,000.

On appeal, the challenges to the instructions of the district judge with respect to the "materiality" of the false representations, and to the jurisdiction of the REA in the matters, were discussed by the Court, and resolved in favor of the Government. With respect to "materiality," the Court recognized the difference in opinions that materiality must be an essential element of all offenses included in 18 U.S.C. 1001, comparing Weinstock v. United States, 231 F. 2d 699 (C.A. D.C., 1956), Freidus v. United States, 223 F. 2d 598 (C.A. D.C., 1955), and Rolland v. United States, 200 F. 2d 678 (C.A. 5, 1953), certiorari denied, 345 U.S. 964, with United States v. Silver, 235 F. 2d 375 (C.A. 2, 1956), certiorari denied, 352 U.S. 880, and Fisher v. United States, 231 F. 2d 99 (C.A. 9, 1956). It was held that the better reasoned rule, supported by the weight of authority, is that Congress intended that materiality should be an essential element of the offenses defined in the section and the Court cited in support thereof Freidus v. United States, supra. The Court stated that, when the words of a statute do not fully, directly and expressly set forth all of the essential elements constituting the offense described, allegations in the words of the statute are insufficient, but allegations of fact which show materiality will suffice. The Court also stated that the subject indictment, which charged the offense in the words of the statute, without an allegation that the false statements were material to the inquiry, was sufficient, since the allegations of fact showed the materiality and it was not necessary to recite it in haec verba.

It is suggested that, when indictments are drawn under Section 1001, care be exercised to allege facts which show the materiality of the offense, although it is not necessary to so state in the exact words of the statute.

Staff: United States Attorney James A. Borland; Assistant United States Attorney Ruth C. Streeter (D. N. Mexico).

NATURALIZATION

Membership in Communist Controlled Organization as Bar to Naturalization. Stanislaw Andrzej Grzymala-Siedlecki v. United States (C.A. 5, January 20, 1961). In accordance with the recommendation of the Immigration and Naturalization Service, the United States District Court for the Middle District of Georgia denied appellant's petition for naturalization on the sole ground that he was a person who, within a period of 10 years immediately preceding the filing of the petition for naturalization, was a member of or affiliated with a Communist-controlled organization (8 U.S.C. 1424). The only evidence of Communist affiliation was appellant's enrollment in the Polish Naval Academy, which automatically carried with it membership in a Communist youth organization. The undisputed evidence revealed that when petitioner was graduated from high school, he found no opportunity for earning a livelihood absent a college education; that all schools of higher learning in Poland were then Communist dominated; and that admission to any of them automatically rendered the student a member of a Communist-controlled youth organization. Moreover, appellant, who was the only witness with respect to his activities before coming to the United States, testified that he unsuccessfully attempted to escape from Poland while he was on leave from the Academy; that while on a cruise after his graduation from the Academy, he deserted at Genoa, Italy; that he reported to the American Consulate, which sent him to the Italian police; that he furnished the Italian authorities with intelligence information concerning the Russians and conditions in Poland; that he broadcast for Radio Free Europe; and that he enlisted in the United States Army under the Lodge Act in order to come to the United States and be naturalized as the result of honorable military service.

Upon review of the record, the Central Office of the Immigration and Naturalization Service requested the District Judge to vacate his order of denial and grant the petition on the ground that appellant was eligible for naturalization in that he came within the amelioratory clause of 8 U.S.C. 1424(d), which provides that Communist membership shall not be considered disqualifying if it "was involuntary . . . or was for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes." The Judge declined to alter his ruling, and appellant took an appeal to the Court of Appeals for the Fifth Circuit. The Solicitor General authorized a confession of error in that Court, but the court directed that the case be heard on its merits, and Government counsel appeared in support of the confession. In a 2-1 decision, the Fifth Circuit reversed. The majority opinion states: "We are not . . . called upon to decide the narrow question as to whether an education beyond the high school level is included in the phrase 'other essentials of living', for under the facts in this record he could not earn his livelihood in Poland without the additional education he sought." After reviewing apposite Supreme Court decisions and the legislative history of the amelioratory clause, the Court of Appeals concluded, "We . . . give to the statute in question a liberal interpretation and rule that the intent and purpose of Congress in the enactment of the aforesaid statute demands a ruling by this court to the effect that applicant's

membership in the Communist-dominated youth organization, within ten years of his application for naturalization, under the circumstances then existing brings the applicant within the exclusions provided in said statute, and that his application must be granted."

