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BULLETIN

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Monthly Totals

Activity in case filings and case terminations continues to increase, and the month of November was no exception to this trend. Cumulative totals for filings and terminations for the first 5 months of fiscal 1964 show increases over the similar period of fiscal 1963, although such increases are rather small. It is encouraging, however, to note that the increase in the total pending caseload is also rather small, and that the pending civil caseload has actually dropped by 1 1/2 per cent. While the increase in the pending caseload was small, it should be pointed out that each such monthly increase, however small, adds up to a substantial increase at the end of the fiscal year. It is not until we see a decrease in the total pending caseload each month that we will know that we are on the way to reversing the upward trend in the number of cases pending. Set out below is a comparison of activity for the first five months of fiscal 1963 and 1964.

	First 5 Months Fiscal Year 1963	First 5 Months Fiscal Year 1964	Increase or Decrease Number	%
Filed				
Criminal	13,677	13,954	+ 277	+ 2.03
Civil	11,017	11,180	+ 163	+ 1.48
Total	24,694	25,134	+ 440	+ 1.78
Terminated				
Criminal	12,733	12,844	+ 111	+ .87
Civil	10,068	10,172	+ 104	+ 1.03
Total	22,801	23,016	+ 215	+ .94
Pending				
Criminal	10,265	10,929	+ 664	+ 6.47
Civil	23,747	23,405	- 342	- 1.44
Total	34,012	34,334	+ 322	+ .95

November was the first month in the present fiscal year in which more cases were terminated than were filed. This is most encouraging. While totals for both filings and terminations from the preceding month were down, nevertheless, the fact that more cases were terminated than were filed is a step in the direction of reducing the caseload.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,252	2,456	4,708	2,305	2,129	4,434
Aug.	2,245	2,228	4,473	1,771	1,852	3,623
Sept.	3,365	2,267	5,632	2,584	1,920	4,504
Oct.	3,298	2,440	5,738	3,164	2,465	5,629
Nov.	2,794	1,789	4,583	3,020	1,806	4,826

For the month of November, 1963, United States Attorneys reported collections of $5,273,475. This brings the total for the first five months of fiscal year 1964 to $26,770,742. Compared with the first five months of the previous fiscal year this is an increase of $9,467,529 or 54.72 per cent over the $17,303,213 collected during that period.

During November $27,087,633 was saved in 101 suits in which the government as defendant was sued for $28,458,409. 58 of them involving $1,780,294 were closed by compromises amounting to $358,789 and 16 of them involving $1,080,276 were closed by judgments against the United States amounting to $1,011,987. The remaining 27 suits involving $25,597,839 were won by the government. The total saved for the first five months of the current fiscal year was $43,955,484 and is an increase of $24,836,667 or 129.90 per cent over the $19,118,817 saved in the first five months of fiscal year 1963.

The cost of operating United States Attorneys' Offices for the first five months of fiscal year 1964 amounted to $7,195,573 as compared to $6,665,724 for the first five months of fiscal year 1963.

It will be noted that the cost of operating United States Attorneys' offices for the first 5 months of fiscal 1964 has risen by almost 8 per cent over the same period in fiscal 1963. In line with President Johnson's request for the exercise of economy wherever possible, we urge all United States Attorneys to watch all expenditures closely and to eliminate any that are found to be not completely necessary.

DISTRICTS IN CURRENT STATUS

As of November 30, 1963, the districts meeting the standards of currency were:

CASES

Criminal

Ala., N.	Ark., E.	Del.	Ga., N.	Ill., S.
Ala., M.	Calif., N.	Dist. of Col.	Ga., M.	Ind., N.
Ala., S.	Calif., S.	Fla., N.	Idaho	Ind., S.
Alaska	Colo.	Fla., M.	Ill., N.	Iowa, N.
Ariz.	Conn.	Fla., S.	Ill., E.	Iowa, S.

CASES (Cont.)

Criminal

Kan.	Mo., W.	N. C., E.	S. D.	Wash., E.
Ky., W.	Mont.	N. C., M.	Tenn., E.	Wash., W.
La., E.	Neb.	N. D.	Tenn., M.	W. Va., N.
La., W.	Nev.	Ohio, N.	Tenn., W.	W. Va., S.
Maine	N. H.	Ohio, S.	Tex., N.	Wis., E.
Mich., E.	N. J.	Okla., N.	Tex., S.	Wis., W.
Mich., W.	N. Mex.	Okla., E.	Tex., W.	Wyo.
Minn.	N. Y., N.	Okla., W.	Utah	C. Z.
Miss., N.	N. Y., E.	Ore.	Vermont	Guam
Miss., S.	N. Y., S.	Pa., W.	Va., E.	V. I.
Mo., E.	N. Y., W.	R. I.	Va., W.	

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Court Denies Oil Company's Motion To Construe Judgment. United States v. Standard Oil Company (New Jersey), et al. (S.D. N.Y.). On December 12, 1963, in a precedent memorandum opinion and order, District Court Judge John M. Cashin denied the motion of defendant Standard Oil Co. (N.J.) to construe or alternatively to conform certain provisions of Jersey's consent judgment of December 14, 1960 with parallel provisions of a consent judgment entered on July 29, 1963, against Texaco Inc. Jersey's motion grew out of an unsuccessful Jersey bid, during the 30-day period after signing of the Texaco consent stipulation, to stay entry of Texaco's judgment pending conformation of the two decrees.

The Jersey motion was a case of first impression in regard to (1) the right of a defendant, in a multiple-defendant case to conform its consent judgment with the separately negotiated judgment of another defendant in the same case; (2) the acceptability of differing language in parallel consent judgments against similarly situated defendants in the same case; (3) the construction of separately negotiated decrees in the same case as independent instruments; and (4) the applicability of the Swift test (United States v. Swift & Co., 286 U.S. 106 (1932)) to consent decree modifications involving ostensibly formal language changes.

