

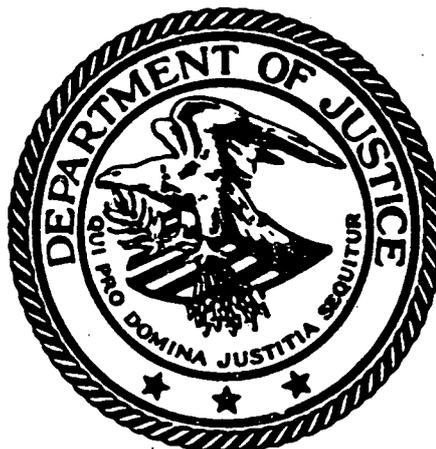
Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

February 13, 1959

United States
DEPARTMENT OF JUSTICE

Vol. 7

No. 4



UNITED STATES ATTORNEYS
BULLETIN

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DISTRICTS IN CURRENT STATUS

As of December 31, 1958, the following districts were in a current status:

CASES

Criminal

Ala., M.	Dist. of Col.	Ky., W.	Nev.	Oregon	Vt.
Ala., S.	Ga., N.	La., W.	N.H.	Pa., E.	Va., E.
Alaska #1	Ga., S.	Me.	N.J.	Pa., M.	Wash., E.
Alaska #2	Hawaii	Md.	N.M.	Pa., W.	Wash., W.
Alaska #3	Idaho	Mass.	N.Y., N.	P.R.	W. Va., N.
Alaska #4	Ill., E.	Mich., W.	N.Y., W.	R.I.	Wis., E.
Ariz.	Ill., N.	Minn.	N.C., E.	S.D.	Wis., W.
Ark., E.	Ill., S.	Miss., N.	N.C., M.	Tenn., E.	Wyo.
Ark., W.	Ind., N.	Miss., S.	N.D.	Tenn., M.	C. Z.
Calif., N.	Ind., S.	Mo., E.	Ohio, N.	Tenn., W.	Guam
Calif., S.	Iowa, N.	Mo., W.	Ohio, S.	Tex., N.	
Colo.	Iowa, S.	Mont.	Okla., N.	Tex., S.	
Conn.	Kan.	Neb.	Okla., E.	Utah	

Civil

Ala., N.	Del.	Md.	N.M.	Pa., W.	Vt.
Ala., M.	Ga., N.	Mass.	N.Y., N.	R.I.	Va., E.
Ala., S.	Hawaii	Mich., E.	N.Y., W.	S.C., W.	Wash., E.
Alaska #1	Idaho	Mich., W.	N.C., M.	S.D.	Wash., W.
Alaska #2	Ill., N.	Minn.	N.C., W.	Tenn., E.	W. Va., N.
Ariz.	Ill., S.	Miss., N.	Ohio, N.	Tenn., W.	Wis., E.
Ark., E.	Ind., N.	Mo., E.	Ohio, S.	Tex., N.	Wis., W.
Ark., W.	Kan.	Mo., W.	Okla., N.	Tex., E.	Wyo.
Calif., N.	Ky., E.	Mont.	Okla., E.	Tex., S.	C. Z.
Calif., S.	Ky., W.	Neb.	Okla., W.	Tex., W.	Guam
Colo.	Me.	Nev.	Ore.	Utah	V. I.

MATTERS

Ala., N.	Calif., N.	Ky., E.	Mont.	Ohio, N.	Wash., W.
Ala., M.	Colo.	Ky., W.	Neb.	Ohio, S.	W. Va., N.
Ala., S.	Conn.	La., W.	N.H.	Okla., N.	Wis., W.
Alaska #1	Dist. of Col.	Me.	N.J.	Okla., E.	Wyo.
Alaska #3	Ga., S.	Md.	N.M.	Pa., E.	C. Z.
Alaska #4	Ill., S.	Mich., W.	N.Y., E.	R.I.	Guam
Ariz.	Ind., N.	Miss., N.	N.C., E.	S.D.	V. I.
Ark., E.	Ind., S.	Miss., S.	N.C., M.	Tenn., W.	
Ark., W.	Iowa, N.	Mo., E.	N.C., W.	Utah	

Civil

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

As of December 31, the number of districts current in each category changed very little. The total current with regard to Criminal cases remained the same, 75 or 79.7%; in Civil cases the number rose from 63 to 66, or 70.2% of all districts; the number current in Criminal Matters pending remained the same, 52 or 55.3%; and the districts current with regard to Civil Matters pending dropped from 83 to 81, or 86.1% of all districts.

MONTHLY TOTALS

During December there were reductions in 5 of the 8 categories of pending business, one total remained unchanged, and two categories showed increases. While Criminal Matters pending rose by 126 items and Condemnation cases increased by 29, the total of all other Civil cases except tax lien remained the same, and Civil Matters pending took a substantial drop of 345 items. For the third consecutive month the total of all pending cases and matters registered a decrease, from 51,495 in November to 51,127 in December, a reduction of 368 items.

Collections during December totaled \$2,174,201, or \$3,845,165 less than for the preceding month. However, November's total was unusually high by reason of one very substantial recovery in an Admiralty case. Aggregate collections for the first six months of the fiscal year show a very encouraging increase over those for the similar period of fiscal 1958. The total of \$17,089,163 collected so far is \$2,483,411 or 17% more than was collected in the first six months of the preceding year, and only \$44,578 below the record for half-year aggregates which was set in 1956. If this accelerated rate of collections is continued throughout the remaining half of the fiscal year, it is conceivable that aggregate collections for 1959 could exceed the all-time high established in 1956.

* * *

CLOSED GENERAL ACCOUNTING OFFICE CASES

The General Accounting Office advises that approximately 500 of its cases now in the hands of United States Attorneys show delinquent payments. It may be that some of these cases have actually been closed by

United States Attorneys, and the General Accounting Office has not been notified.

It is suggested that each office review its closed General Accounting Office case files to determine whether or not that Office has ever been notified of the status of the case. If closed without notification, the newly prescribed Form DJ-80 (Memo No. 256, January 26, 1959) should be submitted for the closed file. This will enable the General Accounting Office to close out its records and avoid unnecessary correspondence on the part of both offices. While the Form DJ-80 is phrased for current and future use, it can be adapted very readily for the purposes here intended. It should be used, as suggested, to notify the General Accounting Office not later than March 10 of any closed cases on which notice has not been previously sent.

* * *

NEED FOR CORRECT REPORTING

In line with Departmental policy of reducing case backlog, attention is invited to the need for eliminating certain cases and matters erroneously carried on the machine listings. It is suggested that a physical inventory be made (of all items reported) for the purpose of verifying the correctness of the current status. Special attention should be given to (1) Selective Service cases (Not to be reported till positive action is taken by the office,) (2) Detainers (detainers lodged by foreign districts with the local United States Marshal should not be reported as removal cases) and (3) Immediate declinations (where it is obvious on its face that no consideration will be given to the matter, as in the case of crank letters, etc.) See pages 21 and 22, United States Attorneys' Docket and Reporting System Manual, Jan. 1958.