Staff: Kenneth C. Shelver and Michael S. Fawer (Criminal Division).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

IMMIGRATION

Declaratory Judgment Action to Create Record of Lawful Admission; Jurisdiction; Indispensable Party. Chang Wing Cheung v. Hagerty (D. R.I., Jan. 5, 1961).

Plaintiff alien, filed an application with the Service for the creation of a record of his lawful admission for permanent residence under the provisions of section 249 of the 1952 Act (8 U.S.C. 1259). The application was denied by the District Director (Boston) and the denial was sustained by the Regional Commissioner on appeal. Plaintiff then filed an action against the Officer in Charge (Providence) for a judgment setting aside the administrative denial and directing defendant to grant his application, and for injunctive relief.

The Court found that the statute (8 U.S.C. 1259) permits the Attorney General, in his discretion and under such regulations as he may prescribe, to create a record of such admission in the case of any alien who meets certain requirements specified in the statute. The pertinent regulations are 8 CFR 103.1(e), (f) and (g). It said that the regulations delegate to District Directors (within the United States) the discretionary authority to grant or deny such applications but that they delegate no such authority to Officers in Charge, such as defendant.

Since the relief sought could not be granted by defendant and could be effectuated only by the District Director at Boston, who has jurisdiction over plaintiff's place of residence, the Court concluded that the District Director is an indispensable party and that this action could not be maintained since he is not a party thereto.

Complaint dismissed for want of jurisdiction and outstanding restraining order vacated.

DEPORTATION

Country of Deportation - Formosa; Physical Persecution if Deported - Prosecution in Foreign State; Withholding Deportation - Legal Standard Applied. Chao-Ling Wang v. Pilliod (C.A. 7, Dec. 27, 1960). Plaintiff, a citizen of the Republic of China, was ordered deported for failure to comply with the conditions of his status as a foreign government official (Chinese Navy Lieutenant in the United States for military instruction). The warrant of deportation directed his deportation to England, if that country would accept him; otherwise

to Formosa, or to the mainland of China. England declined to accept him. He then applied for a stay of deportation under section 243(h) of the 1952 Act (8 U.S.C. 1253(h)) alleging that he will be subject to physical persecution if deported to either Formosa or China.

He was accorded an interrogation by a special inquiry officer to support his application for a stay of deportation at which he and a former governor of Formosa testified. The Government offered no evidence. The special inquiry officer recommended a stay of deportation to China but that deportation to Formosa not be stayed. The Regional Commissioner adopted that recommendation and ordered a stay insofar as China was concerned but denied it as to Formosa on the grounds that applicant (plaintiff) had not established that he would be subject to physical persecution if deported to the latter country.

The district court overruled plaintiff's contention that Formosa is not a "country" within the meaning of section 243(a) of the 1952 Act (8 U.S.C. 1253(a)) and from that part of the court's order plaintiff appealed. The court further held that the order refusing to withhold plaintiff's deportation to Formosa was unsupported by substantial evidence and that the Government's failure to introduce evidence or information in denying his application for that relief constituted a denial of due process of law. It remanded the cause to the Service for further action and the District Director appealed from that portion of the order.

The Court of Appeals said the court below was correct in holding that Formosa is a "country" contemplated by section 243(a), but that the remainder of its holding was incorrect. It had applied the wrong legal standard since it equated the procedure adopted for use in discretionary or non-compulsory proceedings with that followed in a deportation hearing. The Court of Appeals pointed out that while the 1952 Act made no provision for the administration of section 243(h) - 8 U.S.C. 1253(h) - a procedure was established by the implementing regulations, 8 CFR 243.3(b)(2). These provide that the alien may submit any evidence in support of his claim for the consideration of the special inquiry officer and it has been held that this procedure satisfies the requirements of procedural due process. It is not a question, in such a case, of whether substantial evidence supports the order of denial but whether the alien had a fair opportunity to present his case.

In disposing of plaintiff's contention that he would be prosecuted as a violator of the armed forces criminal code upon his return to Formosa, the Court of Appeals held that a prosecution before a military tribunal convened pursuant to laws of a foreign state to try offenses committed by a member of the military forces of that country, cannot be construed to be physical persecution under 8 U.S.C. 1253(h).