The Texaco judgment, modeled along the lines of the Jersey and Gulf judgments entered 3 years earlier, contained an extensive list of defined terms which included definitions of certain foreign joint operations that were excepted from the judgment's injunctive provisions. While the particular terms used in these judgments were about the same, there was some variation between the Texaco and Jersey decrees in the wording of their respective definitions. In its motion (not joined in by Gulf) Jersey contended (1) that the formal conformation of definitional language did not constitute a "modification" within the meaning of the Swift case and therefore that the rigorous tests of that case were inapplicable; (2) that Jersey, being the first defendant to enter a judgment in this case, thereby established its definitions as definitional guidelines for succeeding judgments therein; (3) that differences between definitions in the Texaco and Jersey judgments raised questions of interpretation which involved interference with appropriate judicial administration of Jersey's judgment; and (4) that it was inappropriate as a matter of judicial enforcement to create two similarly charged defendants in the same case differently in respect of conduct excepted from the prohibitions of their respective separately negotiated consent judgments.

Staff: W. D. Kilgore, Jr. and David I. Haberman (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

ADMINISTRATIVE PROCEDURE ACT

Comptroller General's Designation of Subordinate to Certify Copies of Records in General Accounting Office is "Matter Relating Solely to Internal Management of Agency" Within Meaning of Section 3 of Administrative Procedure Act, 5 U.S.C. 1002, and Need Not Be Published in Federal Register. United States v. Hayes (C.A. 4, December 9, 1963). This action was brought by the United States to recover overpayments of allotments to the wife of a serviceman. Photostatic copies of the checks were certified as true by a subordinate of the Comptroller General, pursuant to a formal but unpublished delegation of authority. Objection to the admission of these copies was initially overruled, but a judgment notwithstanding the verdict was granted to defendant on the ground that, since the delegation of authority to certify such copies had not been published in the Federal Register, the delegation was ineffective and the certified copies were not admissible in evidence.

The Fourth Circuit reversed per curiam. It held that this delegation of authority was a "matter relating solely to the internal management of an agency," and thus expressly excepted from the publication requirements of Section 3(a) of the Administrative Procedure Act, 5 U.S.C. 1002(a).

Staff: Peter Edelman and David J. McCarthy, Jr. (Civil Division)

AGRICULTURAL ADJUSTMENT ACT

Authority of Secretary of Agriculture to Revise Cotton Acreage Allotments and Marketing Quotas and to Assess Penalties Upheld. Morrow, et al. v. Clayton, et al. (C.A. 10, December 10, 1963). After a County Agricultural Stabilization and Conservation Committee (ASCS) in New Mexico had authorized the transfer of certain cotton acreage allotments to the appellee-farmers, pursuant to the provisions of the Agricultural Adjustment Act of 1938, as amended 7 U.S.C. 1378, a question arose as to whether these transfers had been effected by fraud, misrepresentation, or in violation of certain regulations of the Department of Agriculture. The County Committee refused to cancel the allotments, whereupon they were cancelled at the direction of the national administrator (ASCS) and the State Committee. The farmers' marketing quotas were revised and penalties were assessed. The farmers sued to cancel the revised notices of marketing quotas and to rescind the penalties, claiming that the State Committee and the national administrator lacked authority to cancel allotments which had been approved by the County Committee. The Government defended on the grounds that (1) the farmers had failed to exhaust their administrative remedy before a statutory review committee and (2) the Secretary and his officials had the authority and the duty to cancel allotments and revise quotas obtained by fraud or in violation of the regulations of the Department of Agriculture. The farmers were successful in the district court.

The Tenth Circuit rejected the exhaustion remedies argument and held that the court had jurisdiction of the matter. However, the decision was in favor of the Government, holding that the Secretary of Agriculture and his duly authorized officials had the authority and duty, "by necessary implication," to cancel allotment transfers, revise marketing quotas and assess penalties in the event of misrepresentation or fraud, and that the vesting of such authority in the County Committee did not divest the Secretary (and his officials) of authority to exercise such powers. The case was accordingly remanded to the district court for a hearing and decision on the issue of fraud. Judge Phillips dissented on the ground that the Secretary had divested himself of authority to invalidate allotment transfers when he gave this authority to the County Committee and that, in any event, the cancellations of allotment transfers were invalid because they were made without notice to the farmers and without a hearing.

Staff: Pauline B. Heller (Civil Division)

ATOMIC ENERGY ACT

Nuclear Testing Authorized by Atomic Energy Act and by Constitution. Linus C. Pauling, et al. v. McNamara, et al. (C.A. D.C., December 23, 1963). This action was brought by 255 persons ostensibly for the purpose of stopping nuclear testing by the Government. Plaintiffs' argument was that the Atomic Energy Act did not authorize nuclear testing, or, in the alternative, that, if the Act did authorize such testing, the Act was unconstitutional. In dismissing the complaint, the District Court held that plaintiffs had no standing to sue, that the complaint failed to present a justiciable controversy, that nuclear testing was authorized by statute and by the constitution, and that the decision in a prior suit by Pauling and others to stop nuclear testing was res judicata. The Court of Appeals, in affirming, held that "the District Court was plainly correct on all points."

The Court went on to emphasize, in a strongly worded opinion, that, as nuclear testing fell within the national defense and foreign policy powers of the Executive and Legislative branches under the Constitution, it was not the proper business of the judiciary to deal with the pros and cons of testing or the political questions there involved. In a separate opinion, Judge Bazelon took the position that the recent Test Ban Treaty had rendered the instant case moot.

