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BULLETIN

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MONTHLY TOTALS

Figures for the first ten months of fiscal 1964 show increases in both filings and terminations over the same period of the previous year, with the number of terminations still trailing the number of filings. As a result, the caseload increased by almost 1,000 cases. The last two months of a fiscal year, however, usually show accelerated activity in terminations, and it is hoped that this year will be no exception to the rule. Set out below is a comparison of cumulative totals for the first ten months of fiscal 1963 and 1964.

	First 10 Months Fiscal Year 1963	First 10 Months Fiscal Year 1964	Increase or Decrease Number	Increase or Decrease %
Filed				
Criminal	27,952	28,013	+ 61	+ .22
Civil	22,230	23,585	+ 1,355	+ 6.10
Total	50,182	51,598	+ 1,416	+ 2.82
Terminated				
Criminal	26,733	26,762	+ 29	+ .11
Civil	21,094	22,089	+ 995	+ 4.72
Total	47,827	48,851	+ 1,024	+ 2.14
Pending				
Criminal	10,419	11,055	+ 636	+ 6.10
Civil	23,479	23,755	+ 276	+ 1.18
Total	33,898	34,810	+ 912	+ 2.69

Criminal cases filed reached the second highest total for the fiscal year, and more civil cases were filed in April than in any of the previous nine months of the year. Criminal cases terminated during the month decreased slightly from the previous month, but terminations of civil cases reached a new high for the year.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,252	2,456	4,708	2,305	2,129	4,434
Aug.	2,245	2,228	4,473	1,771	1,852	3,623
Sept.	3,365	2,267	5,632	2,584	1,920	4,504
Oct.	3,298	2,440	5,738	3,164	2,465	5,629
Nov.	2,794	1,789	4,583	3,020	1,806	4,826
Dec.	2,252	2,214	4,466	2,554	2,039	4,593
Jan.	2,855	2,496	5,351	2,853	2,461	5,314
Feb.	3,015	2,195	5,210	2,486	2,422	4,908
March	2,924	2,589	5,513	3,059	2,472	5,531
April	3,013	2,911	5,924	2,966	2,523	5,489

For the month of April, 1964 United States Attorneys reported collections of $3,091,465. This brings the total for the first ten months of fiscal year 1964 to $47,038,071. Compared with the first ten months of the previous fiscal year this is an increase of $12,953,291, or 38.00 per cent over the $34,084,780 collected during that period.

During April $4,274,646 was saved in 113 suits in which the government as defendant was sued for $4,817,962. 60 of them involving $2,431,998 were closed by compromises amounting to $259,378. The remaining 28 suits involving $1,314,394 were won by the government. The total saved for the first ten months of the current fiscal year aggregated $63,636,322 and is an increase of $17,413,403, or 37.67 per cent over the $46,222,919 saved in the first ten months of fiscal year 1963.

The cost of operating United States Attorneys' offices for the first ten months of fiscal year 1964 amounted to $14,425,448 as compared to $13,520,434 for the first ten months of the previous fiscal year. The rate of increase dropped during March, and if projected to the end of the year will show a total increase of a little over $1,000,000.

DISTRICTS IN CURRENT STATUS

As of April 30, 1964, the number of districts meeting the standards of currency in civil cases and matters was higher than in the preceding month but in criminal cases and matters the number of districts current dropped considerably. In criminal cases, 71 districts, or 77.1% were current; in civil cases, 80 or 86.9%; in criminal matters, 56 or 60.8%; and in civil matters, 78 districts, or 84.7% were current.

CASES

Criminal

Ala., N.	Conn.	Hawaii	Iowa, S.	Mich., W.
Ala., S.	Del.	Idaho	Kan.	Miss., N.
Ariz.	Dist.of Col.	Ill., N.	Ky., W.	Mo., E.
Ark., E.	Fla., N.	Ill., E.	La., E.	Mo., W.
Ark., W.	Fla., S.	Ind., N.	La., W.	Mont.
Calif., S.	Ga., M.	Ind., S.	Maine	Nev.
Colo.	Ga., S.	Iowa, N.	Mich., E.	N. H.

CASES (Cont.)

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Ga., S.	Me.	N.D.	Tex., N.
Ala., S.	Hawaii	Md.	Ohio, N.	Tex., S.
Ariz.	Idaho	Miss., N.	Ohio, S.	Tex., W.
Ark., E.	Ill., E.	Miss., S.	Okla., N.	Utah
Ark., W.	Ill., S.	Mont.	Okla., E.	Vt.
Calif., S.	Ind., N.	Neb.	Okla., W.	Va., W.
Colo.	Ind., S.	N. H.	Pa., E.	Wash., E.
Dist.of Col.	Kan.	N. J.	Pa., M.	W. Va., N.
Fla., N.	Ky., E.	N. C., E.	Pa., W.	W. Va., S.
Ga., N.	Ky., W.	N. C., M.	S. C., E.	Wyo.
Ga., M.	La., W.	N. C., W.	Tenn., W.	C. Z.
				Guam

MATTERS

Civil

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

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Newspaper Charged With Violating Section 2 of Sherman Act and Section 7 of Clayton Act. United States v. The E. W. Scripps Company (S.D. Ohio). D.J. File No. 60-127-76. On May 27, 1964, a civil suit was filed in Cincinnati charging the E. W. Scripps Company - parent of the Scripps Howard newspapers, United Press International, etc. - with monopolization of the daily newspaper business in Cincinnati.

