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

February 7, 1964

United States

DEPARTMENT OF JUSTICE

Vol. 12 No. 3

UNITED STATES ATTORNEYS

BULLETIN

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REIMBURSEMENT OF EXPENSES INCURRED BY COURT-APPOINTED COUNSEL FOR TRAVEL AND SUBSISTENCE NOT ALLOWABLE.

In United States v. Germany, 32 F.R.D. 343 (Md. Ala., 1963) discussed under Rule 15(c), Vol. 11, U.S. Attorneys Bulletin No. 11, June 14, 1963 issue, the Court directed the U.S. Marshal to pay the expenses incurred by court-appointed counsel for travel and subsistence in interviewing a witness at the place of the witness' residence and in viewing the scene of the alleged crime. Subsequent to the Court's order the United States Attorney for the Middle District of Alabama informed the Court that the United States Government had no funds available to pay such expenses and that the Department of Justice had refused to authorize the United States Marshal to honor the order of the Court. On April 19, 1963 (32 F.R.D. 421), the Court dismissed the indictment against Germany on the ground that failure of the Government to provide funds for the payment of expenses deprived the defendant of the "assistance of counsel" under the Sixth Amendment.

Since the United States Government has no appropriated funds for the payment of the above type of expenses incurred by court-appointed counsel, United States Attorneys should not rely upon the ruling of the Court in United States v. Germany, discussed in the June 14, 1963 Bulletin issue, as authority for the reimbursement of a court-appointed attorney for expenses.

MONTHLY TOTALS

During the month of December triable criminal cases decreased but this decrease was offset by the increase in civil cases. In addition, both criminal and civil matters rose during the month. As a result, the aggregate of cases and matters pending increased by 261 items. Set out below is a comparison of the totals for December with those for the preceding month.

	November 30, 1963	December 31, 1963	
Triable Criminal	9,383	9,038	- 345
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,948	16,226	+ 278
Total	25,331	25,264	- 67
All Criminal	10,933	10,599	- 334
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,478	18,772	+ 294
Criminal Matters	13,039	13,293	+ 254
Civil Matters	13,580	13,627	+ 47
Total Cases & Matters	56,030	56,291	+ 261

The number of cases filed and terminated during the first six months of fiscal 1964 shows an increase over the same period of fiscal 1963. Filings continue to increase faster than terminations, and consequently the pending caseload continues to rise. An encouraging aspect of the caseload at the end of December was the slight reduction in the number of civil cases pending. If all of the 92 districts made an effort to increase the number of terminations during the remainder of the fiscal year, the effect on the caseload would be substantial. Fiscal year 1956 offers an example of what can be done if a concerted effort is made - with an average force of 590 Assistants the United States Attorneys' offices terminated 60,350 cases - whereas in fiscal 1963, with an average force of 667 Assistants, only 59,019 cases were terminated.

	First 6 Months Fiscal Year 1963	First 6 Months Fiscal Year 1964	Increase or Decrease Number	%
Filed				
Criminal	15,856	16,206	+ 350	+ 2.2
Civil	12,812	13,394	+ 582	+ 4.5
Total	28,668	29,600	+ 932	+ 3.3
Terminated				
Criminal	15,006	15,398	+ 392	+ 2.6
Civil	11,832	12,211	+ 379	+ 3.2
Total	26,838	27,609	+ 771	+ 2.9
Pending				
Criminal	10,265	10,599	+ 334	+ 3.3
Civil	23,670	23,503	- 167	- .7
Total	33,935	34,102	+ 167	+ .5

For the second consecutive month in the present fiscal year, terminations rose above filings. While the difference was not as substantial as in November, nevertheless it is a hopeful sign that the trend may continue up through the end of the fiscal year.

	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
Dec.	2,252	2,214	4,466	2,554	2,039	4,593

For the month of December, 1963 United States Attorneys reported collections of $3,321,896. This brings the total for the first six months of fiscal year 1964 to $30,092,638. Compared with the first six months of the previous fiscal year this is an increase of $10,300,663 or 52.0 per cent over the $19,791,975 collected during that period.

During December $3,003,689 was saved in 136 suits in which the government as defendant was sued for $5,077,040. 92 of them involving $2,190,886 were closed by compromises amounting to $687,012 and 26 of them involving $2,322,261 were closed by judgments against the United States amounting to $1,386,339. The remaining 16 suits involving $563,893 were won by the government. The total saved for the first six months of the current fiscal year was $46,959,173 and is an increase of $20,294,439 or 76.1 per cent over the $26,664,734 saved in the first six months of fiscal year 1963.

The cost of operating United States Attorneys' Offices for the first six months of fiscal year 1964 amounted to $8,614,993 as compared to $7,934,893 for the first six months of fiscal year 1963.

The cost of operating United States Attorneys' offices continues to run almost 8 per cent above the same period of fiscal 1963, while the increase in cases filed and terminated averages only about 3 per cent. It become increasingly difficult to justify increased appropriations for United States Attorneys' offices in the face of production figures which compare unfavorably with prior years when the authorized force of Assistants was much smaller.

DISTRICTS IN CURRENT STATUS

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

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

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ADMINISTRATIVE DIVISION

Assistant Attorney General S. A. Andretta

REQUESTS FOR INTEREST COMPUTATIONS ON GAO CLAIMS

The General Accounting Office continues to receive numerous requests from various U. S. Attorneys for interest and other computations.

Your attention is invited to Bulletin No. 10, Volume 6, page 293, dated May 9, 1958, under the general caption "Notes on Memo No. 207, Second Revision." This item contains a general dissertation with respect to the circumstances under which the GAO would service the U. S. Attorneys as to interest computations, balances, etc., regarding debit matters reported by that Office. In brief, it conveys the understanding that the General Accounting Office will service requests for necessary information but that the various U. S. Attorneys should determine that there exists a real need for such computations before making such requests.

An examination of one case for which a computation was requested and provided shows that the principal amount of the judgment indebtedness was over $5,000 and could not have been substantially changed by remittances of $20,000 per month which had been made by the debtor for over 4 years. In fact, the payments were inadequate to pay the interest on the debt. This request for computation was not justified under the circumstances as it was a simple calculation.

Please remind your personnel of the current and existing policy understandings. The GAO does not question your judgment with respect to the need for the computation requested, nor does it urge that you furnish a justification or explanation in any future requests, because such might be burdensome. It urges, however, that future requests be predicated on a determination that there is a real need for such data in order that, in the interest of Government economy, they may not be burdened with costly computations merely to update a file.

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 25, Vol. 11 dated December 27, 1963:

MEMO	DATED	DISTRIBUTION	SUBJECT
184-S6	12-26-63	U.S. Attorneys & Marshals	Position Schedule Bonds For 1964-65

MEMO	DATED	DISTRIBUTION	SUBJECT
325-S2	1-2-64	U.S. Attorneys & Marshals	Phase II, Salary Reform Act Of 1962.
365	1-7-64	U.S. Attorneys & Marshals	Travel Regulations
340-S2	1-14-64	U.S. Attorneys & Marshals	Annual Report For Civil Defense Identification Cards

ORDER	DATED	DISTRIBUTION	SUBJECT
309-64	1-6-64	U.S. Attorneys & Marshals	Amendment Of Regulations Relating To Employee-Management Cooperation In Dept. Of Justice (Order No. 293-63).

