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

October 29, 1965

United States
DEPARTMENT OF JUSTICE

Vol. 13 No. 22

UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 13 October 29, 1965 No. 22

APPOINTMENTS - UNITED STATES ATTORNEYS

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

Iowa, Northern - Donald E. O'Brien
Montana - H. Moody Brickett
New York, Western - John T. Curtin
Ohio, Northern - Merle M. McCurdy

The nomination of the following new United States Attorney has been confirmed by the Senate.

District of Columbia - David G. Bress

MONTHLY TOTALS

As the figures below show, the pending caseload during August rose 2,113 cases or 6 percent over the number pending on the same date in fiscal 1965. What is more to the point, the caseload has risen by 1,256 or 3 1/2 percent during the first two months of fiscal 1966. Unless this trend is reversed, fiscal 1966 will prove to be the seventh consecutive fiscal year in which the pending caseload has risen. As has been repeatedly pointed out in the Bulletin, the situation can only be remedied by a sustained and substantial increase in terminations over filings. Until a complete review of all cases is made to ascertain those that can be terminated with little or no further action required, and a concentrated effort is made to increase terminations, the caseload will continue to rise.

	First 2 Months Fiscal 1965	First 2 Months Fiscal 1966	Increase or Decrease Number	%
Filed				
Criminal	4,494	4,881	+ 387	+ 8.61
Civil	4,609	5,020	+ 411	+ 8.92
Total	9,103	9,901	+ 798	+ 8.77
Terminated				
Criminal	3,894	4,082	+ 188	+ 4.83
Civil	4,228	4,439	+ 211	+ 4.99
Total	8,122	8,521	+ 399	+ 4.91
Pending				
Criminal	10,748	12,009	+ 1,261	+ 11.73
Civil	23,749	24,601	+ 852	+ 3.59
Total	34,497	36,610	+ 2,113	+ 6.13

During July the gap between filings and terminations was over 7 percent - during August the gap was approximately 20 percent. Nothing could better explain the upward spiral in the caseload than these figures on filings and terminations. Unless something can be done to increase the number of terminations over the number of filings, the caseload will continue to rise.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,296	2,465	4,761	2,212	2,194	4,406
August	2,585	2,555	5,140	1,870	2,245	4,115

For the month of August, 1965, United States Attorneys reported collections of $5,902,501. This brings the total for the first two months of this fiscal year to $10,357,979. This is $1,539,622 or 17.46 per cent more than $8,818,357 collected in July and August of fiscal year 1965.

During August $40,588,128 was saved in 82 suits in which the government as defendant was sued for $41,119,701. 53 of them involving $1,720,380 were closed by compromises amounting to $390,459 and 10 of them involving $193,115 were closed by judgments amounting to $141,114. The remaining 19 suits involving $39,206,206 were won by the government. The total saved for the first two months of the current fiscal year was $48,406,806 and is an increase of $17,268,480 or 55.46 per cent over the $31,138,326 saved in July and August of fiscal year 1965.

The cost of operating United States Attorneys' Offices for the first two months of fiscal year 1966 amounted to $3,230,190 as compared to $3,009,973 for the first two months of fiscal year 1965.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of August 31, 1965.

CASES

Criminal

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

CASES (Cont'd)

Criminal (Cont'd)

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

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

* * *

ADMINISTRATIVE DIVISION

Acting Assistant Attorney General for Administration John W. Adler

The following Memoranda and Orders applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 17, Vol. 13 dated August 20, 1965:

MEMOS	DATED	DISTRIBUTION	SUBJECT
424	8/10/65	U.S. Marshals	Additional Information Required On S.F. 1179.
417-S1	8/20/65	U.S. Attorneys	Submitting Views On Report On "Recommended Procedures In Criminal Pretrials".
426	8/26/65	U.S. Attorneys	Analysis of Public Law 89-68, 89th Cong., 1st Sess., Making 18 U.S.C. 1952 Applicable To Travel In Aid Of Arson", Together With Copies Of House Report No. 264, Senate Report No. 351, And The Public Law.
425-S1	8/30/65	U.S. Attorneys & Marshals	Cost Reduction.
427	9/10/65	U.S. Attorneys & Marshals	Temporary Appointments Pending Completion Of Character Investigation.
409-S1	9/17/65	U.S. Attorneys & Marshals	Combined Federal Campaign Programs.
428	9/30/65	U.S. Attorneys & Marshals	Revised Travel Regulations
410-S1	10/5/65	U.S. Attorneys & Marshals	Telephone Usage Regulations
429	10/6/65	U.S. Attorneys & Marshals	Increases In Retirement Annuities.