Affirmed in part and reversed in part.

Habeas Corpus; Administrative Bail; Background Information. U. S. ex rel. Rosario Troia v. Esperdy (S.D. N.Y., Jan. 4, 1961). Relator alleged that the District Director's denial of his application for administrative bail pending his deportation was arbitrary and capricious.

Upon a review of the entire file and proceedings, the Court said that the District Director, acting for the Attorney General, considered the relator's previous illegal entries, his living under an assumed name since his last illegal entry, his use of a false name on a Social Security card, his lack of family ties here, and his leaving his wife and children in Italy. These were all factors which he was justified in taking into account in reaching his judgment that relator was not a good bail risk. The conclusion that relator would likely abscond must be reviewed against his general background information, and when so viewed, it cannot be said that the judgment of the District Director was unreasonable, even though others might, upon the same facts, reach a different conclusion.

The reference to other instances where bail has been granted was immaterial, the Court added, since each application must rest on its own facts. Equally irrelevant was the circumstance that relatives were prepared to post bail.

Judicial Review of Deportation Order; Psychopathic Personality - Sexual deviate; Constitutionality of 8 U.S.C. 1182(a)(4). Fleuti v. Hoy (S.D. Calif., Jan. 9, 1961). Plaintiff sought review of an administrative order of deportation based on a charge that when he last entered the United States in August, 1956, he was excludable under section 212(a)(4) of the 1952 Act (8 U.S.C. 1182(a)(4)) as a person afflicted with psychopathic personality (sexual deviate).

The evidence to support that charge was: (1) a certified record of plaintiff's conviction in 1956 of a violation of sec. 288a, Penal Code of California; (2) his sworn statement in which he admitted having been a sexual deviate for some time prior to his original entry (1952); and (3) a report by a United States Public Health Service doctor which classified plaintiff as a psychopathic personality. The Court found such evidence ample to support the Service's finding that plaintiff, at the time of his entry, was a sexual deviate, classifiable as a person afflicted with psychopathic personality.

As to plaintiff's principal contention that the term "psychopathic personality" is so vague and indefinite as to render the statute (8 U.S.C. 1182(a)(4)) invalid and unconstitutional, the Court said that while it may be true that if that term were to be so used in a criminal statute it would be held to be unconstitutional, the statute here is not a criminal one but defines aliens who are to be excluded from the United States. There is no question but that Congress can determine what persons should be excluded and for whatever causes. From the

legislative history of the statute it is clear that Congress intended that sexual deviates would be classified by the enforcing agencies as psychopathic personalities.

Summary judgment for defendant.

Habeas Corpus; Validity of Deportation Order; Crime Involving Moral Turpitude - Bribery of Amateur Athlete. U. S. ex rel. Sollazzo v. Esperdy (C.A. 2, Jan. 13, 1961). This is an appeal from an order of the District Court for the Southern District of New York, 187 F. Supp. 753, dismissing a writ of habeas corpus testing the validity of a deportation order issued against the relator (See: Bulletin, Vol. 8, No. 23, p. 689).

The Court of Appeals said that corruption of an amateur athlete is peculiarly distasteful since the athlete generally performs before the child in him wholly turns to man and thus is still unformed in character; participation in amateur sports is a valuable training for our youth, for their responsibilities in the armed services, in their civilian occupations and generally as citizens; indeed, few quotations are better known and more approved than the remark attributed to the Duke of Wellington that the Battle of Waterloo was won on the playing fields of Eton.

A violation of section 382(1), New York Penal Law, bribing an amateur athlete) can only tend to subvert the basic principles of amateur sport - virtue there is in striving with one's whole spirit, but only evil can come from lack of effort that is bought, the Court added. Accordingly, it held that the crime of bribing a participant in an amateur sport is one which, in the light of contemporary standards, inherently involves moral turpitude.

Affirmed.