* * *

ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Lumber Companies Indicted Under Sherman Act. United States v. Cascadia Lumber Company, et al., (D. Ore.) D.J. File No. 60-160-116. On January 15, 1964, a Portland, Oregon, grand jury returned an indictment against seven lumber companies, charging bid rigging on United States Forest Service sales in violation of Section 1 of the Sherman Act. Defendants, seven of the principal lumbering companies in the Waldport Working Circle of the Siuslaw National Forest in Western Oregon, were Cascadia Lumber Company, Coquille Valley Lumber Company; Larson Lumber Co.; Lincoln Lumber Sales, Inc.; Lundy Brothers, Inc.; Mountain Fir Lumber Company, Oreg., Ltd.; and Red Fir Lumber Company.

The indictment charges that the defendants and co-conspirators conspired from January 1962 through the date of the indictment to allocate Forest Service sales among themselves, to eliminate competition among themselves and to force non-members of the conspiracy to pay higher prices for timber.

The defendants annually purchase approximately $4 million dollars worth of timber from the Forest Service.

Staff: Don H. Banks, Gilbert Pavlovsky and J. Fred Malakoff (Antitrust Division)

Navigation Company Charged With Clayton Act And Sherman Act Violation. United States v. Alexander & Baldwin, Ltd., et al. (D. Hawaii) D.J. File No. 60-0-36. On January 20, 1964, a complaint was filed challenging the majority stock ownership by four of Hawaii's "Big Five" companies in Matson Navigation Company. Matson is the dominant shipping line between Hawaii and the Mainland. The complaint charges that this ownership of Matson violates §7 of the Clayton Act and §1 of the Sherman Act.

Matson and the following four Hawaii corporations ("Big Four") were named as defendants: Alexander & Baldwin, Ltd.; Castle & Cooke, Inc.; C. Brewer & Co., Ltd.; and American Factors, Ltd.

Since 1959, the Big Four have owned 74% of Matson's stock, and currently control 12 of the 21 Matson directorships. Prior to 1959, the Big Four had acquired 40% of Matson's stock; they increased that percentage in October 1959 when Matson redeemed the stock of all shareholders except these four corporations and three other shareholders.

The Big Four control 86% of the sugar industry and over one-half of the pineapple industry. These products, with the exception of military household goods, comprise virtually all the eastbound cargo to the Mainland from Hawaii. Control by the Big Four of the sugar and pineapple industries and numerous other businesses in Hawaii, together with their control of Matson, the complaint

charges, has resulted in the limitation of actual and potential competition between Matson and other water carriers between Hawaii and the Mainland.

The complaint asks that the Big Four be required to divest themselves of their stock ownership in Matson, and that no representative of any of the four firms be permitted to sit on Matson's board of directors.

Staff: Raymond M. Carlson and Carl L. Steinhouse (Antitrust Division)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Internal Security Act of 1950, Section 6 (50 U.S.C. 785); Incomplete Passport Application. Copeland v. Secretary of State (S.D. N.Y.) (DJ 146-7-53-323). On January 23, 1964, a three-judge District Court in the Southern District of New York sustained the authority of the Secretary of State to require an applicant for a passport to state, under oath, as a condition precedent to the processing of his passport application, that he is not a present member of the Communist Party of the United States, or give an explanation of his inability to make such an affirmation.

This is the second three-judge District Court to sustain the authority of the Secretary under Section 6 of the Internal Security Act of 1950 to decline to process the passport application of an individual who has refused to execute the non-Communist Party membership oath promulgated by the Secretary. See Mayer v. Rusk decided December 3, 1963 (D.D.C.) (DJ 146-1-23-2484); Vol. 11, U.S. Attorneys Bulletin, page 613.

Staff: Assistant United States Attorneys Robert E. Kushner and Eugene R. Anderson (S.D. N.Y.); Benjamin C. Flannagan (Internal Security Division), of counsel.

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

Referendum Conducted by Secretary of Agriculture Among Milk Producers to Ascertain Approval of Milk Marketing Order Held Immune to Judicial Review With Respect to Conduct of Referendum. Freeman v. Hygeia Dairy Co. (C.A. 5, January 10, 1964). Appellee, a milk handler under the Corpus Christi Milk Marketing Order, attacked, inter alia, the procedure of the Secretary of Agriculture in conducting a referendum among milk producers to ascertain their approval of the Order as amended in 1957. The original 1955 Corpus Christi Milk Marketing Order covered 7 counties. One of the amendments in 1957 to the 1955 Order added two counties to the area covered. Appellee attacked the producer referendum because all the producers of milk for the enlarged nine county marketing area were allowed to vote in one referendum, one tabulation of votes was made, and one set of percentages was computed. The vote for approval was in excess of the 75% required under the Act. Appellee contended that the producers for the two new counties should have voted separately from the producers for the original seven counties and that the percentage of producer approval, required under the Act to effectuate the order, must be met by the producers for the two county area as well as by the producers for the original seven county area. The district court agreed and held the referendum invalid.

The Court of Appeals reversed, holding that the Secretary had observed the requirements of the statute; and that the details of a producer referendum and the manner in which it is conducted are matters which the statute entrusted to the discretion of the Secretary and are "neither subject to attack by a handler or producer nor subject to judicial review." The Court further held that, since a milk handler has standing to attack a milk marketing order, the case should be remanded to the district court to consider appellee's attacks upon the order which had not been ruled upon by the district court.

Staff: Pauline B. Heller (Civil Division)

CIVIL SERVICE DISMISSAL

Suit for Reemployment Held Barred by Failure to Litigate Issue in Prior Action for Review of Dismissal and by Laches. Harshaw v. Perry (C.A. D.C., January 9, 1964). This suit for review of the denial of plaintiff's reemployment rights was commenced four years after the administrative denial. In a per curiam opinion, the Court of Appeals affirmed the District Court's dismissal of the suit because the reemployment question had been ripe for judicial review at the time the termination

itself was being reviewed in a judicial action and had not been raised then, and because of plaintiff's laches in bringing the second suit.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Frank Q. Nebeker and Sylvia Bacon (Dist. Col.)

CIVIL SERVICE DISMISSAL - VETERANS PREFERENCE ACT

Court of Appeals Retains Jurisdiction of Action Pending Remand to Civil Service Commission for Reconsideration of Disciplinary Penalty in Light of Court's Holding Part of Charges Not Sustained. Bond v. Vance (C.A. D.C., January 9, 1964). Plaintiff, a civilian employee of the Army, was separated (not discharged) on the ground that his prolonged absences from duty constituted an abandonment of his position. Separation, under such circumstances, is not considered disciplinary and Army regulations allow reinstatement upon the employee's request. Plaintiff made such a request and was reinstated. Disciplinary action was then taken and plaintiff was dismissed. Plaintiff, a veteran, obtained Civil Service review under the Veterans' Preference Act. The Commission upheld the separation, considering the entire period of the unauthorized leave - a period of 18 months. The District Court granted the Government summary judgment.

The Court of Appeals (one judge dissenting) reversed, holding that the period of unauthorized absence from work should only have been considered to extend between the time when plaintiff was told to return or face discharge and the time when he requested reinstatement - a period of one month. The Court remanded the case for reconsideration of the penalty in view of the shortened absence. Jurisdiction of the appeal was retained pending reconsideration by the Commission. The dissenting judge saw no reason for reconsideration since, in his view, the facts showed disregard of the employer's interest which warranted dismissal. He also suggested a bar of laches (18 months' delay).

Staff: United States Attorney David C. Acheson, Assistant United States Attorneys Frank Q. Nebeker, William H. Willcox, Sylvia A. Bacon (Dist. Col.)

FEDERAL TORT CLAIMS ACT

Finding of Contributory Negligence Held Not Clearly Erroneous; Objection to Use of Unsigned Deposition Held Waived by Failure to Object Promptly. Orlando Valdez v. United States (C.A. 9, December 18, 1963). This suit arose out of an intersection collision occurring when plaintiff, on a motor scooter, attempted to pass on the right a Government vehicle which was making a right turn from the right lane. The finding of contributory negligence was affirmed as not clearly erroneous. The

Court further ruled that the district court's action in striking certain evidence of experiments was not an abuse of discretion since it amounted to no more than a rejection of the evidence as lacking in persuasiveness.