Prior to 1956 three daily newspapers served the Cincinnati area. These were the Cincinnati Post, published by Scripps, the Cincinnati Enquirer and the Cincinnati Times-Star. Scripps had no interest in either the Enquirer or the Times-Star. The complaint charges that Scripps' 1956 acquisition of a controllingstock interest in the Enquirer and its 1958 acquisition of the Times-Star gave it a monopoly position in violation of Section 2 of the Sherman Act. The complaint also charges that the 1956 stock acquisition was made in violation of Section 7 of the Clayton Act and that Scripps' control of the Enquirer constitutes a combination illegal under Section 1 of the Sherman Act.

Staff: Charles D. Mahaffie, Jr. (Antitrust Division)

Jury Finds Defendant Guilty and Imposes Fines on Three Defendants For Violation of Section 1 and 2 of Sherman Act and Section 302(a) of Taft-Hartley Act. United States v. M. Klahr, Inc., et al. (S.D. N.Y.). D.J. File No. 60-132-12. On April 27, 1964, before Honorable Harold R. Tyler, Jr., M. Klahr, Inc., changed its plea to guilty of all twelve counts of the indictment alleging conspiracies to restrain trade and monopolize commerce in violation of Sections 1 and 2 of the Sherman Act and to pay money to a union representative of their employees in violation of 18 U.S.C. 371, as well as nine actual payments to said representative in violation of Section 302(a) of the Taft-Hartley Act (29 U.S.C. 186(a)). The defendants Jerome Klahr and Solomon Klahr, officers of and stockholders in M. Klahr, Inc., changed their pleas to nolo contendere, which pleas were accepted by the Court after a warning as to the nature and effect of such a plea.

Defendants were charged with combining to fix prices, allocate customers, rig bids and submit covering "booster bids" for one another with respect to the manufacture, sale and installation of venetian blinds in newly constructed office buildings and apartment houses in the tri-state area of New York, New Jersey and Connecticut. The allocation was affected by the creation of a sham credit association and the assignment of artificial credit ratings from "1" through "5" which actually corresponded to the respective alphabetical position of each of the five members of the combination: (1) Avalon Venetian Blind; (2) M. Klahr, Inc.; (3) E. Rathe & Sons; (4) Sterling Venetian Blind Co., Inc.; and (5) Unity Venetian Blind Corp.

In order to guarantee their allocation and to perfect their intended monopolization of the market, the conspirators enlisted the service of John E. Pessolano, president and business agent of Local 2710 of the United Brotherhood of Carpenters and Joiners of America. The U.B.C.J.A. is the largest construction union in the nation and its imprimatur is essential to access to the multitude of construction sites in the tri-state area, a power which has been enhanced by the building boom which is now being experienced by this section of the country. In return for his services, in support of the combination's efforts in foreclosing actual and prospective competition, Pessolano received the sum of $10,000 in monthly or bi-monthly payments approximately $835 or $1670 each.

On May 7 trial was commenced against Pessolano and on May 21, after 11 days of what Judge Tyler described as "the best tried criminal case I have yet seen in my 20 months as a nisi prius judge", the jury found Pessolano guilty, after deliberating for six hours, of all ten counts with which he was charged, to wit: violations of Sections 1 and 2 of the Sherman Act and nine illegal receipts of money in violation of Section 302(b) of the Taft-Hartley Act (29 U.S.C. 186(b)). Judge Tyler granted Pessolano's motion to dismiss after verdict solely with respect to the ninth illegal receipt count.

This prosecution was unique in a number of respects. First of all, both sides of the illegal payment transaction were prosecuted. Secondly, it was the first prosecution wherein both antitrust and Taft-Hartley accusations were joined. Another unusual element was the receipt into evidence of a tape recording of one of the conspiratorial meetings which was produced by one of the conspirators who had concealed a minifon beneath his shirt while attending said meeting.

The Court on May 28, 1964, imposed fines in the total amount of $36,000 on the Corporation and two individuals on all counts. The two individuals were given suspended jail sentences and placed on probation for 1 and 2 years, in addition to the fines. Sentence will be imposed on defendant Pessolano June 18.

