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

June 10, 1966

United States

DEPARTMENT OF JUSTICE

Vol. 14 No. 12

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 14 June 10, 1966 No. 12

MONTHLY TOTALS

During March, the pending caseload rose by 53 cases over the preceding month, and reached a new high. This marks the seventh time that the caseload has risen in the first nine months of fiscal 1966. The cumulative increase since June 30, 1965 totals 2,283, or approximately 253 cases a month. The most encouraging aspect of the March totals is the large increase in civil cases terminated. The 21,017 civil cases terminated was 968 cases above the total for last March, and 650 cases above the total terminated in February, 1966. If the totals for the last quarter of the fiscal year show the same encouraging results, there is some hope that a reduction in the pending caseload may be achieved.

	First 9 Months Fiscal Year 1965	First 9 Months Fiscal Year 1966	Increase or Decrease Number	%
Filed				
Criminal	24,940	24,573	- 367	- 1.47
Civil	21,355	22,148	+ 793	+ 3.71
Total	46,295	46,721	+ 426	+ .92
Terminated				
Criminal	22,885	22,966	+ 81	+ .35
Civil	20,049	21,017	+ 968	+ 4.83
Total	42,934	43,983	+ 1,049	+ 2.44
Pending				
Criminal	12,072	12,664	+ 592	+ 4.90
Civil	24,404	24,935	+ 531	+ 2.18
Total	36,476	37,599	+ 1,123	+ 3.08

March saw the highest number of cases terminated in any of the first nine months of the fiscal year. As the number of cases filed, however, was also the highest total, no inroads were made on the pending caseload. February's gap of 7.0% between filings and terminations was reduced during March to 1.8%, the lowest percentage so far in the fiscal 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
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

For the month of March 1966, United States Attorneys reported collections of $4,565,635. This brings the total for the first nine months of this fiscal year to $52,183,793. This is $2,861,321 or 5.80 per cent increase over the $49,322,472 collected during the first nine months of fiscal year 1965.

During March 1966 $9,871,294 was saved in 107 suits in which the Government as defendant was sued for $11,301,432. 61 of them involving $2,652,690 were closed by compromise amounting to $840,378 and 20 of them involving $957,255 were closed by judgments amounting to $589,760. The remaining 26 suits involving $7,691,487 were won by the Government. The total saved for the first nine months of this fiscal year was $114,057,151 and is an increase of $32,146,404 or 39.25 per cent over the $81,910,747 saved in the first nine months of fiscal year 1965.

The cost of operating United States Attorneys' offices for the first nine months of fiscal year 1966 amounted to $14,726,628 as compared to $13,960,475 for the first nine months of fiscal year 1965.

DISTRICTS IN CURRENT STATUS

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

CASES

Criminal

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

CASES

Civil

Ala., N.	Ark., W.	Fla., M.	Hawaii	Ind., S.
Ala., M.	Colo.	Fla., S.	Idaho	Iowa, S.
Alaska	Del.	Ga., N.	Ill., N.	Kansas
Ariz.	Dist. of Col.	Ga., M.	Ill., E.	Ky., E.
Ark., E.	Fla., N.	Ga., S.	Ind., N.	Ky., W.

CASES (Cont.)

Civil (Cont.)

La., W.	Nev.	Okla., N.	S.C., W.	Va., E.
Me.	N.H.	Okla., E.	S.D.	Va., W.
Mass.	N.J.	Okla., W.	Tenn., E.	Wash., E.
Minn.	N.Mex.	Ore.	Tenn., M.	Wash., W.
Miss., N.	N.Y., E.	Pa., M.	Tenn., W.	W.Va., N.
Miss., S.	N.C., M.	Pa., W.	Tex., N.	W.Va., S.
Mo., E.	N.C., W.	P.R.	Tex., E.	Wyo.
Mo., W.	N.D.	R.I.	Tex., S.	C.Z.
Mont.	Ohio, N.	S.C., E.	Tex., W.	Guam
Neb.	Ohio, S.		Utah	V.I.

MATTERS

Criminal

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

MATTERS

Civil

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

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Supreme Court Rules Merger in Violation of Section 7 of Clayton Act. United States v. Von's Grocery Company, et al. (No. 303 - O.T. 1965) D.J.File 60-0-37-342. On May 31, 1966, the Supreme Court held that the merger of the third and sixth largest Los Angeles retail grocery companies (Von's Grocery Company and Shopping Bag Food Stores) which together accounted for 7.5 percent of total sales in the relevant market, violated Section 7 of the Clayton Act. The Court reversed 6-2 (Justice Fortas did not participate) the judgment of the District Court for the Southern District of California approving the merger, and directed the trial court to order immediate divestiture. This is the first decision clearly applying Section 7 to retail concerns in a local market.