Finally, the Court ruled that an unsigned deposition had been properly admitted into evidence, despite the absence of the presiding officer's statement concerning the reason for the lack of signature under Rule 30 (c) F.R. Civ. P., because plaintiff had failed to object to its use at the beginning of the trial, when the Government first explained to the court why the deposition was unsigned.

Staff: United States Attorney Francis C. Whelan, Assistant United States Attorneys Donald A. Fareed, Clarke A. Knicely (S.D. Calif.)

NATIONAL SERVICE LIFE INSURANCE ACT

Veterans Administrator's Rejection of Application for Addition of Disability Income Rider to National Service Life Insurance Policy Is Subject to Judicial Review; Administrator's Rejection Here Held Reasonable. Charles David Salyers, etc. v. United States (C.A. 5, January 13, 1964) D.J. 146-55-3296. In this action, plaintiff challenged the decision of the Administrator of Veterans' Affairs rejecting his application for the addition of a total disability income rider to his existing National Service Life Insurance policy. The Veterans' Administrator had determined that the applicant had not satisfactorily established that he was in "good health" at the time he applied for the additional insurance. When judicial review was sought we urged that the suit was not predicated on a contract of insurance and thus that the Administrator's decision was not subject to a judicial review (see 38 U.S.C. 784, 785). Alternatively, we contended that, even were that decision reviewable, it could not be set aside here since it was neither arbitrary or capricious. Both the district court and the Court of Appeals rejected our jurisdictional argument but both agreed that the Administrator's decision was reasonable. In rejecting our threshold argument the Court of Appeals emphasized that judicial review of decisions of the Veterans' Administrator is very limited and that courts may not inquire into the propriety of his rejection of an application for new insurance or for reinstatement of a lapsed policy. Review was appropriate here, however, as the right to the desired disability income rider flowed from the existing National Service Life Insurance policy.

Staff: Edward Berlin (Civil Division)

SOCIAL SECURITY ACT

Disability Benefits Denied Where Inability to Work Appeared Based on Lack of Jobs in Area Rather Than Inability to Perform Gainful Employment. Robinson v. Celebrezze (C.A. 5, January 9, 1964) D.J. 137-32-50.

Claimant had had his right arm amputated after an accident and could not get an artificial arm because of the absence of support for attachment. He had an eighth grade education. The evidence showed that he had actually worked as a self-employed truck driver despite the loss of the right arm. After a bad accident he stopped this work and apparently applied for Social Security benefits because he was able to find no other employment. The Secretary's denial of benefits was affirmed by the district court and the Court of Appeals. The Court of Appeals noted that the loss of one arm was not per se disabling, and reaffirmed its earlier statements that the test of disability is ability to perform substantial work not ability to obtain it.

Staff: United States Attorney Louis C. LaCour; United States Assistant Attorney Gene S. Palmisano (E.D. La.).

VETERANS ADMINISTRATION GUARANTEED LOAN

That Veterans Administration Guarantee Was on Loan Secured by Junior Lien Rather Than Senior Lien as Required by Regulations Was Not Bar to Suit by VA to Recover Deficiency From Mortgagor. United States v. Schmittmeyer (C.A. 2, December 30, 1963) D.J. 151-52-799. The Veterans Administration brought this suit to recover the difference between the amount of a loan paid by it pursuant to a guarantee and the value of the property assigned over to the Administration. The suit was resisted on the ground that the mortgage securing the guaranteed loan had been a junior lien rather than a first lien on the property as required by statute and regulations and that the guarantee was void. The court held that the statute did not require a first lien, but the regulations did. It found that the effect of the junior lien was not to void the guaranty but to reduce it by the amount of the prior liens. A defense of fraud was rejected for lack of proof that the Veterans Administration knew of the prior liens at the time it paid the bank on its guaranty. Summary judgment for the Veterans Administration was affirmed.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Leonard J. Theberge (E.D. N.Y.).

WALSH-HEALEY ACT

Wage Determination Under Walsh-Healey Act Set Aside; Refusal to Produce Information Supporting Bureau of Labor Statistics Wage Tables Violative of Administrative Procedure Act. Wirtz v. Baldor Elec. Co. (C.A. D.C., December 31, 1963) D.J. 219715-292. This is an action to set aside the Secretary of Labor's determination of the prevailing minimum wage in the electrical motors and generators industry. Upon it's usual pledge of confidentiality, the Bureau of Labor Statistics gathered information regarding the payment of wages from members of the industry. From this information wage tables were prepared and were introduced in an administrative proceeding under Section 1(b) of the Walsh-Healey Act. The

industry's trade association applied to the Hearing Examiner for a subpoena duces tecum to examine the supporting information because the BLS survey was alleged to be inaccurate. The application was denied and the denial was upheld by the Secretary of Labor, who stated that disclosure would violate the pledge of confidentiality and would seriously impair the work of BLS.

The Court of Appeals affirmed the District Court's action in setting aside the wage determination. The appellate court held that (1) the refusal to divulge the underlying information violated Section 7(c) of the Administrative Procedure Act; (2) considering the evidence offered by the trade association at the hearing, impeaching the accuracy of the BLS tables, there was not substantial evidence to support the determination; and (3) that the District Court's injunction against application of the determination applied to the entire industry whether or not a class action was involved. The Court remanded the record to the District Court to determine factually which, if any, of the plaintiffs had standing to bring the action in the first instance.

Staff: Howard E. Shapiro (Civil Division)

DISTRICT COURTS

FALSE CLAIMS ACT

False Claims Against Legislative Branch of Government Cognizable Under False Claims Act. United States v. Taylor (D. Md., January 3, 1964). Defendant was the Superintendent of the Folding Room of the House of Representatives who, during the years 1955 through 1957, caused the entry on the Folding Room payrolls of four fictitious names. He accepted, endorsed and cashed numerous salary checks issued in the names of the four non-existent payees. A criminal indictment under 18 U.S.C. 287 charged defendant with submitting false claims on fifty-two of the false payroll vouchers presented to the Disbursing Officer of the House, and a jury found defendant guilty on all fifty-two counts. The United States then brought a civil suit against defendant under the provisions of the False Claims Act, 31 U.S.C. 231, and subsequently moved for summary judgment based on the collateral estoppel effect of the prior criminal conviction. The Court granted the motion and entered judgment for the United States for $111,663.69, representing forty-eight statutory forfeitures (the statute of limitations barred recovery as to four of the false vouchers) and double damages amounting to $15,663.69. Although the False Claims Act is directed to claims "against the Government," this is only the second case wherein judgment under the Act was predicated on claims against the Legislative Branch of the Government.

Staff: United States Attorney Thomas J. Kenney (D. Md.);
Jerry Z. Pruzansky (Civil Division)

LANDRUM-GRIFFIN ACT OF 1959

Court Enjoins Local Union From Interfering With Secretary of Labor in Supervising Court-ordered Election of Union Officers. Wirtz v. Teamsters Warehousemen Local 424 (E.D. N.Y., December 11, 1963). On July 9, 1963, the Secretary of Labor commenced this action under Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 482(b)) against a local union made up primarily of migratory workers in Suffolk County, to obtain a court order directing the holding of an election of union officers under the supervision of the Secretary of Labor, because of the failure of the union to hold an election within 3 years. On October 11, 1963, the present union officers consented to a judgment directing such an election. On November 7, 1963 at a routine pre-election conference held between the Department of Labor and the union officers, the latter gave notice that they would object to the nomination by the complaining union members of one Hank Miller for union office. The meeting terminated with the union officers being directed to take no action concerning the election until further notice from the Department of Labor. However, the union officers subsequently distributed notices of election meetings. The Secretary immediately obtained an ex parte temporary restraining order restraining the union (1) from proceeding with the proposed election meeting, and (2) from further interfering with the supervision of the Secretary in the holding of the election. The Court also issued an order directing the union to show cause why the union should not be so permanently enjoined.

