

name. This rule does not require that he should be known by one name equally as well as by the other, but only that he be known by both. Again, a contract or obligation may be entered into by a person by any name he may choose to assume. All that the law looks to is the identity of the individual, and, when that is ascertained and clearly established, the act will be binding on him and on others."

And, in Kreuter v. United States, 201 F. 2d 33 (10th Cir. 1952), a case involving proceedings to vacate and set aside an earlier conviction for interstate transportation of a counterfeit check, the Court stated with regard to the use of names, at page 35:

"In the absence of a statutory prohibition, a person, without abandoning his real name, may adopt or assume a name, and he may use such assumed name to identify himself in the transaction of his business, the execution of contracts and the carrying on of his affairs."

C. A Reading of the Federal Firearms Act as a Whole Shows That the Forfeiture Provisions of Section 905(b) Are Applicable Only to Situations Where the Weapon, Not Some Dealer's Record, Is Involved in the Violation.

In order for a firearm to be subject to forfeiture under § 905(b), it must be "involved in any violation of the provisions of this chapter or any rules or regulations promulgated thereunder." Most of the provisions of the Firearms Act prohibit certain transportation or shipment of weapons. For example, under § 902 shipment by a dealer without a license is illegal. Shipment to a dealer required to have a license who does not have one is also prohibited. Shipment to certain classes of criminals is prohibited. Shipment of stolen weapons or of weapons with the serial numbers removed is prohibited. All of these are obviously the cases where the weapon is moved illegally in interstate commerce and where the weapon is "involved in" the prohibited act.

Turning to § 903(d), we find that it does not prohibit any shipment, transportation or sale. It merely states that

the dealer shall maintain certain records as to his firearms business. If anything is "involved" in a violation of § 903(d), it is the dealer's fountain pen and the papers on which he keeps the records, since it does not prohibit any shipment, disposal, or any other act actually involving the weapon.

It seems obvious that during the years since the Firearms Act has been passed many, many persons have ordered guns using names other than those given on their birth certificates; that many times the records have not been posted by the end of the next succeeding day as required by the regulations; that many records may have failed to completely describe the firearm in all respects. Nevertheless, this is the first time since the enactment of this Act in 1950 that any contention has been made that firearms are "involved" and therefore forfeitable when error or delay in the dealer's records is claimed.

The Attorney General has made it clear in his brief submitted to the Denver Court that this contention would not have been made even in this case but for Mr. King's vain but continuing efforts to obtain an answer from the Attorney General in the Denver action. But, as the Attorney General stated in the Denver action,

"This forfeiture proceeding had previously been withheld upon the hope that the prosecution of the present action could be postponed pending enactment of H. R. 9545. If plaintiff has any lawful property interest in the firearms, he could then have been paid just compensation. Plaintiff, however, has vigorously opposed defendant's efforts to continue this action and it thereby became necessary for Internal Revenue to file its proceeding."

Where physical property is forfeited, the property itself must actually be used in violation of the applicable law. Even where the operator of an illegal distillery uses his automobile to commute to the still, so that it actually furthers his operation, it is not sufficiently "involved" to make it forfeitable as would be the case were the car used to transfer the raw materials to the still or the finished product from it. United States v. Lane Motor Company, 199 F. 2d 495 (10th Cir. 1952), affirmed 344 U. S. 630, 73 Sup. Ct. 459, 97 L. ed. 622. The Supreme Court briefly disposed of the Government's contentions in that case, stating:

"We think it clear that a vehicle used solely for commuting to an illegal distillery is not used in violating the revenue laws." [344 U. S. 630, at 631]

D. All of The Applicable Recognized Principles of Statutory Construction Show That the Statute Should Not Be Extended in Accordance With the Government's Contentions.

We are dealing here with one of the few unique statutes which permit the punishment of innocent persons under the rather shocking absurdity that the property is being punished, not its owners. As shown by the Stipulation, Mr. King is an innocent purchaser for considerable value of unique items of property. Even disregarding his purchase, the weapon passed upon the death of Oswald to his widow and children in equal, undivided halves. Neither the widow nor the children nor Mr. King is claimed to have been involved in any wrongdoing whatsoever.

In this case the funds used to purchase this rifle were clearly community property in which Marina Oswald had a one-half interest, and serious doubts have been raised as to the propriety of sacrificing the rights of an innocent spouse. In United States v. One 1941 Ford 2-Ton Truck, 95 F. Supp. 214 (W.D. Mo., 1951) where the Government sought forfeiture for violation of the Federal liquor laws, it was held that the wife should not be penalized with respect to her ownership of property used for illegal purposes simply because

she is the wife of one who may violate the law without any knowledge on her part.

It is well settled that forfeiture provisions are not favored by law and should be strictly construed, especially where the rights and interests of third parties are involved.

In a case involving remission and mitigation of an automobile seized and forfeited for the unlawful transportation of distilled spirits upon which the federal tax had not been paid, United States v. One 1936 Model Ford, 307 U. S. 219, 59 S. Ct. 861, 83 L. ed. 1249 (1938), the Supreme Court stated with regard to forfeitures in general, at 307 U. S. 226:

" . . . Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law. . ."

and at page 236:

"The forfeiture acts are exceedingly drastic. They were intended for protection of the revenues, not to punish without fault. It would require unclouded language to compel the conclusion that Congress abandoned the equitable policy, observed for a very long time, of relieving those who act in good faith and without negligence, and adopted an oppressive amendment not demanded by the tax officials or pointed out in reports of its committees."

Another method of statutory construction is to look at the purposes of the Act in question in the light of its legislative history. In this case the legislative history of the forfeiture provisions of § 905(b) is particularly significant. That legislative history shows that the primary purpose of the forfeiture was not to inflict additional punishment even upon those owners who themselves violated the Act, but rather, the purpose was to provide a means of clearing up the administrative problem that had resulted from the accumulation of unclaimed arms which had been used as evidence in prosecutions under the Act. This legislative intent is manifest in the following quotation from the House Committee on Ways and Means and the Senate Committee on Finance, reported at 1950-2 U. S. Code Congressional Service, p. 1908:

"The disposition of firearms seized in connection with the enforcement of the Federal Firearms Act has presented an administrative problem. The courts are reluctant to order the disposition of firearms offered as evidence in prosecutions under the act, except to direct their return to the law-enforcement agency, and the owners of such firearms do not make claim for their return when the cases against them are closed. Further, the character and reputation of some violators are such that firearms or ammunition seized in the enforcement of the act should not be returned to them. Firearms and ammunition seized in the enforcement of the act thus accumulate in the hands of the law-enforcement agency.

"The proposed amendment of section 5 of the Federal Firearms Act, like section 2730 of the Internal Revenue Code in the case of firearms subject to forfeiture thereunder, would permit the remission or mitigation of the forfeiture under section 3726 of such code, or the compromise of claims of forfeiture under section 3761 of such code.

"Enactment of the proposed amendment would provide a satisfactory solution of the problem of disposing of firearms and ammunition involved in violations of the Federal Firearms Act. It would provide for forfeiture, yet would permit consideration of the equitable principles of remission or mitigation or of compromise in appropriate cases."

It is also important to the construction to recognize that we are dealing with ~~the~~ criminal statute. The decision in this case would be fully applicable in cases in which the Government might seek to send someone to the penitentiary for five years under § 905(a) of the Act. Certainly, extreme care should be taken in any construction tending to this effect.

