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UNITED STATES ATTORNEYS
BULLETIN

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Vol. 12 April 3, 1964 No. 7

MONTHLY TOTALS

As of the first 8 months of the fiscal year, both filings and terminations are well ahead of the totals for the same period of the previous year. If continued at this rate for the remaining 4 months of the fiscal year, filings will reach the highest total for the past 9 years. On the other hand, unless terminations increase considerably from now to the end of the year they will fall approximately 2200 cases short of the record made last year. This 2200, added on to the 5600 increase which has occurred over the past 3 fiscal years will result in a 7800 increase in the pending caseload for the 4-year period, 1961-1964. It is hoped that some increase in civil terminations will be shown during March as a result of the memo from Assistant Attorney General Douglas and the cover letter from the Head of the Executive Office for United States Attorneys, dated February 18, 1964, in which the United States Attorneys were urged to make a special effort to close out as many civil cases as possible. As of February 29, case filings were running 5.8% ahead of case terminations. Set out below is a comparison of cumulative totals for the first 8 months of fiscal 1963 and 1964.

	First 8 Months Fiscal Year 1963	First 8 Months Fiscal Year 1964	Increase or Decrease Number	%
Filed				
Criminal	21,793	22,076	+ 283	+ 1.30
Civil	17,265	18,085	+ 820	+ 4.75
Total	39,058	40,161	+ 1,103	+ 2.82
Terminated				
Criminal	20,278	20,737	+ 459	+ 2.26
Civil	16,157	17,094	+ 937	+ 5.80
Total	36,435	37,831	+ 1,396	+ 3.83
Pending				
Criminal	10,762	11,108	+ 346	+ 3.22
Civil	23,613	23,379	- 234	- 0.99
Total	34,375	34,487	+ 112	+ 0.33

During February, totals for filings and terminations were below those for the preceding month. During this month, however, civil terminations exceeded civil filings - only the third time this has occurred so far in fiscal 1964. Unless this trend continues to the end of the year in both civil and criminal terminations, the pending caseload will be substantially higher than it was on June 30, 1963.

	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
Jan.	2,855	2,496	5,351	2,853	2,461	5,314
Feb.	3,015	2,195	5,210	2,486	2,422	4,908

For the month of February, 1964, United States Attorneys reported collections of $3,677,626. This brings the total for the first eight months of fiscal year 1964 to $39,502,547. Compared with the first eight months of the previous fiscal year this is an increase of $13,049,660 or 49.33 per cent over the $26,452,887 collected during that period.

During February $4,868,158 was saved in 124 suits in which the government as defendant was sued for $6,474,894. 66 of them involving $2,409,715 were closed by compromises amounting to $527,905 and 37 of them involving $2,119,778 were closed by judgments against the United States amounting to $1,078,831. The remaining 21 suits involving $1,945,401 were won by the government. The total saved for the first eight months of the current fiscal year aggregated $55,635,797 and is an increase of $23,134,463 or 71.18 per cent over the $32,501,334 saved in the first eight months of fiscal year 1964.

The cost of operating United States Attorneys' offices for the first eight months of fiscal year 1964 amounted to $11,467,126 as compared to $10,707,617 for the first eight months of the previous fiscal year. The rate of increase in cost of operation has been reduced somewhat from last month. It is believed, however, that the total increase for the year will be approximately $1,100,000.

DISTRICTS IN CURRENT STATUS

As of February 29, 1964, the number of districts meeting the standards of currency in each category of work was higher than in the preceding month. In criminal cases, 85 districts, or 92.4% were current; in civil cases, 62 or 67.4%; in criminal matters, 68 or 73.9%; and in civil matters, 77 districts, or 83.7% were current.

CASES

Criminal

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

CASES (Cont.)

Criminal

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

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick

Concrete Pipe and Coated Steel Pipe Companies Indicted Under Section 1 Of Sherman Act. A Los Angeles grand jury returned the below-listed five related indictments on March 10, 1964, all of which resulted from the same investigation:

United States v. American Pipe and Construction Co., el al. (S.D. Calif.) Dept. File No. 60-16-48. The two largest West Coast manufacturers of concrete water pipe and three executives of the companies were charged with violating Section 1 of the Sherman Act. Defendants are American Pipe and Construction Co. of Monterey Park, California, and its president, Robert V. Edwards; and United Concrete Pipe Corp. of Baldwin Park, California, its president, Lloyd R. Earl, and its vice president in charge of sales, Richard I. Young.

The indictment charges that the defendants and co-conspirators conspired beginning in or prior to 1954 and continuing thereafter at least until August 1962 to rig bids and divide orders for the purchase of concrete pipe in 10 Western States.

Defendants had average annual sales of concrete pipe in the Western States during the period from 1958 through 1961 of at least $41,500,000.

United States v. Kaiser Steel Corporation, et al. (S.D. Calif.) Dept. File No. 60-16-55. The two largest West Coast manufacturers of steel water pipe and an executive from each company were charged with violating Section 1 of the Sherman Act. Defendants are Kaiser Steel Corporation of Oakland, California, and Ernest L. Ilsley, vice president of its Napa-Fontana Fabricating Division; and United States Steel Corporation, the Consolidated Western Division of which is located at Commerce, California, and P. M. Cobb, vice president in charge of sales of its Consolidated Western Division.

The indictment charges that the defendants conspired beginning sometime prior to 1955, and continuing thereafter until at least August 1962 to rig bids and divide orders for the purchase of steel large diameter water pipe in 10 Western States.

Defendants had average annual sales of steel large diameter water pipe in the Western States during the period from 1958 through 1961 of at least $7,000,000.

United States v. United Concrete Pipe Corp., et al. (S.D. Calif.) Dept. File No. 60-16-56. The two largest West Coast manufacturers of concrete water pipe and the two largest West Coast manufacturers of steel water pipe, and executives from each of the companies were charged with violating Section 1 of the Sherman Act. Defendants are United Concrete Pipe Corp. of Baldwin Park, California, its president Lloyd R. Earl, and its vice president in charge of sales, Richard I. Young; American Pipe and Construction Co. of Monterey Park, California, and its president, Robert V. Edwards; Kaiser Steel Corporation of Oakland, California, and its vice president in charge of the Napa-Fontana

Fabricating Division, Ernest L. Ilsley; and United States Steel Corporation, the Consolidated Western Division of which is located at Commerce, California, and its vice president of sales of the Consolidated Western Division, P. M. Cobb.