Upon a hearing, the Court from the bench granted the Secretary's motion for a permanent injunction restraining the defendant union from:

(1) violating the October judgment and from otherwise interfering with or obstructing the supervision of the Secretary in conducting the elections, or refusing to comply with such rules and regulations as the Secretary may prescribe in their supervision,

(2) proceeding with the proposed elections which were scheduled by the union officers contrary to the direction of the Secretary, and

(3) interfering with any decision of the Secretary with respect to the voting qualifications or eligibility of the union members to hold union office.

This was the first case in which the Department of Labor had encountered interference by any union in the Department's supervision of a court-ordered union election pursuant to Section 402(b) of the Landrum-Griffin Act. The Court supported the Secretary's position that the Secretary has the power to determine elegibility of union members to vote or hold union office under the statutory language of the Act requiring the Secretary to "supervise" an election when one has not been held within three years.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney George P. O'Haire, Chief, Civil Division (E.D. N.Y.)

SUITS IN ADMIRALTY ACT

1960 Amendment Provides Exclusive Remedy Against United States for Maritime Torts Which Could Have Been Instituted in Admiralty Had Private Person Been Involved. Judith Beeler v. United States (W.D. Pa., January 10, 1964) D.J. 157-64-179. Plaintiffs sued under the Federal Tort Claims Act for damages arising from an Allegheny River boating accident which occurred June 12, 1961. The claim was for negligence of the Army Engineers in failing properly to locate signs warning craft on the River of the Kittanning Lock and Dam. Minor plaintiff Judith Beeler was injured when this failure purportedly caused the boat in which she was riding to be swept over the dam.

The Government's answer raised as an affirmative defense the admiralty remedy exceptions to Tort Claims Act jurisdiction contained in 28 U.S.C. 2680(d). The Government moved for summary judgment on the ground that plaintiffs' exclusive remedy against the United States for this maritime tort was under the Suits in Admiralty Act and was made specifically cognizable thereunder by the 1960 amendment to section 2 of the Act, 46 U.S.C. 742.

The Court granted summary judgment holding that the amendment enlarges the Admiralty Act remedy against the United States to include suits cognizable in admiralty. The Court reiterated the rule that, if a remedy is provided by the Suits in Admiralty Act, that remedy is exclusive.

Staff: Daniel E. Leach (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

OBSCENITY

Proof of Scienter and of Community Standards; Use of Expert Witnesses and Comparison Evidence; Presentation of Books to Jury; Revocation of Bail Pending Sentence; Freeze of Corporate Assets Pending Final Satisfaction of Fine. United States v. West Coast News Company, et al. (W.D. Mich.), D.J. File No. 97-38-21. On December 12, 1963, after a trial that began on October 29, a jury found West Coast News Company, a California corporation which is one of the major distributors of pornographic paperback books; Sanford E. Aday, its secretary-treasurer and sole stockholder; and Wallace de Ortega Maxey, its president, guilty on five counts of causing the mailing and the carriage in commerce of obscene books. The jury disagreed on the remaining thirteen counts. The book "Sex Life of a Cop" was named in each of the five counts upon which a guilty verdict was returned.

Acting under the provisions of Rule 32(a), F.R. Crim. P., (rather than Rule 46(a)(2), "bail upon review") Judge Noel P. Fox revoked the bail of the individual defendants pending sentence. His action was based upon fears (caused by occurrences during the trial) that if continued in bail defendant Aday would return to California and claim inability, by reason of health, to return for sentencing, and that time-consuming hearings would be necessary to force his return. Applications for bail were thereupon made to the Sixth Circuit Court of Appeals and to Circuit Justice Stewart, and were denied in each instance. The judge also ordered, under the provisions of 28 U.S.C. 1651(a), a freeze on the assets of the corporate defendant until any fine which he imposed was satisfied.

On December 30, Judge Fox sentenced defendant Aday to the maximum sentence of five years and a $5,000 fine on each count, the sentences to be consecutive. Defendant Maxey received a total of fifteen years and a $19,000 fine, and the corporate defendant was fined the maximum total of $25,000. Sentence of the individual defendants was pursuant to 18 U.S.C. 4208(a)(2), the judge specifying that they would be eligible for parole at such time as the board of parole may determine. A cash bail of $75,000 was set for defendant Aday, and of $10,000 for defendant Maxey. In addition to the appeal from their convictions taken by all defendants, Aday is appealing the denial of his motion to reduce bail.

During the course of the trial, Judge Fox made the following significant rulings, embodied in written opinions:

(1) He held (in response to defendants' motion to dismiss at the close of the Government's opening statement) that the Government need prove only knowledge by defendants of the contents of the books and not specific

knowledge that the books were legally obscene; that the Government need prove only knowledge by defendants that the books were transported in interstate commerce and not specific knowledge that the books were transported into the Western District of Michigan; and that there is no requirement that the Government produce experts to prove the obscenity of the books.

(2) He held, in accordance with Judge Learned Hand's opinions in United States v. Levine, 83 F. 2d 156, and United States v. Kennerley, 209 Fed. 119, that the jury speaks for the community in determining the offensiveness of the books to community standards and is the best (and perhaps the only) expert on the question of the moral standards prevailing in the community, so that the testimony of so-called experts on this subject is unnecessary. Nevertheless, as "a matter of grace", he allowed defendants to offer three expert witnesses. He further held that defendants could offer eight allegedly similar books for comparison purposes, but would have to establish to the court's satisfaction that the offered books were both generally accepted by the community and similar to the books at issue. At a voir dire hearing held for this purpose, he then ruled that six of the offered books were not similar, and that the other two were not shown to be generally acceptable. Defendants' experts were, therefore, forbidden to mention in their testimony any books other than those at issue.

(3) He held that, pursuant to the "book as a whole" test set out in Roth (354 U.S. 476), the most practical way for the books to be presented to the jury was for each juror, at the close of the Government's case, to read each of the books from beginning to end. The judge noted that the books were exhibits, and that although exhibits may be read aloud to the jury by the party offering them, there is no compelling reason for the court to require that procedure if the offering party desires to follow a different one. To meet defendants' objections that they were entitled to a "public" trial, he ruled that the books would be read by the jury sitting in the jury box; court would remain in session; and defendants and their counsel, the prosecuting attorney, the bailiff and court reporter, and the judge would remain in the court room while the jurors read the books.

It is expected that either the written opinions will be published or that Judge Fox will rewrite them into one omnibus opinion which will be published.

Staff: United States Attorney George E. Hill; Assistant United States Attorney Robert G. Quinn, Jr. (W.D. Mich.) Marshall Tamor Golding (Criminal Division)

LOCOMOTIVE BOILER INSPECTION ACT

Diesel Locomotive Held Subject to Requirements of Locomotive Boiler Inspection Act (45 U.S.C. 22-34). United States v. Georgia Railroad (S.D. Ga.), D.J. File No. 59-13-314-1. Defendant railroad was charged with two violations of 45 U.S.C. 32, both arising out of an accident involving a diesel locomotive in which the engineer and fireman were injured. The two

counts were based on failure to perform requirements of Section 32, when serious injuries result from locomotive accidents, to (1) preserve defective parts if they resulted in a locomotive becoming inoperable, and (2) report the accident to the Interstate Commerce Commission.

