R. Bruce

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

July 22, 1966

File

United States

DEPARTMENT OF JUSTICE

Vol. 14 No. 15

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 14 July 22, 1966 No. 15

USE OF ZIP CODE NUMBERS

It is requested that all United States Attorneys' offices use zip code numbers on their outgoing mail. Those offices which do not have the current Zip Code Directory, dated January 1, 1966, may obtain one from their local post offices.

MONTHLY TOTALS

The comparison below shows that for the first 11 months of fiscal 1966 the pending caseload totaled 1,533 more cases than in the same period of fiscal 1965. Compared with the month of April, 1966, the caseload was up 50 cases. In view of the increased caseload pending at the end of May, it does not appear probable that the Deputy Attorney General's request for a reduction in the pending caseload will be fulfilled this year.

	First 11 Months Fiscal Year 1965	First 11 Months Fiscal Year 1966	Increase or Decrease Number	Increase or Decrease %
Filed				
Criminal	31,007	30,550	- 457	- 1.47
Civil	26,552	27,560	+ 1,008	+ 3.80
Total	57,559	58,110	+ 551	+ .96
Terminated				
Criminal	29,170	29,040	- 130	- .45
Civil	25,246	26,312	+ 1,066	+ 4.22
Total	54,416	55,352	+ 936	+ 1.72
Pending				
Criminal	11,814	12,508	+ 694	+ 5.87
Civil	24,312	25,151	+ 839	+ 3.46
Total	36,126	37,659	+ 1,533	+ 4.25

Usually the last two months of the fiscal year show a decrease in cases filed and a substantial increase in cases terminated. The figures for May show that this pattern is being followed in fiscal 1966, but the expected substantial increase in terminations has not materialized. The total number of terminations in May was not as large as the number in March, although criminal cases terminated registered a record high for the year.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,296	2,465	4,761	2,212	2,194	4,406
Aug.	2,585	2,555	5,140	1,870	2,245	4,115
Sept.	3,162	2,103	5,265	2,448	2,258	4,706

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
Oct.	2,702	2,415	5,117	3,078	2,507	5,585
Nov.	2,516	2,240	4,756	2,595	2,032	4,627
Dec.	2,534	2,310	4,844	2,688	2,028	4,716
Jan.	2,823	2,542	5,365	2,501	2,349	4,850
Feb.	2,863	2,469	5,332	2,576	2,377	4,953
Mar.	3,092	3,049	6,141	2,999	3,027	6,026
April	2,922	2,855	5,777	2,863	2,816	5,679
May	3,055	2,557	5,612	3,211	2,479	5,690

For the month of May, 1966, United States Attorneys reported collections of $4,433,332. This brings the total for the first eleven months of this fiscal year to $69,119,899. This is $12,390,951 or 21.84 per cent over the $56,728,948 collected during the first eleven months of fiscal year 1965.

During May, 1966, $3,365,277 was saved in 85 suits in which the Government as defendant was sued for $5,427,107. 44 of them involving $2,863,688 were closed by compromise amounting to $1,571,594 and 14 of them involving $1,032,695 were closed by judgments amounting to $490,236. The remaining 27 suits involving $1,530,724 were won by the Government. The total saved for the first eleven months of this fiscal year was $117,422,428 and is an increase of $19,424,056 or 19.82 per cent over the $97,998,372 saved in the first eleven months of fiscal year 1965.

The cost of operating United States Attorneys' Offices for the first eleven months of fiscal year 1966 amounted to $17,736,443 as compared to $16,340,992 for the first eleven months of fiscal year 1966.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of May 31, 1966.

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Ga., S.	Miss., S.	Okla., N.	Tex., N.
Ala., M.	Hawaii	Mont.	Okla., E.	Tex., E.
Ala., S.	Ill., E.	N.H.	Okla., W.	Tex., W.
Ark., E.	Ind., S.	N.Y., E.	Pa., M.	Utah
Ark., W.	Ky., W.	N.C., M.	Pa., W.	Vt.
Colo.	La., W.	N.C., W.	R.I.	Wyo.
Fla., N.	Me.	N.D.	S.C., E.	C.Z.
Ga., M.	Minn.		Tenn., W.	Guam

MATTERS

Civil

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

* * *

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Bank Charged With Violation of Section 7 of Clayton Act. United States v. First National Bank of Hawaii, et al. (D. Hawaii), File No. 60-111-1014. On June 10, 1966, suit was filed in the District of Hawaii against the proposed merger of the First National Bank of Hawaii, a commercial bank not engaged in the trust business, and Cooke Trust Co., Ltd., a trust company not engaged in the commercial banking business.

