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Vol. 13 No. 2

UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 13 January 22, 1965 No. 2

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of November 30, 1964.

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Ga., N.	La., W.	Okla., N.	Tex., N.
Ala., M.	Ga., M.	Me.	Okla., E.	Tex., S.
Ala., S.	Ga., S.	Md.	Okla., W.	Tex., W.
Alaska	Idaho.	Mont.	Pa., M.	Utah
Ariz.	Ill., E.	N.H.	Pa., W.	Vt.
Ark., W.	Ind., N.	N.Y., S.	R.I.	Va., W.
Calif., S.	Ind., S.	N.C., E.	S.C., E.	Wash., E.
Colo.	Kan.	N.C., M.	S.D.	W. Va., N.
Conn.	Ky., E.	N.C., W.	Tenn., M.	Wyo.
Dist. of Col.	Ky., W.	Ohio, S.	Tenn., W.	C.Z.
				Guam

MATTERS

Civil

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

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Proposed Acquisition of National Distillers and Chemical Corporation's Aluminum Division Alleged To Violate Section 7 of Clayton Act. United States v. Aluminium Limited, et al., (D. N.J.) D.J. File 60-0-37-813. On December 30, 1964, a complaint was filed under Section 7 of the Clayton Act alleging that Aluminium's proposed acquisition of National Distillers and Chemical Corporation's Aluminum Division may substantially lessen competition in the production and sale of aluminum siding, venetian blinds, awnings and primary aluminum. The agreement was to be consummated on January 5, 1965. On December 30, a temporary restraining order was obtained ex parte and a hearing on the application for a preliminary injunction was set for January 7, 1965. However, defendants immediately moved for dissolution of the restraining order and a hearing was set by the Court for January 4, 1965. Thereafter, the Government informed the Court that it would be ready to present its application for a preliminary injunction on that date.

Aluminium Limited is the largest producer of primary aluminum in the world. It is the principal importer of aluminum into the United States, supplying the bulk of the aluminum imported by independent United States fabricators. Aluminium was the principal supplier of aluminum to National Distillers' fabricating operations (aluminum reroll coil and plate) through two joint ventures, one solely with National Distillers and the other with National Distillers and two other independent fabricators. The agreement included National Distillers' interest in the two joint ventures and all of its aluminum facilities consisting principally of three aluminum fabricating plants. National Distillers is the number one producer of aluminum venetian blind components and a substantial producer of aluminum siding and awnings.

Prior to the hearing on January 4th, defendants tried unsuccessfully to persuade Judge Coolahan to sign an order permitting the transfer of the assets to Aluminium with a provision not to commingle any of the property transferred pending trial on the merits. Defendants contended that National was losing $15,000 per day on its aluminum operations, and that a preliminary injunction would have the same effect as a Government victory on the merits, since National would terminate the agreement.

The hearing was concluded on January 4, 1965 and the Court announced its opinion on the following day. The Court accepted the Government's contentions with respect to the lines of commerce (the Government offered proof with respect to the product markets through affidavits and three industry witnesses), but held that the Government had failed to prove that the consummation of the agreement would have the alleged impact on the product markets. The Court was convinced that National had exhausted all possibilities of integrating backwards and that the losses currently experienced by National, following the announcement of the agreement with Aluminium, militate towards the accomplishment of the proposed sale with the only alternative being dissolution and disposal of the assets on a piecemeal basis to the highest bidder.

To preserve the status quo, the Court accepted defendants' order to keep the assets separate and not to commingle any of the property pending trial on

the merits. Trial is set for June 7, 1965.

Staff: J. E. Waters, Richard J. Wertheimer and Lionel Epstein (Antitrust Division)

Merger of Two Daily Newspapers in Tucson Alleged to Violate Section 7 of Clayton Act and Publishing Agreement Alleged to Violate Sections 1 and 2 of Sherman Act. United States v. Citizen Publishing Company, et al., (D. Ariz.) D.J. File 60-127-82. On January 4, 1965, a complaint was filed charging that the proposed merger of the only two daily newspapers in Tucson would be a violation of Section 7 of the Clayton Act. The complaint also charged that the operation of the two newspapers pursuant to the terms of a joint-publishing agreement entered into by the newspapers in 1940 constituted a violation of both Sections 1 and 2 of the Sherman Act.

Named as defendants were Citizen Publishing Company, publisher of the Tucson Daily Citizen (evening), Star Publishing Company, publisher of the Arizona Daily Star (morning and Sunday), Tucson Newspapers, Inc., the agency corporation set up to operate the two newspapers under the terms of the joint-publishing agreement, and Arden Publishing Company, a corporation organized by Citizen in December 1964 for the purpose of acquiring the stock of Star.

On the day the complaint was filed, the Government moved for a temporary restraining order to block the merger which was scheduled to take place the next day. Judge James A. Walsh, Chief Judge for the District of Arizona, ordered a hearing on the motion to be held on that day on notice to all parties to the action. After hearing argument by both sides, Judge Walsh denied the motion, essentially on the ground that the Government could show no need for such an order in view of defendants' agreeing to the entry of an order requiring that the papers be maintained entirely separate and independent pending trial of the suit. The merger was consummated on the following day.

