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

February 8, 1963

United States
DEPARTMENT OF JUSTICE

Vol. 11 No. 3

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 11 February 8, 1963 No. 3

MONTHLY TOTALS

Last month's substantial reductions in all categories of work were not continued during December. Reductions were made in all but three categories, but the reductions were minimal, for the most part. The increase in civil and criminal matters pending resulted in an increase in the aggregate of cases and matters pending. The following analysis shows the number of items pending in each category as compared to the total for the previous month.

	November 30, 1962	December 31, 1962	
Triable Criminal	8,675	8,660	- 15
Civil Cases Inc. Civil Less Tax Lien & Cond.	16,150	15,984	-166
Total	24,825	24,644	-181
All Criminal	10,265	10,216	- 49
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	19,108	19,091	- 17
Criminal Matters	13,143	13,368	+225
Civil Matters	15,179	15,208	+ 29
Total Cases & Matters	57,695	57,883	+188

Terminations continue to show a very encouraging rise, especially in civil cases where the need for a reduction in the caseload is most necessary. The upturn in terminations has reduced the gap between filings and terminations from 8.3% in November to 6.8% in December. It is only when this spread has been reversed, to show more terminations than filings, that the pending caseload will begin to decrease. The work of the past two months shows a decided and encouraging trend in that direction.

	First 6 Mos. F.Y. 1962	First 6 Mos. F.Y. 1963	Increase or Decrease Number	%
Filed				
Criminal	14,842	15,856	+ 1,014	+ 6.83
Civil	12,083	12,812	+ 729	+ 6.03
Total	26,925	28,668	+ 1,743	+ 6.47
Terminated				
Criminal	13,801	15,006	+ 1,205	+ 8.73
Civil	10,337	11,832	+ 1,495	+14.46
Total	24,138	26,838	+ 2,700	+11.19
Pending				
Criminal	9,377	10,265	+ 888	+ 9.47
Civil	22,361	23,670	+ 1,309	+ 5.85
Total	31,738	33,935	+ 2,197	+ 6.92

The following figures show that the volume of work done in December fell considerably below the average for the preceding five months. In view of the holidays and the end-of-the-year annual leave taken by many Government employees, a drop in production is understandable. A drop of 21.8% in one month, however, puts a sizeable dent in the overall figures for the year. The fact that terminations exceeded filings for the third successive month is the one encouraging fact to be derived from the month's weak production figures.

	Filed			Terminated		
	Crim.	Civ.	Total	Crim.	Civ.	Total
July	2,143	2,145	4,288	2,041	1,793	3,834
Aug.	2,454	2,354	4,808	1,964	2,040	4,004
Sept.	3,324	1,887	5,211	2,456	1,740	4,196
Oct.	2,973	2,393	5,366	3,199	2,338	5,537
Nov.	2,783	2,238	5,021	3,073	2,157	5,230
Dec.	2,179	1,795	3,974	2,273	1,764	4,037

For the month of December, 1962, United States Attorneys reported collections of $4,342,308. This brings the total for the first six months of fiscal year 1963 to $31,786,639. Compared with the first six months of the previous fiscal year this is an increase of $5,983,217 or 23.19 per cent over the $25,803,422 collected during that period.

During December, $7,545,917 was saved in 125 suits in which the Government as defendant was sued for $10,937,759. 53 of them involving $1,428,640 were closed by compromises amounting to $530,442 and 55 of them involving $8,506,428 were closed by judgments against the United States amounting to $2,861,400. The remaining 25 suits involving $1,002,691 were won by the government. The total saved for the first six months of the current fiscal year aggregated $26,664,734 and is a decrease of $537,499 from the $27,202,233 saved in the first six months of fiscal year 1962.

* * *

DISTRICTS IN CURRENT STATUS

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

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Dist. of Col.	Ky., E.	N.C., M.	Tex., E.
Ala., M.	Fla., M.	Ky., W.	N.D.	Tex., S.
Ala., S.	Ga., M.	La., W.	Ohio, S.	Tex., W.
Alaska	Ga., S.	Md.	Okla., N.	Utah
Ariz.	Hawaii	Miss., S.	Okla., E.	Va., W.
Ark., E.	Ill., E.	Mont.	Okla., W.	Wash., W.
Ark., W.	Ind., N.	Neb.	Pa., W.	W. Va., N.
Calif., S.	Ind., S.	N.H.	S.C., E.	W. Va., S.
Colo.	Iowa, N.	N.C., E.	Tenn., W.	Wyo.
				C.Z.

MATTERS

Civil

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

* * *

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT - CLAYTON ACT

Monopoly - Railroad Locomotives; Complaint Under Sherman Act Section 2 and Clayton Act Section 7. United States v. General Motors Corporation (N.D. Ill.) On January 14, 1963, a civil antitrust complaint was filed charging that General Motors has violated Section 2 of the Sherman Act by monopolizing the production and sale of railroad locomotives in the United States. The complaint seeks divestiture of General Motors' Electro-Motive Division which manufactures diesel-electric railroad locomotives. An indictment for the same offense was returned on April 12, 1961, and the criminal case, United States v. General Motors Corporation, 61 CR 340 (N.D. Ill.), is now pending in the same Court. In addition to the Section 2 violation, the civil compliant alleges that General Motors' acquisition of the Winton Engine Company and the Electro-Motive Company in 1930 violated Section 7 of the Clayton Act.

The allegations with respect to the Section 2 violation parallel the charges in the earlier criminal indictment. The complaint alleges that General Motors used its position as the nation's largest commercial shipper of rail freight to induce the purchase of GM locomotives. This was accomplished by increasing freight traffic over railroads which purchased GM locomotives, by removing freight traffic from railroads which purchased competitors' locomotives, by discusssing GM freight traffic in the course of locomotive sales efforts, and by using the possible location of GM plants along the lines of railroads to induce the purchase of GM locomotives. Additional allegations, essentially equivalent to those in the criminal indictment, include (1) selling certain models of locomotives at a loss in order to achieve a dominant position in the market for such locomotive models, and, (2) financing the sale or lease of locomotives on terms which GM's competitors were unable to meet. The effect of these anti-competitive practices has been that General Motors has achieved a market share of greater than 80% of the new and rebuilt railroad locomotives sold in the United States, and has monopolized the interstate trade and commerce in the manufacture and sale of such railroad locomotives.

The complaint further alleges a violation of Section 7 of the Clayton Act. In 1930, General Motors acquired the Winton Engine Co., a leading manufacturer of gasoline and diesel engines and the Electro-Motive Company, the leading manufacturer of rail motor cars in the United States. At the time of the acquisitions, Winton was the chief supplier of engines for Electro-Motive rail cars, and both companies had been in successful operation for a number of years. As a result of the acquisitions, General Motors obtained a substantial quantity of important technological information as well as a number of highly qualified engineering and technical personnel. These personnel were instrumental in the development of GM's diesel-electric locomotive, the essential features of which were based on the gas-electric rail motor cars designed by the Electro-Motive Company. The acquisitions also enabled General Motors to combine the resources of these companies with its vast financial, material and technical resources and its competitively strategic position as the nation's largest commercial shipper of freight.