Staff: John J. Galgay, Richard L. Shanley, James J. Farrell and Lionel E. Bolin (Antitrust Division)

Supreme Court Finds Merger of Aluminum Company of America With Rome Cable Corporation Violates Section 7 of Clayton Act. U.S. v. Aluminum Company of America and Rome Cable Corporation (Supreme Court No. 204). D.J. File No. 60-0-37-256. On June 1, 1964, the Supreme Court, by a 6 - 3 vote, reversed the decision of the district court which had, after trial, dismissed the complaint of this case. The complaint charged that Alcoa's 1959 acquisition of Rome was unlawful under Section 7 of the Clayton Act. In upholding the Government's position, the Supreme Court remanded for divestiture.

Writing for the majority, Mr. Justice Douglas first found sufficient distinctions between aluminum and copper as conductors of electricity to justify a finding of separate aluminum conductor lines of commerce. He held that both aluminum conductor, the broad aluminum line, and insulated aluminum conductor, the narrow line included within the broad line, were separate lines of commerce. Within these lines the majority found an anti-competitive impact in the horizontal elimination of Rome's competition, despite the relatively small market shares of the acquired company. Rome's shares were 1.3% in the broad line and 4.7% in the narrow; Alcoa's corresponding shares were 27.8% and 11.6%. The elimination of even 1.3% was found violative of law where "* * * the line of commerce showed highly concentrated markets, dominated by a few companies but served also by a small, though diminishing, group of independents."

The dissent, written by Mr. Justice Stewart and joined by Justices Harlan and Goldberg, goes entirely to the line of commerce question, arguing that the Government failed in its burden of proof that aluminum and copper conductors are properly separable as lines of commerce.

Staff: Robert B. Hummel, Donald F. Melchior, Elliott Moyer, Charles D. Mahaffie, Jr., Richard J. Wertheimer and Leo V. Finn (Antitrust Division)

Protective Orders Entered in Government Antitrust Case Vacated For Use in Private Treble Damage Suit. Olympic Refining v. Judge James Carter (C.A. 9 - No. 19,011). D.J. File No. 60-57-35. This proceeding was brought by Olympic Refining Co., plaintiff in a private treble damage action [Olympic Refining v. Standard Oil of California, et al.] to vacate three protective orders which had been entered in a Government antitrust suit [United States v. Standard Oil of California, et al., Blue Book No. 1024], so that Olympic could gain access to the protected documents.

Originally, Olympic attempted to gain access to the documents in question by requesting them in a subpoena duces tecum attached to a notice of deposition which Olympic had served upon Stanley Disney, the antitrust attorney who was involved in the Government's Standard Oil case.

The documents which Disney was requested to produce were described as follows:

(1) Plaintiff's (Government's) answers, amended answers, and supplemental answers to defendants' interrogatories and all documents and papers related thereto.

(2) Documents designated "Description of documentary Materials and Oral Testimony, Lists of Witnesses and Statements of Witnesses" and all amendments and supplements thereto.

(3) Outline of Plaintiff's Contentions filed January 10, 1957.

Faced with the subpoena issued to Disney, the Government with Olympic intervening in support, filed a motion in its Standard Oil case to vacate the protective order and release the pertinent documents. The motion was opposed by all of the defendants in the Government's Standard Oil case.

The district court denied the Government's motion to vacate and at the same time quashed the subpoena directed to Disney. Olympic then moved the Ninth Circuit for an order requiring the district judge to vacate the protective orders, or in the alternative to vacate its order quashing the subpoena directed to Disney. On appeal to the Ninth Circuit, the Government intervened in the side of Olympic, and all defendants in both the Olympic case and the Government's Standard Oil case intervened in opposition to Olympic.

At the outset of its decision, the Ninth Circuit held that it had jurisdiction to review the district court's order since the order was of an ancillary character and thus was not governed by Section 2 of the Expediting Act, which permits appeals only to the Supreme Court. Cf. United States v. FMC Corp., 321 F. 2d 534, approved by Mr. Justice Goldberg, 84 S. Ct. 4.

The Court then reversed the district court's order denying the Government's motion to vacate the protective orders entered in the Standard Oil case. It remanded the case to the district court to modify the protective orders so as to permit Olympic to have access to the documents in question subject, however, to a restriction to prevent unnecessary disclosure of any present trade secrets or presently sensitive competitive information.

The Circuit Court based its decision on two grounds: First, the basic policy in Government antitrust cases of ordinarily conducting trial and pretrail proceedings in public [citing in particular the Publicity in Taking Evidence Act, 37 Stat. 731 (1913), 15 U.S.C. 30 (1958)]; and second, the fact that from four to eight years had expired since the documents in question had been placed under protective order. The Court stated that it was immaterial that Olympic might possibly obtain the information contained in the protected documents by deposing the defendants in the Olympic case. Likewise regarded as immaterial by the Court were the facts that some of the documents and information to which Olympic would be given access: (a) may not have been admissible as evidence in the Government's Standard Oil case had that case gone to trial; and (b) may not be admissible as evidence in a trial of the Olympic case.

