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DEPARTMENT OF JUSTICE

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UNITED STATES ATTORNEYS

BULLETIN

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NEW APPOINTMENTS

The nominations of the following United States Attorneys have been confirmed by the Senate:

Alabama, Middle - Ben Hardeman

Mr. Hardeman was born September 30, 1903 at Montgomery, Alabama, is married and has one son. He entered the University of Alabama on September 5, 1921 and received his B.S. degree on May 27, 1924 and his LL.B. degree on May 25, 1926. He was admitted to the Bar of the State of Alabama that same year. From 1926 to 1936 he engaged in the private practice of law in Montgomery. He was Reading Clerk for the Alabama State Senate in the 1936-37 session, and from August 20, 1937 to January 3, 1939 he was secretary to United States Senator Dixie B. Graves. He returned to the private practice of law in Montgomery until November 21, 1942 when he was appointed an attorney for the Office of Price Administration. On January 15, 1946 he again resumed the private practice of law. On April 13, 1951 he was appointed an Assistant United States Attorney for the Middle District of Alabama and served until his voluntary resignation on December 31, 1953. Since that time he has engaged in private practice in Montgomery and since November 13, 1957 he has also been Assistant Court Recorder in the Recorder's Court there.

Connecticut - Robert C. Zampano

Mr. Zampano was born March 18, 1929 at New Haven, Connecticut, is married and has two children. He entered Yale University in September 1947 and received his A.B. degree on June 11, 1951 and his LL.B. degree on June 7, 1954. He was admitted to the Bar of the State of Connecticut that same year. From July 1 1954 to July 31, 1955 he was law clerk to Judge Robert P. Anderson, of the United States District Court at New Haven. He was an attorney with a private law firm in New Haven from August 6, 1955 to March 29, 1957 and then engaged in the private practice of law in East Haven for a year. Since April 1958 he has been a partner in a law firm in East Haven. He also served as East Haven Town Court Judge from July 1959 to December 31, 1960; has been Town Counsel of East Haven since 1955; and has been Executive Secretary of the State of Connecticut, Criminal Review Division, since January 1958.

Louisiana, Eastern - Louis C. La Cour

Mr. La Cour was born December 29, 1927 at New Orleans, Louisiana, is married and has five children. He served in the United States Army from September 18, 1946 to March 4, 1948 when he was honorably discharged as a Sergeant. He entered Loyola University in New Orleans and received his B.B.A. degree on February 2, 1952 and his LL.B. degree on May 30, 1956. In 1956 and 1957 he was engaged in the private practice of law, and was an instructor at Xavier University in New Orleans. In 1957 he joined the law firm in which he later became a partner. He has also been an Assistant District Attorney of Orleans Parish since June 16, 1960.

The name of the following appointee as United States Attorney has been submitted to the Senate:

Pennsylvania, Eastern - Drew J. T. O'Keefe

As of May 25, 1962, the score on new appointees is: Confirmed - 84, Pending - 3.

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STANDARDS OF CURRENCY FOR UNITED STATES ATTORNEYS

A number of inquiries have been received concerning the standards of currency. These standards were originally published on January 4, 1957 in Volume 5, Number 1, of the United States Attorneys Bulletin on page 1. For the benefit of those who do not have a copy of this Bulletin, the standards of currency are set out below.

Under these standards each office will be considered current if:

(1) Not more than ten per cent of the criminal cases in court (exclusive of (a) those coded in the 290 series, (b) criminal income tax prosecutions, (c) those under the cognizance of the Internal Security Division or involving security, (d) antitrust prosecutions, (e) those coded 213-- "awaiting sentence," and (f) those on appeal), are more than six months old; and

(2) Not more than ten per cent of the civil cases in court in which United States is plaintiff (exclusive of those involving (a) tax liens, (b) condemnation, (c) bankruptcy, (d) state court receiverships and probate matters, (e) claims on which installment payments are being made, and (f) those on appeal), have been pending more than twelve months; and

(3) Not more than five per cent of the total number of cases and matters pending on the machine listing are "asterisked."

LAW BOOKS AND CONTINUATION SERVICES

"The Supplies and Printing Section of the Administrative Division automatically orders continuation services and pocket parts for existing sets of books in United States Attorneys' offices.

"Any books and/or continuation services no longer required should be reported to the Supplies and Printing Section, Department of Justice, Washington 25, D. C., not later than June 15, 1962, so that arrangements may be made to cancel the service, transfer the books and services to a place needed, or other disposition made."

MONTHLY TOTALS

During the month of April, totals in all categories of work increased, with the exception of pending criminal matters which dropped slightly. The aggregate of pending cases and matters is over 7,200 items higher than it was at the outset of this fiscal year. The following analysis shows the number of items pending in each category as compared with the total for the previous month.

	March 31, 1962	April 30, 1962	
Taxable Criminal	8,286	8,509	+ 223
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,630	15,740	+ 110
Total	23,916	24,249	+ 333
All Criminal	9,865	10,097	+ 232
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,612	18,708	+ 96
Criminal Matters	12,500	12,489	- 11
Civil Matters	14,948	15,112	+ 164
Total Cases & Matters	55,925	56,406	+ 481

The breakdown below shows the pending caseload on the same date in fiscal 1961 and 1962. Filings in civil cases were up almost 7 per cent and terminations totaled more than for the same period in fiscal 1961. There were over 600 more cases filed than were terminated. As a result, the pending caseload shows an increase of 4,050 cases over the same date in the previous fiscal year.

	First 10 Mos. F.Y. 1961	First 10 Mos. F.Y. 1962	Increase or Decrease Number	%
Filed				
Criminal	25,926	26,657	+ 731	+ 2.82
Civil	19,682	21,055	+ 1,373	+ 6.98
Total	45,608	47,712	+ 2,104	+ 4.61
Terminated				
Criminal	24,770	24,822	+ 52	+ .21
Civil	18,244	18,230	- 14	- .08
Total	43,014	43,052	+ 38	+ .09
Pending				
Criminal	8,741	10,097	+ 1,356	+ 15.51
Civil	20,513	23,207	+ 2,694	+ 13.13
Total	29,254	33,304	+ 4,050	+ 13.84

From the standpoint of total filings, the month of April was the most productive month of the present fiscal year. Civil case filings, however, dropped from the high of the previous month. Both civil and criminal terminations decreased from the nine-month high achieved in March. As usual, criminal cases accounted for most of the activity, representing 57 per cent and 58 per cent of the filings and terminations, respectively.

	Filed			Terminated		
	Crim.	Civ.	Total	Crim.	Civ.	Total
July	1,819	1,886	3,705	1,732	1,500	3,232
Aug.	2,163	2,126	4,289	1,629	1,595	3,224
Sept.	2,910	1,989	4,899	2,263	1,650	3,913
Oct.	2,715	2,259	4,974	2,709	1,951	4,660
Nov.	2,806	2,002	4,808	2,702	1,800	4,502
Dec.	2,429	1,821	4,250	2,766	1,841	4,607
Jan.	2,601	2,127	4,728	2,258	1,852	4,110
Feb.	2,955	2,107	5,062	2,406	1,850	4,256
March	3,108	2,383	5,491	3,457	2,101	5,558
April	3,151	2,355	5,506	2,900	2,090	4,990

For the month of March 1962, United States Attorneys reported collections of $3,918,248. This brings the total for the first ten months of ficasl year 1962 to $44,195,401. Compared with the first ten months of the previous fiscal year this is an increase of $14,949,345 or 51.12 per cent over the $29,246,056 collected during that period.

