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Vol. 10 No. 19

UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 10 September 21, 1962 No. 19

DISTRICTS IN CURRENT STATUS

As of July 31, 1962, the districts meeting the standards of currency were:

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

TRAVEL TO ATTEND COURT AT DIVISIONAL OFFICES

A number of offices are submitting Forms 25B for authority to pay mileage and per diem to additional clerical employees to attend terms of court at divisional offices.

The minimum number of cars should be used to transport personnel to court away from headquarters. Generally, one or more Assistant United States Attorneys or Deputy Marshals have need for their cars when they attend court, and have space for one or more passengers. Consolidation of such travel will accomplish substantial savings in travel funds.

MODIFICATION OF CONTRACT FORM 33

Paragraphs 3 and 4 of the Terms and Conditions of the Invitation for Bids appearing on the back of Standard Form 33 (October 1957 edition) have been revised by the General Services Administration to read as follows:

"LATE BIDS AND MODIFICATIONS OR WITHDRAWALS. Bids and modifications or withdrawals thereof received at the office designated in the invitation for bids after the exact time set for opening of bids will not be considered unless received before award and (a) they are submitted by mail (or by telegraph, if authorized) and (b) it is determined by the Government that late receipt was due solely to either (1) delay in the mails (or by the telegraph company, if telegraphic bids are authorized) for which the bidder was not responsible or (2) mishandling by the Government after receipt at the Government installation. However, a modification which is received from an otherwise successful bidder and which makes the terms of the bid more favorable to the Government will be considered at any time it is received and may thereafter be accepted."

Pending revision of Standard Form 33, the above provision should be substituted on Standard Form 36, Continuation Sheet, for the cited paragraphs.

Also, a statement should appear on the Standard Form 36 that the Nondiscrimination in Employment clause is inapplicable to contracts under $10,000.

These changes will become effective October 1, 1962, but may be observed earlier.

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 17, Vol. 10 dated August 24, 1962:

ORDER	DATED	DISTRIBUTION	SUBJECT
280-62	8-27-62	U.S. Attorneys & Marshals	PLACING ASSISTANT ATTORNEY GENERAL NORBERT A SCHLEI IN CHARGE OF THE OFFICE OF LEGAL COUNSEL

* * *

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Court Rules For Government in Electrical Cases. United States v. General Electric Company, et al. and U.S. & TVA v. General Electric Company, et al. In an opinion filed August 21, 1962, Judge Kraft decided three issues of first impression which were involved in the Government's electrical damage actions. He ruled in favor of the Government and TVA's position on all three issues, concluding (1) that the Government had a right to utilize grand jury materials in the preparation and trial of its civil damage actions; (2) that TVA was a "person" within the meaning of Section 4 of the Clayton Act, and, therefore, entitled to treble damages, and (3) that the statute of limitations contained in Section 4(b) of the Clayton Act could be tolled under the doctrine of fraudulent concealment.

1. The Government's Right to Utilize Grand Jury Materials.

Defendants had made a motion to impound grand jury materials and documents and to enjoin Government attorneys who had examined these grand jury materials from further work on the civil damage actions, and for other allied relief. Defendants claimed that the traditional policy of grand jury secrecy prohibited Government attorneys in the civil damage actions from resorting to grand jury materials gathered during earlier criminal investigation. Inasmuch as no application had been made under the second sentence of Rule 6(e) of the Federal Rules of Criminal Procedure, the issue turned on the construction of the first sentence of that Rule which provided that "disclosure of matters occurring before the grand jury . . . may be made to the attorneys for the Government for use in the performance of their duties." Defendants contended that the first sentence referred only to their duties "in an enforcement proceeding," i.e. a criminal prosecution or a civil equity action to enjoin criminal violations. Judge Kraft rejected that contention as an "unduly narrow construction of the Rule," pointing out that the duties of the Government attorneys are by no means limited to enforcement proceedings inasmuch as they are authorized by statute to conduct any kind of legal proceedings, whether civil or criminal, in which the United States is a party in interest. Without deciding whether or not the civil damage suit is a form of enforcement action, the court stated that the "United States is no less interested in recouping losses suffered from violations of its laws than in the enforcement of these same laws."

Moreover, the court accepted the Government's argument, based on cases which permitted the use of grand jury material in civil damage suits after application under the second sentence of Rule 6(e), that the first sentence of Rule 6(e) should be construed to apply to civil damage actions. Judge Kraft stated "that it would be illogical to construe the second sentence of Rule 6(e) to permit disclosure of grand jury matters in civil damage actions, but to interpret the first sentence

of the same Rule to mean that disclosure of grand jury matters to Government attorneys is limited to use only in criminal or quasi-criminal proceedings."

Furthermore, the court relied on the plain language of Section 4(a) of the Clayton Act, authorizing Government suits for damages whenever the Government has been injured in its business or property "by reason of anything forbidden in the antitrust laws." Noting that disclosure was permissible in prosecuting both criminal violations and civil injunctive suits, as defendants conceded, the court stated that "it would appear contrary to reason to hold that such disclosure is forbidden for use in the Government's actions for damages, when, as in these cases, the Government's damage suits allege as their bases the very violations of penal provisions of the Sherman Act for which the Government prosecuted the defendants by indictment and, as well, brought actions for injunction."

