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BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 13 February 19, 1965 No. 4

MONTHLY TOTALS

Following is a table giving a comparison of the cases filed, terminated and pending during the first six months of fiscal year 1964 and 1965.

	First 6 Months Fiscal Year 1964	First 6 Months Fiscal Year 1965	Increase or Decrease Number	%
Filed				
Criminal	16,206	16,136	- 70	- 0.43
Civil	13,394	13,571	+ 177	+ 1.32
Total	29,600	29,707	+ 107	+ 0.36
Terminated				
Criminal	15,398	14,734	- 664	- 4.31
Civil	12,211	12,859	+ 648	+ 5.31
Total	27,609	27,593	- 16	- 0.06
Pending				
Criminal	10,599	11,484	+ 885	+ 8.35
Civil	23,587	23,928	+ 341	+ 1.45
Total	34,186	35,412	+ 1,226	+ 3.59

Following is an analysis of the number of cases filed and terminated monthly during the first six months of fiscal 1965.

	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
Oct.	3,284	2,464	5,748	3,251	2,131	5,382
Nov.	2,497	2,005	4,502	2,741	2,132	4,873
Dec.	2,574	2,204	4,778	2,612	2,059	4,671

For the month of December, 1964, United States Attorneys reported collections of $8,051,299. This brings the total for the first six months of this fiscal year to $39,264,620. Compared with the first six months of the previous fiscal year this is an increase of $9,171,982 or 30.48 per cent over the $30,092,638 collected during that period.

During December $5,989,197 was saved in 107 suits in which the government as defendant was sued for $8,168,419. 60 of them involving $5,970,811 were closed by compromises amounting to $1,877,090 and 19 of them involving $934,905 were closed by judgments amounting to $302,132. The remaining 28 suits involving $1,262,703 were won by the government. The total saved for the first six months of the current fiscal year was $65,630,366 and is an increase of $18,671,193 or 39.76 per cent over the $46,959,173 saved in the first six months of fiscal year 1964.

The cost of operating United States Attorneys' Offices for the first six months of fiscal year 1965 amounted to $9,422,853 as compared to $8,614,993 for the first six months of fiscal year 1964.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of December 31, 1964.

CASES

Criminal

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

CASES

Civil

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

CASES (Cont.)

Civil (Cont.)

Pa., E.	S.D.	Tex., S.	Va., W.	Wis., E.
Pa., M.	Tenn., E.	Tex., W.	Wash., E.	Wyo.
Pa., W.	Tenn., W.	Utah	Wash., W.	C.Z.
R.I.	Tex., N.	Vt.	W.Va., N.	Guam
S.C., W.	Tex., E.	Va., E.	W.Va., S.	V.I.

MATTERS

Criminal

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

MATTERS

Civil

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

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ADMINISTRATIVE DIVISION

Assistant Attorney General for Administration S. A. Andretta

Preparation of Witness Attendance Certificates Form No. USA-798 (Rev.)

There has been some confusion as to whether the U. U. Attorneys' and U. S. Marshals' offices are responsible for supplying certain information on Form No. USA-798(Rev.). The front of the form should be filled in by U. S. Attorneys' offices. They are also responsible for supplying or assisting witnesses in supplying information on the back of the form pertaining to the witness's travel date(s) coming to court, attendance date(s), date(s) of travel returning home, points between which travel was performed, mode of travel, mileage one way, and number of round trips.

United States Marshals should verify the one-way mileage claimed by the witness, and complete that section of the form headed "For Marshal's Use Only" before payment is made to the witness.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Action Under False Claims Act Not Covered by Immunity Statute. United States v. Carnation Company of Washington, et al., (E.D. Wash.) DJ File 60-21-105. On February 3, 1965, the Court denied a Government motion to compel a witness to answer questions put to him during the taking of his deposition by the Government. The witness had refused to answer any questions, concerning the period of time during which the conspiracy alleged in the complaint had taken place, on the grounds that the answers might tend to incriminate him. The Government moved to compel him to answer on the grounds that: (1) He was granted immunity during his appearance before the grand jury in 1962 as to the questions asked by Government counsel during the deposition; and (2) The present action is a "proceeding, suit, or prosecution" referred to by 15 U.S.C. 32, granting immunity to his present testimony even in the event that his prior immunity is inapplicable.

With reference to the first ground, Judge Powell, in his written opinion denying the motion, stated:

> The witness may be called upon to testify to events that have occurred since March of 1962. If the testimony should link the witness to a later violation the earlier immunity would afford no protection. The witness may apprehend that the evidence sought might furnish a link in a chain sufficient to connect him with a more recent crime for which he might still be prosecuted. Malloy v. Hogan, 378 U.S. 1, 13. He would also be subjected to cross examination which would enlarge the questions now pending and explore events that occurred after the grand jury session of 1962.