Staff: Robert B. Hummel and Michael I. Miller
(Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

AGRICULTURAL MARKETING AGREEMENT ACT--MILK ORDERS

District Court Has Discretion to Refuse to Issue Injunction Compelling Dairies to Comply With Milk Marketing Order Pending Dairy's Exhaustion of Administrative Remedies. United States v. Fred Brown, d/b/a/ Gem Dairy (C.A. 10, April 24, 1964). D.J. File No. 106-13-155. In this proceeding, brought pursuant to 7 U.S.C. 608a(6), a provision of the Agricultural Marketing Agreement Act of 1937, the Government sought to compel Gem Dairy to make certain payments required of milk companies regulated under a Federal Milk Marketing Order issued by the Secretary of Agriculture. The Act provides that the pendency of administrative proceedings challenging a Marketing Order shall not impede, hinder or delay the Secretary's right to have that Order enforced, 7 U.S.C. 608c(15). Nevertheless, in this case the district court declined to issue a preliminary injunction calling for the dairy's compliance pending the outcome of its administrative proceedings before the Secretary.

The Tenth Circuit affirmed the lower court's refusal to issue the preliminary injunction, and distinguished United States v. Ruzicka, 329 U.S. 287, upon which the Government had chiefly relied. The appellate court held that the language of section 8c(15) of the Act did not strip the district court of all its inherent equitable discretion to refuse to issue an injunction. In this case the Circuit Court ruled that the failure of the administrative agency to act promptly on the dairy's challenge, the Government's failure to seek enforcement diligently, the absence of any showing either of irreparable injury to the public or serious effect on the operation of the milk order, the failure of the Government to demonstrate that the dairy might be financially unable to pay later on, together with the presence of substantial questions of law, were factors sufficient to justify the lower court's exercise of its discretion to refuse to issue the injunction.

Staff: Sherman L. Cohn and Barbara Deutsch (Civil Division)

CIVIL SERVICE ACT

Judicial Review of Discharge of Officer-Intern From Internal Revenue Service Limited to Insuring Correct Procedures Followed. Laura A. McClellan v. R. L. Phinney (C.A. 5, May 13, 1964). D.J. File No. 145-3-567. Laura A. McClellan was removed from her position in the Internal Revenue Service as an officer-intern. She brought this suit in the district court attacking her removal as illegal and seeking reinstatement with back pay. That court found that the removal was "in accordance with the applicable law and regulations, and that all applicable procedural requirments were met" and therefore upheld the discharge.

The Fifth Circuit affirmed in a per curiam opinion, citing decisions of the District of Columbia Circuit which held the scope of judicial review of Civil Service discharges to be limited to consideration of the factors noted by the district court.

Staff: Alan S. Rosenthal and Lawrence Schneider
(Civil Division)

LIBEL--CONFLICT OF LAWS

In Action For Libel Brought in District Court for Southern District of New York But Based on Affidavit Filed in District of Columbia Lunacy Proceeding, Court Sitting Under Diversity Jurisdiction Must Apply New York State Conflict of Laws Rules: Held, New York Would Apply District of Columbia Law to Proceedings. King v. Hildebrandt (C.A. 2, May 1, 1964). D.J. File No. 145-16-77. King, a District of Columbia resident, brought suit for libel against a resident of New York. The alleged libel was contained in an affidavit made by defendant (with whom plaintiff was personally acquainted) in the District of Columbia to the effect that plaintiff was a person of "unsound mind." The affidavit was used as the basis for the arrest of plaintiff preliminary to a lunacy inquiry. The record also revealed that on the same day two physicians had certified that, in their opinion, plaintiff was suffering from paranoid schizophrenia.

King was taken into custody by the D.C. Mental Health Commission upon a writ issued by the District of Columbia District Court directing an inquest into her sanity and competency to manage her own affairs. A preliminary report by the Commission found her to be of unsound mind. However, before the District Court held a final hearing on the issue, the Commission reported that further examination revealed plaintiff had recovered sufficiently to be discharged. The District of Columbia Court thereupon dismissed the sanity proceedings. Plaintiff then filed this libel action against defendant in the Southern District of New York, invoking that Court's diversity jurisdiction.

The Second Circuit affirmed the dismissal of the complaint by the District Court for the Southern District of New York. The Circuit Court, noting that this was a diversity case, ruled that the conflict-of-laws rules of New York were applicable. It held that New York would apply the law of the District of Columbia in this situation, whether under the old concept of lex loci delicti or the newer "grouping of contacts" theory (Babcock v. Jackson, 12 N.Y. 2d 473, 240 N.Y.S. 2d 743).