The immediate impetus for the proposed merger was provided by a recent change in the banking and trust laws of the State of Hawaii under which state banks, previously prohibited from engaging in trust business, are now permitted to do so by merger or otherwise. Trust companies previously prohibited from engaging in the banking business, are now permitted to expand into that area, either by merging with existing banks, or by organizing and merging with de novo banks.

Although First National Bank, as a national bank, had not been subject to such restrictions imposed by state law, and had considered the possibility of expanding into the trust business via the de novo route, it had decided against the possibility on the ground that it was too expensive. The Federal Deposit Insurance Corporation and the Comptroller of the Currency both approved the proposed merger with Cooke Trust on the ground that there was no actual competition between the parties and their merger therefore had no adverse competitive effect.

Our case is based on the theory that, because of the close relationship between the commercial banking and trust fields, and the recent removal of the statutory wall between them, the proposed defendants are now substantial potential competitors of each other, which competition will be eliminated as a result of their merger. In addition, concentration in both the commercial banking business and the trust business in Hawaii is high at the present time. Commercial banking there is presently dominated by two large banks which have between them approximately 75% of the market in the state as well as in Honolulu County. First National Bank is second largest, accounting for approximately one-third of the market in each.

Concentration in the trust business field is also high. Of the five trust companies in the State, the two largest have about 81% of the total trust company assets in the state and 86% in Honolulu County. Cooke Trust, as third largest, has about 12% in the State as well as in Honolulu County. At the present time negotiations are also publicly under way for the merger of the largest bank in the State (with some 42% of the market) with the largest trust company in the States (with some 47% of the total trust company assets).

Our complaint alleges that the proposed merger of the defendants is in violation of Section 7 of the Clayton Act and prays that they be enjoined from carrying it out.

Staff: Herbert G. Schoepke (Antitrust Division)

Acquisition Challenged - United States v. Reed Roller Bit Company, et al. (W.D. Okla.), File No. 60-0-37-901. On June 21, 1966, a complaint was filed in the United States District Court, Western District of Oklahoma, at Oklahoma City, alleging that the November 2, 1965, acquisition of the business and assets of defendant AMF American Iron, Inc. ("American Iron") of Oklahoma City by Reed Roller Bit Company ("Reed") of Houston, Texas, from American Machine & Foundry Company ("AMF") for $4,100,000 was a violation of Section 7 of the Clayton Act. The three companies were named defendants. Prior to American Iron's acquisition by Reed, American Iron was a wholly owned subsidiary of defendant AMF, which is headquartered in New York City.

The complaint alleges that in the 1965 production and sale of tool joints, which are rotary shouldered connections indispensable to the drilling of oil wells, Reed ranked second and accounted for approximately 35 per cent of total domestic sales, which amounted to approximate sales of $3,748,000 and American Iron ranked third and accounted for 13 per cent of total domestic sales, which amounted to approximate sales of $1,387,000.

The complaint also alleges that in the 1965 production and sale of drill collars, which are lengths of specially machined and treated steel indispensable to the drilling of oil wells, Reed ranked second and accounted for approximately 19 per cent of total domestic sales, which amounted to approximate sales of $1,500,000, and American Iron at least fifth and accounted for 10 per cent of total domestic sales, which amounted to approximate sales of $842,000.

The complaint alleges that a combination of Reed and American Iron in 1965 would rank the combination first in the industry in tool joint sales with approximately 48 per cent share of the total market and that a combination of these firms in 1965 would rank the combination at least second in the drill collar industry with approximately 29 per cent share of the total market.

Significantly, the complaint among other things prays that the defendant AMF and defendant Reed be required to rescind their agreement of purchase of the assets of American Iron and resume the status quo.

A motion for a temporary injunction, a memorandum in support thereof, and a motion for the taking of depositions prior to 20 days after the filing of the complaint were also filed with the court. The court, per Judge Eubanks, tentatively set the hearing on the motion for a preliminary injunction for next August and granted the Government's motion for the taking of depositions. Counsel for defendant Reed also assured the court that it would take no further steps to alter the business formerly operated by American Iron.

Staff: John E. Sarbaugh, Raymond P. Hernacki, John T. Cusack and David M. Ehrlich (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

ADMINISTRATIVE SUBPOENAS

Administrative Subpoenas Must Be Enforced So Long As There Is a Possibility that Defendants are Covered by the Regulatory Statute; Even if There is No Such Possibility, the Subpoenas Must be Enforced if Information Sought is Relevant to Activities of a Third Party Who Is Covered by Statute; Subpoena Need Not Be Signed by Head of Department. United States v. Marshall Curbin & Co., etc. (C.A. 5, No. 22415, July 1, 1966). D.J. Nos. 145-8-635, -634, -633, -632. The district court refused to enforce two subpoenas issued under the Packers and Stockyards Act. The two defendants were in the business of acquiring day-old chicks, sending the chicks out to farmers who would raise them to broiler size, and then selling them to an affiliated processing company. Defendants contended that their records relating to their dealings with the farmers who raised the chicks ("grow-out" records) were beyond the jurisdiction of the Secretary of Agriculture under the Act. The district court agreed, holding that the provisions of the Act regulating poultry "dealers" did not apply to defendants, which the court found to be "producers" rather than dealers. The court also held that the language of the subpoenas -- which sought records "in connection with the acquisition and sale of live poultry" -- did not reach the grow-out records.

