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DEPARTMENT OF JUSTICE

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UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 10 August 24, 1962 No. 17

NEW APPOINTMENTS

The appointment of the following United States Attorney has been confirmed by the Senate:

Guam - James P. Alger

Mr. Alger was born January 23, 1928 at Cleveland, Utah, is married and has two sons. He attended Carbon College at Price, Utah from 1945 to 1947; the University of Southern California at Los Angeles from 1947 to 1949 when he received his A.B. degree; and the University of Utah at Salt Lake City from 1949 to 1952 when he received his LL.B. degree. He was admitted to the Bar of the State of Utah in 1953. He engaged in the private practice of law in Dragerton, Utah from 1953 to 1955 and in Price, Utah from 1955 to 1961. He was also County Attorney for Carbon County, Utah from 1955 to 1961. On June 1, 1961 he was appointed Assistant Attorney General of the Government of Guam, which position he held until his appointment as United States Attorney.

TOP TEN DISTRICTS IN LANDS WORK

After a careful analysis of the work of each United States Attorney's office for the last fiscal year, the Lands Division has determined that the following districts (which are listed in alphabetical order) performed the most outstanding work in lands matters:

California, Southern
Idaho
Missouri, Western
Oklahoma, Eastern
Oklahoma, Northern
Pennsylvania, Middle
South Carolina, Western
Tennessee, Middle
Utah
Wyoming

In determining the districts named, the importance and quantity of lands work pending, the attorney power available for the task, and the quality and quantity of the work performed were considered. Important criteria were:

(1) Quality of legal representation as evidenced by pleadings, briefs, trial transcripts, letters and direct contact;

(2) Efficient and systematic effort to settle or litigate cases;

(3) Fair settlement or trial results;

(4) Efficient coordination with the Lands Division.

While a few other districts performed as well or better than the districts chosen statistically, for overall performance these are believed to have excelled. Among the accomplishments of these districts are:

California, Southern had 7840 tracts pending at the year's beginning. It closed 4335 or more than 55% during the year. While a large group were uncontested, they had been pending for over five years, and a concentrated effort was required to prepare and present these tracts for judgment. Diligence in prosecuting cases is illustrated by success in securing a new trial after a commission award of $169,725 and obtaining a jury verdict of $147,000, approximately 15% above the Government's testimony. Defendants' testimony on value exceeded $330,000.

While Idaho had fewer than 100 tracts pending at the year's beginning, it successfully closed 86% of these. It demonstrated initiative in its handling of lands matters. The first successful trial of a forest fire suppression case received by the Department of Justice since 1954 was handled during the year. There are 48 of these important cases pending (in several districts) involving millions of dollars in claims. Trial preparation is being made now.

Missouri, Western, completed 353 tracts in condemnation for final title opinions. This was 56.7% of the tract load pending at the year's beginning. A number of large cases were tried, and good settlements were negotiated in a series of complicated substantial acquisitions.

Oklahoma, Eastern, with one of the heaviest active condemnation loads in the country closed more than 500 tracts in a year in which it was fourth in the Nation in new tracts condemned, 457. At the same time it organized its pending caseload, perfecting service and publication in scores of cases where this had been neglected, and handled a number of cases for Indians promptly and effectively.

Oklahoma, Northern, with a maximum of practical difficulties, including the absence of a resident district judge and staff vacancies, terminated 755 tracts and laid the ground work for expeditious settlement or trial of the pending 2400 tracts. A constant, vigorous effort was made on lands matters.

Pennsylvania, Middle, closed 196 tracts, slightly above 60% of its pending condemnation work during the year. This required sustained activity and a number of trials. Trial results included an award of $35,000 for a property on which Government testimony placed a value of $33,000 and the defendant's expert witness valued at $120,000.

South Carolina, Western, closed 161 tracts or better than 65% of those pending at the year's beginning. Good trial results were secured in a series of commission trial cases and particularly careful attention was given to some complicated cases involving the navigation servitude.

Tennessee, Middle, closed 192 tracts or 88.9% of those pending at the year's beginning. Cases that had been allowed to accumulate over several years were disposed of and the District's lands work brought to a good status.

Utah, closed 83 tracts of 89 in court at the first of the year. Its lands cases received diligent handling throughout the year. Preparation of evidence included expeditions over many miles of dangerous Green River rapids to show, through films, its non-navigable character.

Wyoming, closed 88 tracts though it had only 73 pending when the year began. This demonstrates the healthy turnover in condemnation cases that can be achieved by vigorous prosecution of settlements and trials.

DISTRICTS IN CURRENT STATUS

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

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

* * *

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

WITNESS EXPENSES

There have been instances where certain witness expenses have been paid as litigative expenses from the appropriation "Salaries and Expenses, United States Attorneys and Marshals, Department of Justice." In the United States Attorneys' Manual (Title 8, page 101) the item "fees" is intended to cover fees for guardians ad litem, appraisers, interpreters, local filing fees, etc. All fees and expenses to witnesses are payable from the witness appropriation.

Statutory witness allowances are payable from the regular witness appropriation for which no Departmental authorization is needed. Fees for witnesses required by State or local law are payable from the special allotment of the witness appropriation. There must be advance authorization for employment of expert witnesses and the payment of any unusual witness expenses, such as the cost of an ambulance to transport an invalid or pay for an attendant. Forms 25B should be submitted to the Department for authority to incur such expenses.

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 16 Vol. 10 dated August 10, 1962:

ORDER	DATED	DISTRIBUTION	SUBJECT
278-62	7-25-62	U.S. Attorneys & Marshals	RECONSIDERATION AND REVIEW OF ADVERSE ACTIONS.

* * *

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Court Issues Preliminary Injunction in Alcoa-Cupples Case. United States v. Aluminum Company of America and Cupples Products Corporation (E.D. Mo.). On July 30, 1962, Judge Meredith issued a preliminary injunction barring further commingling of defendants' assets, transfer of Cupples employees to Alcoa, diminution of Cupples' independent judgment or good will, and sale of Cupples stock, and requiring that the new fabricating plant in California shall be operated by Cupples and the products made there shall be Cupples products and shall be sold and advertised as Cupples Products. In moving for a preliminary injunction, the Government had alleged that the California plant was being built by Cupples for Alcoa and was to be operated by Cupples for Alcoa, the stated purpose being to give Alcoa an approach to the industry if it should be required to divest Cupples. The motion was filed on May 22, 1962, and argument was had on June 22, 1962.

In its 15-page opinion, the Court made numerous findings of fact, followed by a discussion of the law in which it rejected defendants' argument that a preliminary injunction is precluded where the facts are in dispute. Rather, it followed Hamilton-Benrus, stating that the test is "whether the plaintiff has raised serious questions of law and fact on the merits of the ultimate issue." It also adopted the weighing-of-injuries test of Hamilton-Benrus, rather than the "certain and irreparable" injury test urged by defendants.

The Court held that the acquisition by Alcoa, the largest fully-integrated aluminum producer, of Cupples, one of the largest independent fabricators of residential and non-residential windows, doors, curtain wall, etc., raised substantial questions as to the legality of the acquisition. With respect to the "probable future effect" upon a line of commerce, it held that "plaintiff has raised serious and substantial questions, * * * complex questions which require future and more deliberative study after a full presentation of facts, but at this juncture it is clear to this court that a preliminary injunction should issue to protect this court's ability to decree effective relief should this merger be proscribed."

With respect to that portion of its order relating to the new plant, the Court stated: "This will prevent Alcoa from using Cupples employees and know-how to get into that phase of the business that they are not now engaged in and from becoming firmly entrenched in that field in their own name during the pendency of this trial."