The main issue tried was whether the injuries were "serious," within the meaning of the statute. However, the Court first ordered a directed verdict entered for the railroad on the ground that the statute, which dates from the steam locomotive era, was by its terms inapplicable to diesels. The United States moved for judgment n.o.v. (having previously moved for a directed verdict). The Court reversed its stand, and ordered judgment entered on both counts for the United States. This judgment has now been paid.

Staff: United States Attorney Donald H. Fraser; Assistant United States Attorney William T. Morton (S.D. Ga.)

ALIENS

Naturalization Revoked on Ground of Misrepresentation as to Marital Status; Evidence Held Insufficient to Support Revocation on Ground of Concealment of Arrest Record. United States v. Domenico D'Agostino (W.D. N.Y., Burke, J.), D.J. File No. 38-53-590. In this case, the Court revoked defendant's naturalization on the ground that during his naturalization proceedings he had deliberately misrepresented his marital status and had fraudulently concealed that the fact that he was a father of children. The facts disclosed that on June 23, 1921, defendant signed and filed with the county clerk an original declaration of intention to become a citizen of the United States. On the same date he also signed a triplicate declaration of intention and retained the triplicate in his possession. In the original and triplicate declaration of intention he stated that he was married to Domenica D'Agostino, a resident of Italy. On October 21, 1926, defendant filed his petition for naturalization together with the triplicate declaration of intention. The name, birthplace, and residence of his wife, however, had been erased from the triplicate declaration, and defendant stated under oath in his petition for naturalization that he was not married. Defendant was naturalized on March 21, 1927. Evidence was later produced that he had married Domenica Moscata in Italy in 1915, that three children had been born of this marriage, and that the marriage had not been dissolved. The Court found that defendant's misrepresentations were material and were made with the intention of deceiving the naturalization authorities.

The facts also disclosed that during his naturalization proceedings defendant was orally questioned under oath as to whether he had ever been arrested, charged with violations of any laws, or convicted of any crime, and that this question elicited the answer, "No". In fact, defendant had previously been arrested on a charge of violating the National Prohibition Act, which charge was dismissed one day after his naturalization. The Court found that the question was confusing since it was in reality three questions to which only one answer was given and recorded. The Court concluded

that there was no clear and convincing evidence that the question was understood by the defendant to include arrests, or that he intended to deceive the naturalization authorities as to his previous arrest.

Staff: United States Attorney John T. Curtin; Assistant United States Attorney Edmund F. Maxwell (W.D. N.Y.)

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Summary Judgment Based on Pleadings, Answers to Interrogatories, and Affidavits of Medical Experts. United States v. An Article of Device . . . "The Ellis Micro-Dynameter" (E.D. Pa., Dec. 2, 1963), D.J. File No. 22-62-2828. The United States filed a libel of information charging that the device in question was misbranded by false and misleading labeling claims as to its merits in diagnosing diseases. In an injunction suit against the manufacturer, who was responsible for the labeling, it was found that such devices were completely without diagnostic or other medical merit; United States v. Ellis Research Laboratories, Inc., 300 F. 2d 550 (C.A. 7, 1962), cert. den. 370 U.S. 918 (1962). The device under seizure had been sold and shipped by Ellis to the claimant with the same labeling as was involved in the injunction case, prior to that action. The claimant, a practicing chiropractor, was not a party in the Ellis case.

The United States moved for summary judgment on the ground that the seized device and claimant were bound under principles of estoppel by the Ellis case and also on the basis of affidavits by medical and technical experts that all the labeling claims of diagnostic value were false. The claimant made no attempt to support most of the manufacturer's claims, but submitted affidavits supporting limited diagnostic qualities for the device. Since he was not misled by the more extravagant claims and was not misusing the device pursuant to them, claimant contended that he was entitled to a trial on the merits of the more limited claims.

The Court held that since the Act proscribes labeling that is false or misleading in any particular, the unquestioned falseness of the more extreme claims rendered the device subject to forfeiture. The issue of fact raised by the claimant, while genuine, was not material, and therefore did not prevent entry of summary judgment. The Court did not reach the question concerning the res judicata or estoppel effect of the prior injunction litigation.

Staff: United States Attorney Drew J. T. O'Keefe (E.D. Pa.)

Burden of Proof on Government in Food and Drug Seizure Cases Held to Be Fair Preponderance. United States v. 60 28-Capsule Bottles . . . Unitrol (C.A. 3, Dec. 3, 1963), D.J. File No. 22-48-2828. This case, which was brought under the seizure provisions of the Federal Food, Drug, and Cosmetic Act, involved allegedly false and misleading claims for a weight reducing product. The district court held that the Government had the burden of proving its case only by a fair preponderance of the evidence. After trial, judgment was entered for the United States.

On appeal, it was contended that under Van Camp Sea Food Co. v. United States, 82 F. 2d 365 (C.A. 3, 1936), a greater burden of proof should have been required. Language in Van Camp, which was decided under the 1906 Food and Drugs Act, supported appellant's position. The Court of Appeals upheld the district court's ruling, in effect overruling Van Camp. In holding the usual civil standard to be applicable in seizure cases under the 1938 Act, the Court acted in accordance with all other appellate rulings under the later statute.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney James D. Butler (D. N.J.)

CUSTOMS

Domestic Value of Imported Goods Used to Determine Amount of Penalty Under 19 U.S.C. 1497. United States v. Max Beigelman (E.D. N.Y., January 3, 1964), D.J. File No. 54-52-176. Defendant was apprehended at Idlewild Airport attempting to smuggle a quantity of watch movements and cases into the United States. The merchandise was seized, and subsequently suit was filed under 19 U.S.C. 1497 to collect a penalty equal to its value.

The only dispute in the case was whether the amount of the penalty should be fixed by the foreign purchase value or by the domestic market value. The jury determined the foreign value at $2,960, and the domestic value at $4,657. The latter figure was reached by adding to the importer's cost charges for duties and profit. The Court held that the higher domestic value controlled. This was in accord with the long-standing interpretation of Customs. This case, however, was the first judicial ruling (at least the first known formal opinion) on this issue, although similar penalty provisions have been in effect for over 160 years.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Martin Pollner (E.D. N.Y.)

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Refugee Parole Status Denied Yugoslav Crewman. Vicko Glavic v. Beechie, Civ. No. 63-H-515, (S.D. Texas, Dec. 31, 1963.) Plaintiff brought this action under the Administrative Procedure Act contending that his application for stay of deportation to Yugoslavia had not been properly processed by the Immigration and Naturalization Service.

Plaintiff is a Yugoslav crewman whose conditional permit to land was revoked by the Service after he announced his intention not to return to Yugoslavia on the vessel on which he arrived. Plaintiff then applied for a stay of deportation under 8 U.S.C. 1253(h) claiming that he would be physically persecuted for religious and political reasons if deported to Yugoslavia. The Service advised plaintiff that he was not entitled to have his application processed under 8 U.S.C. 1253(h) but that it would be considered as an application for parole into the United States under 8 CFR 253.1(e) which authorizes parole into the United States of alien crewmen whose conditional landing permits have been revoked and who establish that they will be physically persecuted if returned to a Communist dominated country. The Service found that plaintiff would not be physically persecuted if deported, and denied him parole.

The Court noted that a very similar situation occurred in U.S. ex rel Szlajmer v. Esperdy, 188 F. Supp. 491, and that the Court there held that the crewman was entitled to have his application for stay of deportation heard under 8 U.S.C. 1253(h). The correctness of this decision was questioned by the Court and the Court further noted that subsequent to it the regulation 8 CFR 253.1(e) had been promulgated. The Court felt that this regulation appeared to coincide with the statutory framework and to be much more in keeping with Congressional intent as applied to alien crewmen than Szlajmer.