In rejecting the second ground for compelling the witness to testify, the Court stated that in view of the fact that Count I of the complaint is based upon a violation of the False Claims Act, and Count II, while admittedly requesting relief under the antitrust laws, is plead in the alternative:

> Here we have an action under the False Claims Act. It is not covered by the immunity statute. I will not compel the witness to testify in this case.

Staff: Marquis L. Smith, Gerald F. McLaughlin and Luzerne E. Hufford (Antitrust Division)

Application of Two Corporations to Enter Nolo Plea Denied. United States v. Bethlehem Steel Company, et al., (S.D. N.Y.) DJ File 60-138-118. On January 7, 1965, upon application of the defendant Midvale-Heppenstall Company in the above case (the "Forgings" case), Judge Ryan signed an order, later served on the Government, to show cause why Midvale-Heppenstall should not be permitted to plead *nolo contendere*. The previous application to plead *nolo* by all the corporate defendants (including the Midvale-Heppenstall) had been denied by Judge Ryan on October 15, 1962. The primary argument upon which Midvale-Heppenstall relied in again seeking to change its plea to nolo contendere was that in three other cases in the steel industry (United States v. United States Steel Corporation, et al., Criminal No. 63 CR 312 (the "Wheels" case); United States v. Taylor Forge and Pipe Works, et al., Criminal No. 63 CR 313 (the "Pipe Flanges and Rings" case; and United States v. Blaw-Knox Co., et al., Criminal No. 63 CR 602 (the "Castings" case)), the Government had not opposed the nolo contendere plea of the defendant Baldwin-Lima-Hamilton Corporation and thus in this case allegedly was discriminating against Midvale-Heppenstall. In answering the order to show cause, the Government pointed out that Midvale-Heppenstall did not make any of the products and was not a defendant in any of the three cases in which the Government had not opposed the plea of the defendant Baldwin-Lima-Hamilton Corporation, and that special and unusual circumstances applicable only to the defendant Baldwin-Lima-Hamilton Corporation were responsible for the Government not opposing the nolo contendere plea of that corporation in the "Wheels", "Pipe Flanges and Rings", and "Castings" cases.

After the order to show cause had been served on the Government in the "Forgings" case by Midvale-Heppenstall, the defendant Bethlehem Steel Company also moved to change its plea to nolo contendere. On January 29, 1965, Judge Ryan declined to accept the nolo contendere pleas of these two defendants stating:

> Defendants MIDVALE-HEPPENSTALL COMPANY and BETHLEHEM STEEL COMPANY move for permission to withdraw pleas of not guilty entered on May 10, 1962 and to plead nolo contendere to this indictment 62 CR 393. A previous application for the same relief opposed by the Government was denied by me on October 15, 1962, after I had read the grand jury minutes. This motion is again opposed by the Government.
>
> The record discloses that as to none of the five named corporate defendants has the Government consented to a nolo contendere plea, and that the indictment remains pending as to all the corporate defendants.
>
> I find that the record and papers before me, after careful examination and consideration, do not persuade me that the pleas now tendered should be accepted on this indictment by the Court without Government consent.
>
> Motions denied; so ordered.

Staff: Allen A. Dobey, Louis Perlmutter, John C. Fricano and S. Robert Mitchell (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

ADMIRALTY

Injured Seaman's Prior Judgment Against Owner on Unseaworthiness and Maintenance and Cure Claims Does Not Bar Reassertion of These Claims Against Vessel Where Outstanding Liens on Vessel Exceed Its Value, So That Contest Is Between Seaman and Other Lienors. Pratt v. United States (C.A. 1, No. 6314, December 28, 1964). D.J. No. 61-36-179. Pratt sued the owner of the vessel on which he was employed for three counts: under the Jones Act, for unseaworthiness, and for maintenance and cure. He recovered a judgment which was not satisfied. The United States then foreclosed a mortgage on the vessel. Pratt intervened. The liens on the vessel exceed its value.

The Court of Appeals held that the Jones Act reference to the seaman's election does cause an unsatisfied judgment against the owner to preclude assertion against competing lienors of the underlying claims. Thus, despite the fact that the judgment itself could not be asserted against competing lienors, since they were not parties to it, the seaman's assertion of a lien could be upheld. However, the Court held that the competing lienors could use the judgment to establish the maximum amount which the seaman could recover on his underlying claims.

Prior to suing the owner, the seamen had settled with the owner's insurer and had signed a covenant not to sue, expressly reserving his rights against the owner. The Court of Appeals held that there was a question of fact as to whether this covenant affected the seaman's right to proceed against the vessel.