"If the defendants prevail on the merits, it will be no hardship on them to carry out this order since they will at that time own Cupples and have all of Cupples employees, good will and assets plus the plant at Corona, California. However, if the plaintiff prevails it would be

impossible to then order Alcoa to divest itself of Cupples and at the same time permit Alcoa to own and operate a plant at Corona, California, which was conceived and developed by Cupples and its employees and which would have the effect of permitting Alcoa to enter the market for fabricating windows and doors through an illegal merger."

Staff: Edna Lingreen, J. E. Waters, William A. Lovett and Lionel Epstein. (Antitrust Division).

Damages Paid Government by General Electric Company. United States and TVA v. General Electric Company, et al. and United States v. General Electric Company, et al. (E.D. Pa.). On July 25, 1962, an agreement was signed whereby G.E. obligated itself to pay $7,470,000 to the U. S. and TVA in settlement of the Federal Government's claims for damages against G.E. These claims grew out of the price-fixing conspiracies charged in the indictments returned by Philadelphia grand juries during 1960. In connection with those indictments, G.E. and its employees paid fines totalling approximately $500,000.

The products involved in the damage cases are large outdoor oil circuit breakers, power switchgear assemblies, power transformers, steam turbine-generators, distribution transformers, low voltage distribution equipment, low voltage power circuit breakers, insulators, power switching equipment, isolated phase bus and navy and marine switchgear.

In consideration of the settlement amount plaintiffs have agreed to issue covenants under which they agree not to institute, reinstitute or maintain any action against G.E. based upon allegations of conspiracy or upon allegations of fraud, which has been or might be asserted under the Clayton Act, the False Claims Act, or any common or statutory law giving rights to relief under similar circumstances with respect to any purchases made of products involved in the styled cases. In addition, plaintiffs have agreed to move for a dismissal as to G.E. of the styled cases.

Notwithstanding the dismissal, G.E. agreed that plaintiffs should retain the following pre-trial rights of discovery against G.E.

(1) To examine witnesses and obtain discovery and inspection of documents, and

(2) To obtain answers to written interrogatories.

G.E. must pay the agreed upon sum within 10 days after execution of the agreement and plaintiffs must move for the aforementioned dismissal within 30 days after the execution of the agreement.

The sum of $7,470,000 represents between 10 and 11% of the total purchase price of all product categories covered by the damage suits. This settlement is the largest antitrust damage settlement recovery in

history and is one of the largest sums ever received by the Federal Government in settlement of any of its cases.

Still remaining are the damage actions against 18 companies, the largest of which is Westinghouse Electric Corporation. The total relevant purchases from these remaining defendants approximate $35,000,000.

Staff: Fred D. Turnage, H. Robert Halper, Donald G. Balthis, John E. Sarbaugh, Morton M. Fine, John J. Hughes, Stewart J. Miller, Lewis Markus, Floyd C. Holmes and Charles E. Helppie. (Antitrust Division).

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CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

SUPREME COURT

OBSCENITY

Mailability of Obscene Material; Magazines Designed to Appeal to Prurient Interest of Homosexuals Held Mailable. Manual Enterprises, Inc., et al. v. Day (Supreme Court, June 25, 1962). In a 6 to 1 decision the Supreme Court reversed the judgment of the Court of Appeals for the District of Columbia Circuit which upheld a decision by the Post Office Department barring from the mails a shipment of petitioners' magazines. The administrative ruling was based on the alternative determinations that petitioners' magazines were (1) themselves "obscene", and (2) gave information where obscene matter could be obtained, thus making them non-mailable under two separate provisions of 18 U.S.C. 1461. There was no opinion for the Court. Justice Harlan, joined by Justice Stewart, was of the opinion that petitioners' publications, composed primarily for homosexuals, were not obscene because they cannot "be deemed so offensive on their face as to affront community standards of decency," even though their dominant theme may have been an appeal to the "prurient interest" of the individuals to whom they were addressed. Further, Justices Harlan and Stewart were of the opinion that the Post Office order was defective because the publishers did not have knowledge that obscene material was obtainable from its advertisers. Justice Brennan, in an opinion joined by the Chief Justice and Justice Douglas, was of the view that 18 U.S.C. 1461 did not authorize the Postmaster General to close the mails to matter which, in his view, falls within the obscenity ban of that section. Justice Black concurred in the judgment of the Court without opinion. Justice Clark, in dissent, would have affirmed the judgment because the publications gave information as to where obscene matter could be obtained. Disagreeing with Justice Harlan, he was of the view that 18 U.S.C. 1461 did not require knowledge by the publisher that obscene matter could be obtained through its advertisers; in any event, if knowledge were required, Justice Clark found ample basis for concluding that there was knowledge (or that the publishers were chargeable with knowledge) that obscene matter was obtainable from petitioners' advertisers.

Staff: J. William Doolittle, Office of the Solicitor General; David L. Rose (Civil Division)

COURTS OF APPEALS

ADMINISTRATIVE DISCHARGE

Servicemen Held to Have Failed to Exhaust His Administrative Remedies. Kenneth Carl Anderson v. Colin J. MacKenzie (C.A. 9, August 1, 1962). Anderson, an enlisted member of the Navy, was recommended by MacKenzie, his Commanding Officer, for an administrative General Discharge. The matter was

then considered by the Navy Enlisted Performance Evaluation Board, which recommended that Anderson be given administratively an Undesirable Discharge. This latter recommendation was approved by the Chief of Naval Personnel. In accordance with Navy Department regulations, the Chief of Navy Personnel sent the matter back to MacKenzie to afford Anderson an opportunity to have a hearing before a field board of officers. Anderson elected to have such a hearing and chose civilian counsel. At that point, Anderson instituted this action against MacKenzie for injunctive and declaratory relief against further administrative proceedings and the administrative issuance of an Undesirable Discharge. Anderson contended that the Navy had no power to bestow an Undesirable Discharge on him except by court-martial and that except by order of a court-martial he had a constitutional and statutory right to an Honorable Discharge. The district court dismissed the action for failure to exhaust the administrative remedies. The Court of Appeals affirmed. Following Beard v. Stahr, 370 U.S. 41, the Court held Anderson's suit to be premature. It rejected appellant's argument that the Chief of Personnel had already exercised his discretionary authority by ordering the discharge of appellant from the naval service with an undesirable discharge. The Court held that no final determination had been made and stated that it would "not assume that the consideration of the case by the field board of officers and by appellant's commanding officer and the review by the Enlisted Performance Evaluation Board and by the Chief of Naval Personnel [would] be but a sham or a 'rubber stamping' process."

Staff: Sherman L. Cohn (Civil Division)

ADMIRALTY

Limitation of Liability: Right of Petitioning Shipowner to Encroach Upon Limitations Fund for Reimbursement for Expenditures of General Average Nature. American Cyanamid Company, et al. v. China Union Lines, Ltd. (C.A. 5, August 1, 1962). On November 7, 1961, the M/V Union Reliance, owned and operated by China Union Lines, collided with another vessel in the Houston Ship Channel. Ensuing fire caused extensive damage to the Union Reliance rendering her disabled. Her owner abandoned her in the heavily trafficked channel whence she was removed by the United States. On November 28, 1961, China Union Lines filed its petition for exoneration from or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. 181, et seq. The next day the district court ordered the vessel transferred to a trustee for the benefit of claimants. Also the court ordered that cargo be unloaded from the vessel and that China Union Lines be reimbursed out of the proceeds of the sale of the vessel for expenses incurred in unloading the cargo up to $40,000. By oral amendment on December 20, 1961, this figure was increased to $60,000.