The complaint alleges that the effect of these acquisitions has been to substantially lessen competition in and to tend to create, maintain and perpetuate a monopoly in the manufacture and sale of railroad locomotives in violation of Section 7.

The complaint asks that General Motors be ordered to divest itself of the Electro-Motive Division and such other assets as are necessary to establish that division as an independent supplier of railroad locomotives and locomotive parts. In addition, the complaint seeks injunctive relief pending divestiture, which would prohibit the use of General Motors' freight traffic to induce locomotive purchases.

Staff: Paul A. Owens, Daniel R. Hunter, Carl W. Schwarz, Francis G. McKenna, Alfred I. Jacobs, and Gordon A. Noe (Antitrust Division)

Restraint of Trade - Asbestos Cement Pipe; Motion To Dismiss Denied. United States v. Johns-Manville Corporation, et al. (E.D. Pa.) On December 13, 1962, Judge Van Dusen handed down an opinion in which he denied all motions by the defendants, corporate and individual, to dismiss, on three separate grounds, the indictment which had been returned on June 1, 1962. All defendants challenged the indictment on the ground that it failed to charge Sherman Act offenses (Section 1 restraint and Section 2 conspiracy and attempt) with sufficient particularlity and definiteness, and on the ground that Government counsel had abused the process of the court. Three individual defendants moved to dismiss on the ground that they had obtained immunity by having been compelled to testify before a previous grand jury which had investigated the same industry (asbestos-cement pipe) in 1958.

The Court held that the indictment charges offenses with sufficient specificity to satisfy the requirements of the Fifth and Sixth Amendments and Criminal Rule 7(c). To specific objections, the court ruled: (1) In the conspiracy counts, overt acts need not be pleaded; (2) The exact commencement date of the conspiracy need not be stated; (3) It is not necessary to name all alleged co-conspirators; (4) Words which fairly import a concerted action or conniving together are sufficient to describe the terms of the conspiracy; (5) Under the authority of Frankfort Distilleries and Socony-Vacuum, this indictment adequately alleges the means employed for effectuating the conspiracy; and, (6) Count 3 (attempt to monopolize) alleges acts which, if true, would constitute a Section 2 attempt, citing American Tobacco.

In a supplemental motion, defendants contended that the process of the court was abused by Government attorneys by issuing subpoenas requiring grand jury witnesses to appear at the office of the United States Attorney shortly in advance of the time at which the grand jury was scheduled to meet in closed session and by privately interviewing such witnesses in advance of their appearance before the grand jury. Defendants contended that the grand jury was thus deprived of "unrehearsed testimony" to the prejudice of the present defendants.

In denying the motion, Judge Van Dusen found that defendants had failed

to substantiate the claim of prejudice, that there is nothing in the record to establish that the witnesses were coerced in their testimony, or that their testimony was less than complete or in any way changed because of their discussions with Government counsel. He noted that neither the defendants nor the court had found any cases stating that a grand jury may only consider "unrehearsed testimony", and cited cases to the contrary.

While expressing disapproval of the prevailing practice within the District of having grand jury witnesses report initially to the United States Attorney's office, the court found that the practice is not inherently prejudicial to the defendants, and stated in a footnote:

> There would seem to be no objection to the Government attorneys saving the time of grand jurors, who are heavily burdened in this court with extensive consideration of possible antitrust violations, by having potential witnesses determine in advance what exhibits they can or cannot identify, arranging for the compensation of such witnesses, and similar matters described in the affidavits attached to the above-mentioned brief of the Government.

In denying the claim of immunity by three individual defendants, by virtue of their testimony before a grand jury in 1958, the court noted that the charging paragraphs of the indictment read, "Beginning sometime prior to 1954 . . . and continuing thereafter up to and including the date of the return of this indictment, the defendants [offense stated]", thereby charging offenses occurring subsequent to the dates of their testimony. The court held that conspiracies are, in effect, renewed during each day of their continuance (citing Borden, 1939), and reasoned that, consistent with the holding in U.S. v. Swift, 186 F. 1002 (N.D. Ill. 1911) and the rationale of U.S. v. Smith, 206 F. 2d 905 (C.A. 3, 1953), the immunity statute cannot operate prospectively as a license to commit offenses subsequent to the date of the compelled testimony. From the transcript of testimony before the grand jury which returned the indictment, the court found that "the grand jury had before it testimony concerning the offenses charged in the three counts of this indictment occurring after May 1, 1958."

On December 27, 1962, all defendants were arraigned and pleaded not guilty. No trial date has been set.

Staff: Raymond K. Carson, Kenneth R. Lindsay, Rodney O. Thorson and Roy C. Cook (Antitrust Division)

* * *

CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

SUPREME COURT

VETERANS PREFERENCE ACT
FEDERAL EMPLOYEES

Discharged Employee Required to Assume Initial Burden of Producing Witnesses He Desires Present at His Hearing, Whether for Direct Examination or Cross Examination; Only if Employee is Unable to Produce Witnesses Is Discharging Agency Required to Produce Them if They Are Readily Available. Williams v. Zuckert (S. Ct., January 14, 1963). Petitioner was discharged from his civilian position with the Air Force Academy for homosexual assaults. The information upon which the discharge was based consisted of affidavits of Air Force personnel upon whom the assaults had been made. Petitioner made no effort to arrange for the appearance of the witnesses on his appeal to the Civil Service Commission under the Veterans Preference Act, but at the hearing asked the Air Force to produce them for cross examination. His request was denied. The Court of Appeals for the District of Columbia sustained the discharge on the ground that petitioner had not complied with the requirements of the Civil Service Regulation that he assume the burden of arranging for the appearance of his witnesses, following its prior decisions holding that an employee has no right to have the employing agency produce witnesses for the employee to cross examine.

The Supreme Court granted certiorari to consider whether, under Vitarelli v. Seaton, 359 U.S. 535, the Air Force's refusal to produce the witnesses constituted an infringement of petitioner's rights under the Veterans Preference Act and the implementing regulations. After full briefing and oral argument, however, the Court concluded that petitioner had not brought himself within the applicable Civil Service Commission regulations and that the Vitarelli question was not properly presented. The Court therefore dismissed the writ as improvidently granted. In so doing, the Court accepted the Government's reading of those regulations, as requiring the employee to assume the initial burden of producing the witnesses he desires to be present at the hearing, whether for direct examination or cross examination. However, the Court went on to note that, if the employee had made a timely attempt to produce the witnesses himself, and "through no fault of his own failed," the Air Force would have been required, upon a proper and timely request, to produce them, "since they were readily available, and under the Air Force's control."

Mr. Justice Harlan concurred in the result. Mr. Justice Douglas, joined by Mr. Justice Black, dissented on the ground that the discharge pursuant to the charges of immoral conduct would place the employee under such a stigma that he should have "the same right to confront his accusers as he would have in a criminal trial." In other words, they accepted petitioner's contention that the regulations, read in the light of the Constitution, require the

employing agency to assume the burden of producing the accusing witnesses at a Civil Service Commission hearing.