In his opinion for the majority, Justice Black emphasized the "threatening trend toward concentration" in the retail grocery market in the Los Angeles area. He pointed out that before the merger the number of single store owners had been rapidly declining and that this trend has continued since, while the number and size of the chains has increased. In addition, the Court noted that while the grocery business was becoming more concentrated, the small companies were continually being absorbed through mergers. The Court concluded that these facts alone were sufficient to bar the merger.

Justice Black reviewed the legislative history of Section 7 and pointed out that the statute was enacted to arrest a rising trend toward concentration, and to preserve competition among small businesses. He stated that in the midst of the trend toward concentration in the retail grocery industry, Von's and Shopping Bag, two of the most successful and largest companies in the area, jointly owning 66 grocery stores, merged to form the second largest chain in Los Angeles. "If ever such a merger would not violate Section 7, certainly it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress, with power to do so, declared must be arrested."

The Court rejected defendants' contention that the merger was lawful because there was no proof that it would lessen competition. It held that the Act was intended to "arrest anticompetitive tendencies in their incipiency" and it was satisfied that in a market marked by both a continuous decline in the number of small businesses and a large number of mergers, this merger may destroy competition.

In a concurring opinion, Justice White stated that in any industry exhibiting a decided trend toward concentration, where the eight largest firms have over 40% of the market, "any merger between the leaders or between one of them and a lesser company is vulnerable under § 7." Here, he noted, the eight top firms accounted for 44% of total sales after the merger; the merging companies were among those eight; and the merger not only disposed of a substantial competitor but increased the concentration in the leading firms.

Justice Stewart's dissenting opinion (joined in by Justice Harlan) argued that in concluding that competition is necessarily reduced when there has been a decline in the number of competitors, the majority of the Court had decreed a per se rule invalidating any horizontal merger between competing firms. The dissenting Justices maintained that the court failed to appraise the competitive effects of the merger in terms of the "contemporary economy of the retail food industry" in Los Angeles. They argued that the structure of the Los Angeles grocery market remains unthreatened by concentration; competition is vigorous; the competitive position of the small businessman is strong and secure; and that the decline in the number of single-store owners is the "result of transcending social and technological changes."

Justice Stewart argued also that this merger fell outside the test previously prescribed by the Court in the Philadelphia Bank case. He stated that it produced a firm with 1.4% of the grocery stores, 7.5% of sales, and increased by 1.1% the market share of the two biggest firms and by 3.3% the share for the six largest. These figures, he observed, "are hardly the 'undue percentage' of the market, *** nor the 'significant increase' in concentration, that would make this merger inherently suspect" under Philadelphia Bank.

Staff: Robert B. Hummel, James J. Coyle, John F. Hughes, and Elliott H. Moyer (Antitrust Division)

Court of Appeals Affirms District Court In - United States v. George F. Glacy, et al. (C.A. Nos. 6652, 6653, 6662, 6666) D.J. File 60-193-25. On May 25, 1966, the Court of Appeals for the First Circuit unanimously affirmed the conviction of three Boston & Maine Railroad officials--President Patrick B. McGinnis, Vice President George F. Glacy, and Vice President Daniel A. Benson --of misapplying railroad property, in violation of 18 U.S.C. 660. The Court also affirmed the convictions of Henry Mersey and International Railway Equipment Corporation, who aided and abetted the three principals in carrying out the illicit scheme. By virtue of their positions as officers of the Boston & Maine, McGinnis, Glacy and Benson had engineered a sale of ten stainless steel railroad cars to Mersey, a dealer in used railroad equipment. The cars were sold to Mersey for $250,000, considerably less than their true value. Mersey immediately resold the cars to the Wabash Railroad for $425,000, and thereafter paid McGinnis, Glacy and Benson $71,500, most of this coming out of the proceeds of the sale. The principal issue on appeal related to the admission of certain items of hearsay evidence at the trial; the evidence had been admitted under the co-conspirators' exception to the hearsay rule. To provide a foundation for this exception, the Government was required to establish, by independent evidence, that defendants were acting in concert. The Court of Appeals thoroughly reviewed this independent evidence, found it sufficient, and therefore dismissed appellants' claim that the hearsay should not have been admitted. The other issues raised by appellants--adequacy of the indictment, admissibility of a telephone transcript, and applicability of the statute to the facts of the case--were dismissed summarily by the court.

Staff: John H. Dougherty, Howard E. Shapiro and Richard A. Wegman (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

CONSTITUTIONAL LAW

Article 67(b) of Uniform Code of Military Justice Making Review by Court of Military Appeals of Courts-Martial Convictions Mandatory as to Generals but Permissive as to Other Servicemen Does Not Deprive a Private of Due Process. Robert G. Gallagher v. Quinn, et al. (C.A.D.C., No. 19764, May 24, 1966). D.J. File 145-15-92. Pfc. Gallagher sought an injunction and other relief compelling the judges of the United States Court of Military Appeals to review on the merits the record of his court-martial conviction for robbery. The military court had declined review in accordance with Article 67(b) of the Uniform Code of Military Justice (10 U.S.C. 867(b)), which requires that court to review all court-martial cases involving generals or flag officers, but grants the court discretion to review cases involving all other ranks "on petition of the accused and on good cause shown." The district court dismissed plaintiff's complaint. In affirming, the Court of Appeals upheld the constitutionality of Article 67(b) holding that "the review provisions here challenged cannot be held to be so unreasonable or irrelevant as to" deprive Gallagher of due process.