The court of appeals reversed. It held that the records showed a possibility that defendants' activities were within the Act, and that in light of such possibility it was the "plain duty" of the district court to enforce the subpoenas. In addition, the court of appeals found merit in the government's alternate position that, even if defendants were not subject to the Act, their records could be subpoenaed because they were relevant to an investigation of a third party concededly subject to the Act. The Court specifically endorsed, in this connection, the holdings in Freeman v. Brown Bros. Harriman & Co., 250 F. Supp. 32 (S.D. N.Y.), aff'd, 357 F. 2d 741 (C.A. 2), and Freeman v. Fidelity-Philadelphia Trust Co., 248 F. Supp. 487 (E.D. Pa.).

Relying on Cudahy Packing Co. v. Holland, 315 U.S. 357, defendants contended that the subpoenas were not validly issued because they were signed by the Acting Director of the Packers and Stockyards Division, rather than by the Secretary of Agriculture. The court of appeals held that Cudahy had been legislatively overruled by the Reorganization Act of 1949, 5 U.S.C. 133(z) -- 133(z)-15, which authorizes any officer of a government agency to delegate any of his functions. Finally, the Court held that the language of the subpoenas was sufficient to reach the grow-out records.

Staff: Robert V. Zener (Civil Division)

FALSE CLAIMS ACT

False Claims Act Suit Does Not Abate at Death of Claimant; Untimely counterclaims Not Barred by Statute of Limitations Where They Were Timely Raised in Separate Suit but Court Ordered Them Filed as Compulsory Counterclaims in Pending Case. United States v. Lucille B. Woodbury, etc. (C.A. 9, Nos. 19,767 and 19,768, March 11, 1966). D.J. No. 130-61-919. Ray Woodbury sued the United States under the Tort Claims Act, and the United States sued Woodbury and others under the False Claims Act. The district court held that the government's claims against Woodbury had to be filed as compulsory counterclaims in Woodbury's Tort Claims Act suit: the False Claims Act suit was, but most of the counterclaims were not, filed within the six years provided by 31 U.S.C. 235.

Woodbury's Tort Claims Act suit was dismissed for want of jurisdiction. Woodbury v. United States, 313 F. 2d 291. At trial under the False Claims Act, the district court (1) found that Woodbury had made false claims to the government, but held that all but one of these was barred by the statute of limitations because the counterclaims were not filed within the six year period; (2) found that the government's claims had been compromised and waived and that the government was estopped to assert them; and (3) said that there were only ten false claims, that the government had not suffered damage because of those claims, and that if the government were entitled to any recovery, it was entitled only to $20,000, the statutory forfeiture. After cross-appeals had been filed, Woodbury died, and his widow moved to dismiss the government's appeal on the ground that the action, at least as to the forfeiture, had abated.

The court of appeals held: (1) that the action had not abated; (2) that none of the counterclaims was barred by the statute of limitations; and (3) that the district court's findings of compromise, waiver and estoppel were clearly erroneous. It upheld the district court's findings on the number of false claims and the absence of actual damages.

Staff: United States Attorney Sidney I. Lezak and Assistant United States Attorneys Roger G. Rose and Jack G. Collins (D. Oregon)

MILITARY RETIREMENT

Serviceman Must Exhaust his Administrative Remedy Before the Board for Correction of Military Records Prior to Seeking Judicial Review of the Propriety of his Involuntary Retirement. Sohm v. Fowler (C.A.D.C. Nos. 18,771 and 19,014, June 16, 1966). D.J. No. 145-3-678. Sohm, a lieutenant commander in the Coast Guard, thrice was passed over for promotion; he therefore was to be retired from the Coast Guard pursuant to 14 U.S.C. 285. His applications to the courts for interim injunctive relief were denied, and he was retired effective July 31, 1964. While his suit for judicial review of the involuntary retirement was pending, he invoked the jurisdiction of the Board for Correction of Military Records: after the Board had considered his case, it granted his request for a reopening of the record and a de novo hearing before a reconstituted Board; Sohm, however, abandoned his administrative remedy, and the de novo hearing never has been held.

