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

May 28, 1965

United States
DEPARTMENT OF JUSTICE

Vol. 13 No. 11

UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 13 May 28, 1965 No. 11

APPOINTMENTS--DEPARTMENT

The nominations of the following appointees have been confirmed by the Senate:

Assistant Attorney General, Criminal Division - Fred M. Vinson, Jr.
Assistant Attorney General, Lands Division - Edwin L. Weisl, Jr.

APPOINTMENTS--UNITED STATES ATTORNEYS

The nominations of the following appointees as United States Attorneys have been confirmed by the Senate:

Kentucky, Western - Ernest W. Rivers

Mr. Rivers was born July 31, 1923 in Whitley County, Kentucky, is married and has two children. He attended Berea College from September to December 1941; was freight and tonnage clerk for the L & N Railroad in 1942; and served in the United States Army Air Corps from January 28, 1943 to December 6, 1945 when he was honorably discharged as a Flight Officer. He attended Cumberland Junior College from February 4, 1946 to June 2, 1947 when he received his graduate certificate and was employed intermittently by the L & N Railroad from November 21, 1945 to August 1948. He entered the University of Kentucky on September 18, 1948 and received his LL.B. degree on June 1, 1951. He was admitted to the Bar of the State of Kentucky that same year. From September 1951 to July 1952 he was law clerk for the Kentucky Court of Appeals and from August 1, 1952 to November 19, 1953 he was director of registration and licensing for the Kentucky Department of Health. He then engaged in the practice of law in Paducah until January 12, 1962 when he was appointed an Assistant United States Attorney for the Western District of Kentucky, which position he held at the time of his appointment as United States Attorney.

Michigan, Western - Harold D. Beaton

Mr. Beaton was born November 15, 1906 at Burlington, Michigan, is married and has two children. In 1924 and 1925 he taught school in Delta County, Michigan. He received his LL.B. degree from Marquette University in 1933. He was admitted to the Bar of the States of Wisconsin and Michigan in 1933, and to that of the District of Columbia in 1953. From January 1, 1935 to January 1, 1939 he was Prosecuting Attorney for Mackinac County, Michigan. On March 10, 1929 he entered on duty as an Attorney in the Criminal Division of the Department of Justice. He served in the United States Army from April 18, 1942 to September 5, 1945 when he was honorably discharged

as a Sergeant. He returned to the Department of Justice and served until he resigned June 25, 1947 to run for public office. He was re-employed in the Department of Justice on January 5, 1948 and served to December 31, 1953. He then practiced law in Washington, D. C. and Manistique, Michigan. On September 5, 1956 he became Legislative Assistant to Senator Patrick McNamara of Michigan, which position he held at the time of his appointment as United States Attorney.

The nominations of the following United States Attorneys to new four-year appointments have been confirmed by the Senate:

Colorado - Lawrence M. Henry
Florida, Middle - Edward F. Boardman
Kansas - Newell A. George
Massachusetts - W. Arthur Garrity, Jr.
Michigan, Eastern - Lawrence Gubow
Minnesota - Miles W. Lord
Missouri, Western - F. Russell Millin
New York, Northern - Justin J. Mahoney
New York, Eastern - Joseph P. Hoey
Ohio, Southern - Joseph P. Kinneary
Rhode Island - Raymond J. Pettine
Utah - William T. Thurman

The nominations of the following United States Attorneys to new four-year terms were pending before the Senate as of May 14, 1965:

New Mexico - John Quinn
Vermont - Joseph F. Radigan
Wisconsin, Eastern - James B. Brennan

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ADMINISTRATIVE DIVISION

Assistant Attorney General for Administration S. A. Andretta

MEMOS AND ORDERS

The following memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 9, Vol. 13 dated April 30, 1965:

MEMOS	DATED	DISTRIBUTION	SUBJECT
406	4-20-65	U.S. Attorneys	Right to Counsel
409	5-14-65	U.S. Attorneys & Marshals	Combined Federal Campaign Program
ORDERS	**DATED**	**DISTRIBUTION**	**SUBJECT**
335-65	4-22-65	U.S. Attorneys & Marshals	Amendment to Departmental Organization Regulations Reassigning Responsibility for Enforcement of Certain Criminal Provisions Relating to Elections and Political Activities From Civil Rights Div. to Criminal Div.
336-65	4-22-65	U.S. Attorneys & Marshals	Placing Assistant Attorney General John Doar in Charge of Civil Rights Division
337-65	4-27-65	U.S. Attorneys & Marshals	Designating Fred M. Vinson, Jr., to Act as Assistant Attorney General in Charge of Criminal Division
338-65	5-14-65	U.S. Attorneys & Marshals	Designating Edwin L. Weisl, Jr., to Act as Asst. Atty. Gen. in Charge of Lands Division

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Circuit Court of Appeals Orders Transfer of Sherman Act Case. Minnesota Mining & Manufacturing Company v. Platt. (C.A. 7, No. 14725). D.J. File 60-358-89. This is a second mandamus proceeding in the pending criminal case against Minnesota Mining & Manufacturing Co., in which the company seeks a change of venue from the Eastern District of Illinois to Minnesota. The first mandamus proceeding resulted in Platt v. Minnesota Mining and Manufacturing Co., 376 U.S. 240, in which the Supreme Court reversed the prior judgment of the Seventh Circuit ordering transfer of the case. The Court of Appeals there had held that the trial judge in denying transfer had relied upon an improper factor (the difficulty of the Government obtaining a fair jury trial in Minnesota). In Platt, the Supreme Court assumed (without deciding) that this factor was improper, and that mandamus would lie to review denial of transfer, but held that the Seventh Circuit erroneously undertook to consider the transfer motion upon its own de novo evaluation of the record and erroneously directed transfer. This was a "discretionary function of the trial judge." Mandamus is limited to extraordinary matters and the court of appeals' function in these proceedings is only "to determine the appropriate criteria and then leave their application to the trial judge on remand." The case was remanded to the district court for reconsideration of the transfer motion without reference to the factor held to be improper.

On remand, after reconsidering the whole record, including supplementary affidavits, Judge Platt again denied the motion for transfer. On Minnesota Mining's second petition for mandamus, the Seventh Circuit (Chief Judge Hastings dissenting)held that the writ would issue directing Judge Platt to vacate his order denying the transfer and to enter an order transferring the case to the District of Minnesota.

The Court recited extensive "relevant facts" which, it said the Government had not refuted by evidence; as Judge Hastings pointed out in dissent, the recital was "a verbatim copy" of part of the company's brief (some of the facts stated, incidentally, conflict with the Government affidavits). The Court's only discussion in terms of the propriety of criteria was its rejection of the position of Government counsel that the size and financial strength of the company was a relevant factor to consider appraising the impact of additional expense resulting from trial at Danville. It held that size and power of the parties was not relevant. Pointing out that Judge Platt had stated that "interruption of the business and expense of defendant have been over emphasized", the Court of Appeals held that this indicated "something less than a fair consideration", and stressed that these were "important criteria" which a district judge "could not ignore or insufficiently weigh or consider". The Seventh Circuit also ruled that the district judge erred by comparing the caseload in the District of Minnesota with that at Danville, rather than with the average caseload in the entire Eastern District of Illinois. (On this point, the record supports Judge Platt, and shows that the divisions of Illinois maintain separate dockets). The Court concluded that

the district judge had "abused his discretion" in that " [h]e did not reconsider the motion of petitioner to transfer in the light of proper criteria and the interest of justice on the federal criminal rule 21(b)".

The Seventh Circuit's decision is in blatant disregard of the Supreme Court's decision, rendered in the same case, on the limited scope of mandamus in reviewing transfer motions. The Division has recommended a petition for certiorari seeking summary reversal.