Staff: Stephen Pollak (Office of the Solicitor General); David L. Rose (Civil Division)

COURTS OF APPEALS

ADMINISTRATIVE PROCEDURE ACT

Coast Guard Regulation Defining Block Letters and Numerals to Be Used in Numbering Pleasure Craft as Vertical (Not Slanted Upheld as Interpretive in Nature and Therefore Exempt from Notice and Hearing Requirements of Administrative Procedure Act. Garelick Mfg. Co. v. Dillon (C.A.D.C., January 17, 1963). Appellant, a manufacturer of boating assessories, brought this action for declaratory relief, challenging the validity of a regulation promulgated by the Commandant of the Coast Guard pursuant to the Federal Boating Act of 1958, 46 U.S.C. 527. The challenged regulation defined the phrase "block characters" used in a prior regulation as "vertical (not slanted)" numerals and letters. Under the Federal Boating Act, all pleasure craft subject to the Act must carry letters and numerals "of such size, color and type as prescribed by the Secretary." Appellant urged that the challenged regulation defining block characters was a new substantive regulation and, hence, invalid since the Coast Guard had issued the regulation without the notice and hearing required by the Administrative Procedure Act. Appellant also urged that the regulation was arbitrary and capricious.

The district court granted summary judgment in favor of the Government. The Court of Appeals affirmed. The Court held that the regulation was interpretive and, consequently, the notice and hearing requirements of the A.P.A. were not applicable to it. Moreover, the Court found that the regulation was not arbitrary or capricious.

Staff: Stanley M. Kolber (Civil Division)

HOUSING AND HOME FINANCE AGENCY

Redevelopment of Nonresidential Area for Nonresidential Uses Permissible Under 42 U.S.C. 1460(c). Harry A. Blackman v. Erieview Corporation, City of Cleveland, Housing and Home Finance Agency, Public Housing Administration, and United States, (C.A. 6, December 19, 1962). Suit was brought seeking an injunction against an alleged illegal use of federal funds in the development of an urban renewal project in a commercial section of Cleveland, Ohio. Plaintiff, a resident and taxpayer of Cleveland, claimed that the provisions of 42 U.S.C. 1460(c) were violated in that the project area was a predominantly commercial area that was to be developed for commercial uses.

42 U.S.C. 1460(c) provides that urban renewal assistance may not be extended to any area which is not predominantly residential in character. However, the section also expressly provides that assistance may be extended

for the redevelopment of nonresidential areas if the governing body of the local public agency determines that the redevelopment of such an area is necessary for the proper development of the community. The district court granted defendants' motion to dismiss for failure to state a claim. The Court of Appeals affirmed, holding that the exception appearing in section 1460(c) clearly authorizes the redevelopment of commercial areas for commercial uses. In concluding, the Court characterized plaintiff's action as one bordering on the frivolous.

Staff: Morton Hollander and Jerry C. Straus (Civil Division)

PRIVILEGE

Privilege Extended to Department of the Air Force Aircraft Accident Investigation Report Not Containing Military Secrets. Machin v. Zuckert, Secretary of the Air Force (C.A.D.C., January 17, 1963). This action arose upon a foreign subpoena to the Secretary to produce the Department's Report of Aircraft Accident Investigation, covering the crash of a B-25 bomber at Lowry Air Force Base. The report was to be used in private litigation commenced by appellant against the manufacturer of the plane's propeller assemblies. Appellant was the only surviving member of a crew of four. Immediately prior to the crash the pilot reported an overspeeding propeller, and the Air Force made the only examination of the wreckage and the plane's components. This examination was made in connection with the official investigation report.

The Government moved to quash the subpoena on affidavits that assurances of confidentiality of statements made by witnesses before the Board were necessary to a full investigation and the success of the flying safety program of the Air Force, and on the ground that appellant had failed to show an over-riding need, in view of the fact that he had been supplied with the names of all witnesses and the assurance of the Air Force that they would be authorized to testify. Upon denial of the motion, a formal claim of privilege was filed by the Secretary, and the motion to quash was then granted.

The Court of Appeals affirmed as to all information in the hands of the Board, including that obtained from private persons who participated in the investigation, as well as all conclusions which might in any way be based upon such information, and any portions of the report reflecting Air Force deliberations or recommendations as to policies. The Court noted expressly that no claim was made that the documents contained any military or state secrets.

While the case was under submission, the Court required the Government to show cause why appellant should not be permitted to take the depositions of all persons who testified or furnished information to the Board, why such persons should not be authorized to testify in the private litigation, and why they should not be permitted to refresh their memories from any statements made by them. The Court also inquired whether the

Secretary would make available to appellant photographs of the wrecked plane and its parts. The Secretary acceded to these requests. In its opinion, the Court set out one further order to show cause. Considering that the reasons assigned for keeping statements of private persons confidential did not on their face apply to factual findings in the investigations and reports of Air Force mechanics, although there might be reasons why even this portion of the report should be immune from subpoena, the Court gave the Government twenty days within which to show cause why such factual findings should not be given to appellant. As of this time no decision has been made on this order.

The importance of the decision lies in the fact that it accords privilege to information not involving military or state secrets, and does this without requiring the production of the documents for perusal by the court.

Staff: Kathryn H. Baldwin (Civil Division)

SOCIAL SECURITY ACT

Civil Action to Review Decision of Secretary on Rehearing Following Remand of Case by District Court Must Be Filed Within 60 Days of Mailing of Notice of That Decision. Charles W. Jamieson v. Celebrezze (C.A. 7, January 11, 1963). In 1958, plaintiff brought an action to review a decision of the Secretary that, due to excessive earnings during the first 6 months of 1955, plaintiff's monthly benefits for the year 1956 would be withheld until the amount of benefits paid to him during that 6 month period of 1955 could be recovered. In 1959, the district court reversed the decision of the Secretary and remanded the case for rehearing. On March 31, 1960, after rehearing, the Secretary again rendered a decision that plaintiff had been overpaid and ordered the sum to be recovered. On November 13, 1961, more than 19 months after the Secretary's decision, plaintiff brought an action in the district court. The district court dismissed the action as untimely filed. The Court of Appeals affirmed, holding that the 1959 decision of the district court was a final appealable order and the district court lost jurisdiction of the case when it was remanded to the Secretary. The Court did not maintain continuous jurisdiction of the case as claimant alleged. Therefore, pursuant to Section 205(g) of the Act, plaintiff had only 60 days in which to seek review of the Secretary's decision on rehearing. Since plaintiff did not file his action within the 60 day period, his right to review ceased to exist.

Staff: United States Attorney James P. O'Brien; Assistant United States Attorney John P. Lulinski and John P. Crowley (N.D. Ill.)