Staff: Pauline Heller (Civil Division)

APPELLATE PROCEDURE

Third Circuit Court of Appeals Prescribes New Procedure for Interlocutory Review by Madamus and Holds That District Judge Who, Under Prior Procedure, Was Respondent to Mandamus Petition and Was Required to Answer It, Thereby Lost His Appearance of Impartiality and Should Be Disqualified From Sitting on Further Proceedings in Case. Rapp v. Van Dusen, Barrack v. Van Dusen, Popkin v. Van Dusen (C.A. 3, Nos. 14927, 14929, 14934, December 16, 1964). D.J. No. 157-62-341. These were actions in the Eastern District of Pennsylvania, arising out of an airplane crash in Boston Harbor. The District Court ordered transfer of the actions to the District of Massachusetts under 28 U.S.C. 1404(a). Plaintiffs sought mandamus from the Court of Appeals and, under the then prevailing practice, named the district judge as the sole respondent. Also in accordance with prevailing practice, the Court of Appeals directed the district judge to file an answer and gave defendants leave to intervene. The district judge named defendants' counsel as his counsel, and consulted with them concerning the answer. The Court of Appeals set aside the order of transfer. Certiorari was obtained, and the Supreme Court, in Van Dusen v. Barrack, 376 U.S. 612, remanded the case to the District Court for reconsideration of the motion to transfer in light of the principles enunciated in its opinion.

On remand, plaintiffs moved that the district judge disqualify himself under 28 U.S.C. 455, requiring disqualification where the judge "is so * * * connected with [any party's] attorney as to render it improper, in his opinion, for him to sit on the trial * * * or other proceedings." The present petitions for mandamus or prohibition were brought to review the district judge's denial of this motion.

The Court of Appeals, sitting en banc, first held that mandamus was available to review the District Court's refusal to disqualify himself. A prior decision, Green v. Murphy, 259 F. 2d 591 (C.A. 3), had held mandamus not to be available to review a refusal or disqualification under 28 U.S.C. 144 (providing for filing an affidavit of personal bias or prejudice). This decision was distinguished on two grounds: in Green the interlocutory decision was reviewable on appeal from the final judgment, whereas here an order of transfer would take the case out of the circuit; and here, unlike Green, the matters out of which the alleged disqualification arose stemmed from an order of the Court of Appeals.

On the merits, the Court of Appeals found it unnecessary to pass on petitioners' contentions under 28 U.S.C. 455. Instead, the Court prescribed a new procedure for mandamus, designed to remove the district judges from any involvement in the mandamus proceedings, and then held that the district judge should be disqualified on the ground that the "beneficial purpose" of the new procedure should extend to pending cases.

Under the new procedure, petitioners must apply for a rule directed to the prevailing parties to show cause why the order in their favor should not be vacated. The district judge should not be named as a respondent, although a copy of the petition should be served on him. The petition must allege that a request for an interlocutory appeal certification under 28 U.S.C. 1292(b) was made and denied, or was inappropriate under the circumstances.

The new procedure applies "where the purpose of mandamus is to secure interlocutory review of alleged judicial error." The Court stated that there will remain the "rare occasion" where the ground for the petition requires naming the district judge as respondent. In this connection, the Court cited Davis v. Board of School Commissioners, 318 F. 2d 63 (C.A. 5), where a district judge was required to rule promptly on a motion for preliminary injunction, and Hall v. West, 335 F. 2d 481 (C.A. 5), where a "recalcitrant" district judge was ordered to proceed pursuant to the Supreme Court's 1954 desegregation decision.

Staff: Morton Hollander (Civil Division)

FEDERAL TORT CLAIMS ACT

Action for Injury to Minor Under Tort Claims Act Accrues, for Limitations Purposes, at Date of Injury Rather Than Date When Guardian ad Litem Is Appointed. Pittman v. United States (C.A. 9, No. 18503, January 26, 1965). D.J. No. 157-11-1107. A nine-year old boy was injured on July 13, 1959, by a Navy vehicle.

Suit under the Tort Claims Act was commenced on December 18, 1961, by the boy's father, who had been appointed guardian ad litem shortly before the filing of the complaint. The Court of Appeals held that the action was barred by the two-year limitation contained in 28 U.S.C. 2401(b). Plaintiff argued that the injured boy could not sue for himself until reaching majority and thus had no remedy until appointment of a guardian ad litem. Having no remedy, plaintiff argued that there was no "claim," within the meaning of 28 U.S.C. 2401(b), which requires that the action be commenced within two years after the "claim accrues." The Court stated that the argument has "considerable original merit" but is foreclosed by precedent. The Court also noted the congressional fear of stale claims embodied in the Tort Claims Act, and doubted that Congress would have intended that all infants could wait until reaching age twenty-one before bringing suit.