Staff: Robert B. Hummel (Antitrust Division)

Jury Finds Defendants Not Guilty of Section 1 of Sherman Act and Section 371 of Title 18 U.S.C.A. Violations. United States v. The Bridge Construction Corporation, et al. (D. Maine). D.J. File 60-12-115. Trial of this case commenced on April 20, 1965, before Judge Edward T. Gignoux and a jury of eight women and four men in Portland, Maine. On April 27, after deliberating for more than eight hours, the jury returned a verdict of not guilty on both counts as to both defendants.

The indictment which was returned on October 23, 1964, charged the Bridge Construction Corporation, a highway contractor, and its president, Chester G. Bridge, with conspiring with others to restrain trade and defraud the United States in violation of Sherman 1 and section 371 of Title 18 USCA. The essence of the charges was that defendants and others had conspired to submit rigged bids to the Maine State Highway Commission for construction of five Federal aid and two state highway projects from July 1961 to July 1963.

An interesting development in this case was the use by the defense of the President of the Central Maine Power and Light Co. as a character witness. At the conclusion of his testimony the Government moved at the bench to discharge one of the jurors who was employed by that company in a secretarial position on the ground that her impartiality had been compromised. The motion was granted by the Court and the juror was replaced by an alternate.

During the presentation of the Government's case the chief prosecution witness was asked about a conversation between himself and the secretary-treasurer of the corporate defendant relating to two highway projects involved. An objection was made by defense counsel to this testimony on the ground that no foundation had been laid to show that the secretary-treasurer had authority to bind the corporation by his illegal acts in entering into collusive arrangements to submit rigged bids. Although it was stipulated that this officer was duly authorized to sign and submit bids and, in fact, did sign and submit two of the bids involved in the conspiracy charged, the Court, after asking for and receiving memoranda of law on the point, ruled that the testimony could only be admitted de bene as the declarations of a co-conspirator, and gave limiting instructions to the jury that they were to consider it against the defendants only if they found a continuing conspiracy that included the particular projects which formed the subject of the conspiratorial conversation. Judge Gignoux ruled that without foundation evidence to establish that

the secretary- treasurer had authority to determine the prices included in the bid, he would not assume that the authority to sign and submit was a delegation of corporate authority to take any illegal action with respect to prices so as to make the corporation culpable.

Staff: John J. Galgay, Lionel E. Bolin, Robert D. Canty and James J. Dulligan (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

GOVERNMENT EMPLOYEES

Civilian Caretaker Employees of National Guard Not Federal Employees for Purposes of Lloyd-LaFollette and Veterans' Preference Acts. Anselmo v. Ailes, (C.A. 2, No. 29428, April 19, 1965) D.J. File 145-4-1362. These 14 civilian technicians (9 of whom are veterans) were discharged from their positions with the New York National Guard; their discharges were effected without the procedures required by federal and state civil service laws. The Civil Service Commission held that they were not Federal Civil Service employees, and the state courts held that they were not within the State civil service. The technicians then brought this action (in the federal courts) for reinstatement. The Court of Appeals, affirming the district court, held that, although the technicians are federal employees for some purposes, they are not such employees for purposes of the civil service laws. The Court relied primarily upon the state's authority to hire, fire and supervise the work of the technicians.

Staff: David L. Rose and Florence Wagman Roisman (Civil Division).

NATIONAL BANK ACT

In Absence of Direct or Specific Injury, Appellants Lack Standing to Challenge Constitutionality of Federal Statutes. W. Frank Horne, et al. v. Federal Reserve Bank of Minneapolis, et al. (C.A. 8, No. 17,683, decided April 29, 1965) D.J. File 145-3-638. Appellants sought to have the National Bank Act of 1864, 12 U.S.C. 21, and the Federal Reserve Act of 1913, 12 U.S.C. 221, declared unconstitutional on the ground that those statutes improperly delegated the right to coin money to the Federal Reserve Banks, which appellants claimed to be private establishments. The district court dismissed the complaint for lack of standing to sue. The Court of Appeals affirmed on the same ground, pointing out that appellants' only claim of injury was predicated on the fact that they were required to accept Federal Reserve Notes as legal tender. The Court ruled that, inasmuch as this requirement, if it be injurious, is one shared in common by the public at large and not specially applicable to appellants, they lacked the necessary direct injury to have standing to raise such contention of unconstitutionality in a federal court, citing Massachusetts v. Mellon, 262 U.S. 447, and Doremus v. Board of Education, 342 U.S. 429.