The indictment charges that the defendants conspired beginning sometime prior to 1955 until at least August 1962 to allocate and divide orders among themselves for large diameter water pipe in 10 Western States so that the manufacturers of concrete pipe, on the one hand, and the manufacturers of steel pipe, on the other hand, would each obtain approximately fifty per cent of such orders.

Defendants had average annual sales of concrete and steel large diameter water pipe in the Western States during the period from 1958 through 1961 of at least $15,000,000.

United States v. United States Industries, et al. (S.D. Calif.) Dept.File No. 60-16-57. The two largest West Coast manufacturers of concrete water pipe and the three principal West Coast manufacturers of steel small diameter water pipe and executives from three of the companies were charged with violating Section 1 of the Sherman Act. Defendants are United States Industries, Inc., the Tubular Products Division of which is located at Azusa, California, the president of the Tubular Products Division, D. A. Stromsoe, and the executive vice president of the Tubular Products Division, D. N. Chamberlain; American Pipe and Construction Co., and its president, Robert V. Edwards; Smith-Scott, Inc., United Concrete Pipe Corp. and its vice president in charge of sales, Richard I. Young; and United States Steel Corporation.

The indictment charges that the defendants conspired beginning sometime prior to 1955 until at least January 1962 to allocate and divide orders among themselves for small diameter water pipe so that the manufacturers of concrete small diameter pipe, on the one hand, and the manufacturers of steel small diameter pipe, on the other hand, would each obtain an agreed upon precentage of all such business secured by the defendants.

Defendants had average annual sales of concrete and steel small diameter water pipe in the Western States during the period 1957 through 1961 in the Western States of approximately $18,000,000.

United States v. United States Steel Corporation, et al. (S.D. Calif.) Dept. File No. 60-16-58. The three principal West Coast manufacturers of steel small diameter water pipe and an executive from each company were charged with violating Section 1 of the Sherman Act. Defendants are United States Steel Corporation, the Consolidated Western Division of which is located at Commerce, California, and the vice president of sales of its Consolidated Western Division, P. M. Cobb; Smith-Scott, Inc. of Riverside, California, and its president William N. Scott; and United States Industries, and the executive vice president of its Tubular Products Division, D. N. Chamberlain.

The indictment charges that the defendants conspired beginning at least as early as May 1958 until at least January 1962 to rig bids and divide orders for the purchase of steel small diameter water pipe in 10 Western States.

Defendants had average annual sales of steel small diameter water pipe in the Western States during the conspiratorial period of at least $13,500,000.

Staff: Barbara J. Svedberg and Donald J. Fallon (Antitrust Division)

Three Count Complaint For Injunctive Relief and Damages. United States v. Aluminum Company of America, et al., (E.D. Pa.) Dept. File No. 60-9-163. On March 19, 1964, a three-count complaint was filed in the Eastern District of Pennsylvania seeking injunctive relief as to and damages from the following manufacturers of aluminum conductor cable:

Aluminum Company of America
Anaconda Wire and Cable Company
General Cable Corporation
Kaiser Aluminum & Chemical Sales, Inc.
Olin Mathieson Chemical Corporation
Reynolds Metals Company

The complaint alleges a conspiracy among the defendants, beginning in or about June 1958, and continuing thereafter until at least March 1961, to fix stabilize, and maintain uniform prices, terms, and conditions for the sale of aluminum conductor cable, and to quote such prices to various public agencies and electric utilities. The complaint also alleges a conspiracy among the defendants to defraud the United States in the sale of aluminum conductor cable to the Government.

Count One of the complaint asks for injunctive relief against future price fixing and bid rigging in the distribution and sale of aluminum conductor products. In addition, the Court is asked to require each defendant to certify for a period of five years that price changes of aluminum conductor products have been arrived at independently; to certify that prices bid or quoted to public agencies with respect to aluminum conductor products are noncollusive; and to maintain records for five years of meetings attended by its sales or pricing managerial personnel with similar representatives of its competitors.

The United States asks for double damages under the False Claims Act in Count Two, and alternatively, in Count Three, for single damages under the Clayton Act. The complaint does not specify the amount of damages sought.

Aluminum conductor cable is used primarily in overhead transmission and distribution of electricity. During the year 1959, the defendants sold in excess of $70 million of aluminum conductor cable, which was over 90 per cent of all such cable sold in the United States.

On October 31, 1962, an indictment was returned in Philadelphia charging a price-fixing conspiracy on aluminum conductor cable, in which the same companies were named as defendants. The criminal case is still pending.

Staff: John E. Sarbaugh, John J. Hughes, Richard M. Walker, Stewart J. Miller and Floyd C. Holmes (Antitrust Division)

District Court Holds Attorney General Represents All Interests of United States. United States v. Crocker-Anglo National Bank, et al., (N.D. Calif.) Dept. File No. 60-111-598. On March 23, 1964, the three-judge expediting court in San Francisco denied after oral argument separate motions of defendants and Comptroller of the Currency Saxon to join the Comptroller as a party defendant in this case. We filed a brief in opposition to defendants' motion but read a statement into the record in opposition to Saxon's motion.

In our brief in opposition to defendants' motion, we pointed out to the Court that when the United States is a party to litigation, statutes, Executive Order 6166, Sec. 5, and all decided cases made clear that the Attorney General represents all interests of the United States; that as counsel for Saxon, we opposed defendants' motion on the grounds that he was not a proper party to the lawsuit; that he could not properly add anything to the merits of the case; and in the event the Court should after trial, decree divestiture, Saxon would be subject to the order of the Court. Subsequent to the filing of our brief in opposition to defendants' motion but before argument thereon, Saxon, without prior notice to us and without our permission, filed his own motion seeking to be made a party defendant pro se and asserting that the Department would not represent his interests which were to have the merger upheld. He also tendered a proposed answer to the complaint denying the substantive allegations thereof.

We did not dignify Saxon's motion by filing or serving a brief in opposition thereto but read our statement apologizing to the Court for the unauthorized conduct of a member of the Executive Branch of the Government. We also pointed out to the Court that the Supreme Court in California v. Federal Power Commission, 369 U.S. 482 had admonished regulatory agencies not to take any action under their authority which might prejudice the Court's consideration of antitrust issues when such issues were before the courts. A few hours after oral argument, the Court entered a short order denying both motions.