In Sohm's suit for reinstatement, the district court rendered summary judgment for the Coast Guard, upholding the propriety of his retirement. Sohm v. Dillon, 235 F. Supp. 450. The district court noted that it was exercising its discretion, under Ogden v. Zuckert, 298 F. 2d 312, in not requiring exhaustion of the administrative remedy prior to judicial intervention. On Sohm's appeal, the court of appeals reversed, holding that Sohm would have to exhaust his administrative remedy before seeking judicial relief; it directed the district court to "stay the case pending hearing and decision by the Board for Correction of Military Records." Judge Danaher, believing that the District Court's judgment should be affirmed, dissented.

Staff: United States Attorney David G. Bress and Assistant United States Attorneys Frank Q. Nebeker and Robert B. Norris (D. of Col.)

SOCIAL SECURITY ACT

Despite a New York State Court's Determination that a Nevada Divorce was Invalid, the Divorce Decree Makes Claimant Ineligible for a Wife's Social Security Benefits because Nevada's Courts Would Uphold the Divorce. Rocker v. Celebrezze (C.A. 2, No. 30138, March 8, 1966). D.J. No. 137-51-269. Louis Rocker left his wife, Mathilde, in New York (theretofore their domicile) and, after spending five months in Nevada, obtained a divorce in that state. Mathilde then secured, in a New York State court, a judgment declaring the Nevada divorce invalid because of defective service of process. Armed with her New York judgment, Mathilde, having reached the age of sixty-two, applied for Social Security benefits as the "wife" of Louis Rocker. The Secretary denied her application because, under Nevada law, she was not Louis' wife, and the district court upheld that decision. The court of appeals affirmed.

The court of appeals noted that the controlling statute, 42 U.S.C. 416(h)(1)(A), requires that in such a case the Secretary first ascertain the domicile of the insured at the time the claimant files her application and then determine whether, under the law of that domicile, the claimant would be considered the wife of the insured at the time of application. Detecting in the Secretary's decision an implicit finding that Louis had been domiciled in Nevada when Mathilde filed her application, the court of appeals held that that finding was supported by substantial evidence. It also agreed with the Secretary's conclusion that the courts of Nevada would uphold the divorce despite the New York State court's declaration of invalidity, and therefore, upheld the denial of benefits.

Staff: United States Attorney Robert M. Morgenthau, Assistant United States Attorney Lawrence W. Schilling, and Special Assistant United States Attorney James G. Greilscheimer (Of Counsel) (S.D.N.Y.).

TORT CLAIMS ACT

Government Entitled to Recover under Employee's Liability Insurance Policy Where Employee's Negligent Driving Was Basis of Tort Claims Act Judgment. United States v. Myers et al. (C.A. 5, No. 22830, July 6, 1966). D.J. No. 145-14-487. Elwood Pugh, an Air Force employee traveling on government business, negligently caused an automobile accident injuring Myers. Myers sued Pugh, but the government was substituted as defendant under the Government Drivers Law, 28 U.S.C. 2679 (which makes exclusive the liability of the government for the negligence of employee drivers). The government asked the employee's liability insurer to defend. It refused to do so, and the government then settled with Myers after having impleaded the insurer. The district court dismissed the third party complaint against the insurer on the ground that the United States was not entitled to the benefits of Pugh's policy, which contained the standard omnibus clause extending protection to "any person or organization legally responsible for the use of" the insured automobile. The district court reasoned that this clause did not apply to the government, for two reasons: first, the policy was issued on an application in which Pugh stated that he did not use his car for business purposes; and, second, the Government Drivers Law places the exclusive liability for Pugh's conduct on the government.

The court of appeals reversed, holding that the language of the omnibus clause covered the United States. The Court noted that the language of the clause had not been changed, despite numerous judicial decisions construing it to cover the United States, and disagreed with the district court's attempt to distinguish those decisions on the ground that they involved policies insuring primarily business, rather than pleasure, use, reasoning that the business-pleasure distinction would be relevant only to determining whether the accident were covered by the policy, not to determining who is entitled to the benefits of the policy. As to the Government Drivers Law, the Court concluded that Congress did not intend to affect the Government's ability to recover over against employees' insurers, and that the only purpose of the statute was to protect the employees themselves.

Finally, the court held that the insurer, being in breach of its duty under the policy to defend Myers' suit, was liable to the government for reasonable attorneys' fees. The court rejected the insurer's argument that the Government was not damaged because the government attorneys were on salary and would have been paid in any event.

Staff: Robert V. Zener and Robert Vollen (Civil Division)

DISTRICT COURT

BANKRUPTCY

Referee Holds Employer's Unpaid Contributions to Union Annuity Fund are not Entitled to Priority in Bankruptcy as "Wages * * * due to Workmen." In the Matter of A&S Electric Corp. (E.D.N.Y. No. 63B-34, April 25, 1966). After A&S had been adjudicated a bankrupt, the trustee and the union representing A&S's employees stipulated that $5,114 in unpaid contributions (which the collective bargaining agreement obligated A&S to make) to the employees' annuity fund would be given priority under Section 64a(2) of the Bankruptcy Act as

"wages * * * due to workmen." When this stipulation was opposed by the United States Attorney, the referee disapproved it, characterizing the contributions as "flat rate contributions without relation to hours, wages or productivity," holding them not to constitute wages or commissions, and therefore allowing the amount due as a general claim only.

