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

July 12, 1963

United States
DEPARTMENT OF JUSTICE

Vol. 11 No. 13

UNITED STATES ATTORNEYS
BULLETIN

CHANGES IN FEDERAL RULES
ESPECIALLY AS TO ENTRY OF JUDGMENT

Attention is called to the fact that the amendments to the Federal Rules of Civil Procedure became effective July 1, 1963, and under Rule 86(e) they govern all pending cases unless otherwise ordered by the court.

Since it may change the running of time for appeal in some cases, attention is especially called to the new form of Rule 58, which requires entry of judgment as "set forth in a separate document," not a mere docket entry as before.

UNITED STATES ATTORNEYS BULLETIN

Vol. 11 July 12, 1963 No. 13

MONTHLY TOTALS

During the month of May, the totals in all categories of work decreased with the exception of pending criminal matters. Triable criminal cases showed a sizeable drop, but the reduction in civil cases was much less than during April. The reduction in the aggregate of cases and matters pending was only half as large as the reduction during April, and it will require much greater monthly reductions than this to make any inroads on the substantial increase in the pending workload over the past two fiscal years. The following analysis shows the number of items pending in each category as compared to the total of the previous month.

	April 30, 1963	May 31, 1963	
Triable Criminal	8,954	8,673	- 281
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,900	15,811	- 89
Total	24,854	24,484	- 370
All Criminal	10,491	10,281	- 210
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,706	18,601	- 105
Criminal Matters	12,607	12,690	+ 83
Civil Matters	14,497	14,416	- 81
Total Cases & Matters	56,301	55,988	- 313

In the eleventh month of the fiscal year the caseload showed an overall drop of 382 cases from the preceding month. As stated above, however, it will take much greater reductions than this before the pending caseload is reduced to any substantial degree. The gap between filings and terminations was reduced during May from 4.3 in April to 3.4 in May. Fewer civil cases than criminal cases were terminated. As civil cases comprise two-thirds of the pending caseload, it is this category of cases which needs a stepped-up rate of terminations rather than a decrease, as happened during May.

	First 11 Mos. F.Y. 1962	First 11 Mos. F.Y. 1963	Increase or Decrease Number	%
Filed				
Criminal	29,582	30,978	+1,396	+ 4.72
Civil	23,285	24,602	+1,317	+ 5.66
Total	52,867	55,580	+2,713	+ 5.13
Terminated				
Criminal	27,855	30,091	+2,236	+ 8.03
Civil	20,301	23,572	+3,271	+ 16.11
Total	48,156	53,663	+5,507	+ 11.44

	First 11 Mos. F.Y. 1962	First 11 Mos. F.Y. 1963	Increase or Decrease Number	%
Pending				
Criminal	9,976	10,218	+ 242	+ 2.43
Civil	23,345	23,334	- 11	- .05
Total	33,321	33,552	+ 231	+ .69

Fewer cases were filed and terminated in May than in the previous month. However, there were more cases terminated than filed, which is an encouraging trend. For the eleven months of fiscal 1963, terminations are up 11 per cent over the previous year.

	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
Jan.	2,864	2,351	5,215	2,897	2,413	5,310
Feb.	3,073	2,102	5,175	2,375	1,912	4,287
March	3,106	2,449	5,555	3,069	2,276	5,345
April	2,969	2,516	5,485	3,386	2,661	6,047
May	3,110	2,372	5,482	3,358	2,478	5,836

For the month of May, 1963, United States Attorneys reported collections of $3,229,469. This brings the total for the first eleven months of fiscal year 1963 to $37,411,043.* Compared with the first eleven months of the previous fiscal year this is a decrease of $2,649,061 or 7.08 per cent from the $40,060,104* collected during that period.

During May $7,409,828 was saved in 106 suits in which the government as defendant was sued for $10,296,724. 42 of them involving $3,374,254 were closed by compromises amounting to $871,080 and 27 of them involving $3,115,794 were closed by judgments amounting to $2,015,816. The remaining 28 suits involving $3,806,676 were won by the government. The total saved for the first eleven months of the current fiscal year aggregated $53,632,747 and is an increase of $976,062 over the $52,656,685 saved in the first eleven months of fiscal year 1962.

The cost of operating United States Attorneys' offices for the first eleven months of fiscal year 1963 amounted to $14,998,372 as compared to $13,447,757 for the first eleven months of the previous fiscal year.

* Adjusted to reflect deletion of collections made exclusively by IRS in California Southern from October, 1961 to December, 1962 which that district had erroneously reported by one district.

DISTRICTS IN CURRENT STATUS

As of May 31, 1963, the districts meeting standards of currency were:

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Ariz.	Colo.	Ill., N.	Ind., S.
Ala., S.	Ark., E.	Fla., N.	Ill., E.	Iowa, N.
Alaska	Ark., W.	Ga., S.	Ind., N.	Iowa, S.

MATTERS

Criminal

Ky., E.	Mont.	Okla., E.	Tenn., M.	Va., W.
Ky., W.	Neb.	Okla., W.	Tex., N.	W. Va., N.
La., W.	N.H.	Pa., M.	Tex., E.	W. Va., S.
Me.	N. Mex.	Pa., W.	Tex., S.	Wyo.
Md.	N.C., M.	P.R.	Tex., W.	C.Z.
Miss., N.	N.C., W.	R.I.	Utah	V.I.
Miss., S.	Okla., N.	S.C., E.	Vt.	

MATTERS

Civil

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

* * *

ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

MERGERS

Appeal from Denial of Motion for Preliminary Injunction. United States v. FMC Corporation, et al. (N.D. Calif. S.D.). On June 24 and 25, 1963, the Government's motion for preliminary injunction to enjoin the proposed acquisition by the FMC Corporation of the operating assets of the American Viscose Corporation came on for hearing before District Court Judge Harris in San Francisco. The acquisition was to be consummated on June 28, 1963 unless enjoined. The complaint, filed on June 5, 1963, had alleged that the acquisition would result in a substantial lessening of competition in the manufacture and sale of packaging machinery, carbon bisulfide, caustic soda and various other industrial chemicals and in rayon.

The hearing was conducted, in accordance with local court rules, on the basis of affidavits and oral argument. In support of the motion the Government submitted affidavits from several packaging machinery manufacturers describing in detail how the acquisition, if consummated, would give FMC a decisive competitive advantage over them in the sale of packaging machinery for use with flexible films. FMC is one of the largest manufacturers in the country of this type of machinery and American Viscose is the second largest domestic producer of cellophane. The Government also submitted affidavits showing that an improved, more economical process for the production of carbon bisulfide had recently been developed; that its introduction into the United States would be rendered economically impracticable if the acquisition were made; that, until the acquisition plans of FMC were announced, a new firm was, in fact, considering entry into the business of producing carbon bisulfide with the new process; and that the plans of this firm have been suspended because the acquisition, if completed, would severely cut into the potential market available to it. American Viscose is the largest customer for carbon bisulfide in the United States and FMC is the second largest producer of this chemical. An affidavit of one of FMC's largest competitors in the sale of carbon bisulfide and caustic soda described the market upheaval, for the sale of these two chemicals, which would result from the acquisition. Other affidavits submitted in support of the motion included the staff economist's affidavit and a staff affidavit to which was attached a considerable number of documents from defendant FMC's files reciting actual instances of the use of reciprocity power by FMC to increase sales to its suppliers. These examples also included documents showing how FMC would use the power of American Viscose's purchasing to further its reciprocity program.