ORDERS	DATED	DISTRIBUTION	SUBJECT
347-65	9/20/65	U.S. Attorneys & Marshals	Part 0 - Organization Of Dept. Of Justice - Assigning To Criminal Div. Responsibility For Enforcement Of Federal Cigarette Labeling & Advertising Act (P.L. 89-92; 79 Stat. 282).
348-65	10/8/65	U.S. Attorneys & Marshals	Redesignating Lands Div. As Land & Natural Resources Division.

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

STATUTES

REMOVAL STATUTE

Time to File Petitions for Removal of Civil Actions From State to Federal Courts Extended to Thirty Days; Public Law 89-215, September 29, 1965. 79 Stat. 887. Attention is called to Public Law 89-215 which amends 28 U.S.C. 1446 (the removal statute) to provide that petitions for removal in civil actions shall be filed within thirty days in place of the twenty day period previously provided.

SOCIAL SECURITY ACT

Recent OASDI Developments Affecting Title II Litigation; Public Law 89-97, July 30, 1965. 79 Stat. 286. HEW has advised of the more significant recent developments affecting litigation under Title II of the Social Security Act. They are as follows:

1. John W. Gardner succeeded Anthony J. Celebrezze as Secretary of Health, Education and Welfare on August 18, 1965. Mr. Gardner, therefore, should be substituted for Mr. Celebrezzee as the defendant in actions under section 205(g) of the Social Security Act, 42 U.S.C. 405(g). No further action need be taken to continue Title II suits because section 205(g) specifically provides that actions commenced thereunder do not abate due to changes in the person occupying the office of Secretary.

2. Pursuant to Section 332 of Public Law 89-97, the Social Security Administration has adopted procedures under which payment of 25 percent of the benefits due a plaintiff under a favorable court judgment will be withheld until notification is received with respect to an award by the court of an attorney's fee or they are advised that no such fee will be approved. At the time HEW forwards its letter regarding an appeal from an adverse judgment it will also advise as to the amount of benefits due a plaintiff. If thereafter the Solicitor General should determine not to take an appeal, the General Litigation Section of this Division will, at the time of so advising you, advise you also of the amount of past due benefits payable to the claimant as determined by HEW. In this connection, it is HEW's position that attorneys' fees are to be computed only on the past due benefits payable to the claimant (and any other person who is a party to the judgment), but what may be called auxiliary benefits payable to the claimant's dependents are not to be considered in this computation. After advice that no appeal will be taken, it would appear appropriate for United States Attorneys, as a routine matter, to ascertain whether an attorney's fee has been or is going to be allowed by the court, so that complete payment of benefits may be made accordingly.

In addition, HEW is of the view that since the issue of the wage earner's disability is but one element in determining whether or not auxiliaries also

may be eligible for benefits, the amount upon which the court may award an attorney's fee should be restricted to the amount of accrued benefits due the wage earner. Further, HEW states that the subsequent determination of entitlement of dependents to benefits is an administrative determination involving in addition to a resolution of the disability question, many other factors including the question of whether or not applications therefor have been duly filed, relationship, age, etc.; and that the fee an attorney who has been retained also to represent dependents may charge such dependents is subject, unless they were properly made parties to the litigation and the judgment specifically calls for awards of benefits to be made to them, to the provisions of Section 404.976 of Social Security Administration Regulations No. 4, 20 CFR 404.976, governing the fees attorneys may charge in proceedings before the Administration.