* * *

RULE 25 (d), F.R.C.P. - NOTICE TO COUNSEL

With reference to Rule 25 (d) of the Federal Rules of Civil Procedure, it is suggested that when an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, who is a party to a pending action, dies, resigns, or otherwise ceases to hold office during the pendency of such action, notice be given to the adversaries by the United States Attorney. This would be a courtesy since such information is more likely to come to the attention of the United States Attorney than to that of opposing counsel.

* * *

SUGGESTION AWARD PROGRAM

Mrs. Emily S. Wood, United States Attorney's Office District of Oregon, has received an award of \$50 for her suggestion that a space be provided on the Debtor Index Card (USA-117) to indicate the partial

payment number and that additional space be provided for the address of the debtor. Mrs. Wood's suggestion was put into effect in the December 1, 1958 revision of Form No. USA-117.

The Executive Office for United States Attorneys congratulates Mrs. Wood on her award.

* * *

JOB WELL DONE

The Acting District Public Works Officer, has expressed appreciation for the active participation of Assistant United States Attorney Richard A. Lavine, Southern District of California, in the Eleventh Naval District Safety Conference. His informative presentation on "Tort Claims" contributed greatly to the interest and success of the Conference.

United States Attorney Maurice P. Bois and Assistant United States Attorneys Alexander J. Kalinski and William Maynard, District of New Hampshire, have been commended by the Chief Inspector, Post Office Department, for the outstanding manner in which a recent criminal case involving the publication of a well known crime fiction magazine was handled.

* * *

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

PAYMENT OF CERTAIN EXPENSES BY THE
FEDERAL HOUSING ADMINISTRATION

In view of the recent decision of the Comptroller General, B-137311, dated November 3, 1958, that Federal Housing Administration should pay for auctioneers' fees, cost of advertising, title examinations and actual out-of-pocket expenses in their cases handled by United States Attorneys, these expenses will be billed to the Federal Housing Administration for payment. Statutory fees will not be billed to them.

By arrangement between the Department and FHA, the approval of the latter must be obtained by the United States Attorney before incurring any of these out-of-pocket expenses in excess of \$100. No prior approval from FHA is required for incurring the usual and necessary expenses in connection with advertising and title examinations where the amounts do not exceed \$100. Please be careful to apprise FHA in advance of the need to incur any expense expected to exceed \$100. The Department has assured FHA that this would be done.

In arriving at the conclusion that FHA is authorized to pay expenses in cases handled by the United States Attorneys, the Comptroller General took into account such applicable factors as: (1) the agency is authorized to sue and be sued in any court of competent jurisdiction; (2) it is authorized to use its funds as necessary to carry out its programs without regard to any other provisions of law governing expenditures of funds (thus FHA could employ its own legal services); and (3) it has authority to pay expenses of foreclosure proceedings (the type of case under consideration). Therefore, FHA has the authority to sue, etc., by its own staff and to pay the incident expenses. Hence, where for satisfactory reasons the facilities of the United States Attorneys offices are used, FHA can pay the out-of-pocket expenses described.

The same procedure is applicable to any other Government corporation or agency represented in court by the United States Attorney, if the agency may sue by its own staff (or a staff it could legally employ), and pay the cost thereof. Accordingly, this decision of the Comptroller General should be followed, and agencies should be charged with out-of-pocket expenses incurred by United States Attorneys' and Marshals' offices in connection with actions handled for such agencies.

DEPARTMENTAL ORDERS AND MEMOS

The following Memorandum applicable to United States Attorneys Offices has been issued since the list published in Bulletin No. 3 Vol. 7 dated January 30, 1959.

<u>MEMO</u>	<u>DATED</u>	<u>DISTRIBUTION</u>	<u>SUBJECT</u>
256	1-26-59	U.S. Attys	Correspondence with other government agencies re status of cases - General Accounting Office

* * *

ANTI TRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT

Indictment Filed Under Section 1. United States v. The Detroit Chevrolet Dealers' Association, Incorporated, et al., (E.D. Mich.). On January 23, 1959 the Federal Grand Jury in Detroit returned an indictment naming as defendants twenty-two Chevrolet dealers in the Metropolitan Detroit Area and the Detroit Dealers' Association. The indictment in two counts, charges the dealers and the Association with a combination and conspiracy (1) to raise, fix and stabilize the retail price of Chevrolet automobiles and (2) to fix and establish a minimum gross profit to be made on sales of Chevrolet automobiles in violation of Section 1 of the Sherman Act.

The first count charges that beginning sometime in 1954 the defendants agreed (a) to adopt uniform retail list prices to be used by defendant dealers in the re-sale of Chevrolet automobiles; (b) to print and distribute the uniform retail list prices agreed upon; and (c) to refrain from price advertising Chevrolet automobiles except at manufacturers' suggested list prices.

Count 2 of the indictment charges that during part of 1956, the defendants agreed (a) to refrain from making retail sales of Chevrolet automobiles at prices which would result in the dealer realizing a gross profit that was less than \$225 per unit sold, and (b) to police adherence to the agreement through a committee appointed for that purpose.

The effects of these combinations and conspiracies was alleged to be (a) that price competition among Chevrolet dealers in the Metropolitan Detroit Area has been suppressed and restrained; (b) that purchasers of Chevrolet automobiles from Chevrolet dealers in the Metropolitan Detroit Area have been deprived of an opportunity to purchase in a free and unrestricted market, and (c) that retail list prices used by defendant dealers in selling Chevrolet automobiles in the Metropolitan Detroit Area have been arbitrarily fixed and maintained at uniform and non-competitive levels.

This indictment of Detroit Chevrolet dealers represents the third Metropolitan Area in the country in which automobile dealers and/or dealer associations have been indicted as a result of current grand jury investigations of antitrust violations in the sale and distribution of automobiles.

Staff: John W. Neville, Edward G. Gruis and William C. McPike
(Antitrust Division)

Defendants Motion for Acquittal Granted in Sections 1 and 2 of the Sherman Act Case. United States v. Harte-Hanks Newspapers, Inc., et al., (N.D. Texas). Following the completion of the Government's case in this action, Judge T. Whitfield Davidson, on January 21, 1959, granted defendants' motion for a judgment of acquittal. The indictment had charged that defendants, Harte-Hanks Newspapers, Inc., Harte Hanks & Company, Herald-Banner Publishing Co., (formerly Banner Publishing Co.), Houston Harte, Millard Cope and Bruce Meador, had conspired to eliminate the Banner's only competitor, the Greenville Herald, and had monopolized the dissemination of news and advertising in Greenville, Texas, in violation of Sections 1 and 2 of the Sherman Act. The indictment charged that defendants, who controlled the Greenville Banner and seven other newspapers in Texas, had intentionally eliminated the only other newspaper competitive to the Banner in Greenville, by: intentionally operating the Banner at a loss utilizing profits from the seven other newspapers to finance such losses; reducing advertising and subscription rates on the Banner; distributing copies of the Banner free of charge; curtailing the credit available to the Herald; and, finally, purchasing the Herald.