Defendants introduced affidavits by FMC and American Viscose officials, the import of which was to point to the business motives and justification for the transaction and to deny the substantiality of any adverse impact on competition suggested by the Government's evidence. Defendants also submitted affidavits by packaging machinery manufacturers claiming they would not be injured by the acquisition. On the morning of June 27th Judge Harris denied the Government's motion, finding that any anticompetitive consequences which might result were not substantial and could be found only in areas incidental to the principal business of defendants and their purpose in entering into the proposed transaction. Judge Harris further found that

the acquisition was conglomerate in nature because the parties did not compete with each other and that divestiture would be adequate relief should plaintiff prevail on the merits. He also held that defendants would be irreparably damaged by delay in consummation of their plans.

The District Court denied plaintiff's request for a stay pending appeal, and notice of appeal from denial of the Government's motion and a motion for injunction pending appeal were immediately filed in the Court of Appeals for the Ninth Circuit. Circuit Judges Duniway, Merrill and Browning were assigned to hear the Government's motion during the afternoon of the 27th of June and after argument was heard from both plaintiff and defendants the Court of Appeals enjoined consummation of the agreement, scheduled for the next day, pending final adjudication by the Court of Appeals of the merits of the Government's appeal. Hearing on the appeal has been set for July 29th.

Staff: Lewis Bernstein, Lyle L. Jones, Nicolaus Bruns, Jr., Carl D. Lobell, Richard J. Boyle and Richard M. Duke (Antitrust Division)

SHERMAN ACT

Price Fixing; Restrictive Practices; Library Shelves; Indictment and Complaint Filed Under Section 1. United States v. Sperry Rand Corporation, et al. (N.D. Ill.). On June 20, 1963, a grand jury in Chicago returned an indictment charging that seven corporations and five individuals beginning in 1954 and continuing until November 1960, were engaged in a combination and conspiracy to allocate markets for metal library shelves in violation of Section 1 of the Sherman Act. The defendants are: Sperry Rand Corporation and H. J. Syren, formerly sales manager of the Library Bureau Department of that corporation; Art Metal, Inc.; The Globe-Wernicke Co.; W. R. Ames Company and Cloyd Gray, its former president; Estey Corporation and F. Philip Tucker, its president; Hamilton Manufacturing Company and R. G. Halvorsen, its executive vice president; Virginia Metal Products, Inc. and N. C. Gianakos, its former vice president. The indictment alleges that library shelves are purchased primarily by public and private libraries, universities, and state and municipal bodies, and that the total sales of this product in the United States were in excess of $10,000,000 annually.

According to the indictment, defendants agreed to (a) allocate among themselves sales of library shelving, (b) refrain from price competition with each other, and (c) submit noncompetitive and rigged bids and price quotations to prospective purchasers of library shelves. The indictment further charges that defendants met several times each year in Chicago, New York, Washington, Buffalo, and Jamestown, New York, among other places. It alleges that some of the jobs allocated were McCormick Theological Seminary; Texas Supreme Court Library; College of Holy Cross; Yale Rare Book Library; and Miami Beach Public Library.

The civil action was filed the same day against the Sperry Rand Corporation; Art Metal, Inc.; Globe-Wernicke Industries, Inc. (successor to The Globe-Wernicke Co.); and Estey Corporation. The complaint

alleges that even though the conspiracy ended by 1961, there is danger that it may be resumed, and that the defendants terminated it only after three of them had been under a grand jury investigation for almost a year for a combination and conspiracy to fix prices of metal office furniture.

The injunctive relief sought is not limited to library shelves but embraces library or business furniture, machines, systems, or equipment, and seeks an injunction prohibiting the resumption of the activities which were alleged to be illegal.

Staff: Earl A. Jinkinson, Francis C. Hoyt and John J. Lannon. (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

SUPREME COURT

FEDERAL TORT CLAIMS ACT

Federal Prisoners May Sue United States Under Tort Claims Act for Injuries Suffered During Confinement. United States v. Muniz & Winston, (Sup. Ct. June 17, 1963). Henry Winston and Carlos Muniz filed suit under the Tort Claims Act for personal injuries suffered while they were federal prisoners. Winston alleged malpractice by prison doctors. Muniz alleged failure of prison officials to protect him from being beaten by other prisoners. The district court dismissed on the ground that such suits are not authorized by the Act. The Court of Appeals for the Second Circuit, en banc, reversed. On the Government's petition for certiorari, the Supreme Court sustained the Court of Appeals, holding that no exemption for federal prisoners can be read into the Act.

The Court found that the plain language of the Act and its legislative history make it clear that Congress intended to waive sovereign immunity in cases arising from prisoners' claims. It rejected the Government's contention that prisoners' claims are analogous to claims by servicemen for injuries suffered on active duty; Feres v. United States, 340 U.S. 135. However, the validity of Feres, as applied to military claims, was expressly continued. The Court also rejected the argument that availability of a tort remedy would have such an obvious adverse impact upon prison discipline that Congress could not have intended to permit prisoner suits. It noted that the Government can rely upon the discretionary function exception to the Act and expressed confidence that district judges would be able to dispose of complaints intelligently without undue harm to the prison system.

Staff: J. William Doolittle, (Office of the Solicitor General) and Howard E. Shapiro (Civil Division).

COURT OF APPEALS

ADMINISTRATIVE LAW

Airline Must Exhaust Administrative Remedies Before Civil Aeronautics Board Prior to Instituting Suit for Declaratory Relief. Alaska Airlines, Inc. v. Pan American World Airways (C.A.D.C., June 20, 1963). On the basis of a staff study of the pattern of air service between Alaska and the Pacific Northwest, the Civil Aeronautics Board tentatively concluded that the certificate held by Pan American with respect to that route should be terminated. The Board then issued an order instituting a full scale investigation of the air system for the purpose of determining whether the certificates held by Pan American and the three other carriers servicing Alaska from the Pacific Northwest should be terminated, amended or suspended. Immediately thereafter, Pan American instituted this action for a declaratory judgment that the Civil Aeronautics Board lacked Statutory authority to terminate its route. The

Government moved to dismiss on the ground that Pan American had not exhausted its administrative remedies. The district court held that exhaustion was not required in this case and, on the merits, determined that the Board lacked statutory authority to terminate Pan American's certificate.

The Court of Appeals reversed. It held that the action was premature because of Pan American's failure to exhaust its administrative remedies. The Court based its holding on the ground that there were several actions -- e.g., suspension or amendment -- that the Civil Aeronautics Board could take at the conclusion of its investigation, which concededly would be legal, and that there was, therefore, no warrant for judicial intervention in the orderly administrative process on the basis of speculation that the Board would take the one action (termination) which might be illegal.

Staff: Edward A. Groobert (Civil Division).

AGRICULTURAL MARKETING AGREEMENT ACT

Secretary of Agriculture May Regulate Distribution of Milk by "Producer-Handlers." Ezra Taft Benson v. L. B. Vance, (C.A. 5, June 19, 1963). The Court of Appeals -- following the decision of the Third Circuit in Ideal Farms, Inc., v. Benson, 288 F. 2d 608, certiorari denied, 372 U.S. 965 -- reversed the district court and ruled that a dairy farmer who markets his own milk, i.e., a "producer-handler," may properly be subjected to regulation under the Agricultural Marketing Agreement Act on the basis of his distribution for sale of the milk which he produces. The decision reaffirms that a handler may not escape regulation merely because he is also operating in the capacity of a producer.