Staff: Robert L. Wright, Herbert G. Schoepke, Charles A. Degnan and Robert J. Staal (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

SUPREME COURT

ADMIRALTY - INDEMNITY

Shipowner May Be Indemnified by Stevedoring Company on Its Implied Warranty of Workmanlike Performance For Damages Paid to Stevedore. Italia Societa per Azioni di Navigazione v. Oregon (Sup. Ct., March 9, 1964). The Supreme Court adopted our position, urged as an amicus curiae, that a shipowner may recover indemnity from a stevedore for breach of an implied warranty of fitness of its equipment and of workmanlike performance where (a) the stevedore, without fault, has supplied defective equipment which injures one of its own employees during the course of the stevedoring operation, and (b) the injured employee has obtained a recovery from the shipowner on the basis of the unseaworthiness of the equipment supplied by the stevedore. The Government was interested in this matter as the world's largest shipowner and one of the largest customers of contracting stevedores, repair yards, and other maritime contractors.

The Court made clear that, for the shipowner to recover on the basis of the implied warranties, he need not show negligence on the part of the stevedore, for the action was one of contract and not of tort. Indeed, as in this case, the warranties apply even where the defect in equipment furnished by the stevedore is entirely latent, for the stevedore is in far the better position to avoid the accident by testing equipment for latent defects, setting up a retirement schedule for equipment, and in other ways insuring safety of operations.

Staff: Sherman L. Cohn (Civil Division)

COURTS OF APPEALS

ADMINISTRATIVE PROCEDURE ACT

Witness Required to Appear and Testify in Non-adjudicatory Investigation Conducted by Federal Communications Commission Has No Right to Have Counsel Object to Questions and Present Grounds for Objections; District Court Conditioning of Subpoena Enforcement With Direction That Evidence Received Be Held in Confidence Upheld. FCC v. Taft B. Schreiber and MCA, Inc. (C.A. 9, February 17, 1964). This case arises out of an investigation by the Commission of industry practices in connection with the sale and distribution of programs and the supervision of advertising material. In the course of the investigation the Commission subpoenaed records in the custody of MCA's vice president, Schreiber, relating to programs "packaged" by MCA (i.e., programs as to which the scripts and talent had been assembled and developed by MCA). Schreiber appeared, but refused to produce the records in question unless the hearing be conducted in private, on the ground that the records contained "trade secrets," and refused to testify unless his counsel be given the right to object to questions and state the grounds of objection. The two requests were denied by the hearing examiner, whose decision was affirmed by the Commission. The Commission brought suit to enforce the subpoenas. The district court ordered Schreiber to comply with the subpoenas at a private session at which his counsel would have the right to object and present the grounds of objection.

Cross appeals were filed.

The Court of Appeals affirmed the order for private sessions, holding that the district court had not abused its discretion in providing for the protection of MCA's trade secrets. With regard to the right to have counsel object, the Court reversed the district court on the ground that such participation by counsel was not required by the Constitution (conceded by the parties), nor by the Administrative Procedure Act nor the Federal Communications Act in a non-adjudicative fact-finding investigation. As to the Administrative Procedure Act, the Court declined to decide whether Section 6(a) (providing for "representation" by counsel before any agency) applies only to adjudicative hearings, or also applies to fact-finding hearings like the one in the instant case. For, the Court concluded, if the Section does apply to a fact-finding hearing, its terms had been observed in this case. The Court asserted that the term "representation" in Section 6(a) varies in meaning depending upon the nature of the function being exercised by the agency. The Court then concluded that the right to object and argue objections could not be included impliedly in the term "representation" in a fact-finding hearing. Since no specific statutory provision or regulation of the Commission so provided, the Court held there was no such right in the instant hearing.

On MCA's cross-appeal based on the failure of the Commission to publish specific rules of procedure, pursuant to Section 3 of the Administrative Procedure Act, for conduct of investigatory hearings, the Court declined to decide whether Section 3(a) applied to non-adjudicatory proceedings, since, in view of the various orders and notices actually published in connection with the instant proceeding, there was no prejudice to the rights of Schreiber and MCA from the failure to publish ground rules.

The Government has filed a petition for rehearing en banc from the affirmance of the confidentiality condition.

Staff: John O'Malley (Federal Communications Commission)
Sherman L. Cohn (Civil Division)

DECLARATORY JUDGMENT AND INJUNCTION - GAMBLING DEVICES ACT

Attempt to Enjoin Enforcement of Gambling Devices Act of 1962 Brought Prior to Institution of Enforcement Proceedings Dismissed for Lack of Case or Controversy. Lion Mfg. Corp. v. Kennedy (C.A.D.C., March 5, 1964). This suit was brought by the manufacturer and a distributor of certain coin-operated amusement machines to enjoin enforcement of the Slot Machine Act of 1951, as amended by the Gambling Devices Act of 1962, 15 U.S.C. 1171-78, and for a declaratory judgment that the act is unconstitutional and that plaintiffs' operations were not covered by the Act. The 1962 amendment specified various pinball machines that were covered, and excluded others. The suit was brought four days before the 1962 amendment became effective. The Slot Machine Act incorporates some state law on the illegality of slot machines. The complaint alleged that plaintiffs would have to suspend business or proceed under threat of criminal prosecution since it was unclear whether or not the Act applied to their machines. It was also alleged that state law was uncertain in light of the new definitions and that the Attorney General had promised vigorous enforcement of the Act. A three-judge court was requested.

The district court dismissed the complaint for lack of a case or controversy. The motion for a three-judge court was denied on the ground that no substantial constitutional issue was raised by the complaint. The Court of Appeals, per McGown J., affirmed the dismissal on the case or controversy ground. The Court noted that there was no evidence of any plan by the Government to bring a criminal prosecution against plaintiffs, that plaintiffs had failed to describe with any degree of particularity the machines at issue or the state law which would be applicable, so that it was impossible to see whether there was any likelihood that the Act would apply to plaintiffs, that plaintiffs were in effect asking for an advisory judgment and that the courts must be particularly wary not to foreclose the public interest in enforcement of criminal laws by hasty and premature declaratory relief. The district court's refusal to convene a three-judge court was approved on the ground that a single judge has the authority to decide first whether the district court has jurisdiction before convening a three-judge court, and if no jurisdiction exists, the single judge can dismiss the complaint.