3. Section 303(a) of P.L. 89-97 amends sections 216(i) and 223 of the Social Security Act by substituting for the requirement that an individual's impairment must be expected to be of long-continued and indefinite duration or to result in death, a new requirement that he has been under a disability which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 calendar months. A period of disability by reason of this change may be established pursuant to the provisions of section 303(f) of the Public Law for periods of disability beginning as early as October 1941, but benefits are payable only beginning September 1965 or the seventh month in which an individual has been determined to be under a disability under the amended test in section 303(a) of the Public Law, whichever is later. This new requirement also applies to cases in court in which judicial review of the claim was not completed before July 1965. For such cases pending in court, the claimant's entitlement to insurance benefits from September, 1965 onward and to a period of disability is measured by the standards of the new amendment, but the courts should not make awards under that new standard. Instead, if it appears that the claimant may be entitled to benefits under that standard, the court should remand the matter to the Secretary for a determination of entitlement under the new provisions of the Law. For insurance benefits prior to September, 1965, the court should review the Secretary's decision under the standards set forth in the Act prior to the 1965 amendments. The Social Security Administration, the Office of General Counsel, HEW and its Regional Attorneys are reviewing pending actions and wherever remands are appropriate, the United States Attorneys will be advised.

4. Section 303(b) of P.L. 89-97 permits a claimant to establish a prior period of disability of at least one year in duration if he files an application within twelve months of the termination of the past disability.

5. Section 328 of P.L. 89-97 provides that applications for monthly benefits, periods of disability and disability insurance benefits filed before the month in which an applicant satisfies the statutory requirements shall be deemed a valid application if the applicant satisfies such requirements any time before the Secretary renders a final decision. This provision also is effective with respect to pending civil actions where final decision has not been rendered. The Social Security Administration, the Office of General Counsel, HEW and its Regional Attorneys are examining pending cases and wherever a remand is warranted under this provision the United States Attorneys will be advised.

6. Section 339 of P.L 89-97 amends section 216(h) of the Social Security Act, 42 U.S.C. 416(h) to provide that a child claimant who lacks the status of "child" for Title II purposes under the prior provisions of the Act, section 216(h)(2), 42 U.S.C. 416(h)(2), may nevertheless become entitled if, among other conditions, the wage earner (1) acknowledged, in writing, that the child was his son or daughter; (2) has been decreed by a court to be the father of the child; (3) has been ordered by a court to contribute to the child's support because the child is his son or daughter; or (4) such wage earner is shown by evidence satisfactory to the Secretary to be the father of the child. This amendment is effective with respect to monthly benefits beginning September 1965. Pending cases which involve this issue are also being examined to determine whether they could possibly be affected by the amendments. See Moots v. Secretary of Health, Education and Welfare, infra p.461 for the result under Section 216(h) prior to this amendment.

7. Section 308 of P.L. 89-97 amends the provisions of the Act barring benefits to widows upon "remarriage". The phrase "has not remarried" is changed to "is not married", thereby qualifying remarried widows who are no longer married at the time they file for benefits on the earnings records of their first husband. This change relates to benefits for months beginning September 1965. To illustrate, A marries B. B dies and A collects survivors' benefits. Subsequently A remarries and benefit payments are cut off. A then obtains a divorce. Before enactment of P.L. 89-97, A could not claim further benefits as B's widow because she had remarried. Under the new law A may now apply for and obtain survivor's benefits beginning September 1, 1965.

COURT OF APPEALS

ADMINISTRATIVE LAW

Persons Unaffected by Administrative Regulations Have No Standing to Attack Such Regulations Judicially. Danville Tobacco Association v. Freeman (C.A.D.C., No. 18718, September 30, 1965). D.J. No. 18718. Plaintiffs, tobacco warehousemen and their trade associations sought a declaratory judgment that the Secretary of Agriculture's regulations adopted in 1958 under the Tobacco Inspection Act, 7 U.S.C. 511m and the Commodity Credit Corporation Act, 15 U.S.C. 714b were invalid. They also sought an injunction restraining enforcement of the regulations. The regulations provide that additional tobacco inspection and price support services for a new tobacco sale will only be furnished to applicants who prove that they have firm purchase commitments from five or more buyers "who could reasonably be expected to purchase at least two-thirds of the total United States production of the kind of tobacco for which the additional services are requested." Some of the plaintiffs had not made any application for these services and the rest had had their applications turned down on the distinct ground that no need for the proposed sales was established by them. The district court held that the regulations were valid and entered judgment for the Secretary dismissing the complaint.