Judicial Review of Deportation Order; Crime Involving Moral Turpitude - Indecent Assault - Connecticut. Marinelli v. Ryan (C.A. 2, Jan. 4, 1961). Appellant was ordered deported under section 241 (a)(4) of the 1952 Act (8 U.S.C. 1251(a)(4)) on the grounds that he had been convicted of indecent assault under a Connecticut statute (Sec. 53-217 General Statutes of Connecticut) of a crime involving moral turpitude. He sought to enjoin the execution of that order in the district court contending that the crime of indecent assault in Connecticut does not necessarily involve moral turpitude, and appealed from the denial of injunctive relief and the dismissal of his complaint. The record of the proceedings before the Service and before the court below established that appellant had been found guilty of an indecent assault and that he "did place a child under the age of sixteen years in such a situation that his morals were likely to be impaired."

The Court of Appeals found that the phrase of the Connecticut statute, "indecent assault," covers a good many offenses, and its use of the word "assault" does not mean that there must have been violence or the threat of violence. It appeared to the Court that the appellant

was charged at least with the act of touching a boy under the age of sixteen with an indecent intent, which clearly meant a sexual intent. If so, it was at least a homosexual advance and under the law of Connecticut (General Statutes Sec. 53-216) homosexual congress is a crime "as indeed it is everywhere, so far as we know," the Court said, when the advance is made to a juvenile, and it had no doubt that such a crime as was here charged against the appellant involves moral turpitude.

Affirmed.

NATURALIZATION

Ineligibility for Naturalization; Exemption from Military Service - Knowing and Intentional Election. Petition of Constantinos Priomos (W.D. Pa., Dec. 29, 1960). The designated Naturalization Examiner moved to deny this petition for naturalization on the ground that petitioner was ineligible to naturalization under section 315(a) of the 1952 Act (8 U.S.C. 1426(a)). That section provides that any alien who applies or has applied for exemption or discharge from training or service in the United States armed forces on the ground of alienage, and is or was relieved or discharged from such training or service on such ground shall be permanently ineligible to become a citizen of the United States.

The sole question presented here was whether petitioner, in executing Selective Service Form SSS-130, an "Application by Alien for Relief from Training and Service in the Armed Forces," knew its contents and effect and voluntarily waived his rights to citizenship. (See: Moser v. U. S., 341 U.S. 41). The Examiner so found and the Court, after painstakingly examining the transcript of testimony and the petitioner's briefs, arrived independently at findings identical to those of the Examiner and concluded that petitioner is permanently ineligible for naturalization.

Petition denied.

* * *

LANDS DIVISION

Acting Assistant Attorney General J. Edward Williams

Condemnation of Wherry Housing Project Tried Before Commissioners Reversed Because Valuation Based on Exchange of Property Condemned for Other Property and Other Findings Not Supported by Substantial Evidence; Case Remanded for Jury Trial. United States v. Leavell & Ponder, Inc. (C.A. 5, reversing W.D. Texas). The Government appealed from the award in the condemnation of a Wherry housing development. The matter was originally referred to commissioners under Rule 71A, F.R.Civ.P. The property condemned was the leasehold interest in 124 acres of Government land at Fort Bliss, El Paso, Texas, consisting of 800 dwelling units and a shopping center. The development consisted of two identical projects of 400 units each and half the shopping center. In 1953 one of the projects had been exchanged for cash and other property. The contract of sale gave the purchaser of the project the option of either paying $217,000 in cash or paying $172,000 in cash and trading 10 acres in fee and options to purchase another approximately 56 acres of land. The latter alternative was chosen.

The sponsors of the project testified that the all cash alternative was placed in the contract of sale for income tax purposes, and that the real value of the land and options exchanged was $900,000. The commission adopted the sponsors' testimony as to the real value of the assets exchanged in the 1953 sale and based its award on that sale to the penny. The Court of Appeals upheld the Government's contention that such prior sale, if considered as an exchange of property in part, should not be considered. "We think the facts of this case are a clear demonstration of the inherent weakness of the evidence of prior sales of the property in question unless they are sales for cash or its equivalent." In addition to the contract of sale itself, the income tax returns of the parties involved and the revenue stamps placed on the deeds also indicated an exchange of assets with a value of approximately $217,000. The Court held the Government was entitled to introduce the sale as an admission against interest since the contract on its face provided for an all cash sale at $217,000. If the Government did this, the sponsors would be entitled to show the $217,000 did not represent the true value, but such rebuttal cannot be affirmative proof of a higher value.