Staff: Alan S. Rosenthal and Richard S. Salzman (Civil Division).

VETERANS' REEMPLOYMENT RIGHTS

Reemployment Rights Unenforceable Against New Corporation in Absence of Showing of Business Continuity Sufficient to Render It "Successor in Interest"

of Veteran's Pre-induction Employer. Cox v. Feeders Supply Co. (C.A. 6, No. 16,041, May 7, 1965, D.J. File 151-31-221). Cox, a veteran, sought to enforce his reemployment rights against the defendant-corporation as the "successor in interest" of his pre-induction employer under Section 9(b)(B)(1) of the Universal Military Training and Service Act. The defendant-corporation was formed to receive the inventory and furniture and fixtures of the pre-induction employer and continued doing the same type of business at the same location with many of the same customers. The vendor thereafter went out of business. There was no connection in ownership or management. Only part of the assets were purchased and no liabilities were assumed. There was no agreement barring future competition. In holding against the veteran, on the particular facts, the Sixth Circuit specifically quoted the language of the district court indicating that there had been a failure to show business continuity. The Court thereby appeared to accept the test urged by the Government, namely business continuity, as distinguished from the district court's additional criteria of continuity of entity and ownership.

Staff: Max Wild (Civil Division).

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

Claims Arising From Abduction and Negligent Medical Treatment of Injuries by Military Personnel Barred by 28 U.S.C. 2680(h). J. M. Pendarvis, Jr. v. United States (E.D. S.C., Civil Action No. AC-1325, May 4, 1965). D.J. File 157-67-328. Plaintiff, a civilian, alleged he was seized and abducted in the front yard of his home at 11:00 p.m. by soldiers participating in operation "Swift Strike." He claimed he was taken into custody, retained overnight, and that the injuries inflicted upon him were negligently diagnosed and treated. The Court ruled that 28 U.S.C. 2680(h) bars all claims arising out of assault, battery, false imprisonment or false arrest.

Staff: United States Attorney Terrell L. Glenn; Assistant United States Attorney Wistar D. Stuckey (E.D. S.C.).

Where Administrative Claim is Later Withdrawn, Ad Damnum in Subsequent Suit Is Reduced to Amount Claimed Administratively. Smith v. United States, 239 F. Supp. 152 (D. Md., 1965). Plaintiff filed an administrative claim under the Tort Claims Act claiming damages in the amount of $1,800. This claim was withdrawn and a Tort Claims suit was filed with an ad damnum of $70,000. The Government filed a motion to reduce the ad damnum to the amount claimed administratively pursuant to 28 U.S.C. 2675(b). The Court granted the motion, holding that an ad damnum is limited to the amount claimed administratively and the burden is on plaintiff to show basis for the increased amount because of "newly discovered evidence and intervening facts." The Court also held that there is no time limit in which the Government must challenge the sufficiency of plaintiff's showing for an increased amount.

Staff: United States Attorney Thomas J. Kenney; Assistant United States Attorney Arthur G. Murphy (D. Md.); Albert A. Miller (Civil Division)

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CRIMINAL DIVISION

Acting Assistant Attorney General Fred M. Vinson, Jr.

MAIL FRAUD

Proof of Use of the Mails. Atkinson v. United States (C.A. 8, April 14, 1965). Defendants were convicted of violations of the mail fraud statute in a scheme to defraud investors of property by means of fraudulent representations. The mailings charged were the mailings to the mail subscribers of the Kansas City Star of advertisements placed in the newspaper by the defendants.