The District of Columbia Circuit modified that judgment and then affirmed. The appellate court held that the district court should have dismissed the complaint without passing on the validity of the regulations since as to the plaintiffs who had not made application, they had not exhausted their administrativ

remedies and as to those whose applications were denied on a ground other than non-conformity with the regulation, their actions were premature. With regard to the plaintiffs in the latter category, the Court of Appeals noted that they were "seeking judicial review of regulations in the abstract, not as applied to an existing fact situation" and that they had no standing to attack regulations which had not been applied to them.

Staff: Assistant United States Attorneys Frank Q. Nebeker and Sylvia Bacon (D.D.C.).

FEDERAL TORT CLAIMS ACT

Plaintiff Must Establish Identity of Instrumentality Causing Injury Before He May Invoke Doctrine of Res Ipsa Loquitur; Finding by Trial Court That Evidence Did Not Establish Identity of Instrumentality Not Clearly Erroneous. James U. Barnes v. United States, 349 F. 2d 553 (C.A. 5), D.J. No. 157-2-60. While standing in an Army salvage yard at Fort Benning, Georgia, the plaintiff, a dealer in scrap automotive parts, was struck in the eye by an unidentified object. As a result of the accident, the eye had to be removed. The evidence established that approximately five minutes prior to the accident a truck had completed dumping a load of scrap metal in a nearby bin. It was plaintiff's theory that a piece of scrap metal in the bin, while under tension, slipped causing a sliver of metal to snap off and strike him in the eye and that under the doctrine of res ipsa loquitur the United States was negligent. The district court found that there was not sufficient evidence to support a finding regarding the cause of the injury and entered judgment for the United States.

In affirming the judgment, the Fifth Circuit held that before the doctrine of res ipsa loquitur may be invoked in Georgia it is necessary for the plaintiff to establish the identity of the specific instrumentality causing his injury. In the instant case, the district court found that the evidence was insufficient to identify the instrumentality causing the injury, and the Court of Appeals could not say that this finding was clearly erroneous.

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

SOCIAL SECURITY

Putative Widow and Unacknowledged Illegitimate Child Held Not Entitled to Survivor's Benefits in Face of Claim by Legal Widow of Wage Earner. Moots v. Secretary of Health, Education and Welfare, 349 F. 2d 518 (C.A. 4). D.J. No. 137-79-125. Two women claimed Social Security benefits as the widow of the wage earner. The first was ceremonially married to the wage earner in 1905. The wage earner left her in 1920, but there was evidence in the record that this marriage was never legally terminated. The second claimed to have been married to the wage earner in 1953 in Michigan and to have domiciled with him there until his death. She collected Social Security benefits for herself and her infant daughter by the alleged marriage. These benefit payments were stopped when the first alleged widow made claim for benefits. The hearing examiner found that the first woman was the wage earner's widow and that the

second alleged widow number two had never been ceremonially married to the wage earner. Accordingly, benefits were granted to the first claimant and denied to the second. Benefits were also denied to the latter's infant daughter because by Michigan law, which governed under Section 216(h)(2)(A) of the Social Security Act, 42 U.S.C. 416(h)(2)(A), the daughter, as an unacknowledged illegitimate child, could not inherit her father's intestate personal property.

The district court affirmed the Secretary's denial of benefits, and the Fourth Circuit affirmed the judgment of the district court.