Secretary's Determination That Claimant Was Not so Disabled as to Be Unable to Engage in Any Substantial Gainful Activity Reversed and Remanded for Failure to Consider What Employment Opportunities Were Available to An Individual With Claimant's Capabilities. William A. Hodgson v. Celebrezze (C.A. 3, January 8, 1963). Claimant brought this action to review a decision

of the Secretary that he was not entitled to disability benefits and the establishment of a period of disability because he was not so disabled as to be unable to engage in any substantial gainful activity within the meaning of the Act. Claimant is 55 years old and has a sixth grade education. He has been a manual laborer all his life. Medical evidence showed that the function of claimant's right leg was substantially impaired due to an industrial injury and arthritis. Claimant takes aspirin several times a day to relieve the resultant pain, but is able to do light sedentary work. The district court affirmed the decision of the Secretary, but the Court of Appeals, Judge Hastie dissenting, reversed. The majority held that the Secretary must consider not only the particular capabilities of the individual claimant, but in addition what actual employment opportunities may be available to such an individual. Since the Secretary failed to consider the availability of such employment, the Court remanded the case to the Secretary for an appropriate determination.

Staff: United States Attorney Bernard J. Brown; Assistant United States Attorney Daniel R. Minnici (M.D. Pa.)

STATE COURT

UNITED STATES SAVINGS BONDS

Treasury Regulations Not Controlling as to Ownership of Bonds Where Trust Asserted. Wayne L. Doolittle v. Gail Kunschik and United States (App. Ct. Ind., December 19, 1962). Plaintiff, the daughter of the decedent, brought this action in an Indiana state court against the executor of the estate, seeking that she be declared the sole owner of a number of United States Series "E" savings bonds on which she and the decedent were designated as co-owners. The bonds had been purchased with the funds of the decedent, and the executor urged that a resulting or constructive trust in favor of the estate be imposed on the ground that, as indicated by facts in the record, the decedent had not intended that plaintiff have the beneficial ownership of the bonds. The United States intervened and argued that, under the rule in Free v. Bland, 369 U.S. 663, the Treasury Regulations recognizing plaintiff as absolute owner of the bonds should be given full effect, regardless of the dictates of the local law of trusts.

The trial court ruled for plaintiff, finding that a resulting or constructive trust had not been established under Indiana law. The Appellate Court of Indiana affirmed, also on the ground that Indiana law did not create a trust in the circumstances. As to the Government's argument, the Court noted that it questioned "severely that the regulations can take away the power and authority of the court to determine who is the actual and true owner of the proceeds and under what conditions such ownership may arise."

Staff: Mark R. Joelson (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

GAMBLING DEVICES ACT OF 1962

(Johnson Act as Amended by P.L. 87-840 (15 U.S.C. 1171-1178)

Allegation That Plaintiffs Engaged in Wholly Intrastate Activity Precluded Declaratory Judgment That They Were Not Required to Register Under Provisions of Gambling Devices Act of 1962; Injunctive Relief Unavailable Absent Evidence of Contemplated Seizure or Prosecution. John H. Smith et al. v. Robert F. Kennedy et al. (D. Md.). Owners and operators of gambling devices in four Maryland counties sought a declaratory decree that they are not required to register under subject act, and an order enjoining Government interference with their business.

Plaintiffs alleged that none of the devices in question have been the subject of interstate introduction into Maryland since the effective date of the original Johnson Act; "that none of the plaintiffs intends to import or knowingly to receive any gambling machine or parts thereof that have been or may be the subject of importation, subsequent to the effective date of the Johnson Act; that none of the plaintiffs intends to sell, ship or deliver any such device knowing that it will be introduced into interstate or foreign commerce, and such devices are being operated in Maryland, and not as part of interstate or foreign commerce."

On the basis of the foregoing allegations the Court found as a fact that plaintiffs were not required to register with respect to the machines in question.

The Court refused to put its finding in the form of a declaratory decree, and issue an injuction restraining the Government from interfering with plaintiffs' business. The Government was unable to refute the allegation that plaintiffs were engaged in a purely intrastate activity, and there was no evidence that any investigation or criminal prosecution had been begun or was in actual contemplation. Absent evidence to the contrary the Court was unable to find the existence of a controversy or danger of immediate harm to plaintiffs' business.

The decision is strictly confined to the factual situation presented by the aforestated allegations, and in no way limits prosecution based on evidence of a past, present, or future violation.

United States Attorneys are requested to notify the Organized Crime and Racketeering Section by telephone of any proceedings to test the constitutionality of this Act, or civil action for declaratory judgment or similar proceeding. You are further requested to notify the Organized Crime and Racketeering Section, by letter, of any gambling device seizures made in your district pursuant to the provisions of 15 U.S.C. 1177.

Staff: United States Attorney Joseph D. Tydings;
Assistant United States Attorney J. Edward Davis (D. Md.).

REMOVAL WARRANTS

Necessity of Removal Warrants. Several inquiries have been received from United States Attorneys concerning the necessity of a removal warrant where an arrest is made in a distant district (over 100 miles). Under the procedures outlined in Rule 40(b), F.R. Cr. P. the Department has taken the position that removal warrants are necessary in all instances except where a convicted defendant is arrested in a distant district or where an escaped prisoner is being returned to prison in another district. The United States Attorneys' Manual (T. 2, p. 16.3) is therefore being amended to include the following:

ARREST IN DISTANT DISTRICT

When arrest is made in a distant district as defined in Rule 40(b) the procedural requirements therein set forth must be strictly complied with before a warrant of removal issues. The hearing may be had before a United States Commissioner or judge of the district court, but the warrant of removal may issue only by order of the judge. The removal procedure authorized under this Rule is distinguished from statutory extradition proceedings. United States v. Godwin, 191 F. 2d 932.

Arrest Made Under a Bench Warrant: In those instances where a defendant is arrested on a warrant based upon an indictment or information under Rule 9 he is entitled to a removal hearing, unless he waives hearing, and may not be removed without a removal warrant. Where a defendant fails to appear for trial and a bench warrant issues for his arrest the Department has taken the position that such a warrant is still a warrant of arrest under the original indictment or information under Rule 9, F.R. Cr. P. Therefore, when rearrested in a distant district, the defendant under the embracing language of Rule 40 would be entitled to a removal hearing and should not be removed except pursuant to a warrant of removal. If a convicted defendant is arrested under a bench warrant issued from a federal court in another district a removal hearing before a Commissioner is unnecessary and the arrested person may be removed forthwith to the other district from which the bench warrant issued without obtaining a warrant of removal. See MacNeil v. Gray, 158 F. Supp. 16 (D. Mass., 1957).

Arrest of Escaped Prisoner: An escaped prisoner is not entitled to a removal hearing before being returned to prison. The Court of Appeals for the Fifth Circuit in Rush v. United States, 290 F. 2d 709 (1961), held that the provisions of Rules 5 and 40 of the Federal Rules of Criminal Procedure may not be availed of by a prisoner in escape status (Rule 54(b)(5), Mullican v. United States, 252 F. 2d 398 (C.A. 5, 1958)).