After the Government put its case in evidence defendants moved for a judgment of acquittal.

Judge Davidson, in a written opinion, held that the Government's case was insufficient to show a "planned design to destroy competition to the detriment of the advertising public." In evaluating the sufficiency of the Government's case, the Court relied heavily on information attached by the defendants to their trial brief. Such information was not a part of the record before the jury and had not been offered in evidence.

The Court directed a judgment of acquittal for the defendants.

Staff: Henry M. Stuckey, Larry Williams and Kenneth N. Hart
(Antitrust Division)

INTERSTATE COMMERCE COMMISSION

Judicial Review of Administrative Orders. Quickie Transport Company v. United States of America, et al., (D. Minn.). This was an action to vacate and set aside an order of the Interstate Commerce Commission which denied plaintiff's application for extension of its operating rights from a recently constructed oil refinery near Pine Bend, Minnesota, to certain points in Wisconsin and the Upper Peninsula of Michigan. Four other carriers who had authority from the Twin Cities area to points in Wisconsin and Upper Michigan had also petitioned the commission to extend their authority to take in the new refinery at Pine Bend, approximately ten miles from St. Paul.

Plaintiff maintained that the record indicated that it was fit, willing, and able to render the service and that there was sufficient shipper support

of its service for the Commission to grant the request of authority. It also urged that the Commission make no finding that traffic from Pine Bend would not support five carriers as well as four.

The intervenors, the four carriers with authority, and the defendants, United States and the Interstate Commerce Commission, maintained that the burden of proof was upon the plaintiff to present specific evidence to show that the traffic would support five, or any specific number of carriers, and that the plaintiff had failed to present such specific evidence. Further, it was maintained that the service from Pine Bend was merely supplanting that from the Twin Cities, inasmuch as supplies from the new refinery would take the place of those formerly picked up in the Twin Cities by the four certificated carriers.

The three-judge Court held that it was the primary responsibility of the Commission to determine compliance with the requirements set out in the law, which included the number of carriers that should service any given point. It also held that an applicant has the burden of showing that the proposed service is, or will be, required by the present or future public convenience and necessity, which the plaintiff had failed to do. Consequently, on January 30, 1959, the Court dismissed the complaint and entered judgment in favor of the United States and the Interstate Commerce Commission.

Staff: Willard R. Memler (Antitrust Division)

* * *

C I V I L D I V I S I O N

Assistant Attorney General George Cochran Doub

COURTS OF APPEALADMIRALTY

Collision; Sinking of Navy Barge YFNX-6 as Result of Negligence of Government; Violation of Wreck Statute; Subsequent Sinking of NORA V; Pennsylvania Rule Inapplicable to Relieve Claimants of Burden of Proving That NORA V Sank After Colliding With Debris from Wreck of YFNX-6. In the Matter of the Petition of the United States of America as Owner of the Navy Barge YFNX-6 for Exoneration from or Limitation of Liability etc. (C.A. 4, Jan. 5, 1959). On July 7, 1954, the YFNX-6, a wooden hulled Navy barge under tow of the USS BANNOCK, foundered and sank in the middle of Delaware Bay. Eight days later the fishing vessel NORA V capsized and sank in Delaware Bay about four miles west of the YFNX-6 wreck. Claimants, the owner of the NORA V, the surviving passengers and personal representatives of the three passengers who lost their lives, contended that the NORA V sank after colliding with floating wreckage from the YFNX-6. The United States petitioned for exoneration from or limitation of liability. The district court held, after a trial on the liability issues (156 F. Supp. 325), that the YFNX-6 had sunk as the result of the negligence of the USS BANNOCK in towing her but granted the Government's petition for exoneration because claimants had failed to prove that the sinking of the NORA V was caused by anything that came from the wreck of the YFNX-6. Claimants appealed on the ground, among others, that under the rule of The Pennsylvania, 19 Wall. (86 U.S.) 125 (1873), they did not have to prove that the unseen object which holed the bottom of the NORA V came from the YFNX-6 in view of the Government's violation of that part of the Wreck Statute, 33 U.S.C.A. 409 which provides "it shall not be lawful to . . . carelessly sink . . . vessels . . . in navigable channels" The Pennsylvania rule provides that a vessel in violation of a statutory requirement has the burden of showing "not merely that her fault might not have been one of the causes [of a collision], or that it probably was not, but that it could not have been." In affirming, the Fourth Circuit agreed with the district court's refusal to apply the Pennsylvania rule and also with its finding that the Government had sustained its burden of proof by showing that it was practically impossible for the wreckage from the YFNX-6 to have drifted to the locus of the sinking of the NORA V within a period of eight days or less, and that nothing which came off the YFNX-6 was heavy enough to have caused the ensuing damage to the NORA V.

Staff: Charles S. Haight, Jr. (Civil Division)

DISTRICT COURTSTORT CLAIMS ACT

Tort Claims Act; Government Not Liable for Death of Serviceman Killed in Gun Battle With Police Following Discharge from Naval

Hospital Without Having Been Cured of Mental Disease. Eileen Theresa Barbaro, Admx. v. United States (E.D. N.Y., Dec. 10, 1958). Plaintiff's intestate brought this suit under the Tort Claims Act on the ground that her husband's death had resulted from the negligence of doctors in a military hospital. In October 1951, the deceased, after a quarrel with his wife, attempted to commit suicide. He was thereafter taken to Mitchell Air Force Base dispensary where he was ordered transferred to St. Albans Naval Hospital with a diagnosis "reactive depression with suicidal tendencies." Approximately two months later, he was discharged from St. Albans Naval Hospital with a diagnosis "observation psychiatric" and returned to full duty with his military unit. From December 15, 1951, until June 7, 1952, the deceased was absent without leave from his unit except for two brief periods in February and April. On June 7, 1952, the defendant was shot to death in a gun battle with Utah State Police. Plaintiff alleged that the Government had been negligent in discharging her husband from the hospital without effecting a cure of his mental disease. The court dismissed the complaint on the grounds that (1) Plaintiff had failed to make a prima facie case of negligence against the United States and (2) the determinations of the attending physicians that the deceased was fit for return to military duty, presumably made in conformity with medical standards and requirements established by the military services, came within the purview of 28 U.S.C. 2680 which excludes claims against the Government based upon the exercise or performance of a discretionary function on the part of its employees.

Staff: United States Attorney Cornelius W. Wickersham, Jr. and
Assistant United States Attorney Alfred Sawan (E.D. N.Y.);
Irvin M. Gottlieb (Civil Division).