To support the award the commission also had used two other methods of determining fair market value. Both of these other methods were based on capitalization of estimated future income. The commission found that over the remaining 43 years of economic life the owner's potential net income would have been $6,615,341.38. The testimony at the trial on future net income varied widely. The Court of Appeals held that without adequate subsidiary findings it would be impossible to test the correctness of the estimate. Next the commission capitalized this income at 4½% on the assumption it would be received in one lump sum at

the end of the 43 years. There was no capitalization rate lower than 6% in evidence, and the income would be received as monthly rentals. The explanation given by the commission for the 4½% capitalization rate was that it represented the 4% mortgage rate plus ½% for mortgage insurance. The Fifth Circuit said that an appellate court is required to disregard a finding that a prudent investor would be willing to invest his money in the equity of a housing project for the same rate of return he could get from a government guaranteed mortgage. It also held the assumption that the money would be received in a lump sum was erroneous.

The second method of capitalizing income used by the commission was to assume that the net future income would be received either by a corporation or a wealthy individual and that in either case the income tax status of such an owner would be 52% or higher. The Fifth Circuit held that such assumptions "so far as we are able to find, are without precedent in any kind of valuation proceedings." The Court also held that the commission's assumption that 2-3/4% was a proper capitalization rate for the after tax income was without support in the record and must be disregarded.

The Court of Appeals held it was error to admit evidence of certain types of corporate securities such as stocks and bonds, and evidence that this housing equity would be "a conservative investment". Such testimony must be based on knowledge of comparable sales or knowledge of the rate of return which a prudent investor would require to invest in a comparable project. The Court expressly approved the Government's use of Wherry Project and other large housing project sales to derive a comparable rate of return.

Finally, the Court remanded the case to be tried before judge and jury rather than commissioners. The Court reaffirmed that use of a commission was to be the exception rather than the rule. It stated use of a trial judge who can give immediate rulings on admission of evidence and narrow the issues by an appropriate charge to the jury will tend to simplify the issues.

Staff: A. Donald Mileur (Lands Division).

Department of Interior Lacks Authority to Cancel for Fraud Oil and Gas Lease Issued Under Mineral Leasing Act of 1920; Secretary of Interior Not Indispensable Party in Suit to Enjoin Administrative Proceedings to Cancel Such Leases; Lessee Not Required to Exhaust Administrative Remedy Before Challenging Jurisdiction of Administrative Tribunal. Pan American Petroleum Corp. v. Ed Pierson, et al. (C.A.10, reversing D. Wyo.; pet. for reh. denied Dec. 20, 1960). The Department of the Interior issued, pursuant to the Mineral Leasing Act of 1920, as amended, 30 U.S.C. 181 et seq., oil and gas leases on the public domain to Walter G. Davis and others. By assignment Pan American Petroleum Corp. became the owner of several of these leases. Subsequently the

Department began an administrative hearing through subordinate officers in Wyoming to cancel these leases. It was alleged that such leases were falsely and fraudulently procured to allow Davis to hold more acreage than permitted by statute.

Pan American brought this action in the district court to enjoin the administrative proceedings as unauthorized. The district court held that the Secretary of the Interior was an indispensable party and dismissed the complaint, but indicated that the leases could not be cancelled by administrative action. 181 F. Supp. 557. On appeal the Tenth Circuit upheld the district court on the lack of authority to cancel administratively but reversed because the Secretary was held not to be an indispensable party. In determining whether the Secretary was indispensable the Tenth Circuit applied three tests: (1) does the relief sought require the superior to take action either by himself or through a subordinate; (2) are the subordinates acting in excess of their authority; and (3) will the relief sought expend itself on the public domain, the public treasury or interfere with the public administration. As to the first, the Court held the injunction of the district court in Wyoming will effectively grant the relief desired by expending itself on the subordinate officers who are before the court. Secondly, the district court held Sections 27 and 31 of the Mineral Leasing Act of 1920, 30 U.S.C. 184 and 188, provide for suits in the district court to cancel leases held in violation of maximum acreage and other provisions of the Act. The Court rejected the Government's argument that the Secretary has authority to cancel fraudulently obtained leases under the general supervisory authority over public lands contained in 5 U.S.C. 485. The Court likened an oil and gas lease to a fee patent insofar as administrative cancellation is concerned. It was conceded there was no administrative authority to cancel a patent. The Court held the same applied to an oil and gas lease in the absence of a specific authorization of Congress to the contrary. As to the third item, the Court held this did not interfere with the public domain or public administration because the Secretary was free to pursue the fraud remedy in the district court. The Court held Pan American was not required to pursue the jurisdictional question in the administrative proceeding. "It cannot exhaust something which it does not have." The Court noted that this is not a case of administrative proceedings specifically authorized by Congress. The appellee's petition for rehearing was denied. It is now being considered whether the appellees should seek certiorari.