Upon appeal, defendants contended that there was no proof adduced that anyone responded to the advertisement described in certain counts. Conceding this fact, the Circuit Court held, however, that the gist of the offense was the placing in the mail of matter intended to be used to effect the scheme, and the lack of success of a fraudulent scheme is no defense, citing cases.

Defendants further contended that all victims who testified had received the newspaper containing the advertisement from their carrier, and not through the mails, and therefore the mails were not used in furtherance of the scheme. The Court held the contention to be without merit, pointing out that it is sufficient that the use of the mails was caused by the defendants in furtherance of the fraudulent scheme.

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IMMIGRATION AND NATURALIZATION SERVICE

COMMISSIONER RAYMOND F. FARRELL

IMMIGRATION

Deportation order based on narcotics conviction not rendered invalid by expungment of conviction. Maria Garcia-Gonzalez v. Immigration and Naturalization Service (C.A. 9, No. 18,375, April 28, 1965) D.J. File 39-11-566. Petitioner, a Mexican national, brought this action under section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a, seeking judicial review of the denial by the Board of Immigration Appeals of her motion to reopen her deportation proceedings. Submission of this case was held in abeyance until the Supreme Court ruled in Giova v. Rosenberg, 379 U.S. 18, that the denial of such a motion was reviewable under Section 106 supra.

Petitioner was convicted in 1961 for violation of a California statute prohibiting possession of heroin. Because of this conviction she was ordered deported in February 1962. In November 1962, she proceeded under section 1203.4 of the California Penal Code and had her narcotic conviction expunged. Under this section a Court is required upon application to expunge a conviction if the convicted person has fulfilled the conditions of probation and has been discharged from probation prior to the termination of the period thereof. In her motion to reopen to the Board of Immigration Appeals, petitioner contended unsuccessfully that the expungent wiped out the conviction and precluded its use to support a deportation charge.

The Ninth Circuit agreed with the Board of Immigration Appeals that the expungment of the narcotic conviction did not render petitioner non-deportable. The Court noted that an expungment under the California statute does not wipe out the conviction for all purposes. The Court pointed to its decision in Adams v. United States, 299 F.2d 327, wherein it held that a person convicted under California law for possession of marihuana had to register under a Federal law before departing from or entering the United States (18 U.S.C. 1407), notwithstanding that the conviction had been expunged. The Court agreed with the reasoning of the Attorney General in the Matter of A_____ F_____ 8 I. & N. Dec. 429, that Congress did not intend that aliens convicted of a narcotic violation should escape deportation because, as in California, the state affords a procedure authorizing a technical erasure of the conviction, especially in light of the fact that Congress has provided in 8 U.S.C. 1251(b), that an executive pardon for a narcotic conviction shall not defeat deportation. The decision of the Board was affirmed.

Staff: United States Attorney Cecil F. Poole;
Assistant United States Attorney Charles E. Collett
(N.D. Cal.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Criminal Section

Espionage (18 U.S.C. 794(c), 371, and 951). United States v. Robert Glenn Thompson (E.D.N.Y.) D.J. File 146-7-52-574. On May 13, 1965 Robert Glenn Thompson was sentenced to thirty years' imprisonment on his plea of guilty to a charge of conspiring to commit espionage on behalf of the Soviets.

Thompson had been charged in a three-count indictment, returned on January 7, 1964, with conspiring to commit espionage, conspiring to act as an agent of the Union of Soviet Socialist Republics without registering with the Department of State and with the substantive offense of acting as such an agent. Upon sentencing, the latter counts were dismissed on motion of the Government.

Staff: United States Attorney Joseph Hoey; Assistant United States Attorney Raymond B. Grunewald (E.D.N.Y.); Brandon Alvey (Internal Security Division)

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LANDS DIVISION

Acting Assistant Attorney General Edwin L. Weisl, Jr.