During April $1,770,749 was saved in 86 suits in which the government as defendant was sued for $2,945,431. 47 of them involving $1,664,672 were closed by compromises amounting to $562,944 and 23 of them involving $1,052,092 were closed by judgments amounting to $611,738. The remaining 16 suits involving $228,667 were won by the government. The total saved for the first ten months of the current fiscal year aggregated $45,437,493 and is an increase of $11,385,791 over the $34,051,702 saved in the first ten months of fiscal year 1961.

DISTRICTS IN CURRENT STATUS

As of April 30, 1962, the districts meeting the standards of currency were:

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

* * *

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Monopoly-Antibiotics; Court Refuses to Stay Antitrust Case Proceedings Pending Federal Trade Commission Ruling. United States v. Chas. Pfizer & Co., Inc., et al. (S.D. N.Y.) On March 1, 1962, argument was held before Chief Judge Ryan on defendants' joint motion for a continuance or stay of the proceedings under this indictment pending final determination of certain proceedings before the Federal Trade Commission, including, apparently, judicial appeal from an adverse order. The Court reserved decision and filed his opinion on May 7, 1962, denying defendants' motion.

The indictment, filed August 17, 1961, charged Chas. Pfizer & Co., Inc., American Cyanamid Co., Bristol-Myers Co. and their respective chief executives, in three counts under §§1 and 2, with conspiracy to restrain, conspiracy to monopolize, and monopolization, in broad spectrum antibiotics from November 1953 to the date of the indictment. The opinion after summarizing the indictment and the FTC complaint, noted that the latter charged violations of the FTC Act by the three corporate defendants and two other corporations, did not name the individuals and, further, that the FTC complaint charged violations of the FTC Act committed only to the date of filing, July 28, 1958.

Judge Ryan then ruled on the two basic issues, simultaneous actions by the Department and the FTC, and the applicability of the doctrine of collateral estoppel:

> Aside from the difference in the parties and the time span, it appears from a reading of the complaint before the Commission and the record of the hearing that the facts underlying it and alleged in the indictment are similar and in many respects identical. The legal concepts and issues are quite different. The Federal Trade Commission is regulatory in nature; the Sherman Act is penal as well as civil; the consequences flowing from each Act are quite dissimilar. The proceedings themselves, the rules governing them and the legal principles applicable to each are distinct. The special provisions of each statute and the power of the Government to invoke both, simultaneously or successively, have been expressly recognized in one of the enactments (15 USC 51) and by the courts in Federal Trade Commission v. Cement Institute, 333 US 683 (1948); United States v. Cement Institute, 85 F. Supp. 344; United States v. Cement Institute (D. Colo., No. 1291).
>
> The fact that defendants may have been exonerated of violation of the Federal Trade Commission Act and the possibility that the determination may be affirmed by the full Commission's order, does not and would not estop the Government from proceeding against

the defendants under the Sherman Act. This principle was emphatically and unequivocally reaffirmed by the Supreme Court in California v. F. P. C. on April 30, 1962, #187, reversing 296 F. 2d 348, where, notwithstanding an express provision of Section 7 of the Clayton Act that the Act shall not apply "to transactions duly consummated pursuant to authority given by the Federal Power Commission . . ." the court vacated the Commission's order of approval holding that during the pendency of a Government filed antitrust suit, the Commission should not have proceeded to a decision on the merits of the application but should have awaited the determination of the antitrust judicial litigation. How much more clearly does that principle of primary jurisdiction emerge here where the Federal Trade Commission Act provides expressly that no Federal Trade Commission order or judgment of the court enforcing it shall "in anywise relieve or absolve any person . . . . from any liability under the antitrust acts." (Sections 5(e) and 11, 15 USC 21 and 51) Not only are the findings of the Commission not binding on the Government in this criminal proceeding but the findings would not be admissible on trial. The Administrative findings here are neither res judicata, nor do they constitute collateral estoppel. (United States v. R.C.A. 358 U.S. 334.)

Finally, Judge Ryan dismissed defendants' argument that a final determination in the FTC proceeding favorable to them would sharpen or narrow the issues to be tried, which the Government disputed, by holding that this was "a matter which rests within the discretion of the prosecutor. It is just as likely the order [of the FTC] will have no effect on the prosecution." Moreover, the indictment, filed after the Department had been given access to the Commission's records and proceedings, was "presumptively based on additional evidence not before the Commission." Since defendants had not made any showing of undue hardship in concurrently prosecuting their administrative appeal and trying the indictment, the Court refused to invoke its inherent power to stay prosecution of the case. Defendants were given 20 days to file all motions addressed to the indictment.

Staff: John J. Galgay, Herman Gelfand and John H. Clark. (Antitrust Division)

Price Fixing - Milk; Two Count Indictment Under Section 1. United States v. H. P. Hood & Sons, Inc., et al. (D. Mass.) On April 24, 1962, three milk distributing corporations and five individuals were indicted by a grand jury in Massachusetts. H. P. Hood & Sons, Inc., Harvey P. Hood, its former president and presently chairman of the board of directors, William C. Welden, economist for H. P. Hood & Sons, Inc.; United Farmers of New England, Inc., Stanley W. Beal, its general manager; National Dairy Products Corporation, Albert C. Fisher, former vice president of its General Ice Cream Division, and Leo G. Maher, former general manager of its Deerfoot Farms Division were all charged with conspiring to fix prices and rig bids to military installations and other purchasers of milk in violation of Section 1 of the Sherman Act.

In addition, the three corporations and three of the individuals, Harvey P. Hood, William C. Welden and Leo G. Maher were charged with conspiring to defraud the United States Government in violation of 18 U.S.C. 371, by rigging bids to military installations.

The second count charges a conspiracy to defraud the United States, a "felony", in addition to the usual Sherman Act misdemeanor charge. This charge is appropriate in cases where the rigging of bids involved Federal agencies. The maximum sentences under this indictment are five years and $10,000 for the felony and one year and $50,000 for the misdemeanor.

On April 25, 1962 counsel for defendants Albert C. Fisher and Leo G. Maher moved for relief from fingerprinting and photographing at arraignment and also to allow defendants to appear for arraignment by counsel. The motion was argued April 26, 1962 and denied.

On April 30, 1962, all defendants pleaded not guilty and were fingerprinted and photographed by the Marshal and released without bail.

The indictment does not include a Section 14 Clayton Act count in accordance with new policy directives.

Staff: John J. Galgay, John D. Swartz, William J. Elkins, Charles Donelan and Stephen M. Ross. (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURT OF APPEALS

ADMINISTRATIVE PROCEDURE ACT

Federal Reserve Board Order, Requiring Increase in Bank's Capitalization, Not Subject to Review Since Final Action by Board Not Yet Taken. Continental Bank and Trust Co. v. Martin (C.A. D.C., May 3, 1962). The Continental Bank and Trust Company, a state member bank of the federal reserve system located in Salt Lake City, Utah, was ordered by the Board on July 18, 1960, to increase its capitalization by $1,500,000. This order was the culmination of proceedings instituted by the Board to determine whether the bank had violated the Board's Regulation H, which requires state member banks to maintain adequate capital. Under 12 U.S.C. 327, the Board is empowered to expel a member bank from the federal reserve system if the bank violates one of the Board's regulations. For Continental's failure to comply, proceedings have been scheduled wherein Continental is required to show cause why it should not be expelled from the system.