If any individual is to be subject to five years' imprisonment for filling out an order for a hunting rifle with an assumed name, a statute prohibiting this conduct should do so in clear and express terms. There is ~~simply~~ not even ~~so~~ ^{so} vague a provision to such effect in the Firearms Act as now written, much less a clear one.

A further consideration bearing upon the construction is, of course, the desirability of avoiding a result that would conflict with the United States Constitution. In United States v. One Model H Farmall Tractor, 51 F. Supp. 603 (W. D. Tenn., 1943), the Court, unlike the present situation, dealt with a case where the literal language of the statute rather clearly called for the forfeiture of a tractor owned by an innocent party by reason of the use of that tractor in violation of the liquor laws, without the knowledge or consent of the innocent owner. Notwithstanding the rather clear application of the literal words of the statutes, the Court adopted a construction protecting the innocent owner in order to avoid a result of deprivation of property without due process of law in contravention of the Fifth Amendment.

In further sections of this brief we deal with the constitutionality of the construction here sought by the United States.

II. THE CONGRESS, BY ENACTING SUCH LEGISLATION PROVIDING FOR THE ACQUISITION OF THE WEAPONS HERE INVOLVED WITH THE PAYMENT OF JUST COMPENSATION THEREFOR, HAS SHOWN ITS INTENT THAT THE EARLIER GENERAL STATUTE SHOULD NOT BE CONSTRUED AS GOVERNING THE DISPOSITION OF THE SAME WEAPONS.

It is a long-standing rule of construction that specific statutory provisions take precedence over general ones, particularly where the special statutory provisions are subsequently enacted. This is illustrated by the statement of the Supreme Court in Kepner v. United States, 195 U. S. 100, loc. cit. 125, 49 L. ed. 114, 24 S. Ct. 797 (1904):

" . . . It is a well-settled principle of construction that specific terms covering the given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling . . ."

See also Missouri v. Ross, 299 U. S. 72, 81 L. ed. 46, 47 S. Ct. 60 (1936); Baltimore National Bank v. State Tax Commission, 297 U. S. 209, 80 L. ed. 586, 56 S. Ct. 417 (1935).

The case of United States v. Matthews, 173 U. S. 381, 43 L. ed. 738, 19 S. Ct. 413 (1899) presents a somewhat analogous situation to that presented here. That case involved a suit by two deputy marshals for the recovery of a reward for the arrest of a criminal, the reward being offered at the discretion

and direction of the Attorney General under the authority of a specific appropriations statute. The United States, in part, based its refusal to pay the reward on a general statutory provision forbidding public officers from receiving additional compensation. In affirming a judgment for the plaintiffs for recovery of the reward, the Supreme Court gave effect to the provisions of the special legislation over that of the general statutes, stating, at 173 U. S. 381, 387:

" . . . As the reward was sanctioned by the statute making the appropriation, and was embraced within the offer of the Attorney General, it clearly, under any view of the case, was removed from the provisions of the statutes in question. The appropriation act being a special and later enactment operated necessarily to engraft upon the prior and general statute an exception to the extent of the power conferred on the Attorney General and necessary for the exercise of the discretion lodged in him for the purpose of carrying out the provisions of the later and special act."

Subsequent to the filing of this libel action the Congress of the United States has considered and passed legislation directly affecting the subject matter of this litigation. H. R. 9545, which was initiated at the request of the Attorney General of the United States following the recommendation of the President's Commission, provides a procedure whereby evidence pertaining to the assassination of President John F. Kennedy

may be acquired and preserved by the Government in the national interest. This bill, as finally passed, gives the Attorney General authority to determine which items of the evidence before the President's Commission should be acquired and preserved by the United States, and then provides that any person claiming an interest in such property may seek just compensation by filing a claim in the United States Court of Claims or the United States District Court for the judicial district wherein such claimant resides.

In stating the purpose of the bill, the Chairman of the subcommittee which considered the legislation, Mr. Rogers of Colorado, expressly referred to the weapons as being among the "items" of evidence which should be acquired and preserved by the United States. The House Report (H. R. No. 813, 89th Cong., 1st Sess. [1965], p. 2) makes express reference to the fact that:

". . . One private party has already filed suit against the Attorney General of the United States for possession of the assassination weapon and the .38 caliber revolver involved in the death of Police Officer Tippit, claiming to have purchased all right, title and interest in these items from Mrs. Marina N. Oswald. The Government has not yet responded to the complaint. The effect of this legislation would be to deny the plaintiff possession of these items but would afford due process of law by providing a procedure for recovering just compensation."

As to the provision for just compensation for any of such evidence acquired and preserved, the House Report on the bill further stated that the need for just compensation stems from the mandate in the Fifth Amendment to the United States Constitution: ". . . nor shall private property be taken for public use, without just compensation." [H. R. No. 813, 89th Cong., 1st Sess. (1965), p. 3] Although the committee considered the measure of damages sufficient to constitute "just compensation" to Mr. King, the committee, and the Congress, wisely left the question of just compensation to the courts.

In the floor discussion preceding the passage of this bill by the House of Representatives, the weapons were again specifically discussed as being among the items of evidence which should be acquired and preserved by the United States. The possible cost to the Government was also discussed, and, in this regard, Representative Mathias (Rep., Md.) made the following statements, set forth at 111 Cong. Rec. 22159 and 22160, respectively (daily ed. Sept. 7, 1965):

"Mr. Speaker, some question has been raised here today about the possible cost to the Government. Of course, it is impossible to estimate what that cost might be. We are leaving it to the adjudication of

the Court of Claims or an appropriate district court. In conformance with the Constitution, we are leaving it to a proper legal adjudication. But I would say whatever cost might be incurred would represent cost which must be met by the country and a cost which the country would want to meet. The items that will be paid for are somewhat grisly relics of a tragic moment in our national history. Nevertheless, they must be acquired without question."

and

"I thank the gentleman. What he has said about the possible cost of the items of evidence to the Government is absolutely correct. I would point out to my colleagues that after we had studied the legislation proposed originally, it was the unanimous opinion, as I remember it, of the subcommittee that this determination as to cost should be left to a jury if the claimants desire to have a jury trial. We also felt that the original proposal that the Court of Claims have exclusive jurisdiction was not in keeping with what we thought was proper. For that reason we proposed that the claimant might bring action in the U. S. district court of his own district, where he could request a jury trial. I personally feel this gentleman from Colorado, Mr. King--whom I do not know--if he has paid \$10,000 in a bona fide transaction it would not comport with my idea of justice that he should not get his \$10,000 back. That is a matter for the courts to determine. We have our own theories as to what should be done on a monetary payment to the owner of the property. For that reason the committee very wisely left this to the constitutional test of just compensation, as that compensation is fixed by the court. The court may include a jury of plaintiff's peers, if he so desires. I do not know of any way we could proceed more considerately with any claimant, or any way we could do it which would insure greater justice to the Government than this bill provides."

The United States Senate, in the report of the Committee on the Judiciary [S. R. No. 851, 89th Cong., 1st Sess. (1965), p. 2] also made express mention of Mr. King's suit to recover the weapons and stated:

". . . The effect of this legislation would be to deny the plaintiff possession of these items but would afford due process of law by providing a procedure for recovering just compensation by permitting the claimant his day in court to litigate his asserted rights."