Staff: John C. Eldridge and David J. McCarthy, Jr. (Civil Division)

BANK HOLDING COMPANY ACT

Federal Reserve Board Decisions Denying Applications by Bank Holding Companies to Acquire Stock of State Banks in Wisconsin Upheld. First Wisconsin Bankshares Corp. v. Board of Governors; Marine Corp. v. Board of Governors. (C.A. 7, December 17, 1963). Petitioners, Wisconsin bank holding companies, filed applications with the Federal Reserve Board to acquire 80% or more of the voting stock of state banks in Racine, Janesville, and Beloit, Wisconsin, under the provisions of the Bank Holding Company Act of

1956 (12 U.S.C. 1841-42). The Commissioner of Banks of the State of Wisconsin, whose recommendation is required to be solicited, had no objection to one of these applications but opposed the other two. The Antitrust Division of the Department of Justice, which had been advised of the applications as a matter of courtesy, opposed all three applications.

In one case, the Board held a formal public hearing; in another it held a public oral presentation; in the third its decision was based wholly on documentary evidence. In all three, the Board examined the facts (in each case presented by the applicant and undisputed) in the light of the prescribed statutory considerations, and determined that the applications should be denied because the acquisitions would not be consistent with the preservation of competition in the field of banking and would not be in the public interest.

The Court of Appeals, on a direct review of the administrative determinations held that the Board's findings were supported by substantial evidence and were therefore conclusive under the statute. The Court said that "the reviewing court does not act as a super agency, substituting its judgment for that of the Board." The opinion relied heavily upon the reasoning and language of the Eighth Circuit in Northwest Bancorporation v. Board of Governors, 303 F. 2d 832, the only other decision under the Bank Holding Company Act. The Court expressly rejected the applicants' claims that the Board had misinterpreted the language and purposes of the Act when it considered it more important to preserve the competition by smaller banks in the local areas involved than to promote competition against the large out-of-state banks in the New York and Chicago areas.

Staff: Pauline B. Heller (Civil Division)

FEDERAL RULES OF CIVIL PROCEDURE

Absent Compliance With Requirements for Interlocutory Appeal, Order Dismissing Complaint Purporting to Allege Two Causes of Action Arising Out of Separate Events, But Granting Leave to Amend One Cause of Action Within Stated Period, Is Not Appealable Regardless of Whether Amendment Is Filed. Thomas R. Richards, et al. v. Raymond J. Dunne (C.A. 1, December 3, 1963). A complaint was filed against a United States postal inspector purporting to allege two causes of action, defamation and malicious prosecution, arising out of separate events on different dates. The district court ordered that the complaint be dismissed, with leave to amend within 20 days the paragraph relating to defamation. However, as far as the record in the Court of Appeals disclosed, no amendment was filed. Plaintiffs, without complying with the requirements for an interlocutory appeal under Rule 54(b) or 28 U.S.C. 1292(b), filed a notice of appeal from the part of the order dismissing the malicious prosecution cause of action. In their brief in the Court of Appeals, they asserted, despite the contrary indication in the record, that the defamation cause of action was continuing in the district court.

The Court of Appeals dismissed their appeal for lack of appellate jurisdiction. Regardless of whether the purported cause of action for

defamation was still alive in the district court, the appeal was premature. If one claim was continuing, then the action was not terminated as to any of the claims under Rule 54(b), F.R. Civ. P. On the other hand, the Court held that if plaintiffs had failed to amend within the time provided, the order of dismissal would not thereby become final. A second order of absolute dismissal would be necessary following the failure to amend.

Staff: John C. Eldridge (Civil Division)

GOVERNMENT CONTRACTS - RENEGOTIATION ACT

Tax Court Determinations of Excessive Profits Are Not Subject to Review in Courts of Appeals Except for Constitutional or Jurisdictional Issues. Boeing Company v. Renegotiation Board (C.A. 9, December 12, 1963). During the calendar year 1952, Boeing Company did approximately $738 million worth of business under Government defense contracts which were subject to the Renegotiation Act, on a book net worth and invested capital of approximately $57.8 million. Its profits on such business amounted to approximately $56.7 million, or 98% of its book net worth and invested capital, and 7.6% of its sales. After Boeing and the Renegotiation Board failed to reach agreement as to the amount of excessive profits, the Board issued an order determining that Boeing's profits were excessive in the amount of $10 million. Pursuant to Section 108 of the Renegotiation Act (50 U.S.C. App. 1218), Boeing petitioned the Tax Court for a final determination of the amount of excessive profits, if any, contending that it had no excessive profits. After a full trial de novo, and a request by the Renegotiation Board to increase its initial determination, the Tax Court determined that Boeing had received excessive profits in the amount of $13 million for 1952.

Boeing appealed to the Ninth Circuit asserting jurisdiction under the Internal Revenue Code (26 U.S.C. 7482), and alleging errors by the Tax Court in the application of the statutory factors to be taken into account in determining excessive profits, in the placing of the burden of proof, and in various other errors, all of which it complained were so grievous as to deprive it of due process of law. The Renegotiation Board moved to dismiss for want of jurisdiction, and, in the alternative, requested that the Tax Court determination be affirmed.

The Ninth Circuit dismissed Boeing's appeal for want of jurisdiction. Following Ebco Mfg. Co. v. Secretary, 221 F. 2d 902 (C.A. 6), and Grannis & Sloan v. Renegotiation Board, 285 F. 2d 908 (C.A. 4), certiorari denied, 368 U.S. 822, the court held that the Courts of appeals have jurisdiction under the Internal Revenue Code to review Tax Court decisions in renegotiation cases on constitutional or jurisdiction grounds, but that Section 108 of the Renegotiation Act (50 U.S.C. App. 1218) deprives them of jurisdiction to review any other questions of law or fact in such cases. The Court then ruled that it had no jurisdiction, because there were no jurisdictional issues, and that a party could not raise a constitutional issue by asserting that the Tax Court committed errors which were grievous.