The Court held that the order of the Board dated July 18, 1960, did not have the requisite finality for judicial review under Section 10(c) of the Administrative Procedure Act since the order did not have "* * * such an impact as has led the courts in other cases to hold administrative action to be final for judicial review." The Court noted that "no fine, penalty, or other sanction * * * flows from the bank's refusal to obey that order" and agreed with the Government's contention that the requisite finality would not exist until the Board had completed its proceedings and ordered the bank expelled from the federal reserve system for failure to comply with the capital adequacy requirements laid down by the Board in its Regulation H.

Staff: John G. Laughlin and Jerry C. Straus (Civil Division)

FEDERAL EMPLOYEES COMPENSATION ACT

FECA Does Not Bar Suit by Injured Federal Employee Against Negligent Fellow Employee; Charge That Federal Officer Committed Official Act Negligently Does Not Prevent Removal to Federal Court Under 28 U.S.C. 1442(a); After Removal State Court Can No Longer Issue Process Against Other Defendants. Allman v. Hanley (C.A. 5, April 19, 1962). Allman, a civilian government employee, sued three Air Force doctors (Hanley, Taylor and Wilkinson) individually in a state court, alleging that he sustained damages as the result of surgery performed by them in a negligent manner. After personal service was had on Hanley and Taylor, the United States Attorney on their behalf removed the action to a federal court. A motion to remand was denied. After the case was removed, service on Wilkinson issued from the state court. The United States Attorney filed another motion to remove, after which a further motion to remand was denied.

The district court then quashed the service made on Wilkinson. The court granted a motion for summary judgment on behalf of Hanley and Taylor, holding that the FECA, 5 U.S.C. 751, 757(b), which provides that "the liability of the United States or any of its instrumentalities under" the FECA "shall be exclusive, and in place, of all other liability of the United States or such instrumentalities to the employee," bars an injured federal employee from suing his fellow employee who caused the injury.

The Court of Appeals upheld the district court's refusal to remand, holding that "acts done by an officer in the performance of the duty of his office do not lose their official character merely because they were done in a negligent manner. An officer is acting under color of office so long as he does not depart from the course of his duty so that it becomes his personal act." The appellate court also upheld the district court's action in quashing the service of the state court on Wilkinson on the ground that the removal on behalf of Hanley and Taylor removed the entire case to the federal court and ended the power of the state court to issue process. The Court of Appeals, however, reversed the district court's entry of summary judgment on the ground that, in the absence of specific statutory language, it would not abrogate the common-law rights of an employee to maintain a negligence action against a fellow employee and it found no statutory language to that effect.

Staff: Leavenworth Colby, Sherman L. Cohn (Civil Division)

OFFICIAL IMMUNITY

Federal Official Who Recommended Cancellation of Contract Because of Unsatisfactory Performance Not Subject to Libel Suit Brought by Contractor. Ove Gustavsson Contractor Co. v. Floete (C.A. 2, February 5, 1962). Appellant was awarded a contract to build a hutment for the United States. The contract was cancelled because of unsatisfactory performance upon the recommendation of the Government contracting officer. Appellant then brought this suit against the contracting officer for libel, alleging that the contracting officer knowingly made untruthful reports concerning appellant's performance of the contract.

The district court granted the contracting officer's motion for summary judgment, and the Court of Appeals affirmed, holding that federal officials are not personally liable for alleged torts based upon acts done within the scope of their duties. The Court held that this immunity extends to officials of less than exalted rank where, as here, they act in the performance of official duties involving the exercise of judgment and discretion.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Ann B. Miele (E.D. N.Y.)

STATUTE OF LIMITATIONS

Amended Libel Filed More Than Two Years After Claims Arose Held Time-barred Because Claims Presented in Amended Libel Arose Out of Completely

Different Transactions From Those Sub Judice; Since Statute of Limitations Is Jurisdictional Limitation, It Cannot Be Waived by Acts of Party. Isthmian Steamship Company v. United States; States Marine Corporation v. United States (C.A. 2, April 30, 1962). Libellants filed suits against the United States on certain freight and demurrage claims. While these libels were pendente lite, amended libels were filed adding delivery and demurrage claims arising more than two years prior to the amendment of the libels. The district court dismissed these latter claims on the ground that they were time-barred under the two-year limitation period of the Suits in Admiralty Act. On appeal, libellants argued that the claims were not untimely because the Government, after each of the claims accrued, made entries on its books and notified libellants of offsets of cargo damage and shortage claims incurred on other voyages. The Court of Appeals affirmed, holding that the amended libels cannot relate back to the date of the original libels because the claims presented in the amended libel arose out of completely different transactions from those sub judice. In rejecting libellants' arguments, the Court further noted that the two year statute of limitations under the Act is a jurisdictional limitation which cannot be waived by acts of a party, and that a Government official cannot waive the Government's rights without express authority.

Staff: William H. Postner (Civil Division)

Requests For Information Concerning Right to Death Benefits Under Veteran's Life Insurance Policy Held Not to Constitute Claim For Purpose of Suspending Running of Statute of Limitations. Luba Wang v. United States (C.A. 2, May 4, 1962). Appellant's brother took out veteran's life insurance policies while in the service. These policies lapsed in 1946 because of nonpayment of the premiums. The brother died in 1949, but appellant did not make a formal claim for the proceeds of the policy until 1957. The Veterans Administration denied the claim on the ground that it was not made within the six-year statute of limitations prescribed by 38 U.S.C. 784(6). The district court dismissed the complaint. On appeal, appellant contended that she had made a claim for the proceeds in two letters which she had written in 1949 and 1950 to the Veterans Administration. In these letters, appellant requested information concerning the policies and whether the nonpayment of the premiums had been excused by her brother's disability. In each case the Veterans Administration replied that no benefits were payable since the insurance had lapsed for nonpayment of the premiums, but stated that she could apply for waiver of payment for disability, and sent her the appropriate forms to fill out. These forms were not completed. The Court of Appeals held that the district court was correct in dismissing the complaint. The Court ruled that "requests for information, without demand for payment do not constitute a claim for purposes of suspending the running of the statute of limitations."

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Philip J. Ryan, Jr. (S.D. N.Y.)

TORT CLAIMS ACT

Responsibility for Safe Operation of Aircraft Held to Rest With Pilot, and Not With Government Control Tower. United States v. Miller and United States v. Terminal Flour Mills (C.A. 9, May 14, 1962). In these cases the district court had awarded judgments in excess of $120,000 against the United States in connection with wrongful death and property damage claims arising out of a mid-air collision between two privately-owned aircraft. Plaintiffs had contended, and the district court agreed, that the accident was caused by the negligence of Government (CAA) employees in the control tower. The district court further rejected the contention that the claims were barred because of contributory negligence on the part of decedent's aircraft.