Further on this issue, the court examined "the time honored policy of grand jury secrecy and the philosophy behind it" as expressed in United States v. Amazon Industrial Chemical Corporation, 55 F. 2d 254, 261 (D.Md. 1931), and concluded that none of the traditional reasons for grand jury secrecy "dictates that the grand jury materials should be kept secret from the Government's attorneys in these cases." Thus, the court denied defendant's motion, although indicating that the attorneys for Tennessee Valley Authority were not attorneys for the Government within the meaning of Rule 6(e) and could not avail themselves of grand jury materials.

Fred D. Turnage argued this motion on behalf of the Government.

2. Tennessee Valley Authority's Right to Recover Treble Damages.

The court denied defendant's motion for partial summary judgment on Count 1 of each complaint in which TVA joined as a plaintiff with the United States. In each of Counts 1 in those cases, TVA claimed treble damages under the authority of Section 4 of the Clayton Act.

The court concluded that TVA was a person within the meaning of Section 4 of the Clayton Act, as was patently clear from Section 1 of the Clayton Act which defined "person" to include, among other things, "corporations and associations existing under or authorized by the laws of . . . the United States . . ." Since TVA is a corporation created under the laws of the United States, the court read the statutory language of Section 4 of the Clayton Act "in its ordinary and natural sense", as the Supreme Court had suggested in the leading case of United States v. Cooper Corp., 312 U.S. 600 (1940), a case holding that the United States was not a "person" entitled to sue for treble damages. It concluded that the words of the statute were too plain to leave room for construction.

Defendants had argued that TVA should be distinguished from the ordinary corporation because it is a governmental agency in corporate

form and wholly owned by the United States; since the purpose of the treble damage provision was to provide an incentive to private persons to enforce the antitrust laws, a governmental corporation like TVA should be excluded, particularly since it is unnecessary to promote enforcement of the antitrust laws through treble damage suits brought by corporations wholly owned by the very Government charged with the primary responsibility for enforcement. The court reasoned that the "form in which Congress created TVA was not the result of fortuitous or capricious circumstances, but that at any rate, the clear language of the statute could not be ignored."

The court also rejected the argument that the treble damage remedy was unavailable to TVA because TVA is an integral part of the Government and damage to TVA's business and property is damage to the business and property of the United States. It stated that it could "not ignore the separate reality and existence of TVA merely because it is a corporate governmental agency." In fact, "an equally perceptible distinction exists between the business and property of the United States, on the one hand, and the business and property of its corporate agency, TVA, on the other." By statute, TVA business and all property except real property are its own and not that of the United States. Thus, TVA, for the purpose of this case, at least, is an entity distinct from the United States.

Finally, the court rejected defendant's contention that the passage of Section 4 of the Clayton Act, giving the United States the right to sue for actual damages, repealed by implication any right that TVA had to sue for treble damages under Section 4. The court noted that the enactment relates only to the United States, and is clear and unambiguous. Thus, neither the language of the amendment or its legislative history support defendants' contention.

Charles J. McCarthy, General Counsel of TVA, argued this motion on behalf of TVA.

3. The Application of the Fraudulent Concealment Doctrine to the Clayton Act Statute of Limitations.

Defendants' third motion was for partial summary judgment with respect to all Clayton Act claims accruing more than four years prior to the filing of the complaint. The sole issue involved was whether or not the federal doctrine of fraudulent concealment tolls the running of the four-year statute of limitations contained in Section 4B of the Clayton Act.

The court traced the development of the federal doctrine of fraudulent concealment, commencing with the leading case of Bailey v. Glover, 88 (21 Wall.) U.S. 342 (1874). That case, which has never been overruled, but has been approved and followed consistently, established the doctrine of fraudulent concealment to be "that when there has been no negligence or laches on the part of a plaintiff in coming

to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." Supported by the case of Holmberg v. Armbrecht, 327 U.S. 392 (1946), the court concluded that this doctrine was to be read into every federal statute of limitations.

The court thus stated that the fraudulent concealment doctrine would operate to extend the four-year limitations period of Section 4B, unless there is some indication of a contrary congressional intent. Judge Kraft found no indication of that intent in the use of the language "shall be forever barred" in prescribing the period of limitation, or in any of the legislative history of Section 4B which the court studied at great length. To the contrary, the court concluded that the legislative history supported the application of the doctrine to toll the statute, and found that Section 4B was intended as a procedural rather than a substantive limitation. The court concluded that "it was the intent of Congress that the limitations provision in Section 4B be construed in the same manner as state statutes of limitations, i.e., as purely a statute of repose, affecting no substantive rights, and subject to the well-settled doctrine of fraudulent concealment." Furthermore, Judge Kraft rejected both the "plain meaning rule" and the authority of United States v. Borin, 209 F. 2d 145 (1954), which had refused to extend the limitations period of the False Claims Act on account of fraud or concealment, in reaching his decision.