NEW LEGISLATION

There were enacted during the 87th Congress, 1st and 2d Sessions, approximately 53 statutes containing provisions of particular interest to the Criminal Division. A list of such statutes is included with this issue of the Bulletin. Legislative histories of some of these statutes have already been compiled and are on file in the Legal and Legislative Research Unit of the Division; the others are in process of being compiled.

	Public Law No.
Agricultural Act of 1961	87-128
Aircraft and Motor Vehicles - Destruction - False Bomb Information	87-338
Animal Quarantine Act, as Amended - Livestock and Poultry Diseases	87-518
Antiracketeering - Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises	87-228
Appeals - Supreme Court - 28 U.S.C. 2103, as Amended re Appeals Improvidently Taken	87-669
Area Redevelopment Act	87-27
Arrest - Authority of G.S.A. Special Policemen to Make Arrests	87-275
Aviation Act of 1958, Federal, as amended - Aircraft Accidents	87-810
Aviation Act of 1958, Federal, as Amended - Hijacking of Airplanes	87-197
Aviation Act of 1958, Federal, as Amended - Supplemental Air Carriers	87-528
Banks and Banking - National Banks - Trust Powers	87-722
Birds - Protection of Golden Eagle	87-884
Commerce - Hydraulic Brake Fluid - Safety Standards	87-637
Commerce - Property Moving in Interstate Commerce - Destruction or Injury Prohibited	87-221
Communications Act of 1934, as Amended - Elimination of Oath	87-444
Counterfeiting - Tokens, Slugs, etc. - Prohibitions	87-667
Courts - Additional Judicial District in Florida	87-562

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Accreditation as Nurse Not Guaranteed Alien Student Nurse Under Exchange-Visitor Program. Jovita Chico Morales v. INS (C.A. 7, December 17, 1962.) This case involved a petition to review an order of deportation. The petitioner was admitted under the Exchange-Visitor Program in 1958 as a student nurse and was authorized to remain in the United States until October 1961. The Immigration and Naturalization Service then required her to depart from the United States or be faced with deportation proceedings. She refused to do so and was ordered deported.

Petitioner contended in her deportation hearing and these proceedings that when she was admitted by the government under the Exchange-Visitor Program to study nursing, the Government assumed an obligation to furnish her with nursing instruction which would afford her accreditation or academic acceptance. She contended that such obligation was breached by the Government because she was compelled to attend informal classes conducted by a nurse at infrequent periods. The 7th Circuit rejected her contention and ruled that when she entered the United States she was granted a privilege of remaining here for the purpose of benefiting herself in the manner she had chosen; that she had no contract in regard thereto; that necessarily she did have an understanding as to when she was to depart and that she had no sufficient excuse for overstaying her authorized admission. The deportation order was ruled valid.

Staff: United States Attorney James P. O'Brien; Assistant United States Attorney John P. Crowley, (N.D. Ill.)

Alien Need Not Be Advised Exemption from Military Service Renders Him Inadmissible to United States. Jorge Americo Ungo vs. Charles J. Beechie (C.A. 9, January 10, 1963.) This was a suit contesting the validity of an order of deportation, which order was based on inadmissibility to the United States at time of last entry. Petitioner, a permanent resident alien and national of El Salvador, claimed and was granted exemption from service in the armed forces of the United States. The administrative authorities found that as a result thereof he became ineligible to citizenship under Section 315 of the Immigration and Nationality Act, 8 U.S.C. 1426, and inadmissible to the United States under Section 212(a)(22) of the same Act, 8 U.S.C. 1182(a)(22).

Petitioner contended that under the ruling in Moser vs. U.S. 341 U.S. 41, he did not become ineligible to citizenship or inadmissible to the United States because he did not understand these disabilities would result from his exemption from military service. The 9th Circuit found from the evidence in the deportation record that petitioner when obtaining exemption from military service did knowingly waive his right to become a citizen and

that it need not appear that when claiming exemption he be expressly advised of all the consequences which might flow from that waiver under other provisions of the Immigration and Nationality Act, including inadmissibility to the United States.

Staff: United States Attorney Cecil F. Poole; Assistant United States Attorney Charles E. Collett (N.D. Calif.)

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950; Registration of Communist Party Members. Attorney General v. Burt Gale Nelson. On January 21, 1963 the Subversive Activities Control Board issued an order directing respondent, Burt Gale Nelson to register as a member of the Communist Party. (See United States Attorneys Bulletin, Vol. 10, No. 13, June 29, 1962).

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation; Public Lands; Mining Claims; Department of Interior Retains Jurisdiction to Determine Validity of Mining Claim on Public Lands Even After U. S. Has Commenced Condemnation Proceeding to Recover Immediate Possession and Any Property Interest Outstanding; No Waiver of Jurisdiction by Filing Condemnation Proceedings. Best v. Humboldt Placer Mining Co. (S.Ct., January 14, 1963). After the United States had commenced a condemnation action and secured immediate possession of certain public lands needed for construction of the Trinity River Dam and Reservoir in California, the United States instituted a contest proceeding in the Department of the Interior to determine the validity of respondents' mining claims. Respondents, who had 30 days to answer the administrative complaint, brought the present suit to enjoin Interior officials from continuing the administrative action. The district court granted summary judgment for the United States. The court of appeals reversed. The Supreme Court reversed the court of appeals.

The mining claim is a unique form of property. It is a possessory interest in public lands so long as the claim is valuable for minerals. Although title to the land remains in the United States the claim is valid against the United States if there has been a discovery of minerals so long as the lands continue to be mineral in character. Historically, the determination of the validity of claims against public lands has been with the Department of the Interior. If a patent has not been issued, controversies over claims should be settled by the Department of the Interior.

Although the court of appeals said nothing in derogation of these principles, it concluded that after bringing an action to condemn these property interests, the validity of the claims was, of necessity, left to judicial determination. The Supreme Court held, however, that courts who try issues sometimes wait until the administrative agency that has special competence in the field has ruled on them. Congress has entrusted the Department of the Interior with the management of the public domain and prescribed the process by which claims against public lands may be perfected. The United States may use its power of eminent domain to obtain immediate possession and still insist on resort to the administrative proceedings for a determination of the validity of the mining claims. There is nothing incompatible between the use of the courts for immediate possession and the administrative proceedings to determine title, and hence, there is no waiver of administrative jurisdiction. United States v. 93.970 Acres of Land, 360 U. S. 328. The opinion also invoked the reasoning of United States v. Dow, 357 U. S. 17, 21 that a taking may be accomplished either by physical seizure or through condemnation proceedings. Therefore, the Court concluded "* * * the District Court acted properly in holding its hand until the issue of the validity of the claims has been resolved by the agency entrusted by Congress with the task."