Medical Malpractice: Liability of Physician for Incorrect Diagnosis; Failure of Plaintiff to Introduce Expert Testimony. Phyllis Margaret Randolph, Admr. of the Estate of Eugene Floyd Randolph, Deceased v. United States (E.D. Va., Jan. 6, 1959). This action was brought under the Tort Claims Act for the alleged wrongful death of a two-months old infant. Plaintiff asserted that her child's death was caused by the malpractice of a physician employed at the United States Naval Hospital, Portsmouth, Virginia. The evidence disclosed that the mother took the child to the clinic on a Sunday afternoon where, according to the medical log, and the testimony of a nurse, her sole complaint concerning the child was a "protruding umbilicus." A physician examined the child, concluded that no emergency existed and that the condition could be treated in a routine manner. Accordingly, the child had not been admitted into the emergency room. The mother testified at the trial that the child had vomited while enroute to the hospital, and that she had advised the physician of this fact. The physician denied that the mother had made any statement to him concerning vomiting or any other symptoms which would indicate other illnesses in the child. The mother returned home with the child, where it died at approximately 2:00 A.M. the following morning, although its death was not discovered until 6:00 A.M. The Assistant Chief Medical Examiner for the Commonwealth of Virginia, predicated his finding solely upon the history of the case as related by the mother, wrote upon the death certificate that "bronchopneumonia" was the cause of death. The Court ruled that,

although the death certificate is prima facie evidence of the facts stated therein under the provisions of the Code of Virginia, the presumption created by the statute was rebutted in this case because (1) the Medical Examiner's statement had been based solely upon what the mother had told him, and (2) testimony had been introduced by the Government to the effect that, without an autopsy, it was impossible to determine the true cause of death, as infants of that age have a high mortality rate and frequently die of unexplained causes. The Court held, moreover, that in actions for malpractice the plaintiff must produce expert testimony to support a recovery, in the absence of the application of the doctrine of res ipsa loquitur. The plaintiff had introduced no expert testimony to establish her claim of malpractice. The Court pointed out that an improper diagnosis does not establish a negligent act, and the doctrine of res ipsa loquitur was not applicable since "a bad result or failure to cure is not, in itself, sufficient to raise any inference or presumption of negligence on the part of the physician." Judgment was entered accordingly in favor of the Government.

Staff: United States Attorney John M. Hollis (E.D. Va.)

COURT OF CLAIMS

COURT OF CLAIMS

Validity of Statutory Liens of Materialmen Under State Law When Navy Cancels Prime Contract for Default and Takes Over Materials on Hand. Cecil W. Armstrong, et al. v. United States, (C. Cls., Jan. 14, 1959). The Navy contracted with Rice Shipbuilding for the construction of eleven vessels. This contract was terminated for Rice's default and the Navy exercised its contract right to require Rice to transfer title to it in the partially completed vessels and in materials procured by Rice for incorporation in the vessels. After the transfer, plaintiffs, who had supplied some of these materials, claimed that they had valid liens on the vessels and materials under state law, and that they were entitled to just compensation for the "taking" of these. The Court dismissed the petition, pointing out that Government contracts must be construed under federal, not state, law, and that laborers and materialmen can acquire no lien on Government work. Plaintiff sought to limit this rule to cases in which title to the work is to pass to the Government as progress payments are made. The Court refused so to limit it, holding that the contract provision requiring transfer of the vessels and construction materials to the United States in the event of default, gave the Government "inchoate title to the various materials supplied the contractor" by plaintiffs. Since plaintiffs had no property rights in the materials, there was no compensable taking.

Staff: Kathryn H. Baldwin (Civil Division)

Laches as Defense to Action by Discharged Employee. John J. Bailey v. United States (C. Cls. Jan. 14, 1959). Plaintiff, an employee of the Federal Housing Administration, was removed on charges on February 3, 1953. Both the Eighth Civil Service Region and the Civil Service Board

of Appeals and Review affirmed the removal, the latter on December 18, 1953. Plaintiff filed this suit for back pay on May 29, 1958. The Court dismissed the petition, holding that plaintiff had not employed proper diligence in asserting his rights. Plaintiff sought to excuse his delay on the ground that he was continually contacting the agency seeking reemployment. The Court said that these efforts "had nothing to do with his legal rights, if any he had." Plaintiff also sought to excuse his delay by arguing that it was not until the decision in Washington v. United States, 137 C. Cls. 344, decided January 16, 1957, that it was clear that his rights had been violated. The Court likewise found this position untenable, saying that plaintiff "had no right to wait until some diligent litigant raised the point about which plaintiff here complains."

Staff: Norman Hyman (Civil Division)

Courts Martial; Appointing Authority When Commander is Accuser.
Marion G. Denton v. United States (C. Cls., Jan. 14, 1959). This suit was brought to recover the pay plaintiff claims he was entitled to receive following his allegedly illegal conviction by court martial in August 1944. Plaintiff, a Reserve Officer on active duty during World War II, was given orders transferring him to the Greenland Base Command "as Post Commander." Thereafter, the Base Commander ordered plaintiff to proceed to a post some 500 miles northeast of the base command, to assume command of such post. Plaintiff refused to comply, and the Base Commander preferred charges against him. The Base Commander had authority to convene courts martial, but under Article of War 8, when the convening authority is also the accuser, "the court shall be appointed by superior competent authority." In the chain of command above the Greenland Base Command, only the President was authorized to appoint general courts. In this case, "by order of the Secretary of War," the charges against plaintiff were transferred to the First Air Force at Mitchell Field, New York, where a court was convened and plaintiff tried and convicted. The principal issue in the case was whether the "superior competent authority" specified in Article of War 8 had to be in the chain of command. The Court avoided a direct ruling on this point, stating that even if the court had been appointed by the President, as plaintiff argued, he would not have given his personal attention to the matter, but would have relied on the Secretary of War and the latter's staff to prepare necessary papers and arrange details. Since they were in fact the individuals who handled the matter, the difference was only one of form, not affecting plaintiff's substantive rights. The Court therefore dismissed plaintiff's suit for active duty pay, and in the companion congressional reference case, reported to Congress that plaintiff had neither a legal nor an equitable claim against the United States.

Staff: Sondra K. Slade (Civil Division)

Whether Provocation by Supervisor Constitutes Excuse for Assault on Him; Discharge for Good of Service. Willie L. Ruffin v. United States (C. Cls., Jan. 14, 1959). Plaintiff, a Post Office driver, became

engaged in an altercation with his supervisor in the course of which the supervisor allegedly called him insulting names. Plaintiff thereupon slapped his supervisor's face. Charges were preferred, and plaintiff was dismissed. The Civil Service Commission affirmed the dismissal. Plaintiff brought this suit for back pay, contending that the slapping incident did not amount to reasonable cause for his removal. The Court dismissed the petition. It said: "While we do not condone the use of the language complained of, we do believe that it furnished no excuse for violence. *** Plaintiff did commit an act which constituted a breach of law, and it is for the Post Office officials to determine whether the action was reasonable cause for removal." The Court added that the incident did constitute cause for dismissal.

