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UNITED STATES ATTORNEYS
BULLETIN

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IMPORTANT NOTICE - CAUSE OF ACTION CODES

In Departmental Memo No. 124 Revised, Supplement No. 4, dated June 18, 1964 the United States Attorneys were directed to change the cause of action codes on certain categories of Civil Division delegated cases and matters to conform with new cause of action codes set out in the Memo. The new codes were to be applied to all new cases and matters received, and the necessary code changes were to be made on the IBM cards, which were to be submitted to the Department, after July 15, 1964, in groups of 50 cards per week. A reminder of the need to make the necessary code changes was sent to the United States Attorneys by the Civil Division under date of November 5, 1964. Despite these two directives, there remain a number of districts which have not submitted the requested code changes.

Sometime in January a special listing will be sent to these districts, showing the items on which cause of action code changes have not been made, and asking for a request for a report thereon. Before that time, it is suggested that all districts check to make sure that the necessary changes have been submitted to the Department.

MONTHLY TOTALS

During the first quarter of fiscal 1965 the pending caseload rose by 1,815 cases, or 5.3 per cent. Since June 30, 1961 the number of cases pending has increased by 4,680, or 16.1 per cent. Since the end of fiscal 1961 the average number of Assistants on duty has increased by 80, or 14.2 per cent. In view of this increase in legal personnel and the increase in the average salary paid to an Assistant, it is difficult to understand the continuing rise in the caseload. During fiscal 1961, each Assistant handled an average of 144.5 cases and terminated an average of 93.1 cases. In fiscal 1964, with a substantially larger force of Assistants, the average number handled was 145.1 cases and the average number terminated was 93.0. Until such time as a concerted effort is made to reduce the caseload, by terminating more cases than are filed, the caseload will continue to rise - and if the annual rate of increase continues to average over 5 per cent as it has in the past 3 fiscal years, the resulting inflated caseload will require a massive crash program to reduce it to manageable proportions.

	First Quarter Fiscal Year 1964	First Quarter Fiscal Year 1965	Increase or Decrease Number	%
Filed				
Criminal	7,862	7,781	- 81	- 1.03
Civil	6,940	6,898	- 42	- .61
Total	14,802	14,679	- 123	- .83
Terminated				
Criminal	6,654	6,130	- 524	- 7.88
Civil	5,894	6,537	+ 643	+10.91
Total	12,548	12,667	+ 119	+ .95
Pending				
Criminal	11,092	11,760	+ 678	+ 6.02
Civil	23,501	23,676	+ 174	+ .74
Total	34,593	35,436	+ 852	+ 2.44

During each of the first three months of fiscal 1965 filings were considerably ahead of terminations with the exception of September when civil terminations numbered some 15 per cent higher than civil filings. For the entire period, however, the gap between civil filings and terminations is considerably greater than the same gap in criminal cases.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,321	2,460	4,781	2,230	2,391	4,621
Aug.	2,176	2,224	4,400	1,846	1,590	3,436
Sept.	3,284	2,214	5,498	2,054	2,556	4,610

For the month of September, 1964 United States Attorneys reported collections of $4,125,953. This brings the total for the first three months of this fiscal year to $12,944,311. This is an increase of $1,704,789 or 15.17 per cent over the $11,239,522 collected during that period.

During September $5,714,122 was saved in 84 suits in which the government as defendant was sued for $954,642. 56 of them involving $5,132,026 were closed by compromises amounting to $905,219 and 11 of them involving $166,601 were closed by judgments amounting to $49,423. The remaining 17 suits involving $1,370,137 were won by the government. The total saved for the first three months of the current fiscal year was $36,852,448 and is an increase of $24,383,086 or 195.54 per cent over the $12,469,362 saved in the first three months of fiscal year 1964.

The cost of operating United States Attorneys' Offices for September, 1964

amounted to $4,634,816 as compared to $4,314,542 for September, 1963.

DISTRICTS IN CURRENT STATUS

Set out below is a consolidated list of districts in a current status for the month of June, July, August and September. The list itself is as of September 30, 1964 - opposite each district are numbers which indicate the other months in which the district was current in that category. The number 6 indicates June, 1 - July, and 2 - August.

CASES

Criminal

Ala., M. 1
Ala., S. 2
Ariz., 6-1-2
Ark., E. 6-1-2
Ark., W. 6-1-2
Calif., S. 6-1-2
Colo., 6-1-2
Conn., 6-1-2
Del., 6-1-2
Dist.of Col., 6-1-2
Fla., N. 6-1-2
Fla., S. 6-1-2
Ga., N. 6-3
Ga., M. 6-1-2
Ga., S. 6-1-2
Hawaii, 6-1-2
Idaho, 6-1-2
Ill., N. 6-1-2
Ill., E. 6-1-2
Ill., S. 6-1-2
Ind., N. 6-1-2
Ind., S. 6-1-2
Iowa, N. 2
Iowa, S. 6-1-2
Kan., 1-2
Ky., W. 6-1-2
La., E. 6-1-2
La., W. 6-1-2
Maine, 6-1-2
Md., 6-1-2
Mass., 6-1-2
Mich., E. 6-1-2
Mich., W. 6-1-2
Minn., 6-1-2
Miss., N. 6-1-2
Mo., E. 6-1-2
Mo., W. 2
Mont., 6-1-2
Neb., 1-2
Nev., 6-1-2
N.H., 6-1
N.J., 6-2
N.Mex., 6-1-2
N.Y., N. 6-1-2
N.Y., E. 6-1-2
N.Y., S. 6-1-2
N.C., E. 6-1-2
N.C., M. 6-1-2
N.C., W. 6-1-2
N.D., 6
Ohio, N. 6-1-2
Ohio, S. 6-1-2
Okla., N. 6-1-2
Okla., E. 6-1-2
Okla., W. 6-1-2
Ore., 6-1-2
Pa., M. 6-1-2
Pa., W. 6-1-2
P.R., 6-1-2
R.I., 6-1-2
S.D., 6-1-2
Tenn., W. 1-2
Tex., N. 6-1-2
Tex., E. 2
Tex., S. 6-1-2
Tex., W. 6-1-2
Utah, 6-1-2
Vt., 6-1-2
Va., E. 6-2
Va., W. 6-2
Wash., E. 6-1-2
Wash., W. 6-1-2
W. Va., N. 6-1-2
W. Va., S. 6-1-2
Wis., E. 6-1-2
Wyo., 6-1-2
C.Z., 6-1-2
Guam, 6-1-2

CASES

Civil

Ala., N. 6-1-2
Ala., M. 6-1-2
Ala., S. 6-1-2
Alaska
Ariz., 6-1-2
Ark., E. 6-1-2
Ark., W. 6-1-2
Calif., S. 6-1-2
Colo., 6-1-2
Conn., 6-1-2
Del., 6-1-2
Dist.of Col. 6-1
Fla., N. 6-1-2
Fla., S. 6-1-2
Ga., N. 6-1-2
Ga., S. 6-1-2
Ga., M. 6-1-2
Hawaii, 6-1-2
Idaho, 6-1-2
Ill., N. 6-1-2
Ill., E.
Ill., S. 1
Ind., S. 6-1-2
Iowa, S. 6-1-2
Kan., 6-1-2
Ky., E. 6-1-2
Ky., W. 6-1-2
La., W. 6-1-2
Me., 6-1-2
Md., 1
Mass., 6-1-2
Mich., E. 6-1-2
Mich., W. 2
Miss., N. 6-1-2
Miss., S. 6-1-2
Mo., E. 6-1-2
Mo., W. 2
Mont., 6-1-2
Neb., 6-1-2
Nev., 6-1-2
N.H., 6-1-2
N.J., 6-1-2
N.M., 6-1-2
N.Y., W.
N.Y., E. 6-1-2
N.C., E. 6-1-2
N.C., M. 6-1-2
N.C., W. 6-1-2
N.D., 6-1-2
Ohio, N. 6-1-2
Ohio, S. 6-1-2
Okla., N. 6-1-2
Okla., E. 6-1-2
Okla., W. 6-1-2
Ore., 6-1-2
Pa., E. 6-1-2
Pa., M. 6-1-2
Pa., W. 6-1-2
P.R., 6-1-2
S.C., W. 6-1-2

CASES (Cont.)