Ordinary High Water Mark; Rejection of Testimony of Expert Witness When Based on Erroneous Principle; Timely Appeal; United States v. Kansas City Life Ins. Co. Distinguished. Borough of Ford City v. United States, (C.A. 3, April 28, 1965) D.J. File 90-1-23-902. This suit was filed pursuant to a special jurisdictional act, 74 Stat. 252. The complaint alleged that, because of the construction of Lock and Dam No. 6 on the Allegheny River, defendant had raised the level of the river above the pre-dam ordinary high water mark and thus damaged plaintiff's sewer system. In the preliminary trial stages the issue of liability was separated from the issue of damages. The case came on for trial on the issue of liability. It was agreed that the pre-dam ordinary high water mark could be fixed by finding the flow of the river which filled the channel to the post-dam ordinary high water mark and then by an accepted formula transfer the same flow to pre-dam or open river conditions. Evidence was introduced to establish where the post-dam ordinary high water mark was located. Defendant objected to the qualifications of plaintiff's expert witness and moved to strike his testimony on the basis that he had been improperly instructed and was not seeking to find the true ordinary high water mark. The objection was overruled. Defendant introduced its expert witnesses, who testified as to their opinion of the location of the ordinary high water mark. The district court found the ordinary high water mark to be at precisely the point where plaintiff's witness had found it to be and so entered its judgment of liability on January 29, 1963 (213 F. Supp. 248).

The case was called for trial on the issue of damages on August 20, 1963. At the trial, plaintiff made an offer of settlement which defendant wished to consider, provided it could preserve its right to appeal. The court consented to a continuance of the trial pending such consideration. The Attorney General approved the proposed settlement and judgment was entered on the stipulation on November 5, 1963, whereby the parties agreed to the settlement without prejudice to defendant's right to appeal and without prejudice to plaintiff's right to attack such appeal. Notice of appeal was filed December 31, 1963.

The Court of Appeals held the appeal was timely filed, that judgment on the issue of liability was not an appealable order. The Court outlined the criteria for determining the location of the ordinary high water mark, i.e., the effect of the presence of water on vegetation so as to destroy its use for agriculture, the appearance of shelving along the banks, the presence of litter at that line, etc. The Court observed that plaintiff's expert had not followed the true test in fixing upon his location of that line. The Court found that, since the district court had adopted plaintiff's testimony exclusively in fixing the line, it was clearly erroneous. Plaintiff contended that, since it owned no property on the banks of the river but merely dumped its sewerage into the river, it could recover for seepage or an underflooding as in United States v. Kansas City Life Ins. Co., 339 U.S. 624. The Court discarded this argument, stating that the Supreme Court had expressly confined the rule of the Kansas City Ins. Co. case to land situated upstream on a non-navigable tributary, and it did

not apply to properties contiguous to a navigable stream. The Court remanded the case to the district court to enter judgment for defendant-appellant.

Staff: Howard O. Sigmond (Lands Division).

Suit by United States; Limitations and Laches as Defense to Claim of United States; Dismissal for failure to Prosecute Under Rule 41(b), F.R.Civ.P. United States v. State of California (S.D. Calif. Civil No. 62-521-WM) D.J. File 90-1-9-478. This action was instituted to recover suppression costs and damages to National Forest land destroyed by fire. The Court, on its own motion, originally dismissed the complaint on the grounds that an original action could not be maintained by the United States in the United States District Court against the State of California without the consent of the State. The Court of Appeals reversed. After remand, the State of California filed a motion to dismiss the complaint on the grounds that the action is barred by a state statute of limitations, as in Denver v. R.G.R. Co. v. United States, 241 Fed. 614, and by laches for failure to prosecute pursuant to Rule 41(b), F.R.Civ.P.