Staff: Richard S. Salzman (Civil Division).

FEDERAL PROCEDURE - REMOVAL

Suit Commenced in State Court for Review Under 7 U.S.C. 1365 May Be Removed to District Court; County Court in Kansas Is Not Court of "General Jurisdiction" Under 7 U.S.C. 1365. Beckman v. Graves, et al. (C.A. 10, No. 8500, May 11, 1966). D.J. File 106-29-230. In this suit challenging a determination by a county committee that appellant had exceeded his wheat marketing quota, the complaint was originally filed in Sheridan County (Kansas) Court. Thereafter, at the instance of the Government the action was removed to the federal district court. The District Court held that the case was properly removed and then dismissed the action because appellant had not instituted his action in a state court of "general jurisdiction" as is required for review by 7 U.S.C. 1365.

The Tenth Circuit held that removal to the District Court was proper under 28 U.S.C. 1441(a) in view of the concurrent jurisdiction granted the district courts and state courts of general jurisdiction by 7 U.S.C. 1365. The Court refused to infer a prohibition against removal from the fact that Section 1365 gave the choice of the original forum to the farmer, reasoning that the statute "does not guarantee that [the farmer's] choice shall remain undisturbed." The Court also agreed with the District Court's holding that the Kansas county court was not a court of general jurisdiction within the meaning of 7 U.S.C. 1365, and affirmed the dismissal.

Staff: James C. Gaither and J. F. Bishop (Civil Division)

MORTGAGES

State Court Should Not Take Action to Determine Priority Where Rent Receiver Has Been Appointed by United States District Court in Foreclosure Proceedings and Rents Have Been Turned Over to Receiver. Herman G. Moselowitz v. New Parkway Contractors, Inc., et al. (N. J. Superior Court, App. Div., No. A-1068-64, April 1, 1966). D.J. File 130-48-5769. Plaintiff brought this action in the state court seeking an order compelling the rent collection agent of the New Parkway Contractors to turn over rents collected by him to the Sheriff of Middlesex County for application on account of plaintiff's unsatisfied judgment against New Parkway. It appeared that plaintiff was also a defendant in a foreclosure action commenced in the United States District Court by the Federal Housing Administration; that in that proceeding a receiver had been appointed, pursuant to a provision in an FHA-insured mortgage, to collect rents; and that the rent collector had turned over the rents already collected to the receiver. The Law Division of the New Jersey Superior Court denied the order sought by plaintiff. In affirming, the Appellate Division held that "due regard for the federal jurisdiction and recognition of the lack of control by a state court over funds in the possession of the federal court receiver" required the denial of the order sought by plaintiff. The court also pointed out that plaintiff, as a party defendant in the foreclosure suit, could litigate his entitlement to the rents (as against the FHA) in that action.

Staff: United States Attorney David M. Satz, Jr. and Assistant United States Attorney Mark E. Litowitz (D. N.J.)

SHIP COLLISIONS

United States Held Free of Negligence in Its Marking of Wreck of Its Sunken Vessel. Home Shipping Co., etc. v. United States (C.A. 3, No. 15,575, May 4, 1966). D.J. File 61-51-2993. The Third Circuit affirmed, per curiam, the decision of the district court dismissing libellant's suit for $600,000 in damages. Libellant's vessel, the SS COSMIC, in 1957 collided with the marked wreck of the MISSION SAN FRANCISCO, a public vessel of the United States. After a trial on the merits, the district court found (1) that the United States was guilty of no negligence in its marking of the wreck with a lighted buoy off the bow and a quick-flashing light on the stern; (2) that there was no causal connection between the manner in which the ship was marked and the collision; and (3) that the collision was caused solely by a faulty rudder and/or a navigational error on the part of the COSMIC's pilot. In affirming, the Court of Appeals held that the finding that the Government was guilty of no negligence in its marking of the wreck was not clearly erroneous. The useful opinion of the district court is reported at 239 F. Supp. 226.

Staff: Lawrence R. Schneider (Civil Division)

SOCIAL SECURITY ACT

Seventh Circuit Holds That Secretary Need Not Make Finding of Local Job Availability in Order to Deny Disability Benefits. William J. Lamar v. Celebrezze. (C.A. 7, No. 15116, December 22, 1965, 354 F. 2d 645). D.J. File

137-265-108. In this action for disability benefits under the Social Security Act, plaintiff, an ordained minister who also had performed general labor, claimed to be disabled by nervous instability, depression, and back and leg pain. The Secretary denied benefits on the ground that plaintiff's mental and physical condition did not prevent him from engaging in substantial gainful activity. In denying benefits, the Secretary relied in part on two governmental studies: the Dictionary of Occupational Titles and Worker Trait Requirements for 4,000 Jobs. In agreeing with the district court's affirmance of the Secretary's decision, the Seventh Circuit held that it was proper for the Secretary to rely on the two governmental studies. In addition, the Court specifically rejected plaintiff's claim that the Secretary had to show that jobs which he could perform are actually available to him in his locale, stating: "[T]he Secretary is not required to find that these jobs for which plaintiff is qualified are available in his specific geographical area."