Inasmuch as the court found that the Government's complaints contained allegations sufficient to bring plaintiffs within the federal rule of fraudulent concealment, defendants' motions were denied.

H. Robert Halper argued this motion on behalf of the Government.

Staff: Fred D. Turnage, H. Robert Halper, Donald G. Balthis, and Morton M. Fine. (Antitrust Division). Charles J. McCarthy (General Counsel for TVA).

CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

COURT OF APPEALS

COSTS

United States as Successor to R.F.C. Not Liable for Costs in Court of Appeals. Republic of France and Compagnie Generale Transatlantique v. United States, et al. (C.A. 5, August 24, 1962). On motion to tax costs, the question was whether R.F.C. (to which the United States is successor) is liable for costs in a court of appeals. The Fifth Circuit concluded that it was not liable for costs. The Court reasoned that (1) since the holding in R.F.C. v. Menihan, 312 U.S. 81 (where R.F.C. was held liable for costs) the Congress amended the R.F.C. Act (62 Stat. 261) exempting it from costs in, inter alia, the courts of appeals (by referring to then 28 U.S.C. 543); (2) that the repeal of 28 U.S.C. 543 was not evidence of a Congressional intention to subject R.F.C. to costs, since a comprehensive immunity statute (28 U.S.C. 2412(a) was added, providing:

> (a) the United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress.

Staff: United States Attorney Woodrow B. Seals (S.D., Texas); Carl Davis (Civil Division)

NEGOTIABLE INSTRUMENTS

Subsequent Promissory Note on Same Loan Discharges Earlier Note Under Section 119 of Negotiable Instruments Law. Hendry, Executrix of Estate of J. W. Shearer v. United States (C.A. 9, August 27, 1962). This action was brought by the United States against Shearer on a promissory note of which he was an accomodation maker. The note was executed on a loan made by the Farmers Home Administration. A second note on that loan was, at the insistence of the Administration, subsequently executed by the borrowers but Shearer was not a party thereto. The judgment of the district court in favor of the United States on the first not was reversed by the Court of Appeals. Holding that federal law controlled on the question of whether the second note discharged the first, the Court applied Section 119 of the Uniform Negotiable Instruments Law. The Court found that (1) payments received on the loan were in accordance with the schedule contained in the second note, (2) the first note was stamped "Replaced by new note in like amount" and (3) the Government considered, vis a vis the borrowers, that the second note was binding.

Staff: United States Attorney Sylvan A. Jeppesen and Assistant United States Attorney James Christensen (D. Idaho)

SOCIAL SECURITY ACT

Disability Freeze - Evidence Supports Administrative Determination That Claimant's Impairments Not Sufficiently Severe to Prevent Her From Performing Gainful Activity. Allison v. Ribicoff (C.A. 4, August 30, 1962). Plaintiff appealed from the entry of summary judgment by the district court against her, in her action seeking review of a denial by the Secretary of Health, Education and Welfare of her application for a period of disability and disability insurance benefits. The Court of Appeals affirmed. It held that there was substantial evidence to support the administrative finding that claimant's impairments, consisting of arthritis, obesity, and nervousness, were not of sufficient severity to preclude her from engaging in substantial gainful activity.

Staff: John C. Eldridge (Civil Division)

Disability Freeze - Mere Inability to Perform Particular Job Claimant Had Prior to Onset of Alleged Disability Does Not, in Itself, Entitle Claimant to Period of Disability or Disability Benefits. Gotshaw v. Ribicoff (C.A. 4, August 30, 1962). This appeal was taken by plaintiff from a summary judgment entered against her by the district court in her action seeking review of a denial by the Secretary of Health, Education and Welfare of her application for a period of disability and disability insurance benefits, after she had been forced to give up her job as a spinner in a textile mill. The Court of Appeals affirmed. It held that the Secretary's determination that appellant, although no longer able to operate a spinning machine because of arthritis, could engage in work not requiring prolonged walking, standing, or heavy lifting, was clearly permissible, and warranted the denial of her application. The Court pointed out that mere inability to engage in the particular job that one had been doing previously was not inability to engage in any substantial gainful activity. The Court of Appeals' opinion emphasized the limited role of the courts in reviewing administrative determinations in this area, underscored the rule that the presence of a disease or impairment does not entitle a claimant to disability benefits unless it precludes engagement in any substantial gainful work, and held that claimant's failure to seek other work consistent with her physical capabilities was a significant factor to be taken into consideration.

Staff: John C. Eldridge (Civil Division)

Disability Freeze - Evidence Sufficient to Support Finding That Claimant's Impairment Remediable. Health v. Ribicoff (C.A. 4, August 30, 1962). Claimant, afflicted with pernicious anemia, applied for a period of disability and disability insurance benefits, but the Secretary, finding that his illness was remediable, denied the application. The district court rendered summary judgment upholding the Secretary's denial, and claimant appealed. The Court of Appeals affirmed, holding that there was substantial evidence supporting the Secretary's finding that appellant's pernicious anemia was remediable.