The Claimant's contention that the present forfeiture action is without merit is further substantiated by the following statement made by the Attorney General of the United States in his letter to the Speaker of the House of Representatives requesting the introduction of the legislation which ultimately became H. R. 9545, such statement being quoted from H. R. No. 813, 89th Cong., 1st Sess. (1965), pp. 4-5:

"DEAR MR. SPEAKER: Enclosed for your consideration and appropriate reference is a legislative proposal providing for the acquisition and preservation by the United States of certain items of evidence pertaining to the assassination of President John F. Kennedy.

"In its investigation of the assassination of President Kennedy, the Commission appointed by President Johnson examined numerous items of physical evidence which were used to form the basis for its report. These items included the assassination weapons, the revolver involved in the murder of Patrolman J. D. Tippit, and many other exhibits. This evidence and the investigative

reports, transcripts, and other working papers of the Commission, have been officially transmitted to the National Archives by the Commission. Pending final decision as to the disposition to be made of these exhibits, the physical evidence has been retained in the custody of the Federal Bureau of Investigation.

"Prior to the completion of its work, the Commission requested that this Department take the necessary steps to provide for the retention of the essential items of physical evidence in the possession of the U. S. Government for an indefinite period of time. After full consideration of the alternatives, I am persuaded that the national interest requires legislation which will provide a valid legal basis for the permanent retention of these critical exhibits." [Emphasis added]

Clearly, the enactment of H. R. 9545, together with the attendant discussion thereof in both Houses of the Congress, serves as an expression of legislative intent as to both the current status of the weapons--that they are private property which cannot, and should not, be taken without the payment of just compensation under due process of law--and the disposition of the weapons--that they should be acquired and preserved under this legislation.

III. FORFEITURE OF THE WEAPONS WOULD CONSTITUTE THE DEPRIVATION OF PRIVATE PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The United States is attempting by this action to seize and forfeit private property for an alleged violation of its laws. Assume, for the moment, that such a violation has occurred and that the person guilty of such violation should have his rights in the involved property seized and forfeited. However, the United States here attempts to seize and forfeit not only the property rights of the alleged wrongdoer, but also the property rights of an innocent and good faith purchaser, and indirectly the contract rights of the innocent wife and children of the alleged wrongdoer.

It may be said that, in a former era of constitutional law, the Supreme Court upheld the right of the United States, when supported by adequate statutory authority, to forfeit the interests of innocent parties in property used in violation of its laws where no substantial value was involved. In Goldsmith, Jr. - Grant Company v. United States, 254 U. S. 505, 65 L. ed. 377 (1921), the Court considered U. S. Rev. Stat. § 3450, which provided for the forfeiture of things used in the

removal and concealment of contraband goods, and held that the forfeiture of the interest of an innocent seller who had reserved title to an automobile as security for unpaid purchase money did not render such statute constitutionally invalid as a taking of property without due process of law. The Court relied upon the transparent fiction that the "thing" in such forfeiture actions is primarily considered the offender, so that due process required only determination of the "guilt" of the inanimate object. This theory that the thing is considered to be the offender is but a legal fiction protecting the courts from the necessity of dealing with the real thrust of their decisions. Such avoidance of a hard look at the real results of constitutional decisions is completely contrary to all modern constitutional law cases! Even as plausible a concept as "separate but equal" has not prevailed to avoid a hard look at the real impact of a constitutional decision. Brown v. Board of Education of Topeka, 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686 (1954). The Supreme Court in its more recent decisions considers no hard and fast rules of a conceptual nature, but instead: "The pattern of due process is picked out in the facts and circumstances of each case . . ." Brock v. North Carolina, 344 U. S. 424, at 427, 97 L. ed. 456, 73 S. Ct. 349

(1952). The modern view of the Court is reflected in the following quotation from Nebbia v. New York:

" . . . And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." [291 U. S. 502, at 525]

The real effect of a holding for forfeiture here is clear and simple. The unique and valuable property of innocent persons would be taken without compensation. No amount of verbiage can hide this fact. If the law is permitted to look at this simple truth, the violation of the Fifth Amendment requires no citation.

Aside from the indications that the Goldsmith case is no longer a governing decision, the Court there clearly left open the constitutionality of forfeiture where the Government might attempt a greater "amplitude of application." The Court stated:

"The changes are rung on the contention, and illustrations are given of what is possible under the law if the contention be rejected. It is said that a Pullman sleeper can be forfeited if a bottle of illicit liquor be taken upon it by a passenger, and that an ocean steamer can be condemned to confiscation if a package of like liquor be innocently received and transported by it. Whether the

indicated possibilities under the law are justified we are not called upon to consider. It has been in existence since 1866, and has not yet received such amplitude of application. When such application shall be made, it will be time enough to pronounce upon it. . ." [254 U. S. 505, at 512]

We would submit that the "amplitude of application" which the Supreme Court felt was premature in 1921 is no longer mere conjecture. The weapons involved in the instant case could have limitless value, and the legal fiction of the guilt of an inanimate object should not be relied upon to extinguish the valuable rights of innocent persons.

Respectfully submitted,

KILGORE & KILGORE

By _____
William C. Garrett

By _____
Eugene R. Lyerly

1800 First National Bank Building
Dallas, Texas 75202

Attorneys for Claimant John J. King

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JOHN J. KING,

Plaintiff,

v.

NICHOLAS deB. KATZENEACH,
Attorney General of the
United States,

Defendant.

Civil Action No. 9163

ORDER

Upon consideration of defendant's Motion to Dismiss Plaintiff's Complaint Or, Alternatively, To Stay Further Proceedings, and the plaintiff and defendant having appeared by William C. Carrett and James S. Holmberg, and Fred William Drogala and Lawrence H. Henry, respectively, and the Court, after hearing argument and being advised, having determined that if the forfeiture proceedings occurring in the United States District Court for the Northern District of Texas are adjudicated valid this Court is ousted of its jurisdiction over the subject matter of plaintiff's complaint, in that it lacks jurisdiction over the specific property involved herein, it is hereby

ORDERED that defendant's motion to stay further proceedings is granted and that further proceedings herein are suspended and this file is closed until the forfeiture proceedings in the Northern District of Texas are finally concluded; and it is further ordered that the motion to dismiss is not granted at this time.

FURTHER ORDERED that this proceeding may be reopened after the conclusion of the Texas proceedings upon a showing of good cause by plaintiff herein; and it is

FURTHER ORDERED that defendant shall have 20 days from the date of any order reopening this proceeding in which to move, answer or otherwise plead to plaintiff's complaint.

DATED at Denver, Colorado, this 8 day of October, 1965.

BY THE COURT:

129-11
3 FEB 24 1966
Wm. E. Layle
WILLIAM E. LAYLE
UNITED STATES DISTRICT JUDGE.

9168

FILED
United States District Court
Denver, Colorado

MAY 24 1965

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

G. WALTER BOWMAN
CLERK
BY _____
DEP. CLERK

JOHN J. KING,)
)
Plaintiff)
)
v.)
)
NICHOLAS deB. KATZENBACH,)
Attorney General of the)
United States,)
)
Defendant.)