This opinion is therefore probably the clearest statement of the Seventh Circuit's agreement with the Secretary's rejection of the geographical availability standard in determining disability under the Social Security Act.

Staff: United States Attorney Richard P. Stein and Assistant United States Attorney David W. Mernitz (S.D. Ind.)

Under Doctrine of Res Judicata, Benefits May Not Be Awarded on Second Application as to Period Covered by Previous Decision Denying Benefits. James B. Myers v. Gardner (C.A. 9, No. 20,282, May 9, 1966). D.J. File 137-12-333. Claimant filed applications for disability benefits in July and September 1960. These applications were denied on the ground that claimant failed to establish disability at any time on or before December 7, 1960, the effective period of his applications. Review of that decision resulted in an unappealed affirmance by the district court. In February 1962, claimant again filed for benefits; this time the hearing examiner found that claimant was disabled and awarded a period of disability commencing January 1961 and disability benefits beginning July 1961. Claimant brought this action claiming that benefits should have been awarded commencing in 1955 when his disability allegedly commenced. The district court affirmed the Secretary's decision, holding that the previous administrative decision denying benefits, sustained by the unappealed first decision of the district court, was res judicata as to any disability claimed to exist on or before December 7, 1960. The Ninth Circuit held that the district court properly applied the doctrine of res judicata.

Staff: United States Attorney Manuel L. Real; Assistant United States Attorneys Frederick M. Brosio, Jr. and William B. Spivak, Jr., (S.D. Calif.)

Unless Arbitrary or Unreasonable, Secretary's Refusal to Grant Untimely Requested Hearing Before Hearing Examiner Must Be Upheld on Review. Gardner v. Charles F. Moon (C.A. 8, No. 18,154, May 12, 1966). D.J. File 137-45-36. Moon's application for Social Security old age benefits was denied initially and upon reconsideration on the ground that he did not meet all of the necessary qualifications. Although the reconsidered determination advised him of his right to request a hearing within six months, he did not request a hearing before ten months had expired, explaining that he was ill and confined to bed during part of the pertinent period. The Secretary treated the belated request

as a petition for an extension of the six month filing period for "good cause" --a grace remedy provided by the regulations. It was ruled, however, that the reasons advanced by the claimant did not establish "good cause." Upon claimant's request for judicial review, the district court reversed the Secretary and ordered that a hearing be granted, holding in effect that the Secretary had abused his discretion.

The Court of Appeals reversed. It ruled that the question of whether claimant had made a showing of good cause was a matter addressed to the Secretary's discretion, and the Secretary had not acted unreasonably or arbitrarily in finding an absence of good cause under the facts presented. The Court emphasized that even if the district court believed that good cause had been shown, it could not reverse the Secretary; for the only question before the court was whether the Secretary had acted arbitrarily or unreasonably.

Staff: Frederick B. Abramson (Civil Division)

SOVEREIGN IMMUNITY

District Court Lacks Jurisdiction Over Suit to Enjoin War in Viet-Nam. Emilio Eminente v. Lyndon Baines Johnson, et al. (C.A.D.C., No. 19,802, May 3, 1966). D.J. File 145-1-45. The Court of Appeals affirmed the district court's dismissal of this suit brought against the President, the Secretary of State, and the Secretary of Defense by an alleged owner of property in North Viet-Nam. The plaintiff sought recovery of $1,000,000 in damages together with an order enjoining defendants from causing further injury to his property by bombing or conducting other military operations thereon. Plaintiff's principal contention was that, in the absence of a congressional declaration of war, the conduct of military operations in Viet-Nam exceeded defendant's authority. The District of Columbia Circuit agreed with the trial court that it lacked jurisdiction over this action since it was an unconsented suit against the United States and raised non-justiciable issues.

Staff: Florence Wagman Roisman and Richard S. Salzman (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

PROSECUTION POLICY

Different Offenses in Same Transaction. Recently there have been an increasing number of cases in which the same defendant has been charged in separate counts with acts which clearly do not constitute separate offenses when performed by the same individual, such as stealing and receiving property of a bank, or transporting and receiving the same motor vehicle. Where both such counts are submitted to the jury, the case presents problems under the Supreme Court's decision in Milanovich v. United States, 365 U.S. 551, holding that submission of both counts is error. In order to obviate such problems, we suggest that there should never be a separate charge of receipt by the person who is accused of doing something else which necessarily involves possession--such as theft or transportation. Even in situations in which the offenses may be more severable under certain conditions--as for example concealing and transporting a stolen motor vehicle--there should be only one count unless the proof that is available clearly shows separate and distinct acts constituting the second offense. For example, concealment of a stolen motor vehicle should not be charged as a separate offense unless there is proof of such affirmative acts as changing motor numbers or changing color. Care in bringing indictments in this respect may save later reversals.