The merger of the two newspapers was precipitated by the threatened acquisition of the Star by Brush-Moore, a company owning a chain of approximately 12 newspapers. Under a 1940 stock-purchase agreement entered into at the same time as the joint-publishing agreement, the two Tucson newspapers had granted to each other the option to buy in the event that either one of them received an offer from an outside party. Citizen had exercised its rights under this option on December 22, 1964.

The joint-publishing agreement provides, in part: a) for the establishment of an agency corporation jointly to operate all commercial aspects of both newspapers; b) that neither newspaper will "directly or indirectly, engage in any other publishing business" in the Tucson area; c) for the pooling and division of profits by the two newspapers; d) for the fixing of all advertising and circulation rates by the agency corporation; and e) that neither newspaper would engage in any other business that would in any way conflict with the terms of the agreement.

Staff: Charles D. Mahaffie, Jr. and Gerald A. Connell (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

APPELLATE PROCEDURE

Notice of Appeal Filed Almost Seven Months After Sixty-Day Appeal Period Expired Held Invalid. Maurice N. Williams v. Veterans Administration (C.A. 7, No. 14746, December 14, 1964). D.J. File 151-24-332. Appellant filed a breach of contract action against the Veterans' Administration in the District Court for the Eastern District of Illinois seeking money damages. The Government moved to dismiss on the ground that the same suit had been dismissed by the United States District Court for the District of Columbia Circuit on October 20, 1959. On November 7, 1963, the District Court dismissed the complaint on the ground of res judicata.

Upon the Government's motion, the Court of Appeals dismissed the appeal stating that Rule 73(a), of F.R.C.P., requires that an appeal must be filed within 60 days of the entry of judgment when the United States is a party and that, in the instant case, neither a notice of appeal nor a letter evidencing an interest to appeal was filed in the District Court until July 23, 1964, almost seven months after that period had expired.

Staff: United States Attorney Carl W. Feickert (E.D. Illinois).

FEDERAL TORT CLAIMS ACT

Sixth Circuit Upholds Lower Court's Determination That Workers at Atomic Energy Plant Operated by Independent Contractor Failed to Establish That Injuries or Diseases Incurred Were Caused by Negligence of United States. H. T. Mahoney, et al. v. United States of America (C.A. 6, Nos. 15819-20, December 17, 1964). D.J. Files 157-70-139, 147, 156. Tort Claims Act actions were instituted on the ground that the Government was negligent in its operation of the Oak Ridge Gaseous Diffusion Plant and that, as a result thereof, certain individuals who worked at the plant as employees of the independent contractors charged with operating the facilities were exposed to radioactive substance or toxic gases, causing them to die or incur blood cancer. The District Court, in ruling for the United States, found that plaintiffs failed to establish a causal relation between their work for the independent contractor and their resulting diseases or injuries. In addition, the court found that there was no showing that the Government committed any act of negligence which proximately caused such disease or injuries. The Court of Appeals entered an order affirming the decision below "for the reasons and upon the ground set forth in the excellent opinion of Chief Judge Robert L. Taylor, reported in 220 F. Supp. 823." The Court of Appeals stated that the lower court findings of fact were not clearly erroneous.

Staff: J. F. Bishop (Civil Division).

Barr v. Matteo Rule Held Dispositive of Former Department of Agriculture Employee's Tort Suit Against Other Agriculture Employees. Keiser v. Richard P. Hartman, et al. (C.A. 3, No. 14,841, December 21, 1964). D.J. File 145-8-565. Plaintiff, a former Agriculture employee, instituted an action against seven other Agriculture employees seeking damages for alleged libel and other tortious conduct. The District Court dismissed the complaint on the ground that the employees' acts were absolutely privileged under the rule enunciated in Barr v. Matteo, 360 U.S. 564. The Court of Appeals, in affirming, held that the lower court was correct in stating that Barr v. Matteo was dispositive. The Court pointed out that plaintiff's counsel had "frankly conceded as much at bar." The Court noted that counsel had expressed the hope of being able to persuade the Supreme Court on certiorari to overrule that decision.

Staff: Edward Berlin (Civil Division).

Sailor Enroute to New Base While on Leave Status Injures Plaintiff; Since He Was Travelling in His Own Car and at His Own Expense Court Held That Under Washington Law He Was Not Within Scope of His Employment. Paulyne B. McCall, as Administratrix of Estate of Virgil C. McCall v. United States (C.A. 9, No. 19164, November 25, 1964). D.J. File 157-82-328. A naval enlisted man, while travelling in his own car from California to Bremerton, Washington, struck and killed plaintiff's decedent as he was changing a tire near Seattle, Washington. Suit was instituted against the United States under the Tort Claims Act. The District Court found as a fact and concluded as a matter of law that the sailor was not acting within the scope of his employment as an employee of the United States at the time of the accident.