Subsequently, China Union Lines filed a motion for disbursement to it of $90,000 from the proceeds of sale of the vessel as reimbursement for unloading expenses. On March 12, 1962, the district court entered an order authorizing disbursement of $60,000, but staying its order pending application by interested parties to the Court of Appeals under 28 U.S.C. 1292(b). On April 11, 1962, the Court of Appeals entered an order granting permission to appeal from the interlocutory order of the district court.

After briefing and argument, the Court of Appeals vacated its order permitting appeal, and remanded the case to the district court for further proceedings to determine (1) how much China Union Lines expended in transporting the ship to the dock where the owners of the cargo could remove it and where the ship could be boarded and examined by prospective bidders, (2) what transpired between the owners of the Union Reliance and the owners of her cargo with respect to the owner's assumption of the task of removing cargo. The Court of Appeals' opinion also indicated that orderly procedure demanded findings of fact and conclusions of law as required by Admiralty Rule 46 1/2, to support the order appealed from.

Staff: John W. Boult (Civil Division)

HATCH ACT

Hatch Act Violated Where State Officer Takes Active Part in Political Management While Employed in Connection with Federally Financed Activity. Sam M. Engelhardt, Jr., and the State of Alabama v. United States Civil Service Commission (C.A. 5, July 25, 1962). The Director of the Alabama State Highway Department and the State of Alabama brought this action in the district court to review a report and order of the Civil Service Commission which had determined that Engelhardt had violated Section 12(9) of the Hatch Act, 5 U.S.C. 118k (a). While holding the post of Highway Director, Engelhardt was also the Chairman of the Executive Committee of the Democratic Party in the State of Alabama. The district court affirmed the Commission's determination and order, holding that the Hatch Act prohibited Engelhardt's political activity. It held that petitioner was an officer of the State of Alabama whose principal employment was in connection with activity which was financed in part by loans or grants made by the United States. The court ruled that as head of the Alabama Executive Committee, Engelhardt had taken an active part in political management during the pertinent period. The court also rejected petitioner's claim that the Act was unconstitutional as applied. It noted that every constitutional argument raised by petitioner had been considered and rejected by the Supreme Court. The Court of Appeals concurred in the district court's opinion and affirmed for the reasons set forth therein. See also, Palmer v. United States Civil Service Commission, 297 F. 2d 450 (C.A. 7), certiorari denied 369 U.S. 849.

Staff: Anthony L. Mondello (Civil Division)

HOUSING AND HOME FINANCE AGENCY

Housing and Home Finance Administrator Held Not Liable to Surety to Defaulting Contractor on Project Financed by Housing and Home Finance Agency. Phoenix Assurance Company v. City of Buckner, et al. (C.A. 8, July 18 1962). Plaintiff appealed from the dismissal of its complaint seeking to declare void a performance bond issued by it to protect the City of Buckner against default in the completion of a construction contract, or, in the alternative, to impose liability on the Housing and Home Finance Administrator. The complaint alleged, inter alia, (1) that the Administrator ordered work on the Government financed project to proceed despite the fact that he knew the contractor would be unable to perform and that a loss would

occur to the surety, and (2) that he negigently certified progress payments to the contractor. The district court dismissed the complaint. The Court of Appeals affirmed. The Court held that the Administrator's "* * * relation to the City was only that of a lender of Government funds * * *" and noted that "the contention of Phoenix that it is entitled to visit its misfortune upon the Housing and Home Administrator has too inadequate a base to merit discussion."

Staff: Jerry C. Straus (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' ACT

Finding by Deputy Commissioner That Fatal Lung Cancer Was Caused, Aggravated, or Accelerated by Employment Injury Not Supported by Substantial Evidence. C. D. Calbeck v. Strachan Shipping Company. (C.A. 5, August 1, 1962). The employee, a sixty-year-old stevedore, was "splattered" with triple superphosphate fertilizer when a conveyor belt, used in unloading the vessel, malfunctioned. He thereafter complained of, and was treated for, bronchial symptoms apparently resulting from inhalation and ingestion of the fertilizer. Medical treatment led to discovery of an incurable and inoperable carcinoma of the lung which pre-dated the injury. Death due to the latter followed.

The Deputy Commissioner awarded benefits to the widow and children, finding that death was proximately caused, aggravated or accelerated by the employment injury. The district court enjoined and set aside the award having concluded that it was not supported by substantial evidence. The Court of Appeals affirmed the district court, one judge dissenting. While acknowledging the Deputy Commissioner's argument that an award can be made even though the claim is unsupported by, or even in conflict with, medical evidence, the Court found no other evidence to support a finding that the fertilizer accelerated the growth of the cancer or that the cancerous condition was aggravated by it. It also rejected the contention that the fertilizer incident masked the employee's true condition and thereby delayed a diagnosis of cancer so that it progressed beyond the stage at which treatment might have been given. The Court ruled that the opinion testimony of claimant's expert in this connection was uncertain, contradictory, based upon surmise and conjecture and could not be regarded as substantial evidence.

Staff: Marvin S. Shapiro (Civil Division)

Tuberculosis, Contracted by Claimant Whose Duties Exposed Her to Co-employees Having Four to Eight Times Normal Tuberculosis Rate, Arose Out of Employment. Gilbert Pacific, Inc., et al. v. P. J. Donovan. (C.A. 5, July 25, 1962). Appellant commenced this action to enjoin payment of an award granted by the Deputy Commissioner of Labor under the Longshoremen's and Harbor Workers' Compensation Act. The district court held that the evidence sustained the Commissioner's finding that claimant, who contracted tuberculosis during three years that she was employed in Okinawa, worked in close contact with Okinawan co-employees exposing her to persons having four to eight times normal tuberculosis rate. Additionally, the court held that the disease arose out of her employment and was compensable under the Act.

It ruled that claimant's illness "was either an occupational disease as defined in Board of National Missions [116 F. Supp. 625], or a disease arising naturally out of such employment as applied in Todd Dry Docks [61 F. 2d 671 (C.A. 9)], or an injury arising out of or in the course of employment as applied in Contractors [150 F. 2d 310 (C.A. 9)]." The Court of Appeals agreed with the district court's analysis and affirmed for the reasons set forth in its opinion.

Staff: United States Attorney Kathleen Ruddell and Assistant United States Attorney Gene S. Palmisano (E.D. La.); Charles Donahue, Solicitor; Herbert P. Miller, Assistant Solicitor; George M. Lilly, Attorney (Department of Labor).

DISTRICT COURT

BANKRUPTCY

Unclaimed Bankruptcy Dividends Held Not Escheated to Commonwealth of Massachusetts. In the Matter of the Application of the Commonwealth of Massachusetts. (D. Mass., June 5, 1962). Certain undistributed bankruptcy dividends that remained with the United States District Court unclaimed more than five years were paid into the United States Treasury pursuant to 28 U.S.C. 2042. The Commonwealth of Massachusetts filed its petition on July 25, 1956, seeking an order directing payment by the United States of these unclaimed dividends. The petition of the Commonwealth of Massachusetts to claim these funds was based upon the General Laws of Massachusetts, Chapter 2000A, Abandoned Property Law, which provides in part that any monies paid into any court shall be presumed abandoned if not claimed within fourteen years. On motion to dismiss filed by the Government, the Court held that it had no authority to enter a judgment of escheat awarding the funds to the state in the absence of a prior judgment of escheat in favor of the state in a state court, or notice of the federal district court suit to the unknown creditors. Since neither of these conditions had occurred, the Court granted the Government's motion. (Since the filing of this action, 11 U.S.C. 106 has been amended to provide that unclaimed monies in bankruptcy proceedings shall not be subject to escheat under the laws of any state).