Staff: Neil Brooks (Department of Agriculture) and
Alan S. Rosenthal (Civil Division).

FEDERAL CIVIL SERVICE

Delay of Four Years in Instituting Suit Held to Constitute Laches and Bar Reinstatement Action by Demoted Federal Employee. Zuckert v. Peterson, (C.A.D.C., June 3, 1963). Appellee brought suit four years after his demotion by the Air Force, for reinstatement to his former position. The district court granted summary judgment to appellee on the basis of various alleged procedural irregularities relating to the demotion. The Court of Appeals, relying upon its prior decision in Jones v. Summerfield, 265 F. 2d 124, reversed. It held that the claim "was plainly barred by laches."

Staff: Barbara W. Deutsch (Civil Division).

Reassignment of Specific Tasks Held Not to Constitute "Transfer of Function" Under Veterans Preference Act (5 U.S.C. 861) so as to Require

Transfer of Employees Performing Tasks. Robert S. McNamara v. Joseph W. Dick, (C.A.D.C., May 16, 1963). In this case a challenge was made by a group of civilian employees of the Department of Navy to a reorganization of job assignments in the naval shipyards. The Navy, in reorganizing its vessel repair and maintenance facilities, had reassigned tasks previously performed by a class of employees rated as "Analyst and Schedulers" mainly to employees holding the higher paid rating of "Planner and Estimators." The"Analyst and Schedulers" rating was abolished and those employees were permitted to take examinations qualifying them for the increased number of "Planner and Estimator" positions. The remaining "Analyst and Schedulers" were, pursuant to "reduction-in-force" procedures, reassigned to other positions in the shipyard necessitating the least grade reduction. The civilian employees adversly affected claimed that their job retention rights secured to them by the Veterans Preference Act had been violated. Specifically, they contended that the reorganization had resulted in a "transfer of functions" and that under the Act (5 U.S.C. 861) and the pertinent administrative regulations (5 C.F.R. 20) they were entitled to be transferred automatically to the "Planner and Estimators" rating along with their previously assigned tasks prior to the application of the "reduction-in-force" procedures. The district court agreed with their contention.

The Court of Appeals reversed. It agreed with the Government that the administrative regulations limiting the "transfer of function" provision to the transfer of an agency function as opposed to the transfer of the individual tasks of particular employees within that agency was a reasonable effectuation of the Veterans Preference Act. And, it held that in the instant case there had been only a reassignment of tasks within one function. Additionally, the Court noted that "reduction-in-force" precedures in no wise require the issuance of promotions to adversly affected employees. This decision will allow agencies to continue to reassign tasks to that category of employees considered most capable without requiring a similar shift of the employees, which would often serve to frustrate the very purpose of the reorganization.

Staff: Edward Berlin (Civil Division).

FEDERAL RULES

Motions for Stays Pending Appeal Denied by Court of Appeals. Plus Poultry, Inc. v. United States: Tyson's Poultry, Inc. v. United States, (C.A. 8, June 10, 1963). The United States brought actions to enforce subpoenas duces tecum issued by the Secretary of Agriculture to two Arkansas poultry processors. The subpoenas were issued as the first step in an investigation of the poultry industry following numerous complaints by small poultry growers of illegal and ruinous practices in the industry. The poultry companies refused to comply with the subpoenas, claiming that they were not within the coverage of the Packers and Stockyards Act. The district court rejected the companies' defenses and ordered them to comply. They then applied to the Court of Appeals for a stay of the district court's order pending

their appeal. The Government opposed the application on the grounds that: (1) the small poultry growers were in dire financial straits and there was an urgent need to proceed with the investigation: (2) appellants had no substantial likelihood of prevailing on the merits, and (3) an examination of appellants' books and records would result in no irreparable injury to them. The Court of appeals agreed that appellants failed to show any substantial likelihood of success on appeal and would suffer no injury beyond mere inconvenience if they complied with the subpoenas. Therefore, the Court held that the public interest in maintaining the small poultry growers outweighed any interest of appellants and denied their motions for a stay.

NOTE: We have been informed that the opinion will not be published. However, the district court opinion which is to be published is of assistance in detailing the particular factual setting and, if a need should arise, a copy of the court of appeals' opinion can be secured through regular channels.

Staff: Terence N. Doyle (Civil Division).

FEDERAL TORT CLAIMS ACT

Deviation from Geographically Authorized Area of Employment, and Conduct Not Within Authorized Type of Activity, Takes Employees Outside Scope of Employment for purposes of Respondeat Superior. Buck Witt v. United States, (C.A. 9, June 26, 1963). Plaintiff owned a mink farm in Oregon, and on May 8, 1961, an United States Army airplane flew over the farm at negligently low altitudes, thereby causing the plaintiff's mink to panic and destroy themselves. The plane was manned by an Army instructor pilot and an Army co-pilot who was in need of further training. These Army personnel had been instructed to fly some cargo from their base in Colorado to an airfield in the State of Washington, and then to return to Colorado. After delivering their cargo in Washington, however, and instead of returning directly to Colorado, they flew down into Oregon for a short visit with the pilot's parents who lived near the plaintiff's farm. While visiting in Oregon, they engaged in the negligent flights causing the damage, allegedly for the purpose of giving the co-pilot additional training.

The district court awarded judgment for the Government on the ground that the Army personnel were not acting within the scope of their employment at the time of the injury. The Ninth Circuit affirmed, accepting the Government's argument that the pilot and co-pilot were outside the scope of their employment in two respects: (1) they had left the geographically authorized area of employment by deviating from the prescribed route: (2) they were engaged in unauthorized activity, for, although flight training was at other times a part of their duties, in the instant case they had been authorized only to fly a load of cargo, not to stop over enroute and engage in such training.

Staff: John C. Eldridge (Civil Division).

Res Ipsa Loquitur Inapplicable Where Plaintiff Unable to Show That It Was More "Probable" Than Not Defendant's Negligence Caused Injury. United States v. Ridolfi, (C.A. 2, June 14, 1963). Plaintiff brought this action under the Tort Claims Act to recover for injuries sustained while he was a patient at a Veterans Administration Hospital. The district court found that plaintiff

suffered an unanticipated grand-mal seizure while at the hospital, that the injuries occurred during the seizure, and that it was equally possible that the injuries resulted from the Government's negligence, from an unavoidable accident, or from a nonactionable battery (28 U.S.C. 2680 (h)). The Court then held the United States liable by invoking the doctrine of res ipsa loquitur, on the theory that that rule is applicable whenever an inference of negligence is possible.

The Court of Appeals reversed. Addressing itself to controlling New York law (the place where the alleged negligent act occurred), it held that the doctrine of "res ipsa loquitur" is not called into play unless there is evidence "which shows at least probability that a particular accident could not have occurred without legal wrong by the defendant." The Court noted that the doctrine, when applicable, "merely substitutes for proof of specific negligent conduct an inference of negligence arising out of the happening of an accident which, in itself, is sufficient to make out a prima facie case for the plaintiff." The burden then shifts to the defendant to produce evidence demonstrating that the accident was not due to his fault. But the plaintiff still has the burden of proof to convince the trier of fact that, on the whole case, the accident was the result of the defendant's negligence. Accordingly, where, as here, the evidence indicated that it was equally possible that the injury resulted from a non-negligent cause, res ipsa loquitur was inapplicable.