Staff: Sherman L. Cohn (Civil Division)

SOCIAL SECURITY ACT

Fifth Circuit Reaffirms Its Position That Both District Courts and Courts of Appeal Have Same Scope of Review in Disability Cases. Clinch v. Celebrezze (C.A. 5, March 4, 1964). In a per curiam opinion, the Court of Appeals upheld the district court's denial of a motion to remand the case for the taking of additional evidence which was made after the district court had rendered its decision. The Court reaffirmed its position established in Ward v. Celebrezze, 311 F. 2d 115, that both the district courts and the courts of appeal "pass upon the identical question of law, i.e., whether the findings of the Secretary are supported by substantial evidence." The Ward case had rejected our argument that the Court of Appeals need only determine whether the district court misapprehended or grossly misapplied the substantial evidence test, rather than make a new and independent review of the evidence. The argument was not made in the instant case, but was raised by the Court at oral argument.

In the instant case the Court noted that substantial evidence supported the Secretary's denial of benefits, and that no good cause had been shown to support the motion for remand to the Secretary. (The motion was based upon alleged new evidence, which had been in the possession of claimant throughout the district court action, but was not brought to the court's attention until after the entry of judgment affirming the Secretary.)

This case constitutes the seventh straight victory before the Fifth Circuit in social security disability cases.

Staff: Morton Hollander and Barbara W. Deutsch (Civil Division)

TORT CLAIMS ACT - INSURANCE

Failure to Give Insurer Written Notice of Accident as Soon as Practicable in Accordance With Contractual Undertaking Does Not Bar Recovery Under Policy Unless Insurer Proves Prejudice. Wiseman v. United States v. City Service Cleaning Contractors, Inc. (C.A. 3, February 18, 1964). In this suit, damages were sought

for the death of an employee of an independent contractor engaged to clean the windows of a Government building. We impleaded the decedent's employer and its insurance carrier. The United States had been added as a named insured on the employer's liability insurance policy. The district court, finding that the accident was the result of the combined negligence of the United States and the decedent's employer, awarded judgment in favor of the plaintiff. The United States was awarded contribution from the employer and full indemnity from its insurer. The insurer appealed the finding of negligence and that it was liable on the policy. Since we were thus involved in the appeal, we joined the insurer's attack on the finding of negligence. With respect to the indemnity claim, the insurer contended that the United States could not recover on the insurance policy as it had failed to give written notice of the accident as soon as was practicable as required by the policy. We urged that as long as the insurance company had received timely notice from the employer and was not prejudiced by our failure, it could not complain. The Third Circuit, after concluding that the district court's finding of negligence was not clearly erroneous, agreed that under applicable Pennsylvania insurance law an insurer cannot escape its contractual responsibility notwithstanding the insured's failure to give notice as required by the insurance contract absent proof that it has been prejudiced by such failure.

Staff: Edward Berlin, Civil Division

DISTRICT COURT

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. Jay Wilcox v. United States (S.D.N.Y., February 26, 1964). Plaintiff sued under the Federal Tort Claims Act for damages arising from the stranding of his yacht in the Rye Beach Channel. The claim was for negligence of the Coast Guard in failing properly to place and maintain a buoy marking the outer limit of the channel.

The Government moved for summary judgment raising the defense of the exclusion of admiralty claims from Tort Claims Act jurisdiction, 28 U.S.C. 2680(d). The exclusive remedy against the United States for this maritime tort was under the Suits in Admiralty Act as contained in the 1960 Amendment to Section 2 of the Act, 46 U.S.C. 742. The motion was brought prior to the passage of the 2-year statute of limitations.

The Court granted summary judgment holding that the cause of action asserted was one in admiralty for which a remedy was provided under the Suits in Admiralty Act. Where such remedy is provided, then an action may not be brought under the Tort Claims Act. The motion was granted without prejudice to the right of plaintiff to reassert the claim in admiralty.

Staff: Louis E. Greco and Philip A. Berns (Civil Division)

STATE COURT

AGRICULTURAL ADJUSTMENT ACT

Disparate Rather Than Proportional Allocation of Rice Acreage Allotment Permissible Under Governing Regulation. Clubb v. DeKeyser (Supreme Court of Louisiana, February 24, 1964). In this case the Supreme Court of Louisiana affirmed the judgment of the intermediate state appellate court and thereby rejected the Government's contention that the lower courts had erred in overturning a decision of the local Agricultural Stabilization and Conservation (ASC) review committee. The case arose from the reconstitution of a rice farm's rice acreage allotment necessitated by the division of that farm into two farms. The ASC county committee originally made what we argued was an erroneous disparate allocation of the allotment rather than the proportional allocation required by the regulations, and later attempted to correct that error with the approval of the ASC review committee. On judicial review, the state district court held that the regulations providing for proportional allocation were merely permissive, but on our appeal the intermediate state appellate court agreed that the regulations were mandatory and generally provided for proportional allocation. That court, however, affirmed the result below on the basis of an exception it found in the regulations requiring proportional treatment, and because of its doubts as to the local committees' power to alter an allocation after it is once made. After granting our petition for a writ of review, and hearing the case on the merits, the Supreme Court of Louisiana avoided the difficult question of the committees' power to alter an earlier allocation by holding that the original, disparate allocation of the allotment was permissible under the regulations, and that, therefore, there was nothing for the local committees to correct.

Staff: Stephen B. Swartz (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Racial Discrimination in Hospitals Receiving Funds Under Hill-Burton Act (42 U.S.C. 211 et seq.) Simkins, et al. v. Moses H. Cone Memorial Hospital, et al., 211 F. Supp. 628 (M.D. N.C.) 323 F. 2d 959 (C.A. 4), cert. denied, March 2, 1964. The plaintiffs -- Negro physicians, dentists and persons in need of medical and dental treatment -- filed this action to secure the desegregation of the Moses H. Cone Memorial Hospital and the Wesley Long Community Hospital in Greensboro, North Carolina. The complaint, in addition to requesting an order requiring non-discriminatory admissions to, and staff privileges at, the hospitals, also asked for a judgment declaring unconstitutional so much of the Hill-Burton Act (42 U.S.C. 291) as directs the Surgeon General (pursuant to an exception to a broad non-discrimination clause) to authorize the construction of hospital facilities and the promotion of hospital services on a separate-but-equal basis (42 U.S.C. 291e(f)). Since the proceeding was one in which "the constitutionality of * * * [an] Act of Congress affecting the public interest * * * [was] drawn in question," (28 U.S.C. 2403; Rule 24(a), F.R. Civ. P.) the United States intervened. (See Bulletin, Volume 10, p. 287). The Government agreed with respondents that the separate-but-equal proviso in section 291e(f) should be declared unconstitutional and that an injunction should issue to restrain petitioners from discriminating on account of race or color.