Civil

S.D., 6-1-2
Tenn., E. 6-1-2
Tenn., M. 6-1-2
Tenn., W. 6-1-2
Tex., N. 6-1-2
Tex., E. 6-1-2
Tex., S. 6-1-2
Tex., W. 6-1-2
Utah, 6-1-2
Vt., 6-1-2
Va., E. 6-1-2
Va., W. 6-1-2
Wash., E. 6-1-2
Wash., W. 6-1-2
W. Va., N. 6-1-2
W. Va., S. 6-1-2
Wis., E. 6-1-2
Wyo., 6-1-2
C.Z., 6-1-2
Guam, 6-1-2
V.I., 6-1-2

MATTERS

Criminal

Ala., N. 1-2
Ala., M. 1
Ala., S. 1-2
Alaska, 1-2
Ariz., 6-1-2
Ark., E. 6-1
Ark., W. 6-1-2
Calif., S. 6-1
Colo., 6-1-2
Conn.
Del., 1-2
Dist.of Col., 6-1
Ga., N. 1-2
Ga., M. 1
Ga., S. 6-1-2
Hawaii, 6-1-2
Idaho, 6-1-2
Ill., E. 6-1
Ill., S. 1-2
Ind., N. 6-1
Iowa, N. 6
Kan., 2
Ky., E. 2
Ky., W. 6-1-2
La., W. 6-1-2
Me., 6-1-2
Md., 1-2
Mich., W. 6-1
Miss., N. 1-2
Miss., S. 6-1-2
Mo., W. 6-1-2
Mont., 6-1-2
Neb., 6-1-2
N.H., 6
N.J.
N.M., 1-2
N.C., M. 6-1-2
N.C., W. 6-1-2
N.D., 6-1-2
Ohio, N.
Ohio, S. 6-1-2
Okla., N. 6-1-2
Okla., E. 6-1-2
Okla., W. 6-1-2
Pa., E. 6-1
Pa., M. 6-1-2
Pa., W. 6-1-2
S.C., E. 6-2
S.D., 1-2
Tenn., W. 6-1-2
Tex., N. 6-1-2
Tex., E. 6-1-2
Tex., S. 6-1-2
Tex., W. 6-1-2
Utah, 6-1-2
Vt., 1-2
Va., W. 2
Wash., E. 6-1-2
Wash., W. 2
W. Va., N. 6-1-2
W. Va., S. 6-1-2
Wis., E. 1
Wyo., 6-1-2
C.Z., 6-1-2
Guam, 6-1-2

MATTERS

Civil

Ala., N. 6-1-2
Ala., M. 6-1-2
Ala., S. 6-1-2
Alaska, 6-1-2
Ariz., 6-1-2
Ark., E. 6-1-2
Ark., W. 6-1-2
Calif., S. 6-1-2
Colo., 6-1-2
Conn., 6-1-2
Del., 6-1-2
Fla., N. 6-1-2
Ga., S. 6-1-2
Idaho, 6-2
Ill., N. 6-1-2
Ill., S. 6-1-2
Ind., N. 6-1-2
Ind., S. 6-1-2
Iowa, N. 6-1-2
Iowa, S. 6-1-2
Kan., 6-1-2
La., W. 6-1-2
Me., 6-1-2
Md., 6-1-2
Mass., 6-1-2
Mich., E. 6-1-2
Mich., W. 6-1-2
Minn., 6-1-2
Miss., N. 6-1-2
Miss., S. 6-1-2
Mo., E. 6-1-2
Mo., W. 6-1-2
Mont., 6-1-2
Neb., 6-1-2
Nev., 6-1
N.H., 6-1-2
N.J., 6-1-2
N.Y., E. 6-1-2
N.Y., S. 6-1-2
N.Y., W. 6-1-2
N.C., M. 6-1-2
N.C., W. 6-1-2
N.D., 6-1-2
Ohio, N. 6-1-2
Ohio, S. 6-1-2
Okla., N. 6-1-2
Okla., E. 6-1-2
Okla., W. 6-1-2
Pa., E. 6-1-2
Pa., M. 6-1-2
Pa., W. 6-1-2
S.C., W. 6-1-2
S.D., 6-1-2
Tenn., E. 6-1-2
Tenn., M. 6-1-2
Tenn., W. 6-1-2
Tex., N. 6-1-2
Tex., E. 6-1-2
Tex., S. 6-1-2
Tex., W. 6-1-2
Utah, 6-1-2
Vt., 6-1-2
Va., E. 6-1-2
Va., W. 6-1-2
Wash., E. 6-1-2
Wash., W. 6-1-2
W.Va., N. 6-1-2
W.Va., S. 6-1-2
Wis., W. 6-1-2
Wyo., 1-2
C.Z., 6-1-2
Guam, 6-1-2
V.I., 6-1-2

In addition to the foregoing, the following districts were current in the categories and months indicated:

CRIMINAL		CIVIL	
Cases	Matters	Cases	Matters
Ala., N. 6-1	Tenn., M. 6	Fla., N. 6	Fla., N. 2
Alaska 2	Ind., N. 6-1-2	Ill., N. 6	Fla., S. 6-1
Calif., N. 2	Iowa N. 6-1-2	Ind., S. 6	Ga., M. 6
N.Y., W. 6-1-2	Minn., 6	Iowa N. 6	Hawaii 1
Tenn., E. 6-1-2		Iowa S. 1	Ill., E. 1
		Md., 6	Ky., E. 6-1-2
		Minn., 6	Ky., W. 6-1-2
		Mo., E. 6	N.M., 2
		N.Y., N. 6	N.Y., N. 2
		S.C., W. 1	P.R., 1
		Tenn., M. 1-2	S.C., E. 1-2
		Calif., N. 6	Wis., E. 2

* * *

ADMINISTRATIVE DIVISION

Assistant Attorney General for Administration S. A. Andretta

MEMOS AND ORDERS

The following Memoranda and Orders applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 19, Vol. 12 dated September 18, 1964:

MEMOS	DATED	DISTRIBUTION	SUBJECT
383	11- 2-64	U.S. Attorneys	Reporting Information Re Attendance of Government Employees And Military Personnel as Witnesses.
384	10-30-64	U.S. Attorneys & Marshals	Equal Employment Opportunities for Women in Federal Service.
ORDERS	**DATED**	**DISTRIBUTION**	**SUBJECT**
324-64	10- 8-64	U.S. Attorneys & Marshals	Clarifying Departmental Procedures Re Production or Disclosure of Information or Material in Response to Subpoena, Order or Other Demand.
325-64	10-26-64	U.S. Attorneys & Marshals	Amendment of Regulations Relating to Place and Time of Filing Briefs in Support of, or in Opposition to, Appeals Filed With Board of Immigration Appeals.
326-64	11- 9-64	U.S. Attorneys & Marshals	Designating Zeigel W. Neff As Member of Youth Correction Division of Board of Parole.

ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Defendants' Motion For Jury Trial Granted in Civil Damage Suit. United States v. Flynn-Learner, et al., (D. Hawaii) D.J. 60-138-139. On September 14, 1964, the Government filed its motion to strike a "demand for jury trial" filed four months late by certain of the defendants, and requested an order that this civil damage case be tried to the court. On the same date the Government filed a motion for summary judgment against defendant National Metals, Ltd., seeking a holding that it was precluded from relitigating any issues in the civil damage trial except actual Clayton Act damages, by reason of its guilty pleas to the companion indictment. Also on the same date, Flynn-Learner and its parent company moved for partial summary judgment on the following grounds: that the Federal Property and Administrative Services count of the complaint (Count One) constituted double jeopardy, unusual punishment, and res judicata, because these defendants were acquitted at the companion criminal trial, and that these defendants should have a severance for trial from the other defendant on the ground that the latter's guilty plea to the companion criminal case would prejudice them at the trial. Flynn-Learner and its parent company simultaneously filed a motion for discretionary grant of jury trial pursuant to Rule 39(b), F.R.C.P.

District Judge C. Nils Tavares filed orders on October 30, 1964, granting the Government's motion to strike the jury demand and denying the alternative motion for jury trial as a matter of discretion. Judge Tavares also denied the motion for severance and the motions of Flynn-Learner and its parent grounded on double jeopardy, unusual punishment, and res judicata. The Government's motion for summary judgment against National Metals was denied principally on the ground that a more just result, particularly the assessment of damages, could be achieved by trying this defendant along with the other defendants, since a trial was inevitable in either case.

On November 2, 1964, at a hearing on motions filed by Flynn-Learner and its parent for certification to the Ninth Circuit on the judge's adverse decision on the double jeopardy, unusual punishment, and res judicata questions, the Court announced that it entertained some doubt as to its ability to give defendants a fair trial, because an officer of defendant National Metals had aided the Court in its campaign for district judgeship appointment. The Court's solution to this possible prejudice was to reverse itself on the jury trial question, granting defendants' motion for discretionary jury trial under Rule 39(b) and obtaining from defendants a waiver of their severance motion (which the Court had already decided adversely to them), and a withdrawal of their motions for certification to the Ninth Circuit. As a consequence, the case will go to trial before a jury against all defendants beginning November 30, 1964.

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

Court Denies Motion of Defendants to Inspect and Copy All Subpoenas Issued During Grand Jury Investigation. United States v. Archer-Daniels-Midland Company, et al. (W.D. N.Y.) D.J. 60-150-21. On October 28 Judge Henderson, in a brief decision, 1) denied the joint motion of two of the twelve corporate defendants to inspect and copy all subpoenas, both duces tecum and ad testificandum, issued during the grand jury investigation which resulted in the indictment in this case and 2) denied the motions by two of the six individual defendants for extensive bills of particulars, noting that the Government had already furnished all defendants with a bill of particulars listing all prices it alleged had been agreed on, and had agreed to furnish particulars with respect to the date and place of price fixing meetings.

The Court's decision gave no reason for its denial of the motion to inspect subpoenas but Judge Henderson had indicated, at the oral argument on the motion, that he agreed with the Government's contention that since grand jury subpoenas were included within the ambit of Rule 6(e), F.R.Crim.P., (citing Application of the State of California, 195 F. Supp. 37 (E.D. Pa. 1961)), in the absence of compelling reasons they should not be disclosed to the defendants. The moving defendants argued that there was no longer any need for grand jury secrecy and that they should be allowed access to subpoenas in order to determine what records of bakery flour sales the Government had examined during the grand jury investigation (although the motion itself was not so limited); this information would then enable them, in preparing their defense to the allegation that they sold flour at fixed prices, to focus on a limited amount of data.

This is apparently the first time that defendants in a criminal case have moved for inspection and copying of all grand jury subpoenas.

Staff: Joe F. Nowlin, Gerald A. Connell and Richard M. Duke (Antitrust Division)

Court of Appeals Upholds Civil Investigative Demand Issued by Government. Hyster Co. v. United States. D.J. No. 60-182-76. On November 4, 1964, the Court of Appeals for the Ninth Circuit affirmed a district court order denying a petition of the Hyster Co. to modify or set aside a civil investigative demand.

Hyster attacked the constitutionality of the Antitrust Civil Process Act and the demand principally on Fourth Amendment grounds. It claimed that the Act authorizes the issuance of compulsory process without a showing of a probable violation, that the Act authorizes a delineation of the areas under investigation in unduly broad terms, that it fails to bar the use in a later criminal proceeding of the documents thus obtained, and that it authorizes a description of the documents sought by categories, rather than by particular document. The Court of Appeals rejected these contentions, relying upon Petition of Gold Bond Stamp Co., 221 F. Supp. 391, Aff'd per curiam, Gold Bond Stamp Co. v. United States, 325 F. 2d 1018 (C.A. 8). The Court also rejected as not amounting to "a constitutional difference" the distinction which Hyster drew between statutes like the Fair Labor Standards Act and Federal Trade Commission Act, the constitutionality of which the Supreme Court had upheld respectively in Okla. Press Pub. Co. v. Walling, 327 U.S. 186, and United States v. Morton Salt Co., 338 U.S. 632, and the Antitrust Civil Process Act. Unlike the Attorney General, the administrators of the former statutes are not

prosecutors and it is constitutionally improper, Hyster argued, to confer upon an officer, whose duties include prosecution, the kind of powers given by the Antitrust Civil Process Act. The Court noted, "The fact that the Attorney General can himself institute a prosecution, instead of referring the information to someone else [as do the administrators referred to above]" is an immaterial constitutional difference. The Court, referring to the antitrust laws, also pointed out that the Attorney General, like these administrators, has investigative and enforcement powers and duties, primarily civil in nature. "He is still a public officer, exercising functions conferred upon him by law. There is no presumption that he will abuse his powers, quite the contrary * * *."

Hyster also argued that the demand violates the self-incrimination clause of the Fifth Amendment:

> "Because the Demand . . . would require implicit testimony by the executives and employees of Hyster in the process of making a selection of documentary material in response to the Demand without the opportunity of gaining immunity against self-incrimination under the Fifth Amendment . . . and for the same reasons, the said executives and employees would be denied the protection of the immunity provisions of 15 U.S.C. Secs. 32-33."

The Court of Appeals rejected this argument for the reasons that since Hyster is the only party before the Court it cannot assert the privilege on behalf of someone else and since it is a corporation it has no privilege on its own behalf. Besides, the Court noted, there is nothing to show that Hyster couldn't get responsible officers or employees, who had nothing to do with the transactions to which the requested documents relate, who could do the necessary work of picking them out.

Hyster also argued that the demand fails to comply with the Act. Among other grounds, it argued that the demand insufficiently describes the nature of the conduct under investigation and that the demand fails to describe the documents with sufficient particularity. The Court disposed of these grounds by referring to Gold Bond, supra, and by stating its agreement with that decision.

Another ground advanced by Hyster was that the Act requires the demand to be directed to a "person under investigation" and that there has been no showing that Hyster is such a person. The Court's answer was that the Act does not require the demand to recite that the addressee is "under investigation". It noted that the demand does state that it "is issued pursuant to the provisions of" the Act. This was sufficient, at least in the instant case. "Hyster does not allege that it is not under investigation. There is a presumption that a public officer is acting lawfully."