Relying upon United States v. Summerlin, 310 U.S. 414; United States v. John Hancock Mut. Ins. Co., 364 U.S. 301, and similar cases, the United States opposed defendant's motion to dismiss because of limitations. Relying on the further proposition that, first, the United States is not barred by laches, and, secondly, that Rule 41(b) is a procedural rule and is not intended to be and has never been invoked to bar a claim prior to the time it is in litigation, the Government also opposed the motion to dismiss for failure to prosecute.

On April 12, 1965, the Court entered an order denying the motion to dismiss on the grounds relied upon by the State. With respect to Rule 41(b), the Court specifically stated:

> (2) the discretion which rests in a United States District Judge, pursuant to Fed.R.Civ.P. 41(b), to dismiss an action for failure to prosecute is of course governed by the policy of the law which finds expression in the rule that the United States, as Sovereign, is not bound by any statute of limitations nor barred by any laches of its officers, no matter how gross; * * *.

Staff: Herbert Pittle (Lands Division).

Navigation Servitude: Failure to State Cause of Action. Tennessee Gas Transmission Company v. United States (C.Cls. May 3, 1965) D.J. File 90-1-23-1087. Plaintiff alleged that as a direct result of the construction and operation of Greenup Locks and Dam near Greenup, Kentucky, some 2.21 acres of plaintiff's land on the banks of the Ohio River downstream from the locks and dam were eroded away in a short period of time, and its submerged pipeline crossing the Ohio at that point was threatened with the probability of a washout. Plaintiff claimed there had been a constitutional taking. Defendant filed a motion to dismiss and plaintiff filed a motion for summary judgment. The Court observed that there was no allegation in plaintiff's petition that the Governmental activity complained of raised the water level of the Ohio River above the ordinary

high water mark and that in view of the fact that the exercise of the dominant power of the Government in aid of navigation extends to the entire bed of the stream below the ordinary high water mark, plaintiff is not entitled to recover unless it can establish that a taking occurred as a result of defendant's raising the water level of the stream above the ordinary high water mark. The Court allowed plaintiff thirty days to amend its petition consistent with the order.

Staff: Howard O. Sigmond (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Statute of Limitations; Third Party Beneficiary Actions; United States Not Barred by State Statutes of Limitation. United States v. Parker House Sausage Co. (C.A. 6, No. 16,035, May 10, 1965). Withholding and F.U.T.A. taxes were assessed against a taxpayer in 1952. On July 1, 1953 Parker House Sausage Co. agreed to pay the federal tax liens as part of the consideration for its purchase of taxpayer's real estate. A collection suit was filed by the United States against the taxpayer and Parker House Sausage Co. on January 19, 1961. The suit was timely under Section 6502 of the Internal Revenue Code of 1954 because of waivers executed by taxpayer.

As one of its grounds for recovery, the United States sued as third party beneficiary of the July 1, 1953 contract. Parker House contended that the Michigan 6 year statute of limitations on contract actions barred such a suit by the United States. The Court of Appeals affirmed the district court's holding that a suit by the United States to enforce its claim is not barred by a state statute of limitations.

Staff: Lawrence B. Silver, Joseph Kovner (Tax Division)

District Court Decisions

Attorney's Fees; Federal Tax Lien, Subordinate to Foreclosing Mortgagee's Claim Including Normal Costs, Entitled to Priority Over Claim of Mortgagee for Attorney's Fees Even Though Under State Law Attorney's Fees on Foreclosure of Mortgage Are Expressly Made Part of Costs Allowable to Mortgagee. First National Bank of Lewistown v. Francis C. Tilzey, et al. (D. Mont., January 19, 1965). (CCH 65-1 U.S.T.C. ¶9234). The United States was joined in this mortgage foreclosure action because it had tax liens on the property, which were junior to the mortgage sought to be foreclosed. The foreclosing mortgagee claimed the priority of not only the mortgage but also the attorney's fees incurred in the foreclosure action on the basis that under Montana statutes attorney's fees incurred in the foreclosure of a mortgage are expressly made a part of the costs allowable to the foreclosing mortgagee.