Staff: Frances L. Nunn (Civil Division)

CASES INVOLVING THE EMERGENCY FEED
PROGRAM OF THE DEPARTMENT OF AGRICULTURE

The Frauds Section of the Civil Division has recently promulgated a new policy for the handling of Emergency Feed cases. On February 3, 1959, a memorandum defining the policy was sent to all offices handling these cases. In general, the new policy authorizes United States Attorneys to settle enumerated classes of these cases for single damages. This represents a relaxation of the former policy which set a base settlement figure of double damages and one forfeiture (under 31 U.S.C. 231), and required that all settlements be approved by the Department.

The new policy is based on the views expressed by many United States Attorneys who have been handling these troublesome cases over the past three years. It is believed to be a realistic and workable approach to the various problems involved, and it is anticipated that it will permit the reduction of case loads within a few months to a hard core of cases involving only the more serious violations. United States Attorneys are urged to take immediate steps to put it in effect.

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CIVIL RIGHTS DIVISION

Assistant Attorney General W. Wilson White

Violation of Voting Rights, United States of America v. George C. Wallace, Civil Action 1487-N, Criminal No. 11098-N. On December 8, 1958, the Commission on Civil Rights held a hearing in Montgomery, Alabama, to investigate complaints alleging violation of voting rights on account of race or color. At the hearing certain registrars and custodians under Commission subpoenas refused to produce voting and registration records of Barbour, Bullock, and Macon Counties, Alabama. Certain registrars also refused to be sworn and testify before the Commission. The Commission requested the Attorney General to seek enforcement of these subpoenas. On application of the Attorney General the Court entered an ex parte order on December 11, 1958, requiring all respondents to produce records and testify before the Commission on December 18, 1958. On December 17, after motions were filed by respondents the Court modified the production order to require production on January 9, 1959, and further ordered a hearing on January 5, 1959. On January 5, 1959, counsel for all respondents and the Government agreed to an order which would permit the inspection of the voting records in the counties in which they were located and reserving jurisdiction with respect to the testimony of certain registrars. During the period January 5, to January 8, 1959, agents of the Commission made an inspection of the voting records in Macon County and the registrars of that County were questioned during the inspection. George C. Wallace, an Alabama Circuit Judge, who had custody of the records in Barbour and Bullock Counties, Alabama, permitted agents of the Commission to inspect only three or four registration application forms. On January 9, 1959, after application by the Attorney General for further relief, the Court entered an order and opinion overruling all of respondents' contentions and directing George C. Wallace to make the records available to agents of the Commission on January 12, and 13, 1959. The Court further dismissed the cause as to the registrars in Macon County. On January 12, 13 and 14, 1959, the agents of the Commission finally gained access to the voting records and made their inspection but only after dilatory and delaying acts of respondent, George C. Wallace, who had placed the records in the custody of hastily called grand juries in the two counties. On January 15, 1959, on motion of the Attorney General, the civil action was dismissed because the relief sought - inspection of records - had been effected. At that time the Court directed counsel for the Government to institute criminal contempt proceedings against George C. Wallace. An order to show cause was issued and on January 26, 1959, after trial of the case, the Court entered an order discharging George C. Wallace. The Court found that Wallace had, in fact, complied with the order for production of records and that the purported divesting himself of custody was a subterfuge which was merely an attempt to give the impression that he was denying the Federal Court's order while, in fact, he retained control of the records and made them available to Commission agents. The Court refused to judicially determine the motives of Wallace but stated that, if they were political, "this Court refuses to allow its authority and dignity to be bent or swayed by such politically, generated whirlwinds."

Staff: First Assistant Joseph M. F. Ryan, Jr. and David R. Owen,
Attorney, (Civil Rights Division)

CRIMINAL DIVISION

Assistant Attorney General Malcolm Anderson

OBSCENITY

Venue in District Where Material Delivered (18 U.S.C. 1461). United States v. Charles G. Hall and Mary Hall (N.D. Calif.). Charles G. Hall and Mary Hall, his wife, were alleged to have caused to be delivered by mail, obscene pictures from cities in California and Oregon to Grace, Idaho. Complaint was filed against them in the District of Idaho under the recently enacted venue amendment to 18 U.S.C. 1461, authorizing prosecution to be instituted in the district or districts in which obscene material is caused to be delivered, as well as in the district or districts of mailing.

Defendants, the parents of seven children, were arrested in the Northern District of California, to which district the case was transferred under Rule 20, F. R. C. P. Upon plea of guilty each defendant was sentenced to imprisonment for ten years, but the Court ordered a review of the sentences, as provided by 18 U.S.C. 4208.

A considerable amount of obscene material in the possession of the defendants was seized; also photographic equipment, as well as an index of names and addresses of persons throughout the United States with whom the defendants were corresponding. The material involved was described as the vilest ever coming to the attention of the United States Attorney's office. The punishment imposed was as heavy as ever imposed in an obscenity case, according to the Post Office Department. The case was also unique, in that it was the first prosecution in which the new venue provisions of 18 U.S.C. 1461, as amended, were used.

Staff: United States Attorney Robert B. Schnacke;
Assistant United States Attorney Robert E. Woodward
(N.D. Calif.).

LIQUOR REVENUE

Vehicles; Search and Seizure; Probable Cause; Tests for Existence of Probable Cause; 26 U.S.C. 7302. Richard Calvin Price v. United States (C.A. 10, January 2, 1959). In reversing a judgment of conviction in a case involving the stopping of a motor vehicle on a highway, and remanding the cause with directions to sustain the motion to suppress the seized nontaxpaid liquor as evidence, the Court of Appeals for the Tenth Circuit discusses "tests" for the existence of probable cause which may be useful as a rule of thumb both for attorneys and investigators in the field. Among the tests listed by the Court were the following: evidence relating to the violator's reputation as a dealer in contraband liquor; evidence that he owned or operated a still; evidence that he was a professional

liquor runner; evidence that he ever sold or agreed to sell contraband liquor; evidence that the automobile had ever been used on previous occasions for the transportation of contraband liquor; evidence that the automobile appeared to be lower at the rear end than at the front; evidence that the road being traveled was a well-known route from a well-known source of supply to a well-known source of outlet for contraband liquor; evidence of speeding in an effort to escape; evidence of a change of course of the automobile.

The Court did not indicate which of the "tests" alone or in combination would be sufficient to establish probable cause.

Staff: United States Attorney Robert S. Rizley;
Assistant United States Attorney Hubert A. Marlow
(N.D. Okla.).

NARCOTICS

Conspiracy to Violate Narcotics Laws; Statutes Under Which Sentence Must Be Imposed. Enzor v. United States (C.A. 5, December 16, 1958). Enzor was charged with conspiring to sell narcotics. The indictment cited 18 U.S.C. 371 as the statute violated although the objects of the conspiracy were alleged to include violation of section 4705(a) of Title 26, U.S.C., the penalty for which is contained in section 7237(b). The latter section contains its own "built-in" conspiracy prohibition and provides for a minimum, mandatory penalty of 5 years. The sentence imposed was 4 years' imprisonment.