The appellate court then ruled that, under District of Columbia law, statements in pleadings and affidavits made in the course of judicial proceedings are absolutely privileged if relevant to the issues involved. Since defendant's affidavit was required to start a lunacy proceeding in the District of Columbia, it was relevant. The Court further ruled that this absolute privilege attaches under District of Columbia law only if probable cause existed to make the affidavit. However, as the case was considered on undisputed facts, the Second Circuit held the existence of such probable cause to be a question of law. It found

that the record showed defendant to be a qualified psychologist, that she had several interviews with plaintiff, and that she had carefully consulted expert medical opinion before making the affidavit in question. The Second Circuit held "we are convinced that, had this question been presented to the courts of the District of Columbia, probable cause as a matter of law would have been found," and affirmed the dismissal of the suit.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorneys Arthur S. Olick and John F. X. Peloso (S.D. N.Y.)

FALSE CLAIMS ACT

Negotiation and Collection of Government Check With Knowledge That It Was Issued by Mistake Constitutes Violation of False Claims Act. Aaron Scolnick v. United States (C.A. 1, May 7, 1964). D.J. File No. 46-36-135. The prime contractor under a Government procurement contract was the Small Defense Plants Administration (SDPA) and the subcontractor was Production, Inc., whose president was Aaron Scolnick. By mistake of the procurement agency, Government checks in payment for certain shipments made by the subcontractor were issued and made payable to Production, Inc., instead of to the prime contractor. Scolnick deposited the checks in his corporation's bank account for collection, although he was aware that the Government checks were issued to Production, Inc., by mistake and that his firm was not entitled to the payment since it had been paid in advance for the shipments.

The district court awarded judgment to the Government of double damages plus forfeiture penalties under the False Claims Act, 31 U.S.C. 231. The First Circuit affirmed, holding that "the endorsement and deposit for collection of a government check known to be issued by mistake in payment of an obligation already, in fact, satisfied is the presentation of a false claim within the meaning of the False Claims Act, 31 U.S.C. § 231."

Staff: Sherman L. Cohn and Harvey L. Zuckman (Civil Division)

SOCIAL SECURITY ACT--USE OF JOB STUDIES

Fourth Circuit Considers Secretary's Use of Government Job Studies in Two Cases, Upholding One Decision and Reversing the Other. Sadie J. McDaniel v. Celebrezze (C.A. 4, April 13, 1964); Clistie Bell Thomas v. Celebrezze (C.A. 4, April 15, 1964). At the time of her application for disability benefits, Sadie J. McDaniel was 51 years old, had a sixth grade education, and had worked as a spinning machine operator, sheet metal worker and waitress. She claimed to be unable to work because of a heart condition and residual effects of a fractured hip. In denying benefits to claimant, the Secretary took administrative notice of various medical texts and governmental studies pertaining to employment opportunities, using the former to expand and explain certain medical reports and opinions and the latter to show the types of available work which a person in claimant's condition could pursue.

The district court upheld the Secretary's denial of benefits and the Court of Appeals affirmed. The Fourth Circuit held that the Secretary's taking of official notice was not grounds for reversal, (1) "where the requirements of the Administrative Procedure Act [5 U.S. 6.1006(d)] have been met" and claimant's counsel afforded an opportunity to challenge the publications used, and (2) where there was substantial evidence in the record as a whole (including the reports officially noted) to support the Secretary's decision.

In Thomas, the Secretary appealed from a district court order reversing his denial of disability benefits to claimant, a 50-year old woman with a second grade education. The Court of Appeals affirmed the lower court's decision. The Fourth Circuit concluded that, though the cancerous condition which caused claimant to leave her job had been removed, the residual effects of the surgery rendered her unable--contrary to the Secretary's finding--to engage in her former work as a weaver and battery filler, positions which required a degree of manual dexterity and stamina. The Court also rejected our argument that the record supported the Secretary's alternative finding that claimant could perform other work. The Court stated that to reach this conclusion the Secretary consulted the Dictionary of Occupational Studies. Citing Stancavage v. Celebrezze, 323 F. 2d 373 (C.A. 3), as authority, the Court held that this approach was unpersuasive in this case. The availability of the jobs mentioned by the Secretary, the Court stated, was at best speculative when considered in the light of the evidence in the record as a whole, including plaintiff's limited work history and severe impairments. The Court referred to McDaniel for the proposition that "reviewing courts must carefully evaluate this type of evidence [governmental studies] in determining whether there is substantial evidence" to support the Secretary's determination.

McDaniel v. Celebrezze
Staff: United States Attorney Joseph D. Tydings
and Assistant United States Attorney
Robert J. Carson (D. Md.)

Thomas v. Celebrezze
Lawrence R. Schneider (Civil Division)

SOCIAL SECURITY ACT--RIGHT TO COUNSEL

Disability Case Remanded to Secretary For Taking of Additional Evidence; Court Disturbed That Claimant Not Given Notice of Right to Counsel in Sufficient Time to Obtain Representation at Administrative Hearing. Vencil Prewitt v. Anthony J. Celebrezze (C.A. 6, April 6, 1964). D.J. File No. 137-30-101. As a result of an automobile accident, claimant suffered significant spine, back, and limb injuries. Although the Secretary conceded that claimant could no longer pursue his former trades (farming and carpentry) and that he is barely literate, the claim was denied on the ground that claimant had not proven inability to perform any substantial employment. The Sixth Circuit reversed the decision of the district court upholding the Secretary's determination. The appellate court was disturbed by the fact that the medical evidence in the record did not reveal the degree of disability suffered by claimant or the degree of limitation that his injury imposed on his physical activity.