The decision of the Court of Appeals therefore leaves intact the Tax Court's determination in this case, which constitutes a favorable precedent for the approximately $94 million worth of renegotiation litigation pending in the Tax Court against aircraft and missile firms. However, cases filed in the Tax Court subsequent to the enactment in 1962 of Public Law 87-520 (76 Stat. 134, 50 U.S.C. (Supp. IV) App. 1218) will be governed by that new statute, which permits appellate review on some issues of Tax Court determinations in renegotiation cases.

Staff: David L. Rose (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

MILITARY MEDALS AND INSIGNIA

Sale and Exchange by Hobbyists; Policy of Department of Justice. The Department of Justice has recently received a number of complaints concerning unauthorized sales of decorations and medals authorized by Congress for the armed forces of the United States. These complaints were concerned particularly with sales of such medals for cash by one hobbyist collector to another collector. Such activity is expressly prohibited by 18 U.S.C. 704, which was enacted by Congress to prevent the degradation of high awards presented to United States servicemen for service and valor in the defense of their country.

Since the Department of Defense is responsible for promulgating the appropriate regulations governing such transactions, under authority granted by 18 U.S.C. 704, the problem was brought to its attention through the Institute of Heraldry, U.S. Army. This agency has recently informed the Criminal Division that no exception to the general prohibition provided by Section 704 would be made to exempt the collector or hobbyist.

The Criminal Division is presently making an effort to identify and inform all organizations of collectors that a cash sale of military decorations of the United States is a violation of a Federal criminal statute. They will be further advised that the statute does not preclude the pure barter type situation, that is the exchange of one medal for another. The Offices of the United States Attorneys are asked to cooperate with this effort by furnishing such information to local organizations of hobbyists within the respective districts. The policy of the Department of Justice is to warn first offenders before initiating any prosecutive action under Section 704.

EVIDENCE

Best Evidence; Photostats of Microfilms of Checks. United States v. H. M. Myrick and Vernon Evans Bergman (C.A. 5, Dec. 18, 1963). Defendants were charged with the fraudulent sale of securities, mail fraud, and interstate transportation of property obtained by fraud. On appeal from their convictions in the United States District Court, Eastern District of Texas, the Court of Appeals for the Fifth Circuit affirmed.

One of the points of error urged on appeal was the Court's admission into evidence of photostats of microfilms of checks which a bank had produced pursuant to subpoena. It was argued by appellants "under the best evidence rule there has been no predicate laid." The Court ruled that 28 U.S.C. 1732(b) makes such copies "admissible in evidence if the original reproduction is in existence and available for inspection under directions of the Court," and that since defense counsel never suggested that the

photostats offered in evidence were incorrect and never demanded production of the microfilms from which the photostats were made, admission of the photostats was entirely proper.

Staff: United States Attorney William Wayne Justice (E.D. Texas); Theodore G. Gilinsky (Criminal Division)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Denial of Adjustment of Immigration Status Upheld. Rudolph Ambra v. Edward P. Ahrens (C.A. 5, No. 20,453; December 17, 1963.) Appellant, a national of Argentina, brought this action in the United States District Court for the Southern District of Florida, seeking a declaratory judgment that the Immigration and Naturalization Service had improperly denied his application under Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) for adjustment of status to a permanent resident alien. The Service found appellant not qualified for adjustment on the ground that he was inadmissible to the United States as an alien ineligible to citizenship because of his having applied for and been granted relief from service in the Armed Forces of the United States. Appellant contended that the Service should have made a specific finding on the factual issue of whether he had signed the application for relief from military service with knowledge that it would render him ineligible to citizenship. The District Court rejected appellant's contention holding that such a finding was implicit in the decision of the Service.

On appeal, appellant sought only remand of his case to the Service to make a specific finding as to whether he knowingly waived his right to apply for citizenship. Conceding that courts have required administrative agencies to make findings of fact, the Fifth Circuit saw no basis for doing so here. The Court found unbelievable appellant's contention that he did not know that he was waiving his right to citizenship and under these circumstances, the Court was of the opinion that it would be an exercise of futility to remand the case to the Service as suggested by appellant. The Court said it was certain that the officers of the Service would on remand reach the same conclusion and that there would follow several years more of litigation before appellant was finally deported as he plainly deserved to be. The judgment of the lower court was affirmed.

Staff: United States Attorney William A. Meadows, Jr. and Assistant United States Attorney Donald E. Stone (S.D. Fla.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act; Order That Party Register Under Act. Communist Party of the United States v. United States (C.A.D.C., December 17, 1963.) The Order of the Subversive Activities Control Board that the Party register under the Act was affirmed by the Supreme Court (367 U.S. 1), and became final October 20, 1961, and by the terms of the Act the Party should have registered by November 19 of that year. The officers sent the Attorney General an unsigned letter bearing the Party seal declining to file the registration forms and claimed the privilege against incrimination under the Fifth Amendment. An indictment of the Party for failure to register was returned December 1, 1961, and after a jury trial a verdict of guilty was returned and the Party was fined $120,000.

The Court of Appeals (Chief Judge Bazelon, Circuit Judges Washington and McGowan) in an opinion by Chief Judge Bazelon reversed on the ground that Congress in the Communist Control Act of 1954 had "virtually" declared the Party a criminal conspiracy per se, so that no officer or member could sign the registration forms without incriminating himself. The case was remanded for a new trial if requested by the Government in order to attempt to prove that the Party could find some "other person" who would volunteer to sign the documents in accordance with the Attorney General's regulations; otherwise to enter a judgment of acquittal.

Staff: The appeal was argued by George B. Searls (Internal Security); with him in the brief were Kevin T. Maroney and Lee B. Anderson.