The Court of Appeals affirmed, noting that, at the time of the accident, the sailor was on leave status, that he was enroute to Washington as a result of his having arranged a transfer for his own convenience pursuant to the Navy's "SWAP" program and that he was travelling at his own expense. The Court stated that the case before it had to be analogized to the situation where a private employer has a business at two different locations, has a policy of allowing its employees to transfer from one location to another and while that employee is enroute to his new location he injures a third person. In such a situation, the Court held, it would look to Washington law and determine whether, at the time of the accident (1) the employee's conduct was of the kind that he was employed to perform, (2) whether he was doing that which was required of him by his contract of employment, and (3) whether his actions were done at the direction of his employer or in furtherance of the employer's business. Applying these criteria to the case at hand, the Court of Appeals stated that the driving of an automobile by the sailor was not the kind of work that he was employed to perform, nor was it work which he was required to do by his contract of employment or by direction of the United States. Although the "SWAP" program improved the morale of Navy personnel, the Court stated that the program was nevertheless not in furtherance of the interests or business of the United States. It therefore concluded that the sailor was not acting within the scope of his employment at the time of the accident.

Staff: United States Attorney William R. Goodwin,
Assistant United States Attorney Robert C. Williams
(W.D. Wash.).

GOVERNMENT CONTRACTS

Defense of Laches Not Available to Government Contractor in Suit Brought Against Him by United States To Recover Savings Resulting From Contract Changes. Haymarket Veterans Uniform Co. v. United States (C.A. 1, No. 6374, November 23, 1964). D.J. File 77-36-1226. The United States brought an action to recover savings which allegedly had accrued to a manufacturer as a result of certain changes made in a Government contract with the manufacturer. The District Court entered judgment in our favor. On appeal, the contractor contended that it had been deprived of due process of law since its records had been lost or destroyed during the six-year period between the time the contract provisions were changed and the suit instituted and it was therefore unable to show that the contract changes did not result in any savings to it. The Court of Appeals held that the contractor's contention was "really nothing more than an assertion of laches as a matter of law." Citing United States v. Summerlin, 310 U.S. 414, as authority, the Court stated that it was well settled that the United States is not subject to the defense of laches when it is enforcing its rights.

Staff: United States Attorney W. Arthur Garrity, Jr., Assistant United States Attorney Paul A. M. Hunt (D. Mass.).

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Although Impetus Which Propelled Shipkeeper From Dock Into Lake Erie Had Land Based Origin, Situs of Injury and Death Held Within Scope of Admiralty Jurisdiction and Thus Covered by Longshoremen's Act. Interlake Steamship Co. v. Nielsen and Interlake Steamship Co. v. O'Hearne, etc. (C.A. 6, No. 15705-06, December 3, 1964). D.J. File 83-57-21. Claimant's husband was employed by the Interlake Steamship Company as the shipkeeper of the SS ARCTURUS which was berthed at a Lake Erie dock. During the course of his employment one evening, the shipkeeper drove his car to the end of the dock where the ship was berthed. The following morning the car was found in 25 feet of water beyond the end of the dock. The car's roof was caved in as a result of the automobile landing upside down on the ice. The body of claimant's husband was found behind the wheel of the car. He had died as a result of a fractured skull. The Deputy Commissioner awarded claimant compensation under the Longshoremen's and Harbor Workers' Compensation Act.

The District Court set aside the award on the sole ground that the case did not come within the boundaries of admiralty jurisdiction. The court reasoned that in compensation cases the test must be that "if the impetus which put in motion the sequence of events resulting in the fatal accident came from the land, and operated on the person injured while on land, then there can be no jurisdiction [under the Act] and no valid award."

Upon the Deputy Commissioner's appeal, the Court of Appeals for the Sixth Circuit reversed. The Court stated that "it seems obvious to us that the trend

of case law, the impact of the Admiralty Extension Act and the effect of Calbeck /Calbeck v. Travelers Insurance Co., 370 U.S. 114/, have all pointed in the direction of expanding the boundaries of admiralty jurisdiction toward land. It does not require any great clairvoyance to hold that at present admiralty jurisdiction clearly encompasses the navigable waters immediately adjacent to a dock." The Court concluded that, although the impetus which propelled claimant's husband onto the ice had a land based origin, this does not alter the fact that the situs of the injury and death was clearly within the scope of admiralty jurisdiction. In so concluding, the Court specifically rejected the opinion rendered by Judge Scarlett in Atlantic Stevedoring v. O'Keeffe, 220 F. Supp. 881 (S.D. Ga.), which involved facts closely akin to the instant case. The Atlantic Stevedoring case is presently being appealed to the Fifth Circuit.

Staff: Leavenworth Colby (Civil Division).