Civil Action No. _____

C O M P L A I N T

JOHN J. KING, plaintiff, complaining of defendant,
NICHOLAS deB. KATZENBACH, Attorney General of the United States,
alleges:

1. Plaintiff is a citizen of the State of Colorado, residing at 27 Sunset Drive, Englewood, Colorado. Defendant is, and has been at all times since prior to February 1, 1965, the Attorney General of the United States, duly qualified and acting as such, and is a citizen of the District of Columbia. The matter in controversy exceeds, excluding all interest and costs, the sum of Ten Thousand Dollars (\$10,000). This court has jurisdiction of this action because of the diversity of citizenship of the parties and also, in the alternative, under the Act of October 5, 1962, 76 Stat. 744, United States Code, Title 28, Sec. 1361.

2. Under the provisions of United States Code, Title 28, Sec. 1391, as amended by the Act of October 5, 1962, 76 Stat. 744, this action is properly brought in this judicial district, such district being the district in which the plaintiff resides, and the summons and complaint may be served by delivering same to

the defendant by certified mail beyond the territorial limits of this judicial district.

3. Plaintiff is the owner of the following described personal property:

RIFLE: Caliber 6.5 mm. Mannlicher-Carcano Italian military rifle, Model 91/38, serial number C2766, with attached 4-power telescopic sight stamped "Ordnance Optics Inc.," "Hollywood California," together with two-piece sling strap and cartridge clip marked "SMI" "952," as more fully described on pages 553 through 555 of Appendix X, Report of the President's Commission on the Assassination of President Kennedy, and identified as Exhibit #139 of that Commission.

REVOLVER: Caliber .38 Special Smith & Wesson Victory Model revolver, serial number V510210, as more fully described on pages 558 and 559 of Appendix X, Report of the President's Commission on the Assassination of President Kennedy, and identified as Exhibit #143 of that Commission, together with the holster for said revolver.

4. The defendant, under color of his office as Attorney General of the United States, now has, and at all times since prior to February 1, 1965, has had, custody and control of the said personal property.

5. Plaintiff has heretofore requested and demanded that defendant deliver to plaintiff the above-described firearms, which are the personal property of plaintiff. Defendant does not own the above-described firearms and has no right under any law to retain such firearms in his custody, either for his own account or in his official capacity as Attorney General of the United States. Defendant has nevertheless refused and failed and continues to refuse and fail to deliver such firearms to plaintiff, and defendant threatens to withhold such firearms from plaintiff permanently. Such refusal and failure on the

part of defendant has deprived and continues to deprive plaintiff of his property without due process of law.

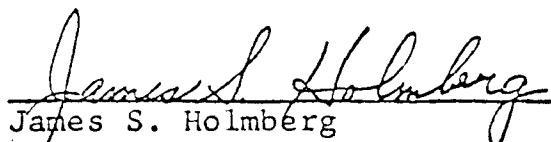
WHEREFORE, plaintiff demands:

A. That defendant be required to deliver up to plaintiff the aforesaid firearms;

B. That defendant pay to plaintiff the costs of this action; and

C. That plaintiff have such other and further relief as is just.

Respectfully submitted,


James S. Holmberg

HOLMBERG AND POULSON
1700 Broadway
Denver, Colorado 80202
Telephone: 623-3268

Attorney for Plaintiff

Of Counsel:

William C. Garrett
Charles F. Hawkins
KILGORE & KILGORE
1800 First National Bank Building
Dallas, Texas 75202
Telephone: Riverside 1-6784

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JOHN J. KING,

Plaintiff,

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the
United States,

Defendant.

Civil Action No. 9163

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT
OR, ALTERNATIVELY, TO STAY FURTHER PROCEEDINGS

Defendant, by his attorneys, pursuant to Rule 12 of the Federal Rules of Civil Procedure, hereby moves the Court to dismiss plaintiff's complaint upon the ground that the Court lacks jurisdiction over its subject matter. Alternatively, defendant moves the Court to stay further proceedings in this action pending completion of a statutory forfeiture proceeding commenced by the Alcohol and Tobacco Tax Division of the Internal Revenue Service under 26 U.S.C. §7325, as amended, and presently pending in the United States District Court for the Northern District of Texas. In support of this motion defendant respectfully refers the Court to a memorandum of points and authorities, and Exhibits "A" through "E", inclusive, filed herewith and made a part hereof.

JOHN W. DOUGLAS
Assistant Attorney General

LAWRENCE M. HENRY
United States Attorney

HAYLAND F. DEATHERS

FRED W. BROGSA

Attorneys, Department of Justice
Attorneys for Defendant

T. 1/19/66

FMV:JJC:ls
129-11

J. M. E.

January 19, 1966

Mr. Melvin M. Diggs
United States Attorney
Dallas, Texas

Attention: Mr. B. H. Timmins, Jr.
Assistant U. S. Attorney

Re: One 6.5 mm, Mannlicher Carcano Military Rifle,
Model 91-38, Serial No. C2766, with Appurtenances,
and One .38 Special S & W Victory Model Revolver,
Serial No. V510210, with Appurtenances

Dear Mr. Diggs:

There are attached copies of the pleadings, order and memoranda in the Denver proceeding.

It was a pleasure seeing you at the Department.

Sincerely,

FRED M. VINSON, Jr.
Assistant Attorney General
Criminal Division

By: CARL W. BELCHER
Chief, General Crimes Section

Enclosures

CC: Records
Chrono.
Mr. Cella

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JOHN J. KING,

Plaintiff,

v.

NICHOLAS deB. MATZENBACH,
Attorney General of the
United States,

Defendant.

Civil Action No. 9168

DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
PLAINTIFF'S COMPLAINT OR, ALTERNATIVELY, TO STAY FURTHER
PROCEEDINGS

Subsequent to the filing of Defendant's Initial Memorandum in Support of Motion to Dismiss Plaintiff's Complaint or, Alternative, to Stay Further Proceedings, information was received that on September 10, 1955, the United States Marshal for the Northern District of Texas executed a Warrant of Seizure upon the property described in plaintiff's complaint pursuant to an order of Chief Judge Joe Ewing Estes of that District. By the terms of this Warrant, the United States Marshal attached the property "until further order" of Chief Judge Estes in the libel action pending in that District and, in so doing, placed both the firearms and their appurtenances within the custody and control of that court. As a result of this action any possible doubt as to the proper forum in which the title to or the right to possession of this property must be litigated has now been resolved since 28 U.S.C. Section 2463 specifically provides that:

"All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

Since the firearms and their appurtenances are being detained under 26 U.S.C. Sections 7325, 7401, which provisions are a part of the Internal Revenue Code, and have been attached by the United States District Court for the Northern District of Texas, it is readily apparent that they are now held subject only to the control and jurisdiction of that Court.

Garth v. United States, U.S.D.C. S. District Calif., 132 F. Sup. 894, 897.

In Wabash Railroad v. Adalbert Collem, 203 U.S. 38 at p. 54, the Supreme Court stated the proposition as follows:

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. * * * *"

This principle is also based upon the general doctrine of in custodia legis. See Covell v. Heyman, 111 U. S. 176. Moreover, the last sentence quoted above comports with defendant's statement in the initial memorandum that plaintiff will not be prejudiced by a dismissal of this suit since the Northern District of Texas has ample jurisdiction to determine his claims of title and ownership. Indeed, 28 U.S.C. Section 2465 states that if a claimant prevails against the government in a libel action the property involved "shall be returned forthwith to the claimant or his agent * * *".