The District Court dismissed the complaint on the ground that petitioners were not subject to the prohibitions of the Fourteenth Amendment. The Court of Appeals for the Fourth Circuit, sitting en banc, reversed holding that the equal protection clause applied to petitioners; that this clause precluded petitioners from discriminating in their patient and staff admission policies on account of race or color; and that the separate-but-equal portion of the Hill-Burton Act was unconstitutional.

The Government argued that the Hill-Burton program necessitated such State "involvement" (See, Burton v. Wilmington Parking Authority, 365 U.S. 715, 722) in the hospitals' activities that a correlative State responsibility, within the meaning of the Fourteenth Amendment, had to be imposed. Emphasis was placed on the extensive state-federal planning, the functions delegated to the Surgeon General with respect to hospital admission practices, the substantial federal financial contribution and other elements of state involvement beyond those arising out of the Hill-Burton program.

On March 2, 1964, the Supreme Court denied certiorari, leaving standing the decision of the Fourth Circuit. This decision should have significant impact on hospitals participating in the Hill Burton program within the Fourth

Circuit, and participating hospitals, in other circuits, which practice discrimination also undoubtedly will be affected.

Staff: Solicitor General Archibald Cox, Assistant Attorney General Burke Marshall, Harold H. Greene, Howard A. Glickstein (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

BANKING

Admission of Confession Obtained After Polygraph Test. United States v. Charles E. McDevitt, (C.A. 6, No. 15341, March 2, 1964). After a number of shortages occurred at a branch bank, the defendant, branch manager, submitted to a polygraph test which indicated deception on his part. Following the test he made a signed confession. At his trial he contended that his confession was the result of the polygraph test and therefore inadmissible. However, the district court disagreed and admitted the confession into evidence. The Court of Appeals held: ". . . The present appeal, however, does not involve a case where the operator attempted to testify, as an expert, as to what was indicated by the polygraph test. Though the reported cases are few, it seems to be well established that the use of a lie detector in the process of interrogation does not render a subsequent confession involuntary or inadmissible. Tyler v. United States, 193 F. 2d 24 (C.A. D.C.), cert. denied, 343 U.S. 908; Commonwealth v. Jones, 341 Pa. 541, 19 A. 2d 389; Commonwealth v. Hipple, 333 Pa. 33, 3 A. 2d 353; Webb v. State, 163 Tex. Cr. 392, 291 S.W. 2d 331. See Wigmore, Evidence § 999 (3d ed. 1940)."

Staff: United States Attorney Merle M. McCurdy;
Assistant United States Attorney John G. Mattimoe
(N.D. Ohio)

OBSTRUCTION OF JUSTICE
(26 U.S.C. 7212 (a))

Attempts to Interfere With Administration of Internal Revenue Laws; Pointing Rifle at Officer. United States v. Taylor (D. New Mexico, January 7, 1964). Dept. File No. 125-49-4. In this case, an Internal Revenue officer was attempting to serve a notice of levy on Taylor. Taylor produced a .22 caliber rifle and at close range pointed it at the officer, threatened to shoot him, ordered him off the premises, and indicated an intent to shoot him or any other Internal Revenue officer who returned. Taylor was indicted under 26 U.S.C. 7212(a). A plea of not guilty was entered and, following a trial by jury, a verdict of not guilty was returned.

After the Government rested its case, the Court ruled that the case would be tried as a misdemeanor, stating that the pointing of the rifle was a threat of force rather than the use of force. The jury was not informed that the charge was considered by the Court to be a misdemeanor rather than a felony. This issue was argued before the court. The judge said he had no choice but to take a strict interpretation of the statute. The Court recognized that the law as written appeared illogical in that a pushing would be regarded as the use of force while the pointing of the rifle constituted a threat of force.

It is suggested that to avoid such a situation 18 U.S.C. 111 be utilized in those cases where a deadly or dangerous weapon is used in the impeding or interfering with persons designated in 18 U.S.C. 1114 (which includes employees of Internal Revenue) while in the course of their official duties.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Conviction for Failure to Maintain Safe Working Conditions for Shipyard Employees. United States v. Martinolich Ship Repair Co. (N.D. Calif.) Dept. File No. 83-11-99. On February 26, 1964, Judge Stanley Weigel allowed Martinolich Ship Repair Co. (Oakland, California) to plead nolo contendere to a one count information charging it with having failed to establish safe working conditions for employees engaged in "hot work" as required by regulations enacted under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 941(f)) [thereby causing the death of two employees]. Martinolich was fined $3,000, the maximum under the statute, primarily as a deterrent against similar violations by the shipping industry.

This is the first criminal prosecution under the safety regulations of the Act. Briefly, it involved the following: On May 14, 1963, Martinolich's yard superintendent ordered one of his supervisors to have several leaks in the tanks of a fuel oil barge repaired. Both the superintendent and supervisor were aware that safety regulations required that an inspection be conducted and a gas-free certificate obtained before they allowed employees to engage in "hot work" around spaces last containing combustible liquids. However, assuming the barge's tanks were empty and free of hazardous vapors, neither the superintendent nor the supervisor checked to find out what cargo it had last carried. (In fact, the tanks contained residues of fuel oil transported on May 2 and 10, 1963.) The supervisor obtained a welder and laborer to act as "fire watch" and instructed them to make the necessary repairs. Shortly after the welder lit his torch, two explosions rocked the barge. Their force hurled the welder through the air, impaling him on a nearby barge cable. His assistant's body was found floating in water, approximately 150 feet from the barge. The barge itself burst into fire, which was later brought under control by the Oakland Fire Department.