On appeal, the Ninth Circuit reversed. The appellate court accepted the Government's contention that the claims were barred because of contributory negligence. In addition, the Court explicitly rejected as "erroneous" the notion "that where a control tower is present to direct traffic, the /Government/ controllers have the primary responsibility for controlling aircraft so as to prevent collisions, and that pilots are under such circumstances relieved from duty otherwise placed on them." On this phase of the case, the Court flatly held that "the focal point of ultimate responsibility for the safe operation of aircraft under /Visual Flight Rules/ weather conditions rests with the pilot," not with the Government tower controllers on the ground.

Staff: Robert E. Powell (Civil Division)

DISTRICT COURT

DECEDENTS' ESTATES

Government Claim Not Barred by Distribution of Decedent's Estate and Approval of Executrix's Final Account. United States v. Elsie Maud Snyder (E.D. Pa., April 30, 1962). Philip Neison obtained annuity payments from the Railroad Retirement Board to which he was not entitled because he had other employment. The error was not discovered until after he had died, his estate had been probated, the assets had been distributed, and the executrix had received approval of her final account. The executrix was also the residuary legatee, and this action was brought against her by the Government in that capacity. Defenses of laches, statute of limitations and the time limit in the state probate court were all overruled. The fact that the estate had been distributed and the final account had been approved did not bar the United States from pursuing the assets into the hands of the legatees. Thus, judgment was entered in favor of the United States.

Staff: United States Attorney Drew J. T. O'Keefe; Assistant United States Attorney Sullivan Cistone (E.D. Pa.); Robert Mandel (Civil Division)

TORT CLAIMS ACT

United States Not Liable for Flood Damage Under Exculpatory Provisions of 33 U.S.C. 702(c). 1955 Feather River Flood Cases (N.D. Calif., April 23, 1962). Seventeen suits involving over 500 plaintiffs were filed under the Tort Claims Act charging that the United States was negligent in the construction and operation of the flood control structures on the Feather, Yuba and Bear Rivers which, in December 1955, gave way at three points. The Court found that the floods were caused by extraordinary climatic conditions, and it ruled that the United States was, therefore, exempt from liability under the provisions of 33 U.S.C. 702(c). The Court held that the United States cannot be held liable for flood damage, even if negligent, when the flood is, in part, caused by natural forces.

Staff: United States Attorney Cecil F. Poole; Assistant United States Attorney William B. Spohn (N.D. Calif.); Irvin M. Gottlieb (Civil Division)

STATE COURT

WORKMEN'S COMPENSATION ACT

Iowa Industrial Commissioner Held to Have Jurisdiction to Hear Hospital's Claim for Treatment Furnished Injured Employee. Buck v. O'Dea Chevrolet Co. (Iowa Sup. Ct., May 8, 1962). The Veterans Administration provided hospital and medical care to two employees of private companies who were injured in the course of their employment. The VA filed a claim with the Iowa Industrial Commissioner under the Iowa Workmen's Compensation Act for the cost of the treatment afforded the employees. That Act provides that the employer shall furnish reasonable medical care to the employee, and also that all fees for claims for medical and hospital services shall be subject to the approval of the Industrial Commissioner.

The Industrial Commissioner denied the VA's claims on the ground that it had jurisdiction only to hear claims asserted by the employee. An Iowa district court reversed. On appeal to the Supreme Court of Iowa, the Court affirmed, holding that the Industrial Commissioner has jurisdiction to hear and approve claims of a hospital for care furnished injured employees.

Staff: United States Attorney Donald Wine; Assistant United States Attorney Aubrey A. Devine (S.D. Iowa)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections: Civil Rights Acts of 1957 and 1960. United States v. Bibb County Democratic Executive Committee, et al. (M. D. Georgia). On May 16, 1962, the Department of Justice filed suit in the United States District Court for the Middle District of Georgia under the Civil Rights Acts of 1957 and 1960. Named as defendants are the Bibb County Democratic Executive Committee, the twenty-seven individual officers and members of the Committee, and the Ordinary of Bibb County.

The complaint, the first brought by the Department to challenge discriminatory practices in the conduct of elections, alleges that the defendants have required and are planning to require Negroes to vote in separate polling places, with separate voting machines, and have tabulated and published, and will tabulate and publish separate white and Negro vote totals. The Ordinary supervises the conduct of general elections and the Democratic Executive Committee conducts the primary elections. The Court is asked to forbid the defendants to continue operating discriminatory election facilities.

Staff: United States Attorney Floyd M. Buford (M. D. Ga.); Jerome Heilbron (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

CONFESSIONS

Police Tactics in Securing Confession Deemed Proper and Commendable; Error by Trial Court in Submitting Written Confession of Accomplice to Jury for Deliberation Deemed Not Prejudicial. Elwood Sawyer v. United States (C. A. D. C., April 19, 1962). Approximately one month after the armed robbery of a store, two men were arrested in connection with a series of other robberies. Upon interrogation they implicated appellant Sawyer as a participant in the armed robbery of the store. Sawyer was immediately arrested and confronted by his accusers. He was arrested at 3:30 p.m. and shortly thereafter admitted participation in the robbery. He signed a typewritten confession at approximately 4:40 p.m. Sometime between 5 p.m. and 6 p.m., he was immediately identified by the victim of the robbery. At this time appellant orally stated to the detective and the victim that he did recognize the victim. On appeal appellant contended his oral statement, as related at the trial by the detective and the victim, was inadmissible because it came too late after his arrest and was the product of systematic and skillful police interrogation.

In holding that there was no evidence of a prolonged interrogation of the accused the Court stated:

> . . . As a matter of fact, we think the police activity in these respects was proper and commendable. They proceeded at once upon the arrest and initial accusation to check the identification of the accused as made by two admitted accomplices. The lady (victim) said the police located her place of employment and reached her "as soon as I got on the job." . . . (Slip opinion at p. 3.)

During the trial, the two men who had originally implicated the appellant both testified on direct examination that the appellant was not involved in the robbery in question. Under proper instruction to the jury, the court permitted the Government on cross-examination to confront the witnesses with their signed statements, and one of the witnesses was confronted with his grand jury testimony, which were introduced in evidence for the purpose of impeachment.

During its deliberation, the jury requested that the exhibits be sent to them. Counsel were not then present but no objection was made when the judge later informed them that he had sent the two statements and the grant jury testimony to the jury. On appeal, appellant contended that the court committed reversible error in submitting the full text of the three exhibits to the jury. The written statement of one of the accomplices contained a long, discursive account of the activities of a group called "The Le Droit Ramblers." It described a large number of robberies of which the appellant was named only once (for the crime in question). Only that part of the statement which implicated the defendant was admitted into evidence. Appellant contended that submission

of the full text of this statement implied that the appellant was involved in numerous other crimes as a member of the "gang."

Submission of the grand jury record and one of the statements to the jury was not considered improper. However, submission of the full text of the other statement (only part of it being admitted into evidence) was held to be error; but not reversible error because proof of the appellant's guilt was overwhelming.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Judah Best, Nathan J. Paulson and Victor Caputy (C.A. Dist. Col.).