Staff: United States Attorney W. Arthur Garrity, Jr. and Assistant United States Attorney Stanislaw R. J. Suchecki (D. Mass.) Hadley W. Libbey (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections; Civil Rights Acts of 1957 and 1960; Voting Referee Provision (42 U.S.C. 1971(e)); Vacation of State Judge's Injunction Issued Against Federal Judge. U. S. v. Manning, et al., (W.D. La.). This case was previously reported in the Bulletin (Vol. 10, p. 432). After a pattern or practice of racial voting discrimination had been found and an injunction issued under the Civil Rights Acts of 1957 and 1960, District Judge Hunter issued an interlocutory order qualifying 28 Negroes to vote in East Carroll Parish, Louisiana. This action had been taken since the registrar had previously resigned. Following issuance by a state judge of a temporary restraining order against Judge Hunter, enjoining him, among other things, from issuing registration certificates to the 28 Negroes, the Department had the case removed to the federal court. A three-judge court thereupon vacated the state court's temporary restraining order and enjoined the State, the Louisiana Attorney General, the state court judge, and others from interfering with the federal court in issuing certificates of qualification to Negroes to vote. Thereafter, certificates were issued under the Civil Rights Act of 1960 to 26 Negroes, who on July 28, 1962, voted in a Democratic primary election for the first time in at least 40 years, and perhaps for the first time since Reconstruction days.

Staff: United States Attorney Edward L. Shaheen;
Assistant Attorney General Burke Marshall,
John Doar, St. John Barrett, David L. Norman,
Frank M. Dunbaugh and Gerald P. Choppin
(Civil Rights Division)

Voting and Elections; Civil Rights Act of 1957. United States v. Mathews, et al. (M. D. Ga.) This civil action brought under the Civil Rights Act of 1957 (42 U.S.C. 1971(a)(b)(c)) was filed on August 13, 1962 against 16 defendants, charging them with intimidating, attempting to intimidate, and conspiring to intimidate Negroes and representatives of the Student Non-violent Coordinating Committee (SNCC) in Terrell County, Georgia for the purpose of interfering with the right of Negroes in that County to register to vote. Five of the defendants are law enforcement officers, including the sheriff of Terrell County and his two deputies, the sheriff of Sumter County and the chief of police of Dawson, Georgia. The remaining defendants are other public officials and private individuals who reside in Terrell County.

The suit charges all of the defendants (except the chief of police of Dawson) with having disrupted voter registration meetings in Negro churches in Terrell County attended by local Negroes and representatives of SNCC. The complaint states that these meetings were for the purpose of encouraging

Negro registration in that County. It charges that during the disruption of the meetings, the defendants copied the license numbers of cars parked around the church; entered the church uninvited; interrogated persons in attendance; required the Negroes in Terrell County to stand and made a list of names of Negroes in attendance. Other Negro citizens of Georgia seeking to attend the meetings were turned away by threats of physical violence. The persons in attendance were told that the white community was disturbed and that the law enforcement officers could not protect them. It is also alleged that following one of these meetings, two of the Negroes in attendance were discharged from their jobs by a defendant who saw them at the meeting.

It is further alleged that the defendant law enforcement officers of Terrell County arrested and jailed two of the representatives of SNCC on a vagrancy charge without justification in an attempt to intimidate, threaten and coerce these two persons and Negro citizens of Terrell County for the purpose of preventing, hindering, delaying, and interfering with the right of such Negroes to register and to vote.

The Government seeks a preliminary and permanent injunction against the defendants from engaging in certain acts for the purpose of interfering with the right of Negroes to register and to vote, or for punishment for their having previously registered or voted. The acts include disrupting voter registration meetings, committing acts of violence, terminating employment relationships, attempted threats of coercion, and combining or conspiring to engage in any such conduct.

The Government also seeks to enjoin the defendant law enforcement officers of Terrell County from proceeding with the prosecution of two representatives of SNCC; from surveiling, interrogating, arresting or prosecuting any person and from willfully failing to provide police protection, for the purpose of interfering with the right of Negro citizens in Terrell County to register to vote, or for punishment for their having registered or voted.

With the filing of the suit the Government applied to the Court for a temporary restraining order to enjoin further proceedings in the prosecution of the two representatives of SNCC. This application which was supported by 15 affidavits was denied.

This is the fifth suit brought by the Government involving acts of intimidation of Negroes for the purpose of interfering with the rights of Negroes to register to vote.

Staff: United States Attorney Floyd M. Buford;
John Doar, David L. Norman, Arvid A. Sather
(Civil Rights Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FEDERAL AID HIGHWAY FRAUDS

Conspiracy to Defraud United States. Francis L. Harney, et al. v. United States; Joseph I. Mirkin v. United States (C.A. 1). Early in 1960 the Federal Bureau of Investigation and the Bureau of Public Roads collaborated in exploring possible irregularities in the Federal Aid Highway Program in Massachusetts. A Federal grand jury also conducted extensive inquiry into the same matter. Six indictments were returned in Boston, Massachusetts all dealing with irregularities in acquisition of rights of way. Four of the indictments, including the captioned matters, charged conspiracy to defraud the United States Government by interfering with acquisition of right of way procedures (18 U.S.C. 371). Being pilot prosecutions in the area of highway land acquisition fraud, their outcome was deemed significant in the proper enforcement of the Federal Aid Highway Program.

The subject cases were the first to be tried. In the first indictment Francis Harney, a negotiator in the Right of Way Division, Department of Public Works, James O'Connell, an attorney, and Charles Lawton, a real estate and insurance brokerage firm owner, were named as codefendants with four others, including fee appraisers and the owner of the land where parcel was taken for right of way, being listed as co-conspirators. The second indictment charged Mirkin, a negotiator in the Right of Way Division, Department of Public Works, as sole defendant with two land owners being named as co-conspirators. The trial of Harney v. United States was concluded on November 2, 1961 with guilty verdicts against all defendants each being fined $5,000 and sentenced to one year in jail. Mirkin was also found guilty in the second case and received a similar sentence. On appeal the judgments of conviction were affirmed July 18, 1962 in both cases, the first by written opinion, the second per curiam on the basis of the decision in the Harney case.

The Court of Appeals reviewed the essential part of the charge, i.e., the defendants, with knowledge that Massachusetts would apply for and receive from the United States payments in partial reimbursement for damages in land takings, . . .

> . . . ' . . .did combine, conspire, confederate, and agree' among themselves and with the co-conspirators named but not charged in the indictment '(a) to hamper, hinder, obstruct, and impede the lawful functions, operations and purposes of said Bureau of Public Roads of the Department of Commerce in the administration of the Federal Aid Highway program by impeding and preventing by craft, trickery and deceit a fair, honest, and disinterested valuation and negotiation of damages resulting from the taking by the Commonwealth of the real property owned by Damort Land Corporation; (b) to divert or cause to be diverted to the personal use, gain and benefit

> of one or more of the defendants and co-conspirators a large portion of the money paid by the Commonwealth to Damort Land Corporation in payment for the real estate taken from said corporation, the share of said payment reimbursable by said agency of the United States being ninety per cent, contrary to and in derogation of the purpose and intent of the Commonwealth in making the said payment and contrary to and in derogation of the purposes and intent of the Federal Aid Highway program and (c) to cause the Commonwealth to pay to Damort Land Corporation in payment for the real estate taken from said corporation an amount of money far in excess of the sum which the said owner demanded and was willing to receive in full payment of its claim, . . .'