Plaintiff also claimed estoppel to raise the statute of limitations, on the ground that he had been misled by advice given by an Assistant United States Attorney. The Court summarily rejected this claim, citing Federal Crop Insurance v. Merrill, 332 U.S. 380, and Munro v. United States, 303 U.S. 36.

Staff: Pauline Heller (Civil Division)

SOCIAL SECURITY ACT

Denial of Disability Claim Supported by Record; Secretary's Regulations Regarding Evaluation of Psychological Disorders Must Be Followed Unless Unreasonable or Plainly Inconsistent With Statute. Brasher v. Celebrezze (C.A. 8, No. 17802, January 21, 1965). D.J. No. 137-43-63. This application for disability benefits was based on allegations of liver disease, hearing loss, tuberculosis, and chronic alcoholism and nervousness. The Secretary denied the application, and the district court upheld the Secretary. The Court of Appeals affirmed, accepting the Secretary's findings that none of the alleged disorders were present in sufficient degree to prevent claimant from doing his former work. Noting that the psychological evidence had been evaluated by the Secretary in light of 20 C.F.R. 404.1519, the Court stated that the Secretary's construction of the statute must be sustained "unless unreasonable or plainly inconsistent with the governing statute." The Court also stated that it was "impressed with the meticulous and detailed care and consideration which the administrative authorities provided for this claimant and for every medical and legal point he raised."

Staff: United States Attorney F. Russel Millin, Assistant United States Attorney John L. Kapnistos (W.D. Mo.)

Sixth Circuit Upholds Secretary's Denial of Disability Benefits; Secretary Had Determined Claimant Able to Do Former Work. Charlie Hall v. Celebrezze (No. 15791, C.A. 6, January 25, 1965). D.J. No. 137-30-191. Claimant filed an application for disability benefits, alleging an inability to work in the mines as a result of arthritis. The Secretary found that claimant's impairment did not preclude him from continuing to perform his former work. The district court affirmed.

Upon claimant's appeal, we argued (a) that the record supported the Secretary's former work finding and (b) that the Secretary was not required to make job availability findings when he found claimant able to return to his former job. The Court of Appeals affirmed, stating only that "the findings of the Secretary are supported by substantial evidence and therefore are conclusive." The Court cited Adkins v. Celebrezze, 330 F. 2d 704 (C.A. 6), and Ward v. Celebrezze, 198 F. Supp. 15 (E.D. Tenn.), affirmed, 309 F. 2d 157 (C.A. 6), in support of its decision. This case represents one of the few instances when the Court of Appeals for the Sixth Circuit has upheld the Secretary.

Staff: Lawrence R. Schneider (Civil Division).

Denial of Disability "Freeze" Not Supported by Substantial Evidence Where Secretary Has Found That Claimant Cannot Engage in Former Occupation But Has Made No Findings as to Type of Work Claimant Is Able to Engage in; Case Remanded to Secretary for Further Proceedings. Ray v. Celebrezze (C.A. 4, No. 9554, January 11, 1965). D.J. No. 137-84-104. Claimant filed an application for a period of disability or "freeze" on August 8, 1958 when he was forty-five years old. The application was denied on the ground that while he did have a permanent physical impairment, it did not prevent him from engaging in any substantial gainful activity. The Secretary found that claimant could not engage in his former arduous occupations as a coal miner or welder, but there was no evidence taken and no findings were made as to what type of work he could engage in. The district court affirmed the Secretary, finding that the determination was supported by substantial evidence.

On appeal, claimant argued for reversal and that he was entitled to both a disability freeze and disability insurance benefits. The Secretary conceded that the requisite findings to support the denial had not been made and argued that the case should be remanded for further proceedings. The Fourth Circuit remanded and held that, where the Secretary finds a claimant is unable to do former work, but is still able to work, the Secretary "must take evidence and make findings based upon the particular claimant's ability, education, background and experience as to what, if any, kind of work he or she can perform and that employment opportunities of this nature are available. Merely citing catalogues which list capsule descriptions of thousands of jobs available to prospective employees is not sufficient."

Staff: Robert Vollen (Civil Division).