Staff: United States Attorney Claude V. Spratley, Jr. and Assistant United States Attorney James A. Oast, Jr. (E.D. Va.)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

Government Held Not Negligent in Action for Wrongful Death of Three Year Old Child Who Could Not Be Seen by Government Driver Because of Contour of Vehicle. McClain v. United States, (M.D. Ala., Civil No. 2222-N, September 23, 1965). D.J. File 157-2-69. The Government driver, a rural mail carrier, had stopped in front of the McClain home to deliver the mail. Several of the older children came up on the driver's side, and he handed the mail out to them. Meanwhile, unnoticed, the three year old, who was thirty-five inches tall, ran around the car until he had reached the right front. The hood of the mail carrier's automobile was forty-one inches high. When the Government driver started off, his automobile pushed the child over, and the right rear wheel struck his head, killing him. Judge Johnson held that the Government driver had fulfilled his duty to use reasonable care, and he could not have reasonably foreseen that, with the older children present and with the father in the front yard, the three year old would have been allowed to run, or would have run, across the road in front of his automobile.

Staff: Assistant United States Attorney Rodney R. Steele (M.D. Ala.) and Denis E. Dillon (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

IMPORTANT NOTICE

Immigration and Nationality Act; Changes in Law Which Will Affect Cases Now in Litigation. Public Law 89-236, signed by the President on October 3, 1965, makes numerous changes in the provisions of the Immigration and Nationality Act. While the new law does not take effect until December 1, 1965, consideration should now be given to its impact on litigation presently pending under the Act. In some instances, aliens now litigating administrative determinations under the Act may become eligible for administrative relief under the amendments for which they have been hitherto statutorily ineligible. In other instances, the amendments may supply a definitive answer to a litigated question of statutory construction.

We suggest that each immigration case now in litigation should be taken up with the Immigration and Naturalization Service office in your area to determine whether it will be affected by the new legislation. Undoubtedly, many pending cases will become moot because of changes in the law. It is urgent that these be identified as soon as possible, so that the time of your staffs and of the courts may not be unnecessarily taken up. Further questions should be referred to the Criminal Division.

UNIVERSAL MILITARY TRAINING AND SERVICE ACT
Public Law 89-152

Draft Card Burning Demonstrations; Policy to Be Followed Concerning Investigation and Prosecution. Dept. File 25-012. Several mass demonstrations have been held in various sections of the country during the past few months where young men of draft age have purported to burn their draft cards as a public expression of their protest against the foreign policies of the United States and against the drafting of men for service in the Armed Forces under the provisions of the Universal Military Training and Service Act.

Public Law 89-152, effective August 30, 1965, amended Section 462(b)(3) of Title 50, U.S.C. App., to read in pertinent part, "(3) who . . . knowingly destroys, knowingly mutilates . . . any such certificate . . ."

The Federal Bureau of Investigation will arrange to have Bureau personnel present as observers at all such demonstrations that come to its attention. Where it appears that there may have been a violation of Public Law 89-152, appropriate investigation will be conducted. The information obtained will be furnished to the United States Attorney for transmittal to the State Director of Selective Service for appropriate attention. The United States Attorney will consider the information developed by the investigation and any action taken by the Selective Service System, with a view toward instituting criminal prosecution. However, prosecution based solely upon a violation of Public Law 89-152 should not be instituted without prior authorization from the Criminal Division.

GAMBLING

Jeopardy; Defendant Not Placed in Double Jeopardy Where Trial Was Continued on One Count After Plea of Guilty to Second Count When Violations Grew Out of Single Wrongful Act. United States v. Goldman (C.A. 3, October 4, 1965). D.J. File 160-48-200. Milton Goldman was charged in separate counts of a single indictment with violations of Sections 7203 and 7262 of Title 26 of United States Code. The defendant during his trial pleaded guilty to violating Section 7262. His trial continued and he was found guilty by a jury of violating Section 7203. Although Sections 7203 and 7262 set forth different offenses, the defendant in this case violated both sections by committing a single wrongful act.

Defendant contended on appeal that the continuation of his trial on the Section 7203 count after he had pleaded guilty to the Section 7262 count constituted double jeopardy. The Third Circuit without deciding the question whether Congress intended double punishment for a single wrongful act held that defendant was not placed in double jeopardy. The Court found the proceeding no different than if both counts had gone to the jury for a verdict.