Staff: United States Attorney Cecil F. Poole; Assistant United States Attorney Jerrold M. Ladar (N.D. Calif.)

ALIENS

Illegal Entry After Deportation; Sufficiency of Evidence; Admissibility of Evidence of Customary Conduct. Fermin Arriaga-Ramirez v. United States (C.A. 10, 325 F. 2d 857). Appellant here had been charged and convicted in two separate cases for having been found in the United States after having been deported, in violation of Section 276 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1326. In the first case, in the District Court for the District of Colorado, defendant challenged the sufficiency of the Government's evidence that he had been deported July 20, 1950. To prove the deportation the Government presented a warrant of deportation signed, as having been

executed, by an Immigration and Naturalization Service officer, and testimony by the same officer that it was regular practice in deportations on July 20, 1950, at Laredo, Texas, to refer to a closing report accompanying the warrant. The report in appellant's case, which was admitted into evidence, bore descriptive data on the deportee, a photograph of him, and the same name and file number as the warrant. The report stated that the deportee had a tattoo on his left wrist, and there was testimony that appellant had such a tattoo. The Court of Appeals sustained the lower court as to sufficiency of the evidence. The Court noted that it was proper to show custom as an element of proof of identity and of physical deportation. Such proof, said the Court, has probative value.

In the second of the two cases, defendant contended that he left the United States voluntarily on June 25, 1961, and that, even though an order for his deportation had been issued, this was not "deportation" as contemplated by 8 U.S.C. 1326. The Court of Appeals, citing authorities, held that voluntary departure under such conditions amounts to deportation. The Court of Appeals concluded that the record showed that there was substantial proof of deportation in both cases and that there was substantial proof to identify the appellant as the person previously deported in both instances.

Staff: United States Attorney Lawrence M. Henry; Assistant United States Attorney Arthur L. Fine (D. Colo.)

ALIENS

Illegal Entry After Deportation; Wilfulness as Element of Crime of Being Found in United States After Deportation. United States v. Leroy Hastings Trott w.a. (D. Md.). Defendant was tried before the court without a jury on an indictment under Section 276 of the Immigration and Nationality Act (8 U.S.C. 1326), making it a felony, inter alia, for any alien who has been arrested and deported to be "found" thereafter in the United States unless he has obtained the prior consent of the Attorney General to reenter the country. The indictment charged that defendant "was found to be in the United States wilfully and unlawfully..." Defendant moved for a judgment of acquittal on the ground that the Government had failed to prove wilfulness. The Court (Thomsen, C.J.) overruled the motion, holding that (1) wilfulness is not an element of the crime and, therefore, the allegation of wilfulness in the indictment was surplusage, and (2) in any event, the evidence established wilfulness and criminal knowledge.

Judge Thomsen recognized that his first conclusion was contrary to that of Judge Mathes of the Southern District of California in United States v. Alfonso Miranda-Cuarenta, discussed sub nom. United States v. Miranda-Curenta at p. 40 of the United States Attorneys Bulletin for January 27, 1961 (Vol. 9, No. 2). In rejecting the Miranda decision, Judge Thomsen argued, in effect, that the case on which Judge Mathes apparently relied (Lambert v. California, 355 U.S. 225, holding a municipal ordinance, making it a crime for a convicted person to be in Los Angeles for five days without registering, was unconstitutional as applied to a defendant who had no knowledge of his duty to

register) actually supported a contrary conclusion. In this respect, Judge Thomsen pointed out that, in Lambert, the Supreme Court had specifically rejected the view of Blackstone that "a vicious will" is a necessary element of a crime; that the Court had, instead, recognized in Lambert that lawmakers often have wide latitude in declaring an offense, without including knowledge and diligence in its definition; and that the Lambert opinion was predicated on the fact that the ordinance in that case dealt with "wholly passive" conduct, as distinguished from "the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed" (355 U.S. at 228). Section 276, in Judge Thomsen's view, is clearly distinguishable from the ordinance in Lambert because the word "found" necessarily implies a reentry, open or surreptitious.

Judge Thomsen was of the opinion that the Government had established a prima facie case of wilfulness and knowledge by showing that defendant had theretofore been deported for reentry illegally after deportation; that his last reentry had been under an assumed name; and that he had lied to the Immigration and Naturalization Service.

Defendant testified that he had given $20 and four bottles of rum to members of the crew to assist him in "stowing away" on a British vessel he thought was going to England; that he was surprised when he found himself in New York Harbor; and that the crew insisted that he go ashore there. This testimony, according to Judge Thomsen, did not help defendant since defendant had more than $400 in American money and no British money with him; he had a "girl friend" in New York, whom he visited; and he admitted that he knew he could not reenter the United States legally without the permission of the Attorney General.

Despite the decision in this case, United States Attorneys should continue to be guided by the second paragraph of the discussion of the Miranda-Curenta case in the United States Attorneys Bulletin, supra. Volume IV of the Guides for Drafting Indictments, presently being issued by the Criminal Division, contains a form of indictment for use under the "found" clause of Section 276.

Staff: United States Attorney Thomas J. Kenney; Assistant United States Attorney Arthur G. Murphy (D. Md.)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation: District Court Has No Authority to Vacate Declaration of Taking on Grounds of Bad Faith of Administrative Officer. United States v. Cobb; United States v. Halbert (C.A. 9, February 19, 1964), D.J. File No. 33-5-2199. The Government sought to condemn a right of way through Rogue River National Forest over some unpatented mining claims. A declaration of taking was filed and $1.00 was deposited as estimated just compensation. The mining claimants obtained an order from the district court dismissing the declaration of taking on the ground that the estimate of just compensation was not made in good faith. The Government challenged the right of the district court to dismiss the declaration of taking or to inquire whether the estimate of just compensation was made in good faith.

The Court of Appeals held that it is not within the power of a district court to set aside or dismiss a declaration of taking on the basis of a finding of lack of good faith. In this, the Ninth Circuit followed the earlier Fifth Circuit decision, In re United States, 257 F. 2d 844 (1958), cert. den., 358 U. S. 908. The Court reasoned that the statute delegates to administrative officials the authority to make the declaration of taking and the estimate. Permitting the judge to go into the question of good faith would allow the defendants in every contested condemnation case to try first the question of good faith and thereafter try the question of just compensation all over again. The Court further held that the finding of bad faith is not supported by the record.