SOCIAL SECURITY ACT

Sixth Circuit Reverses Secretary and Orders Award of Disability Benefits to Claimant Even Though His Impairment Might Have Been Remedied by Surgery. Columbus Ratliff v. Celebrezze (C.A. 6, No. 15410, December 8, 1964). D.J. File 137-30-114. In December 1957, claimant was injured in a mine accident which resulted in his hospitalization in order to receive treatment for a fracture of the transverse processes of the lumbar vertebrae. He was placed in a cast for two months and thereafter was given a back brace to wear. In the summer of 1958, his physician recommended that a spinal fusion be performed. Claimant, however, objected to such surgery. His attitude on this matter was deemed to be a reasonable one by his physician. Stating that continual pain in his lower back prevented him from returning to work as a coal miner, claimant applied for disability benefits on April 8, 1959. His application was denied by the Secretary apparently on the ground that the back impairment was remediable. Claimant sought review of the Secretary's denial in the District Court. The Court granted the Government's motion for summary judgment, stating that claimant's impairment was not a permanent one and could be remedied.

The Court of Appeals for the Sixth Circuit reversed. The Court held that the claimant had presented evidence showing that he could not return to his former job as a coal miner. In addition, there was no evidence according to the Court, from which a finding could be made that claimant could do other work of a substantial gainful nature. With respect to the remediability of his impairment, the Court held that, in view of the uncertainty of the outcome of an operation and the physician's stated view that claimant's attitude of rejection was reasonable, it could not be held that claimant had refused to cooperate in medical treatment.

Staff: Terence N. Doyle (Civil Division).

Tenth Circuit Affirms Lower Court's Reversal of Secretary's Denial of Benefits, Holding Inconsistencies in Record Explainable and Therefore Not Substantial Evidence to Support Secretary's Decision. Celebrezze v. Warren (C.A. 10, No. 7688, December 29, 1964). D.J. File 137-49-21. Claimant applied for Social Security disability benefits on the ground that he experienced migraine headaches frequently and with great severity. Claimant underwent extensive diagnostic testing to trace the source of his headaches, but they were found unrelated to any organic malfunction. The Secretary, in rejecting the claim, noted that, if claimant's subjective allegations as to the frequency and severity of his headaches were accepted at face value, a finding of disability would have been warranted. The Secretary found, however, that there were various inconsistencies in the evidence which warranted rejection of the claim.

The District Court upset the Secretary's decision as unsupported by substantial evidence. The Tenth Circuit, in its first decision in a Social Security disability case, affirmed, finding explainable the inconsistencies upon which the Secretary had based his rejection of the claim. Accordingly, the Court held that "on the basis of the medical evidence, together with the uncontradicted evidence of continuing severe migraine headaches, the Secretary's decision was not supported by substantial evidence."

Staff: Martin Jacobs (Civil Division).

DISTRICT COURTS

FEDERAL TORT CLAIMS ACT

Exploratory Operation Based on Vague and Indefinite Symptoms Is Not Necessarily Negligent Even Though Such Operation Did Not Result in Diagnosis or Cure. Frank Pearce v. United States (W.D. Okla., December 7, 1964). D.J. File 157-60-91. Plaintiff sued the United States under the Federal Tort Claims Act seeking damages in the amount of $560,000 for personal injury due to the alleged medical malpractice on the part of Government doctors at the United States Veterans Administration Hospital in Oklahoma City, Oklahoma. Plaintiff had been admitted to the Hospital on April 6, 1960, complaining of pains in the gastric area, vomiting blood, and passing blood stained stools. On the night of April 7, 1960, he began to bleed massively and a gastric resection was performed. The actual cause of the bleeding was not discovered in this operation and subsequently a splenectomy was performed which stopped the bleeding. Plaintiff alleged that the doctors at the Veterans Administration Hospital made a wrong or mistaken diagnosis and thus forced plaintiff to undergo unnecessary surgery.

The Court in rendering a judgment in favor of the Government stated: "A wrong diagnosis or mistake in diagnosis does not prove that it was a negligent one. Where the symptoms are obscure, as in this case, there is no liability for a mistake in diagnosis." The Court cited the following cases in support

of its opinion: McHugh v. Audet, 72 F. Supp. 394 (1941); DeZon v. American President Lines, 318 U.S. 660; and Ewing, et al. v. Goode, 78 F. Supp. 442.

Staff: United States Attorney B. Andrew Potter, Assistant United States Attorney Robert L. Berry, (W.D. Okla.), and Vincent H. Cohen (Civil Division).

FEDERAL JURISDICTION

District Court Relies on 28 U.S.C. 1444 and Grants Government's Petition For Removal From State Court of Action Brought Under 28 U.S.C. 2410; Encumbrances in Good Faith For Value Unaffected by Equities. Hamlin v. Hamlin (M.D., Ga., No. EC6440, December 28, 1964). D.J. File 101-40-14. Dave Hamlin conveyed a farm to one of his sons, Edward, who recorded the deed and then mortgaged the farm to Farmers Home Administration as security for a loan. After Dave's death, other members of the family attacked the deed as a transfer induced by fraud and undue influence, for inadequate consideration. They joined the United States as defendant in a state court, under favor of 28 U.S.C. 2410. The United States petitioned for removal under 28 U.S.C. 1444, which permits removal of any action brought under Section 2410. All other parties sought a remand, arguing that Section 1444 could be invoked only if the federal court had jurisdiction under some other statute. The Federal Court refused to remand, finding Section 1444 itself to be a sufficient grant of jurisdiction. The United States also moved to dismiss on the ground that it, as an incumbrancer which relied bona fide on a record title and gave value, could not be cut off by equities between its grantor and the latter's predecessor in title. The Court treated this as a motion for summary judgment and sustained it as to the issues of fraud and undue influence upon Dave Hamlin; but the motion was overruled as to the issue of insufficient consideration.