Staff: Roger P. Marquis and A. Donald Mileur
(Lands Division)

Condemnation; Condemnee Not Entitled to Severance Damages When Their Remaining Lands Have Been Depreciated in Value by Loss of Access to Railroad Relocated Because of Government Project. St. Regis Paper Co. v. United States (C.A. 9, Dec. 28, 1962) 427 acres of appellant's timberlands have been taken for a Government dam and reservoir project. The reservoir project necessitated the relocation of the main line of the Northern Pacific Railway which ran adjacent to appellant's lands with a spur line connecting. Appellant does not contend that it was entitled to compensation for the taking of the main line of the railroad in valuing its spur facilities which were condemned. It does contend that it is entitled to severance damages caused by depreciation to its remaining lands which no longer have access to the railroad.

The Court of Appeals affirmed the holding of the district court that the appellant was not entitled to compensation for this item of severance damages. The Court applied the ruling in Campbell v. United States, 266 U.S. 368, 372, that the just compensation assured by the Fifth Amendment does not include diminution in the value of a remainder caused by the acquisition and the use of adjoining lands belonging to others for the same project. It also distinguished its own recent holding in United States v. Pope & Talbot, Inc., 293 F. 2d 822. In Pope & Talbot the loss of access was caused in substantial part by the flooding of lands belonging to the condemnee. Here, the loss of access was caused entirely by the taking of property belonging to the railroad.

Staff: United States Attorney Brockman Adams (W.D. Wash.)
A. Donald Mileur (Lands Division).

Condemnation; U.S. Not Liable for New Sewage Treatment Plant Ordered by States after Government Built Dam and Reservoir on Navigable River Into Which Sewer System Empties; Lack of Vested Right to Discharge Sewage in Navigable Stream as Against Federal Power. City of Eufaula, Alabama v. United States (C.A. 5, January 17, 1963.) The United States is constructing a dam on the Chattahoochee River into which the City of Eufaula has been discharging its sewage for many years. When the dam is completed and the waters pooled the health authorities of Alabama and Georgia will no longer allow the City to discharge its raw sewage into the river, requiring instead treatment of the sewage before its discharge. A small portion of the present system will be inundated by the backed up stream. It was determined that the City was entitled to $14,050 for the taking of that portion. On this appeal the City contended that in addition the United States was liable for the cost of the new treatment facilities.

The district court held against the City and the Court of Appeals affirmed. At the outset the Court of Appeals noted that the present system will physically operate as efficiently after the taking as before. The Court held that the United States' actions, admittedly in furtherance of navigation and commerce, do not create a claim in the City of Eufaula under the Fifth Amendment. No one can own a property interest in a navigable river superior to the dominant power of the United States to control and regulate that stream in the interest of interstate commerce.

Whether the City has a property right under state law to use the flow of the river for sewage disposal is immaterial, for any such right is subject to the power of Congress to control the waters for purposes of commerce. The Court distinguished Town of Clarksville, Va. v. United States, 198 F. 2d 238 (C.A. 4, 1952) because in that case the Government project inundated 41% of the town's area which rendered its sewer system useless and the Government stipulated that compensation should be paid for a substitute system.

Staff: A. Donald Mileur (Lands Division).

Public Lands; Mineral Leasing Act; Interior's Regulations and Procedures to Determine First Qualified Applicant for Noncompetitive Mineral Lease Declared Valid. Thor-Westcliffe Development, Inc. v. Udall (C.A. D.C., January 24, 1963.) Section 17 of the Mineral Leasing Act, 30 U.S.C. 226, declares that lands not within a producing oil and gas field shall be leased noncompetitively "to the person first making application." The Secretary of the Interior promulgated a regulation which provided for posting notice of leases which have previously expired, together with a notice that such leases are subject to simultaneous filings of lease offers until the fifth day after posting. If more than one offer is filed for the same land, priorities are determined by a drawing. 43 C.F.R. 192.43. In this case, appellant filed his lease offer as soon as the previous lease had expired and without waiting for the posting. It was rejected as being made contrary to the regulation. The successful applicant was determined by a drawing from among those who complied with the regulation. Appellant, after exhausting administrative remedies, brought this suit to have itself declared the "person first making application" and argue that the Secretary must comply with the statutory mandate.

The district court granted summary judgment in favor of the Secretary. The Court of Appeals affirmed. It was noted that serious problems had arisen in the administration of the Mineral Leasing Act, and that the regulation had been issued in an attempt to solve them. Appellant suggested they could be solved in other ways, but the Court stated it was not for appellant or the court to suggest the method for solving the problems. The only inquiry the Court could make was whether the regulation was "unreasonable and plainly inconsistent" with the statute.

The Court of Appeals held that while the Secretary is not permitted to issue a lease other than to the "person first making application," he can determine who that first person is. Nor is the statutory language so clear as to render an implementing regulation inappropriate. Having recognized the authority of the Secretary to make a regulation, the Court decided that this particular regulation is neither unreasonable nor inconsistent with the plain language of the Act, having in mind the language and purpose of the statute as well as the administrative experience of the Secretary.

Staff: A. Donald Mileur (Lands Division).

Public Lands; Cancellation of Public Auction Sale Under Isolated Tracts Act After Applicant Declared Purchaser, on Basis of Subsequent Mineral Discovery; Vesting of Equitable Title Under Mandatory and Permissive Disposal Statutes. Willcoxson v. United States (C.A. D.C., January 4, 1963). Appellant applied to the Secretary of the Interior for a sale of two tracts on the public domain under the Isolated Tracts Act, 43 U.S.C. 1171. That Act authorizes the Secretary to sell at public auction small, isolated tracts which, "in his judgment, it would be proper to expose for sale" and gives a preference right to owners of adjoining land. Among the regulations governing such sales, the Secretary provided that "until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States." Pursuant to appellant's application, sales at public auction were held in 1953 and he was declared the purchaser of both tracts in February 1954 and January 1955, respectively. He paid the purchase price. However, cash certificates were not promptly issued because of a heavy backlog of work in the Land Office.

In May 1955, appellant advised the Land Office that uranium prospectors were on the tracts and asked what he could do to have them removed. The Land Office thereupon suspended action upon appellant's application and, after a field investigation, canceled the sales because the land was mineral in character and could not be disposed of under the Isolated Tracts Act. Following unsuccessful appeals through the Interior Department, appellant filed suit against the Secretary in the District of Columbia to compel issuance of a cash certificate, and a suit in New Mexico against the United States for $6,000,000 under the Federal Tort Claims Act. By agreement of the parties, that suit was removed to the District of Columbia and both actions were consolidated with a suit instituted by the United States for a declaratory judgment (in order to have a minimum of litigation and to avoid possible disposition of appellant's suit against the Secretary on grounds unrelated to the merits). The district court, upholding the administrative ruling, granted summary judgment for the United States and dismissed with prejudice appellant's two suits.