Staff: United States Attorney Joseph P. Hoey and
Assistant United States Attorney Steve C. Arniotes
(E.D.N.Y.)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

RAPE ON INDIAN RESERVATION

In Rape Prosecution Presence of Victim Not Necessary For Purpose of Identification. United States v. Wilson Gray, et al. (D. Ariz.) Four Indians were charged with the offense of rape committed on a white girl who was employed by the Office of Economic Opportunity as a "Vista" worker on the Navajo Indian Reservation. Since a psychiatrist advised that victim's appearance at the trial might cause her great harm and damage, life-size photographs of the victim were used for identification purposes during the trial and the victim herself did not appear. After a six-day trial the jury returned verdicts of guilty and, on June 27, 1966, one defendant was sentenced to 15 years and the other defendants were committed under the Federal Youth Corrections Act.

Staff: United States Attorney William P. Copple; Assistant United States Attorney Lawrence Turoff (D. Ariz.).

HOBBS ACT

Indictment Alleging Unlawful Threats in Violation of Hobbs Act Held Supported by Evidence Showing Conduct of Defendants Necessarily Produced Fear of Economic Loss. United States v. Sopher, et al, (C.A. 7, Nos. 15,057-15,061). D. J. File 123-23-353. Defendant Sopher, who was mayor of Streator, Illinois, was convicted, along with three other defendants, of obstructing interstate commerce by extortion and of conspiracy to commit such an offense. The evidence disclosed that the defendants, in a series of contacts with the president of a supplier of building materials, indicated that they would give "city" approval to the use of his equipment in return for a payment equal to ten per cent of the bid price made to the contractor.

Defendants argued on appeal that the evidence did not show a "threat" that was in violation of the Hobbs Act. They maintained that no proof was introduced indicating that disapproval would necessarily result from a failure to pay. The Court, however, rejected this reasoning and held that the defendants' conduct necessarily produced a fear of economic loss on the part of the supplier. It concluded that the evidence supported a finding that a bid by a contractor that included this particular supplier's equipment would have been rejected unless the supplier had agreed to make the requested payment.

Staff: United States Attorney Edward V. Hanrahan; Assistant United States Attorneys John Peter Lulinski and Lawrence Jay Weiner (N.D. Ill.).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Second Circuit Disagrees with Ninth Circuit and Holds Deportation Statute Constitutional. Clive Michael Boutilier v. INS, CA 2, No. 30274, July 8, 1966.

Petitioner, a Canadian national, was found deportable on the ground that at time of his entry in 1955 he was a homosexual and inadmissible to the United States under 8 U.S.C. (1964 ed.) 1182 (a)(4) as a person afflicted with psychopathic personality. By this action, Petitioner sought to have his deportation order set aside. Circuit Judge Kaufman writing for himself and Circuit Judge Smith held the deportation order to be valid. Circuit Judge Moore dissented.

Petitioner first contended that while affliction with a psychopathic personality may be a basis for the exclusion of aliens from the United States, the term does not authorize deportation. The Court rejected this contention noting that the deportation statute provides for the expulsion of aliens excludable at time of entry and furnished a backstop designed to intercept those aliens Congress did not wish to be admitted to the United States.

Petitioner next contended that the term psychopathic personality was not designed to exclude all homosexuals. After examination of the legislative history of the statute Judge Kaufman was convinced that Congress utilized the phrase "psychopathic personality" not as a medical or psychiatric formulation but as a legal term of art designed to preclude the admission of homosexuals into the United States. He upheld the validity of the U.S. Public Health Service Regulations classifying all homosexuals as persons afflicted with "psychopathic personality".

Lastly, Petitioner argued that the statute was unconstitutional for vagueness and that the deportation order deprived him of due process. Judge Kaufman conceded that the void for vagueness doctrine applies to legislation imposing civil sanctions and that legislation must be sufficiently precise to afford adequate notice of the standards by which the individuals affected are required to guide themselves. However, he found the doctrine inapplicable here because the statute was not aimed at conduct after entry but was meant to exclude aliens who at time of entry possessed certain characteristics. It was his view that the statute authorized the deportation of the Petitioner even if he lead a life of impeccable morality after entry.

Circuit Judge Moore dissented on the ground that the statute was void for vagueness. After observing that the Petitioner had both homosexual and heterosexual experiences after entry, he reasoned that if the statute had warned the Petitioner that his sexual deviation would exclude him from the United States the Petitioner could have patterned his behavior to avoid its proscription. Since in his opinion the statute gave no warning, he found the deportation order under the circumstances repugnant to due process.