Staff: Edward A. Groobert (Civil Division).

MERCHANT MARINE ACT

Hearing Not Required Prior to Administrative Determination That Subsidized Foreign Commerce Carrier Had Terminated Its Affiliations With Domestic Carriers. Seatrain Lines, Inc. v. Luther H. Hodges (C.A.D.C. June 6, 1963.) In January 1957 the Waterman Steamship Corporation, then an unsubsidized ocean carrier in foreign commerce, filed an application with the Maritime Subsidy Board for an operational-differential subsidy contract covering certain of its operations on foreign trade routes. Thereafter, it applied to the Board for written permission under Section 805(a) of the Merchant Marine Act, 46 U.S.C. 1223 (a), to continue the operations of its two domestic affiliates. After a hearing at which Seatrain Lines, a competitor of Waterman's domestic affiliates, was permitted to intervene, permission was granted subject to restrictions intended to protect such competitors as Seatrain from the possibility that Waterman might use any of the subsidy in aid of its domestic affiliates. On June 8, 1961, Waterman without notice to Seatrain filed with the Board an outline of intercorporate changes described as "Plan for Termination of Affiliation" directed at divorcing or removing affiliation between Waterman and its domestic subsidiaries, which plan was ultimately approved. Seatrain had in the meanwhile intervened in a suit instituted by another domestic carrier challenging in part the propriety of the Board's approval of the termination plan without first holding a full hearing. The district court granted the defendant's motion for summary judgment.

The Court of Appeals affirmed. It held that the Board need hold a hearing only where it is requested to exercise its statutory discretion, to waive the bar of Section 805 (a), and to grant a foreign commerce carrier a subsidy notwithstanding its affiliation with a domestic carrier. "Because of the possible impact on other domestic carriers they must be heard before the bar of Section 805 (a) is waived. But if the foreign carrier has no affiliate in domestic trade, no permission, and therefore no hearing, is called for. Similarly if a disabling affiliation is removed by a carrier which had been granted a subsidy subject to divesting conditions, no notice or hearing is required." In each of the latter instances the subsidized foreign carrier must determine at its own risk whether or not its affiliations with other carriers and the use of assets of the subsidized operations bring it within the prohibitions of Section 805(a). If it is incorrect in this determination it is subject to prosecution under 46 U.S.C. 1223a, 1228. So here Waterman, without statutory compulsion, merely requested an advisory opinion from the Board.

In short, the decision clarifies that a hearing is required under the Merchant Marine Act only with respect to "an application to continue domestic operations while receiving subsidy as a foreign commerce carrier, but not on the issue whether a subsidized carrier has a domestic affiliate."

Staff: Carl C. Davis and John G. Laughlin (Civil Division).

SOCIAL SECURITY ACT

Services Performed by Landlord for Tenants Held Sufficient to Classify Income as "Rentals from Real Estate." Anna Conklin v. Celebrezze (C.A. 7, June 20, 1963). This was an action for old-age insurance benefits based on earnings from self-employment. In order for the claimant to qualify for benefits, her annual net earnings from self-employment income had to be at least $400. 42 U.S.C. 411(b) (2). Here the claimant was entitled to benefits only if the income she received from two apartments and a room of her private dwelling which she had rented constituted "rentals from real estate" received in the course of a trade or business as a real estate dealer. The Secretary concluded that the claimant had not rendered sufficient services to her apartment tenants to justify the inclusion of those rentals with the result that she received less than the requisite $400 in self-employment income annually. The district court had upheld the Secretary's rejection of benefits.

The Court of Appeals reversed. The Court -- noting that the claimant performed regular managerial services for her apartment tenants -- held that the Secretary's conclusion that her activities were insufficient was not supported by substantial evidence.

Staff: United States Attorney N.S. Heffernan; Assistant United States Attorney Bronson C. LaFollette (W.D. Wisc.).

Wages Received by Wife from Closely Held Corporation Imputed to Husband Where Wife Not in Bona-fide Employee Relationship. Jasper E. Minton v. Celebrezze, (C.A. 7, June 13, 1963). For several years prior to 1951, Jasper Minton operated an automobile dealership and other business interests as a sole proprietorship. In that year he incorporated, and substantially all of the stock was issued to him and his wife. In 1951 and 1952 he served as president and general manager of the corporation, earning in excess of $5,000 each year. During those years his wife was not an employee of the corporation. In January 1953, the corporation, by resolution, reduced Jasper Minton's salary to $75 per month and Mrs. Minton was appointed comptroller of the corporation at a similar salary. Thereafter, each applied for Social Security benefits alleging that they would not have earnings in excess of the amount permitted by the Act, then $75 per month. When, in 1955, the Act was amended to permit up to $1200 per year, the appellants' salaries were correspondingly increased and remained at $100 per month until Jasper Minton reached 72 years of age and the statutory earnings limitation no longer applied. His earnings in the following years substantially increased.

In January 1953, appellants' were awarded old age insurance benefits based upon Jasper Minton's wage record. Subsequently the Bureau determined that Minton had received, between 1953 and 1957, earnings in excess of that permitted under the Act, and the appellants' were notified that the overpayments they had received ($7,723) would be withheld from future benefits. This determination was ultimately approved by the Secretary and the appellants were unsuccessful in their attempt to have the district court set aside the overpayment deduction. The Court of Appeals -- concluding that the record contained substantial evidence to support the Secretary's finding that Mrs. Minton was not in a bona-fide employment relationship with the corporation -- affirmed. It noted that "the circumstances surrounding the payments made to her by the corporation warrant the inference drawn by the Secretary that the 'employment' was no more than a fiction designedly utilized to channel additional earnings to Minton in excess of the maximum permitted." The Court held that in such a factual situation it was appropriate for the Secretary to disregard the wife's employment relationship, to impute her "earnings" to her husband, and, withhold the overpayments mistakenly paid.

Staff: Sherman L. Cohn and Lawrence R. Schneider (Civil Division).

VETERANS PREFERENCE ACT

Incumbent of Confidential or Policy-making Position May Be Removed by Agency Head for Lack of Personal Suitability. Leonard v. Douglas, (C.A.D.C. June 26, 1963). A veteran's preference eligible employed as First Assistant to the Assistant Attorney General in charge of the Civil Division, Department of Justice, was removed by the Attorney General on October 27, 1961. The veteran had been furnished a statement of proposed

adverse action, had answered the reasons set forth therein, and had been given a personal hearing by the Attorney General. The reasons stated for his removal were that the position of First Assistant is a confidential or policy making post whose incumbent must be suitable to his superiors and a person considered by them best able to determine the policies of the department, but that this relationship did not exist between the veteran and the Assistant Attorney General to whom he was then First Assistant. Upon removal, the veteran instituted suit for reinstatement. He alleged that his removal was invalid under § 14 of the Veterans Preference Act, 5 U.S.C. 863, because it was not for "such cause as will promote the efficiency of the service." Pending the veteran's appeal to the Civil Service Commission under the Act, his suit was stayed. The Commission sustained the removal. Thereafter, the district court granted summary judgment in favor of the Attorney General and the Civil Service Commissioners, who had been joined as parties.