STANDING TO SUE

Hotel Owners Competing With Transient Housing Included in Redevelopment Plan for Urban Renewal Lack Standing to Challenge Validity of Administrative Action in Approving Plan. Berry, et al. v. Housing and Home Finance Agency, et al. (C.A. 2, No. 29,256, January 26, 1965). D.J. No. 130-50-1957. This action was commenced by the owners of a hotel in Utica, New York, against Federal and local agencies and officials seeking to enjoin the carrying out of a redevelopment plan for an urban renewal project which included transient housing units competing with the hotel. Plaintiffs alleged illegality in the approval of the plan by HHFA insofar as the plan included such transient housing, because of failure to comply with a 1959 amendment to the Housing Act, 42 U.S.C. 1456(g). That amendment provides, in substance, that hotels and other transient housing are not to be included in urban redevelopment projects unless a competent, independent analysis of the local supply of such housing reveals a need for additional units. The district court granted a motion by HHFA and its officials to dismiss as to them for lack of standing.

The Court of Appeals affirmed, holding that the plaintiffs lacked standing to maintain the suit because of the settled principle that economic loss stemming from lawful competition, even though made possible by federal aid, is *damnum absque injuria*. In doing so, the Court rejected the argument that the 1959 amendment (42 U.S.C. 1456(g)) conferred standing. Looking to the language of the statute and its legislative history, the Court concluded that the amendment created merely "public rights, enforceable only by [HHFA]," and that this was one of those instances in which "an individual has no legal remedy even though a federal law affecting his interests may have been violated." It added that the "public good sought through the Housing Act could well be frustrated by delay and expense of litigation if allowed on the suit of every person objecting to possible competition in renewal projects."

It is to be noted that although the Government challenged the appealability of the district court's order, and the question was argued at length, the Court did not determine the jurisdictional question, but decided the case on the merits, "assuming *arguendo*, that the order [was] appealable."

Staff: Alan S. Rosenthal and Kathryn H. Baldwin.

FALSE CLAIMS ACT

Government Construction Contractor Who Submits False Reports of Wage Payments to Obtain Progress Payments Under Contract Violates False Claims Act; Criminal Conviction on Identical Issues Is Res Judicata in Civil False Claims Act Suit; $2,000 Statutory Forfeiture Imposed for Each of Defendant's Prime Contracts. United States v. Greenberg (S.D. N.Y., 61 Civ. 1452, January 12, 1965). D.J. No. 46-51-551. Greenberg entered into three prime contracts with the Navy for construction work, the contracts containing the standard provisions requiring the payment by the prime contractor and subcontractors of the prescribed minimum wages to laborers and mechanics. To obtain progress payments for performance under the contract, the prime contractor was required to submit weekly payroll reports of the wages paid by him and the subcontractors and to certify to the correctness of the wages so reported, and that they conformed to the prescribed labor standards. Following Greenberg's criminal conviction on charges of aiding and abetting his subcontractors in the preparation of false payroll reports, the United States sued him under the civil provisions of the False Claims Act, 31 U.S.C. 231. Since only the underpaid employees were injured and no pecuniary damage was sustained by the United States, the complaint did not demand damages and was limited to the recovery of such number of $2,000 statutory forfeitures as might be appropriate.

Consistent with several other district court decisions to like effect, the District Court here held that Greenberg's conduct constituted violations of the False Claims Act. It held that the factual issues of such alleged violations were not only independently proved in the civil trial but that the issues were conclusively established in the Government's favor by the prior criminal conviction. Discussing the several alternatives concerning the number of $2,000 forfeitures to be assessed, one of such possible alternatives being a forfeiture for each of the thirty-four false payroll reports, the Court concluded that under all the circumstances of the instant case it would be appropriate to impose a $2,000 forfeiture for each one of Greenberg's three prime contracts with the Navy. However, it added the caveat that such selection of the number of forfeitures to be assessed under all the circumstances of the instant case was not to be construed as a uniform rule to be applied in all cases of this nature.

Staff: United States Attorney Robert M. Morgenthau, and Special Assistant United States Attorney James G. Greilsheimer (S.D. N.Y.).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

COUNTERFEITING AND FORGERY; MAIL FRAUD
(18 U.S.C. 503 and 1341)

Use of Forged Postage Meter Impressions. United States v. Francis O. Olson; United States v. Francis O. Olson and Addressing and Mailing, Inc. (D. Minn.). D.J. File 55-39-31. Olson, operator of the Addressing and Mailing Corporation, mailed material for others, using photographic impressions of legitimate meter postage issued to his company to reprint postage on outgoing material. A printing plate had been prepared from a negative obtained from the photographing of legitimate meter postage. The printing plate was then used to reproduce false postage meter impressions on matter run through an offset printing press after which the matter would be deposited in the mail without payment. During the trial there was a determination by the postal authorities that at least $49,356 in forged postage meter impressions had been used. Prosecution was had on the basis that under 18 U.S.C. 503 a meter stamp has many of the characteristics of a postmarking impression, and the forging of a cachet or postmarking impression on a letter would be a crime under section 503. The Mail Fraud statute, 18 U.S.C. 1341, was used in the indictment and the corporation of which Olson was the operator was charged as a co-defendant. A guilty verdict was returned on all counts. This is the first application of 18 U.S.C. 503 to this type of case.