Staff: Irwin A. Seibel (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

FEDERAL RESERVE SYSTEM--STAY OF ORDER

Sixth Circuit Refuses to Stay Order of Board of Governors of Federal Reserve System Approving Application of Corporate Owner of National Bank to Become Bank Holding Company. Kirsch, et al. v. Board of Governors of the Federal Reserve System, (No. 16180, C.A. 6, October 16, 1964). D.J. No. 145-105-28. Petitioners sought review of an order of the Federal Reserve Board approving the application of the Society Corporation, owner of Society National Bank of Cleveland, to become a bank holding company and to acquire control of a Fremont, Ohio, bank. Petitioners moved the Court of Appeals to stay the order pending final determination of the cause. Upon opposition to the stay by the Government and by the applicant corporation, the stay was denied by the Court in a per curiam opinion.

Staff: J. F. Bishop (Civil Division)

FEDERAL TORT CLAIMS ACT

Employee of Nonappropriated Fund Activity, Organized and Operated as Private Association, Held Not Employee of United States. Jack H. Scott, et al. v. United States, (No. 21341, C.A. 5, October 21, 1964). D.J. No. 157-19M-153. The Hunt Club at Fort Benning was organized by members of the U.S. Army stationed at Fort Benning to provide facilities for those persons stationed at the base who were interested in horse back riding. The organization was in fact self-governing and self-sustaining financially. Its constitution expressly provided that it was to "be organized as a private association" and that it would "not operate as an instrumentality of the Federal Government." The applicable Army Regulations, AR 230-5, para. 2b, authorized military personnel acting in their unofficial capacity to form such private associations to operate on military installations subject to the approval of the commanding officer of the installation.

This case was brought to recover damages arising from injuries to the wife and daughter of a Captain stationed at Fort Benning, who was an officer and member of the Club. The injuries occurred at Fort Benning when their horse, which was tied to a hitching rail, pulled back, causing the rail to fall upon the two plaintiffs. They brought this action under the Tort Claims Act, asserting that the injuries arose due to the negligent construction and maintenance of the hitching rail by officers and employees of the Club.

The district court ruled that the Hunt Club was not an agency or instrumentality of the United States within the meaning of the Tort Claims Act, and that the Government was therefore not liable under the Act for the conduct of persons acting as officers or employees of the Club. 226 F. Supp. 864 (M.D. Ga.).

The Court of Appeals affirmed, largely on the basis of the opinion below. Although recognizing that the Commanding General exercised ultimate authority over activities of such Clubs on military installations, the Court agreed that "there was insufficient nexus between the Hunt Club and Fort Benning to classify the Club as a Federal agency under the Tort Claims Act." The Court noted that all of the prior decisions holding the United States liable for the conduct of employees of nonappropriated fund activities involved organizations which were essential or integral to military operations, or which were established and operated as instrumentalities of the Federal Government.

Staff: David L. Rose (Civil Division)

Third Circuit Holds That Under Pennsylvania Law, There Can Be No Award For Medical Care Rendered Free of Charge by V.A. But Estimated Cost of Future Care Can Be Recovered, Even Though Plaintiff May Elect to Get Free Care From V.A. Feeley v. United States, (No. 14738, C.A. 3, November 4, 1964). D.J. No. 157-62-321. Plaintiff was struck by a Post Office truck while crossing a street in Philadelphia. As a result, his right knee and leg were injured and a pre-existing, service-connected psychoneurosis was aggravated. He received medical care from a Veterans Administration hospital free of charge. The district court entered a decision in his favor and the Government appealed from that part of the judgment which allowed plaintiff, as part of his damages, the reasonable value of medical care furnished free by the V.A. and the award for future medical care. The Government also claimed that the district court failed to make adequate findings of fact as required by Rule 52(a) with respect to the amount of damages. It did not contest the negligence finding.

The Court of Appeals looked to state (Pennsylvania) law and held that (1) there can be no award for medical care where it has been rendered free of charge, and (2) the estimated cost of future medical care can be recovered notwithstanding that plaintiff may elect to avail himself of free care from the V.A. The Court remanded the cause with directions to "re-examine the amounts awarded by it for pain and suffering and to make proper finding of fact and conclusions of law in accordance with . . . Rule 52(a)." The Court of Appeals was troubled by the district court's failure to make findings with respect to what damages were incurred as a result of a sports injury sustained subsequent to the accident caused by the United States.

Staff: Marilyn S. Talcott (Civil Division)

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

Under Section 504(a) of Landrum-Griffin Act, 29 U.S.C. 504(a), Person Convicted Under Hobbs Act Is Barred From Holding Union Office For Period of Five Years Following Release From Prison. Peter Postma v. Teamsters Local 294 and Attorney General. (No. 28991, C.A. 2, October 21, 1964). D.J. No. 156-50-50. The Hobbs Act, 18 U.S.C. 1951, makes criminal the obstruction of interstate commerce by means of extortion or conspiracy to commit extortion. Postma was convicted under that Act in 1956, for conspiring to extort money from interstate truckers, with whom he was ostensibly negotiating a new collective bargaining agreement in his capacity as a business agent of Teamsters

Local 294. Following Postma's conviction, Congress passed the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), one provision of which, 29 U.S.C. 504(a), bars from union office for five years following release from prison, persons convicted of, inter alia, "extortion" or conspiracy to commit same.

Postma sought a declaratory judgment that his Hobbs Act conviction did not bar him from office in the Teamsters, but the district court held that 29 U.S.C. 504(a) of the Landrum-Griffin Act did have that effect. 229 F. Supp. 665 (N.D. N.Y.) On appeal, the Second Circuit affirmed, holding that Postma's conviction under the Hobbs Act was one for "extortion" as used in 29 U.S.C. 504(a). The appellate court also rejected Postma's alternate claim that, as applied to him, section 504(a) was an unconstitutional bill of attainder or ex post facto law. The Court of Appeals relied on De Veau v. Braisted, 363 U.S. 144, 160, in which the Supreme Court had rejected a challenge on these grounds to the validity of the New York Waterfront Commission Act which has similar provisions disqualifying convicted felons from union office.

Staff: Morton Hollander and Richard S. Salzman (Civil Division)

TARIFF CONSTRUCTION -- PRIMARY JURISDICTION

Eighth Circuit Reverses District Court For Failure to Consider Interstate Commerce Commission's Tariff Construction Made on Matter Within Its Primary Jurisdiction. United States v. Great Northern Railway Co. (C.A. 8, No. 17,527, October 19, 1964). D.J. No. 120-39-665. This case involved construction of a railroad tariff which covered certain grain shipments made by the Commodity Credit Corporation from various origins in Minnesota, on consignment first to Minneapolis, where the grain was inspected, and thence on reconsignment to Duluth. Under the tariff, a lower through rate was applicable except where a shipment was accorded "transit privileges." The railroad contended that the inspection and reconsignment of the shipments at Minneapolis constituted the rendering of transit privileges within the meaning of the tariff so as to make a higher non-through rate applicable. This construction of the tariff had been upheld on previous occasions by the district court. The Government had not appealed those cases.

The Government contended that the shipments had not been accorded transit privileges because that term as used in the tariff had a specialized transportation meaning which did not encompass the type of inspection and reconsignment which occurred here. The Government further contended that the tariff construction issue involved here was a matter within the primary jurisdiction of the Interstate Commerce Commission and that that body had previously rejected the railroad's interpretation thereof in a proceeding to which the railroad was a party, but from which it had not sought judicial review.