CONFESSIONS

Admissibility of Statement Made During Period of Illegal Detention While Reenacting Crime. George Williams, Jr. v. United States (C.A. D.C. 1962, No. 16,793). Appellant was found guilty of assault with a dangerous weapon, larcency, and assault with intent to kill. He was apprehended by a police officer in the early morning hours of March 6, 1961, as he was leaving a store which he had presumably just robbed. He attacked the arresting officer, exchanged gun fire with a second officer, and then escaped. At 10:30 a.m. of the same day, a few minutes after being served with a warrant of arrest, appellant was brought to police headquarters where he orally confessed to a police detective. In rebuttal, it was revealed that appellant had also been taken back to the scene of the crime and that he had told the man in charge of the store that he had tried to break into the store that previous night. Trial counsel was asked if he had any prayers to submit and he replied in the negative. An objection was made to the Government's requested instruction on the "Voluntariness" of the statement by the accused, and the suggestion was withdrawn. Counsel took no exception to the charge as given, but after verdict he moved for a judgment of acquittal n.o.v. For the first time it was urged that the jury's verdict had been based upon a confession obtained while the prisoner was being illegally detained.

The Court of Appeals stated that had there been timely and adequate objection at the trial, it would agree that the trial judge should have excluded the statement attributed to appellant when he was brought back to the scene of the crime. The Court was of the opinion that the police by that time already had ample evidence of probable cause upon which to have brought Williams before the Commissioner, hence the statement made at the scene of the crime could be said to have been elicited during a period of unreasonable delay, and to have been erroneously received in evidence. Defense counsel, however, instead of objecting on Mallory grounds, had contended that such testimony was outside the scope of direct examination. Finding ample evidence beside this statement by appellant to sustain the conviction, however, the Court of Appeals refused to reverse for plain error.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys William H. Collins, Jr., Nathan J. Paulson, Joseph A. Lowther and Judah Best (Dist. Col.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Review of Deportation Order; Constitutionality of Statute; Abuse of Discretion - Denial of Stay of Deportation. Polites v. Sahli, (C.A. 6, May 7, 1962). Appeal from district court's order of May 3, 1961 dismissing appellant's complaint on motion for summary judgment (See Bulletin: Vol. 9, No. 11, p. 335).

In granting defendant's motion for summary judgment the district court declined to rule on an issue presented by an amended complaint - that subsequent to the entry of the order of deportation in 1955 Polites had become afflicted with a heart condition, the symptoms of which had allegedly developed three years prior thereto.

Thereafter Polites sought an administrative stay of deportation for the reason stated in the amended complaint. His petition for the stay was denied and by stipulation the appellee's ruling on that petition was to be reviewed by the Court of Appeals.

In addition to contending that the denial of the stay of deportation because of his physical condition was an abuse of discretion, appellant again advanced on appeal the unconstitutionality of 8 U.S.C. 1251 (a)(6).

The Court of Appeals summarily disposed of the latter contention when Polites' counsel conceded that the forerunner of the statute in question has been upheld by the Supreme Court in Galvan v. Press, 347 U.S. 522 and in Harisiades v. Shaughnessy, 343 U.S. 580.

As to the first contention, the Court found no abuse of discretion on the part of the administrative officer nor any action on his part that could be characterized as arbitrary or capricious, and said that the Court cannot substitute its judgment for that of the administrative officer.

Since an administrative stay of deportation is a matter of grace and not of right, an order denying it will not be set aside except on the clearest showing of abuse.

Affirmed.

Staff: United States Attorney Lawrence Gubow; Assistant United States Attorney Jay Nolan (E.D. Mich.); Charles Gordon, Regional Counsel, St. Paul, Minnesota

Judicial Review of Order of Deportation; Standard of Review; Stay of Deportation - Physical Condition. Dentico v. INS (C.A. 2, May 9, 1962). This action for review of an order of deportation was commenced in the district court and transferred to the Court of Appeals under sec. 5(b) of P.L. 87-301 (See Bulletin: Vol. 10, No. 2, p. 59).

In the main, petitioner repeated the challenges to the order which the same Court of Appeals did not sustain in a prior appeal in a habeas corpus proceeding (U.S. ex rel. Dentico v. Esperdy, 280 F. 2d 71; See Bulletin: Vol. 8, No. 15, p. 483).

Two other points were urged by petitioner: (1) The Board of Immigration Appeals erred in not reopening the deportation hearing on the basis of affidavits relating to his father's alleged citizenship, and (2) his physical condition renders him unable to travel.

The Court held that as to (1) the evidence was a long way from being such that it could reverse the Board under the controlling standard of review in 8 U.S.C. 1105a(5), and as to (2) the determination of that issue is for the Attorney General or his delegate, not for the courts.

Complaint dismissed.

Staff: United States Attorney Robert M. Morgenthau; Special Assistant United States Attorney Roy Babitt (S.D. N.Y.)

Judicial Review of Order of Deportation; Assisting for Gain an Alien to Enter Illegally. Lopez-Blanco v. INS (C.A. 7, May 10, 1962). In 1959 petitioner was convicted of wilfully and knowingly transporting an alien (Ceballos) within the state of Texas, knowing him to be in the United States in violation of law. The court at that time recommended against deportation as a result of the conviction.

After his last entry in 1960 petitioner was ordered deported under 8 U.S.C. 1251(a)(13) for having, prior to his entry, knowingly and for gain encouraged, induced, assisted, abetted, or aided Ceballos to enter or try to enter the United States in violation of law. His petition for a judicial review of the deportation order by the Court of Appeals followed (8 U.S.C. 1105a).

There was conflict in the record as to whether petitioner transported Ceballos only within Mexico or only within the United States, whether he actually transported Ceballos or two other persons, or whether he took Ceballos only to the border in Mexico and later met him in the United States to continue their journey to Chicago, but in separate automobiles.

The Court's scrutiny of the record as a whole satisfied it that the final order was based on reasonable, substantial and probative evidence, and that it must be affirmed.

Because of those findings the Court also concluded that the denial to petitioner of voluntary departure did not constitute an abuse of discretion since he did not show the requisite good moral character.

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Suit Against Subordinate Federal Officer; No Cause of Action Stated Where Relief Sought Is Action in Excess of Officer's Official Authority; District Engineer May Not Cancel Permits. Harris v. Smedile (C.A. 7, May 8, 1962). Alleging, inter alia, denial of due process, action in excess of federal statutory authority resulting in irreparable damage, and the unconstitutionality of state statutes, eleven state taxpayers (one of whom was also the owner of real property in the immediate vicinity involved) sought an order compelling the District Engineer to cancel and withdraw a permit issued to Midwest Steel Corp. to construct a bulkhead in, and to fill offshore land under, navigable waters of Lake Michigan. The permit was issued upon the recommendation of the Chief of Engineers and the authorization of the Secretary of the Army. Affirmation of the dismissal was urged on the grounds that (1) all plaintiffs lacked standing to sue because of the absence of a substantial interest apart from the general public and because the alleged future damages were mere "assumed potential invasions;" (2) no cause of action was stated as to the District Engineer who is expressly denied authority to perform the act of cancellation; (3) plaintiffs' unfounded pronouncements of fact or of mixed fact and law were not admitted by the motion to dismiss; and (4) the Chief of Engineers, the Secretary of the Army, and Midwest Steel Corp. were indispensable parties--the superior officers, for the reason that the relief sought can only be granted by them, and the permittee, for the reason that cancellation of the permit would inescapably affect its interests.