Staff: United States Attorney David M. Satz; Assistant United States Attorney Nathan Edgar Finkel (D. N.J.).

* * *

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Condemnation; Valuation of Cotton Allotments. United States v. Citrus Valley Farms (C.A. 9, No. 19657, Aug. 17, 1965), D. J. File 33-3-200-17. The United States condemned a large farm in Arizona which enjoyed a 500-acre cotton allotment. The owner, pursuant to 7 U.S.C. 1378, transferred the allotment to other land. The Government urged that enhancement in value from the cotton allotment (about $450,000) should be excluded from compensation by subtracting the enhancement from the market value of the land and allotment (about $1,000,000). The district court instructed the jury that the farm should be valued as enhanced by the allotment and from that amount the value of the right to transfer the allotment should be deducted. The jury found the enhanced value to be $1,000,000 and the value of the right to transfer the allotment to be zero.

On appeal, the Ninth Circuit affirmed on the grounds that the Government's method of valuation would necessarily attribute to the allotment the entire extra value of cotton land with an allotment, whereas, in fact, part of the enhancement stemmed from the effort and investment of the owner in making the land productive cotton land. Accordingly, the Court felt that the district court's approach would more accurately reflect just compensation for the property taken. The Government did not argue that the zero figure for the right to transfer was not supported by the evidence. One judge would not even have permitted subtracting the value of the right to transfer. This decision does not preclude allowance to the Government of a claim for the allotment retained by the condemnee, but makes its proof considerably more difficult.

Staff: Edmund B. Clark (Land and Natural Resources Division)

* * *

TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

CIVIL TAX MATTERS
District Court Decisions

Jurisdiction; Court Is Without Jurisdiction to Hear Suit to Enjoin Collection of Taxes and to Compel Return of Taxpayer's Property Seized by District Director, Unless Taxpayer Can Show He Has No Adequate Remedy at Law and Under No Circumstances Could Government Prevail. John Albert Liguori v. United States, District Director of Internal Revenue, et al. (E.D. N.Y., September 14, 1965). A $2,200 assessment of narcotics transfer tax (excise tax $100 per ounce) was made as a result of taxpayer's possession of 22 ounces of marijuana at the time of his arrest. Sec. 4741 I.R.C. 1954. The District Director levied upon and seized certain jewelry that taxpayer, a jeweler, had at his place of business. Prior to the sale, taxpayer sought an injunction and the return of the jewelry on the ground that the assessment was void. Jurisdiction was claimed by virtue of 28 U.S.C. 1340.

The complaint sought to come within the tests of Enochs v. Williams Packing Company, 370 U.S. 1, which would enable the Court to enjoin the collection of the tax, i.e., that "under the most liberal view of the law and facts, the United States cannot establish its claim" and that "plaintiff has no adequate remedy at law." To do this, taxpayer alleged that the assessment was a jeopardy assessment and was void since no 60 or 90 day letter was received, that he was never engaged in any purchase, sale, or transfer of narcotics, that a portion of the seized property was held by him on consignment, and that the seizure left him insolvent, thereby depriving him of his remedy at law.

In opposition, the Government filed factual affidavits showing taxpayer's possession of narcotics at the time of his arrest, the pending indictment for the possession of narcotics, that he had not pursued his legal remedy and that the 60 and 90 day letter provisions of Sections 6212, 6213, I.R.C. 1954 do not apply to excise tax assessments. Due to time restrictions imposed by the order to show cause obtained by taxpayer, the Government was unable to cross-move for dismissal.

The Court denied taxpayer's application for a temporary restraining order and proceeded on its own motion to dismiss the complaint for lack of jurisdiction. 26 U.S.C. 7421(a). The Court held that the $100 an ounce marijuana transfer tax is a valid excise tax and not a penalty, that the notice provisions of Sections 6212, 6213, refer only to income, gift and estate taxes and not to excise taxes, and that

> Considering plaintiff's argument that he has not been found guilty of transferring marijuana, it is clear that it fails to meet the test set out in Enochs. The Government's right rests on good faith, and not upon a conviction in a criminal proceeding . . . Plaintiff would not be entitled to the relief requested solely upon the showing

> of the Government's lack of good faith. Plaintiff must also show that he has no remedy at law . . .; mere inconvenience or financial embarrassment in the conclusory language is not enough.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Ralph Bontempo (E.D. N.Y.); Charles A. Simmons and Levon Kasarjian, Jr. (Tax Division).