Subversive Activities Control Act; Order to "Communist Front" to Register. American Committee for Protection of Foreign Born v. Subversive Activities Control Board (C.A.D.C., December 17, 1963). After hearing, the Board found that the Committee was substantially controlled by the Communist Party and was primarily operated for giving aid and support to the Party by seeking to prevent, by litigation and publicity campaigns, the denaturalization and deportation of officers and members of the Party, and ordered it to register under the Act as a "Communist-front". The Court of Appeals (Chief Judge Bazelon, Senior Circuit Judge Prettyman and Circuit Judge Danaher) in an opinion by Senior Circuit Judge Prettyman held that the order was supported by a preponderance of the evidence and affirmed the Board's order. Chief Judge Bazelon dissented.

Staff: The appeal was argued by George B. Searls (Internal Security); with him on the briefs were Kevin T. Maroney, Lee B. Anderson, Robert L. Keuch, and Benjamin F. Pollack (Internal Security), and Frank R. Hunter, Jr., General Counsel, and Charles F. Dirlam (S.A.C.B.).

Subversive Activities Control Act; Order to "Communist Front" to Register. Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Act. (C.A.D.C., December 17, 1963). After a hearing, the SACB in 1955 found that the V.A.L.B. was a "Communist front" and ordered it to register as such with the Attorney General. The organization's petition for a review of the order was held in abeyance in the Court of Appeals until the Supreme Court's decision in 1961 of Communist Party v. SACB.

The Court of Appeals held that, as to Communist-front organizations, the registration requirement of the Act is constitutionally valid, for the reasons expressed by the Supreme Court in its ruling on the requirement as applied to a Communist-action organization (Communist Party v. SACB, 367 U.S. 1).

Concerning the evidence in support of the statutory standard that, to be declared a "front", an organization must (1) be substantially directed, dominated, or controlled by a Communist-action organization, and (2) be primarily operated for the purpose of giving aid and support to a Communist-action organization, Communist foreign government, or the World Communist movement. (Section 3 of the Act), the Court of Appeals first noted that a finding against the organization must be based on its nature as it existed after 1950, the date of the passage of the Act. The Court then found that a preponderance of the post-1950 evidence in the record, although principally documentary, established that the Brigade was substantially dominated, directed or controlled by representatives of the Party, and operated primarily to aid and support the Party. The order was affirmed, with the proviso that within 30 days either or both parties may file a petition for reconsideration, referring specifically to any post-1950 evidence which the Court overlooked.

Chief Judge Bazelon dissented, writing that the Board's order was invalid because it was based on a record made eight years ago and because the record was "stale" when made, due to the paucity of 1950-1954 evidence therein.

Staff: Robert L. Keuch (Internal Security) argued the appeal; with him on the brief were Kevin T. Maroney, George B. Searls, and Lee B. Anderson (Internal Security) and Frank R. Hunter, Jr. General Counsel, Charles F. Dirlam, and Peter P. Hanagan (S.A.C.B.)

Subversive Activities Control Act; Order to "Communist Front" to Register. Louis Weinstock v. Subversive Activities Control Board (C.A.D.C., December 17, 1963). In 1956 the SACB ordered the United May Day Committee to register with the Attorney General as a "Communist-front" organization. A petition for review of the order was filed in the Court of Appeals by Weinstock"as Intervenor" in behalf of the Committee; the petition was held in abeyance until the outcome of Communist Party v. SACB (367 U.S. 1) in 1961. Thereupon the Court granted petitioner's request to consider the brief submitted in the companion American Committee case (discussed above) as his brief, insofar as it raised constitutional questions. Here the Court affirmed the Board's order, holding that, on the authority of Veterans of the Abraham Lincoln Brigade v. SACB (decided on

the same day and discussed above), the registration provisions of the statute were valid, being encompassed within the Communist Party decision, supra.

Chief Judge Bazelon wrote a concurring opinion, referring to his dissent in the American Committee case.

Staff: On the brief, upon which the case was submitted without argument, were Kevin T. Maroney, George B. Searls, Lee B. Anderson and Robert L. Keuch (Internal Security), and Frank R. Hunter, Jr., General Counsel, Charles F. Dirlam, and Peter P. Hanagan (S.A.C.B.).

Subversive Activities Control Act; Order to "Communist Front" to Register. Jefferson School of Social Science v. Subversive Activities Control Board (C.A.D.C., December 17, 1963). After a hearing the Board found that the School satisfied the Act's criteria for a "Communist-front," and ordered the school to register as such with the Attorney General. The School petitioned the Court of Appeals for review of the registration order. Upon the School's subsequent motion to dismiss its petition for review because it had allegedly ceased to exist, the Court of Appeals remanded to the Board for a hearing on the issue of the School's dissolution. The Board's "Report on Remand", which ruled that the School had not proved its dissolution, as well as the merits of the petition for review, were the subjects of the instant decision.

The Court first denied the motion to dismiss, holding that the School had indeed failed to sustain the burden of proving its dissolution. Factors which threw considerable doubt upon the reality of the alleged dissolution were (1) the non-participation in the dissolution agreement of five of the thirteen trustees; (2) the relationship of the school to the presently existing and operating realty corporation which had owned the School's premises; (3) the continued existence of its library, unsold; (4) the continued operation of its book shop; (5) the existence of the School for Marxist Studies, a sizable institution teaching the same courses for the same purposes and manned in large part by the School's former instructors.

The Court then ruled that the School's constitutional questions concerning the statute's registration provisions were rejected upon the authority of the Supreme Court's decision in Communist Party v. SACB 367 U.S. 1, sustaining the registration provisions as to the parent organization.

The Court concluded with a ruling that the School was estopped from re-litigating before the Board an issue which the Supreme Court had decided, in the affirmative, in the Party case, supra, i.e., whether the Party was a Communist-action organization within the meaning of the statute. Holding, on the basis of the Board's finding in the School's case, that the School is in privity with the Party, the Court ruled under the doctrine of res judicata that the prior judgment operated as an estoppel in the action between the Party's privy, the School, and the SACB.