On appeal by the veteran, the judgment of the district court was affirmed. The Court of Appeals held that the relationship between the Assistant Attorney General and his First Assistant requires personal trust and confidence; that the First Assistant may at any time be called upon, as Acting Assistant Attorney General, to exercise policy responsibilities to and with the Attorney General; and that cause for removal which will promote the efficiency of the service must be measured by the particular service involved as well as by professional competence. Considering the nature of the position, removal for the reasons stated was found to be consistent with the language of the Act as construed by the Attorney General and by the Civil Service Commission.

Staff: Donald B. McGuineas, William P. Arnold, and Howard E. Shapiro (Civil Division).

DISTRICT COURT DECISION

CONTRACTS

Surplus Property; Bidder's Experience; Risk of Loss After Default. United States v. Stephen Hoffman (E.D. N.Y., June 24, 1963). Defendant was high bidder on some surplus Air Force jackets but refused to take or pay for them because of their alleged bad condition. The Court followed the numerous precedents upholding the "as is, where is" clause. Two rather novel features of the opinion are: (1) The Court gave weight to the fact that the defendant was an experienced lawyer and businessman, and (2) Some of the jackets, left in crates out of doors between the sale to defendant and the resale, deteriorated so badly that the later purchaser was excused from accepting and paying for them. Defendant was nevertheless required to pay for them, as the risk of loss and damage rested on him after his default.

Staff: United States Attorney Joseph P. Hoey, Assistant United States Attorney Martin R. Pollner (E.D. N.Y.); Robert Mandel (Civil Division).

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Racial Discrimination in Education of Military Dependents; Impact Area Schools. United States v. County School Board of Prince George County, et al. (E.D. Va.) The United States filed a complaint against the County School Board of Prince George County, Virginia, the School Superintendent, the Virginia Pupil Placement Board and the Commonwealth of Virginia alleging that the state and local authorities were assigning dependents of federal personnel stationed or employed at Fort Lee, Virginia, to particular public schools in the County upon the basis of their race. The complaint alleged that this violated the 14th Amendment and more specifically that it violated a written assurance given by the County School Board in applying for federal aid for school construction under Public Law 815 that the schools of the County would be available to the federally connected children in accordance with state law. The case was tried on May 14 and 15, 1963. A number of Negro officers and enlisted men stationed at Fort Lee testified that their children had been assigned to all-Negro schools located in Petersburg, Virginia, and that the defendants had refused to assign their children as they did the children of white personnel to nearby schools which had been constructed with the aid of federal funds.

On June 24, 1963, the District Court rendered judgment for the Government. The Court rejected a contention by the defendants that the United States lacked standing to sue. It held that the assurance given by the School Board in applying for federal funds was a contractual promise, that the assurance bound the School Board to assign the federally connected children in accordance with state law, that the law of Virginia did not at the present time permit racial discrimination, and that the assurance had therefore been breached by the assignment of the federally connected children to schools upon the basis of their race. The Court rejected the broader contention of the United States that the conduct of the defendants was actionable as an unconstitutional burden upon the exercise of the war power. A permanent injunction was entered restraining the County School Board and the State Pupil Placement Board from further violating the terms of the assurance.

Staff: United States Attorney Claude V. Spratley, Jr. (E.D. Va.); St. John Barrett, John Ossea, and Alan G. Marer, Attorneys, Civil Rights Division.

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

COUNTERFEITING

Similitude of Faint Reproduction in Reverse of One Side of Bill. United States v. Charles Smith (C.A. 4, May 21, 1963). The Court of Appeals held that the possession of two slips of paper each bearing the faint reproduction in reverse of one side of a ten dollar Federal Reserve note, the back of each slip being blank, and the two slips not being joined together so as to give the appearance of a single bill, does not constitute the possession of a "falsely made, forged, counterfeited or altered obligation or other security of the United States" in violation of 18 U.S.C. 472. The defendant used the papers as part of a confidence or "flim-flam" scheme by which he would attempt to convince victims that he could reproduce genuine currency. Although this use provided the element of fraud, the Court held that the Government was required to prove that the papers were in fact "counterfeit" obligations, and found that they were too crude to mislead, and hence could not be deemed "counterfeit". It should be noted that the holding applies only to the terms of Section 472 and would not bar prosecution of similar activities under the sixth paragraph of 18 U.S.C. 474, which prohibits the making of an "impression in the likeness of any . . . obligation or other security [of the United States], or any part thereof." (Emphasis added).

AUTOMOBILE INFORMATION DISCLOSURE ACT
15 U.S.C. 1231 et seq.

Removal of Labels. Where the manufacturer or dealer retains the title to certain new cars and devotes the cars to business use as "demonstration" or "company" cars before selling them as such, the title to such cars could be considered as being vested in the manufacturer or dealer as the "ultimate purchaser", and the manufacturer's labels properly removed from such cars. However, in view of several recent situations involving the removal of labels from these cars, the Division is of the opinion that so long as a car may subsequently be sold with a new car warranty, the label should not be removed, notwithstanding use as a "demonstrator" or "company" car. If the dealer intends to sell such cars with new car warranties, he should keep the labels affixed.

A recent case from the District of Vermont (United States v. T-P Motors, Inc., Criminal No. 6351, Joseph F. Radigan, United States Attorney) involved a new car dealer wilfully removing the labels from two new cars. The evidence in the case indicated that no labels were on the cars when they were sold and delivered to buyers. There was a strong showing of misleading pricing, overcharging on accessories, and inflated trade-in prices on old cars.

In attempting to prove that the labels were on the cars when delivered from the manufacturer to the dealer, the United States Attorney relied on the district manager from the manufacturing corporation. The district manager testified that it was the policy and practice of the manufacturer to put price labels on all new cars, that it was his understanding of the law that they were required to do so, and to the best of his knowledge and from his observation they were on all new cars produced by his company.

The judge ruled that this was insufficient proof that labels were affixed to the particular cars in question. He reasoned that, in order to go to the jury on a charge of wilfully removing labels, logically there had to be more direct proof that there were ever labels on the particular cars in question. The Government could not sustain this burden and the case was dismissed.

In order to meet the burden of proof in a case in which this issue is foreseen, it may be necessary to obtain the testimony of someone more closely connected with the affixing of labels than a district manager. Since section 1232 of the act requires the manufacturer to affix the label to a window and clearly endorse the prescribed information, it may be necessary to obtain verification from a representative of the plant at which the label was affixed.

If the anticipated defense involves assertions that the car was delivered without the label being affixed, it may be necessary to obtain testimony or documents from the contracting carriers relating to the delivery of the car to the dealer in good condition. This could include any signed receipts from the dealer to the carrier attesting to receipt of the car in good condition.

The Criminal Division would appreciate receiving any information which may come to the attention of the United States Attorneys concerning these matters.