The Department is considering whether the Government should petition for certiorari in the case of Lavoie v. INS, _____F.2d_____ in which the Ninth Circuit reached the same conclusion as Circuit Judge Moore that the statute was void for vagueness.

Staff: United States Attorney Robert M. Morgenthau (S.D.N.Y.)
Francis J. Lyons and James G. Greilsheimer, Special Assistant United States Attorneys of Counsel

* * *

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Indians; Federal Jurisdiction; Valuation; Administrative Law: Authority of the Secretary of the Interior to Restore Ceded Tribal Lands Under Sections 3 and 7 of the Indian Reorganization Act; Doctrines of Case or Controversy, Standing and Ripeness; Decrease in Land Values Due to Fear of Possible Government Action. Hinton, et al. v. Udall, et al. (C.A. D.C., No. 19671, June 27, 1966, D.J. File No. 90-2-12-371). - Pursuant to Sections 3 and 7 of the Indian Reorganization Act of June 18, 1934 (also known as the Wheeler-Howard Act), 48 Stat. 984, 25 U.S.C. secs. 463 and 467, the Secretary of the Interior ordered restoration to the San Carlos Tribe of Indians of subsurface interests in certain ceded lands in Arizona known as the Mineral Strip "subject to any valid existing rights" and exclusive of "any patented lands or any interest in any patented lands (including subsurface interests in such lands) * * *." The individual appellants, who own patented lands and also have surface grazing permits and leases in the area, and the State of Arizona, which claims rights in the area under grants from the United States, sought to enjoin any restoration of either surface or subsurface interests.

The district court, in an opinion reported at 243 F. Supp. 672, dismissed the action, concluding that neither the individual appellants nor the State of Arizona had standing to challenge the Secretary's actions and that there was no case or controversy presented on which to base jurisdiction. It also ruled that the Secretary's restoration order was authorized by the Indian Reorganization Act.

The court of appeals affirmed "on the ground that appellants do not present a controversy with the Secretary that is ripe for judicial intervention. We express no view as to the correctness of the District Judge's determination on the merits." The opinion reviews decisional applications of the interrelated doctrines of ripeness and justiciability.

In answer to appellants' claims of a decrease in the value of their property interests, based on fear that the Secretary would order restoration directly affecting their interests, the court said:

> The doctrine whereby courts refrain from deciding the legality of official actions that may never be taken in fact cannot be circumvented by showing that the overhanging possibility of such actions is depressing land values. Land value quotations may be affected by many possibilities far too speculative, contingent and unformed to permit determination of judicial validity. Land values, like securities values, are sensitive to mere expressions of interest in buying and selling, or even to the mere existence of an interest sufficient to warrant analysis by sellers and buyers as to the possibility of zoning changes, corporate expansions, new Government programs, and the like. Where fears or hopes are based on underlying contingencies that have not developed in reasonably firm and

concrete form, the resulting effects on market value are insufficient to warrant judicial determination of the legality of the unformed possibility.

Staff: Raymond N. Zagone (Land and Natural Resources Division)

Public Lands: Conservation of Natural Resources; Trespass; Timber Cutting in National Forest Provable Only by Circumstantial Evidence, Sufficient to Hold Logger Liable for Double Damages as Provided by State Innocent Trespass Statute. Mabry Ogle, d/b/a Ogle Logging Co. v. United States (C.A. 9, No. 19,548, June 22, 1966, D.J. File No. 90-1-11-981). - Appellant operated a logging company and was the owner of timberlands adjacent to a national forest. Relying on Oregon's innocent trespass statute (O.R.S. 105.815), which permits the recovery of double damages for unintentional timber cutting trespass, the Government filed a complaint charging appellant with the cutting and removing from its forest land approximately 1,200,000 board feet of standing timber.

The district court, in a trial without a jury, found that the Government was entitled to a lesser amount of damages in the amount of $6,000 single stumpage value and twice that amount by reason of the State's innocent trespass statute.

The appellant appealed attacking the sufficiency of the evidence. The Ninth Circuit Court of Appeals affirmed, holding that although there was conflicting evidence on the point, and the case against appellant was wholly circumstantial, the trial court was entitled to rely on the circumstances which included the fact that in the years in question, appellant controlled the only access road to the tract, the fact of his nearby cuttings, and the lack of opportunity for others to cut during these years. The court of appeals stated that if the district court had accepted appellant's version of all the events, they could not disturb the decision. But here, said the court, where the findings went against him, it could not evaluate them except to see whether they are clearly erroneous.

As to the appellant's reliance on remarks made by the district court, during the trial, as to the weakness of the Government's case, the court of appeals pointed out that such remarks must be considered erased by the findings of fact ultimately made.