Chief Judge Bazelon dissented on the mootness question.

Staff: The appeal was argued by Kevin T. Maroney (Internal Security); with him on the brief were George B. Searls, Lee B. Anderson, Robert L. Keuch and Benjamin F. Pollack (Internal Security); and Frank R. Hunter, Jr., General Counsel, Charles F. Dirlam and Peter P. Hanagan (S.A.C.B.)

False Statement - 18 U.S.C. 1001. U.S. v. Ernest Alfred Corduan. On November 13, 1963, a federal grand jury at San Diego, California, indicted Corduan for a violation of 18 U.S.C. 1001, charging that defendant did knowingly and wilfully falsify a material fact and made a false fictitious and fraudulent statement and representation to the Board of United States Civil Service Examiners for Scientists and Engineers for the Navy Department in that, in his application for employment with the United States Navy Electronics Laboratory at San Diego, defendant claimed that he had received a BSME degree from the University of Illinois in 1943 and a BSEE degree from the University of Illinois in 1948 and that he had attended the University of Hawaii from 1939 to 1942, whereas in fact, defendant, then and there, well knew that he did not receive the foregoing degrees from the University of Illinois nor did he attend the University of Hawaii from 1939 to 1942. On November 25, 1963 Corduan pleaded guilty. The case was continued until January 3, 1964 for probation report and sentence.

Staff: United States Attorney Francis C. Whelan (S.D. Calif.); Vincent P. MacQueeney (Internal Security Division).

Foreign Agents Registration Act: Failure to Register. U.S. v. Elmer Henry Loughlin (D. C.) The defendant, a Brooklyn physician who had previously pleaded not guilty to a one count indictment under the Foreign Agents Registration Act of 1938 charging him with failure to register with the Attorney General as an agent of the Government of Haiti, its officers, agents and representatives, on December 16, 1963, proffered a plea of nolo contendere, which was accepted by the Court. The Government did not oppose the Court's acceptance of the plea of nolo contendere since defendant had, during the period subsequent to the indictment, complied with the registration provisions of the Act by filing an acceptable registration statement. Sentencing was deferred pending a Probation Office report.

Staff: James C. Hise (Internal Security Division).

Contempt of Congress Conviction; Authorization of Issuance of Congressional Subpoena. Robert Shelton v. United States (C.A.D.C., December 30, 1963). Appellant was convicted of unlawful refusal to answer two questions prepounded to him on January 6, 1956, by the Internal Security Subcommittee of the Senate Judiciary Committee. His prior conviction on the same charge was reversed for failure of the first indictment to allege the subject under inquiry at the time the questions were asked. Russell v. United States, 369 U.S. 749.

The Court of Appeals, Judge Wright speaking for himself and Judge Washington with Judge Miller in dissent, eschewed the constitutional issues which appellant pressed, and ruled that the subpoena under which appellant appeared at the Subcommittee hearing was, according to the terms of the Subcommittee's charter (S. Res. 366, 81st Cong., 2d Sess.), invalidly issued, because the decision to issue it was made -- not by the Subcommittee or, by delegation, the chairman -- but de facto by Subcommittee counsel alone.

Staff: Assistant United States Attorney William Hitz (D.D.C.) argued the case; with him on the brief were United States Attorney David C. Acheson (D.D.C.) and Robert L. Keuch and Carol Mary Brennan (Internal Security Division).

Subversive Activities Control Act of 1950: Registration of Communist Party Members. Attorney General v. John William Stanford, et al. On December 20, 1963, the Subversive Activities Control Board issued five orders directing John William Stanford of San Antonio, Texas; William Cottle Taylor and Benjamin Dobbs of Los Angeles, California; and Frances Gabow and Aaron Libson of Philadelphia, Pennsylvania, to register as members of the Communist Party pursuant to the provisions of Section 8(a) and (c) of the Subversive Activities Control Act of 1950. To date, thirty-seven such membership petitions for orders requiring registration have been filed with the Board and orders have been issued in twenty-five cases. Hearings are to be scheduled in the other twelve cases.

Staff: Thomas C. Nugent, Richard B. Chess, John E. Ryan, James H. Jeffries, III, and James A. Cronin, Jr.. (Internal Security Division)

Subversive Activities Control Act of 1950, as amended by the Communist Control Act of 1954: Communist-Infiltrated Organizations. International Union of Mine, Mill and Smelter Workers v. Attorney General. The Subversive Activities Control Board on December 20, 1963, issued its report and order dismissing the petition filed May 31, 1962, by the Union for a redetermination that it is no longer a Communist-infiltrated organization within the meaning of the Internal Security Act of 1950, as amended by the Communist Control Act of 1954. The Board on May 4, 1962, after lengthy proceedings, had granted the Attorney General's petition filed July 28, 1955 and declared the union to be a Communist-infiltrated organization. The order of May 4, 1962 is on appeal to the Court of Appeals for the District of Columbia, and will not become a final order until all appellate review has been exhausted. When there is in effect a final order of the Board declaring a union to be a Communist-infiltrated organization, the union is ineligible to use the services of the National Labor Relations Board.

Staff: F. Kirk Maddrix, James H. Jeffries, III (Internal Security Division)

False Statement - 18 U.S.C. 1001., U.S. v. Robert M. Ackerson. On October 28, 1963, in the Federal District Court in Denver, Colorado, Ackerson pleaded guilty to one count of an 11 count indictment, which substantially charged that the defendant falsified Applications for Bonus Payments for uranium ore, filed with the Atomic Energy Commission. The Court, on the Government's motion, dismissed the remaining 10 counts. Subsequently, on November 22, 1963, District Judge Hatfield Chilson sentenced the defendant to two years imprisonment, which he suspended, placing the defendant on probation for two years. Ackerson was also ordered to pay the United States a fine of $1,000, payable during the defendant's period of probation.