WITNESS

Impeachment of Veracity; By Rebuttal Witnesses if Defendant Takes Stand. United States v. Johnny Walker (C.A. 6, February 4, 1963) 313 F. 2d 236. Defendant was convicted on four counts of transporting in interstate commerce a falsely made security, with fraudulent intent, in violation of 18 U.S.C. 2314. The Government's rebuttal witnesses (two police officers), after testifying that they had known the defendant in the community, were asked "would you believe the witness under oath"? Over objection, the court permitted the witnesses to reply that they would not. On appeal, it was contended that this was an improper question inasmuch as no foundation had been laid for such knowledge on the part of the officers and that when defendant took the stand in his own behalf, the Government, for impeachment purposes, was limited to cross-examination and proof of prior felony conviction. The Court of Appeals for the Eighth

Circuit, recognizing that there is a conflict of authority regarding the admissibility of the question, concluded that the majority view supported admissibility and deemed it advisable to follow the majority rule.

After citing the established rule that the general character of the defendant in his community cannot be attacked unless evidence as to his good character is first introduced, the Court drew a distinction between the general character of the defendant and his reputation in the community for truth and veracity and stated that defendant's reputation for truth and veracity is put into issue once he takes the stand and testifies in his own behalf. The Court held that when the defendant took the stand, thereby shedding his cloak of immunity, he could be impeached in the same manner as any other witness, including by testimony of witnesses as to the truth and veracity of the defendant.

Certiorari was denied by the Supreme Court on June 10, 1963.

ASSAULT OF FEDERAL OFFICER

Prosecutions under 18 U.S.C. 111. In a recent case brought to the Department's attention an investigator of the Alcohol and Tobacco Tax Division, Treasury Department, was assaulted and robbed during the performance of his official duties. The assault was in no way related to the investigator's work, and there was no evidence to show that the persons committing the assault had knowledge of the victim's official position. In the absence of some evidence as to knowledge, the United States Attorney was advised to defer prosecution to state authorities.

There is a conflict of authority as to whether the Government, in order to sustain a conviction under 18 U.S.C. 111, need prove that the assailant knew the victim to be a Federal officer. Some cases have held that pre-existing knowledge was an essential fact to conviction. Carter v. United States, 231 F. 2d 232 (C.A. 5, 1956), cert. den., 351 U. S. 984; Hall v. United States, 235 F. 2d 248 (C.A. 5, 1956). However, the most recent case in point, Bennett v. United States, 285 F. 2d 567 (C.A. 5, 1960), cert. den. 366 U.S. 911, held that the statute does not require the doer of the act to have knowledge that the person assaulted is a Federal officer.

In view of this split of authority, Section 111 should not be used in cases where knowledge cannot be attributed to the subject. By this we do not mean that the statute must be limited to situations where the officer has clearly identified himself prior to the assault or interference. Rather, if there is some evidence showing that the subject was aware of the officer's identity, then prosecution is warranted. Otherwise, the proper course is to defer to state authorities for appropriate prosecution.

BANKRUPTCY

Transfer of Property in Contemplation of Bankruptcy. Palmer v. United States (C.A. 9, May 29, 1963). Defendants were found guilty of knowingly and fraudulently transferring inventory of their firm in contemplation of the corporation's bankruptcy and of concealing assets after an involuntary petition in bankruptcy was filed. At the trial, the Government in attempting to establish contemplation of bankruptcy proved that the bankruptcy was preceded by a history of financial difficulty, attachments of personal property, constant demands of creditors, cessation of the keeping of financial records and return of merchandise to suppliers.

The principal argument raised on appeal was that while the evidence showed that the financial condition of the corporation was perilous, it at most showed contemplation of insolvency rather than contemplation of bankruptcy; citing In re Hirsch, 96 Fed. 468 (W.D. Tenn. 1899).

The Government argued that where officers of a corporation heavily in debt, apparently insolvent and evidently reaching a crisis in their affairs deliberately transfer a considerable part of the corporation's tangible assets, such persons are held to have contemplated the natural and reasonable consequences of their acts, that is, that the bankruptcy laws would have application and that a trustee would in due course be appointed. Greenspahn v. United States, 298 Fed. 736 (C.A. 7, 1924). Also see Beaux Arts Dresses, Inc. v. United States, 9 F. 2d 531 (C.A. 2, 1925); Green v. United States, 240 Fed. 949 (C.A. 2, 1917).

The Court of Appeals concluded that although each act standing alone was ambiguous, when the acts of the defendants were viewed against the pressure of creditors and apparent insolvency, the jury determination could not be overturned.

Staff: Acting United States Attorney Sidney I. Lezak; Assistant United States Attorney Roger G. Rose (D. Ore.).

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Devices Condemned as Misbranded. United States v. 24 Devices . . . Sunflo Flowing Air Purifier (C.A. 3). The Court of Appeals for the 3d Circuit on June 18, 1963 (after oral argument on June 11) affirmed the order of the District Court (D. N.J.) that the subject devices be condemned as misbranded under the Food, Drug, and Cosmetic Act (21 U.S.C. 352 (a)). The Sunflo device is about the size of a small table radio and contains a fan, air filter and two ultra-violet lamps. The labeling, which was found to be false and misleading, claimed the device to be of therapeutic benefit with respect to respiratory ailments because of the removal of allergens from the air and the effects of ozone and negative ions produced by the action of the lamps. Several such products have

been marketed and proceeded against in recent years. This was the first such case in which the therapeutic qualities of the device were fully litigated and found to be of no significant value in treating respiratory ills.

Staff: Duane L. Nelson (Criminal Division).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Collateral Attack on Executed Deportation Order Not Permitted. Vito Palma v. INS and Vito Palma v. Pederson (C.A. 6, June 15, 1963.) Petitioner and plaintiff-appellant, a native and national of Italy, was deported from the United States in 1937 because of his conviction and sentence for two crimes involving moral turpitude. He remained in Italy until he entered the United States illegally in 1955. He was arrested in 1962 and after an administrative hearing was ordered deported. By habeas corpus proceedings in the United States District Court at Cleveland, Ohio, he sought his release from the custody of the Immigration and Naturalization Service. After an adverse decision he appealed to the Sixth Circuit. He also challenged the validity of the deportation order by a petition for review in the Sixth Circuit under Section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a.

Petitioner and plaintiff-appellant asked the Sixth Circuit to review the validity of his 1937 deportation order, contending that it was void in that there was a failure to observe the regulations governing deportation hearings, and to accord him the right of counsel. The Government answered that an executed deportation order is not subject to collateral attack except where the record shows a gross miscarriage of justice, that no such showing had been made in this case, and that even if collateral attack were permitted the deportation order was valid.

The Sixth Circuit denied the appeal and the petition for review finding that the record of the 1937 hearing did not show a gross miscarriage of justice and that twenty-five years is too long to wait to complain of procedural infirmities. After observing that the petitioner was not an immature youth at his 1937 hearing and that he must have acquired knowledge of the benefits of counsel in his two criminal proceedings, the Court concluded that his waiver of counsel was free from coercion and clearly understood.

Staff: United States Attorney Merle M. McCurdy and Assistant United States Attorney Dominic J. Cimino (N. D. Ohio); Kenneth C. Shelve and Donald R. Bennett (Criminal Division)

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Motion to Dismiss Petition for Review of, and to Affirm, Order of Subversive Activities Control Board, Granted. William L. Patterson v. S.A.C.B. (C.A.D.C., July 3, 1963). On May 23, 1963, the Court of Appeals denied Patterson's motion to vacate the S.A.C.B.'s order that the Civil Rights Congress register with the Attorney General as a Communist-front organization (11 Bull. No. 12, p. 341). Patterson, an intervenor identifying himself as Liquidator of the Congress, had claimed that the order was moot because the Congress has ceased to exist; the Court ruled that the Congress and its Liquidator, at a Board hearing on the motion by remand from the Court, had failed to prove to any satisfactory degree that the organization was dissolved (Ibid.).