In holding for the railroad, the district court relied on its former decisions and ignored the pertinent I.C.C. decision, ruling that the issue of tariff construction was one within the primary jurisdiction of the court.

The Court of Appeals reversed and directed the entry of judgment for the Government. The Court held that construction of the term "transit privileges"

was a matter within the primary jurisdiction of the I.C.C. and therefore the I.C.C.'s construction in its former ruling was entitled to such great weight and deference that it would be adopted here.

The Court refused to entertain the railroad's attacks on the I.C.C. decision, holding that to permit the railroad to do so would allow it now to attack collaterally the decision it could have attacked directly. The Court noted that, in any event, the I.C.C.'s decision was in accordance with the plain language of the tariff, which had been authored by the railroad itself.

Staff: Frederick B. Abramson (Civil Division)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

Discretionary Function Exception (28 U.S.C. 2680(a)) Precludes Recovery For Damages Sustained as Result of Sonic Boom Generated by Duly Authorized Air Force Training Flight. Glenn Huslander, et ux. v. United States (No. 10069, W.D. N.Y., Sept. 28, 1964), D.J. No. 157-53-256. Plaintiffs brought suit alleging that a sonic boom had broken a window in their home inflicting personal injuries upon Mrs. Huslander. The Government moved for summary judgment on the ground that the flights in question were conducted pursuant to express training directives promulgated at the top level of the Air Force. The supporting affidavits of the Air Force Chief of Staff and subordiante personnel noted the considerations underlying the decision to conduct supersonic intercept training missions.

The District Court granted the Government's motion, holding that this case "necessarily falls within the discretionary function exception." The Court reasoned that the actions in monitoring and ordering an aircraft to supersonic flight "necessarily involve the exercise of policy judgment and discretion." In addition, the Court stated that 2680(a) extends even to the individual aircraft commander who might elect to undertake supersonic flight in emergency situations.

Staff: United States Attorney John T. Curtin and Assistant United States Attorney Thaddeus S. Zolkiewica (W.D. N.Y.); Michael R. Wherry (Civil Division)

Government Not Liable For Failure to Keep Post Office Steps And Sidewalks Entirely Free of Snow And Ice During Intermittent Snow Storms. Vivian P. Boe v. United States (No. 4029, D.N.D., October 30, 1964). D.J. No. 157-56-27. Arthur Boe slipped and fell on the steps of a Post Office in New Rockford, North Dakota, breaking his left femur. He later died in hospital from resulting complications. Plaintiff, claiming that the United States was responsible for the fall and resultant death of Mr. Boe, instituted suit under the Tort Claims Act.

The Court found that the area where the accident occurred had been cleaned by postal custodial personnel at 7:30 a.m. Subsequent to the cleaning, additional

snow fell. Mr. Boe tripped at about 10:30 a.m. In holding the Government not liable, the Court stated that it is a "practical impossibility" to keep steps and sidewalks entirely free of snow and ice at all times. The Court believed that the Government had done that which an ordinarily prudent man would have done in the same or similar circumstances. The Court stated that the United States was not the guarantor of the safety of every invitee in or about its premises. Residents of North Dakota, the Court noted, are wholly familiar with ice, snow, sleet or rain.

Staff: United States Attorney John O. Garaas and Assistant United States Attorney Gordon Thompson(D. N.D); Mrs. Alice K. Helm (Civil Division)

New Jersey Statute Limiting Amount of Damages Recoverable in Suit Against Non-profit New Jersey Hospitals Not Applicable in Suit Under Federal Tort Claims Act Against Government Veterans' Administration Hospital. Ruth A. Taylor, individually, as Executrix of Raymond M. Taylor, Deceased, and as Next Friend of Barbara Taylor, an infant, v. United States. (No. 205-63, D. N.Y., October 2, 1964). D.J. No. 157-48-500. Plaintiff sued the Government under the Federal Tort Claims Act seeking $1,000,000 damages for the wrongful death of her husband due to alleged malpractice on the part of Government doctors at the United States Veterans' Administration Outpatient Clinic in Newark, New Jersey.

The Government moved to reduce plaintiff's ad damnum from $1,000,000 to $10,000 contending that the United States, as a private person, would not be liable to plaintiff under the law of New Jersey where the cause of action arose for an amount in excess of $10,000 because of N.J.S. 2A:53A-7, 8 which provides in substance that no nonprofit corporation, society or association organized exclusively for hospital purposes shall be required to pay more than $10,000 in damages as a result of the negligence of such corporation, society or association of its agents, or servants.

The Court in denying the Government's motion stated that neither the United States of America nor its agency, the Veterans Administration, may be construed as a nonprofit corporation organized exclusively for hospital purposes.

Staff: United States Attorney David M. Satz, Jr. and Assistant United States Attorney Edward J. Turnbach (D.N.J.); Vincent H. Cohen (Civil Division)

Court Attributes Pain And Suffering Sustained by Plaintiff to First Operation And Not to Second Operation Which Was Necessitated by Veterans Administration Doctor Leaving Sponge in Plaintiff. Thomas v. United States (No. 61-C-950, E.D. N.Y., October 6, 1964), D.J. No. 157-52-955. In this case, plaintiff sought damages of $100,000 for injuries sustained while undergoing treatment in a Veterans' Administration hospital. He alleged that as a result of the V.A. surgeon's failure to remove a sponge from his wound, during the course of performing a major operation, he had to undergo a second operation in order to locate and remove the sponge. As a result thereof, plaintiff alleged he suffered great mental strain, anxiety and fear in the nature of cancer phobia.

The District Court found the United States to be liable, but awarded damages in the amount of $1,000. In its findings of fact, the Court went into a detailed description of the types of pain allegedly suffered by plaintiff and determined that many of his ailments were attributable to the first operation, as the Government had contended.

Staff: United States Attorney Joseph P. Hoey (E.D. N.Y.)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

DENATURALIZATION

Misrepresentation as to Identity and Facts of Entry: Materiality. United States v. Antonio Riela (C.A. 3, No. 14,540, Nov. 4, 1964). D.J. 38-48-1485. The defendant, Antonio Riela, was born in Italy in 1897 and entered the United States in 1926 as an undetected stowaway. In 1930, when applying for a certificate of arrival and a declaration of intention to become a citizen, he stated his name was Antonino Pietro Riela and he gave the vital statistics and arrival data of one Pietro Riela, who had been born in Italy in 1896 and who had been lawfully admitted to the United States for permanent residence in 1923. On the basis of these facts, the latter's arrival record was located, a certificate of arrival issued and defendant made his declaration of intention based thereon. In 1932, in applying for naturalization, and in 1933, in his formal naturalization petition, he furnished misinformation substantially identical to that previously supplied. He was admitted to citizenship on August 22, 1933.

When the fraud was discovered years later, a suit was filed under Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. 1451(a), to revoke the naturalization order on the ground that it was procured by willful misrepresentation and concealment of material facts. In answer to the Government's interrogatories, defendant admitted his true vital statistics and that he had entered as a stowaway in 1926. He did not testify at the trial and the Government produced the real Pietro Riela, who identified the 1923 arrival record as relating to his own entry. In an opinion reported at 215 F. Supp. 914 (D. N.J., 1963), the District Court found defendant had illegally procured naturalization by willful misrepresentation and concealment of material facts and entered judgment revoking the naturalization. On appeal, defendant contended the evidence was insufficient to sustain the essential allegations of the complaint.