The Court of Appeals affirmed the dismissal "for failure to state a cause of action of which the court had jurisdiction." The court declared that even if plaintiffs' allegations were admitted by the motion to dismiss, the District Engineer was without authority, under the pertinent statute and regulations, to perform the act of cancellation. "The answer to an officer's use of excessive authority is not for a court to force him to further excess of authority." The opinion did not discuss the other matters developed in the brief on appeal, copies of which were distributed to all United States Attorneys in February.

Staff: Raymond N. Zagone (Lands Division).

Sovereign Immunity; Ejectment Action Against Federal Forester in Possession of Lands Claimed by U. S. Barred; Principle of Larson v. Domestic & Foreign Corp. Reaffirmed; United States v. Lee Limited. Malone v. Bowdoin (S.Ct. No. 113, May 14, 1962). In this action, plaintiffs sought to eject a federal forester from lands claimed by the United States. The district court's dismissal (under the name of Doe v. Roe, 186 F. Supp. 407), the Fifth Circuit's reversal and denial of the petition for rehearing (284 F.2d 95 and 287 F.2d 282), and the forester's contentions, were previously reported 9 U. S. Attys, Bull. No. 21, p. 624.

Emphasizing the absence of an allegation that the officer acted unconstitutionally and the admission that the officer occupied these lands solely in accordance with his statutory authority, a majority of the Supreme Court, in an opinion by Mr. Justice Stewart, affirmed dismissal of the suit as "an action which in substance an effect was one against the United States without its consent," under the rule of Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949). Reconciliation of all the relevant decisions prior to 1949 was described as a Procrustean task made unnecessary in this case by the Court's review and "informed and carefully considered choice between the seemingly conflicting precedents" in Larson. The majority stated that United States v. Lee, 106 U.S. 196 (1882), was limited by Larson as "a specific application of the constitutional exception to the doctrine of sovereign immunity." 337 U.S. at 696. It was repeated that Lee was decided at a time when there was no tribunal in which claims for compensation for a taking of land could be made.

Mr. Justice Douglas' dissenting opinion was concurred in by Mr. Justice Harlan. He maintained that the Lee case was applicable and controlling, even though a citizen may now assert a claim directly against the United States for money damages under the Tucker Act or the Federal Tort Claims Act. Mr. Justice Frankfurter took no part in the decision of this case. Mr. Justice White took no part in the consideration or decision of this case.

Staff: Daniel M. Friedman (Solicitor General's Office)
Raymond N. Zagone (Lands Division, on brief)

Lands Division Seminar and Condemnation Manual. United States v. 2,635.04 Acres of Land, Allen and Barren Counties, Kentucky, N. C. Young, et al. (W.D. Ky.) Several cases involving the acquisition of land for the Barren Dam and Reservoir Project No. 2 came on for trial a short time ago under circumstances which found personnel in the United States Attorney's office with no prior experience in the trial of an eminent domain proceeding. The first case tried related to property where defendant's lowest testimony was $30,000, as compared to the Government's testimony of $16,500. The jury returned a verdict in the amount of $16,500. The next case tried was a tract of land for which $21,151 was deposited as estimated compensation and regarding which an offer of settlement had been submitted and approved both by the Corps of Engineers and the former encumbent of the United States Attorney's office in the amount of $27,706. After trial, the jury in this case returned a verdict of $21,200, or $49 above the deposit. The third case tried involved two tracts of land for which estimated compensation was deposited in the registry of the court in the amount of $51,550. In this case, an offer of settlement in the amount of $62,000 had been jointly approved by the acquiring agency and the former encumbent of the United States Attorney's office but was rejected by the former landowner. In this case, the jury returned a verdict of $58,500.

It was stated by the United States Attorney that the Lands Division's Seminar which he attended March 15, 16 and 17, 1962, together with the data

contained in the Condemnation Manual, were of real value in preparing and trying these cases. Because of the citations and references which had been noted, the United States Attorney was successful in persuading the court to admit evidence for the first time relative to recordation data regarding the purchase price paid for the property condemned. The United States Attorney was also of the opinion that this source material was most helpful in making his presentation of proof and his cross-examination of witnesses short and to the point and which he feels aided materially in the favorable results.

Staff: United States Attorney William E. Scent (W. D. Ky.)

Acquisition of Property by Federal Government; Specific Mineral Reservations Perpetual. United States v. The Leiter Minerals, Inc. (E.D. La.) 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 minerals rights theretofore or thereafter reserved in deeds 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 a 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.

A case was then 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".

The Supreme Court of Louisiana in substance confirmed the Court of Appeals decision. It said that here "we are called upon to render only an advisory opinion" and that ordinarily it would not do so but here "out of respect for, and as a courtesy to," the highest court in the land it would do so. It also said that the lower courts had gone too far in interpreting the contract and that "our only task is to interpret Act 315 of 1940". After a discussion of Louisiana law as to minerals it declared: "If the United States Supreme Court construes the reservation as one establishing a servitude for a certain time or a specific duration, as argued by the lessees of the United States, then Act 315 of 1940 is not applicable and if applied would be unconstitutional." After discussion of the reasons for this

conclusion, the Court also declared: "If the United States Supreme Court concludes, as argued by counsel for Leiter, that the reservation does not establish a servitude for a certain time or of specific duration but establishes one of uncertain and indefinite duration, and that it was the intention of the parties to fix by contract the period of liberative prescription, then Act 315 of 1940 is applicable and constitutional." Consistent with its view as to declaratory judgment, it directed dismissal of the suit. One judge dissented, quoting the district court in full, and the Chief Judge expressed agreement with the majority and the district judge.

Following the decision of the Supreme Court of Louisiana, both Leiter and the United States filed motions for summary judgment in the federal district court. On April 11, 1962, former District Judge J. Skelly Wright, now Judge of the United States Court of Appeals for the District of Columbia Circuit, rendered an opinion granting the Government's motion for summary judgment and denying Leiter's motion. The Court held that the mineral reservation in the Government's deed was not affected by Act 315 of 1940, since the contract of the parties clearly provided for and established a mineral servitude for a definite, fixed and specific time which had elapsed, and "Accordingly, the servitude expired by its own terms and the mineral rights reverted to the United States."

Staff: Former United States Attorney A. Hepburn Many (E.D. La.)

Navigable Waters; San Juan River Not Navigable When Utah Was Admitted to Union, Therefore Title to Bed of Stream Remained in United States; Costs; Defendant State Liable for Costs in Federal Court. State of Utah, et al. v. United States (C.A. 10, May 10, 1962). The United States brought this action to quiet its title to the bed of the San Juan River in southern Utah for a 55-mile stretch between Chinle Creek and the Colorado-Utah boundary. Defendants were the State of Utah and certain persons holding oil and gas leases in the stream bed from the State. The legal issue was whether the San Juan was a navigable stream within the area or any significant portion of it in 1896 when Utah became a state. If the stream was navigable, it became the property of the State. If non-navigable, it was the property of the riparian owners. The test of navigability is whether the river in its natural and ordinary condition is used or is susceptible of being used as a channel for commerce over which trade and travel is conducted or may be conducted in the customary modes on water. After considering extensive testimony and exhibits, the district court found the stream was non-navigable. On appeal, this finding was attacked because there was an insufficient basis of fact for the determination of navigability. The Court of Appeals, affirming on the ground that the district court had applied the proper legal tests to the facts found, shared the view of that court that the river was non-navigable in fact and in law in 1896. The Court of Appeals also held the findings of the district court were sufficient under Rule 52(a), F.R.Civ.P. The purpose of the findings under that rule is to aid the appellate court in acquiring a clear understanding of the basis of the decision by the trial court. The findings meet this requirement.