The First Circuit relying on Hammerschmidt v. United States, 265 U.S. 182, 188 (1924), decided an offense was clearly alleged under 18 U.S.C. 371, as cheating and overreaching the State of Massachusetts with respect to the amount it paid for land taken for Federal highway purposes would in the end expend itself upon the Federal Government to the extent of 90%, thereby obstructing one of its lawful functions and, if successful, subject it to pecuniary loss. Reviewing the evidence of the defendants' machinations, the Court found that although the land owner was willing to accept $30,000 for his land, a sum of $60,000 was ultimately awarded, the excess finding its way into the pockets of the conspirators. In the opinion of the Court, it was enough to sustain the charge if the State was hoodwinked into paying more for the land than the land owner was willing to accept. Conceding it was the duty of the United States to pay fair market value for any land it takes for public purposes, it was recognized this would not prevent a land owner from giving his land, or the United States from making an advantageous bargain, provided it did so in a fair, honest and above board transaction. The question then is not the land's fair market value, but whether by chicane the State was beguiled into paying more for the land than the owner, acting as a free agent, was willing to accept.

Defendant-appellants also argued that the evidence was deficient because there was not a sufficient interest of the United States shown in the land taking. In disposing of this contention, the Court reviewed cursorily the Federal-State relationship in road building, the initial step of program approval by the Bureau of Public Roads and the later submission by the State of plans, specifications and estimates for each proposed project. On project approval, funds are administratively set aside, the State may proceed, and there is a contractual obligation by the Federal Government for the payment of its proportional share.

The remainder of the opinion refuted various arguments that the trial occurred in a prejudicial atmosphere created by wide publicity accorded to Federal road scandals, and that certain evidence was improperly admitted or excluded.

The charge and the objections in the Mirkin case were similar to Harney. There the land owners agreed to accept $17,500 as damages but

Mirkin argued they could get $19,500, the maximum price set by a State Review Board, in return for which Mirkin, a State employee, got a $400 "cut."

Copies of the indictments returned in these cases are available on request of interested United States Attorneys to the Criminal Division.

Staff: United States Attorneys W. Arthur Garrity; Assistant United States Attorneys Paul A. M. Hunt, Joseph F. Gargan and John J. Curtin, Jr. (D. Mass.).

John L. McCullough, Michael A. Berch and Marvin R. Loewy (Criminal Division)

CORAM NOBIS

Alleged Absence of Counsel; District Court's Fact-Findings on Conflicting Evidence. United States v. Joseph Castelli (C.A. 2, July 10, 1962). The appellant, an alien, was convicted of a narcotics offense on his plea of guilty before Judge Knox in the Southern District of New York in 1927 and received a one year sentence. In 1955 he was ordered deported because of this conviction. Following execution of the deportation order, he reentered illegally and now faces deportation anew. He filed an application in the District Court in the nature of coram nobis to vacate the 1927 conviction, alleging that he was innocent of the offense and neither had nor was offered the assistance of counsel. The District Court ordered a hearing.

Appellant relied entirely on his own testimony as to what took place at the 1927 proceedings. No attempt was made to obtain the testimony of Judge Knox based on notes he might have made in the case or on his recollection of the general practice in 1927, or to call any other witness with personal knowledge of that subject. Appellant admitted that he had never previously claimed innocence or lack of counsel, even at his prior deportation hearing. One, Johnson, a Government witness, and deputy clerk in the Southern District of New York since 1922, testified that the regular practice in 1927, except in prohibition cases, was for the Court to inquire whether an accused appearing without an attorney had counsel or desired the Court to assign counsel. Appellant next presented the affidavit of a former Assistant United States Attorney, submitted in a 1953 proceeding on the basis of information which he thought came from Johnson, that this was not the practice. Johnson testified that he had not made the statement so attributed to him. The District Court did not believe appellant and denied the application.

In a per curiam opinion, the Court of Appeals affirmed. It noted that appellant's testimony made it apparent that, to say the least, his recollection of the happenings in 1927 was extremely vague. "If the judge chose to disbelieve what little Castelli did recall and to accept Johnson's testimony, that was his prerogative".

Staff: Assistant United States Attorneys Richard A. Givens and Andrew T. McEvoy, Jr. (S.D. N.Y.).

INTERSTATE TRANSPORTATION OF WAGERING PARAPHERNALIA
(18 U.S.C. 1953)

Statutory Construction; Exemption provision; Meaning of Term "Any Newspaper or Similar Publication". United States v. Kelly, et al. (E.D. Ky.). On July 20, 1962, in a jury trial before Judge Henry L. Brooks, defendants were convicted of four counts of transporting gambling paraphernalia in interstate commerce in violation of 18 U.S.C. 1953.

Defendants were the owners of two racing publications, the Illinois Sports News, printed in Chicago, Illinois, and the Louisville Daily Sports News, printed in Louisville, Kentucky. Among other things, both of these publications contained up-to-the-minute information about scratches, track conditions, jockeys, the morning line; and so forth and were of a type usually sought by bookmakers and others of the gambling fraternity. Part of the defendant's operation consisted in transporting from Chicago to Louisville quantities of paper, blank except for the pre-printed mast-head of the Louisville Daily Sports News, to be used in the printing of that publication. Another part of their operation involved transporting from Chicago to Louisville copies of the "Overnight Edition" of the Illinois Sports News, from which certain information was extracted and reproduced in the Louisville publication. Two of the counts on which convictions were returned involved the transportation of the paper and the other two involved the transportation of the Illinois publication.

The jury found that defendants had transported paraphernalia, papers, or writings in interstate commerce, and that these items had been used, were to be used, or were adapted, devised, or designed for use in bookmaking. Government witnesses included some thirty local bookmakers who testified that they all used the Louisville Daily Sports News in their operations. A police official testified that in virtually every raid on local bookmaking establishments, he or his officers had found copies of it on the premises. In addition, defendants ultimately stipulated to the effect that eighty percent of their circulation was to bookmakers.

The jury had to find that the Louisville Daily Sports News was not "any newspaper or similar publication" within the meaning of the exemption provided by the statute. They were instructed to consider these words in their ordinary sense with the meaning commonly attributed to them. During the course of the trial, both sides introduced the expert testimony of newspaper editors on the issue. The jury deliberated for approximately eleven and a half hours before arriving at a decision that the publication was not a newspaper within the common meaning of the word, and only then after returning to the courtroom several times to seek further assistance from the judge.

The jury had also been instructed that defendants must have acted wilfully and knowingly, that is, with criminal intent, in order that they be found guilty. Defendants had contended that they had acted with good faith, on the advice of counsel, and had had reasonable grounds to believe that the Louisville Daily Sports News was not paraphernalia, paper or writings within the meaning of the statute.

Staff: United States Attorney William E. Scent (E.D. Ky.).
Edward T. Joyce (Criminal Division)

LIQUOR LAW FORFEITURE

Forfeiture; Denial of Remission. United States v. One 1959 Pontiac Bonneville 2-Door Sedan, Motor No. 859A4826 (N.D. Ga.). This is a liquor case in which the District Court denied the petition for remission to the intervening petitioner-claimant, General Motors Acceptance Corporation, owner of a conditional sales contract executed by a straw purchaser of the automobile. In so doing, the Court found that under the circumstances surrounding the sale of the car the salesman knew that the person who signed the contract was not the true purchaser, yet he continued to cooperate with the actual purchaser to hide that fact from the petitioner in order to obtain credit, or he was negligent in the extreme in not determining who the real purchaser was. The Court further found that the salesman did not make the sale until it was approved by the petitioner; that he supplied the petitioner with certain information upon which it approved the contract; and that the terms of this contract were written in only after consultation with the petitioner. The Court noted that the contract, on its face, provided that the dealer was to be responsible to the petitioner for misrepresentation and false information supplied to it and made the basis of the contract. The Court ruled that in supplying information to General Motors Acceptance Corporation for its prior approval before making the sale, the salesman was acting as the agent of the petitioner. Pursuant to GMAC's instructions, he filled in the body of the contract and the sale was then deemed complete. This, said the Court, established the salesman as agent for General Motors Acceptance Corporation clearly within the holding of United States v. One 1955 Model Buick Coupe, 145 F. Supp. 72 (S.D. Ga. 1956) and the subsequent opinion on appeal in General Motors Acceptance Corporation v. United States, 249 F. 2d 183 (C.A. 5, 1957), thus imputing to the petitioner the salesman's knowledge, actual or implied, of who the actual purchaser was. The Court distinguished the facts of the case from those in General Finance and Thrift Corporation v. United States, 226 F. 2d 735 (C.A. 5, 1955). An appeal from the decision was noted by the petitioner but was withdrawn on its motion. Publication of the opinion is expected.