The Court of Appeals affirmed. Acknowledging that the Government has an unusually heavy burden of proof in denaturalization, the Court found the evidence ample to sustain this burden. Holding that evidence that defendant gave knowingly false answers to pertinent questions would not, standing alone, satisfy the burden in the absence of further evidence that the answers were material, the Court concluded they were material since they suppressed facts which, if known, would have warranted denial of the naturalization petition.

Under the statutes applicable at the time of defendant's naturalization, the alien was required to (a) gain lawful admission to the United States for permanent residence; (b) obtain a valid certificate of arrival showing the facts of arrival (c) make a declaration of intention based on such a certificate of arrival; (d) reside in the United States continuously for at least five years preceding the date of his naturalization petition; (e) file a verified naturalization petition stating, among other things, the date and place of his birth and the date, place and manner of his arrival. Since

defendant had entered as a stowaway without the visa and inspection required by the immigration laws, the Court held his presence here was unlawful and he lacked the permanent legal residence prerequisite to naturalization. The declaration of intention and certificate of arrival were themselves invalid and hence insufficient to support a petition for naturalization. The Court held that defendant's willfully false answers were material because they suppressed facts which, if known, would have barred his naturalization.

The Court of Appeals also rejected the contention that the District Court did not make the findings of fact required by F.R. Civ. P. Rule 52(a), holding that the District Court's comprehensive opinion was sufficient in this regard.

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

UNIVERSAL MILITARY TRAINING AND SERVICE ACT

F.B.I. Investigations to Locate Delinquents Who Have Served in Armed Forces. Under Section 1611.4 of the Selective Service Regulations (32 C.F.R. 1611.4) every male person who has been separated from active service in the Armed Forces, who has not been registered prior to such separation, and who would have been required to register except for the fact that he was in active service on the day fixed for his registration, is required to present himself for and to submit to registration before a local board within 30 days following the date of his separation.

It has come to our attention that United States Attorneys sometimes receive requests from local boards to locate persons who have failed to register as required by Section 1611.4. These persons have completed tours of active duty or have been discharged because, for various reasons, they do not meet the standards of the service.

It seems clear that the delinquents would register if they should be located and criminal prosecution would be declined. In the unlikely event that prosecution should be undertaken, it is doubtful that it would be successful for the reason that the delinquent had volunteered and served in the Armed Forces even before he had a duty to register.

The purpose of an investigation by the Federal Bureau of Investigation is to assist in a criminal prosecution. Where it is reasonably certain in such instances that prosecution would not ensue or would be unsuccessful, the Bureau should not be asked to conduct investigations merely to locate the delinquent.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Alien Crewman Denied Suspension of Deportation. Athanasios Patsis v. Immigration and Naturalization Service (No. 17,316, C.A. 8, October 29, 1964) DJ No. 39-43-25. Petitioner, a Greek national, sought review of the final order of the Board of Immigration Appeals denying his appeal from an order of a special inquiry officer which found petitioner deportable and denied several applications of the petitioner for discretionary relief from deportation.

The Court found that petitioner's case as presented to them centered on the issue of whether he had been improperly denied suspension of deportation under 8 U.S.C. 1254(a). Petitioner, who entered the United States as an alien crewman in 1948, applied for suspension of deportation several months prior to an amendment to 8 U.S.C. 1254 declaring alien crewmen ineligible for suspension of deportation. The amendment was one of the grounds for denial of the suspension application and was upheld by the Court on the basis of several cases, including Fassilis v. Esperdy, 301 F.2d 429. Petitioner suggested that the amendment should not be applied to his case, alleging that the special inquiry officer had purposely delayed his decision on the suspension application until after enactment of the amendment. The Court rejected this argument, quoting from Fassilis to the effect that an alien has no vested right to suspension and that suspension is not acquirable until final administrative action on his application.

Petitioner's application for suspension was made under subdivision 5 of 8 U.S.C. 1254(a), which contains the requirement that the alien be physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation under certain subdivisions of 8 U.S.C. 1251(a), and proves that during all such period he has been and is a person of good moral character. The special inquiry officer had held that petitioner had not satisfied the ten-year condition in that ten years had not elapsed from the commission of a deportable act by petitioner, that is, his failure to file an address report card with the Immigration and Naturalization Service. The Court noted that this ruling was contrary to that in Fong v. Immigration and Naturalization Service, 308 F.2d 191. In Fong the Ninth Circuit held that the ten year period of physical presence and good moral character ran from the commission of the first deportable act or the first assumption of a deportable status, and that the ten year period was not interrupted by subsequent commission of deportable acts or assumptions of deportable status. The Court here, the Eighth Circuit, after consideration of the language of the statute and its legislative history disagreed with Fong, ruling that the ten year period must be free from the commission of deportable acts and the assumptions deportable status. The Court stated that it would be unthinkable that the further commission of a subversive or immoral act of the kind contemplated by the statute would lose significance because of the presence of a similar kind of act more than ten years earlier. The Court quoted the following portion of the decision

of the Board of Immigration Appeals in the Matter of V..R.., 9 I&N Dec. 340:

> Moreover, it seems quite unlikely to us that Congress could have intended that the alien whose wrongdoing continued to the moment of his apprehension should have the same favorable opportunities as the alien whose wrongdoing ceased ten years prior to his apprehension.

The petition for review was denied.

Staff: United States Attorney Richard D. Fitzgibbon, Jr. and Assistant United States Attorney Grove G. Sweet (E.D. Mo.); Don R. Bennett and Kenneth C. Shelver (Criminal Div.) of counsel.

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Injunction Suit Against Secretary of Interior and Subordinate Officials Dismissed on Grounds That Plaintiffs Have Adequate Remedy of Law. Power et al. v. Udall et al. (Civ. 5305, D. Ariz.) D.J. File No. 90-1-2-751. Plaintiffs, irrigators on the Colorado River near the international boundary, obtained a temporary restraining order enjoining the Secretary of the Interior and certain officials of the Bureau of Reclamation from blocking the flow of fresh water into the Colorado River at a point above plaintiffs' land and crops and from pumping briny water into the Colorado River above said area without the flow of fresh water to dilute the briny water. The case arose from operation of drainage pumps from the Wellton-Mohawk Project upstream from plaintiffs for a 30-day period during which, pursuant to international arrangements, Mexico deferred deliveries of water required by the Water Treaty of 1944 and thus was unaffected by the increased salinity of Colorado River water due to the operation of the drainage pumps.

Motion to dismiss the complaint and dissolve the temporary restraining order made on the grounds inter alia, that it was an unconsented to suit against the United States, under the Larson rule, that the Supreme Court alone has jurisdiction to confirm or deny asserted rights to mainstream Colorado River water under pending proceedings in Arizona v. California, that plaintiffs had an adequate remedy at law, and that the issuance of injunctive orders adversely affects the public interest involved in the regulation of the Colorado River in accordance with the Boulder Canyon Project Act and international arrangements with Mexico.

The Court permitted plaintiffs to introduce proof of irreparable damage but, on the basis of oral argument and memoranda submitted, granted the motion to dismiss on the grounds that plaintiffs had an adequate remedy under the Tucker Act for the alleged taking and resulting damage, citing Dugan v. Rank, 372 U.S. 609.

The procedure here followed appears very effective in opposing suits for injunction against Government officers. By moving to dismiss the complaint for injunction, in addition to moving to dissolve the temporary restraining order, and by documenting the jurisdictional arguments with affidavits showing the background and basis of the Governmental actions sought to be restrained, the Court is less likely to exercise its injunctive powers notwithstanding a showing of damage by the Governmental actions.