It was argued that the State of Utah was not liable for costs because of its sovereign immunity. The Court of Appeals held that the rule was not applicable when the State appears as a party to a suit in a federal court. It was also contended that the individual lessees were not necessary parties to the litigation, and therefore should not have to pay costs. The Court of Appeals held that the district court had discretion to tax costs, and that there had been no abuse of discretion in awarding costs against the individuals who asserted a lease interest under the State.

Staff: Assistant United States Attorney Parker M. Nielson (D. Utah)

Eminent Domain; Declaration of Taking Act; Government's Right to Accounting for Profits or Reasonable Rental for Period Between Passing of Title to U.S. and Surrender of Possession to It. United States v. Certain Interests in Property Situate in the Borough of Brooklyn, County of Kings, State of New York and Dayton Development Fort Hamilton Corp., Fort Hamilton Manor, Inc. (C.A. 2,). The United States condemned the outstanding equity interests in the Fort Hamilton Wherry project. Title passed to the United States on December 15, 1960, under the Declaration of Taking Act, 40 U.S.C. 258a. The district court entered an order granting possession to the Government as of February 1, 1961. The Government contended that it was entitled either to an accounting of the income received and expenses incurred by the condemnee or to reasonable rental for the period between title vesting in it and possession being given to it. The district court entered an order in the condemnation proceedings directing the former owners to make and file an accounting of all income received and expenses incurred during the period in question. The former owners appealed. With reference to the period during which the condemnees remained in possession after title had vested in the United States, the Court of Appeals stated: "We hold that the United States has a valid claim for rental value of the premises during this period, rather than an accounting of moneys received as agent, and reverse and remand for determination of such rental value." The Court of Appeals went on to explain, inter alia:

> The test is the fair market value of the right to possession of the leasehold for the period between the date of passing of title and the end of the holdover period under the order of the court. This amount the United States is entitled to recover. The court has treated the condemnees as managing agents, collecting rents from the subtenants and paying expenses for the account of the owner, on its finding, which we hold erroneous, that the parties had so contracted. Since the condemnees, however, were in the position of lessees legally in possession after the lease had been terminated by condemnation of their interest therein, under court order continuing their right to possession, rather than as agents for the Government, we hold that they had a right to continue their subrental and management of the premises during the period, with a duty to pay the reasonable value of their tenancy for the period, to be fixed by the Court under the Act. 40 U.S.C. 258(a).

The Court of Appeals also noted that "What is a reasonable rental is a question to be determined in the light of all the circumstances in the instant case taking into consideration evidence if available of what is customary for management services of a like character * * *".

Staff: Harold S. Harrison (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS

IMPROPER TAXATION OF COSTS AGAINST UNITED STATES IN TAX REFUND SUITS AND DOCUMENTS REQUIRED BY THE DEPARTMENT FOR PAYMENT OF TAX REFUND JUDGMENTS.

1. Taxation of Costs

Your attention is again directed to the requirement in Rule 54(d) of the Federal Rules of Civil Procedure that exception to the improper taxation of costs against the United States by the clerk must be taken by your filing a motion for review by the court within five (5) days from the date they are taxed by the clerk. Of late it has been noticed that in some instances cost bills are being forwarded by the United States Attorneys for processing and payment without their having taken exception to the improper costs taxed therein. Usually, by the time these cost bills are received in the Tax Division and reviewed, it is too late to request your offices to move for review by the court, the time for filing a motion to review having expired. It is requested, therefore, that this matter be given your special attention so that in the future the payment of improper costs may be avoided.

As you know, the United States is liable for fees and costs only when Congress has expressly so provided. 28 U.S.C. 2412(a). The authorization to tax the United States with costs in tax cases is found in 28 U.S.C. 2412(b). This section limits costs in tax refund suits in which the United States is named as the defendant to those allowed by the trial court and such costs shall include only those actually incurred for witnesses and fees paid to the clerk after joinder of issue. Other costs, e. g., the $15 filing fee paid to the court clerk at the time the suit for refund of federal taxes is instituted and the Marshal's fee for service of summons, both of which are paid prior to the joinder of issue, are not recoverable. See: United States v. Mohr, 274 F. 2d 803 (C.A.4); Georg Jensen, Inc., v. United States, 185 F. Supp. 251 (S.D. N.Y.). See also: Lichter Foundation, Inc., v. Welch, 269 F. 2d 142 (C.A. 6) (dictum). The $20 attorney's docket fee under 28 U.S.C. 1923 is also not recoverable against the United States since it is paid directly to the prevailing party's attorney rather than to the court clerk. See: Georg Jensen, Inc., v. United States, 185 F. Supp. 251 (S.D. N.Y.).

The examples cited above provide sufficient guide lines and indicate the controlling criteria. A recoverable cost against the United States must be one which was actually incurred for a witness or a fee paid to the clerk. If the expenditure qualifies on either of these grounds, it is subject to the further prerequisite that it must be incurred after joinder of issue. If any one of these requirements is not met, care should be taken to make timely objection in accordance with Rule 54 (d) of the Federal Rules of Civil Procedure.

Where the tax refund names the District Director as defendant, the Division has, as a result of several adverse appellate court decisions, given up its prior position that the only costs allowable are the same as those recoverable in suits against the United States. The Division now concedes that costs may be awarded to a successful taxpayer as if the suit were brought against a private party, and where the Government is successful, we intend to tax costs against unsuccessful taxpayers in the same manner as is done in a suit between private parties.

It is especially important that the Government be consistent in its position with regard to costs. The existence of a uniform administrative practice or the lack thereof may or may not be a factor considered by the judiciary in determining in future cases whether certain costs are allowable. See: United States v. Mohr, supra. You will be advised on the pages of this Bulletin as different items of cost, in addition to those given as examples above, are judicially tested.

2. Documents Required by the Department

The Division should be promptly furnished with one certified and two uncertified copies of cost bills together with one certified and two uncertified copies of judgments and certificates of probable cause, to enable the Internal Revenue Service to expedite payment and hold the Government's liability for interest to a minimum.

District Court Decisions

Administrative Summons: Fifth Amendment Plea in Refusal to Appear in Response to Internal Revenue Service Summons Held Premature; Authority Under Section 7602 of I.R.C. 1954 Not Limited to Single Purpose. In the Matter of the Tax Liability of Reuben Turner (Memorandum Opinion, S. D. N.Y., April 26, 1962). This was an action to vacate or modify a Treasury summons issued pursuant to Section 7602, I.R.C. 1954, on the ground that complicance therewith would violate taxpayer's rights under the Fourth and Fifth Amendments to the Constitution. Taxpayer contended that the summons was part of an investigation designed for the eventual institution of criminal proceedings against him and to require him to comply with the summons would violate his privilege against self-incrimination.

The Court held that the authority under 26 U.S.C. 7602, is not limited to a single purpose, pointing out that "The taxpayer is summoned to determine the 'correctness of any return.'" Moreover, that until the investigation is completed it is not certain whether any tax liability, civil or criminal, will be asserted against petitioner.