In response to the Court's grant of 30 days for the Congress to file a brief on the merits of its petition to review the Board's order, counsel for the Congress on June 4 informed the Court that no brief would be submitted by the Congress. The Board then filed a motion to dismiss the petition for review and to affirm the Board's order.

On July 3, the Court granted the Board's motion, dismissing the petition for review and affirming the Board's order that the Congress register. Under Section 14(b) of the Internal Security Act (50 U.S.C. 793(b)), the Board's order will become final upon the expiration of the time allowed for filing a petition for certiorari, if none has been filed by then; or, upon the denial of a petition for certiorari.

Staff: Kevin T. Maroney and George B. Searls (Internal Security).

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

TRIAL EVALUATION REPORTS

To further improve the quality of litigation on behalf of the United States, the Appellate Section of the Lands Division has inaugurated the practice of having the attorney assigned to a case prepare, in most cases, an evaluation report on the quality of the trial in connection with preparing recommendations for or against appeal. It has been concluded that to be of maximum usefulness these reports should be forwarded both to the Section of the Division having cognizance of the particular case and to trial counsel in the case. While constructive criticism may necessarily be included in some reports, they will be forwarded solely in a spirit of mutual helpfulness. We recognize that the judgment of even such outstanding Monday morning quarterbacks as we are is not infallible and that frequently the record may not reveal trial practicalities with which the attorney on the firing line was confronted, or circumstances which made alternative methods of procedure undesirable.

Trespass; Method of Computing Damages Under Oregon Multiple Damage Timber Trespass Statutes. United States v. Hult, (C.A. 9, June 18, 1963). The Court of Appeals reversed the decision of the district court on the authority of United States v. Firchau, 380 P. 2d 800 (Ore., 1963) (See 11 U.S. Attys. Bull. No. 8, pp. 242-243), and held that in determining the amount of the judgment to be entered in favor of the United States for damages caused by a timber trespass, the amount of the damages actually suffered as a result of the trespass should be doubled before the damages are mitigated by the salvage value of the timber. The Court of Appeals further held that the fact, if it is a fact, that the United States could have salvaged the cut timber at a value equaling or exceeding the stumpage value of the timber had no relevance in determining the amount of actual damages resulting from the trespass, but should be considered only with regard to mitigation after the actual damages have been doubled.

Staff: Roger P. Marquis and Margaret S. Willick (Lands Division)

Indian Lands: Validity of Interior Department Regulations Establishing Grazing Units; Case Dismissed as Moot. James Holy Eagle, et al. v. L. P. Towle, as Superintendent of the Pine Ridge Indian Agency (D. S.D., May 15, 1963). Action was brought by a minority of 128 owners of 186 undivided interests in allotted lands comprising a grazing unit on the Pine Ridge Indian Reservation to enjoin the Superintendent of the Pine Ridge Agency from granting a grazing permit covering the unit to the highest bidder. The permit in question was signed before a temporary restraining order was issued by the Court and was delivered to the permittees after the order was dissolved and after the Court had denied the request for a preliminary injunction. Defendant contended that the owners not joined as

plaintiffs, the Secretary of the Interior and the United States, were indispensable parties and also sought to uphold the authority of the Department of the Interior to grant the grazing permit covering the grazing unit. In addition, defendant contended that plaintiffs had suffered no irreparable damage. The Court dismissed on the ground that the case was rendered moot by the delivery of the permit and refused to rule on the question of whether defendant had power to grant further permits. The Court did indicate, however, that its action could be supported on the ground of lack of indispensable parties and failure of the plaintiffs to show irreparable damage.

Staff: United States Attorney Harold C. Doyle and Assistant United States Attorney Travis H. Lewin (D. S.D.)

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Appeal: Stay of District Court Order Pending Final Disposition of Appeal; 28 U.S.C. 2408; F.R.C.P., Rules 62 and 73. In re Bruce Construction Corp., Debtor; In re Miami Station, Inc., Debtor (C.A. 5, June 21, 1963). The district court in summary proceedings in bankruptcy directed immediate distribution by the United States of certain sums, held by it and payable under government contracts, to a surety, attorneys for the contractors and to the trustee in bankruptcy, notwithstanding that the United States was claiming setoffs for unpaid taxes against several of the contractors. Both the United States and the surety appealed from the district court's order, the appeal of the United States, in part, raising the issue whether the District Court had jurisdiction to issue a money judgment against the United States. The district court refused any stay of payment by the United States and directed payment to be made in 20 days. Thereupon the United States filed a motion with the Court of Appeals for a stay pending final disposition of its appeal, on the ground that it was entitled to a stay as of right from the order granting summary execution on a money judgment. In its motion the United States contended that Rules 62(d) and 73, F.R.C.P., afford a stay as of right to a private appellant upon the giving of a supersedeas bond. 7 Moore's Federal Practice (Second ed., 1955), Section 62.06; 3 Barron and Holtzoff, Federal Practice and Procedure (1958 ed.), Sections 1374 and 1375. 28 U.S.C. 2408 and Federal Rule 62(d) provide that no bond or other security shall be required of the United States as appellant. Under these circumstances the United States contended that it was deprived of its right to a stay because it is not required to furnish a supersedeas bond, citing Schell v. Cochran, 107 U.S. 625; McCourt v. Singers-Bigger, 150 Fed. 102 (C.A. 8, 1906); Pacific Coast Casualty Co. v. Harvey, 250 Fed. 952 (C.A. 9, 1918). On June 21, 1963, the Court of Appeals issued the following order: "The Government's motion to stay is GRANTED pending further orders of this Court."

Staff: Joseph Kovner and Karl Schmeidler (Tax Division)

District Court Decisions

Internal Revenue Summons: Petition to Enforce Denied Because of Inadequacy of Record to Establish Who Could Raise Defense of 26 U.S.C. 7605(b) as to Unnecessary Examination. United States v. Charles B. Carey. (D. Del., May 21, 1963.) (CCH 63-1 USTC Par. 9495). This is an action brought by the Government under 26 U.S.C. 7605(b) for the judicial enforcement of two Internal Revenue Service summons addressed to Charles B. Carey, accountant for taxpayers Robert Cooper Moor, Sr. and Betty R. Moor. The summonses demanded books and records of the taxpayers relating to their individual tax liabilities for the years 1954, 1955 and 1956 and also the partnership information returns of Robert Cooper Moor, Sr. and J. Roland Heldmeyer, trading as Eastern Shore Amusement Company regarding the same years. The respondent-accountant refused to produce the demanded records claiming that the Government had failed to show the existence of suspicion of fraud for the years 1954, 1955 and 1956 and that as to these

years, since the Internal Revenue Service is barred by the statute of limitations from making any assessments unless fraud is established, the examination is unnecessary under 26 U.S.C. 7605(b).