PATENT PRACTICE

Unauthorized Representation of Patent Practice. United States v. Ann Hull (D.C. D.C.). On May 18, 1966, Ann Hull, who operates a business as a "patent searcher," was convicted in a non-jury trial of violating 35 U.S.C. 33. This statute proscribes the unauthorized representation of oneself as competent to practice before the Patent Office. Sentence is pending.

Mrs. Hull, who is not registered or recognized as an attorney or agent in the United States Patent Office, offered to prepare patent applications for hopeful inventors across the country who had corresponded with her. This is the first completed prosecution under this statute. Another indictment, involving Harold Blasius of New York City is still awaiting trial.

Staff: United States Attorney David G. Bress;
Assistant United States Attorney David N. Ellenhorn
(Dist. of Col.).

BANKING - MISAPPLICATION

Fraudulent Loans on Undeveloped Land Based on Its Appraisal as if It Were Developed. United States v. Ralph T. Hickey, et al. (C.A. 7, April 4, 1966). The defendants, five in all, were charged with violation of 18 U.S.C. 657, 1006 and 371 for misapplying the funds of the Concord Savings and Loan Association,

Chicago, Illinois. Although the facts in the case are complex, it may be stated briefly that the defendants obtained control of the Association by making loans from the Association to companies in which they had interests by greatly over-valuing land which was security for the loans. When it was learned that appraisers would not value the undeveloped land sufficiently high for the loan, an appraisal was obtained on the value of the land as if it was developed. However, this information was withheld from the Association directors. The Court of Appeals affirmed the conviction of the defendants.

Regarding the method of appraising land for a loan, the Court of Appeals stated:

> Whatever its merit to builders and developers might be, the speculative and unrealistic character of "lot method" appraisals in assessing the value of vacant land as security for mortgage loans is apparent. "Lot-method" appraisal is a reflection of a value which may be achieved at some time in the future when the land is subdivided, improved, and ready to be sold in individual residential lots. It does not reflect the present fair market value of the vacant land, that is, what it would bring if exposed for sale on the open market, with both buyer and seller acting without duress and with full knowledge of the facts. It is common knowledge that mortgage loans on real estate, to be adequately secured, must be based upon the present fair market value of the land. The loans must be granted in an amount sufficiently below fair market value to insure a recovery in the full amount of the loan should foreclosure and sale become necessary through a default in repayment. The defendants must be charged with knowledge of these basic principles.

As to proof of the conspiracy, defendants contended that the district court erred in allowing into evidence, events which took place after the conspiracy ended; i.e., after the misapplication which financed the obtaining of control of the Association. The Court of Appeals noted that the duration of a conspiracy depends upon the facts of a particular case and ends when its principal objective is attained. However, where it was originally agreed that certain steps would be taken after the objective was reached, the conspiracy may be found to continue. In the instant case, this referred to the plan to repay the loans and evidence of this plan was admissible.

Objecting to part of the district court's charge to the jury, defendants said Section 657 does not prohibit surreptitious loans to officers or prohibit an officer from causing loans to be made to a fictitious borrower. The Court of Appeals disagreed with defendants' contentions and held that in the circumstances of this case, an intent to injure or defraud may be inferred from the borrower and misrepresentation of this fact to the Association. Also an officer is guilty of misapplication where part of the proceeds of a loan are siphoned to the officer under the pretense that the loan is for construction purposes, as was done here.

Staff: United States Attorney Edward V. Hanrahan; Assistant United States Attorneys William O. Bittman and Barry J. Freeman (N.D. Ill.).

BANKING - MISAPPLICATION

Fictitious Loans. United States v. Norman H. Weaver (C.A. 7, May 13, 1966). The defendant Weaver was convicted for violations of 18 U.S.C. 656, 657, 1005, and 1006 for misapplying funds of a bank and a small business investment company. Weaver, with two other defendants, Lawrence Stickell and Lester Brock, purchased a majority of the investment company's stock and by making fictitious loans from the company, obtained control of the First State Bank of Westmont, Illinois where they misapplied additional funds for their own interests.

Staff: United States Attorney Edward V. Hanrahan;
Assistant United States Attorney John P. Crowley
(N.D. Ill.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

NATURALIZATION

Lodge Act Enlistee Found Eligible for Naturalization Upon Basis of Time Spent on Temporary Disability Retired List. Petition for Naturalization No. 442536 of Sterie Dimitrov Todorov (N.D. Illinois.)