On this basis defendant respectfully submits that this court lacks jurisdiction over the subject matter of claimant's complaint. Not only is 26 U.S.C. Section 7325 plaintiff's exclusive remedy for resolving the issues involved herein, but it is now clear that the property involved is within the custody of the United States District Court for the Northern District of Texas, which District under 28 U.S.C. Section 2463, has exclusive jurisdiction over its disposition.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JOHN J. KING,

Plaintiff,

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the
United States,

Defendant.

Civil Action No. 9168

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
PLAINTIFF'S COMPLAINT OR, ALTERNATIVELY, TO STAY
FURTHER PROCEEDINGS

By this action plaintiff seeks to require the Attorney General of the United States to surrender to him the rifle used in the assassination of President John F. Kennedy and the revolver used in the death of Patrolman J. D. Tippit of the Police Department of Dallas, Texas. These firearms were seized following the above events and were subsequently delivered to the President's Commission on the Assassination of President Kennedy for use as evidence in its proceedings. At the conclusion of its inquiry the Commission returned the firearms to the Attorney General, together with a great many other items of evidence.^{1/}

^{1/} The Presidential Commission delivered its accumulation of evidence to the Attorney General with the recommendation that much of it, including the firearms, be preserved for historical purposes. To this end the Attorney General requested Congress to enact legislation to enable the Government to condemn these items upon payment of just compensation. (See Exhibit "A"). In response to his request, H.R. 9545 (a copy of which is attached as Exhibit "B") was introduced in the House of Representatives on June 16, 1965 by Mr. Rogers of Colorado. This Bill will allow the Attorney General to designate the items to be preserved and will allow claimants to the property thus condemned to file suit for just compensation, either in the Court of Claims or in the U.S. District Court for the judicial district in which the claimant resides. On September 7, 1965, the Bill was passed by the House (see House Report 813 attached to Exhibit "B"; Congressional Record, September 7, 1965, pp. 22153 to 22160), and it is presently pending before the Senate Judiciary Committee.

On August 4, 1965, the Alcohol and Tobacco Tax Division of the Internal Revenue Service made a determination to institute forfeiture proceedings against the firearms involved herein upon the ground that they had been involved in a violation of the provisions of the Federal Firearms Act, 15 U.S.C. §905(b).^{2/} Because the law requires that forfeiture proceedings be commenced in the judicial district in which firearms are seized,^{3/} Internal Revenue requested that the firearms involved herein be transferred to Dallas, Texas. This was done on August 16, 1965 and forfeiture proceedings were commenced that same day pursuant to the terms of 26 U.S.C. §7325, as amended Sept. 2, 1953, Pub. L. 85-859, Title II, §204(10), (12), 72 Stat. 1429; Sept. 2, 1958, Pub. L. 85-866, Title I, §78, 72 Stat. 1662. Both the rifle and the revolver, therefore, together with their appurtenances, are presently in Dallas, Texas, in the custody and control of the Supervisor in Charge, Alcohol and Tobacco Tax, Internal Revenue Service.

The progress of the forfeiture proceeding to date has been as follows:

1. At the commencement of the proceeding on August 16,

^{2/} This forfeiture proceeding had been previously withheld upon the hope that prosecution of the present action could be postponed pending enactment of H.R. 9545. If plaintiff has any lawful property interest in the firearms, he could then have been paid just compensation. Plaintiff, however, has vigorously opposed defendant's efforts to continue this action and it thereby became necessary for Internal Revenue to file its proceeding.

^{3/} 26 U.S.C. §7323(a) provides that:

Nature and venue.--The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made.

Internal Revenue caused the firearms in question to be appraised by three sworn appraisers, and, the appraisals having valued the firearms at less than \$2,500.00, it caused a notice of seizure, describing the articles and the reason for their seizure, to be published for three weeks in the district in which the seizure was made. (See Exhibit "C"). This notice called upon any persons claiming the property to appear and file a claim within 30 days from the first publication. These actions were all in accordance with the procedures prescribed in 26 U.S.C. §7325(1), (2).

2. On September 3, 1965, pursuant to the above notice, plaintiff filed a claim with Internal Revenue, along with a required bond in the amount of \$250.00. This claim and bond, together with certain related papers, are collectively filed herein as Exhibit "D". Upon receipt of these documents it was incumbent upon Internal Revenue to transfer them, along with a duplicate list of the items seized, to the United States Attorney for the Northern District of Texas for the commencement of a libel action against the property "in the ordinary manner prescribed by law." 26 U.S.C. §7325(3). This was done on September 9.

3. The following day, on September 10, District Judge Joe E. Estes signed an Order Granting Leave To File Libel at the request of the United States Attorney. A copy of this order and of the Libel of Information, is filed herein as Exhibit "E". By these actions the libel action was formally commenced in the U.S. District Court for the Northern District of Texas.

Summary of Argument

26 U.S.C. §7325 provides the exclusive procedure for adjudicating the forfeitability of firearms seized under 15 U.S.C. §905(b). United States v. One 1955 Oldsmobile

Sedan "008", D.C. W.D. Pa., 1960, 181 F.Supp. 903; DeDonis v. United States, D.C. W.D. Pa., 1952, 103 F.Supp. 119; Milkint v. Morgenthau, C.A. 4, 1937, 92 F.2d 267. If plaintiff wishes to contest the forfeiture of the firearms, he must do so in accordance with this procedure which specifies that the issue of forfeitability, if contested, must ultimately be resolved by the United States District Court in the district in which the firearms were seized -- here the Northern District of Texas. 26 U.S.C. §7325(3); Rush v. United States, C.A. Okla., 1958, 256 F.2d 862. Plaintiff may, of course (and indeed must to raise a contest), press its claim of ownership and right to possession of the firearms in the forfeiture proceeding in that District. Any issue or argument available to plaintiff in this action will be equally available to him in the forfeiture proceeding.

On this basis, in view of the exclusive forfeiture procedure Congress has provided in 26 U.S.C. §7325, and inasmuch as the issue of forfeitability, which is inextricably interwoven with plaintiff's present demand for possession, must be litigated in the Northern District of Texas, defendant respectfully submits that this Court lacks jurisdiction over the subject matter of plaintiff's complaint.^{4/}

ARGUMENT

I. The Court Lacks Jurisdiction Over the Subject Matter of the Complaint

- A. The Forfeiture Procedure Specified by Congress in 26 U.S.C. §7325, Which Has Resulted in the Libel Action Pending in the Northern District of Texas, is the Exclusive Remedy for Resolving the Issues Involved in this Action.

^{4/} Alternatively, defendant has moved that further proceedings in this action be stayed pending completion of the forfeiture proceeding. This motion is based upon the principle that the Government's title and claim to forfeitable items vests at the moment the violations occur. United States v. Stowell, 133 U.S. 1, 15. Unless and until forfeiture is disallowed the Government has title to the firearms and plaintiff is in no way entitled to possession.