Staff: United States Attorney Miles W. Lord;
Assistant United States Attorney Hartley
Nordin (D. Minn.).

GOLD RESERVE ACT

Executive Order No. 6260, as Amended, Upheld Under 12 U.S.C. 95a; Grant of Authority to President to Regulate Gold Transactions During Time of War or "Any other Period of National Emergency" Not Limited to Banking Crisis of 1933. Pike and Brouwer v. United States, (C.A. 9; Jan. 14, 1965). D.J. File 12-012. Defendants appealed from their conviction in December of 1963, under 12 U.S.C. 95a, for possessing gold in violation of Executive Order No. 6260. At issue was the meaning of 12 U.S.C. 95a, granting to the President authority to regulate gold transactions "during the time of war or during any other period of national emergency." Appellants contended that the authority conferred by 12 U.S.C. 95a was limited to the duration of the banking crisis of 1933; and, therefore, that they were improperly convicted for violating an executive order based on an emergency declared by reason of Communist aggression. The Court of Appeals for the Ninth Circuit held otherwise -- that 12 U.S.C. 95a pertains to any emergency declared by the President. The Court relied principally upon the clear, broad language of 95a and cited instances of Congressional concurrence, either expressly or through acquiescence, in the exercise by the President of 95a authority to meet emergencies other than war or the banking crisis of 1933. The case United States v. Briddle, 212 F. Supp. 584 (S.D. Cal., 1962), was expressly disapproved.

At the same time, the Court found no occasion to review its decision in Bauer v. United States, 244 F. 2d 794 (1957), concerning the need for judicial inquiry into the existence of a national emergency.

Staff: Former United States Attorney Francis C. Whelan; Assistant United States Attorneys Richard A. Murphy and Kevin O'Connell (S.D. Calif.).

MOTION TO VACATE
(28 U.S.C. 2255)

Mail Fraud; Advance Fee Scheme. Lester E. Butler v. United States (C.A. 8, Jan. 11, 1965). D.J. File 36-9-34. Appellant and 19 others were convicted of violations of the mail fraud statute, 18 U.S.C. 1341, in the so-called Lenders Service Advance Fee case, which conviction was affirmed. Butler v. United States, 317 F. 2d 249 (C.A. 8, 1963), cert. den. 375 U.S. 838. See United States Attorneys' Bulletin dated June 14, 1963, Vol. 11, No. 11, p. 309.

Appellant filed a motion under 28 U.S.C. 2255 to vacate the judgment, from the denial of which motion appellant appealed. Appellant contended (1) that at the trial he was not accorded the right to counsel, as guaranteed by the Sixth Amendment of the Constitution and the due process clause of the Fifth Amendment, and (2) that he was denied due process "in that by the circumstances of the trial he was not accorded the opportunity to testify and introduce evidence in his own behalf".

In affirming the decision of the district court, the Court of Appeals pointed out that it is well settled that a motion under 28 U.S.C. 2255 cannot serve the office of an appeal and that issues disposed of on a prior appeal will not be reviewed again via such a motion, citing cases. Since the points raised by appellant were adjudicated in the previous appeal, appellant could not prevail. In concluding the Court stated:

> "The complaints of appellant are neither new nor novel. . .As is usually the situation in cases where the individual under sentence levels post-trial attacks against trial counsel, appellant seemingly was satisfied during the course of the trial with the type and quality of the services that were being rendered in his behalf. The jury's pronouncement of appellant's guilt apparently provoked the change in his attitude. Since that eventful hour, appellant has endeavored to cast the blame for his predicament upon all others who participated in the trial - the Judge, the U.S. Attorney and his own lawyer - but in typical manner, appellant has failed to recognize and to consider the beam in his own eye."

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LANDS DIVISION

Acting Assistant Attorney General J. Edward Williams

Res Judicata; Judicial Review; Mineral Leasing Act; Appellate Procedure; Affirmance on Motion Without Briefing. Duncan Miller v. Stewart L. Udall, Secretary of the Interior (C.A. D.C., No. 19008, January 12, 1965; D.J. File No. 90-1-4-108). Duncan Miller brought this suit against the Secretary of the Interior, seeking judicial review of two administrative decisions denying oil and gas leases to Miller under the Mineral Leasing Act. Miller admitted in his complaint that the two administrative decisions had been judicially reviewed in two prior actions and the Secretary's decision upheld by the Court of Appeals, Miller v. Udall (C.A. D.C., No. 18029, February 7, 1964); Miller v. Udall (C.A. D.C., No. 18116, February 7, 1965), but attempted to justify relitigation by numerous vague allegations of due process and newly discovered evidence. The district court granted the Secretary's motion to dismiss the action.