The court of appeals concluded by saying: "Trial courts observe witnesses. We cannot. Our sole function is to find if there was enough evidence to pass the clearly erroneous test. We find there was."

Staff: Robert M. Perry (Land and Natural Resources Division)

Public Domain; Administrative Procedure; Mines and Minerals; Small Tract Act. Dredge Corporation v. J. Russell Penny (C.A. 9, No. 19964, May 23, 1966), D.J. File No. 90-1-18-567. - In November 1951 and January 1952, a large area

of land immediately adjoining the City of Las Vegas was classified for disposition pursuant to the Small Tract Act, 52 Stat. 609, 43 U.S.C. sec. 682(a). The purpose of this Act was to open up for public disposition five-acre tracts of land where a need existed for increasing the public lands available for home and small business sites. In the expanding Las Vegas Valley area, the public requirements for this purpose are obvious. The Act provides that all patents thereunder shall contain a reservation to the United States of the oil, gas and other mineral deposits, with the right to prospect for such deposits "under such regulations as the Secretary may prescribe." Acting pursuant to this authority, the Secretary promulgated regulations declaring that lands sold under the Small Tract Act would be open for leasing under the Mineral Leasing Act but that the reserved minerals would not otherwise be subject to prospecting or disposition.

In July 1952, the Dredge Corporation filed 16 sand and gravel claims under the applicable mineral laws, covering a total of 2,560 acres within the small tract area. In 1955, when the Manager of the Land Office ascertained the existence of these claims (mining claims are not recorded in the Land Office), 16 decisions were issued, without notice or hearing, declaring the claims null and void on the ground that classification under the Small Tract Act rendered the lands no longer open to location under the mining laws. When the case was ultimately appealed to the Secretary he ascertained not only that the lands had been classified prior to the date the claims were filed but that small tract leases had been issued covering the entire area. The Secretary then held that a combination of classification and leasing amounted to a withdrawal of the lands for mineral entry and affirmed the conclusion that the mining claims were null and void.

In attacking the Secretary's decision, the mining claimant contended that the Secretary was required to make regulations relating to actual disposition of the reserved minerals and had no authority to provide that all minerals, other than Leasing Act minerals, would not be open to public disposition. It also contended that Department of the Interior procedure lacked due process because the Manager's action was taken without notice and hearing. The court held that because the Manager acted solely on the basis of facts available from his records, i.e., facts relating to classification and leasing, no issues were presented that would require a hearing. It also concluded that the Small Tract Act did not require the Secretary to promulgate regulations pertaining to disposition of reserved minerals under the mining laws but that, on the contrary, the Small Tract Act vested in the Secretary a discretion to decide at what point reserved minerals should be open for disposition. In reaching the latter conclusion, the court was influenced by the fact that oil and gas leases would not seriously interfere with the surface use by the small tract owner but that the development of mining claims, particularly sand and gravel claims, could completely defeat the purpose of the small tract grants.

Staff: Thomas L. McKevitt (Land and Natural Resources Division)

* * *

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

CIVIL TAX MATTERS

District Court Decisions

Suit to Enjoin Collection of Marihuana Transfer Tax: Illegally Obtained Evidence: Jurisdiction: Injunctions Will Not Issue Even Though Underlying Evidence of Tax Liability Was Suppressed in Criminal Proceeding. Militare v. Scanlon, District Director. (DC E.D. N.Y., March 9, 1966). (CCH 66-1 U.S.T.C. ¶15,688; PH 17 A.F.T.R. 2d 776). A $13,177.83 assessment of narcotics transfer tax (excise tax, $100 per ounce) had been made against plaintiff as a result of his possession of quantities of marihuana at the time of his arrest. Section 4741, Internal Revenue Code of 1954. Plaintiff was charged by the state with feloneously possessing a narcotic drug with intent to sell. In the state court criminal proceeding, the court suppressed the evidence giving rise to the indictment for the reason that the evidence resulted from an illegal search and seizure. This evidence was the same marihuana that provided the basis for the civil tax assessment.

After the suppression order, plaintiff paid $10 and filed a claim for a refund. The claim was denied and plaintiff brought this suit to declare the assessment to be erroneous, illegal and contrary to law, to vacate the levy and liens and to enjoin the collection of the taxes. Jurisdiction was claimed under 28 U.S.C. §1346.

The complaint sought to come within the exceptions of Enochs v. Williams Packing Co., 370 U.S. 1, for the reason that "the sole evidence supporting the marihuana tax liability generated from the illegal search and seizure." As an alternative, plaintiff claimed that the Court had jurisdiction herein for the reason that it was a refund suit.