Staff: A. Donald Mileur (Lands Division).

Condemnation; Right to Take; Lack of Judicial Review of Alleged Arbitrary and Capricious Action. United States v. Mischke (C.A. 8, reversing D. Neb.) The United States condemned, among other tracts, some 700 acres owned by Louise Mischke, for a dam and reservoir project on the Missouri River. The District Court, after trial, dismissed the proceeding as to a 42.5 acre portion of the tract, concluding that

such portion was not needed for the dam and reservoir, that it was being taken for recreational purposes and that it would not have been taken except for the urgings of State of Nebraska officials.

The Court of Appeals reversed. It first stated that if the District Court had jurisdiction to review the administrative determination "the redetermination of the question by the judge had evidentiary support". The Court held, however, that the district judge lacked jurisdiction and that determination of the question is for the Secretary of the Army. Recognizing that there were cases from which an implication could be drawn that there was a "bad faith" or "arbitrary and capricious" exception to the rule of non-reviewability, the Court held that no such exception exists. After reviewing the cases the opinion concluded:

> The determination of the Secretary of the Army, the delegate of Congress, as to the necessity of acquiring the lands selected by him, is, we think, no more vulnerable to judicial review or redetermination than would have been the same determination and selection if made by Congress itself in the Act authorizing the project.
>
> Our conclusion is that the District Court was without jurisdiction to enter the order appealed from. The order is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

This opinion represents agreement with the Government's urging upon appeal that the Court should declare the existence of lack of jurisdiction to review administrative determinations so as to eliminate useless trials.

Staff: Roger P. Marquis (Lands Division).

Federal Tort Claims; Tort Committed in Course of Acquisition of Building Under Eminent Domain Power; Interest; Set Off. Merchants-Matrix Cut Syndicate v. United States (C.A. 7, reversing N.D. Ill.). In 1958 the Court of Appeals affirmed a holding that actionable torts had been committed by the United States in connection with the occupation of the Rand McNally Building in Chicago in 1951, a matter which had been the subject of several earlier opinions. See 6 U.S. Attys. Bull., No. 21, p. 662; Id., Vol. 5, No. 5, pp. 136-137; Id., Vol. 3, No. 3, p. 31. The Court reversed the judgment, however, on the ground that moving expenses which could not be recovered in condemnation proceedings could not be recovered under the Federal Tort Claims Act. The Government's petition for certiorari was denied. 359 U.S. 991. Upon remand, the District Court reduced the original judgment of $104,128.18 to $84,343.21.

The Court of Appeals again reversed and directed entry of judgment for $62,338.78. It first held that the exclusion of moving expenses included all expense consequent upon moving to a new location, not just the expenses of physically transporting the personal property from the old site to the new one. Hence, it held that the District Court erred in not eliminating awards because electrical current was changed from D.C. to A.C., causing losses as to electric typewriters, presses and air conditioners.

The Court of Appeals next held that the District Court erred in allowing interest on the reduced amount of the judgment from the date of the original judgment, holding that under the Tort Claims Act interest is allowable only from the date of final judgment. 28 U.S.C. 2411(b); 31 U.S.C. 724(a). Finally, the Court of Appeals, as a result of stipulation made in open court during argument of the appeal, held that a deposit made in the condemnation case to take temporary use of this space should be set off against the amount awarded.

The Court refused to re-examine the earlier decision as urged by the Government and refused plaintiff's motion to charge the Government with damages because, allegedly, the appeal was taken only for purpose of delay.

Staff: Roger P. Marquis (Lands Division).

Acquisition of Property by Federal Government; Specific Mineral Reservations; Effect of State Statute Making Reservations Perpetual. The Leiter Minerals, Inc. v. The California Co. (La. Ct. App., reversing Plaquemines District Court). The United States acquired lands in Louisiana in 1938 with a reservation to the vendor of minerals under certain conditions to expire April 1, 1945, subject to extension if minerals were produced. No production occurred and after 1945 the United States made oil and gas leases to The California Company which has brought in many very substantial producing oil and gas wells. In 1940 the Louisiana legislature passed a statute declaring that the rights theretofore or thereafter reserved in mineral reservations to the United States "shall be imprescriptible", i.e., perpetual.