After Miller filed a notice of appeal, the Secretary filed a motion in the Court of Appeals to dismiss the appeal or summarily affirm the judgment of the district court on the grounds that the appeal was frivolous and the decision of the district court was so clearly correct that no further litigation was justified. On January 12, 1965, the Court of Appeals entered a per curiam order affirming the judgment of the district court.

Staff: Richard N. Countiss (Lands Division).

Condemnation: Substitute Facilities Doctrine; Abuse of Discretion in Appointment of Rule 71A Commission; Erroneous Instructions to Commission. Franklin County, Georgia v. United States (C.A. 5, No. 21230, February 2, 1965) D.J. File No. 33-11-396-489. The United States condemned numerous segments of Franklin County roads and bridges in connection with the Hartwell Dam and Reservoir Project. Over the objections of both parties, the trial court appointed a Rule 71A, F.R. Civ. P., commission to determine just compensation and erroneously instructed the commission to determine the fair market value of the property condemned. Instead of determining fair market value, the commission applied the correct test, the substitute facilities doctrine, which requires the United States to pay other public bodies for roads and sewers condemned only if, and to the extent that, it is necessary for the public bodies to replace them. The commission found no necessity for Franklin County to replace the property taken by the United States and awarded the County $1.00 as nominal compensation.

The Fifth Circuit affirmed the award of nominal compensation. The Court held that the County was not harmed by the erroneous instruction since the commission applied the correct legal test in determining compensation. The Court further held that the appointment of the commission was justified by the character and location of the property condemned. Finally, the Court held that the record warranted the conclusion that substitute facilities were unnecessary and that the award of nominal compensation was proper.

Staff: Richard N. Countiss (Lands Division).

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T A X D I V I S I O N

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Wilful Attempt to Evade Income Taxes; Conviction Affirmed in Court of Appeals. United States v. Smith, 335 F. 2d 898 (C.A. 7), certiorari denied, January 25, 1965. Defendant was convicted by a jury on three counts of wilful evasion of income taxes for the years 1951 through 1953. The Government's evidence showed that defendant, a vice-president of the Hod Carriers' and Laborers' International, deliberately omitted from his income tax returns numerous "kick back" payments received from road building contractors to insure "labor peace". In affirming the judgment, the Court of Appeals ruled inter alia: (1) that the trial court did not abuse its discretion in refusing to order the production of confidential prison medical records of a principal Government witness in order to attack the credibility of the witness by showing his alleged addiction to drugs. The witness had denied any addiction to drugs on cross examination, and the only evidence offered in support of the defense motion to produce was that the witness may have been addicted to drugs some eight years prior to his testimony; (2) that the trial court did not err in refusing to order the production of grand jury minutes on the ground that the Government, by voluntarily producing a portion of the grand jury testimony, had thereby waived its right to object to disclosure of the balance; and (3) that petitioner was not deprived of an impartial jury because one of the petit jurors had served eight years earlier on a grand jury which indicted two Government witnesses for tax evasion offenses arising from some of the same "kick back" transactions involved in defendant's trial. The Court held that prejudice on the part of this juror could not be presumed by virtue of her prior grand jury service, and that--absent a showing otherwise--it must be presumed that this juror was true to her voir dire oath.

Staff: United States Attorney Edward R. Phelps (S.D. Ill.); Joseph M. Howard, Norman Sepenuk, Charles A. McNelis (Tax Division)

District Court Decisions

Bankruptcy; Pre-bankruptcy Levy Entitled to Priority Over Claim of Prior Assignee Who Failed to Comply With State Recording Statute and Over Trustee in Bankruptcy. In the Matter of San Fernando Valley Restaurants, Inc. (S.D. Cal., October 6, 1964). (CCH 65-1 U.S.T.C. ¶9138). In 1958 the taxpayer-bankrupt, a corporation engaged in the restaurant business, entered into an agreement with The Diners' Club whereby taxpayer extended credit to customers presenting a Diners' Club membership card and the Diners' Club would pay taxpayer for the credit, less certain charges.

Taxpayer then obtained a bond in favor of the State of California for its sales tax obligations under which taxpayer agreed to indemnify the surety for any expenses it would become liable to pay for taxpayer. At this time federal taxes in the amount of $3,806 had been assessed against taxpayer. Thereafter, as a condition of keeping its bond in effect, the surety required and taxpayer agreed to assign accounts receivable owing to taxpayer by Diners' and to maintain at all times accounts with at least the face amount of the bond with trustees for the surety.