The Court denied plaintiff the right to have his application for stay of deportation heard under 8 U.S.C. 1253(h) and after reviewing the proceeding under the regulation 8 CFR 253.1(e) concluded that the action of the Service in denying plaintiff parole was fairly and constitutionally taken in accordance with the applicable statutes and regulations. The complaint was dismissed.

Staff: United States Attorney Woodrow Seals and
Assistant United States Attorney Morton L. Susman (S.D. Texas)
of Counsel; Joseph Sureck, Regional Counsel,
Immigration and Naturalization Service

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Spanish Land Grants; Act of March 3, 1851; United States' Patents; Boundaries. Elinor E. Petersen, et al. v. United States, et al. (C.A. 9, No. 18,667, Jan. 17, 1964) D.J. File No. 33-5-572-31. The United States brought a condemnation action taking 51.424 acres of land located below the waters of San Francisco Bay. These lands, some two miles out in the Bay, were subsequently filled by the United States. The State of California was considered by the United States to be the owner of the lands involved in the proceeding. Appellants, claiming ownership of the lands involved by virtue of a Spanish land grant which had included land adjacent to that part of San Francisco Bay in which the area here in question lies, intervened.

Appellants sought to establish that the land taken by the United States lay within the boundaries of their Spanish land grant and that, under Spanish law, the land belongs to them. It was argued that one should look to the 1820 grant by the King of Spain to ascertain the boundaries of their claim of title.

The Court of Appeals, in affirming the decision of the district court, held that the Act of March 3, 1851, was, in effect, a registration statute under which a new title, certified as valid by the new sovereign, was established for each successful applicant claiming title to land under Spanish or Mexican land grants and that the patent issued by the United States was the title deed from which any subsequent owner had to trace his ownership. The Court went on to hold that a boundary line described in the patent issued by the United States at "ordinary high water" or "ordinary high tide" cannot, by any process of interpretation, be located somewhere on or under the surface of the water a mile or more from the line of high tide or high water.

Staff: George R. Hyde (Lands Division)

Public Lands: Mining Claims; Cancellation by Government; Time for Determining Validity; Effect of Change in Economic Conditions on Validity; Failure to Pursue Administrative Remedy. Mulkern v. Hammitt (No. 18,694, C.A. 9, Jan. 22, 1964) D.J. File No. 90-1-18-443. Plaintiff had located mining claims for sand and gypsum in 1922. The Secretary of the Interior in an administrative contest instituted by the Government declared the claims invalid because at the time of the hearings (1957) economic conditions had changed so that the minerals were no longer marketable. Plaintiff sought to enjoin cancellation of her claim but the district court denied the injunction.

On appeal, the Ninth Circuit affirmed the district court, holding that the Government may cancel claims which, though once valid, no longer are because, due to a change in economic conditions, the minerals do not

have a market or a reasonable prospect for one. The Court also rejected a claim that the presence of mineral water in marketable quantities would support the mining claims because that point had not been included in the appeal to the Secretary and claimant was now barred by failure to pursue the administrative remedy.

Staff: Edmund B. Clark (Lands Division)

Public Lands: Grazing Rights; Preference to Landowners. McNeil v. Udall (D.C. D.C., Dec. 13, 1963) D.J. File No. 90-1-12-341. In 1956, the plaintiff, a Montana rancher, in appealing from an award of grazing privileges, challenged the validity of a special rule adopted in that year whereby the Range Code Class I preference period for the allocation of grazing rights on the public lands was changed from the years 1929-1934 to 1947-1952. It was McNeil's contention that the special rule was entirely void in that it gave Class I privileges to individuals who had established ranches after passage of the Taylor Grazing Act of 1934. The district court rejected this contention. On appeal, the Court of Appeals, in a somewhat cryptic opinion, held that the special rule was not void in its entirety but that because McNeil was a pre-1934 rancher he was entitled to have his rights measured by application of the 1929-1934 period. (It is difficult to paraphrase the Court's decision since its precise holding is not too clear.) Justice Burton (sitting by designation) dissented on the ground that the record already showed that application of the special rule to McNeil would not result in any discrimination. On remand, the range manager ascertained McNeil's Class I rights by reference to his use of the federal range during the 1929-1934 period. However, since the award based on the 1929-1934 period turned out to be less than McNeil would have received by application of the special rule period of 1947-1952, he was awarded Class II privileges in an amount sufficient to make up the difference.

When McNeil sought review of this award in the United States District Court for the District of Columbia, he contended that his grazing privileges for the years 1960 and 1961 should have been measured not by his use of the federal range during the 1929-1934 period but by the present commensurability (i.e., forage capacity) of the land that he owned during that period and that he continues to own today. Because the forage capacity of the land has been increased considerably since 1934, his Class I privileges would be greatly increased by adoption of this principle. In effect, McNeil contended that his privileges as a pre-1934 landowner should not be limited to his use of the federal range during that period but that he should be given a preference over all non pre-1934 landowners measured by the full commensurability of his present land holdings. On December 13, 1963, Judge Tamm entered judgment in favor of the defendant, holding that the award made by the range manager was in compliance with the earlier directive of the Court of Appeals.

This litigation is considered particularly important by the Grazing Service of the Bureau of Land Management, Department of the Interior. The

special rule was adopted in the Malta Grazing District for the purpose of bringing order out of a chaotic system that had developed while this area was administered by a state grazing district. If McNeil's contentions are correct, thousands of adjudications and allotments that have been made in this area would have to be entirely revised. McNeil's contentions present an entirely new concept of the preference rights to be awarded landowners in granting grazing privileges on the public domain.

Staff: Thos. L. McKevitt (Lands Division)

Water Rights: Sovereign Immunity Under 43 U.S.C. 666; Federal Jurisdiction Over Water Adjudications Removed From State Courts. Leland Davis v. Audrey Adams (S.D. Cal., Dec. 12, 1963) D.J. File No. 90-1-2-712. On March 1, 1963, plaintiff served the Secretary of Agriculture and the Attorney General, as well as about 400 private defendants, who owned all of the recorded water rights on the "North Fork" of the Fresno River, seeking a general adjudication of water rights. The action was brought in the Superior Court of the State of California for the County of Madera and named "the United States Department of Agriculture, Sierra National Forest," as one of the defendants, because it was recorded as owning certain "North Fork" water rights.

On August 1, 1963, the State Court granted the Department of Justice's motion to quash service on the Department of Agriculture on the grounds that it is not a suable entity. Plaintiff then named the United States as a party and the case was removed to the United States District Court for the Southern District of California within 20 days after service of the amended complaint, as is required by the time limitations in 28 U.S.C. 1446.

After removing the action, the United States moved to dismiss it on the grounds that the "North Fork" tributary of the Fresno River is not "a river system or other source," as that term is used by 43 U.S.C. 666 in waiving the sovereign immunity of the United States.

On December 12, 1963, the federal court granted the United States' motion to dismiss. It held and stated that:

> (1) The United States is only subject to suit under 43 U.S.C. 666 where all persons having water rights on a "river system or source" have been joined in a general adjudication of such water rights.
>
> (2) The "North Fork" tributary of the Fresno River is not a "river system or other source" as that term is used in 43 U.S.C. 666, because the water rights on it interlock with those on the Fresno River, so as to be part of a larger "river system or source."
>
> (3) The United States is an indispensable party to any water suit when it claims water rights in the area of adjudication, so that the suit must be dismissed if the United States has not waived its immunity or been properly joined as a defendant.