Staff: John C. Eldridge (Civil Division)

Disability Freeze - Evidence Supported Secretary's Determination That, Despite Existence of Certain Orthopedic Impairments, Claimant Had Failed to Establish Inability to Engage in Substantial Gainful Employment. Pearman v. Ribicoff (C.A. 4, August 30, 1962). Plaintiff appealed from the entry of summary judgment by the district court against her, in her action seeking review of a denial by the Secretary of Health, Education and Welfare of her application for a period of disability and disability insurance benefits. The Court of Appeals affirmed. It held that, although claimant had certain orthopedic impairments as a result of an automobile accident, consisting of complete ankylosis of the right leg and arm and partial ankylosis of the right hand, the Secretary's determination that claimant had failed to establish inability to work because of these impairments was supported by the record. The Court of Appeals pointed to the evidence showing that claimant was an intelligent woman with a high school education, that her work experience had been varied, that she could drive an automobile and write with a large pen, and that she had not even attempted to secure employment since her accident.

Staff: John C. Eldridge (Civil Division)

Disability Freeze - Where Medical Evidence Conflicting as to Existence and Severity of Claimant's Alleged Impairments, Resolution of Conflict for Secretary, and Affirmance of Secretary's Determination Required. Snyder v. Ribicoff (C.A. 4, August 30, 1962). Claimant, alleging a multitude of impairments which she claimed disabled her from working, applied for a period of disability and disability insurance benefits. The Secretary denied her application, and the district court entered summary judgment against her. The Court of Appeals affirmed. The Court pointed out that the medical evidence in the administrative record contained substantial conflicts as to the existence and severity of her alleged ailments, that the resolution of such evidentiary conflicts was for the administrative body, and, under such circumstances, affirmance of the administrative determination was required.

Staff: John C. Eldridge (Civil Division)

Disability Freeze - Where Evidence Vague as to Remediability of Claimant's Impairment, and Where More Enlightening Evidence on Question Available, Case Should be Remanded to Make Such Evidence Part of Record. Stephens v. Ribicoff (C.A. 4, August 30, 1962). The district court upheld the Secretary's denial of claimant's application for a period of disability and disability insurance benefits under the Social Security Act, and claimant appealed. According to the Secretary's findings, which the Court of Appeals held were supported by the record, claimant was afflicted with a psychiatric disorder which resulted in chest pain and other symptoms simulating heart attacks. The Secretary had further found that this illness was remediable, and thus claimant was not disabled within the meaning of the Social Security Act. The Court of Appeals, however, was of the view that the evidence was most vague on this issue. The Court remanded the case to the district court with directions to remand to the Secretary for further development of the issue of remediability, stating:

"It seems clear that more enlightening evidence is available on the issue, and in all fairness to both parties, this should be made part of the record before a final decision is rendered."

Staff: John C.Eldridge (Civil Division)

UNIFORM GRAIN STORAGE AGREEMENT

Warehouseman Cannot Recover from Commodity Credit Corporation Expenses Incurred in Litigation Against its Insurer to Recover Proceeds of Insurance Policy. Bartlett and Company, Grain v. Commodity Credit Corporation (C.A. 8, August 27, 1962). This action was brought by a warehouseman, with which C.C.C. had stored grain which was damaged, to recover from C.C.C. a portion of the expenses incurred by the warehouseman in securing from its insurer the proceeds of policies of insurance on the grain. The Uniform Grain Storage Agreement executed by the parties provided that the warehouseman was required to keep the grain insured against certain risks, and that in any event, the warehouseman, at its own expense, was to take the steps necessary to recover moneys due as indemnity for loss whether or not an insured loss. The warehouseman insured against the enumerated risks, and, in addition, for its own protection, took a policy insuring against loss due to interruption of business. Neither policy insured against flood, as such. The grain was damaged when flood waters entered the elevator, causing expansion which violently burst the bins. The parties thereafter entered into an agreement concerning the allocation of loss and expressly negated any waiver of rights under the warehouse agreement.

After costly litigation on its policy of business loss insurance, in which the warehouseman sought recovery under the "explosion" coverage, the proceeds of the policy were paid to him, creating a substantial fund. From the portion allocable to C.C.C., the warehouseman sought to deduct an aliquot portion of its litigation expense. The district court ruled in favor of the Government and, with an inconsequential modification, the Court of Appeals affirmed. The Court held that such a deduction could not be made since, under the warehouse agreement, the warehouseman was required to bear any such expense. The Court found that agreement unmodified by the post-flood agreement. Additionally, the Court agreed with the district court that C.C.C. was entitled to interest on the amount payable to it, from the date the proceeds were paid to the warehouseman in satisfaction of its judgment against its insurer. The Court held C.C.C. entitled to interest at the rate of 6% during a period when the funds were commingled, and at a lower rate during a period when the funds were segregated and invested in Treasury bills.