Claiming under this reservation, The Leiter Minerals, Inc., brought suit against the California Company in the Louisiana Court. The United States then brought suit in the federal court to enjoin such proceedings and to establish its title to the minerals. Preliminary injunction was granted and affirmed by the Court of Appeals for the Fifth Circuit. See 3, U.S. Attys. Bull., 31. The Supreme Court, however, modified the injunction to permit interpretation by the state courts of the state law under declaratory judgment proceedings. 352 U.S. 220. See 5 U.S. Attys. Bull,, p. 107.

This case was brought in the state court for a declaratory judgment. The trial court held that the statute applied so as to make the

rights to minerals permanent in Leiter. The Court of Appeals reversed. It held that the rights of the United States rested on express contract, that the statute does not purport to prohibit the United States from acquiring minerals and that the statute applies only in the absence of express contract. Hence, it declared that the statute "does not apply in the case since the mineral reservation is of specific ex contractu duration".

Staff: Former Assistant Attorney General Perry W. Morton; United States Attorney M. Hepburn Many, and Roger P. Marquis, Lands Division, on brief for United States, Amicus Curiae.

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TAX DIVISION

Acting Assistant Attorney General Abbott M. Sellers

IMPORTANT NOTICE

Departing United States Attorneys and Assistant United States Attorneys have asked whether they may take away copies of the Tax Division manual, The Trial of Criminal Income Tax Cases, for their private use. This manual is Government property. Only a limited supply is available and, hence, no copies can be spared by the Government without seriously hampering the efficient handling of criminal income tax cases. The continued availability of these texts will be of particular importance to incoming United States Attorneys and their new Assistants.

All United States Attorneys and Acting United States Attorneys are requested to see to it that assigned copies of the Tax Division's criminal trial manual are not removed. Any copies that may have been taken away should be promptly recalled.

CIVIL TAX MATTERS
Appellate Decision

Liens - Bankruptcy: Federal Tax Liens on Real Property Recorded and Filed Prior to Bankruptcy Entitled to Be Paid from Specific Fund Arising from Sale of Real Property Prior to County Claim for Taxes Accruing During Pendency of Bankruptcy Proceedings. County of Clark, State of Nevada v. United States (C.A. 9, 6 A.F.T.R.2d 6013, November 28, 1960). In its order for the sale of the assets of a bankrupt corporation, Properties Moulin Rouge, Inc., the district court provided that the sale should be subject to federal, state, county and city taxes in an amount not in excess of $52,000. The United States claimed the entire fund on the basis of a perfected tax lien for sums due prior to adjudication in bankruptcy. The County of Clark asserted a claim to the funds based upon taxes accruing during the pendency of the bankruptcy proceedings.

The referee determined that the sale of the property by the district court had resulted in a material benefit to the United States and that equitably the County was entitled to a reasonable sum for the payment of real estate taxes as costs of administration and preservation accruing during the time that the trustee was in possession. Consequently, he allocated $19,585.62 of the fund to the County and $32,414.38 to the United States. Upon review the district court held that the United States was entitled to the entire fund.

The Court of Appeals affirmed, holding that the tax claim of the United States was a secured statutory lien upon real property, valid under Section 67(b) of the Bankruptcy Act, 11 U.S.C. 107, and was not by statute rendered subject to costs of administration and preservation. The Court rejected the County's contention that, aside from the statute, on equitable grounds the encumbered property should be charged with costs of preservation for secured creditors, since the payment of local taxes is of no benefit to the United States. The further claim that the share of the United States should be reduced to the extent of local taxes to which certain prior lienholders were subject was rejected since no such prior lienholders shared in the $52,000 fund. The order creating the fund, from which there had been no appeal, allocated it only for the payment of taxes to whichever governmental body had a prior right to it -- in this case the United States by virtue of its prior perfected lien on the real property.