(4) 43 U.S.C. 666 does not give original jurisdiction to federal courts in those cases where the United States has waived its sovereign immunity. The merits of such suits should be decided in state courts.

(5) Whether the United States has waived its sovereign immunity under 43 U.S.C. 666 is a federal question allowing the federal courts to dismiss such actions in those cases where it finds sovereign immunity has not been waived by the United States.

The case should be of value as a precedent for establishing that a tributary is not a sufficient "river system or other source" to allow an adjudication of water rights against the United States and also for establishing that the United States can remove water adjudications to federal courts for the purpose of determining whether there has been a waiver of sovereign immunity under 43 U.S.C. 666. Unlike the prior case in the field In re Green River, 147 F.Supp. 127 (D.C. Utah, 1956), which denied that there was a federal question allowing jurisdiction to remove state water adjudications in which the United States has been joined, the current decision allows the United States to remove such cases to federal courts and have them dismissed based on sovereign immunity, when the plaintiff has failed to join all water users on the "river system or other source" as that term is used in 43 U.S.C. 666.

The Department will not, however, acquiesce in the Court's statements noted in (4) above or limit its contentions respecting federal court jurisdiction on removal of suits assertedly brought under 43 U.S.C. 666 to determine whether or not consent has been granted. We shall continue to contend and to attempt to establish that any suit against the United States assertedly permitted by this statute is a suit arising under the laws of the United States of which the federal district courts have jurisdiction on removal for all purposes if it is determined that the statute is applicable.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney Gordon P. Levy (S.D. Cal.); John J. Schimmenti (Lands Division).

Public Lands: Color of Title; Judicial Review; Administrative Procedure Act. Lester J. Hamel v. Neal D. Nelson, et al. (N.D. Cal.) D.J. File No. 90-1-4-89. Plaintiff applied to the Secretary of the Interior for permission to purchase a small piece of land under the so-called Color of Title Act, 43 U.S.C. 1068. His application was filed under subsection (b) of that section and, therefore, under the regulations of the Secretary of the Interior was designated as a "Class 2" application. That subsection provides in pertinent part:

The secretary of the Interior . . . may, in his discretion, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse possession by a claimant, his

> ancestors or grantors, under claim or color of title for the period commencing not later than January 1, 1901, to the date of the application during which time they have paid taxes levied on the land by state and local governmental units, issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than $1.25 per acre . . .

The Secretary held that plaintiff's proof failed to meet the requirements of the subsection and rejected the application. Plaintiff then instituted this action against three officials of local offices of the Bureau of Land Management in California for a declaratory judgment that plaintiff is entitled to a patent to the land in question and for an injunction forbidding defendants to do anything which would interfere with plaintiff's use and enjoyment of the land. Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted.

In ruling on the motion, the Court stated that "The primary question presented by the motion is whether the Bureau's order denying petitioner's application is judicially reviewable." The Court then went on to say that "Under the Administrative Procedure Act, this Court may review agency action such as that involved here, except in so far as '(1) statutes preclude judicial review or (2) agency action is committed to agency discretion.' 5 U.S.C. §1009." The Court held that, while there is no statute which precluded judicial review, "this is a case involving action which is 'by law committed to agency discretion.'" The Court reasoned that the language of 43 U.S.C. 1068(b) is clearly permissive in nature and directed to the discretion of the Secretary. It provides that if it is shown "to his satisfaction" that the land was held under claim or color of title and that the other specified conditions are present, the Secretary "may, in his discretion" issue a patent.

> I conclude that §1068(b) represents a binding legislative commitment of agency action to agency discretion and that whether the conditions specified in it are present is an administrative rather than a judicial question.

The Court distinguished Adams v. Witmer, 271 F.2d 29 (C.A. 9, 1959), saying:

> The court in the Adams case held that administrative action is not unreviewable merely because it "involves" some discretion, Id. at 33, accord Homovich v. Chapman, 191 F.2d 761, 764 (D.C. Cir. 1951); but the Adams case is distinguishable from the present case because it related to an application for patents for mining claims under 30 U.S.C. §§et seq., and, unlike 43 U.S.C. §1068(b), those sections contain no explicit commitment of agency action to agency discretion, though they do contemplate agency action "involving" some element of discretion.

Accordingly, the Court granted the motion to dismiss the complaint.

Staff: United States Attorney Cecil F. Poole and Assistant United States Attorney Rodney H. Hamblin (N.D. Cal.).

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX DIVISION

Appellate Decision

Tax Evasion; Conspiracy to Evade Taxes; Introduction Into Evidence of Hearsay Declarations Held Reversible Error. United States v. Wortman & Moore (C.A. 7, Jan. 14, 1964). Defendants Wortman and Moore were convicted of wilfully conspiring to defraud the United States, and to commit certain offenses against the United States as follows: (1) to defraud the United States of income taxes owed by defendant Wortman (2) to defraud the United States in the exercise of its governmental function and right of ascertaining, assessing, and collecting the taxes owed by defendant Wortman, and (3) to conceal by trial, scheme and devise material facts within the jurisdiction of the Internal Revenue Service. The theory of the Government's case was that the individuals involved had conspired to conceal from the Internal Revenue Service defendant Wortman's business activities, and the sources, nature, and amounts of his income for the years 1944 to the date of the indictment. Compare United States v. Klein, 247 F. 2d 908, certiorari denied, 355 U.S. 924. The Court of Appeals reversed the convictions on the ground that certain admissions made by defendant Moore were erroneously admitted against defendant Wortman, and prejudiced the jury's verdict. The basis for this ruling was that this evidence constituted inadmissible hearsay declarations by one alleged co-conspirator against another, made out of the latter's presence and without proof that he had in any manner authorized it. Citing the familiar rule that such declarations are inadmissible against a co-conspirator, absent proof aliunde of a conspiracy (e.g., Krulewitch v. United States, 336 U.S. 440, 443), the Court held that the admission of such evidence was erroneous.

Though it is clear that the evidentiary principle stated by the Court is well established, we wish to note that it is perhaps equally well settled that the order of proof, particularly in a complicated conspiracy case, is within the sound discretion of the trial court. Accordingly, it has been held that it is not error if acts or declarations by one co-conspirator are admitted against another prior to proof that a conspiracy existed. United States v. Sansone, 231 F. 2d 887, 893 (C.A. 2), certiorari denied, 351 U.S. 987. The Court may admit co-conspirator's acts or declarations subject to a motion to strike if independent evidence fails to establish the conspiracy and the defendant's participation in it. Parente v. United States, 249 F. 2d 752, 754 (C.A. 9). In the instant case, the trial court specifically instructed the jury that they must determine both the existence of the conspiracy, and the defendant's participation in it,

"without regard to and independently of the statements and declarations of others"; and that only after making such a determination could they then consider such statements and declarations made in furtherance of the conspiracy. While the Court of Appeals took note of these instructions by the trial court, it held that--without the benefit of the erroneously admitted evidence--the Government failed to establish the existence of a conspiracy. Accordingly, the Court concluded that the evidence never became admissible, and was so prejudicial that it could not be overcome by a jury instruction. While we think that the Court of Appeals was in error, in that the Government's evidence ultimately established a conspiracy and thus made the declarations admissible, the record does not present an adequate vehicle for a petition for certiorari. See Tax Division Manual, The Trial of a Criminal Income Tax Case, pp. 40-41, 115.