Staff: United States Attorney Charles L. Goodson; Assistant United States Attorney Burton Brown (N.D. Ga.).

NATIONAL MOTOR VEHICLE THEFT ACT
(18 U.S.C. 2312)

Alleged Violation of Rule Against Pyramiding of Inferences. Sadler v. United States, _____ F. 2d _____ (C.A. 10, April 26, 1962). Sadler was paroled from the United States Penitentiary at Leavenworth, Kansas, on July 1, 1961, with instructions to report to the Federal probation officer at Savannah, Georgia. Instead, he violated his parole by going to Laredo, Texas, where on July 15, 1961, he rented a Chevrolet from Hertz for one day and drove to Salt Lake City, Utah, arriving on July 18, 1961. There, he found a Utah driver's license in the name of one Conway. He bought a car, obtained license plates for it in Conway's name, and attached them to the Chevrolet. Sadler claimed he intended to park the car, inform Hertz of the location so they could retrieve it, and pay the rental charges when his economic position im-

proved. Before he could do this he was arrested by Salt Lake City police and charged as a Federal parole violator. At the trial, defendant testified that he tried to return the car to Hertz at San Antonio, Texas but found the office closed. A Government witness testified, however, that the office was open.

Sadler was found guilty by a jury of violating 18 U.S.C. 2312 and sentenced to a four year term of imprisonment. In an attempt to reverse his conviction Sadler claimed, inter alia, that there was no evidence of any intent to embezzle and urged that if such intent be inferred from the evidence a finding that the intent was formed before the trip ended violated "the rule against the pyramiding of inferences." In rejecting this argument the Court said that the word "inference" as used in that rule was not to be confused with a fact proved by circumstantial evidence; that a fact arrived at by indirect or circumstantial evidence may serve as the basis of an inference. Thus, from the facts established in this case, the Court decided that a felonious taking may reasonably be inferred, that knowledge of the taking was contemporaneous with the taking since the person who took the car was charged with knowledge. The Court was of the further view that there was evidence of events occurring before the interstate transportation ended to support the "inference of taking;" hence, the jury's determination of the time of the taking did not necessarily grow out of the inference of the taking but depended upon resolving the truth of that evidence.

Finding no merit in the rest of Sadler's arguments, the conviction was affirmed.

Staff: United States Attorney William J. Thurman; Assistant United States Attorney Gerald R. Miller (D. Utah).

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Immigration and Nationality Act - Traveling Without Passport (8 U.S.C. 1185(b)). United States v. William Worthy, Jr. (S. D. Fla.) On April 24, 1962, a one-count indictment was returned against the defendant charging that he entered the United States from Havana, Cuba, without a valid passport in violation of 8 U.S.C. 1185(b). This section provides that it shall be unlawful for a citizen of the United States to depart from or enter the United States during the time of any National Emergency proclaimed by the President without bearing a valid passport, except as provided in the regulations promulgated under the statute. Since January 19, 1961, a valid United States passport has been required for travel between the United States and Cuba.

On August 8, 1962, the defendant was found guilty by the Court after a trial without a jury. Evidence introduced by the Government reflected that Worthy, who possessed no passport at all, was aware of the restrictions regarding travel to Cuba and deliberately entered that country with knowledge of the statutory penalties. No date has yet been set for sentencing; the maximum penalty is five years and $5,000 or both. This is the first case tried under this section of the statute.

Staff: United States Attorney Edward F. Boardman (S.D. Fla.)
Paul C. Vincent and Alta M. Beatty (Internal Security Division).

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation; Wherry Housing Project; No Error for Jury to Consider Government's Right to Approve Rent Increases; Construction Cost of Nearby Capehart Housing Project Not Admissible in Evidence as Comparable Sale; No Abuse of Discretion by Trial Court in Rejecting Comparable Sales Offered by Government; Reproduction Costs Admissible When Used Only as Factor Considered by Experts in Arriving at Market Value. Fairfield Gardens, Inc. v. United States, (C.A. 9, June 27, 1962). The Government brought this action in 1957 to condemn Fairfield's leasehold interest in two Wherry military housing projects at Travis Air Force Base, California. The Government owned the fee, and Fairfield had a 75-year lease from 1951. The Government was required to condemn because of the construction of the Capehart military housing project at the same base. The Government condemned Fairfield's equity interest in the leasehold subject to the outstanding mortgages incurred when the project was constructed. After trial of the issue of just compensation, Fairfield filed an appeal and the Government filed a cross-appeal. The Court of Appeals affirmed the judgment of the district court.

Fairfield contended it was error to allow the jury to consider that, under the applicable contracts, statutes and regulations, the project rentals were subject to approval or control by the Government. It was held that since Fairfield had no right to transfer its property interest free of the rent controls, such fact must be taken into consideration in the condemnation action. "The Constitution does not require a disregard of the state of the title. Boston Chamber of Commerce v. Boston, 1910, 217 U.S. 189, 195." At the time of taking in this case, the Capehart project was being constructed nearby. The trial court ruled that neither the "purchase price" nor the construction cost of such project could be admitted in this case. The Court of Appeals held that a construction contract is not a comparable sale, and that the cost of that project would not be material in determining the market value of the lease involved here.

On the Government's appeal, the Court of Appeals rejected the Government's argument that there was a national market for large housing projects in which market value is primarily determined by capitalization of income at a substantially uniform rate. The Government had urged the existence of such a market as a basis for showing that similar sales around the nation were admissible in evidence as comparable in value to this housing project. The Court of Appeals held that "If there be such a market, we cannot take judicial notice of the fact, and we do not think that, fairly considered, Mr. Hastings, testimony shows such a fact." Therefore, it was held the trial court did not abuse its discretion in excluding the other nationwide sales.

Finally, it was held that it was not reversible error for the trial court to allow reproduction costs to be shown and considered by the

experts. It was pointed out, however, that these costs were considered "only as a factor to be considered in arriving at market value, and not as itself evidence of market value." With respect to the argument that the reproduction cost evidence was so extensive and detailed that it must have "brainwashed" the jury thereby producing an excessive award, the Court of Appeals said, "We recognize that this is a danger; we do not think that it occurred here."

Staff: A. Donald Mileur (Lands Division)

Public Lands; Case Held Moot Where, Pending Appeal, Interior Drops Threatened Proceeding to Cancel Oil and Gas Lease Which Was Enjoined by District Court. Henriques v. Gulf Oil Corp. (C.A. 10, June 29, 1962). There were competing applications for oil and gas leases on the same public lands by Smith and Conley. The Department of the Interior decided that Smith had the better right and issued the lease to him. On a later administrative appeal by Conley, it was decided that the lease had been erroneously issued to Smith. Thereupon, an administrative proceeding to cancel the Smith lease was commenced. Smith and his assignee, Gulf, went into district court and secured an injunction against the threatened administrative cancellation on the authority of Pan American Petroleum Corp. v. Pierson, 284 F.2d 649 (C.A. 10, 1960, cert. den. 366 U.S. 936). See 9 U.S. Attys. Bull. No. 9, p. 90; 9 U.S. Attys. Bull. No. 12, p. 371. An appeal was taken to the Tenth Circuit to secure a decision on whether the Pan American case was applicable to the facts of this case.