Staff: Walter Kiechel, Jr. (Lands Division)

Court Lacks Jurisdiction to Determine Membership in Indian Tribe. Levi W. Jones, et al. v. Robert D. Grover, Area Field Representative, United States Department of Interior, etc. (W.D. Okla., Sept. 15, 1964) D.J. File No. 90-2-4-74. Plaintiffs alleged that they are enrolled members of the Sac and Fox Tribe and

that the Secretary of the Interior and other officials of the Bureau of Indian Affairs had refused to make per capita payments to them. They sought a judgment directing payment to them out of funds held for the benefit of the Sac and Fox Tribe of amounts equal to the per capita payments that had been distributed to other members of the tribe. On behalf of the defendants, it was asserted that plaintiffs were either not enrolled members of the tribe at the time required to qualify them to receive the payment or, in those cases where they were enrolled and thus qualified, payments were distributed to them.

The Court granted the Government's motion for summary judgment. The Court concluded that "gist of Plaintiff's complaint is directed at inquiring into the question of membership of an Indian Tribe - and that under the applicable law this court does not have jurisdiction to consider such inquiry. Martinez v. Southern Ute Tribe, 249 F. 2d 915 (C.A. 10, 1957), cert. den., 356 U.S. 960; Prairie Band of Pottawatomie Tribe v. Puckkee, 321 F. 2d 767 (C.A. 10, 1963)."

Staff: Assistant United States Attorney David A. Kline
(W. D. Okla.)

Public Property; Attempted Injunction Against Sale; Suits Against United States. Town of Ayer v. Paul Lazzaro, Regional Director, General Services Administration (D. Mass.), D.J. File No. 90-1-4-115. During the war, various housing agencies of the United States, acting pursuant to the Lanham Act, constructed extensive housing projects in the vicinity of military bases or near factories producing military goods. Most of the buildings erected as part of these housing projects were not substantially constructed.

On October 9, 1962, the particular area involved in this litigation, located in the Town of Ayer, Massachusetts, was declared surplus by the Army to the General Services Administration and was sold by the latter agency on June 9, 1964 to the highest bidder. Following the sale, the Town of Ayer took exception to the fact that the buildings had not been torn down prior to the sale and to the apparent intention of the purchaser to continue to use the purchased land as a housing area. The Town contended that the buildings constituted an eyesore in the community and that their continued use would create a slum. Accordingly, it instituted this action to enjoin the sale, contending that demolition of "temporary" housing of this type was required by reason of the provisions of 42 U.S.C. 1553. The Town also indicated in its complaint that the buildings, if left standing, could only be used in violation of applicable town ordinances.

With this latter development the purchaser intervened, asking for a declaration that the sale be cancelled if it were found that existing town ordinances would prevent the owner's use of the buildings in place. A motion for summary judgment was filed on behalf of defendant, the G.S.A. Regional Director, on the ground that, pursuant to 42 U.S.C. 1582, transfer of the project to the Army by the housing agency rendered the provisions of 42 U.S.C. 1553 inapplicable and on the ground that the action was an unconsented suit against the United States.

On October 14, 1964, in an opinion by Judge Caffrey, the motion for summary judgment was sustained. The Court held that plaintiff had not established that the defendant, in selling the buildings, had exceeded his statutory authority and that, for this reason, the action constituted a suit against the United States within the meaning of Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949). The Court, on its own motion, dismissed the cross-claim brought by the purchaser on the ground that, because the Court lacked jurisdiction in the principal suit against the defendant officials, it also lacked jurisdiction to determine the cross-claim. A possibility remains that, if the Town persists in opposing the purchaser's use of the buildings in place, the purchaser will, in separate litigation, attempt to establish the invalidity of the sale.

Staff: Assistant United States Attorney John Paul Sullivan (D. Mass.).

Public Lands; No Easement to Graze Cattle as Incidental to Alleged Right to Appropriate Water; No Appropriative Right Shown Under Act of July 26, 1866. United States v. Roy Hunter, (No. 2315 - S.D. Cal.) D.J. File No. 90-1-12-342. Plaintiff brought this action to permanently enjoin defendant from trespassing on the Death Valley National Monument by watering and grazing cattle at certain springs located within the Monument. Defendant claimed that his predecessors in interest, his father and grandfather, had continuously watered and grazed cattle at these springs since 1871 and that, based on the Act of 1866, an appropriative right to continue to water stock there without supervision or regulation by the Government had therefore been acquired. In addition, defendant claimed to have acquired a right to graze cattle at these springs as a necessary incident to watering them since it is a physical impossibility for him to water the cattle at the springs unless he can also graze them on the land upon which the springs are located. Defendant likens this right to graze his cattle to an easement for the conduct of water over the land of another by means of pipes, conduits, canals and ditches.

An examination of the history of the Act of 1866 and an analysis of the decisions interpreting that Act led the Court to conclude that, under the facts of the instant case, no rights by appropriation either to the use of the water of the springs for the watering of cattle or to the nearby contiguous land for grazing purposes were ever acquired by defendant.

Under the Act of 1866, a determination that an appropriative right to water exists depends upon the local customs, laws and decisions of courts. 14 Stat. 253, sec. 9; Rev. Stat. sec. 2339 (July 26, 1866). The Court stated that defendant did not cite any decision directly supporting the contention that vested appropriative rights were secured by cattle owners merely permitting their cattle to graze on Government-owned land. No evidence of such local custom was offered, and the local law, as indicated by the California Act of 1852, points to the contrary.

The injunction was therefore granted, the Court stating that its decision to do so was based solely upon its conclusion that no legal basis had been established for the acquisition of an appropriation to water cattle by virtue of local customs, laws or decisions of California. The Court also noted, however, that the argument that an easement for grazing is necessarily an incident to an appropriative right for watering livestock also lacked merit.

Staff: Assistant United States Attorney James R. Akers, Jr. (S. D. Calif.).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Supreme Court Action

The Supreme Court has recently granted certiorari in Jaben v. United States, 333 F. 2d 535 (C.A. 8). The Jaben case, which was digested in Vol. 12, No. 14 of the United States Attorney's Bulletin, involves the sufficiency of a complaint following the model form (Form 1, p. 137, Trial of Criminal Tax Cases) which was filed to toll the statute of limitations. The Government acquiesced in the granting of certiorari to permit the Court to resolve the conflict between this decision and that of the Ninth Circuit in United States v. Greenberg, 320 F. 2d 467.

Appellate Decision

Instructions: Whether Defendant Indicted Under Section 7201 of 1954 Code is Entitled to Instructions Under Rule 31(a), F.R. Crim. P., which would permit jury to find him guilty under Section 7203 or Section 7207 as lesser included offenses. Michael C. Sansone v. United States, 334 F. 2d 287 (C.A. 8). Sansone had owned a piece of land, and had sold a portion of it in 1956 and another portion in 1957. Although he reported capital gains from stock transactions for these years, he did not report these land sales. His defense was that he still owned a portion of the land, and as he would have to make certain costly improvements on this retained portion, he could not determine his gain on the sales until he made the improvements and sold the remainder of the land. He had signed an affidavit, however, in which he admitted that he knew he should have reported the 1957 sale, but was waiting until he could better afford to pay the tax. He contended that on these facts the jury should have been instructed that they could have found him guilty of the lesser included offenses of wilfully filing a tax return which he knew to be false or fraudulent as to a material matter (Section 7207), or of wilfully failing to pay a tax (Section 7203). The Eighth Circuit rejected these arguments. The Supreme Court had these questions before it several times under the 1939 Code--Dillon v. United States, 350 U.S. 906; Berra v. United States, 351 U.S. 131; Achilli v. United States, 353 U.S. 373--and now apparently wants to re-examine them in light of the 1954 Code, for it granted certiorari on October 26, 1964.