Moreover, the Court was also troubled that claimant had not been advised of his right to counsel at his administrative hearing until that hearing was about to begin. Since claimant was then 50 miles away from his home, the Court concluded that "with his limited education and his limited financial needs it should not be expected that he would be able to procure legal representation at that time."

Finally, the Court noted that the Secretary had failed to find other types of work in which the claimant might still engage. The case was remanded to the Secretary for "an adequate development of medical testimony" and further findings of fact.

Staff: Bernard T. Moynahan, Jr., United States Attorney at the time the case was considered, and Assistant United States Attorney William A. Watson (E.D. Ky.)

SOCIAL SECURITY ACT--SCOPE OF REVIEW

Fifth Circuit Reiterates Narrow Scope of Review in Disability Cases. George M. Lemley v. Anthony J. Celebrezze (C.A. 5, April 28, 1964). D.J. File No. 137-1-211. Claimant, who had spent 37 years working in an iron ore mine performing various assignments which were mostly in the nature of manual labor, alleged disability as a result of bronchial asthma, silicosis, and heart trouble. The Secretary did not dispute that claimant was suffering from some degree of lung impairment. However, he ruled that the disability was not so severe as to preclude claimant from the performance of substantial gainful activity unconnected with ore mining.

The District Court for the Northern District of Alabama upheld the Secretary's decision. The Fifth Circuit, reiterating the narrow scope of judicial review applicable to disability cases, concurred in the District Court's holding that the administrative decision was supported by substantial evidence.

Staff: Edward Berlin (Civil Division)

SOCIAL SECURITY ACT

Seventh Circuit Adopts View That Where Record Evidences Claimant's Continued Physical Ability to Engage in Other Types of Suitable Work, He Is Not "Disabled" Merely Because He Has Been Unable to Get Employment. Robert E. Jones v. Celebrezze (C.A. 7, May 5, 1964). D.J. File No. 137-26S-74. Claimant, a fifty-two year old laborer with a sixth or eighth grade education, alleged that he was "disabled" within the meaning of the Act because of a leg and back condition. His left leg was shorter and smaller than his right one and he walked with a slight limp, all as a result of poliomelitis suffered in early childhood. Although he had only 50% of normal forward and lateral bending of the spine, and less than 50% backward bending, there was no evidence of any specific back injury. There was a conflict in the medical findings as to the existence of Paget's disease. Claimant's last worked as an iron pourer in a foundry, a job which concededly

he could no longer perform. However, he testified to a varied previous work experience, and admitted that he still performed odd jobs from which he earned somewhat less than $1,000 a year. He also admitted that he watched the papers for light work but had not found any employer who would hire him for such work. On this record, the Secretary denied benefits. The district court upset that determination, holding that claimant had demonstrated his inability to do the kind of work he had done previously, and that it was then the Secretary's burden to establish what other kinds of suitable substantial gainful employment were available.

The Court of Appeals reversed, stressing that the record "demonstrates plaintiff's continued ability to perform other types of work. His previous work experience and his demonstrated continued physical ability evidences his capacity to engage in substantial gainful employment in work at a similar educational level but which does not require heavy lifting or stooping. The Secretary did not have the burden of proving the availability of such employment opportunities." It was not enough, the Seventh Circuit held, for claimant simply to show that he was unable to secure employment.

Staff: Frederick B. Abramson (Civil Division)

WUNDERLICH ACT

Government Contractor Failed to Take Administrative Appeal from Decision of Contracting Officer Pursuant to Disputes Clause; Contracting Officer's Determination of Contractor's Liability Was Therefore Final and May Not Be Reexamined by District Court in Government's Later Action for Damages Against the Contractor. United States v. Hammer Contracting Corp. (C.A. 2, April 20, 1964). D.J. File No. 77-52-1498.

This was an action by the Government for breach of a contractual guarantee. The contractor in this case had installed a lawn at a Veterans Administration hospital and had guaranteed it for one year. Before the expiration of the guaranty period, the government contracting officer informed the contractor that large areas were bare and needed re-seeding. The contractor refused to re-seed, claiming that the original seeding was not defective and that the bare spots resulted from improper maintenance by the Veterans Administration. Thereupon the contracting officer informed the contractor that the necessary re-seeding would be done by someone else with the cost being charged to the original contractor. The contractor failed to take an administrative appeal from this decision as required by the standard disputes clause of the contract.