Staff: United States Attorney Lawrence M. Henry (D. Colo.); Vincent P. MacQueeney (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation: Deposit of Deficiency Does Not Bar Appeal Under Federal Law Which Alone Is Applicable; Rule 43(a), F.R.Civ.P., Is Rule of Admissibility and State Exclusionary Rules Are Not Controlling; Comparable Sales Are Best Evidence of Value; Expert Witness May Testify to Prices of Comparable Sales Despite Hearsay and Best Evidence Rules and Possibility of Trial Prolongation by Exploration of Collateral Issues; Discretion to Exclude Sales as Not Comparable Does Not Permit Exclusion As Matter of Law; New Trial on Value Should Not Be Heard by Same Commission. United States v. Featherston (C.A. 10, December 20, 1963). The district court in Kansas has followed state practice in excluding the sales prices of comparable properties except on cross-examination to test the knowledge of the witness because of its view that such evidence leads into collateral issues. Upon a challenge by the United States to that practice in this case, the district court held a hearing by its three judges en banc on that issue and invited all condemnation commissioners in Kansas and attorneys engaged in condemnation proceedings to be present and submit briefs. Thereafter, the court ruled that Kansas law need not be followed, but that, because of hearsay, no witness could testify to the sales price of a comparable sale unless he was the seller, buyer or broker for the transaction.

The Government appealed because it customarily uses expert appraisers who were not parties to the comparable sales upon which they rely. The landowner moved to dismiss the appeal on the ground that the Government, having deposited the deficiency into the registry of the court, cannot take advantage of the judgment (to stop the running of interest) and then prosecute an appeal.

The Tenth Circuit held that the right to maintain the appeal is governed by federal, not Kansas, law and that payment of a judgment does not bar an appeal therefrom when, as here, repayment may be enforced. On the merits, it held that Rule 43(a), F.R.Civ.P., which the landowner relied upon as requiring Kansas law to be followed respecting evidence of comparable sales, is a rule of admissibility, not a rule of exclusion, and that state exclusionary rules are not controlling in the federal courts. Under federal law, it held that the best and most objective evidence of value is comparable sales and that, although the best evidence and hearsay rules are important, they should not be applied to prevent an expert giving the basis for his opinion. "The fear of trial prolongation by exploration of collateral issues does not impress us." It recognized that a commission may exercise discretion in excluding sales of property that are not sufficiently similar to afford an adequate basis for comparison, but held that "The trouble is that the commission in this case did not exercise any discretion. Instead, it held as a matter of law that the evidence was not admissible" and that this required reversal. Finally, as requested by the Government, it held that "Fairness to the parties requires that on remand the issue of compensation should not be heard or determined by the same commission."

Staff: S. Billingsley Hill (Lands Division).

Indians: Validity of Klamath Termination Act; Discrimination Due to Race; Delegation of Power to Private Banks as Trustees; Validity of Balloting Procedure. Furman Crain, Sr. v. First National Bank of Oregon, et al. (C.A. 9, November 13, 1963). Pursuant to the provisions of the Klamath Termination Act, 25 U.S.C. 564-564x, the Secretary of the Interior by proclamation on August 13, 1961, terminated the federal trust relationship to the affairs of the Klamath Indians, provided for liquidation and distribution of tribal assets, and placed the share of tribal funds belonging to Indians in need of assistance in trusts with private banks. Plaintiffs, being beneficiaries of such trusts, sued for declaratory judgments holding (1) that the Act violates the Fifth Amendment in that it restricts plaintiffs' use of their property solely because of Indian ancestry, (2) that the designation of private trustees for the management of the trust property is an unconstitutional delegation of Congressional power to a private person, and (3) that plaintiffs were not offered the ballot choice required by the Act because on the ballot used, if they voted to remain in the tribe, they necessarily also voted approval of the management plan proposed.

The district court upheld the Act and the balloting procedure. The Court of Appeals affirmed. It held: "There is no unlawful discrimination because of Indian ancestry. Appellants acknowledge that Indian property is subject to control during wardship. Here, during wardship, their need of assistance was determined by the procedures prescribed by Congress and their property was placed in trust with the prescribed Congressional restrictions as a means of partially continuing wardship. The whole theme of the Klamath Termination Act is the general termination of governmental guardianship of a tribal society and the recognition of the dignity of the individual and not discrimination against him."

As to delegation of legislative power to private banks, the Court held that Congress had exercised its lawmaking power by authorizing termination of restrictions and setting forth the procedures and that it had appropriately authorized private corporations with extensive trust experience to carry out (administratively) the trust features of the Act. As to the ballots, the Court held that the Act gave the Secretary ultimate authority to adopt a management plan whether or not those who elected to remain in the tribe approved.

Staff: S. Billingsley Hill (Lands Division).

Condemnation: Subsequent Change of Plans by United States Does Not Invalidate Original Taking. United States v. Three Parcels of Land (D. Alaska, Civil No. F-6-61). A declaration of taking was filed on May 31, 1961, and the sum of $228,000 was deposited for the taking of property for postal facilities in the City of Fairbanks. An agreement was executed prior to the taking between the Alaska State Housing Authority and the United States wherein it was agreed that the sum of $228,000 was just compensation for all of the land in the proceeding, and that awards of just compensation for any other interests in the property would be deducted from such sum.

It was subsequently ascertained that Mrs. Mary E. Bridges had an interest in a portion of the property designated as Parcel No. 2. She moved for the continuance of several scheduled pretrial conferences, and on September 19, 1963,

the Court directed the United States to file a statement on or before November 8, 1963, declaring whether the public use for which the land was taken is to provide necessary postal facilities and, if not, to file a brief in support of the Government's position. On December 4, 1963, defendant Bridges moved for leave to file an answer to the complaint.