The above proceeding involved a petition for naturalization filed under Section 329(a) of the Immigration and Nationality Act, 8 U.S.C. 1440(a) and the Act of June 30, 1950 (P.L. 597, 81st Cong. 2d Sess.), popularly known as the Lodge Act.

Petitioner, a national of Bulgaria, enlisted in the United States Army in Germany under the Lodge Act on September 4, 1956 for a period of five years. In the same month he entered the United States under military orders and served in an active duty status in the Continental United States and in the Canal Zone until March 4, 1959 when he returned to the United States for treatment of Berger's disease. This disease rendered him 70 percent disabled and in June 1959 the United States Army placed him on the Temporary Disability List. He remained in this status until 1964 when he was issued a Certificate of Retirement from the Army.

Section 4 of the Lodge Act provided that the provisions of Section 329 of the Immigration and Nationality Act, insofar as they provided a statutory basis for the naturalization of aliens who have served in the Armed Forces of the United States, are applicable to Lodge Act enlistees who have completed five or more years of military service, if honorably discharged therefrom. Section 4 further provided that enlistees who completed five years of military service and were honorably discharged should be deemed to have been lawfully admitted to the United States for permanent residence within the meaning of Section 329(a).

The first question before the Court was whether petitioner's military service had to be in active duty status as required by Section 329(a). The Court decided this question in the negative, holding that if Congress intended the service to have been in active duty status it would have so provided in the Lodge Act and not used the phrase "military service". The next questions were whether petitioner had five years of military service and whether he had been honorably discharged within the meaning of the provisions of the Lodge Act. After examining the military regulation relating to the status of persons on the temporary disability retirement list, the Court concluded that such persons continue to be members of the Army and are in "military service". The Court construed petitioner's Certificate of Retirement issued in 1959 as an honorable discharge from the Army and granted the petition for naturalization as recommended by the Immigration and Naturalization Service.

Staff: Maurice R. Glover, Naturalization Examiner, Immigration and Naturalization Service; Chicago, Illinois

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Traveling Without Validated Passport. United States v. Lee Levi Laub, Stefan Martinot and Anatol Schlosser. (E.D.N.Y.) Defendants were charged with having conspired to induce, recruit and arrange for a group of U.S. citizens to depart from the United States for Republic of Cuba, in violation of 8 U.S.C. 1185(b). Section 1185(b) makes it unlawful for a U.S. citizen to depart from or enter the United States without bearing a valid passport. Two of the defendants were also charged in substantive counts with having violated Section 1185(b).

Pursuant to the regulations promulgated by the State Department under Section 1185(b), citizens of the U.S. are forbidden to travel to certain proscribed countries, including the Republic of Cuba, without having passports specially validated for such travel. In the instant case, while defendants possessed unrevoked, unexpired passports at the time of their travel to Cuba, their passports had not been specially validated by the State Department for travel to Cuba.

The trial of this case commenced on October 5, 1965 without a jury and was concluded on October 22, 1965.

Chief Judge Joseph C. Zavatt, in an opinion filed on April 15, 1966, acquitted the defendants on the ground that 8 U.S.C. Section 1185(b) does not forbid the travel of U.S. citizens to restricted countries where the traveler possesses an unrevoked, unexpired passport.

The Court held that there was nothing in the legislative history of the statute from which it might be inferred that Congress intended to grant the executive branch of the Government the power to impose criminal penalties upon a U.S. citizen who departs from or enters the U.S. bearing an unexpired passport even though he had travelled to an area proscribed by the Secretary of State. In short, the Court felt that Section 1185(b) was nothing more than a border control statute regulating departures from and entries into the U.S. and not a travel control statute.

The conclusion reached by Judge Zavatt is at variance with the decision of the Federal District Court in the Southern District of California in a similar prosecution under 8 U.S.C. 1185(b), (U.S. v. Travis). The Ninth Circuit Court of Appeals affirmed the conviction and the case is presently pending before the Supreme Court.

In Travis, the defendant, who had travelled twice to Cuba, was tried without a jury on a stipulation of facts. In that case, among other things, it was stipulated that "at no time pertinent or material herein did defendant, Travis, bear a valid United States passport specifically endorsed for travel to the

Republic of Cuba; she at all times pertinent and material herein knew the provisions of Section 1185(b) of Title 18, United States Code, and sections 53.2 and 53.3 of Title 22, Code of Federal Regulations."

Subsequent to Judge Zavatt's decision in the first Laub case (1963 travel to Cuba), the defendants in a companion case (1964 travel to Cuba - U.S. v. Laub, et al.), moved to dismiss the indictment for failure to state an offense. By order entered May 5, 1966, the District Court dismissed the indictment in the second Laub case on the authority of its opinion in the related case of United States v. Laub. The Government filed a notice of appeal in the District Court on May 19, 1966, invoking the jurisdiction of the Supreme Court under 18 U.S.C. 3731 on the ground that the dismissal of the indictment was based upon the construction of the statute upon which the indictment was founded.