Staff: United States Attorney H. M. Ray, Assistant United States Attorney Thomas G. Lilly (N.D. Miss.), Robert Mandel (Civil Division).

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CIVIL RIGHTS DIVISION

Assistant Attorney General John Doar

Summary Punishment - 18 U.S.C. 242. United States v. Samuel Felton Cox (W.D. Texas) D.J. File 144-76-658. On April 15, 1964, a federal grand jury at El Paso, Texas, returned an indictment against Cox for a violation of 18 U.S.C. 242, charging that defendant, on or about July 23, 1963, acting under color of law, arrested Orval Brasuel and, while Brasuel was in his custody, using an electric cattle prodder, injured and physically abused Brasuel in an attempt to obtain a confession from him. Brasuel was arrested on July 22, 1963, by Cox and two deputy sheriffs of Ector County, Texas, on a charge of stealing horses. Brasuel was taken to the sheriff's office at Odessa, Texas, and then released to Cox for transportation to Marfa, Texas. It was during this trip that Brasuel was physically abused.

On September 30, 1964, Cox was found guilty, after a jury trial at Pecos, Texas, and on November 16, 1964, was sentenced to serve one year. The Court granted a thirty-day stay of execution of sentence.

Lois Samuel Miller made statements, on or about April 14, 1963, to a federal grand jury and in an interview with the Federal Bureau of Investigation, that he had observed Wayne Salter, a fellow inmate of Brasuel's, on July 24, 1963, inflicting the injuries upon Brasuel for which Cox was later convicted. On October 6, 1964, an indictment was returned by a federal grand jury at El Paso, Texas, in two counts. The first count alleges a violation of 18 U.S.C. 1503, in that Miller did obstruct the administration of justice by knowingly giving false testimony to the federal grand jury. The second count alleges a violation of 18 U.S.C. 1001, in that Miller knowingly and fraudulently made false, fictitious and fraudulent statements of material facts to the Federal Bureau of Investigation. This case has not yet come to trial.

Staff: United States Attorney Ernest Morgan and Assistant United States Attorney Morris H. Raney (W.D. Tex.).

Conspiracy to Deprive Victim of Liberty and Property Without Due Process of Law. United States v. Clyde R. Jackson, et al. (W.D. S.C.) D.J. File 144-68-166. Defendants, Sheriff, Deputy Sheriff, and County Attorney of Edgefield County, South Carolina, were indicted along with one private individual for conspiring to deprive a middle-aged woman of the proceeds of an insurance check. Victim had nursed and been a companion to an elderly man for about 1-1/2 years prior to his death on May 6, 1961. This man had made her the beneficiary of a $5,000 insurance policy on his life, in gratitude for the services she had rendered. The County Attorney, who was also the executor of the deceased's estate, pursuant to a plan to extort the insurance proceeds from the woman, swore out a warrant charging her with having stolen some personal property over a year before. She had committed no such crime, which defendants knew very well. Together with the Sheriff, the County

Attorney arrested her, placed her in the county jail, and kept her there for some 22 days, during which time she was continually importuned to have the check delivered to her at the jail and sign it over to the County Attorney in purported payment of the property allegedly stolen. During her detention, neither the victim's attorney nor other visitors were permitted to interview her privately, she was not afforded a change of clothing (when arrested she was attired in shorts), nor was she permitted to make bond, her attorney being told that if he put up bond additional charges would be placed against her and she would be returned to jail. She finally yielded to these pressures, obtained the check, endorsed it in blank and gave it to the defendants. Three days later (after the check had been collected), she was released and escorted out of the state.

The indictment, in three counts, charged defendants with conspiring to deprive the victim of her liberty and property without due process of law and with two substantive violations of 18 U.S.C. 242.

The case went to trial on December 14, 1964. After the Government had completed its case and rested, three of the defendants proposed to the Court that it accept nolo contendere pleas from them. The Court did so. Thereupon the Government dismissed the case against the remaining defendant, the Deputy Sheriff, who had played a minor role in the violations.

The Court proceeded to impose sentence on the convicted defendants, sentencing them each to one year, suspended, with probation to continue for five years. A condition of probation for the principal defendant, the County Attorney, was that he make restitution to the victim. He did so at once, paying her the full amount of which she had been deprived with interest at 6% from May, 1961.

Staff: United States Attorney John C. Williams; Assistant United States Attorneys Ernest J. Howard and Robert O. Du Pre; John L. Murphy (Civil Rights Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Use of Funds by Union Official For Personal Purposes Constitutes Embezzling and Conversion Under Labor-Management Reporting and Disclosure Act. United States v. Harmon (C.A. 6, Dec. 19, 1964). D.J. File 156-37-96. Defendant was convicted of embezzlement and conversion of union moneys and funds and making false entries on the union's books with respect thereto, all in violation of 29 U.S.C. 501(c) and 439(c). The proof with respect to the embezzlement and conversion counts showed that defendant utilized credit cards issued by oil companies to the union for his personal expenses. Defendant, secretary-treasurer and business agent of the union, thereafter approved these bills and signed all the checks.