The Court entered a memorandum of decision on December 10, 1963, in which it noted that the time for filing an answer had expired but upon consideration of the proposed defenses, held them legally insufficient. Some of the assertions were that as a matter of law defendant Bridges was entitled to the return of her property; that she had a superior right to all persons to have the property returned to her; and that any conveyance of the property to the Alaska Housing Authority would be unlawful.

The Court noted that it was a matter of common knowledge that the plans of the United States were changed after the taking of this property, but held that any subsequent change in plans did not render the original taking invalid nor cause title to revert to the defendant Bridges.

Staff: United States Attorney Warren C. Colver and Assistant United States Attorney James R. Clouse, Jr. (D. Alaska)

Due Process Clause of Fourteenth Amendment Relates Only to Conduct of State Governments and Has no Relevancy to Conduct of Private Citizens; No Federal Jurisdiction Exists in Absence of Showing That State Law Deprives Litigant of Property Without Due Process. Elbert Roberts v. Twin Fork Coal Company (Civil No. 737,E.Ky., October 14, 1963.) This action was filed by a landowner for damages and to enjoin the defendant mining company, the lessee of the minerals, from strip mining and augering coal from plaintiff's land. As the basis for federal jurisdiction, plaintiff contended that he was being deprived of his property without due process of law in violation of the Fourteenth Amendment to the Constitution. (Because of its interest in preventing strip mining, the Government filed a suggestion of interest respecting the merits, but the Court did not reach the merits.) The Court held that the due process provisions have no relevancy to the wrongdoing of private persons, but they are solely a stricture on the conduct of state governments, and that unless it could be proved that defendant was acting for the state either actually or colorably in stripping coal from plaintiff's land it could not be shown that defendant had violated the amendment. The Court further pointed out that if state involvement could be predicated on the fact that the state fosters a certain common law policy, it is not certain that this would be such a case, as all of the Kentucky cases relied on by defendant to sustain his right to strip mine have contained waivers of damages to the surface, whereas in this case there was no waiver. The Court stated that until a case similar to this one has been decided by the Court of Appeals of Kentucky no one can say that there is Kentucky law on the precise subject, and that it deprives plaintiff of his property. The motion to dismiss was granted.

Staff: United States Attorney George I. Cline (E.D. Ky.)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Cash Surrender Value of Life Insurance Policy - Effect of Service of Notice of Lien and Levy on Insurance Co. United States v. Albert Salerno and The Mutual Life Insurance Company. (D. Nev., October 21, 1963.) (64-2 USTC ¶9130). This was a suit to reduce tax liability to judgment and to foreclose liens on the cash surrender value of an insurance policy on the life of the taxpayer. Taxpayer defaulted. Notice of tax lien was filed on January 30, 1957 and served on the insurance company on June 18, 1958. Notice of levy was served on the company on February 11, 1960. Automatic premium loan provisions were applicable to the policy and premium loans were charged against the policy starting on November 6, 1958. The Court recognized that the tax lien attached to the cash surrender value on the date the assessment was made, but questioned the effect of the making of the automatic premium loans after the lien has so attached. The Court concluded that the premium loans are, in effect, payments and prior to a levy and demand the taxpayer's debtor incurs no liability to the Government for payment of the indebtedness to the taxpayer. Foreclosure reaches only the property existent at the time of that foreclosure. However, since the insurance company incurs personal liability for the impairment of the property after levy is made, the effect is to give judgment to the Government for the amount of the cash surrender value as of date of levy.

Staff: United States Attorney John W. Bonner (D. Nev.)

Interpleader: Filing of Petition For Receiver in State Court Did Not Place Property of Taxpayer in Custodia Legis. Youngstown Sheet & Tube Co. v. Patterson-Emerson-Comstock of Ind., Inc., et al. (N.D. Ind., November 27, 1963.) (CCH 64-1 USTC ¶28). Taxpayer, Patterson-Emerson-Comstock of Indiana, had contracted with the Youngstown Sheet & Tube Company to perform certain construction work. Upon completion of that work, Youngstown held some $76,000 of retained percentages due on this contract. On June 14, 1961, the District Director assessed nearly $300,000 worth of taxes against taxpayer and notice of lien was filed at approximately the same time. On June 26, 1961, a creditor of taxpayer filed a complaint and ancillary proceedings for the appointment of a receiver in the Indiana State Court. On June 28, 1961, the Internal Revenue Service served a notice of levy upon the plaintiff, Youngstown, to reach any property held by it belonging to taxpayer. Subsequent to the State Court receivership, taxpayer was adjudicated a bankrupt and the trustee in bankruptcy made a demand on plaintiff for the fund held. Plaintiff, Youngstown, interpleaded the sum it held. In the interpleader action the United States claimed priority over other parties thereto by virtue of the federal tax liens. The trustee in bankruptcy

claimed priority over the United States for the alleged reason that the levy served on June 28, 1961 was ineffective because taxpayer's property had been subjected to the custody of the State Court by virtue of the receivership proceedings which were instituted on June 26, 1961. The receiver contended that he succeeded to the rights of the State Court receiver and that since the levy was ineffective the United States would be required to look to the bankruptcy proceedings for any collection from this fund.

The Court held that the claim of the United States took priority over the claim of the receiver and held that the fund was not in custodia legis at the time the levy was served, and therefore the levy effectively reduced the debt to the possession of the United States. The Court held that the mere filing of a petition for receiver does not place the property of the debtor in the custody of the court and that the receiver must actually take possession of the property before it may be considered in custodia legis. Based upon these conclusions, the United States was awarded a second priority subsequent only to two perfected mechanic's liens filed against plaintiff, and therefore recovered judgment for the bulk of the interpleaded fund.

Staff: United States Attorney Alfred W. Moellering and Assistant United States Attorney Joseph Eichhorn (N.D. Ind.); and Wallace E. Maloney (Tax Division)

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