Staff: Alan S. Rosenthal, Herbert E. Morris (Civil Division)

WUNDERLICH ACT

Government Contracts - Where Contract Dispute Is Administratively Resolved, Subsequent Judicial Proceeding Involving Same Dispute is Limited to Evidence Contained in Administrative Record. Allied Paint & Color Works, Inc. v. United States (C.A. 2, August 29, 1962). Suit was brought by a Government contractor to recover $6,898.06 for a quantity of paint which the contractor had agreed to put up into paint kits for the Government but which, while the paint was in the contractor's warehouse prior to being incorporated

into the kits, was destroyed by fire. The dispute involved the question of which party bore the risk of loss for fire under two different contracts relating to the furnishing of this paint by the Government to the contractor. The Armed Services Board of Contract Appeals had held that the risk of loss was on the contractor, based upon both its interpretation of the contracts and extrinsic evidence revealing the parties' intent. In the district court, the contractor argued (1) that it should be able to introduce in court evidence bearing upon the parties' intent in addition to the evidence in the administrative record before the Armed Services Board of Contract Appeals, and (2) that, at any rate, the Board's interpretation of the contracts was erroneous. The district court rejected both of these arguments, holding that no additional evidence could be introduced in court and agreeing with the Board that the risk of loss by fire was upon the contractor, not the Government.

In affirming, the Court of Appeals agreed with the district court that, in this case, the evidence was properly limited to that disclosed by the administrative record. The Court of Appeals also agreed with the interpretation of the contracts by the Board and district court that the risk of loss was on the contractor. While the Second Circuit's opinion in this case is not entirely clear, the Court does appear to line up with the Ninth Circuit's holding that under the Wunderlich Act, 41 U.S.C. 321-322, where there has been an administrative resolution of a contract dispute, the subsequent judicial proceeding is confined to the evidence in the administrative record. See, e.g., United States v. McKinnon, 289 F. 2d 908 (C.A. 9). The Court of Claims, as the Court pointed out, has held to the contrary, Volentine and Littleton v. United States, 145 F. Supp. 952 (Ct. Cls.).

Staff: John G. Laughlin, John C. Eldridge (Civil Division)

CUSTOMS COURT

JURISDICTION

Customs Court Not Empowered to Extend Period in Which Reappraisement Appeal Must Be Filed. West Palm Beach Terminal Co. v. United States, R61/16264 (R.D. 10235). This appeal was brought seeking reappraisement. Section 501(a) of the Tariff Act of 1930, as amended, permits the filing of an appeal within 30 days after written notice of the appraised value is received by the importer from the Government. The appeal had been filed on the 31st day. The Government moved to dismiss the appeal for reappraisement on the ground that it was untimely, pointing out that the Customs Court is not a court of equity and that the statutory requirements for such appeal are mandatory. The plaintiff argued that the Government was in no way prejudiced by the one day delay and urged the Court to consider the case on its merits. The Court granted the Government's motion to dismiss stating that "the law makes no distinction between late filing whether the period of tardiness be 1 day or 100 days."

Staff: Mollie Strum (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

THEFT AND FORGERY OF TREASURY CHECKS

Prosecution and Punishment. United States v. Benjamin F. Keeton (W.D. N.Y., June 4, 1962). In the April 20, 1962 issue of the Bulletin (Vol. 10, No. 8, p. 232) there was an item calling attention to the program for vigorous prosecution of mail theft cases, with emphasis on cases involving thefts of U.S. Treasury checks. It was stated that substantially severe sentences were being imposed following the presentation by United States Attorneys of statistics and other information concerning mail thefts locally which caused the courts to appreciate the magnitude and seriousness of the problem.

As an example of the new attitude of the courts towards this problem, on June 4, 1962 District Judge Harold P. Burke of the Western District of New York imposed concurrent terms of $2\frac{1}{2}$ years for each of 46 counts of unlawful possession and aiding and abetting in the forgery and negotiation of checks stolen from the mails for which Benjamin Keeton was convicted. Keeton, who ran a dry cleaning store, was the ring leader of a group of mail thieves and forgers. He got others to steal Government checks from apartment house letter boxes, forge them and cash them at his place of business, the proceeds being evenly split between him and the thief. Five codefendants who pleaded guilty received suspended sentences or prison terms up to one year and a day.

Staff: United States Attorney John T. Curtin; Assistant United States Attorney Thaddeus S. Zolkiewicz (W.D. N.Y.).

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner, Raymond F. Farrell

CIVIL CONTEMPT

Civil Contempt Action Arising Out of Allegedly Wrongful Deportation Does Not Survive Death of Deported Alien. William Heikkila v. Bruce G. Barber, etc., (C.C.A. 9, August 29, 1962). Administrative proceedings were brought against appellant in 1947 charging him with being deportable for having been a member of the Communist Party. After a long delay occasioned by litigation instituted by appellant he was deported to Finland in 1958. Appellant then contended that his deportation was illegal and in contempt of a restraining order issued by the lower court while he was in Canada en route to Finland. He asked the lower court for a judgment against the appellee in the amount of the damages he allegedly suffered by reason of his deportation.