The Government contended that the order of the district court dismissing the declaration of taking was reviewable under the collateral orders doctrine of Cohen v. Beneficial Loan Corp., 337 U. S. 541 (1949). In the alternative, the Government filed a petition for writ of mandamus. Without deciding whether the order was appealable, the Court of Appeals held that it might be reviewed by way of mandamus because "it is an order which completely disrupts the further orderly proceeding in condemnation."

Staff: A. Donald Mileur (Lands Division).

Condemnation: Comparable Sale Evidence; Exception to Hearsay Rule. Bailey v. United States, 325 F. 2d 521 (C.A. 1, 1963), D.J. File No. 33-22-562-359. The First Circuit is the only federal court of appeals which has indicated that it might be proper to exclude under the hearsay rule the testimony of an expert real estate witness as to the prices paid in sales of comparable property. United States v. Katz, 213 F. 2d 799 (C.A. 1, 1954), cert. den., 348 U. S. 857. Katz stated, however, that the district court might, in the exercise of its discretion, allow hearsay testimony of comparable sales price. In the Bailey case, the district court allowed the Government's expert to give the sales prices which he knew only by hearsay. On an appeal by the landowner, the First Circuit affirmed the district court.

The Court explained its Katz decision as merely rejecting a rule which would allow "wholesale admission of hearsay to show the basis of the expert's opinion."

The Court points out, however, that "we did not go to the other extreme and hold that the hearsay rule applied in all its rigidity." The Court indicates the trial court should exercise its discretion based on the calibre of the expert witness, and may permit "qualified expert appraisers to testify when giving the basis for their opinions as to the sale prices of comparable properties even though they did not have direct knowledge of the prices paid for such lands."

Staff: A. Donald Mileur (Lands Division).

Public Lands: Mining Claims; Power of Secretary of Interior to Institute Contests Against Unpatented Claims; Failure to Exhaust Administrative Remedies. Davis v. Nelson (C.A. 9, March 13, 1964), D.J. File No. 90-1-18-564. The Secretary of the Interior instituted a large number of contests against the owners of unpatented mining claims on the public domain, to determine if the lands embraced in the claims were mineral in character and if a valid mineral discovery had been made. While the contests were in various stages of the administrative proceeding and before a final administrative decision had been made, 64 of the claimants brought this action against subordinate Interior officials, contesting the power of the Secretary to institute the contests and, alternatively, seeking judicial review of alleged procedural irregularities in certain of the contests. The Court of Appeals affirmed the district court's dismissal of the suit.

The Court reviewed in detail the statutes, regulations and cases that define the authority of the Secretary of the Interior when dealing with mining claims upon public lands and concluded:

> It is our view, therefore, that the Secretary of the Interior, acting through defendant subordinate officials under the grant of authority to supervise public business on public lands, including mines, has power and authority to initiate a contest to see "that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States (1920), 252 U. S. 450, 460; Duguid v. Best, supra. Such authority is not dependent upon the assertion by the United States of some other use for or the existence of some contemplated public project involving the public lands in question. Establishment of clear title to public lands is itself sufficient justification for the action.

The Court rejected the alternative request for premature judicial review of some of the contests, stating:

> Procedural errors, no matter how serious, are subject to correction on administrative review equally with erroneous determinations of fact and law after hearing. We cannot assume that improvident or illegal action by the manager would not be summarily reversed by the Director or Secretary. Plaintiffs first must follow the course of administrative procedure to finality before appealing to the courts for relief. (Citing cases.) This is so even if a claim of unconstitutionality is asserted against the administrative process. (Citing cases.)

Staff: Richard N. Countiss (Lands Division).

Condemnation: Individuals Who Claim Interest in Property as Taxpayers Not Entitled to Intervene; Right to Condemn Property Owned by State. W. Shannon Linning, et al. v. United States (C.A. 5, March 3, 1964), D.J. File No. 33-10-547-38. The United States condemned a strip of land about 5,500 feet long and 230 feet wide adjoining the naval station at Mayport, Florida for military and naval purposes in connection therewith. The property was beach land within the tidal range, and extending into the waters of the Atlantic Ocean. It was owned by the Trustees of the Internal Improvement Fund of the State of Florida. Linning and 63 other individuals filed a petition to intervene, alleging that their petition was based upon their rights as citizens and taxpayers of Florida, and that the lands were held in trust for the use of all the citizens of Florida and could not be alienated, nor could they be appropriated by the United States since they were already held by an agency of the State for a governmental purpose. The district court denied the petition to intervene, concluding that appellants had no such interest as permitted them to intervene under Rule 24, F.R.Civ.P.

In the district court and also on appeal, appellants contended that Rule 71A, F.R.Civ.P., requires that all persons claiming any interest in the property to be condemned shall be named as defendants, and that they were parties having an interest. The Government contended that Rule 71A, and not Rule 24, governed the parties to a condemnation proceeding, and that the appellants had no such interest as required that they be named parties to the proceeding. It also argued that the fact that the land was owned by the State was no barrier to its condemnation by the United States. The Court of Appeals affirmed the order of the district court in a per curiam opinion, stating: "Ownership by or in trust for the public does not create an ownership interest in individual citizens and taxpayers such as requires or permits them to be parties to a condemnation action by the United States. It is well settled that the United States may acquire for its use lands held by a State even though the land be already dedicated to a public use."

Staff: Elizabeth Dudley (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Petition for Writ of Certiorari Filed by Government in United States v. Max Powell and William Penn Laundry, Inc., 325 F. 2d 914 (C.A. 3) The Government has asked the Supreme Court to review a judgment of the Third Circuit which holds that the Internal Revenue Service cannot enforce a summons for the production of records relating to "closed" taxable years (as to which the statute of limitations bars assessment in the absence of fraud) unless it establishes that there is reasonable ground to suspect fraud. This holding is in conflict with Foster v. United States, 265 F. 2d 183 (C.A.2), certiorari denied, 360 U. S. 912, and United States v. Ryan, 320 F. 2d 500 (C. A. 6), certiorari granted, February 17, No. 590, this Term, which hold that the Government need only show that "the inspection * * * was in aid of an investigation authorized * * * by Section 7602 of the Internal Revenue Code of 1954" and that "the records sought were material and relevant to the investigation." (265 F. 2d 186-187). We believe that this latter view correctly states the law.