In United States v. One 1955 Oldsmobile Sedan "99", D.C. W.D. Pa., 1960, 181 F.Supp. 903, 905, the owner of an automobile which had been seized by agents of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, filed an action for its return. The evidence indicated that subsequent to its seizure a forfeiture proceeding under 26 U.S.C. §7325, as amended, had been commenced according to the procedure outlined above. The plaintiff, however, had not filed a claim or posted a bond in the administrative proceeding although he had received timely notice. The automobile was forfeited without contest.

The Government moved to dismiss the complaint on the ground that the Court lacked jurisdiction, and the Court agreed stating that (at p. 905):

Section 7325, Title 26 U.S.C.A., provided movant with an adequate remedy at law to contest the legality of the seizure and forfeiture of his automobile. By his failure to engage in the civil action thus provided and file a claim and cost bond within the prescribed thirty-day period, we think he is barred from seeking the return of his automobile under the Rules of Criminal Procedure. Movant should not be permitted to ignore the plain legal remedy provided by Congress and then invoke relief under Rule 41(e). Milkint v. Morgenthau, 4 Cir., 1937, 92 F.2d 266, 267; United States v. One 1953 Oldsmobile Sedan, D.C. W.D. Ark. 1955, 132 F.Supp. 14, 18; cf. DeBonis v. United States, D.C. W.D. Pa. 1952, 103 F.Supp. 119, 121. Also it seems eminently clear that the court in the matter under consideration does not have jurisdiction to order the return of the automobile to movant. * * * (Emphasis supplied.)

Similarly in Milkint, et al. v. Morgenthau, C.A. 4, 1937, 92 F.2d 266, the plaintiff brought a suit in equity to prevent statutory forfeiture of his automobile. The District Court dismissed the complaint for lack of jurisdiction and the Fourth Circuit affirmed, holding under a substantially identical, predecessor statute, that:

Section 1624, U.S.C.A., title 26, plainly provides that "any goods, wares, or merchandise" seized as being subject to forfeiture under any provisions of the Internal Revenue Laws, of the appraised value of \$500, or less, should be proceeded against as was admittedly done here.

This method of proceeding against seized property of the value of \$500, or less, was an exclusive method and Congress undoubtedly had the right to make this provision. Fisburn v. Jackson (D.C.) 55 F.(2d) 934, and cases there cited.

The proceedings had were regular and the plaintiffs had personal notice of them. They chose to stand idle and allow the forfeiture to be prosecuted to a conclusion without availing themselves of the remedies provided by the statute. P. 257 (Emphasis supplied.)

DeBonis v. United States, D.C. W.D. Pa., 1952, 103 F. Supp. 119, involved a suit against the United States for damages for "the illegal seizure and sale" of plaintiff's truck following completion of an administrative forfeiture proceeding. Plaintiff had earlier filed, while the forfeiture proceeding was pending, a related action for the return of his truck. The Court had dismissed this suit on the ground that "[t]he rights of the plaintiff will be adjudicated in forfeiture proceedings as provided by the Internal Revenue Laws, 26 U.S.C.A. §3724 [now §7325]." After the dismissal of this suit, however, plaintiff did not participate or file a claim in the forfeiture proceeding, which resulted in the sale of the truck.

In dismissing the suit for damages the Court noted the earlier dismissal and held:

The plaintiff here did not file a claim under this section of the Act to which the learned Judge referred and the truck was duly sold; neither has he filed with the Secretary a petition for remission. Since he failed to contest the forfeiture in the manner directed by the law he cannot now claim that the truck was not legally forfeited.
P. 121

On the basis of these authorities it is abundantly clear that plaintiff must press any claim he may have to the firearms

in the forfeiture proceeding in Dallas, Texas. This will not prejudice plaintiff in any way since any argument available to him now will likewise be available to him in the forfeiture proceeding. The fairness of this procedure was explained in detail in Thompson v. Schwaeb, C.A. 9, 1927, 22 F.2d 518, where the Court, speaking of the predecessor statute, observed as follows:

* * * The law provides for a summary forfeiture and sale by the collector when the appraised value of the property is less than \$1,000, but any person claiming the property may stay all further proceedings before the collector by filing a claim and executing a bond as provided by the statute. When this is done, the authority of the collector is at an end, and the whole matter is automatically transferred to a court of law, where all the parties in interest are given their day in court and a full opportunity to be heard.

This remedy would seem to be full, complete, and adequate. True, the claimant is not given a right of action in his own name; but this in nowise detracts from the adequacy of the legal remedy. He is given the right to compel the government to institute proceedings in which his rights may be fully heard and determined, and it is entirely immaterial whether he appears in court as a plaintiff in an action of law, or as a claimant in a proceeding at law to declare a forfeiture. The very object of the statute would seem to be to give parties claiming the seized property a right to have their claims determined in a court of law, instead of compelling them to resort to some other proceeding, or to invoke some other remedy.
P. 519-20

For the reasons stated the forfeiture proceeding commenced by Internal Revenue under 26 U.S.C. §7325, as amended, must be deemed plaintiff's exclusive remedy and this action should be dismissed.^{5/}

5/ Extensive discussion of the alternative motion to stay Further proceedings is not required. Since the issue of forfeitability must be decided by the Northern District of Texas, 26 U.S.C. §7323, plaintiff's claims of title and right to possession cannot be adjudicated until the former issue is resolved. Moreover, under United States v. Stowell, 133 U.S. 1, 16, the right to the firearms was vested in the United States.

Respectfully submitted,

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Attorneys for Defendant

DECLERED
OCT 4 - 1966
U. S. ATTY - DENVER, COLO.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JOHN J. KING,

Plaintiff,

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the
United States,

Defendant.

X
X
X
X
X
X
X
X
X
X

Civil Action No. 9168

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS OR TO STAY

This action is brought by Plaintiff, as the owner of certain weapons, to obtain their return from the Attorney General of the United States. Quite some time ago the weapons in question were held by the President's Commission on the Assassination of President Kennedy for use as evidence in its proceedings. The proceedings of that Commission were concluded in 1964, and the President's Commission, instead of itself returning the property used in evidence to the lawful owners, delivered such property to the Attorney General.

After efforts to obtain action from the Department of Justice (see Exhibits 1 and 2 hereto), Plaintiff filed this action on May 24, 1965, and necessary service was had promptly upon filing. This Court obtained jurisdiction of the controversy at that time both under the diversity provisions and also by reason of 28 U.S.C., § 1361.

After the filing of this action, the Attorney General, stating that he needed to obtain a "valid basis" for retention of the property in question, submitted to the Speaker of the House of Representatives a bill which, if passed and constitutional, would give him the right to condemn this property in the event that the Attorney General should elect to make such condemnation. (See Attorney General's letter to the Speaker dated June 17, 1965, included in the House Report submitted by Defendant.)

On July 22, 1965, the Defendant obtained a 30-day extension of his time within which to answer or otherwise plead, upon an argument based on the pendency of the condemnation bill. That bill, if passed, would provide venue for action under it in this Court but not in the Dallas Court.

On August 16, 1965, the Attorney General, without application to this Court and without the owner's approval, consent, or knowledge, transported the weapons involved here from Washington, D. C. to Dallas, Texas.

On August 16, 1965, the United States commenced an administrative forfeiture proceeding, purportedly under the terms of 26 U.S.C., § 7325. On September 3, 1965, this claimed administrative forfeiture proceeding was terminated upon Plaintiff's filing the claim and bond under 26 U.S.C., § 7325(3).