Pending appeal, an administrative decision by the Department of the Interior in another case construed the applicable regulation so as to sustain the validity of the Smith lease. Interior accordingly vacated the earlier adverse administrative decision in this case, and this left no administrative proceeding to cancel the Smith lease either pending or threatened.

The Court of Appeals, on the motion of the Interior officials, held the case was moot and ordered it remanded for dismissal. It held that the fact that Interior does not accept the Pan American decision does not defeat the claim of mootness. The courts will not interfere with executive actions which do not affect individual interests adversely. Nor does the fact that Conley still has an administrative appeal keep the case from being moot where there is nothing to show that the Interior officials threaten to cancel the Smith lease.

Staff: A. Donald Mileur (Lands Division)

Public Lands; Mineral Leasing Act; Secretary of Interior's Decision That Certain Lands Owned by United States Were to be Leased as "Public Lands" Rather Than as "Acquired Lands" Is Not Subject to Judicial Review Unless Arbitrary, Unreasonable or Erroneous as Matter of Law. Morgan v. Udall, (C.A. D.C. July 5, 1962). Wallis, Morgan and other competing parties had filed several offers for an oil and gas lease on certain Government-owned lands. All the various parties had at different times

filed "public lands" lease offers under the Mineral Leasing Act of 1920, as amended, 30 U.S.C. 181 et seq., and "acquired lands" lease offers under the Mineral Leasing Act for Acquired Lands, 30 U.S.C. 351-359. The Department of the Interior determined that the lands were to be leased as "public lands", and that Wallis was the first qualified applicant who had filed a proper public lands lease offer which complied with Department regulations. Accordingly, a lease was issued to Wallis. Morgan and others brought this suit attacking the action of the Secretary. The district court granted summary judgment for the Secretary and Wallis.

On appeal the judgment was affirmed. The Court of Appeals, in a short opinion, held that the Secretary's decision is subject to judicial review only if it can be shown that he acted arbitrarily, unreasonably, or that his interpretation of what constitutes "public lands" is erroneous as a matter of law. Upon review of the record, the Court of Appeals could find no adequate basis upon which the Secretary's determination could be disturbed.

Staff: A. Donald Mileur (Lands Division)

Condemnation; Findings on Value of Airport Runways, Hangar and Related Warehouses Are Erroneous Where Based on Reproduction Costs Without Evidence of Such Demand as Would Justify Reproduction; Severance Held Not Proper Where Based on Highest and Best Use Erroneously Found by Commission to be Residential Instead of Agricultural. United States v. Frank S. Buhler, (C.A. 5, July 6, 1962). This condemnation case involved the reacquisition of an Air Force base which had been constructed on leased land by the Government during World War II. It was subsequently deactivated, and the land with runways, hangar, several warehouses, railroad spur, streets, utilities and other improvements, was relinquished to the fee owners. The Government in 1952 condemned in fee the 1,144 acres on which these improvements were located. Later, there were five smaller takings which totaled over 200 acres. All of the takings were out of a larger tract of 4,419 acres owned by the Buhler family. This larger tract was less than a mile at its closest point from the city of Victoria, Texas. 2,915 acres of the tract had been leased for 12 years for rice farming in 1950, two years before the fee taking. The case was tried, over Government protest, to a commission appointed under Rule 71A(h), F.R.Civ.P. On a prior appeal, the Court held that it was not error to refer the case to a commission, but that the report of the commission was inadequate for appellate review. Accordingly, the case was remanded for further findings. United States v. Buhler, 254 F.2d 876 (1958). See 6 U.S. Attys. Bull., No. 11, pp. 327-329. After the commission submitted a greatly expanded report, which was approved by the district court, finding the same award, the Government brought this second appeal.

On the second appeal, the Fifth Circuit reversed, holding that certain of the findings were clearly erroneous. The principal complaint of the Government was that the commission had based its award for the improvements primarily on reproduction costs. The Court of Appeals first noted that it had found use of reproduction costs inappropriate unless there is

a showing that substantial reproduction would be a reasonable business venture. It then held "there is neither any finding by the commission, nor is there any evidence upon which such finding could be made, to the effect that there was any such demand at the time of the taking of tract 1 for airfield facilities * * * as would justify reproduction * * * of runways and drainage facilities at a total cost of $317,550 or a hangar building * * * at a cost of $105,000." In the absence of any evidence of demand for airport or airfield facilities as such, it would be pure speculation for the commission to determine that the highest and best use of this property would be for use as an airfield. It was likewise held to be error to consider the reproduction cost of the various warehouses where there was no evidence that any prospective purchaser would be likely to reproduce them if they didn't exist.

The commission had allowed severance damages on the theory that the land taken would be used for a jet air base which would result in a depreciation to the remainder by reason of its proximity to the noise, vibration and hazard. In one area it had also allowed severance damages because the taking was for an ammunition area and firing in butt which was found to result in "hazards, real or psychological". The Court of Appeals found that these items of severance damages were based on the assumption that the highest and best use of the remaining property was for residential purposes. The Court of Appeals noted that approximately six square miles were involved and that it had been leased out for 10 years for rice farming. The Court said, "Here there is no evidence in the record that there was any reasonable likelihood that in such 'near future,' as is comprehended within the meaning of that term as used in the decided cases, any substantial part of this entire acreage would be either adaptable or needed for residential purposes." The Court of Appeals also indicated it thought there was considerable merit to the Government's contention that this type of severance damage could not be considered at all because it would arise, if ever, from lawful Governmental activities on the land after the date of taking, but the Court did not reach the issue.

Because the Court of Appeals was loath to delay the final disposition of the case, it remanded for the district court to make new findings in accordance with the opinion of the Court of Appeals and based on the record already made. It was critical, however, of the reference of the case to the commission, and commented "on the great desirability, wherever it is possible, for a trial court to give the most careful scrutiny before determining that a condemnation case should be referred to commissioners rather than to be submitted to a jury."

Staff: A. Donald Mileur (Lands Division)

Avigation Easements; When Cause of Action Accrues; Just Compensation and Effect of Dimimution Caused by Previous Aircraft Activities. Jensen, et al., v. United States, No. 52-58; Jones, et al., v. United States, No. 53-58; Burdge, et al., v. United States, No. 58-58; McClaughry, et al., v. United States, No. 66-58 (C. Cls.) These four cases, tried as one, were

brought to recover just compensation for the taking by the United States of avigation easements over properties owned by the plaintiffs. The actions were filed in 1958 and involved properties near McConnell Air Force Base, Wichita, Kansas. The base was activated in 1951. Prior to that time, the field was used for the Wichita Municipal Airport and thousands of take-offs and landings by civilian and some military aircraft had occurred prior to the institution of suits.

In December 1950, the first B-47 jet bomber was delivered to the Air Force at the then Municipal Airport. By June 1951, when the Air Force base was opened, 11 B-47s had been delivered and numerous test flights had been conducted. From that time on to the latter part of 1953, the number of B-47 flights increased. Seventy per cent of all take-offs were made over the plaintiffs' properties and aircraft flew frequently over those properties as low as 100 feet above the ground.

The Government contended that the plaintiffs' claims were barred by limitations because the taking of avigation easements had occurred in 1950-51 when the jet flights first commenced. This was in accord with the decision in Highland Park v. United States, 142 C.Cls. 269, 161 F.Supp. 597.

The Court recognized the diminution in the value of the properties and the effect on their highest and best use caused by the numerous flights of aircraft more than 6 years before suit was filed but rejected the defense of limitations and held that the interference with the use and enjoyment of the properties did not become serious enough to constitute a taking until 1953.