Staff: United States Attorney Joseph P. Hoey and
Assistant United States Attorney Vincent T. McCarthy
(E.D. N.Y.); Paul C. Vincent and William Hipkiss
(Internal Security Division)

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Appeal; Order of District Court Refusing to Set Aside Judgment Which Had Been Affirmed in Prior Appeal Affirmed Without Opinion on Second Appeal. Duncan Miller v. Stewart L. Udall, Secretary of the Interior (No. 19,934, C.A. D.C., May 27, 1966) D.J. File 90-1-18-604. Appellant brought suit to review an administrative decision of the Secretary of the Interior which held that Miller was not the first qualified applicant for oil and gas leases on certain public domain lands in Alaska. The district court entered summary judgment in favor of the Secretary on March 13, 1964. The judgment was affirmed on appeal. Miller v. Udall, 349 F. 2d 193 (C.A. D.C. 1965).

After the Court of Appeals remanded the case to the district court, Miller filed a motion to set aside the district court's judgment. It was argued that Miller had no opportunity to show the district court his side of the controversy and that judgment was entered against him without a date being set for a hearing. The district court denied the motion. Another appeal was taken on which the Secretary did not attempt to argue the merits, but merely pointed out that this was in effect a second appeal from the same judgment taken 18 months after it became final. The Court of Appeals affirmed without an opinion.

Staff: A. Donald Miller (Land and Natural Resources Division).

Condemnation: Survey of Tract Condemned Charged to United States as Part of Just Compensation Where Survey Shows More Acreage Than Described in Declaration of Taking. United States v. Thomas F. Lee (C.A. 5, No. 22686, May 12, 1966) D.J. File No. 33-45-868-292. In this action, there was a controversy between the landowner and the Corps of Engineers as to the amount of acreage in the tract condemned. The landowner contended he owned 82 acres more than the declaration of taking stated. He had a survey made after being told by the Engineers that they would not pay for it. While the jury was deliberating at the trial of the case for the determination of just compensation, counsel for the landowner moved the court to order the Government to pay the cost of the survey. In the final judgment, the court ordered "that survey costs in the amount of $980 be taxed against the United States as costs in this case."

The United States appealed on the ground that it never pays costs, and further that the cost of a survey is not a court cost, and that similar expenses have been rejected by the courts. The Court of Appeals affirmed the judgment, but held that instead of assessing the cost of the survey as costs, the district court should have called it "part of just compensation contemplated under the Constitution," and modified the judgment to that extent. The Court stated: "Nothing in this opinion shall be taken to mean that the cost of every survey made by the landowner must be borne by the Government," but under the facts of this case, in the exercise of its equity powers, the

district court had a right to add the cost of the survey to the value put on the fee taken, to give the condemnee the just compensation contemplated by the Fifth Amendment to the Constitution. The Court's decision was based on its theory that only by having the survey made was the landowner paid for 82 acres for which he would not have been paid otherwise.

A petition to rehear has been filed on the ground that such an expense is not a part of just compensation, and that the Fifth Amendment requires that just compensation be paid only for property taken. It is pointed out that when the condemnee has been paid the fair market value of the property taken, he is put in as good position pecuniarily as he would have occupied if his property had not been taken.

Staff: Elizabeth Dudley (Land and Natural Resources Division).

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

CIVIL TAX MATTERS

District Court Decisions

Action on Lien; Federal District Court Granted Government's Motion for Preliminary Injunction to Bar Continuance of State Court Action to Determine Title to Delinquent Taxpayer's Assets. United States v. Cameron Construction Co., et al. (S.D. N.Y., Oct. 5, 1965). (CCH 66-1 U.S.T.C. ¶9396). Defendant Smith, by written agreement, became the general contractor for the erection of a Veterans Hospital in New York. Thereafter, Smith entered into a contract with defendant Cameron to furnish labor and materials as a subcontractor. Cameron secured advances from Kerhonkson National Bank and, as security therefor, assigned the proceeds of its contract with Smith. Subsequently, the Bank filed a judgment against Cameron in the approximate amount of $25,000. On the subcontract, Smith owed Cameron approximately $22,000. The District Director caused federal tax liens to be filed against Cameron in the approximate amount of $10,000. A Notice of Levy was also served upon Smith. The United States then filed suit against the taxpayer, Smith, the bank, and other lienors in order to foreclose its tax lien against the funds owed to Cameron by Smith.