As the papers filed in support of this Motion show, no party other than the Plaintiff claimed the weapons in the administrative proceeding brought in Dallas which has now been terminated.

On August 24, 1965, Defendant obtained a second 30-day extension of his time to plead upon the basis of the Dallas administrative proceedings, which were terminated the next week.

On September 10, 1965, Defendant obtained from The Honorable Joe E. Estes, United States District Judge for the Northern District of Texas, an order granting leave to file a libel concerning the weapons which are the subject of this suit. Such leave was obtained upon a request and proposed libel of information which in no manner revealed to the Dallas Court the pendency of the subject action in the District of Colorado or that the Plaintiff's property had been transported to Dallas for the purpose of commencing the action without leave of this Court and without Plaintiff's knowledge or consent.

Defendant does not submit any papers indicating that seizure or attachment of the weapons involved in the controversy has been made in Texas, nor is there any such claim made in Defendant's Memorandum. Indeed, Defendant's Memorandum states that the weapons in question are in the custody and control of the Supervisor in Charge, Alcohol and Tobacco Tax Unit, Internal Revenue Service.^{1/}

^{1/}Plaintiff's attorneys have been informed both by said Supervisor and by the Marshal of the United States District Court for the Northern District of Texas that such weapons are not in the custody and control of the Supervisor but are in the custody, control, and possession of the Department of Justice through its Federal Bureau of Investigation. Whatever the truth of this hide-and-seek game, Defendant's Memorandum concedes that the weapons are not in the custody of the Marshal for the Texas Court.

On or about September 21, 1965, Defendant served its presently pending Motion to Dismiss Plaintiff's Complaint or Stay Further Proceedings upon the basis that Defendant had through his actions and his Dallas filings destroyed this Court's jurisdiction.

Summary of Argument

A. Defendant in no way contends that this Court did not have complete jurisdiction over the matter in controversy on the filing of this action and the service of process herein.

B. Defendant's entire contention as to want of jurisdiction in this Court is based on a subsequent administrative action. Since that administrative action has been terminated without any adverse effect on Plaintiff's ownership, it can furnish no reason for a dismissal or stay of this action.

C. Since this legal action is the prior pending action concerning the controversy which is involved both here and in the purported Dallas action, it is well-established that the Court should retain jurisdiction.

D. This Court can fully adjudicate the controversy between the parties, whereas the Dallas Court could not even if it had jurisdiction of the res. Accordingly, this action should proceed even if the determination of forum were a discretionary matter.

Handwritten notes:
did not acquire jurisdiction over res. Plaintiff could have done so.
Administrative action is not a part of this action.
It would not have terminated Plaintiff's ownership.
Plaintiff's ownership is not affected by the Dallas action.
The Court should retain jurisdiction.
The Dallas Court could not even if it had jurisdiction of the res.
Accordingly, this action should proceed even if the determination of forum were a discretionary matter.

not

E. In any event, the Dallas Court has no jurisdiction since no valid seizure of the weapons has been made under process of the Dallas Court, and Plaintiff has not been served in Texas.

*① A. Good counter
② I. In rem jurisdiction
③ not subject to
obstacles from*

F. The Dallas Court can obtain no valid jurisdiction, even by some seizure hereafter made, under the well-established principle that transportation of property to a jurisdiction by a converter is ineffective to give in rem jurisdiction.

Argument

A. This Action Is Brought in the Court of Proper Venue Having Complete Jurisdiction over the Controversy.

Defendant does not dispute that this Court had full and complete jurisdiction when the action was filed and service obtained. Jurisdiction is founded upon 28 U.S.C., § 1346, and 28 U.S.C., § 1361:

"§ 1346. UNITED STATES AS DEFENDANT

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

.....

"(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

.....

"(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section."

"§ 1361. ACTION TO COMPEL AN OFFICER OF THE UNITED STATES TO PERFORM HIS DUTY.

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Added Pub. L. 87-748, § 1(a), Oct. 5, 1962, 76 Stat. 744."

The venue in this district is provided by 28 U.S.C.,

§ 1391:

"§ 1391. VENUE GENERALLY

* * * * *

"(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

The only question presented in this Motion is therefore the startlingly novel one raised by Defendant's contention that he has somehow by his own acts destroyed this Court's jurisdiction.

B. A Subsequently Commenced Administrative Proceeding Involving the Same Controversy, Which Has Already Been Terminated, Can Furnish No Grounds for Dismissal or Stay of This Action.

So far as his Memorandum shows, the Defendant's Motions are based entirely upon the administrative forfeiture provisions of 26 U.S.C., § 7325. That section provides a summary procedure

under which the Secretary of the Treasury may administratively clear title to property of small value where no one steps forward to claim that property. Section 7325(3) provides as follows:

"(3) Execution of bond by claimant.--Any person claiming the goods, wares, or merchandise so seized, within the time specified in the notice, may file with the Secretary or his delegate a claim, stating his interest in the articles seized, and may execute a bond to the United States in the penal sum of \$250, conditioned that, in case of condemnation of the articles so seized, the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation; and upon the delivery of such bond to the Secretary or his delegate, he shall transmit the same, with the duplicate list or description of the goods seized, to the United States district attorney for the district, and such attorney shall proceed thereon in the ordinary manner prescribed by law."

When the bond and claim are filed pursuant to the above provision, the authority of the Treasury Department is at an end and the controversy must be determined in a court of law. Thompson v. Schwaebe, 22 F. 2d 518 (9th Cir., 1927); Milkint v. Morganthau, 92 F. 2d 267 (4th Cir., 1937).

Even aside from the termination of the summary administrative proceeding, the fact that the administrative proceedings were subsequent to the institution of this action is alone sufficient to dispose of these Motions under the principle that the jurisdiction of the court having the first complaint upon the controversy should determine it. Authorities supporting this point are set forth in the following portion of this Argument.

C. The Denver Action Being the Prior Action in Point of Time, It Is Well-Established That the Controversy Should Be Resolved Here.

As stated by Learned Hand in Emil v. Hanley, 130 F. 2d 369 (2nd Cir., 1942), aff'd. 318 U. S. 515:

" . . . Priority between courts in point of jurisdiction depends, not upon the day when the property comes into their possession but upon that of the commencement of the first suit in which possession can be taken." (p. 370)

This principle of priority between courts of concurrent jurisdiction has been long and consistently applied. Smith v. McIver. 9 Wheat. 532, 22 U. S. 532 (1824); Cresta Blanca Wine Co. v. Eastern Wine Corp., 143 F. 2d 1014 (2nd Cir., 1944); Triangle Conduit & Cable Co. v. National Electric Products Corp., 125 F. 2d 1008 (3rd Cir., 1942), cert. denied 316 U. S. 676; Crosley Corp. v. Hazeltine Corp., 122 F. 2d 926 (3rd Cir., 1941), cert. denied 315 U. S. 813; In re Georgia Power Co., 89 F. 2d 218 (5th Cir., 1937), cert. denied 302 U. S. 692.

The authorities on this point very clearly hold that it is the subsequent Dallas action which must be dismissed or stayed, not the action in this Court. Upon proper application it is clear that this Court should enjoin the Defendant from prosecuting the Dallas action and even that the failure to issue such an injunction would be an abuse of discretion. Cresta Blanca v. Eastern Wine Corp., supra; Triangle Conduit & Cable Co. v. National Products Corp., supra; Crosley Corp. v. Hazeltine Corp., supra.