The District Court had held in Streeter Brothers v. Overfelt, 202 F. Supp. 143, that the lien for attorney's fees had priority over a junior tax lien relying on the mortgage provision to this effect and on the Montana statutes. In overruling its prior decision, the District Court held (relying on United States v. Pioneer American Insurance Co., 374 U.S. 84) that, despite the classification under state law of attorney's fees in proceedings such as this, under federal standards the claim for attorney's fees would not have become choate prior to the creation of the federal tax liens. The Court also relied on the recent decision in Camptown Savings and Loan Association v. United States, 85 N.J. Super. 18, 203 A. 2d 529, where it was held that a federal tax lien took

priority over a claim for attorney's fees even where the latter was fixed and definite, the percentage being set out by a rule which had the force of a statute.

The Court thus found that the federal tax liens were entitled to priority over the claim of the foreclosing mortgagee for attorney's fees.

Staff: United States Attorney Moody Brickett (D. Mont.).

Jurisdiction; Federal District Court Has No Jurisdiction of Action Brought by Taxpayer to Enjoin Attorney General From Using Records Obtained During Internal Revenue Service Investigation in Considering Whether to Seek Indictment of Taxpayer. John Smith, Jr., and John Smith & Sons, Inc. v. Nicholas deB. Katzenbach, et al. (D. D.C., March 10, 1965). In this action a North Carolina taxpayer petitioned the United States District Court for the District of Columbia to enjoin the Attorney General of the United States and others from using for any purpose records and information obtained by Internal Revenue Agents from taxpayer during a tax investigation. Although no summons was issued to taxpayer, he contended that he was entitled to be advised of his right to counsel when a Special Agent came into the investigation, and that, because he was not so advised, the injunction sought should be issued.

The District Court granted defendants' motion to dismiss the complaint on the grounds that it lacked jurisdiction over the subject matter, in that the action was an unconsented suit against the United States, and alternatively, that taxpayer had an adequate remedy at law in the form of a motion under Rule 41(e), F.R. Crim. P., in the United States District Court in North Carolina to suppress the records and information.

Staff: United States Attorney David C. Acheson; Assistant United States Attorney Joseph Hannon (D. D.C.); and Robert A. Maloney and Harry D. Shapiro (Tax Division).

Internal Revenue Summons; Government Entitled to Recover Entire Cost of Summons Enforcement Action Including Cost of Contempt Proceeding from Contemners Who Exercised Gross Inattention and Reckless Disregard of Preservation of Records Summoned. In the Matter of The Examination of D. I. Operating Company. (D. Nev., March 18, 1965). (65-1 U.S.T.C. ¶9372). Internal Revenue summonses were issued in September of 1961 to D. I. Operating Company and to Allard Roen, its Secretary, calling for the production of certain records of that corporation which operated the gambling casino at the Desert Inn Hotel in Las Vegas, Nevada. After the District Court ordered compliance with the summons, an appeal was taken to the Court of Appeals, which reversed and remanded the case to the District Court for specific findings as to the relevancy and materiality of the records sought. 321 F. 2d 586.

After a hearing in October of 1964, the District Court again entered an order requiring compliance with the summons and no appeal from this order was taken. It was then represented that, although the records had been available when the initial summonses were served, they subsequently had been lost or destroyed and this civil contempt proceeding was brought.

The District Court discussed the nature of the proceeding and then found the corporation and its Secretary in contempt of its October, 1964, Order and awarded the Government a compensatory fine representing its costs of enforcement of the summons from the time of its issuance to the conclusion of the contempt proceeding. The Government filed an affidavit which showed that $7,950.35 had been expended over the three and one-half year period, and a joint and several judgment in this amount was entered against the corporation and its Secretary.

Staff: United States Attorney John W. Bonner (D. Nev.); Fred B. Ugast and Harry D. Shapiro (Tax Division).

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