As to the Fifth Amendment plea, the Court found that taxpayer's rights are not impaired by requiring his appearance in response to a Treasury summons, hence, the plea was premature. Application of Burr, 171 F. Supp. 448 (S.D. N.Y., 1959). "The privilege of the Fifth Amendment must be exercised in connection with precise questions and not as a general excuse for refusing to appear in response to subpoena." Landy v. United States, 283 F. 2d 303,304 (C.A. 5, 1960); accord, Rogers v. United States, 340 U.S. 367 (1951). Should the proper occasion arise in the course of the hearing, taxpayer is entitled to exercise his constitutional privilege.

Staff: United States Attorney Robert M. Morgenthau (S.D. N.Y.).

Administrative Summons; - Motion to Quash and Suppress Denied - Stolen Property Confiscated by City Police and Subpoenaed by I.R.S. under Section 7602, I.R.C. 1954, Held Not Violative of 4th, 5th, or 14th Amendments. Cosmo S. Geniviva and Helen V. Geniviva v. John H. Bingler, District Director (W.D. Pa. October 9, 1961) [Apparently unreported]. This cause was heard initially as a motion to quash summons, suppress evidence and for return of property illegally seized. The motion to quash was denied, the stolen property ordered produced for inspection by the Internal Revenue Service and then returned to plaintiffs.

The instant motion was restricted to whether or not plaintiffs were entitled to have suppressed evidence confiscated from burglars by city police and later turned over to the Internal Revenue Service pursuant to a summons issued under Section 7602, I.R.C., 1954. Plaintiffs' private residence in Ellwood City, Pennsylvania, was burglarized. Shortly thereafter the burglars were arrested and the property and most of the money recovered. The money was turned over to the Lawrence County, Pennsylvania, District Attorney and County Detective. Internal Revenue Agents received certain wrappers from the city police which had been in possession of plaintiffs. Pursuant to an Internal Revenue Service summons served upon the District Attorney and County Detective they turned over the money and property to the Internal Revenue Service.

Plaintiffs contended that the use of the property in evidence in any criminal proceeding would violate their rights under the 4th and 5th Amendments to the United States Constitution. However, plaintiffs were not under indictment nor had any criminal proceeding been instituted against them.

The Court traced the history of the rule of exclusion of evidence illegally obtained either by federal officers, state officers or otherwise, citing Burdeau v. McDowell, 256, U.S. 465 (1921), Byars v. United States, 273 U.S. 28 (1927), Gambino v. United States, 275 U.S. 310 (1927), Wolf v. Colorado, 338 U.S. 25 (1949), Elkins v. United States, 364 U.S. 206 (1960) and Mapp v. Ohio, 367 U.S. 643 (1961).

In denying the motion to suppress the Court concluded by holding:

> The rule as to the exclusion, in both federal and state courts, of evidence obtained by an unreasonable search and seizure in violation of the Fourth or the Fourteenth Amendment has been broadened and expanded since Burdeau v. McDowell, supra. The rule, however, has not been expanded to the extent that evidence obtained by persons not acting in concert with either state or federal officials must be excluded. In this case, no constitutional rights of plaintiffs were invaded by or under color of official authority and in view of the principles set forth in Burdeau v. McDowell, supra, plaintiffs' motion to suppress will be denied.

Staff: United States Attorney Joseph S. Ammerman; Assistant United States Attorney Samuel J. Reich (W.D. Pa.) Frank J. Violanti (Tax Division)

Liens: Divestiture of Senior Federal Tax Liens by State Foreclosure Sale; Brosnan Case Distinguished. United States v. Richard C. Peterson, et al., ____ F. Supp. ____ (E.D. Pa., April 23, 1962). The United States instituted suit to foreclose its tax lien against certain real property of the taxpayer located in Northampton County, Pennsylvania. Joined as a party-defendant was a local bank which held a second mortgage on the property which had been recorded subsequent to the recording of the federal lien. Prior to the commencement of the Government's suit the bank had foreclosed its second mortgage in accordance with Pennsylvania State procedures, which permit a foreclosure and sheriff's sale by merely publishing notice without joining interested lienholders as parties to the action. The Government was not joined in the state foreclosure proceeding and had no notice of it. The attorney for the bank bid in the property (valued at about $10,000) at the sheriff's sale for approximately $600. The bank also held a first mortgage on the property, by virtue of an assignment from the original mortgagee, which was senior in time to the federal lien but which was not foreclosed.

The bank moved to dismiss the Government's complaint on the ground that the federal tax lien on the property had been completely divested by the sheriff's sale. The bank relied in its argument on United States v. Brosnan, 363 U.S. 237 (1960), in which the Supreme Court held (in a 5 to 4 decision) that Pennsylvania State foreclosure and sale procedures could divest a junior federal tax lien where the Government had not been made a party to the action pursuant to 28 U.S.C. 2410. The bank's contention was that the same result must follow where the federal tax lien is senior to the mortgage foreclosed, since under Pennsylvania law a foreclosure and sale divests all liens, no matter whether junior or senior.

The court denied the bank's motion to dismiss, holding that the Brosnan case must be limited to the narrow procedural question there decided (whether state procedures can be followed to divest a junior federal lien where 28 U.S.C. 2410 is not utilized to make the Government a party), and that where Congress has provided specific protection for senior federal liens under Section 2410(c), Brosnan cannot be said to support the proposition that Pennsylvania procedural law must be followed to the extent of divesting a senior federal lien upon the foreclosure of a junior mortgage where 28 U.S.C. 2410 is not utilized. The court states in its opinion:

> I recognize that this result may shock real estate lawyers and title searchers steeped in the old and firmly established principle of Pennsylvania law that a judicial sale divests real estate of all other liens on it except those preserved by statute. However, a contrary result would be even more shocking. It would put in the hands of a foreclosing lienholder the power to determine whether or not a senior federal tax lien is to be divested, depending on whether or not the United States is joined as a party. If the United States is joined as a party, as provided under Section 2410, the senior federal tax lien would

not be divested. If the United States is not joined, the federal lien under Pennsylvania law (as distinguished from federal substantive law) would be divested. (It makes poor sense that the rights of the United States should be less when it is not joined as a party than when it is.) Although this is a type of problem which Congress rather than the courts should deal with, it seems unwise to give to lienholders a power, perhaps capriciously, to divest federal liens, depending on whether or not they name the United States as a party to the foreclosure proceedings.

Staff: United States Attorney Drew J. T. O'Keefe, Assistant United States Attorney Joseph H. Reiter (E.D. Pa.), and John M. Youngquist (Tax Division).

Organization of the Tax Division

New designations have resulted in several changes in the supervisory structure of the Tax Division. The present organization is set forth for the information of United States Attorneys and their staffs:

Assistant Attorney General	Louis F. Oberdorfer
First Assistant	John B. Jones, Jr.
Second Assistant	Richard M. Roberts
Executive Assistant	C. Guy Tadlock
Assistant for Civil Trials	Edward S. Smith
Section Chiefs	
Appellate	Lee A. Jackson
Court of Claims	Lyle M. Turner
Criminal	Fred G. Folsom
General Litigation	Fred B. Ugast
Refund No. 1	David A. Wilson, Jr.
Refund No. 2	Myron C. Baum
Refund No. 3	Jerome Fink
Review	C. Moxley Featherston

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