In reaching this result the Court relied upon the statements it made in its previous decisions on the statute of limitations in Klein v. United States, decided January 18, 1961, and Davis v. United States, 295 F.2d 931. The Court stated that "the taking and the depreciation occurred over a year's time." However, in determining just compensation the Court gave effect to the Government's testimony and the argument based upon it that the properties, being located so close to a very busy airport for so many years prior to 1953, had already suffered loss so that "any bud of residential value" had already been blighted. The Court, therefore, adopted the Government's appraisal and allowed the recovery of only $46,700, as compared with the plaintiffs' claims for $850,000.

Staff: Herbert Pittle (Lands Division)

Public Lands; Mineral Leasing Act; Effect of 1960 Amendment on Applicants' Previously Filed Offers for Noncompetitive Oil and Gas Leases; No Vested Right to Lease Upon Filing of Offer. Duncan Miller, et al., v. Stewart L. Udall, Secretary of the Interior. (Dist.Col.) Prior to September 2, 1960, plaintiffs filed offers for noncompetitive oil and gas leases under the Mineral Leasing Act of 1920, as amended, 30 U.S.C. 181 et seq. The Act provides that the first qualified applicant is entitled to a noncompetitive lease. Plaintiffs' offers were

the first offers by applicants qualified to hold leases but they were not considered until after the passage of the Mineral Leasing Act Revision of 1960. That Act provided for changes in the term of leases from 5 years to 10 years and provided for an increase in rentals from 25¢ per acre to 50¢ per acre per year. When the offers were considered, the Department of the Interior requested plaintiffs to execute an agreement to embody in the lease the provisions required by the Act of 1960. Plaintiffs refused to agree to a change in the terms and insisted that they had a right to leases on the terms and conditions in effect at the time they filed their offers. Upon their refusal to agree to the changes, their offers were rejected.

This suit was filed to require the Secretary of the Interior to reinstate the offers and to issue leases in accordance with the terms in effect prior to the 1960 Act when the offers were filed. Both sides filed motions for summary judgment and defendant's motion was granted. The Court held that the mere filing of the offers to lease did not confer upon plaintiffs a vested right to a lease and that after the passage of the 1960 Act, the Secretary was not required to issue a lease in accordance with the prior law.

Staff: Herbert Pittle (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Escrow Agent Who Pays Creditor of Taxpayer With Taxpayer's Funds After Actual Notice of Federal Tax Liens and After Request by Internal Revenue Service for Those Funds Is Liable in Damages for Tortious Conversion of Lien, Even Though no Levy Was Made on Escrow Agent. United States v. John A. Allen, et al. (E.D. Wash.). Taxpayer John A. Allen entered into a contract with a general contractor whereby taxpayer was to perform certain services for which he was to be paid in installments as the work was completed. The general contractor made the progress payments to an escrow agent, the Land Title Company, who in turn disbursed them to taxpayer. While the escrow agent was holding some of the progress payments, taxpayer defaulted. The Internal Revenue Service did not levy on this fund but they did advise the escrow agent of the existence of federal tax liens which encumbered the fund. The escrow agent, however, with actual knowledge of the federal liens, ignored the request of the Internal Revenue Service, and paid the funds belonging to taxpayer in the amount of $2,415.87 to another creditor of taxpayer.

The Government sued the escrow agent for damages for a tortious conversion of its lien. The Court held that the escrow agent's payment of these funds in disregard of the federal tax liens was wrongful and that the Government was entitled to recover $2,415.87 from the escrow agent because of the conversion of the funds and the impairment of its lien by the escrow agent.

Staff: United States Attorney Frank R. Freeman (E.D. Wash.) and John F. Beggan (Tax Division).

Lien for Taxes; Bank Accounts; Failure to Pay Over by Bank After Levy and Demand; Bank Does Not Have Right of Setoff Against Taxpayer's Accounts. United States v. Bank of America National Trust and Savings Association, CCH 62-2 U.S.T.C. ¶9563 (S.D. Calif., 1962). The instant suit was instituted against the defendant bank for failure to honor a levy directed against the taxpayer's bank account. Section 6332, Internal Revenue Code of 1954. The levy was in enforcement of federal tax liens. Section 6321, Internal Revenue Code of 1954.

After the Government's levy on the bank account, the bank asserted its right of setoff against such bank account for debts owing by taxpayer to the bank. The bank contended that it was a "purchaser" of the various negotiable checks taxpayer deposited with the bank and that therefore its title to the deposits was protected by virtue of Section 6323, Internal Revenue Code of 1954. Section 6323 protects a purchaser of taxpayer's

property in certain situations if such purchaser did not have actual notice of a federal tax lien or if such purchaser did not have constructive notice of such lien. The bank also contended that upon deposit of negotiable checks by taxpayer, it had a prior lien on such checks. Section 440, California Code of Civil Procedure.

However, the Court held for the United States. The Court held that the bank's right of setoff was not good as against the federal tax liens, citing Bank of Nevada v. United States, 251 F.2d 820 (C.A. 9, 1957). With respect to the bank's other contentions, the Court pointed out that the fault in the reasoning in the bank was that the federal tax liens attached to the taxpayer's chose in action against the bank (under the Bank accounts) and not to the negotiable checks deposited by the bank.

Staff: United States Attorney Francis C. Whelan (S.D. Calif.)

Administrative Summons; Attorney for Taxpayer Not Permitted to Appear as Counsel for Witness Summoned for Testimony Pursuant to Section 7602 of Internal Revenue Code of 1954; Attorney's Role in Counseling Witness Summoned for Testimony Pursuant to Section 7602 Restricted to Advising Witness of His Constitutional Rights. In re Louis A. Johnson (E.D. Illinois, May 8, 1962), 9 A.F.T.R.2d ___, P-H ¶198,134. Respondent Louis A. Johnson was summoned pursuant to Section 7602 of the Internal Revenue Code to appear before the Internal Revenue Service and give testimony relating to the excise tax liability of one Fred Russell. Johnson appeared in response to the summons with his attorney, Joseph Goldenhersh. Goldenhersh acknowledged that he represented the said Fred Russell in the matter of his excise tax liability and furthermore that he was the attorney for Johnson. Johnson refused to testify unless his attorney, Joseph Goldenhersh, was present at all times.

Pursuant to Section 7604(b) of the Internal Revenue Code of 1954 the Government sought judicial enforcement of the summons issued to Johnson excluding Goldenhersh, taxpayer's lawyer. The Court entered an order on May 8, 1962, directing that Johnson appear before the Internal Revenue Service and "give such testimony, without the presence of counsel retained by or connected with" the taxpayer. However, the Court pointed out that Johnson may be accompanied by an attorney of his own choosing provided that such attorney state under oath that he does not represent directly or indirectly, or is not retained by Fred Russell, "and that said attorney shall further state under oath, that he has not within the past year, represented, been retained by, or received fees for legal services directly or indirectly from Fred Russell."

Moreover, the order provided that the attorney representing Johnson during the taking of his testimony shall only take part in the proceedings by restricting his counseling to advising the witness of his Constitutional rights.

Caution should be exercised in the use of this case in view of the following language in Backer v. Commissioner, 275 F. 2d 141:

None of the harm which the Commissioner here apprehends will result from letting taxpayer's counsel represent a witness as his own selected counsel will result except upon the failure of counsel to conduct himself in accord with his sworn duty to the court. If he does so fail then is the time for remedial action to be taken. Such action is not permissible when, as here, the trial court and government counsel reject any suggestion that either the witness or counsel will violate either the law or the ethics of their profession in the proposed investigation.

Staff: United States Attorney Carl W. Feickert and Assistant United States Attorney Robert F. Quinn (E.D. Ill.); and Frank J. Violanti (Tax Division)

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