Staff: United States Attorney Carl W. Feickert (E.D. Ill.); Norman Sepenuk, J. M. Howard (Tax Division)

CIVIL TAX MATTERS
Appellate Decision

Suit to Enjoin Enforcement of Internal Revenue Summonses; Supreme Court Holds That Such Suit Is Subject to Dismissal For Want of Equity. Reisman v. Caplin (Supreme Court, Oct. Term, 1963 - No. 119, January 20, 1964.) Internal Revenue summonses were served upon the accounting firm of Peat, Marwick, Mitchell and Company, calling upon the firm to give testimony and produce certain records pertaining to the taxpayer and certain organizations controlled by him. Petitioners, who are attorneys, sought to enjoin enforcement of the summonses, alleging that they had employed the accounting firm to assist in the preparation of cases then pending in the Tax Court against taxpayer, and also to assist them in connection with a criminal investigation the Commissioner was about to institute. The complaint alleged that the summonses called for the production of privileged matter, including the work product of counsel, and were not issued for the purpose of assessing taxes or of ascertaining the correctness of any return, but to obtain evidence for use in pending tax cases or to prosecute the taxpayer criminally. In affirming the dismissal of the complaint by the district court, the Court of Appeals for the District of Columbia held that petitioners' suit was one against the United States to which it had not consented, and was hence barred under the doctrine of sovereign immunity.

The Supreme Court affirmed the judgment of the Court of Appeals, but on a different ground. The Court held that the suit was subject to dismissal for want of equity since petitioners had an adequate remedy at law. The rationale of the decision was that the Internal Revenue Code establishes a comprehensive scheme for the issuance of summonses, enforcement thereof, and penalties for refusal to comply; that under these orderly

procedures established by the Code, persons summoned and interested third parties may raise objections to the validity of the summons and assert their rights and privileges both in the administrative proceedings before a revenue agent and during court enforcement proceedings instituted by the Commissioner; and that a good faith refusal to comply with the summons would avoid any risk of punishment under those sections of the Code which authorize prosecution (Section 7210) or "an attachment as for contempt" (Section 7604(b)) for failure to comply with the summons. After holding that an order directing compliance with a summons is final for purposes of appeal, the Court concluded as follows:

> Finding that the remedy specified by Congress works no injustice and suffers no constitutional invalidity, we remit the parties to the comprehensive procedure of the Code, which provides full opportunity for judicial review before any coercive sanctions may be imposed. Cf. United States v. Babcock, 250 U.S. 328, 331 (1919).

It should be noted that the instant decision would require the dismissal - not only of equitable suits to restrain enforcement of a summons - but also of actions at law usually labelled as an application or motion to quash. See Application of Colton, 291 F. 2d 487 (C.A. 2). In substance, these latter actions are tantamount to an injunction suit to restrain enforcement of the summons, and the rationale of the Supreme Court's decision would bar such suits, and would remit the summoned party to the comprehensive procedure provided by the Code (1954 Code, Sections 7602-7604), viz: appearance in response to the summons, refusal to testify or produce (for stated reasons), institution of enforcement proceedings by the Commissioner (involving hearing, adjudication on the merits, and order to comply), and finally, application for stay of the order and appeal to the Court of Appeals.

Staff: Assistant Attorney General Louis F. Oberdorfer; Stephen J. Pollak (Solicitor General's Office); Joseph M. Howard, Norman Sepenuk (Tax Division)

State Court Decision

Situs of Insurance Policy For Filing Notice of Tax Lien. Bankers Trust Co. v. Equitable Life Assurance Society of U. S. (N.Y. Sup. Ct., May 31, 1963.) (CCH 64-1 USTC ¶9160). D. J. No. 5-51-8802. This proceeding involved a contest over the cash surrender value of certain insurance policies. The policies had been assigned to Bankers Trust but the United States claimed that prior to the assignment it had filed notices of tax liens which made its liens valid as against purchasers and pledgees.

The Court held that for the United States to prevail over the pledgee bank it must have filed its notice of lien where the property was situated. The Court held that on the date when the assignment was made the situs of

the policies was in New York City where the holding party and the fund were located. The filing of the notices at the residence of the taxpayer was insufficient in view of the state statute designating otherwise. The Court further reasoned that as to some of the policies the assignments in actuality were continuations of assignments that had been made prior to the notice of liens.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Clarence M. Dunnaville (S.D. N.Y.).

District Court Decisions

Summons - Identity of Taxpayer Not Prerequisite to Valid Summons. Tillotson v. Boughner (N.D. Ill., December 16, 1963.) (64-1 USTC ¶9143) D.J. No. 5-23-4128. In 1961 Boughner, an attorney, sent a letter to the District Director in Chicago enclosing a check for $215,499.95 and stating that the check was in payment of taxes for past years which were due from an unidentified taxpayer. An administrative summons was issued to Boughner for the purpose of discovering information as to the identity of the taxpayer. Boughner appeared in response to the summons but refused to testify and this proceeding was commenced by the Government to force compliance. Boughner defended the action on the ground that (1) the Internal Revenue Service lacked authority to issue an administrative summons seeking information with respect to an unidentified taxpayer and (2) even if such a summons was permissible, it could not be issued by a special agent as in this case.

The Court found no merit in the first argument since the statutory authority to issue summonses (28 U.S.C. 7602) applies broadly to an inquiry as to the liability of "any person" for "any internal revenue tax" and nowhere is limited to only known persons. The Court discounted the cases cited by defendant because they interpreted the statutory language before the broad language of the present Section 7602 and because in the instant case it was clearly shown that the Commissioner was not engaged in a mere fishing expedition, for the matter he was investigating was admittedly a situation involving an unpaid tax liability. The Court summarily disposed of defendant's argument by stating that no authority was found for the premise that a special agent could concern himself solely with criminal matters.

Staff: United States Attorney Frank E. McDonald, Jr. (N.D. Ill.); Robert A. Maloney (Tax Division).

Jurisdiction: No Jurisdiction Over United States in Action For Conversion; Federal Tort Claims Act Does Not Confer Jurisdiction in Tax Matters. United States v. Henry T. Banner and Henry T. Banner d/b/a Mohawk Valley Construction Company. (N.D. N.Y., December 30, 1963.) D.J. No. 5-50-1430. The Government's complaint seeks recovery of some

$52,000 for withheld income, FICA, FUTA and individual income taxes of Henry T. Banner as the sole proprietor of Mohawk Valley Construction Company. Defendant's answer to the amended complaint included two counterclaims seeking affirmative relief against the United States of some $52,000. The first counterclaim was premised upon alleged negligence on the part of the United States in failing to take steps to collect certain accounts receivable due defendant after the District Director of Internal Revenue had levied upon said accounts. The second counterclaim sounds in conversion for the failure of the United States to commence legal proceedings to collect the aforesaid accounts receivable after levying upon same. The Government moved to dismiss the counterclaims for lack of jurisdiction and for failure to state a claim.

In granting the Government's motion, and dismissing the counterclaims, the Court concluded that there is no jurisdiction over the United States in an action for conversion and further that the Federal Tort Claims Act does not permit suit against the United States where the claim is premised upon the collection of taxes.

In discussing the conversion allegation, the Court, citing United States v. Finn, 239 F. 2d 679, held that "Even the Tort Claims Act, by its terms, limits the right of action and recovery to injury or damage based upon negligence." In discussing the negligence allegation, the Court, citing Broadway Open Air Theatre v. United States, 208 F. 2d 257, held that "The provisions of 1346(b), which subjects the Government to suit for damages, occasioned by the negligence of its employees is limited by the exception found in 28 U.S.C. 2680(c) which exempts the Government from suit in the matter or any claim arising out of the assessment or collection of any tax."

Staff: United States Attorney Justin J. Mahoney; Assistant United States Attorney George B. Burke (N.D. N.Y.); and Charles A. Simmons (Tax Division).

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