District Court Decisions

Statute of Limitations: Action on Federally Created Right Is Commenced by Filing of Complaint; Service of Summons and Complaint After Expiration of Statutory Period Does Not Make Action Untimely. United States v. Milton J. Harris. (S. D. Fla., October 10, 1963). (CCH 64-1 USTC ¶9276). The Government's complaint seeks recovery of some $171,000 of income tax liabilities of Milton J. Harris for the years 1941 through 1946, inclusive. Assessment was made on September 16, 1948, and by virtue of waivers and offers in compromise the statute of limitations was extended until August 24, 1962. The complaint was filed on August 24, 1962, a Friday; the Clerk issued a summons to the Marshal for service on August 27, 1962, a Monday. Defendant claimed that in order for the action to be timely, service must be effected on or before August 24, 1962.

The Government moved for summary judgment and the Court found that by application of Rule 3 of the Federal Rules of Civil Procedure, an action is commenced by the filing of the complaint with the court; the term "commenced" is interpreted through Rule 4(a). The Court stated that Rules 3 and 4(a) provide "for all cases instituted in the Federal District Courts, a uniform method of suspending the operation of the applicable statute of limitations, and that in the instant case the filing of the complaint on August 24, 1962, tolled the statute of limitations, and that the suit in the instant case was commenced on August 24, 1962, and the fact that the summons was not issued by the Clerk until August 27, 1962, was unimportant as that was merely a ministerial act directed to be done 'forthwith' by the Clerk, and his short delay could not be visited upon the litigant." Further the Court found that

issuance of the summons by the Clerk on the next succeeding business day after the filing of the complaint, constitutes "forthwith", in accordance with Rule 4(a).

As an ancillary point the Court further found that by the application of federal tax law, a tax collection waiver (Form 900) is not a contract but is rather a waiver of certain federal statutes of limitations which is created and allowed by federal statute, and there is no necessity for consideration in the execution of said waivers to give these waivers legal validity. Taxpayer has filed a notice of appeal to the Fifth Circuit.

Staff: United States Attorney William A. Meadows, Jr., and Assistant United States Attorney Lavinia L. Redd (S. D. Fla.) and Charles A. Simmons (Tax Division)

Taxpayer-contractor Divested of Property Interest in Funds Paid Taxpayer Under Construction Contracts Once Funds Placed in Trust Account for Benefit of Materialmen and Laborers, and Bank (Trustee) Therefore Not Liable for Penalty Under Section 6332, Internal Revenue Code 1954. United States v. The Pan American Bank of Miami. (S. D. Fla., February 4, 1964). CCH 64-1 USTC ¶9271). A surety executed performance and payment bonds on each of two construction jobs to be performed by taxpayer. Thereafter, taxpayer encountered financial difficulties; and although it had not as yet defaulted on the contracts and the surety had not been required to perform under the bonds, taxpayer, the surety, and the bank executed a "trust agreement" whereby all future payments to taxpayer under contracts would be deposited in the trust account with the bank for payments due materialmen and laborers under the contracts. All withdrawals by taxpayer from the account were to be countersigned by the surety while the surety could unilaterally withdraw all funds from the bank. Prior to the date the surety was required to perform under its bonds, the taxes had been assessed, the liens filed, and a levy served on the bank to reach some $24,000 in the trust account. The bank refused to honor the levy and the surety thereafter withdrew all the funds in the account.

In the suit against the bank for failure to honor the levy, the Court held that at the time of the service of the levy taxpayer did not have any property or rights to property in the funds in the trust account but had only a contingent and remote interest in them which never ripened into property or rights to property and that the materialmen and the laborers were the beneficiaries of the trust and the funds on deposit with the defendant bank. Judgment was entered in favor of the bank. The Court remarked from the bench that the existence of the trust agreement distinguished this case from United States v. R. F. Ball Construction Co., et al., 355 U. S. 587.

Staff: United States Attorney William A. Meadows, Jr., and Assistant United States Attorney Lavinia L. Redd (S. D. Fla.) and Raymond L. McGuire (Tax Division)

Internal Revenue Summons: Defense of Unnecessary Examination Under Section 7605(b), Internal Revenue Code, Held Available to Former Corporate

Officer in Possession of Corporate Records. United States, et al. v. Max Powell. (E. D. Pa., December 27, 1963). (CCH 64-1 USTC ¶9263). This case involves the judicial enforcement of an Internal Revenue summons issued to one Max Powell directing him to produce books and records of Kline's Coat, Apron & Towel Service of Harrisburg, Inc. (hereinafter referred to as Kline's) for use in connection with an investigation into the tax liabilities of that corporation for the fiscal years ended May 31, 1958, and May 31, 1959. The summons in question was issued and served on May 28, 1963, pursuant to Sections 7602 and 7603 of the Revenue Code and judicial enforcement is being sought under Section 7604 of the Code. Powell, now President of William Penn Laundry, Inc., was Vice-President of Kline's during the years involved in the inquiry. Kline's is presently owned by Workwear, Inc., of Cleveland, Ohio. William Penn Laundry, Inc. is under obligation to underwrite the defense of Kline's, and save the buyer of Kline's harmless from any additional tax liabilities that may be assessed against it.

It should be noted that the Court here was merely deciding the threshold issue of whether Powell has standing to assert the defense of unnecessary examination under Section 7605(b) in refusing to produce the books and records of Kline's. Briefly, the defense of unnecessary examination as urged by respondents here is that once the three year statute of limitations on assessment (under 26 U.S.C. 6501(a)) has expired, the Internal Revenue Service cannot examine into years which are barred from assessment unless a prior showing of suspicion of fraud is made. The terms of Section 7605(b) specifically apply to a taxpayer, and Section 7701(a)(14) of the Code defines a taxpayer as "any person subject to any internal revenue tax." However, despite these clear indications of the strict applicability of the statute to taxpayers, the Court found that Powell as President of William Penn Laundry, Inc., stood in the same shoes as the taxpayer (Kline's) and accordingly could assert the defense of Section 7605(b).

Staff: United States Attorney Drew J. T. O'Keefe and Assistant United States Attorney Sidney Salkin (E. D. Pa.) and Frank J. Violanti (Tax Division)

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