On appeal the appellant raised questions relating to the admissibility of certain telephone conversations which the Court of Appeals found to be without merit. The government, on the other hand, called the attention of the Court of Appeals to the fact that the sentence imposed was not in accord with the statutory requirements. The Court agreed, reversing and remanding the case with directions to the district court to enter a proper sentence. The Court stated:

The Government urges that the conviction was of an offense under the specific statute notwithstanding a reference to the general statute in the indictment. As between two statutes punishing conspiracy, the particular statute is entitled to preference over the general statute. Masi v. United States, 5th Cir. 1955, 223 F. 2d 132, Price v. United States, 5th Cir. 1934, 74 F. 2d 120, cert. den. 294 U.S. 720, 55 S. Ct. 549, 79 L. Ed. 1252, reh. den. 295 U.S. 767, 55 S. Ct. 643, 79 L. Ed. 1708; Robinson v. U.S., 8th Cir. 1944, 142 F. 2d 431. The statute on which an indictment is founded is to be determined from the facts charged in the indictment, and the facts pleaded may bring the offense within one statute, although another statute is referred to in the indictment.

Masi v. United States, supra; United States v. McKnight, 2d Cir. 1958, 253 F. 2d 817. The indictment charged an offense under 26 U.S.C.A. § 7237(b), as amended, for which the minimum prison term is five years, one year more than fixed by the court's sentence.

Where, as here, an appeal has been taken from a conviction and sentence in a criminal case and the conviction is found to be free from error, the case may nevertheless be remanded for a proper sentence upon the suggestion of the United States Attorney. (Citing cases).

Staff: United States Attorney James W. Dorsey;
Assistant United States Attorney John W. Stokes, Jr.
(N.D. Ga.).

NARCOTICS

Probable Cause; Verified Hearsay Evidence May Constitute Probable Cause for Arrest Without Warrant. Draper v. United States. On January 26, the Supreme Court affirmed the conviction in this narcotics case. The decision is important because it clarifies some of the uncertainty engendered by the Giordenello decision of last June, 357 U. S. 480, as to the sufficiency of hearsay information as constituting probable cause for an arrest or for the issuance of a warrant of arrest. In Giordenello, the Court expressly left open the question whether a warrant may be issued solely on hearsay information, and in holding the complaint involved there to be insufficient for failure to provide any basis for the commissioner's determination that probable cause existed, the Court noted that the "complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief."

The instant case involved an arrest without a warrant. A named "special employee" of the Bureau of Narcotics in Denver, Colorado, who had previously given reliable information, advised the agents that defendant was peddling narcotics in that city. Four days later he told the agents that defendant had gone to Chicago by train to replenish his supply and would return by train on a certain date. He gave a detailed description of defendant and the clothing he was wearing. The agents kept watch at the railroad station and recognized defendant from the informant's description as defendant left an incoming Chicago train. They placed him under arrest and found heroin in his pocket and a bag he was carrying. In upholding the validity of the arrest and the incidental search, the Court held that although hearsay may be incompetent evidence in a criminal trial, it may be considered by law enforcement officers in assessing whether they have probable cause for an arrest without a warrant. On the question of the sufficiency of the information the agents had to show probable cause, the Court pointed out that the special employee had been hired to supply information on traffic in narcotics, that his information had always been found reliable, and that the agents had personally verified

in their surveillance at the railroad station "every facet of the information given [by the informant] except whether [defendant] had accomplished his mission and had the three ounces of heroin on his person or in his bag." These facts and circumstances were held to constitute probable cause to believe that defendant was committing a violation of the narcotics laws.

The Chief Justice and Mr. Justice Frankfurter took no part in the decision. Mr. Justice Douglas dissented.

Although the decision does not settle the question left open in Giordenello, supra, whether hearsay information alone can be a sufficient basis for the issuance of a warrant of arrest, it does clearly hold that verified hearsay may constitute probable cause for an arrest without a warrant. It follows a fortiori that a warrant issued upon a complaint setting forth such facts and circumstances as were within the agent's knowledge in this case would be good.

Staff: Argued in the Supreme Court by Leonard B. Sand
(Solicitor General's office);
Jerome M. Feit (Criminal Division) on the brief.

NARCOTICS

Order in Which Sentences on Multiple Counts Are to Be Served. In Greene v. United States, another narcotics case decided on January 26, the Court did not reach tendered issues as to the validity of cumulative sentences for offenses arising out of a single transaction. The decision went off on a question as to the order in which sentences on multiple counts are to be served. The District Court for the District of Columbia had sentenced defendant to consecutive terms of 5 years on each of 3 counts, and to 5 years on each of the remaining 12 counts, the latter sentences to run concurrently with each other and with the sentences on the consecutive sentence counts. In affirming the judgment, the Court of Appeals thought it was unnecessary to decide the validity of the convictions on the consecutive sentence counts because it found that at least 5 of the sentences on the concurrent sentence counts were valid and supported the aggregate sentence of 15 years. The Supreme Court held that this was error. It said that the concurrent sentences would not support imprisonment for more than 5 years; that since the trial judge did not specify that they were to run with any particular one or more of the consecutive sentences it cannot be said that such of them as are valid would run with any of the consecutive sentences which might be held invalid; and that imprisonment for the aggregate period of 15 years could be sustained only if each of the consecutive sentences is valid. Accordingly, the Court vacated the judgment of the Court of Appeals and remanded the cause to that Court with directions to decide the validity of the consecutive sentences.

Staff: Argued in the Supreme Court by John L. Murphy
(Criminal Division);
Eugene L. Grimm (Criminal Division) on the brief.

DENATURALIZATION

Absence of "Good Cause" Affidavit; Motion to Reopen Judgment. Sam Title v. United States (C.A. 9, January 6, 1959). The proceedings in the District Court were previously reported in the July 18, 1958 issue of the United States Attorneys' Bulletin (Vol. 6, No. 15, p. 463).

When the complaint was filed in this denaturalization suit, the "good cause" affidavit was not appended. Defendant attacked the Court's jurisdiction, both by motion to dismiss the complaint and in his answer, on the ground that the affidavit was jurisdictional. The District Court ruled against defendant on this issue and, after trial, entered judgment against him on the merits, United States v. Title, 132 F. Supp. 185 (S.D. Calif., 1955). His appeal to the Ninth Circuit was ultimately dismissed for want of prosecution. Following the Supreme Court's ruling in the Matles, Lucchese and Costello cases, 356 U.S. 256, that the affidavit must be filed with the complaint, defendant filed a motion in the District Court under Rule 60(b) of the Federal Rules of Civil Procedure to vacate the denaturalization judgment and dismiss the complaint on the grounds that the judgment is void for want of jurisdiction and that it is no longer equitable that the judgment should have prospective application. The District Court dismissed the motion without opinion.