Staff: United States Attorney, Howard W. Babcock (D. Nev.); A. F. Prescott, Helen A. Buckley (Tax Division)

District Court Decisions

Summons - Administrative; Production of Books and Records Under Section 7602, Internal Revenue Code of 1954; Privilege Against Self-Incrimination Cannot Be Raised by President and Sole Stockholder of Corporation With Respect to Books and Records of Corporation. In the Matter of Greenspan, CCH 61-1 U.S.T.C. par. 9132 (S.D. N.Y. 1960). In connection with an investigation of excise tax liability, respondent, the president and sole stockholder of a corporation, was served under authority of Section 7602 of the Internal Revenue Code of 1954 with a summons directing him to appear and produce certain relevant corporate books and records. Section 7602 authorizes the examination of "any books, papers, records, or other data which may be relevant or material to such inquiry."

Respondent appeared, but refused to produce the involved books and records, or to identify them, on the ground that such production or identification would tend to incriminate him. Respondent contended that the privilege against self-incrimination could be raised by him with respect to the involved corporation's books and records, because the involved corporation represents his purely personal and private interests.

The Court, however, rejected respondent's contention concerning the privilege against self-incrimination, and ordered him to produce the relevant books and records and to identify them, identification being auxiliary to the production. The Court held that it is immaterial that the involved corporation may embody and represent purely personal and private interests, for the reason that the corporation is a creature of the state.

Staff: United States Attorney S. Hazard Gillespie, Jr. and Assistant United States Attorney David Klingsberg (S.D. N.Y.)

Liens; Jury Trial Denied in Action to Enforce Federal Tax Liens. United States v. Evelyn Fish Malakie, et al. (ED N.Y. November 15, 1960 and January 9, 1961). This is an action to enforce federal tax liens on certain property of taxpayer, and to obtain a deficiency judgment for any tax liability remaining unpaid. Taxpayer did not answer, but one of the other parties demanded jury trial in his answer. The Court granted the Government's motion to strike this demand for jury trial, holding in an opinion filed on November 15, 1960, that an action of this kind is equitable in nature, and that, therefore, there is no right to jury trial. In this opinion the Court cited its own decision in United States v. Damsky, 187 F. Supp. 404 (U.S. Atty's Bull., Vol. 8, No. 25, p. 763, December 2, 1960), where it was held that the taxpayer has no right to jury trial in an action to enforce federal tax liens, and stated that a defendant other than the taxpayer is in a far weaker position.

Subsequently, taxpayer filed an answer, demanding a jury trial, and the Government moved to strike this demand. In a decision filed on January 9, 1961, the Court granted this motion, holding that taxpayer's answer, putting in issue the validity or the amount of the lien, does not change the equitable nature of the action.

It should be noted that the taxpayers in the Damsky case, supra, have filed a motion with the Court of Appeals for the Second Circuit, for a writ of mandamus to compel the district court to give them a jury trial. This motion was argued in the Court of Appeals on January 9, 1961, the same day as the District Court filed its second decision in the instant case, and has not yet been decided.

Staff: United States Attorney Cornelius W. Wickersham, Jr. and Assistant United States Attorney Jon H. Hammer (E.D. N.Y.)

Liens; Priority; Tax Liens for Withholding Taxes Against Subcontractor Superior to Assignment of Claims by Subcontractor in Production Contract; Rights of Prime Contractor Superior to Tax Lien. United States ex rel. Lyall Saunders as Assignee of Sinclair Refining Co. v. Parks Construction Co., Inc. (N.D. Iowa 60-2 U.S.T.C. Paragraph 9736. The Air Force entered into a construction contract with defendant, Parks Construction Company. Parks subcontracted part of the construction to taxpayer, Burke Construction Company. Taxpayer assigned its claims under the contract to Omaha Body and Equipment. Plaintiff, Saunders, and defendant Anderson supplied materials to taxpayer and were unpaid. Parks held a retainage of $8,137.56 it admitted was due under the contract.

The Court held that the Government's lien was junior to the claims of Saunders and Anderson, but superior to that of Omaha. The interest acquired by Omaha by virtue of the assignment did not bring it within the term "purchaser" of Section 6323 of the Internal Revenue Code of

1954, nor was it a "perfected lien," under the rule referred to in First State Bank of Medford v. United States, 166 F. Supp. 204.

Staff: United States Attorney F. E. Van Alstine and Assistant United States Attorney William R. Crary (N.D. Iowa); Edward A. Bogdan, Jr. (Tax Division)

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