N.B.--The prohibition against bringing prosecutions under Section 7207 (p. 34, Trial of Criminal Tax Cases) is still in effect.

Staff: United States Attorney Richard D. FitzGibbon, Jr., Assistant United States Attorney William C. Martin (E.D. Mo.).

CIVIL TAX MATTERS
Supreme Court Matters

The Supreme Court has just denied certiorari in two summons enforcement cases--Wild v. Brewer, decided June 2, 1964, on rehearing (C.A. 9; 13 A.F.T.R. 2d 1622), and Boughner v. Tillotson, 333 F. 2d 515 (C.A. 7).

The Wild case, which was digested in Vol. 12, No. 13 of the United States Attorney's Bulletin, holds that the president and sole shareholder of a corporation may not invoke his personal privilege against self-incrimination when he is served with a summons to compel him to produce the corporation's books.

The Boughner case, which was digested in Vol. 12, No. 17 of the United States Attorney's Bulletin, holds that an Internal Revenue summons may be issued in an investigation of an ascertained but unknown taxpayer, and that a summons may be issued even though the investigation could lead to a criminal prosecution.

District Court Decisions

Priorities; Federal Tax Liens Held Entitled to Priority Over Attorneys' Liens for Services Rendered in Securing Judgment for Personal Injuries and Property Damage to Taxpayers Where Both Liens Attached Simultaneously to Proceeds of Judgment. Ozella Harrington, et al. v. Howard Flanders, et al. (D. Ariz., June 26, 1964). (CCH 64-2 U.S.T.C. ¶9748). On December 14, 1960, taxpayers, residents of New Hampshire, instituted suit in an Arizona state court against Ozella Harrington for personal injuries and property damages and obtained a judgment on July 13, 1962. An appeal was taken but was dismissed by consent on June 3, 1963. Tax assessments were made against the taxpayers on January 19, April 20, and July 27, 1962, and notices of lien were filed in New Hampshire on February 1, June 21, and July 31, 1962.

On August 20, 1963, Ozella Harrington and her insurance company instituted this interpleader suit because of the conflicting claims of the taxpayers, their attorneys in the negligence suit, a judgment creditor of the taxpayers and the Government, which had served notices of levy on the insurance company. After trial, the Court awarded the liens of the Government first priority. In so doing, the Court recognized that taxpayers' attorneys in the negligence suit, who had a contingent fee contract with taxpayers, had a charging lien on the recovery of taxpayers; but such lien was not choate until the dismissal of the appeal on June 3, 1963. On that date, the liens of the attorneys and of the Government attached simultaneously to the indebtedness due to taxpayers, and the Court ruled that, under such circumstances, the Government liens took precedence. In so ruling, the Court concluded that the Government's notices of lien were properly filed in New Hampshire, where taxpayers resided, and that the liens encumbered all property of taxpayer, including property acquired after the liens were filed, such as the recovery in the negligence suit which became fixed when the appeal was dismissed on June 3, 1963. The claim of taxpayers' judgment creditor was also found to be inferior to the federal tax liens.

Staff: United States Attorney Charles A. Muecke; Assistant United States Attorney Jo Ann Diamos (D. Ariz.); and Paul T. O'Donoghue (Tax Div.).

Tax Liens; Lien Filed at Domicile of Taxpayer Is Effective Against Personal Property Outside of Domicile and Levy Upon Debtor of Taxpayer Prior to Taxpayer's Bankruptcy Is Superior to Rights Acquired by Trustee in Bankruptcy. Little Audrey's Transportation Company, Inc. v. Beverly Bank, et al. (S.D. Ill., September 11, 1964). (64-2 U.S.T.C. ¶9787). An assessment of federal taxes was made against taxpayer and notice of federal tax lien was filed in the county

of taxpayer's domicile. The Beverly Bank then obtained a judgment against taxpayer, and, thereafter, an additional assessment of taxes was made against him and notice of lien was filed. The bank then instituted garnishment proceedings against Little Audrey's Transportation Company, Inc., and, later, the District Director levied upon the debt due from Little Audrey's to the taxpayer. Little Audrey's instituted an interpleader suit and taxpayer was adjudicated a bankrupt on the same date.

In granting the Government's motion for summary judgment, the Court ruled that the federal tax liens primed any lien obtained by the Beverly Bank by service of the garnishment summons, since, on that date, the tax liens had already been filed. The Court further found that the Government's lien encumbered the debt, even though the property involved in the interpleader suit was not located in the county where the tax liens were filed, because the situs of the intangible property was determined by the domicile of the creditor-taxpayer. Therefore, the Court ruled that the levy prior to bankruptcy had reduced the debt to the possession of the Government and rendered the claim of the United States superior to any right which could thereafter be acquired in such property by a creditor of the taxpayer or a trustee in bankruptcy of the taxpayer.

Staff: United States Attorney Edward R. Phelps; Assistant United States Attorney Richard Eagleton (S.D. Ill.); and Russell L. Davis (Tax Div.).

Jurisdiction; In Order to Sustain Extra-territorial Service of Summons Pursuant to New York "Long-Arm" Statute, Government Must Show That Its Claim Arose From Business Transacted Within New York. United States v. The Montreal Trust Company, et al. (S.D. N.Y., October 20, 1964). (CCH 64-2 U.S.T.C. ¶9807). This action was brought against the executors of the estate of Isidore J. Klein, a citizen and resident of Canada, who died on June 14, 1955, to recover federal income taxes allegedly owed by Klein for the years 1944 through 1946. Service was had upon the executors in Canada pursuant to Sections 302 and 313 of the Civil Practice Laws and Rules of New York, the so-called "long-arm"statute, and this service was upheld by the Court after an earlier hearing provided Klein had transacted business within New York during the years in question. (64-1 U.S.T.C. ¶9477; Vol. 12 U.S. Attorneys' Bulletin 454). After hearing evidence on this question, the Court ruled that Klein had not transacted business in New York sufficient to sustain the service of summons.

During the years in question, Klein was the managing director of United Distillers, Ltd., a Canadian distiller. Although Klein had been in New York during the years in question, the Court found that there was no evidence that he he was transacting any business other than that of the corporation, and, since this is a claim against Klein individually, the Court ruled that service could not be sustained on the basis of such activity, even though the corporation itself was engaged in the transaction of business in New York. The Court also refused to find that Klein's insistence that a part of the profits of New York purchasers of the Canadian whiskey be paid to his relatives amounted to the transaction of business. Also, the fact that there was a large spread between the price of the whiskey f.o.b. Vancouver and the price paid by purchasers was not significant in the absence of evidence that Klein personally benefited from it.

Finally, the Court rejected the contention that the assessment of the tax against Klein was prima facie evidence of a state of facts which would sustain the validity of the extra-territorial service. Therefore, service of the summons on the Montreal Trust Company, as executor, in Canada was set aside.

An appeal is being considered on the basis that the Court too narrowly construed the requirement of transacting business within the meaning of the New York statute.

Staff: United States Attorney Robert M. Morgenthau; and Assistant United States Attorney Thomas H. Baer (S.D. N.Y.).

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