The lower court ruled that appellant's deportation was lawful and not in violation of the restraining order. While the appeal was pending, appellant died and his administratrix then filed a motion for an order substituting her as appellant. After assuming appellant had the right to appeal from the lower court's order denying damages for civil contempt, the Court of Appeals denied the motion on the ground that the civil contempt action sounded in tort and did not survive the death of the appellant.

Staff: Assistant United States Attorney Charles E. Collett (N.D. Calif.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Violation of Coast Guard Regulations. U.S. v. George C. Perry (D. Mass.) On June 17, 1962, George C. Perry pleaded guilty to an information filed in Boston, Massachusetts charging him with violations of Coast Guard Regulations 33 CFR Sections 126.13(b) and 126.29 promulgated under Section 191(b) of Title 50, United States Code. Perry, President of the Crossroads Marine Disposal Corporation, failed to obtain proper authorization from the captain of the port to handle zirconium, a dangerous cargo, at a non-designated port facility in Boston in August 1960. The handling of the zirconium and zirconium residue on the pier, without proper fire apparatus and without other precautionary measures, resulted in an explosion and several small fires.

Staff: Assistant United States Attorney William M. Gibson (D. Mass.); Alta M. Beatty (Internal Security Division)

False Statement (18 U.S.C. 1001). United States v. James W. McCoo, Jr. (D.C.). On August 6, 1962, a Federal grand jury at Washington, D. C. returned a two-count indictment charging that McCoo filed two Applications for Federal Employment (Standard Forms 57) with the Veterans Administration, in which he falsely asserted that he had received a Bachelor of Science Degree and had completed a number of semester credit hours at various institutions. The Civil Service Regulations require that an applicant for the position of biochemist must have successfully completed a four year course leading to a Bachelor's Degree. On August 10, 1962, McCoo failed to appear for arraignment but was apprehended by FBI special agents on August 11, 1962 in Chicago, Illinois and placed in the custody of the Chicago Police Department. Subsequently, on August 13, 1962, a hearing was held before the United States Commissioner at Chicago and the hearing was continued until August 15, 1962 pending receipt of the necessary documents from Washington, D. C.

Staff: United States Attorney David C. Acheson and Assistant United States Attorney Timothy Murphy (Dist. Col.); Vincent P. MacQueeney (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Mineral Leasing Act--Relinquishing Lessees Can Have New Leases on Same Land if They Are First Qualified Applicants. Miller v. Udall (C.A. D.C. July 26, 1962). Miller sued to cancel certain oil and gas leases to public lands issued under Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, 443, as amended, 30 U.S.C. 226, and to have new leases for these lands issued to him. The Secretary had denied each of Miller's lease applications for the lands in question on the ground that Miller was not the first qualified applicant. The successful applicant in each instance was the same person who had relinquished the immediately preceding lease before its term had expired. Miller attacked the process, by which the relinquishing lessees were able to obtain new leases, as having denied to other applicants a fair opportunity to obtain leases.

Under land office regulations in effect at the time of Miller's applications, when a lease was relinquished the land became subject to new lease applications when the relinquishment was noted on the tract book of the local land office. This notation would be made while the land office was closed to the public, and the relinquishing lessees would file their new applications as soon as the office reopened and before anyone else had a chance to examine the tract book. The Court of Appeals commented that other applicants were thus effectively precluded from receiving notice that the leases were again open to the public. The rule has since been changed to afford the general public greater notice.

The Court of Appeals stated that the record showed that both the Secretary of the Interior and the relinquishing lessees fully complied with the letter of the statute and the regulations as they existed at the time, and that the leases were issued to the qualified persons first making application for them, in accordance with the statutory command. It therefore affirmed the judgment of the district court dismissing the suit. The Court did not reach the question of whether the lessees were indispensable parties to the suit.

Staff: Hugh Nugent (Lands Division)

Eminent Domain; Federal Versus State Law; Trade Fixtures; Removal Costs. United States v. Certain Property in Manhattan (C.A. 2). The district court awarded approximately $2,000,000 (a figure very close to the Government's estimate of value) as compensation for land and buildings near Foley Square condemned for a federal building site. In addition, it awarded $186,000 for "trade fixtures" in the form of printing equipment in one of the owner-occupied buildings, and denied the claims of all the tenants for

"trade fixtures" in the amount of $350,000. The latter claims included items such as restaurant equipment, lights, floor tiles, etc. The tenants' claims were denied on the grounds that they were barred by disclaimer clauses in their leases with the Government executed subsequent to the taking.