On appeal, it was contended that these facts do not constitute either embezzlement or conversion because the union's checking account was a chose in action, intangible and therefore incapable of embezzlement or conversion. The Court, in rejecting this contention said: "The language in the statute, 'embezzles, steals, or unlawfully and willfully abstracts or converts to his own use,' would seem to cover almost every kind of a taking, whether by larceny, theft, embezzlement or conversion." The purpose of the statute was held to be the removal of loopholes left by the common law definitions of these crimes.

The Court also rejected defendant's claim that the calling as witnesses of three union officials who refused to answer questions on the basis of their privilege against self-incrimination was not prejudicial error even though they had previously indicated their intention to do so. The Court held that the trial court could not have prevented the calling of these witnesses and that a cautionary instruction to the jury was sufficient in this case to prevent prejudice.

NEW LEGISLATION

There were enacted during the 88th Congress, 1st and 2d Sessions, approximately 34 statutes containing provisions of particular interest to the Criminal Division. A list of such statutes is included with this issue of the Bulletin. Legislative histories of some of these statutes have already been compiled and are on file in the Research and Legislative Union of the Division; the others are in process of being compiled.

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Agriculture - Livestock Feed Program	88-585
Automobile - Seat Belts	88-201
Bribery in Sporting Contests	88-316
Commission - Assassination Investigation - Authorizing Commission to Compel Attendance and Testimony of Witnesses, etc.	88-202

	Public Law
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Credit Union Act, Federal, As Amended - Organization and Operations	88-353
Criminal Justice Act of 1964	88-455
District of Columbia Business Corporation Act Amendments of 1963	88-111
District of Columbia Hospitalization of the Mentally Ill Act	88-597
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District of Columbia Securities Act	88-503
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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation Cases - Copies of Property Descriptions

In the institution and prosecution of condemnation proceedings a number of additional copies of the description of the properties are usually required for the filing of the complaint, service of notice, recording lis pendens and publication of notice. Frequently several tracts are included in one proceeding with the resulting lengthy and complicated descriptions.

The Bonneville Power Administration and the field representatives of the Departments of the Army, Navy and Interior and the General Services Administration and most other agencies have been instructed to supply to the United States Attorneys necessary additional copies of the description of properties for which condemnation proceedings are to be instituted. In order to expedite the prosecution of such proceedings and to reduce costs, please obtain any needed additional copies of such descriptions from the designated representatives of these agencies.

Condemnation: Government Held Liable for Depreciation of Remainder Caused by Interference With Riparian Owner's Access to Navigable Bay; Whether Government Project Was in Aid of Navigation Held Question of Fact With Burden of Proof on Government; Navigation Servitude Does Not Include Commerce. United States v. 50 Foot Right of Way (Bergen Point Iron Works) (C.A. 3, 1964) D.J. File 33-31-327. A right of way for a double pipe line constructed during World War II was condemned across Bergen Point's waterfront industrial plant. The plant was located on Newark Bay with an old dilapidated pier which had not been used for many years prior to the date of taking, 1943, projecting out to the pier line. Bergen Point had been granted title to the bed of the bay out to the pier line by the State of New Jersey. The trial court held damages for that portion of the easement which ran over the fast land above the high water mark to be $500, which was not contested on this appeal. The trial court also found as to that portion of the easement over submerged lands that, if compensable, the damages caused by the pipe line's interference with access to the deep water would be $5,850. However, the trial court found that, since the Government had control of the bed of the bay under its navigational servitude, no compensation was owing. From this portion of the judgment the landowner appealed, and the Court of Appeals reversed.

Although there is an early Third Circuit case, Stockton v. Baltimore & N.Y. R. Co., 32 Fed. 9 (C.C. D. N.J. 1887), almost identical to the present fact situation, the Court held this had been overruled by the subsequent Supreme Court decision in United States v. River Rouge Improvement Co., 269 U.S. 411 (1926). As the Third Circuit interpreted River Rouge, the right of the United States in the navigable waters of the several states is limited to control thereof for purposes of navigation. Congress, in the exercise of this power may adopt "any means having some positive relation to the control of navigation," but may not destroy or impair rights of riparian owners for a project "which has no real or substantial relation to the control of navigation or appropriateness to that end." It was further held that whether the right of way across

Bergen Point's land was taken in aid of navigation was a question of fact. There was no evidence introduced, nor did the petition in condemnation aver that the purpose of the pipe line was to facilitate navigation. Hence, it was held that the United States had failed to meet its burden of proof on this issue. As to the amount of compensation owing, the Court of Appeals affirmed the alternative finding of the trial court. The Government is now considering whether to file a petition for certiorari.

Staff: A. Donald Mileur (Lands Division).