The Court granted the Government's motion to dismiss for lack of jurisdiction on the following grounds:

(1) The single unit for this excise tax is $100 for an ounce of marihuana or a fraction thereof. Since an amount identifiable as a tax must have been paid to fit within Flora v. United States, 362 U.S. 145, 171 fn. 37 (b), and plaintiff has only paid $10, this case cannot be stripped down to a refund suit. Had plaintiff paid $100 the result would probably have been different.

(2) Even though the sole basis for the assessment is the illegally obtained evidence, the assessment is still presumptively correct. Since plaintiff cannot show 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" the complaint must be dismissed.

Special attention must be given to the Court's language, as set forth below:

> * * * such an assessment of tax as the present one, dissociated from its generating evidence, is supported by the presumption of correct assessment until the taxpayer proves the difficult negative--that he does not owe any tax in the premises. The oddity that the state of the case is, arguably, that the assessment is not in fact supported by any lawfully obtained evidence becomes simply an illustration that the presumption is not based on inference rooted in probability but on policy.

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

Jurisdiction of District Court: Suits Against the United States: Consent Lacking--The Government was Entitled to be Dismissed as a Defendant Where it had not Consented to be Sued. Suit to Restrain Collection: Erroneous Levy: Injunction--Where the District Director Erroneously Levied on Funds in an Amount in Excess of the Taxes and Additions Due and Owing, Taxpayers were Entitled to Relief as to the Excessive Amount but Were not Entitled to an Injunction to Restrain Enforcement of that Portion of the Levy which was not Excessive. Du Frene Bros., Inc., et al. v. United States, et al. (S.D. Calif., Central Div., April 13, 1966). (CCH 66-1 U.S.T.C. ¶9472). On December 27, 1965 the Internal Revenue Service issued a Notice of Levy pursuant to 26 U.S.. 6331 for the collection of wage taxes due the United States. The Notice was served on a bank, against a bank account in the names of joint adventurers. The plaintiffs, members of the above joint venture, brought an action for an injunction restraining the United States and the District Director from taking any steps to collect the federal taxes claimed in the Notice of Levy and for an order quashing the levy.

The plaintiffs contended that the alleged tax liability was not the liability of the joint venture, but merely the individual liability of a member of the joint venture. Therefore, they concluded, the joint venture, not being the taxpayer, could obtain an injunction restraining the Government from proceeding against its property without violating 26 U.S.C. 7421 (a).

The district court found that the levy of December 27, 1965 was erroneous as to $3,527.85 of the $9,611.74 on the face of the levy. The Court concluded:

(a) that the United States, by not waiving its sovereign immunity, was entitled to be dismissed as a party-defendant.

(b) that since the Notice of Levy was erroneous to the amount of $3,527.85, the plaintiffs were entitled to relief for this amount only.

(c) that the plaintiffs are not entitled to enjoin the Government from enforcing against the plaintiff, the Notice of Levy issued December 27, 1965 in

the amount of $6,083.89 plus statutory additions thereto.

(d) that the United States is entitled to 63.3 per cent of its costs.

Staff: Assistant United States Attorneys Loyal E. Keir and Robert T. Jones, (S.D. Calif.).

Levy and Distraint: District Court Had no Jurisdiction to Determine Rights to Property Seized by the Government for Delinquent Taxes in Summary Proceeding Brought by Petitioner. Camille Falsone v. John E. Foley. (W.D. N.Y., June 3, 1966). (CCH 66-2 U.S.T.C. ¶9478). On September 24, 1965, the Internal Revenue Service assessed taxes against Angelo Bonito, the father of the petitioner. Notice and demand for payment were sent to the taxpayer, which resulted in a lien arising in favor of the Government on all real and personal property of the taxpayer. Notice of the lien was recorded on November 16, 1965.

On or about March 18, 1966, the taxpayer made a gift to the petitioner of an automobile which he previously owned. On April 1, 1966, this car was seized by the Internal Revenue Service. In a memorandum filed May 27, 1966, the Court held that while the Government might have brought action to enforce its lien pursuant to the provisions of 26 U.S.C. §7403, the summary procedure against a taxpayer's property authorized by 26 U.S.C. §6331 does not extend to the property of a third person.

However, the May 27, 1966 memorandum has been vacated in all respects. The Court stated that: "it now appears that the summary procedure utilized by the petitioner in this case is not authorized," citing N. H. Fire Ins. v. Scanlon, 172 F Supp. 392 (S.D. N.Y. 1959), aff'd 276 F.2d 941 (2d Cir.), aff'd 362 U.S. 404 (1960). In addition, the Court stated that its previous memorandum "overlooked" the fact that 26 U.S.C. §6331 authorized levy and distraint of property "on which there is a lien provided in this chapter for payment of this tax."

Staff: United States Attorney John T Curtin, (W.D. N.Y.); and Ronald A. Ginsburgh, (Tax Division).

* * *

I N D E X