The basis of the Government's claim was that under Article 3-A and Section 77(8) of the New York law it is a trust beneficiary of trust funds and therefore its rights are superior to that of the bank's to the monies held by Smith. The bank, after the institution of the instant action, instituted supplementary proceedings in the Supreme Court of Ulster County, New York, against Smith to compel him to pay to the bank the monies held by Smith. Only Smith and the bank were parties to the state court action. The District Court granted the Government's motion for a preliminary injunction against further state court proceedings holding that the Government's rights to the collection of these tax liens would be jeopardized because the Government was not a party to the action. The Court stated that all matters could be determined in the federal court and that a summary determination of priorities involving property rights in federal liens is not favored. Also, even if the Government intervened in the state court proceeding, all the issues could not be determined because all the other lienors would not be before the Court. The Court further stated that the proper issue on a motion for a preliminary injunction is "whether to preserve the status quo by preventing disbursement of the fund until the issue priority is determined." The district court said that this issue could be determined by it, applying New York law, in an appropriate plenary proceeding.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Martin Paul Solomon, (S.D. N.Y.).

Liens; Priority; Federal Tax Liens Encumbering Sum of Money Due Taxpayer From Production of Oil and Gas Held to Be Superior to Claim of Judgment Creditor and Assignee of Taxpayer for Benefit of Creditors. United States v.

Texas Eastern Transmission Corp., et al. (W.D. La., Nov. 24, 1966). (CCH 66-1 U.S.T.C. ¶ 9350). The United States brought suit to foreclose its tax liens on a sum of money in the possession of a stakeholder representing money due as payment for the production of oil and gas. Other claimants to the fund were a judgment creditor of taxpayer and a trustee for creditors of the taxpayer under a production assignment. The withholding taxes were assessed subsequent to the time the judgment claim was recorded and prior to the time of assignment of the fund, but the tax liens were not filed of record until after the assignment was executed and after the judgment had been recorded.

The Court held that under Texas law (Vernon's Texas Civil Statutes, Art. 5449) the judgment creditor had a lien on the real property of the taxpayer when his judgment was recorded. However, while under Texas law oil and gas in place constitutes real property, once produced it loses its character as real property and becomes personalty. Hence, the lien acquired under Texas law by recording the judgment did not attach to personal property, the oil and gas produced, or to the proceeds resulting from their sale. Thus, the Court held the judgment creditor had no lien at all on the fund in question. Fore v. United States, 339 F.2d 70 (C.A. 5).

The assignee claimed priority because his assignment was recorded prior to the recordation of the tax lien, and asserted that it was necessary for the United States to record first since he was a purchaser within the meaning of Section 6323 of the Internal Revenue Code of 1954. Relying on In re Juno Construction Co., 237 F. Supp. 203 (S.D. Cal.), the Court held that the assignee was not a purchaser within the meaning of the statute because the assignment of production was not for a present valuable consideration in the manner of vendor and vendee.

Staff: United States Attorney Edward L. Shaheen (W.D. La.); and Sherin V. Reynolds, (Tax Division).

Statute of Limitations; Waiver; Signature of District Director; In Opposing Government's Motion for Summary Judgment Taxpayer Raised Statute of Limitations as Defense to Collection Suit, and Government argued That Statute Was Suspended by Waiver Agreement Signed by District Director; Court Held That Government Was Not Entitled to Have Plea of Limitations Rejected as Matter of Law Since There Was no Evidence in Record of Actual Date District Director Signed Waiver. United States v. White, Sr. (E.D. Ark., 12-6-64). (CCH 66-1 U.S.T.C., ¶9397). On February 28, 1964, the United States brought suit against the taxpayer and others to collect a 1951 income tax liability which had been assessed on January 31, 1955, following a Tax Court decision entered pursuant to a stipulated deficiency. Under date of May 20, 1955, taxpayer submitted an offer in compromise on IRS Form 656, which stipulated that the taxpayer waived the benefit of any statute of limitations applicable to the assessment or collection of the tax liability sought to be compromised and agreed "to the suspension of the running of the statute of limitations on assessment and/or collection for the period during which the offer was pending and for one year thereafter"; the form also contained a provision that "waiver of the statutory period of limitations is hereby accepted, and the offer will be considered and acted upon in due course." The form was signed by a delegate of the Commissioner of Internal Revenue, but the form did not indicate the date on which the District

Director actually signed it and the date could not be ascertained from any of the material of record in the case.

The United States moved for partial summary judgment. Defendants resisted on the ground that the collection action was barred as to all of them by the six-year statute of limitations (Sec. 6502(a) of the 1954 Code). The Government replied that the running of the statute was tolled or suspended by virtue of the waiver provision in the offer form for a period of three years, one month and twelve days, and that its suit was filed within that extended time. The Court noted that there was a division of authority between the courts of appeals as to whether the District Director's signature was necessary to suspend the statute. The First and Third Circuits have held that such a waiver is ineffective unless signed by the Commissioner or his delegate, while the Fifth and Ninth Circuits have taken a contrary view. The Court did not decide the issue but ruled that a question of fact existed, and that taxpayer was entitled to make a factual showing which would sustain his plea of limitations. In the absence of such a showing, the Court stated that taxpayer might be faced with a presumption that the District Director signed the waiver on the same day it was received in his office. The Government's motion for summary judgment was denied.

Staff: United States Attorney Robert D. Smith, (E.D. Ark.); and Sherin V. Reynolds, (Tax Division).

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