In support of its petition, the Government attached an affidavit of a revenue agent alleging that as a result of his examination of the information returns of the partnership and individual tax returns of the taxpayers; from the investigation he conducted; and from information supplied to him by other officials in the Internal Revenue Service, he has reasonable grounds to suspect fraud in that the taxpayers have substantially understated their income for the years in question. At the hearing on the petition, the Government questioned the standing of the accountant to raise the defense of unnecessary examination for the first time, and at this point the Court, after some discussion as to who owned the records and the possibility of the assertion of constitutional and other privileges as to the production of these records, permitted the taxpayers themselves to intervene. Coincidentally, the attorneys for the respondent were also attorneys for the taxpayers; hence, it appeared the taxpayers were raising precisely the same defense as that raised by the accountant.

The Court, after devoting almost its entire opinion to a discussion of the defense of unnecessary examination under Section 7605(b) and the Government's failure to show that the examination was necessary concluded by stating that that issue need not be decided. Since neither party had adequately developed the record showing exactly what papers were involved, the Court reasoned that the issue of who had standing to invoke the protection of Section 7605(b) was not in the sharp focus needed for decision and, therefore, the petition should be dismissed without prejudice.

While it is dicta, the Court's analysis and conclusions on the question of unnecessary examinations under Section 7605(b) deserves comment. The Court construes Section 7605(b) as the only substantive, statutory restriction on the Internal Revenue Service's power of investigation under Section 7602.

If the Government, as it has done here, only alleges by affidavit that there exists reasonable grounds to suspect fraud as to time-barred years, it will not be sufficient to overcome the defense of unnecessary examination under Section 7605(b). In short then, the Court reasons, once the statute of limitations bars the assessment of taxes absent a showing of fraud, the Government before it will be permitted to examine records relating to time-barred years must establish (evidently to the trial court's satisfaction) the existence of reasonable grounds to suspect fraud. It would appear that there is no probable cause requirement in the Third Circuit on the basis of Zimmerman v. Wilson, 105 F. 2d 583 (C.A. 3, 1939) where the Court stated at p. 585:

> It is not unreasonable to allow the Government to obtain all available information. The running of the statute of limitations does not alter the reasonableness of such a course. (Emphasis added).

Accord, Lash v. Nighosian, 273 F. 2d 185 (C.A. 1, 1961). Contra, Foster v. U. S., 265 F. 2d 183 (C.A. 2, 1959), certiorari denied, 360 U.S. 912; DeMasters v. Arend, 313 F. 2d 79 (C.A. 9, 1963); Globe Construction Co. v. Humphrey, 229 F. 2d 148 (C.A. 5, 1956); Peoples Deposit Bank & Trust Co. v. U. S., 212 F. 2d 86 (C.A. 6, 1954).

An appeal is under consideration.

Staff: United States Attorney Alexander Greenfeld (Del.); and Frank J. Violanti (Tax Division).

Sovereign Immunity: Suit for Damages Against United States and District Director Is Barred By Immunity Doctrine. Film Truck Service, Inc. v. Nixon. (E.D. Mich., April 4, 1963.) (CCH 63-1 USTC Par. 9422). Film Truck Service, Inc., the taxpayer, sued the United States and Ralph I. Nixon "individually and in his capacity as District Director of Internal Revenue" seeking money damages on the theory that plaintiff was entitled to a credit on the taxes due the Government in an amount equal to the difference between the actual aggregate amount received from a distraint sale of taxpayer's assets and the total sum which would have been realized if its assets were sold as a unit rather than separately. Plaintiff alleged the property (including ICC and Michigan Public Service Commission Certificates of Authority) was not "offered both separately (or in groups) and in the aggregate and sold under whichever method produces the highest aggregate amount" as provided by Section 6335(b) of the Internal Revenue Code.

Had the assets been sold as a unit, according to plaintiff, the amount recovered would have more than satisfied its total tax liability.

The Government moved to dismiss on the grounds that: (1) neither Section 1331 or 1340 of 28 U.S.C. is a waiver of sovereign immunity by the United States; (2) an individual defendant may not be sued for damages resulting from his alleged misconduct in the discharge of his official duties. As to the former, Section 2680(c) of 28 U.S.C. bars a suit against the United States under the federal tort claims act for the negligent conduct of employees in the collection of taxes. If the acts complained of were considered as wilful and intentional so as to go beyond the scope of his authority, the District Director was, nevertheless, personally immune from suit since the acts complained of were in connection with "general matters committed by law to his control or supervision." Cooper v. O'Connor, 99 F. 2d 135 (C.A. D.C.); also Ove Gustavsson Contracting Co. v. Floete, 299 F. 2d 655 (C.A. 2).

Plaintiff also relied upon the argument that this was actually a suit for the refund of taxes which should have been realized if the sale had been properly carried out.

In granting the motion to dismiss, the Court held that Section 2680(c) of 28 U.S.C. barred the suit as one for damages against the United States involving the collection of taxes. The sovereign immunity rule was not avoided by naming the District Director a defendant to the action. As an action against the District Director individually,

the Court stated that the action did not come within either the federal question or the diversity jurisdiction of the Court. The Court dismissed the "refund" argument as an unwarranted interpretation of 28 U.S.C. 1346(1).

Staff: United States Attorney Lawrence Gubow; Assistant United States Attorney Robert F. Ritzenhein (E.D. Mich.); and Louis J. Lombardo (Tax Division).

Transferee Liability: Held That Transfer Was Valid Loan and That Bankrupt Was Not Subject to Transferee Liability. Tax Liens: Recording of Lien Not Necessary to Be Valid Against Trustee in Bankruptcy; Failure of Taxpayer to File Claim in Bankruptcy Does Not Foreclose Government's Right to Proceed on Behalf of Taxpayer. In the Matter of Babcock Printing Press Company, Bankrupt. (N.D. Ohio, November 26, 1962.) (63-1 USTC Par. 9484). The taxpayer, Lake City Malleable, Inc., is liable to the United States for taxes in an amount in excess of $40,000. In 1956 that corporation transferred $40,000 to Babcock Printing Press, Inc. and in 1957 Babcock went into bankruptcy. In seeking to reach the transferred money, the Government proceeded on two alternative theories in the bankruptcy court. The first theory was that the transfer was without consideration and consequently the bankrupt was liable as a transferee. The referee found that the transfer was a valid loan. This holding was sustained by the District Court because the referee's ruling could not be found to be clearly erroneous, In Re Snyder 112 F. Supp. 897.

The Government's alternative position, rejected by the referee, was that if the transfer was a valid loan, it was an asset of the taxpayer's subject to the federal tax lien. On review, the District Court held that the loan-receivable was outstanding; the tax lien created by Section 6321 would attach to it; and that such a lien need not be recorded under Section 6321 to be valid against the trustee in bankruptcy, In the Matter of Fidelity Tube Corp., 278 F. 2d 776.

The Court further held that the fact that the taxpayer had not filed a claim for the receivable did not foreclose the Government from prosecuting the claim on behalf of Lake City Malleable, Inc., and the relevance of the fact that the Government had not filed a claim as a lienholder should be remanded to the referee to determine whether the Government could amend its general proof of claim so as to reflect its lien theory, Fidelity & Deposit Co. of Maryland v. Fitzgerald, 272 F. 2d 121.

Staff: United States Attorney Merle M. McCurdy; Assistant United States Attorney Dominic Cimino (N.D. Ohio).

* * *