As stated in the Triangle Conduit case,

"In the Crosley case we held that a United States district court which first obtained jurisdiction of the parties and issues had the power to enjoin the further prosecution of proceedings involving the same parties and issues begun thereafter in another United States district court. We further held that under the circumstances of that case it was the duty of the court first obtaining jurisdiction to enjoin the prosecution of the subsequent proceedings in the other court. As we have seen, in the present case the district court in Delaware first obtained jurisdiction of Triangle and National and of the controversy between them. Having taken jurisdiction of the declaratory suit brought by Triangle it became the duty of that court to adjudicate the controversy. The rule which we announced in the Crosley case required it to restrain the parties from seeking to have the district court in Michigan duplicate that adjudication." (125 F. 2d 1008, at 1009)

In the Cresta Blanca case the appellate court held it was reversible error for the trial court not to enjoin the second action involving the same controversy, alluding to the waste of money and effort involved in having two actions pending, in the following language:

"It is a sensible doctrine, in accord with equitable principles and conducive to justice between the parties and to economy of judicial time and energy." (143 F. 2d 1012, at 1014)

There can be no question but that the same controversy is involved in both of these actions. In the Denver action, the Plaintiff seeks return of his property, whereas in the Dallas action, the Defendant claims the United States has obtained title to the property by virtue of a forfeiture claimed to have taken place upon Oswald's purchase of the weapons. The Attorney General's contention that the United States has title to the property involved may be pleaded as a defense in this action.

Even if the Government's claim to forfeiture should be considered in the nature of an affirmative claim or demand on

the part of the United States, 28 U.S.C., § 1346, conferring jurisdiction of this action, provides in part as follows:

"(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section."

Moreover, 28 U.S.C., § 1355, confers upon district courts generally jurisdiction over any forfeiture action, providing:

"§ 1355. FINE, PENALTY OR FORFEITURE

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress."

The fact that Plaintiff here filed a claim in the now terminated administrative proceeding in no way affects the priority of this Court's proceeding. In Brooks Transportation Co. v. McCutcheon, 154 F. 2d 841 (App. D. C., 1946), the court held that the controversy should be determined in the district court where the action was first instituted, even though the plaintiff in the prior action had counterclaimed in an action subsequently filed by the adverse party in another district involving the same facts. The court there stated:

"The fact that plaintiff below was afterwards sued in the same cause of action in the court in Maryland, and in the protection of his interest felt it necessary to appear in that court, was not an abandonment by him of his suit then pending in the District of Columbia. When the trial in Maryland came to naught his right to insist upon trial in the District Court in Washington was unaffected by anything that had occurred there." (at p. 842)

Likewise, the fact that the action subsequently filed in the Dallas Court is an in rem action brought in the form of an admiralty suit does not affect the result. Eastport Steamship Co. v. U. S., 1930 F. Supp. 333 (Ct. Cl., 1955); Eastport Steamship Corp. v. U. S., 140 F. Supp. 743 (Ct. Cl. 1956).

D. This Court Can Fully Adjudicate the Controversy Between the Parties, Whereas the Dallas Court Cannot.

It will be noted that the Defendant claims that the Dallas action will be dispositive of this matter if the United States is successful in that action. The Attorney General does not in any way concede that the Dallas action will be dispositive if Mr. King prevails in the Dallas action. In other words, Mr. King's success in the Dallas action would leave the Attorney General free to assert whatever other claims to title he might be able to either "dream up" or obtain by Congressional action.

On the other hand, this action, in which Plaintiff demands his property, puts in issue all defenses which the Attorney General may have and therefore will fully dispose of the matter.

In addition, it will be noted that the bill pending in Congress to grant the Attorney General power to condemn the property involved here will, if enacted into law and if constitutional, permit Mr. King to sue for his damages here but not in Dallas. Up until very recently, the Attorney General had been obtaining delay from this Court upon the contention that the possible condemnation matter could be brought into this action.

It therefore is clear that even if the selection of forum were addressed to the Court's discretion, that discretion should be exercised to select the forum where complete relief may be granted.

E. The Dallas Court Has No Jurisdiction Since No Seizure of the Weapons Has Been Made There.

The Attorney General is asking this Court to relinquish its prior jurisdiction without even submitting to the jurisdiction of the District Court in Dallas. Certainly, this Court should not relinquish its jurisdiction under these circumstances, even disregarding the priority here.

Defendant's Memorandum states:

"Both the rifle and the revolver, therefore, together with their appurtenances, are presently in Dallas, Texas, in the custody and control of the Supervisor in Charge, Alcohol and Tobacco Tax, Internal Revenue Service." (p. 2 of Defendant's Memorandum)

The Texas Court, of course, has no jurisdiction over Mr. King, who is not present for service there. The only manner in which jurisdiction could be obtained in Dallas would be by a seizure of the property, bringing it under the custody, control, and possession of the Texas Court.

Rule 10 of the Admiralty Rules applicable to an in rem libel such as that filed in Dallas provides as follows:

RULE 10. Process in suits in rem

"In all cases of seizure, and in other suits and proceedings in rem, the process, if issued and unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct." [Emphasis added]

Under this rule, the Dallas Court has not obtained jurisdiction to proceed to a decree in rem in admiralty, the res not being in its possession. The law on this subject is adequately set forth in Yokohama Specie Bank v. Chenting T. Wang, 113 F. 2d 329 (9th Cir., 1940), cert. denied 311 U. S. 690.

"To obtain jurisdiction to proceed to a decree in rem in admiralty, it is essential that the res come into the possession of the court by seizure under adequate warrant of arrest. Criscuolo v. Atlas Imperial Diesel Engine Co., 9 Cir., 84 F. 2d 273.

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"According to the weight of authority, the term arrest, as used in admiralty, imports an actual seizure of the property. Taylor v. Carryl, 20 How. 583, 15 L.Ed. 1028; The Rio Grande, 23 Wall. 458, 23 L. Ed. 158; Bruce v. Murray, 9 Cir., 123 F. 366; Brennan v. Steam Tug Anna P. Dorr, D.C. Pa., 1880, 4 F. 459; The Merrimac, D.C. Fla., 1917, 242 F. 572.

"A good discussion of the subject is contained in Pelham v. Rose, 1870, 9 Wall. 103, 106, 19 L.Ed. 602. Although the case involved a purported seizure of a promissory note under an act relating to the confiscation of property of persons engaged in rebellion against the United States, the act provided that the proceedings thereunder should conform as nearly as possible to proceedings in admiralty or revenue cases. In holding that there had been no valid seizure of the note, Mr. Justice Field, speaking for the court, said that 'the seizure of the property * * * is made the foundation of the subsequent proceedings. It is essential to give jurisdiction to the court to decree a forfeiture. Now, by the seizure of a thing is meant the taking of a thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized. As applied to subjects [objects] capable of manual delivery, the term means caption; the physical taking into custody. * * * To effect its seizure, as required by the Act it was, therefore, necessary for the Marshal to take the note into his actual custody and control. And such was the purport of the command of the writ of monition. * * * The term arrest is the technical term used in admiralty process to indicate an actual seizure of property.'"