After having the re-seeding done, the Government brought this action against the contractor to recover the cost of the work. In the action we asserted that, because of his failure to appeal the contracting officer's decision, the contractor was foreclosed from contesting the question of whether he was required to do the corrective work under the guaranty clause. The district court rejected our argument on the ground that the contracting officer had failed to inform the contractor that a "final decision" as contemplated by the disputes clause was being made. Nevertheless, after hearing testimony of many witnesses for both

sides in a time-consuming trial de novo, the district court held for the Government, awarding judgment for the cost of having the re-seeding done.

On appeal, we asked the Court of Appeals to affirm on the ground rejected by the district court, i.e., that a trial de novo was improper and that the contractor was foreclosed from contesting liability under the guaranty clause because of his failure to prosecute an administrative appeal. The Second Circuit agreed with our contention and affirmed on this ground. The court's opinion expressly stated that "the district court should not have reviewed the question of liability."

The Second Circuit's decision will be helpful.

It recognizes the need for according finality to the contracting officer's determination not only where we rely on that determination in defending suits filed against the Government but also where, as here, we rely on it in the course of a suit filed in court by the Government against the private contractor for breach of contract. Of even greater importance, however, is the fact that the opinion should help in eliminating, in these cases arising under government contracts, expensive and time-consuming trials de novo before the district court.

Staff: Morton Hollander and John C. Eldridge
(Civil Division)

DISTRICT COURT

NATIONAL HOUSING ACT

Bank Assigned Promissory Note to United States and Warranted That It Was Enforceable Against the Maker; Where Bank Did Not Take Opportunity To Become Party to Government's Suit on Note Against Maker in Which Court Held Note Unenforceable, Bank May Not Relitigate Issue of Enforceability in Government's Subsequent Suit Against Bank for Breach of Warranty. United States v. University National Bank (N.D. Ill., April 14, 1964). D.J. File No. 130-23-2610.

Under Title I of the National Housing Act, 12 U.S.C. 1701, the Government insures payments of certain promissory notes. In this case, one Flores executed a promissory note to a builder, who negotiated that note to the University National Bank. The Bank in turn assigned the note to the United States, expressly warranting (as required by the regulations under the Act) "that the note qualifies for insurance." The United States then paid over the amount of the note to the Bank.

The Government sought to enforce the note against Flores, the maker, by suit in the District Court for the Northern District of Indiana. Following trial, judgment was issued for Flores. The district court found that the Bank was aware at the time it accepted the note of certain infirmities in the builder's right to enforce it. Accordingly, the court held that the Bank was not a holder in due course. Since the Government's title derived from one not a holder in

due course, the district court held that the Government could not enforce the note against the maker.

The Government then brought the instant suit against the Bank. We sought to recover on the Bank's warranty that the note qualified for insurance. To so qualify, the regulations provided that the note must be enforceable against the borrower. The Government moved for summary judgment, urging that the Indiana district court had held the note unenforceable against Flores (the borrower) and that this issue therefore could not be reconsidered in the present suit against the Bank.

The district court granted the Government's motion on the authority of Citizens National T. & S. Bank of Los Angeles v. United States, 270 F. 2d 128 (C.A. 9). The district court held that the issue of whether the Bank was a holder in due course was fully litigated in the Indiana suit, that the Bank's officers had testified in that suit, and that the Bank had ample opportunity to participate in the suit to protect its interests. Having failed to do so, the Bank was foreclosed from relitigating the issue. Since the Bank conceded making the warranty, and as the Indiana Court had held the note unenforceable against the borrower, the court entered summary judgment for the United States for the Bank's breach of its warranty.

Staff: United States Attorney Edwin V. Hanrahan
(N.D. Ill.)

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections; Civil Rights Acts of 1957 and 1960. United States v. Leonard C. Duke, Circuit Court Clerk and Registrar, Panola County, Mississippi; and State of Mississippi (N.D. Miss., May 22, 1964 (C.A. 5)). This suit was filed on October 16, 1961 (See Bulletin Vol. 9, p. 642). At that time there were 7,639 white persons and 7,250 Negroes of voting age in the county. At least 5,343 of the white persons were registered to vote but only one Negro, who had registered in 1892. The complaint alleged that defendants had engaged in a number of discriminatory acts and practices, including the application of different and more stringent standards to Negro applicants than to white applicants; the rejection of qualified applications by Negroes; the failure to afford Negro applicants equal opportunities to register; and the discouragement of Negroes from attempting to register. The trial court refused to issue an injunction. The Court of Appeals for the Fifth Circuit reversed. The Court found that there was ample evidence of discrimination, not only from the statistics, which "often tell much, and courts listen," but also in many other aspects of this case. It found that while white applicants, some of whom were illiterate, in many cases merely had to sign the registration book, many obstacles were placed in the way of Negroes, including delays in processing, refusals to wait on Negroes; giving them very difficult sections of the State constitution to interpret; failure to notify them as to whether they had passed or failed; and the like.