On appeal by some of the owners, the awards for land and buildings were affirmed. The award for printing equipment was also affirmed in amount, the Court of Appeals rejecting the argument that it should have been valued on a reproduction cost less depreciation basis. The Government cross-appealed, on the grounds that the printing equipment was personalty, removable without harm to it or the realty, and, under federal law, not taken in the proceeding, that the award represented removal costs for the equipment and, in any event, the equipment could be valued only insofar as it enhanced the value of the real estate. These arguments were also urged as additional support for the dismissal of the tenants' "trade fixture" claims. The Court of Appeals held all the "trade fixtures" compensable, including the printing equipment because, under New York condemnation law, they would be regarded as real estate since the cost of removal and reinstallation made necessary by the condemnation of the lands and buildings substantially impaired the resale value of the "trade fixtures." The clauses in the leases were disregarded, primarily on the ground that they were unfair. Petitions for rehearing filed by both sides were denied. The Government believes the decision to be wrong in that it applies New York condemnation law to ascertain what is taken in federal condemnation. Moreover, several other subsidiary errors appear in the opinion. The question of whether to apply for a writ of certiorari is now being considered.

Staff: Edmund B. Clark (Lands Division)

Declaration of Taking Act; Purported Bad Faith Exception to Rule of Finality of Administrative Estimate of Just Compensation. United States v. 1,795.01 Acres of Land, more or less, Situate in Marion County, State of Iowa, and B. Frank Tonda, et al. (S.D. Iowa) The former owners of six tracts included in the condemnation proceeding instituted to acquire land for the Red Rock Reservoir Project filed a motion to vacate and set aside the declaration of taking and orders of possession on the following grounds: (1) that the amounts deposited as estimated compensation were so grossly inadequate as to constitute bad faith and arbitrary action; (2) that the subject tracts will not be required for Government use for more than a year and thereby the premature taking of possession was a deprivation of due process of law in violation of the 14th Amendment; and (3) that defendants were discriminated against in that sufficient notice was not served upon them for possession.

The District Court issued a memorandum opinion and order denying the motion to vacate the declaration of taking and orders of

possession. With respect to defendants' first ground, the Court noted that (1) the amount deposited with the declaration of taking as estimated compensation is not intended as a final determination of just compensation; and (2) it has been held that there is no jurisdiction provided for the review of the amount of estimated compensation. Concerning the second ground, the Court simply states "* * * that the administrative determination of which tracts in the project will first be taken is not subject to judicial review." With respect to defendants' third ground alleging that they were discriminated against, in that possession was demanded and taken without sufficient notice to them, the Court recited the factual situation including modifications as to possession on the suggestion of the Government which eliminated any undue hardship on the condemnees. Accordingly, the Court found that the orders as to possession, as modified, were just and equitable to all concerned.

Staff: United States Attorney Donald A. Wine (S.D. Iowa)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Liens; Priority of Federal Tax Liens Vis-a-vis Mortgagee's Claim for Attorney's Fee In Foreclosure Proceeding. United States v. Pioneer American Insurance Co. (Supreme Court of Arkansas, June 4, 1962.) In this case it was held that a mortgagee's claim for an attorney's fee as provided for in the mortgage took priority over federal tax liens filed after the mortgage was executed and recorded but before the foreclosure decree awarded the attorney's fee and fixed it in amount. The United States had urged that under the existing authorities governing the priority between federal tax liens and competing liens the mortgagee's lien for an attorney's fee was inchoate and unperfected in relation to the federal liens until the decree of foreclosure awarded the attorney's fee; up until that time it was fixed neither in certainty nor in amount.

The pertinent facts were: A deed of trust securing a promissory note was recorded on July 7, 1956. The promissory note provided for a "reasonable" attorney's fee for the mortgagee if collection became necessary through an attorney or court proceedings. Default occurred. Shortly thereafter two federal tax liens were filed against the mortgagor. Then the complaint in foreclosure was filed, and thereafter three more federal tax liens were filed. On November 9, 1961, a decree was entered allowing foreclosure, and awarding the mortgagee an attorney's fee of $1250; this fee was accorded priority over the federal tax liens.

Six of the seven justices held that the lower court was correct; the Chief Justice dissented, in a strong opinion. The majority pointed to the fact that default occurred before any federal liens were filed, and that an Arkansas statute validating the provision in the note providing for the fee characterized that provision as a contract of indemnity. Also, the court thought that the United States would be unjustly enriched if it were able to profit from the services of the mortgagee's attorney without allowing him a fee.

The United States contended that under the established law governing lien priorities where federal tax liens are involved the lien for the attorney's fee was inchoate and unperfected until the fee was actually fixed in certainty and amount by the foreclosure decree. The Arkansas statute, which spoke in terms of services actually rendered, merely validated a type of provision theretofore void as against public policy in Arkansas. Further, since there was no real marshalling of assets, the services of the mortgagee's attorney had not really benefitted the United States.

It has been decided to file a petition for certiorari with the Supreme Court of the United States, on the basis that this decision is contrary to United States v. Bond, 279 F. 2d 837 (C.A. 4), certiorari denied, 364 U.S. 895, and In re New Haven Clock & Watch Co., 253 F. 2d 577 (C.A. 2). It is hoped that the pending cases in the federal and state courts involving this issue can be held in abeyance subject to the outcome of Pioneer American in the Supreme Court.