The Court of Appeals affirmed. It pointed out that the Supreme Court decisions, while referring to the affidavit as a "procedural" prerequisite to the maintenance of a denaturalization suit, studiously avoided calling it a "jurisdictional" prerequisite. The Court agreed, in addition, with the Government's contention that, even if the affidavit requirement be regarded as jurisdictional in the sense that suit could not be maintained without it, the District Court's ruling that it has jurisdiction is res judicata and reviewable only on appeal. The Court rejected the defendant's suggestion that in denaturalization cases a special rule should be adopted relaxing the strictness of the ordinary rule assuring the finality of judgments. It pointed out that Rule 60(b) was not designed to provide relief for judicial error or to afford a substitute for appeal; and that a change in the judicial view of applicable law after a final judgment is insufficient basis for vacating such judgment entered before announcement of the change.

Staff: United States Attorney Laughlin E. Waters;
Assistant United States Attorneys Richard A. Lavine and
James R. Dooley (S.D. Calif.).

DENATURALIZATION

Absence of "Good Cause" Affidavit; Dismissal Without Prejudice. United States v. Steve Paich (W.D. Pa., January 8, 1959). In denaturalization suits filed against this defendant and six others, the affidavits showing good cause for revocation were not filed with the complaints, as was the general practice then prevalent. In United States v. Zucca, 351 U.S. 91 (1956), it was held that such an action could not be maintained unless the good cause affidavit were on file. Accordingly, the affidavits were belatedly filed in these cases. In 1958, the Supreme Court held in Matles v. United States, 356 U.S. 256, that the affidavit must be filed with the

complaint when the proceedings are instituted. On motion of the United States Attorney, all seven complaints were dismissed without prejudice.

Defendants thereupon moved to amend the dismissal orders so that the actions would be dismissed "with prejudice." They contended that the Government intends to present the same type of case that was held insufficient in Nowak v. United States, 356 U.S. 660 (1958). They also argued that the present order permits the Government to harass them with an ever-impending threat of the institution of denaturalization proceedings, to their social and economic detriment.

The District Court denied the motion. Conceding that the allegations of the Nowak complaint were similar in some respects to those involved here, the Court pointed out that the Supreme Court had not held the Nowak allegations insufficient but had merely ruled that the Government's evidence did not sustain those allegations by the required standards of proof.

As for the other argument, the District Court mentioned that the present state of these cases was not due to any delinquencies on the part of the Government but principally to uncertainty in the law with respect to the affidavits. The Court noted that the Government denied any improper motivation and gave assurances that it will determine with reasonable promptness whether the denaturalization proceedings should be reinstated. To justify a dismissal with prejudice, there must be something more than the mere prospect of defending another suit, ruled the court.

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

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Not a Condition of Deportation that Country Accepting Deportee Will Assure Permanent Residence; No Beneficial Rights Accrue to Alien as Spouse of American Citizen Where Prior Marriage Not Shown to Be Dissolved. U. S. ex rel Ling v. Murff, (S.D.N.Y., January 2, 1959). Relator, a citizen, applied for a writ of habeas corpus on behalf of her husband Yee Kang Ling. Yee was born in China in 1929, legally entered the United States in June 1955 as a nonimmigrant seaman on a Dutch flag ship, overstayed the period for which admitted and was ordered deported pursuant to section 241(a) (2) of the Immigration and Nationality Act (8 U.S.C. 1251(a) (2)) and 101(a) (15) of that Act (8 U.S.C. 1101(a) (15)). Deportability was conceded. An application for the privilege of voluntary departure under Sec. 244(e) of the Act (8 U.S.C. 1254(e)) was granted provided departure occurred prior to January 10, 1957. The grant was conditioned upon formal deportation should the alien fail to depart as directed. He did not avail himself of the privilege and on January 11, 1957 a warrant for his deportation issued.

The alien did not designate the country to which he desired to be deported and he therefore was ordered to be deported to the Netherlands pursuant to subdivisions (1), (2) and (7) of Section 243(a) of the Act (8 U.S.C. 1253(a)). The Netherlands government agreed to accept him as a deportee.

Agreeing with the conclusion of U. S. ex rel Tie Sing Eng v. Murff, 165 F. Supp. 633, the Court held that the statute providing for the deportation of aliens to a country willing to accept them does not impose upon the government as a condition of deportation, an assurance that the deportee will be granted permanent residence in that country.

The relator also claimed that she was the wife of the alien, having been married to him on March 1, 1958, and that therefore he was entitled to adjustment of his status to that of a permanent resident, as he was, by virtue of the marriage, a "nonquota immigrant". Sec. 101(a)(2)(A) and Sec. 245 of the Act (8 U.S.C. Sec. 1101(a)(27)(A), 1255(a)).

The Court found, however, that the record contained uncontradicted evidence that on the date of this marriage and prior thereto the alien was married to another who resides in China with their daughter. On the other hand the record was devoid of evidence that the prior marriage had in any manner been dissolved. Therefore, the Court found that the alleged marriage to the American citizen could afford no ground for an adjustment of status as claimed; the marriage contracted with relator is void.

The petition for habeas corpus was dismissed upon the merits.

* * *

INTERNAL SECURITY DIVISION

Acting Assistant Attorney General J. Walter Yeagley

Conspiracy; Unauthorized Exportation of Munitions; Expedition Against Friendly Foreign Power; Unlawful Possession of Firearms. U. S. v. Teodoro Enrique Casado Cuervo, et al. (S.D. Fla.) On December 18, 1958, a four count indictment was returned against eight individuals charging a conspiracy to violate 18 U.S.C. 960 (setting on foot an expedition against a friendly foreign power), 22 U.S.C. 1934, as amended, (exportation of munitions without a license as required under 22 C.F.R., Section 121, et seq.), 26 U.S.C. 5841, 5848, 5851, and 5861 (possession of firearms that were not registered with the Secretary of the Treasury or his delegate) as well as substantive counts under these statutes. (See U.S. Attorneys Bulletin, Vol. 7, No. 2, page 45). Defendants were released on bail and returned to Cuba. On January 23, 1959, all defendants appeared and pleaded guilty to count one which charged them with conspiring to export munitions of war without necessary authorization in violation of 22 U.S.C. 1934. The other counts were dismissed. Defendants were each fined \$200 and given 30 days in which to pay the fine.

Staff: United States Attorney James L. Guilmartin and Assistant United States Attorney David Clark (S.D. Fla.)

Employee Discharge. Hazel T. Ellis v. John Foster Dulles, et al. (D. D.C.) Hazel T. Ellis was discharged as an employee by the Department of Commerce. As the widow of a deceased veteran, she appealed to the Civil Service Commission under Section 14 of the Veterans Preference Act of 1944. During the course of a hearing before an Appeals Examiner of the Commission, an extract from a document in possession of the Department of State was received in evidence over her objection. Prior to a decision by the Commission, and following the Department of State's refusal of appellant's request to secure the remaining portions of the document, appellant filed a complaint in the District Court for the District of Columbia in the nature of mandamus to compel the Secretary of State to make available the complete document for the purpose of inspecting it. The lower court, by order dated June 27, 1958, granted the Government's motion for summary judgment and dismissed the complaint, for failure to exhaust administrative remedies. Mrs. Ellis thereupon appealed to the Court of Appeals for the District of Columbia Circuit. While this appeal was pending, the Civil Service Commission rendered a decision affirming the removal of the employee from the Department of Commerce; holding that the extract of the document had been rejected in its entirety as unacceptable in evidence before the Commission, and that no consideration had been given to it in arriving at its decision. Inasmuch as the decision clearly disclosed that the extract from the document was not considered by the Commission in rendering its decision, the Government filed a suggestion of mootness in the Court of Appeals, asking that the appeal be dismissed. Over objection by appellant, the Court of Appeals, on January 23, 1959, in a per curiam opinion, dismissed the appeal as moot.