The Court of Appeals affirmed. It held that (1) under the terms of the Act, the Secretary had discretion to determine whether and when to sell and, by the regulation, he determined that nothing prior to issuance of a cash certificate would denote his decision to sell; (2) this Act, unlike some statutes relating to disposal of public land, does not vest equitable title when certain statutory requirements have been met, for it is not "a positive mandate to the Secretary" but rather "permission to take certain action in his discretion;" (3) the fact that appellant was declared the purchaser in part because of his statutory preference right, as contiguous owner, did not prevent cancellation of the transaction on the basis of subsequent mineral findings, for he had no rights prior to the Secretary's final decision to sell; and (4) the regulation does not violate 43 U.S.C. 678, which provides that "at every public sale [of public lands], the highest bidder * * * shall be the

purchaser" because the present Act authorizes sale "notwithstanding the provisions of section 678" and section 678 does not purport to affect the timing of the Secretary's decision to sell.

Staff: S. Billingsley Hill (Lands Division).

Public Lands and Water Rights; Lack of Standing of Individual Indians to Initiate General Water Adjudication Involving Tribal Water Rights; Construction of Waiver of Sovereign Immunity Statute, 43 U.S.C. 666. United States v. George Knight, et al (D. Utah). This action arose as the result of defendants' interference, by threats of force and violence, with activities of personnel of the Bureau of Indian Affairs on the Goshute Indian Reservation in western Utah.

With one exception, defendants are members of the Goshute Tribe. At the request of the Goshute Tribal Council, and pursuant to directions of the superintendent of the Nevada Indian Agency, B.I.A. personnel were on the reservation to clean out an irrigation ditch to allow the diversion of water from the main portion of the reservation to another noncontiguous part thereof. The main portion of the reservation consists of public lands reserved and set aside for the Goshute Indians by a 1914 Executive Order. These lands are part of a larger area in which the Goshute Indians had agreed to remain under the terms of a treaty of peace and friendship of 1863. The smaller, noncontiguous portion of the reservation is composed of lands purchased by the United States in 1936 and 1937 in trust for the same Indian tribe. Suit was filed for a permanent injunction against further interference.

In defense, defendants assert that the Government agents were without authority to enter upon the reservation to clean the irrigation ditch for the purpose of diverting water from the main portion of the reservation. They seem to argue that rights to the use of water reserved under the doctrine of Winters v. United States, 207 U.S. 564, may not be exercised to irrigate lands acquired and held for the benefit of the same Indian tribe, and that the rights reserved here for use on the executive order lands are prior to appropriations made for the acquired lands while they were in private ownership. By leave of court, defendants filed a counterclaim and third-party complaint bringing in 78 additional parties and the State of Utah in an attempt to transform the action into a general adjudication of water rights. They relied on 43 U.S.C. 666 as giving consent for such a proceeding by counterclaim against the United States.

The United States moved to strike, or, in the alternative, to dismiss the counterclaim and third-party complaint. In support of this motion, it was argued (1) that since the water rights constituted property of the Goshute Tribe held in trust by the United States, the individual Indian defendants had no enforceable interest in the water rights and hence lacked standing to initiate a water adjudication; (2) that this was not a proper case for third-party practice under Rule 14, F.R.C.P., because the additional parties were not liable to defendants for all or part of the United States' claim for injunctive relief against defendants, (3) that the United States had not consented by the

provisions of 43 U.S.C. 666 to be sued by way of counterclaim, but only as a defendant in an original action, and (4) that the proposed action was not a general adjudication of water rights as contemplated by sec. 666.

By memorandum decision dated October 26, 1962, United States District Judge A. Sherman Christenson granted the Government's motion. The decision upheld several of the contentions made by the United States and stated, in part, that in form the suit did not involve rights to the use of water of "a river system or other source" but only rights to the use of water arising in a particular area; that in substance it was not a suit for a general adjudication but was brought by parties who had no right to maintain or initiate a general adjudication suit, who had no independent title or right to the use of the water, and who obviously had no interest in determining priorities among themselves and other beneficiaries, but were interested only in preventing water in which they claim a beneficial interest from being conveyed off the reservation.

The Court further stated that, as the suit did not fall within the spirit, purpose, letter or form of Section 666(a), it was not one to which the United States had consented to be subjected. The Court said that it did not necessarily agree with the Government's view that even though the Government might be named the defendant in an original suit for a general adjudication if Section 666(a) applied, it could not be compelled to defend a counterclaim for the same relief. The Court added, however, that it seemed apparent that a counterclaim against the Government without its consent would at least be as unauthorized as an initial complaint against it for the adjudication of its water rights if that complaint did not come within the scope of Section 666. The Court concluded that, whether by original complaint, counterclaim or third party claim, there was no basis in the defendants' allegations for a suit for the adjudication of rights to the use of water of a river system or other source for the purposes of Section 666.

Since the case is once again one only for injunctive relief against defendants' continued interference, and since all pertinent facts have been stipulated, it will be, in the near future, submitted on written briefs. By pre-trial order the Court has specified the contested issues of law to be: (A) Do defendants have requisite standing to question in resisting the government's claim for injunctive relief the authority of the Secretary of the Interior and his subordinates to divert water from the reservation to the purchased lands? (B) Did the treaty of 1863 vest any rights in said Indian tribe to waters arising on the reservation created by executive order of 1914? (C) May the agents of the United States lawfully divert waters arising on said reservation for use outside of the geographical limits thereof, and specifically for use on lands purchased? (D) Do these defendants have the right to forcibly interfere with personnel of the Bureau of Indian Affairs who are diverting the water? (E) Should the court in the exercise of its equitable powers and with due regard to the principles of equity restrain and enjoin defendants from obstructing or preventing by force or otherwise the agents of the Bureau of Indian Affairs from so diverting

said water or cleaning the ditch for such purpose?

It is the Government's position (1) that lack of authority in plaintiff's agents is not available as a defense against the suit to enjoin forcible interference with those agents, (2) that since the land and water rights in question are tribal property and defendants have no interest therein except a communal interest as members of the tribe, defendants have no standing to claim as a defense that they were protecting the "reserved" water rights, and (3) the authority of the Government's agents to do the work in which they were stopped and to distribute water among the Goshute tribal land is not affected by what the relative priorities might be as between the water rights appurtenant to the reserved lands and the acquired lands.

Staff: United States Attorney William T. Thurman (D. Utah) and Arthur Ayers (Lands Division).

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS

Reminder: Bills of Particulars

In a recent tax evasion case a Bill of Particulars voluntarily supplied by the Government had described the method of proof as "bank deposits." The prosecutor had intended this to encompass the analysis of the bank deposits plus proof of the expenditure of undeposited income as is usually contemplated in cases using the bank deposits method of proof (e. g., Percifield v. United States, 241 F. 2d 225, 229, at fn. 7). The trial court, however, at first ruled against any evidence of any funds in the taxpayer's hands which did not go into his bank account. This blocked proof of expenditures of undeposited currency which was necessary to show the alleged understatement. After checking into the record of several bank deposits cases, the prosecutor was able to make and document a successful argument that the phrase "bank deposits," without more, encompassed an analysis of deposits plus expenditures.

This episode is noted in order to remind United States Attorneys to be sure to make their Bills of Particulars broad enough to encompass all ramifications of the theory of proof on which their case may rest. A proviso should be added to any proffer of particulars that the Government will bring any corroborative proof in addition to the proof offered under the main theory of prosecution.