Staff: United States Attorney Charles M. Conway and Assistant United States Attorney Robert E. Johnson (W.D. Ark.); Joseph Kovner, David I. Granger (Tax Division)

District Court Decisions

Liens: Federal Tax Lien Superior to State Tax Lien Not Reduced to Judgment Prior to Filing of Federal Lien. Commonwealth of Pennsylvania v. Wilson Lumber Co. (Court of Common Pleas of Lackawanna County, Pa., April 16, 1962). In this case the Commonwealth of Pennsylvania filed liens for unpaid contributions to the Unemployment Compensation Fund on May 20, 1954 and July 3, 1954. Notice of Federal tax lien was filed on September 3, 1954. Judgment was entered on the Commonwealth liens on August 4, 1955. On execution initiated by plaintiff, defendant's personal property was sold by the sheriff and the proceeds paid into court for distribution.

The Court held the federal tax liens prior to the Commonwealth's liens, since the Commonwealth was not at the time of filing of its liens a judgment creditor entitled to the protection of Section 6323 of the Internal Revenue Code and its liens were neither perfected nor choate prior to assessment of the federal taxes. United States v. Gilbert Associates, 345 U.S. 361 (1953). The Court relied also on Ersa v. Dudley, 234 F. 2d 178 (C.A. 3, 1956), holding a Pennsylvania lien for unemployment compensation delinquencies inferior to federal liens filed after judgment in the state court, but before execution. The Court concluded, on the basis of United States v. City of New Britain, 347 U.S. 81 (1954), that the Federal tax lien was prior in time and prior in right to the inchoate liens of the Commonwealth.

Staff: United States Attorney Bernard J. Brown and Assistant United States Attorney Carlow M. O'Malley, Jr. (M.D. Pa.)

Injunction; Rescission of Compromise of Tax Liability Based on Fraud and Retention of Payments Made to Government Thereunder, Upheld. Marcus Hackerman and Sara Hackerman v. Rountree, District Director (M.D. Tenn., June 22, 1962.) Taxpayers submitted an offer to compromise an income tax liability of approximately $250,000 by installment payments of $21,000. The offer was accepted by the IRS. Subsequently, the taxpayer was convicted of knowingly making a false statement in a financial statement submitted in support of the offer. Thirty days after the time for appeal of the criminal conviction had expired, the Commissioner sent the taxpayers

notice of rescission of the compromise. Total payments of $18,525 had been made under the compromise, of which two payments of $75 each had been made after the Court denied a motion for a new trial in the criminal case. All of the payments were retained and credited to the tax liability.

Taxpayers brought this action to enjoin collection of the tax. The Government moved to dismiss on the grounds of lack of jurisdiction and failure to state a claim on which relief can be granted. The Court granted the motion, holding that rescission of the compromise was justified by the criminal conviction, that rescission was made within a reasonable time after the conviction, that taxpayers were not prejudiced by acceptance and crediting of their payments to the tax liabilities during the interim and that the averments of the complaint did not show proper grounds for injunctive relief.

Staff: United States Attorney Kenneth Harwell (M.D. Tenn.); and Robert L. Handros (Tax Division).

Subsequent Federal Tax Liens Held Entitled to Priority Over Earlier Inchoate Attachment Liens. United Aircraft Corp. v. Edgerton & Sons, Inc., et al., 62-2 USTC, ¶9633 (D. Conn., July 23, 1962). On October 22, 1951, United Aircraft commenced action against John and Helen Polydys, and others, to recover damages for losses alleged to have been caused by their fraud. On the same day an attachment was made on real property in Bridgeport, Connecticut, owned by the Polydyses, under the provisions of Rule 64, which permits attachments at the commencement of a federal suit to the same extent as they are permitted by the law of the state in the district where the federal court is located. The funds in question are the proceeds of a foreclosure sale of the property held pursuant to an order of the Court.

The United States intervened to assert tax liens against the Polydys, the liens having arisen on December 26, 1951. Notices of tax liens were filed on December 28, 1951.

After the pleadings had been filed, it appeared that the issues involved were the question of the priority of the tax liens over the attachment liens and whether the real property which had been held by Helen Polydys was subject to a constructive trust because of the alleged fraud perpetuated by John Polydys against United Aircraft.

Upon motion of the United States for the Court to determine priorities of the various claimants to the fund presently on deposit with the Court, the Court made the following determination. It found that the validity of the attachment was governed by the law of Connecticut and that, under such law, the attachment created merely quasi liens of a limited nature which constituted, at the most, no more than an inchoate property interest, holding that the state court's determination that the liens are inchoate is practically conclusive upon the federal courts. Illinois v. Campbell, 329 U.S. 362. The Court further held that the limited interest obtained by the attachment brings this case squarely within United States v. Security Trust & Savings Bank, 340 U.S. 47, which

held that a prior inchoate interest is inferior to a choate federal tax lien. It awarded United States priority as to the funds on deposit with the court.

Staff: United States Attorney Robert C. Zampano; Assistant United States Attorney Irving M. Perlmutter (D. Conn.); and Paul T. O'Donoghue (Tax Division).

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