Staff: F. Kirk Maddrix, Samuel L. Strother, Anthony F. Cafferky
(Internal Security Division)

T A X D I V I S I O N

Assistant Attorney General Charles K. Rice

FIRST AND SECOND ASSISTANTS

Mr. Howard A. Heffron has been appointed First Assistant in the Tax Division to replace Mr. Andrew F. Oehmann who resigned to enter private practice. Mr. Heffron, a graduate of Harvard Law School and a former Editor of the Harvard Law Review, had been in private practice in New York. Formerly an Assistant United States Attorney for the Southern District of New York from July 1953 to March 1957, Mr. Heffron first entered Government service upon graduation from law school as law clerk to U. S. Circuit Judge William E. Orr of the Court of Appeals for the Ninth Circuit.

Mr. Abbott M. Sellers has been appointed Second Assistant. Mr. Sellers originally joined the staff of the Tax Division in 1934, and has served in various capacities, including that of Chief of the Compromise Section.

Mr. C. Moxley Featherston has been appointed as the new Chief of the Compromise Section. Mr. Featherston has been in Government service some 24 years, including four years in the Trial Section and eight years in the Compromise Section.

CIVIL TAX MATTERS
District Court Decisions

Interpleader Action Involving Tax Claims, Laborers' and Materialmen's Claims and Claims of Assignee to Interpleaded Fund. Southwestern Bell Telephone Company, a Missouri Corporation v. United States, R. J. Sims, McAlester Finance Corporation, et al. (W.D. Okla., Oct. 21, 1958.) In this interpleader action plaintiff-owner, Southwestern Bell Telephone Company, deposited \$27,183.70 as balance of the contract prices on certain contracts entered into between the taxpayer-contractor and the plaintiff. The principal questions were whether taxpayer had an interest in the funds to which the federal tax liens could attach and whether a finance company which loaned money to taxpayer and received assignments of taxpayer's contracts was a purchaser within the meaning of Section 6323 of the 1954 Code. As to the first issue the Court held that under the contracts no money was due from the owner to the contractor because certain payments had not been made to laborers and materialmen and that, since the contractor was not entitled to the money deposited with the Court, the tax liens against the contractor did not attach to such fund. The contracts provided that the telephone company had the right to require satisfactory proofs of payment of all labor and material furnished before acceptance of the work. The Government's position is that the contractor did have the right to such funds, that the tax liens attached to such funds and are entitled to priority over the laborer's and materialmen's liens. The Solicitor General has authorized appeal subject to reconsideration in light of action by the Supreme Court in United States v. Durham Lumber Co., 257 F. 2d 570 (C.A. 4), in which a petition for certiorari has been filed.

As to the second issue the Court held the loan and assignments constituted the finance company a purchaser within the meaning of Section 6323 of the 1954 Code. The Government's position is that the transaction was not a sale and the finance company was not a purchaser. The assignment was given as a security. The Court held that the finance company was entitled to a judgment for the difference between the amount it would receive from the fund involved and the amount it had advanced to the taxpayer. Thus the so-called purchaser did not look solely to that which he purchased. Appeal was authorized on this issue. There is however a question as to whether the finance company may be considered a mortgagee within Section 6323 of the 1954 Code.

Staff: United States Attorney Paul W. Cress; Assistant United States Attorney Leonard L. Ralston (W.D. Okla.)
Dean E. McCormick, Jr. and Paul T. O'Donoghue (Tax Division)

Quiet Title Action; Jurisdiction to Entertain Where Government Is Sole Party Defendant: Effect of Assessment Against Partnership as to Partner Not Identified by Name in Assessment Records: Validity of Tax Lien Where No Valid Assessment Has Been Made. James R. Coson v. United States (S.D. Cal., December 30, 1958). This action was brought to quiet title to certain parcels of real estate located in a county in which a notice of federal tax lien securing an asserted tax liability of the plaintiff had been filed. The validity of the lien was attacked on the ground that no such tax had ever been assessed against the plaintiff. The United States was sole party defendant.

The Government defended on the ground that (a) the Court had no jurisdiction to entertain the action since the Government had consented to be sued in this type of action only in cases coming within the provisions of 28 U.S.C. §2410, and that the statute does not extend to cases wherein the Court has not already acquired jurisdiction independently, i.e., through joinder of a party other than the Government and (b) that in any event the lien in question was valid because the tax had been assessed against the plaintiff or, in the alternative, because the plaintiff was indebted to the Government for the tax even though no assessment had been made.

The Court, although it could find no case directly supporting its conclusion, held that it had jurisdiction of the subject matter of the action under 28 U.S.C. §1340, since it involved a controversy arising under an internal revenue law. It then concluded that the legislative history of Section 2410 clearly indicated waiver of sovereign immunity granted therein should extend to cases wherein the United States was the sole party defendant, the statute containing no language precluding such construction. In arriving at its conclusion, the Court states: "Since the taxes were not income, estate, or gift taxes, he (the taxpayer) did not have the alternative of filing a petition with the Tax Court." This remark is somewhat enigmatic since it does not appear to have any logical bearing on the issue resolved by the Court, the jurisdictional question being the same whatever the nature of the taxes underlying the lien.

As to the second issue presented, the Assessment Certificates, unit ledger cards, and Certificate of Assessments and Payments introduced by the Government contained no mention of the plaintiff, but instead referred to the "Moulin Rouge", a gambling casino operated by a partnership of which the plaintiff was a member during the period for which the taxes were assessed, and two other partners. Although the taxes involved were withholding, employment, and cabaret taxes which it seems could validly have been assessed against the partners and the partnership jointly (See, In Re Clinton Crockett (N.D. Cal., 1957) 57-1 USTC Par. 9559), the Court held that Section 6203, I.R.C. requires that the taxpayer be identified in making a valid assessment against him, that since there was no such identification, no valid assessment was ever made against the taxpayer, and that without such valid assessment no lien could arise under Sections 6321 and 6322, I.R.C.

The Court decreed that the Government has no lien for taxes asserted in the notice of lien in question against the real estate involved in this action, and ordered that the United States refrain from asserting such a lien. However, the judgment by its terms imposes no restraint on subsequent assessment of the tax against the plaintiff or any action to collect such tax by the Government.

Staff: United States Attorney Laughlin E. Waters and Assistant
United States Attorney Edward R. McHale (S.D. Calif.)
Harrison B. McCawley (Tax Division).

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