CIVIL TAX MATTERS

State Court Decision

Priority of Liens; Government's Tax Lien Entitled to Priority Under State Law Over Claim of Materialman Which Had Judgment and Had Instituted Garnishment Action. Beaver Ready-Mix Concrete Co., Inc. v. Amundson (Circuit Court, Dade County, Wis.) 63-1 USTC ¶9103. Plaintiff, a materialman, instituted this garnishment action to recover a fund held by a finance company for the benefit of taxpayer, and the United States intervened. The Court ruled that, while certain monies paid by a municipality to taxpayer in connection with a public works contract might have been considered a trust fund under state law for the benefit of the materialman who supplied material in connection with the contract, there had been no tracing of such monies to the fund held by the finance company, and, thus, the Government's tax lien on the fund was entitled to priority over the materialman's judgment lien. The materialman had conceded that the tax lien was entitled to priority over the garnishment lien.

Staff: United States Attorney James B. Brennan; Assistant United States Attorney William J. Mulligan (E.D. Wis.); and John F. Beggan (Tax Division).

District Court Decisions

Statute of Limitations for Collection of Income Taxes After Assessment; Construction of Waiver of Statute of Limitations Contained in Offer in Compromise. United States v. Claude F. Morgan (S.D. Tex., 1962), 62-2 USTC ¶9826. Taxpayer submitted an offer in compromise of his liability for certain assessed taxes, which offer was rejected by the Internal Revenue Service. Five months after such rejection, taxpayer submitted another offer in compromise, which provided for the payment of a certain sum out of the proceeds of the sale of realty within six months after acceptance. The second offer was accepted by the Internal Revenue Service. However, taxpayer did not sell the involved property shortly after acceptance, as contemplated by the parties. The Internal Revenue Service terminated the accepted offer about two years after acceptance.

The offers in compromise contained similar language providing for the suspension of the period of limitations on collection of the assessed taxes:

> In making this offer, and as a part consideration thereof, . . . the proponent hereby expressly waives:
>
> * * * * * *
>
> 2. The benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised, and agrees to the suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending, or the period during which any installment remains unpaid, and for 1 year thereafter. (Our Emphasis.)

Two limitations problems were presented by this case. The first problem related to two assessments and arose out of the fact that the second offer was made five months after the rejection of the first offer. It is relevant to the limitations issue whether the foregoing quoted language of the offers in compromise is to be interpreted as suspending the statute only from (or during) the date of the making of the offer until one year after it was rejected or terminated (the suspension of the two offers thus running concurrently for about seven months), or as suspending the statute for a period of time equal to that elapsed from the making of the offers through one year after their rejection or termination (the periods of the suspension thus being cumulative). Under the first

interpretation, or "concurrent" interpretation of the compromise offer language, the statute would be suspended for less than six years, while under the second, or "cumulative" interpretation, the statute would be suspended for six years and three months. In order for the Government's suit to be timely as to these two assessments, it was necessary that the statute be suspended for at least six years and two months. However, the Court held that the language of the offers was not an agreement to extend the statutory period for a given number of days (the "cumulative" interpretation), but an agreement to suspend or interrupt the operation of the statute during an interval of time (the "concurrent" interpretation).

A second limitations problem related to two additional assessments, and involved an interpretation of the language of the offer which provided for the suspension of the statute for "the period during which any installment remains unpaid." Taxpayer contended that the statute began to run one year after the offer became payable (six months after acceptance), whereas the Government contended that the statute did not begin to run until one year after the accepted offer was terminated. The Government argued that the accepted offer remained unpaid within the language of the offer, until the Government made its election of remedy between the termination of the offer (proceeding under the original tax liability and enforcing the offer). The Court followed the Government's interpretation of the language of the compromise offer on this second issue.

Staff: United States Attorney Woodrow B. Seals; Assistant United States Attorney John H. Baumgarten (W.D. Tex.); and Lorence L. Bravenec (Tax Division).

Transferee Liability; Transferee of Taxpayer-Corporation's Assets Held Not Liable for Taxes; Determined That Transfer Was Bona Fide and Taxpayer Received Transferee's Stock of Substantial Value in Return; Trust-Fund Doctrine Held Inapplicable. United States v. Wrangell Fisheries, Inc., et al. (W.D. Wash., October 16, 1962), 62-2 USTC ¶ 9822. The Government commenced suit in 1958 against the taxpayer-corporation and successive transferees of taxpayer's assets to collect an outstanding balance of corporate income tax liability for 1947. Prior to and during a part of 1949 taxpayer's sole business activity consisted of a joint venture in Alaskan salmon fishing and canning in which taxpayer held fifty percent interest along with a partnership of several individuals which held the other fifty percent interest. In May of 1949 the joint venture was incorporated as the "Farwest Wrangell Co., Inc." and taxpayer transferred all of its business assets to the new corporation in return for 1,250 shares of stock therein. After the transfer, taxpayer's only remaining assets were the shares of stock and certain tax refund claims, and taxpayer ceased to do any active business.

The Government's contentions at trial were (1) that by the terms of the 1949 corporate resolution of the transferee (Farwest Wrangell) providing for the acquisition of taxpayer's assets the transferee agreed to assume "all liabilities" of the taxpayer "with respect to the joint venture," which would include the tax liabilities of taxpayer arising out of the joint venture operation, and (2) that the transfer of assets in return for stock of indeterminate value was in effect part of a mere reincorporation of taxpayer which called for imposition of the "trust fund doctrine" against the transferee for the outstanding tax liabilities of the taxpayer.

In applying the tests of transferee liability applicable to corporate-takeover situations as set forth in West Texas Refining & Development Co. v. Commissioner, 68 F.2d 77, 81 (C.A. 10, 1933), the Court found (1) that the language of the corporate resolution did not encompass an expressed or implied assumption of the taxpayer's tax liabilities, and (2) that the incorporation of the joint venture was something more than a mere reincorporation of the taxpayer since other parties were involved to a substantial degree. The Court held that the Government had failed to prove the liability of the transferee at law or in equity for the taxes involved, pointing out that the stock of Farwest Wrangell held by taxpayer was of substantial value and was not distributed by it to its shareholders pursuant to any scheme to divest the company of all assets, and that the Government had never filed tax liens nor proceeded against the stock held by taxpayer. (It is noted that by the time the Government commenced this action taxpayer was completely devoid of assets, the stock in question having been pledged in 1952 before the tax was assessed and subsequently seized and sold in 1954 under execution in satisfaction of a judgment against taxpayer in favor of a close corporation which effectively controlled the taxpayer-corporation.)

Judgment was entered in favor of the Government against the taxpayer-corporation, and the Government's complaint against the transferees was dismissed.

Staff: United States Attorney Brockman Adams; Assistant United States Attorney Payton Smith (W.D. Wash.); and John M. Youngquist (Tax Division).

* * *