An additional assessment of federal taxes in the amount of $9,508 was then made against taxpayer, and, subsequently, taxpayer assigned accounts receivable from Diners' in the face amount of the bond to the trustees for the surety. However, the parties to the assignment did not comply with state statutes relating to notice to creditors of the assignment of accounts. Notices of federal tax liens were then filed and a notice of levy was served upon The Diners' Club, at which time it held an amount representing accounts receivable of taxpayer and which included the accounts purportedly assigned to the surety. Taxpayer was adjudicated a bankrupt the next day.

The referee ruled, and was sustained on appeal, that the assignment to the surety was invalid as to creditors because the notice requirement of state law had not been met. The referee subsequently ruled that the Government was not entitled to the funds representing the accounts receivable, the assignment of which had been voided. On a petition for review, the District Court ruled that the Government, by its levy prior to bankruptcy, had done everything possible to secure the funds and that its claim was, therefore, superior to the claim of the trustee in bankruptcy. The Court relied upon United States v. Eiland, 223 F. 2d 118 (C.A. 4), and Division of Labor Law Enforcement v. United States, 301 F. 2d 82 (C.A. 9).

Staff: Former United States Attorney Thomas R. Sheridan; Assistant United States Attorneys Loyal E. Keir and James S. Bay (S.D. Cal.).

Statute of Limitations; Filing of Proof of Claim for Federal Taxes in Probate Proceeding Held Proceeding in Court Sufficient to Toll Statute of Limitations Upon Instituting Suit to Collect Taxes. United States v. American Casualty Co. of Reading, Pa., et al. (W.D. Ky., December 29, 1964). (CCH 65-1 U.S.T.C. ¶9167). In 1951, the Government had filed a proof of claim for federal taxes with the administrator of the estate of the deceased taxpayer. When the administrator failed to file a settlement of his account, the state court issued a rule against his surety, American Casualty Company, to file a settlement and the matter was referred to a Special Commissioner to settle the accounts of the administrator. The Commissioner accorded the Government's claim first priority under 31 U.S.C. 191 because the estate was insolvent, and the state court approved of the Commissioner's report over the objections of the surety.

Subsequently, the Government instituted this suit against the surety and others and the surety sought to avoid liability by interposing the defense that the suit was instituted more than six years after the assessment of tax and was, therefore, barred by the statute of limitations. Section 6502, Internal Revenue Code of 1954. The Government contended that the filing of the proof of claim was a "proceeding in court" within the meaning of the statute of limitations (Sec. 6502) and, therefore, the statute had been tolled.

In granting the Government's motion for summary judgment the Court considered the case of United States v. Saxe, 261 F. 2d 316 (C.A. 1) to the effect that, under Massachusetts law, the filing of a claim is solely for the protection of the personal representative and thus is not a "proceeding in court." However, the Court concluded that the function and effect of filing a proof of claim under Kentucky law had a different purpose, and that the Kentucky probate court had the duty to determine whether claims should be allowed and paid and its findings were tantamount to final judgment unless reversed on appeal. Therefore, the Court ruled that the filing and allowance of the claim and the orders and judgment of the probate court constituted a "proceeding in court" and established the validity of the Government's claim which it was entitled to collect from the surety.

Staff: United States Attorney William E. Scent; Assistant United States Attorney John E. Stout (W.D. Ky.); and Ronald A. Ginsburg (Tax Div.).

State Court

Priorities; Federal Tax Lien Which Arose During Taxpayer's Lifetime Held Superior to Personal Injury Proceeds in Settlement of Wrongful Death Action Over Lien of State Insurance Fund for Workmen's Compensation Payments Made After Taxpayer's Death. Estate of Matthew Sellers. (Surrogates Court, Kings County, N. Y.). On May 8, 1957, taxpayer was seriously injured when a boiler exploded at his place of employment. He lived for four days during which time he was conscious. After his death, the administratrix of his estate instituted an action to recover for his pain and suffering and for his wrongful death. While this action was pending, the State Insurance Fund paid out in excess of $13,000 as workmen's compensation benefits to his widow and child. Federal taxes had been assessed and tax liens had been filed prior to his death.

The administratrix filed a petition to compromise the personal injury and wrongful death actions for $7,500 and the Surrogates Court approved of the settlement and determined that twenty per cent of the amount should be allocated to the cause of action for personal injury. The Government contended, successfully, that the federal tax lien, which had accrued during the decedent's lifetime, attached to the cause of action for personal injury and was superior to the lien granted to the State Insurance Fund "on the proceeds of any recovery," because the federal tax lien was prior in time to the compensation lien which could arise only when the benefit payments were made, which was after the decedent's death.

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

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