Condemnation: Jury Instructions; Hearsay Evidence; Fair Comment on Evidence; Rebuttal Testimony; Mineral Interests. United States v. Sowards, et al. (C.A. 10, December 11, 1964). D.J. File 33-46-257-65. The United States, being unable to reach agreement with the owners as to the value of certain coal deposits and mine workings on 18.18 acres, agreed to sever the mineral interests from the surface rights and instituted condemnation proceedings to establish the value of the disputed mineral interests. Trial by jury was presided over by District Judge Willis Ritter of the District of Utah.

The Court of Appeals reversed the District Court, holding that the district judge must exercise great care to maintain an impartial attitude and not become an advocate for one of the parties in the conduct of a trial. The Court of Appeals also held that the district judge had assumed a hostile attitude to representatives of the United States to the extent that a fair trial was not had and the jury was prevented from giving fair and dispassionate consideration to the evidence presented. The effect of the court's statements to the jury was characterized as destroying the Government's evidence.

The Court of Appeals also repeated its position stated in United States v. Featherston, 325 F.2d 539, that expert witnesses are permitted to testify as to hearsay matters to show the jury what they had relied upon in reaching their conclusions as to value. The Court further recognized that merely because property is condemned it does not necessarily have substantial value. It further held that rebuttal testimony had been improperly excluded.

Staff: George R. Hyde (Lands Division).

Administrative Law; Indians; Declaratory Judgment; Attorneys' Contracts; Invalidity Absent Approval of Secretary of Interior. Ike Leaf, Melvin M. Belli, et al. v. Stewart L. Udall (N.D. Cal.) D.J. File 90-2-20-814. In the summer of 1963, a compromise proposal was submitted by attorneys for the various groups of California Indians having suits pending before the Indian Claims Commission against the United States. One of these groups was the Pit River Indians residing in northern California. When the proposal was referred to the Indian Claims Commission for approval, pursuant to the provisions of 25 U.S.C. 70n, that Commission directed that hearings be held for the purpose of ascertaining whether the proposal had the approval of the various Indian tribes involved. Following a hearing in September, 1963, the members of the Pit River Band who attended the meeting voted to reject the compromise. Thereafter, the Indian Claims Commission authorized a procedure whereby mail ballots would be taken from all recognized members of the tribe. This ballot resulted in approval

of the proposal. There remained, however, an active group of Pit River Indians led by Ike Leaf, an alleged chief, and a "tribal council" appointed by him, who vehemently contended that the proposal should be rejected.

On July 20, 1964, the Indian Claims Commission entered a final judgment, based on the compromise, in the consolidated cases. Thereafter, in a meeting of the Ike Leaf appointed "council," resolutions were passed discharging the tribal attorneys who had supported the compromise and giving notice that contract negotiations would be entered into with Attorneys Melvin M. Belli and Frederick A. Cone of San Francisco. Following this, another meeting of the entire tribe was called. At that meeting, the proposed new attorney's contract was approved and executed. It was then forwarded to the Commissioner of Indian Affairs for approval as required by 25 U.S.C. 70n and 81, and 25 C.F.R. 72.13.

On September 15, 1964, this action was instituted by Ike Leaf as the representative of the Pit River Indians and by Melvin M. Belli and Frederick A. Cone for the purpose of obtaining an order (a) declaring that an attorney-client relationship existed between the plaintiffs and (b) directing the Secretary of the Interior and the Commissioner of Indian Affairs to approve the contract. A motion was also filed to require defendants to answer within a period of time much less than the sixty days provided by Rule 12. This motion was based on the contention that, pursuant to 25 U.S.C. 70s, the time to appeal from the Indian Claims Commission judgment entered on July 20, 1964, would expire on October 20, 1964, and that it was imperative that Belli and Cone be approved as counsel in time to file an appeal within the available period of time. Shortly after the suit was filed, the Commissioner of Indian Affairs disapproved the proposed contract. A motion to dismiss was then filed, based on the ground that the complaint failed to state a claim in that approval of the contract was discretionary and on the ground that the United States was an indispensable party. Plaintiffs countered with a motion for summary judgment.

On October 28, 1964, the Court entered an order sustaining the motion to dismiss, denying the motion for summary judgment and dismissing the complaint with prejudice. It held that plaintiffs' contention to the effect that the proposal had never been approved by a majority of the tribe had been conclusively determined by the Indian Claims Commission, that the approval of attorneys' contracts with respect to Indian Claims Commission litigation is a discretionary function of the Secretary of the Interior and that the allegations in the complaint did not establish that the discretion was exercised arbitrarily.