Internal Revenue Summons; Family Corporation; Secretary of Family Corporation Required to Comply With Summons to Produce Corporate Books and Records, But Did Not Have to Produce Individual Records or Receipts from Suppliers. John P. Wright v. C. Galen Detwiler (W.D. Pa., June 24, 1965). (CCH 65-2 U.S.T.C. ¶9605). The Secretary of a closely held, family-owned corporation was summoned by a Revenue Service Special Agent and required to produce Corporate books, disbursements by individual officers and records pertaining to the receipt of funds from suppliers. The Secretary was one of four brother-owners of the corporation who had agreed in writing on a restraint upon the alienation of their shares. Thus, because of the close relationship of the shareholders, the Secretary asserted that to compel the production of the documents called for would violate his rights under the Fifth Amendment against giving evidence against himself. He also asserted that enforcement of the summons would constitute an unreasonable search and seizure in violation of the rights of the four stockholders and the corporation and that the summons called for the production of documents owned and possessed in a purely personal capacity.

In ordering compliance with the summons as to corporate books, the Court noted that it was well-established that even a family-owned corporation can be compelled to produce its books and records in a tax investigation despite the present tendency to grant to individuals the widest protection under the Fourth and Fifth Amendments and that any change would have to be made by an Appellate Court. However, the Court did not order production of other records specified in the summons because it was concluded that the summons lacked clarity as to exactly what was called for and could include individual records.

The District Court's decision was subsequently affirmed per curiam. 65-2 U.S.T.C. ¶9606.

Staff: United States Attorney Gustave Diamond and Assistant United States Attorney David Hill (W.D. Pa.).

Redemption; Tax Liens Against Taxpayer's Real Estate Continue and May be Enforced After Termination of Compromise Agreement and Redemption of Property by Taxpayer's Wife Resulted Only in Her Obtaining First Preferred Equitable Lien for Amount of Redemption Price, With Interest. Theodore Samet, et ux. v. United States. (M.D. N.C., June 11, 1965). (CCH 65-2 U.S.T.C. ¶9520). The taxpayer, Theodore Samet, was the fee simple owner of certain real property which he had acquired on August 4, 1942. On March 30, 1954 the property was seized by the District Director of Internal Revenue, and, pursuant to a warrant of distraint, was on April 23, 1954, sold at public auction to the highest bidder for the sum of $3,000. On April 22, 1955, the property was redeemed by taxpayer's wife, by tendering the sum of $3,600 to the purchasers. No deed

was ever issued by the District Director although an entry was made in the District Director's records reflecting the redemption.

An offer to compromise the tax liabilities and a collateral agreement providing for a schedule of payments were subsequently executed which included provisions for default under which the United States had the right to terminate the compromise agreement. Taxpayer defaulted in his agreement and, on March 11, 1963, he was advised that the compromise agreement was terminated. The United States then looked to the real property as a source for the satisfaction of the tax liens under which it was originally sold. Taxpayer had, meanwhile, on September 24, 1959, executed a quit claim deed to the property to his wife.

The Court held that one who redeems at a tax sale obtains but an equitable lien for the money paid in effecting the redemption. This is so, the Court reasoned, because, from a reading of the redemption statutes (Section 3704(b), I.R.C. 1939), Congress never intended for a redemptioner to obtain the same rights as a distraint sale purchaser. Hence, the Court concluded that the redemption entitled taxpayer's wife to an equitable lien for the amount she paid to redeem, with interest at six per cent per annum, in addition to any further rights or interest she might be entitled to under laws of the State of North Carolina.

Staff: United States Attorney William H. Murdock, (M.D. N.C.); and Paul T. O'Donoghue, (Tax Division)

* * *