Staff: Assistant United States Attorney David E. Golay (N.D. Cal.) and Thos. L. McKevitt (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Court Grants Motion to Implead Third-Party Defendant in 100% Penalty Case. Gardner v. United States, 63-Civ. 2525 (S.D. N.Y.). Tax payer and one Alistair Kyle were jointly assessed for the penalty imposed under Sections 6671 and 6672 of the 1954 Code because it was alleged that they were officers of Toys of the World Club, Inc., "required to collect, truthfully account for, and pay over such tax." Taxpayer paid the full amount assessed but seeks a refund on the ground that he was not a responsible officer of the company. The Government moved pursuant to Rule 14(a), F.R.C.P., to implead Alistair Kyle for the purpose of obtaining a judgement against him in the event it must make a refund to the taxpayer. The Court granted the Government's motion holding that by impleading Alistair Kyle the Government will be able to determine which is liable for the assessed penalty. This, said the Court, is "consistent with the purpose of Rule 14(a) which is to avoid circuity and to enable disputed jural relationships that grow out of the same matter to be resolved consistently in one action."

Staff: Assistant United States Attorney Harvey R. Blau (S.D. N.Y.)

Jurisdiction of Bankruptcy Court to Restrain Tax Court Proceeding; Where Taxpayer Corporation Sought to Enjoin Tax Court Proceeding Involving Two of Its Subsidiaries, the Court, in Its Discretion, Determined There Was No Compelling Reason For Terminating Tax Court Proceeding. In the Matter of The Scranton Corporation. (M.D. Pa., October 23, 1964). (CCH 64-2 U.S.T.C. ¶9815). Taxpayer corporation was in reorganization proceedings under Chapter X of the Bankruptcy Act and the trustees sought to enjoin the Tax Court from proceeding further upon petitions filed by two of its wholly-owned subsidiaries. The trustees had filed consolidated income tax returns for two years and the income of the two subsidiaries was offset by the losses of the parent and other subsidiaries. The Internal Revenue Service disallowed the consolidation and assessed deficiencies in tax against the two income-producing subsidiaries on the basis that one subsidiary had not filed a consent to the consolidation and its income was not included in the return.

The trustees sought to negotiate with the Internal Revenue Service at various administrative stages and they filed petitions with the Tax Court to "protect the record" during the negotiating process. In this petition, the trustees sought to have the bankruptcy court assert jurisdiction over the matter and to restrain the Tax Court from proceeding.

In denying the petition and upholding the Government's position, the Court noted that it could assert jurisdiction under Section 111 of Chapter X of the Bankruptcy Act but that it was within the discretion of the bankruptcy court to do so. The Court reasoned that the fundamental basis for restraining an action outside of the reorganization court was that it unduly hindered, delayed,

burdened, or was inconsistent with the pending corporate reorganization and that there had been no showing that the Tax Court proceeding would so affect the reorganization proceeding.

Staff: United States Attorney Bernard J. Brown (M.D. Pa.); John M. Youngquist and Louis J. Lombardo (Tax Div.).

Right to Jury Trial; Demand For Trial by Jury Denied in Civil Action by United States to Set Aside Fraudulent Conveyance of Real Property and Foreclose Federal Tax Liens on Such Property. United States v. Augustus M. McCrory, et al. (M.D. Ala., September 30, 1964). (CCH 64-2 U.S.T.C. ¶9856). The United States filed a civil action against taxpayer, Augustus M. McCrory, and his wife seeking to set aside certain conveyances of real property on the ground that such conveyances were fraudulent under state law and to foreclose the federal tax liens against such property. A deficiency judgment was sought in the event that the proceeds from the sale of the property fraudulently conveyed were insufficient to satisfy the excise tax liabilities asserted against taxpayer. Taxpayer and his wife filed an answer timely demanding a trial by jury. The United States filed a motion to strike the demand for trial by jury.

The District Court granted the Government's motion holding that the relief sought by the United States was within the equity jurisdiction of the Court, and, therefore, neither of the defendants had a right to a trial by jury. The Court relied upon Damsky v. Zavatt, 289 F. 2d 46 (C.A. 2), and United States v. Malkie, 188 F. Supp. 592 (E.D. N.Y.), in reaching this result.

Staff: United States Attorney Ben Hardeman; and Assistant United States Attorney Rodney R. Steele (M.D. Ala.).

Summons Enforcement; Examination of Bank's Books and Records; Internal Revenue Service Required to Notify Taxpayer When It Issues Summons to Third Party to Produce Evidence Relevant to Taxpayer's Returns. In re Cole. (S.D.N.Y., December 1, 1964). (CCH 65-1 U.S.T.C. ¶9105). The Government's petition to enforce an Internal Revenue summons, which required a bank representative to appear before an Internal Revenue Service hearing officer and to produce bank records relating to the personal and business dealings of taxpayer, was denied on the basis that it was premature because taxpayer did not receive notice of the proposed examination, and, thus, he had been denied the right to challenge the summons before the hearing officer. The Court relied upon Reisman v. Caplin, 375 U.S. 440, which said that both the parties summoned and those affected by a disclosure may appear or intervene before a hearing officer or the District Court and challenge the summons by asserting their constitutional or other claims. The District Court set aside the summons but it indicated that the Government could issue a new summons to the bank upon reasonable notice to taxpayer.

An appeal from this decision is presently pending in the Second Circuit.

Staff: United States Attorney Robert M. Morgenthau; and Assistant United States Attorney Lawrence Vogel (S.D. N.Y.)

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