The Court of Appeals stated that effective relief was long overdue and that the only effective relief in this case was to apply the principle of freezing the registration standards that were in effect when a great majority of the white citizens were registered. The only alternative allowed to that "freeze" was a re-registration of all citizens, white and Negro. Accordingly, the Court directed that defendants be enjoined from conducting registration by any procedure on the basis of standards which differ in any way from those which had been used in determining the qualifications of white voters (even if it should appear that these standards violate the letter of Mississippi law).

The Court also required the registrar and his successors to file monthly reports with the clerk of the trial court with a copy to be mailed to plaintiff's counsel showing the names and dates of applications for registration during the previous monthly period and the race of the applicant, the action taken on the application, and, if the application is rejected, the specific reason or reasons for such rejection. The Court also required that the records be made available to attorneys or agents of the United States at all reasonable times. Ira Shankle, the new registrar, was substituted for Leonard C. Duke, the registrar at the time of this case.

Staff: United States Attorney H. M. Ray (N.D. Miss.); John Doar, Harold H. Greene, Gerald P. Choppin (Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

LOTTERY

New Hampshire's "Sweepstakes"; Prosecutive Policy. Numerous inquiries regarding possible conflict with federal law have been received since the start of ticket sales for New Hampshire's "Sweepstakes".

New Hampshire law now authorizes a sweepstake to be held on no more than two horse races a year run within New Hampshire. This year but one will be held. Tickets will be sold only at the race tracks and at state liquor stores to persons physically present. They are in theory non-transferable. Each customer is supposedly limited to the purchase of six three-dollar tickets at any one time. Tickets are sold on flight-insurance type vending machines. The original "ticket" remains in the machine, however, the purchaser obtaining only a "receipt" on which appears an acknowledgment of purchase, his written name, address and serial number. This "receipt" supposedly need not be presented by a winner to claim his prize. Finally, while it is not certain how the state will attempt to distribute out-of-state winnings, this may be done by (a) mailing the winner a check; (b) wiring him or his bank the funds; or (c) having him travel to New Hampshire for personal receipt.

In order to provide uniform prosecutive policy and assist you in replying to inquiries, the following statement of the Department of Justice's position has been drafted:

Since the "receipts" do not represent the purchaser's interest in the lottery, carring or shipping them interstate does not violate 18 U.S.C. 1301, as construed in such cases as United States v. Halseth, 342 U.S. 277 (1952); Francis v. United States, 188 U.S. 375 (1903); and France v. United States, 164 U.S. 676 (1897).

Carrying or shipping them interstate, however, does violate 18 U.S.C. 1953, because such receipts are within the proscribed "any record, . . . paper, writing, or other device used, . . . or adapted, devised, or designed for use in . . . (b) wagering pools with respect to a sporting event . . .". Moreover, mailing such "receipts" inter- or intrastate violates 18 U.S.C. 1302 (as amended to incorporate Section 1953).

Thus, there should be no particular difficulty in prosecuting anyone who travels to New Hampshire and brings back a quantity of "receipts" for resale, or who operates a "service"offering for a fee to go to New Hampshire, purchase the ticket and bring the "receipt" back to a customer in another state. The difficult problem is the case of the tourist who carries "receipts" interstate, either for himself or bought as a favor for friends. It is our position that interstate carriage of "receipts" is a violation of Section 1953 whatever the motive. It is recognized that prosecution of tourists will require the exercise of considerable discretion. While the "casual" violations cannot be condoned, it may be necessary to use such prosecutions primarily for the deterrent effect to be achieved.

The decision regarding prosecutions of persons carrying "receipts" interstate is a matter for the discretion of individual United States Attorneys. The following are relevant factors in the exercise of this discretion: (a) whether the "receipts" were for the carrier's own use, or if not, whether the service was gratuitous or remunerative; (b) number of "receipts" carried; (c) volume of "receipt" traffic; (d) organized crime connections; and (e) local ability or inclination to deal with the problem.

Brief mention may be made of possible violations due to use of communications media in promoting the Sweepstakes. 18 U.S.C. 1304 prohibits the broadcasting, "by means of any radio station" requiring a federal license, of "any advertisement of or information concerning any lottery . . . or any list of the prizes drawn or awarded" therein. This Section applies to the New Hampshire Sweepstakes, as do Sections 1301 and 1302, which prohibit the mailing (inter- or intrastate) or interstate shipments of newspapers, circulars, leaflets, etc., advertising the Sweepstakes, or containing lists "of the prizes drawn or awarded".

MISCONDUCT OF DEFENSE COUNSEL

Subornation of Perjury and Obstruction of Justice by Defense Counsel. United States v. Laughlin (D. D.C.); United States v. Echeles (N.D. Ill.). In two recent cases defense counsel have been convicted of subornation of perjury and obstruction of justice in connection with their representation of defendants in criminal prosecutions.

James J. Laughlin was convicted on April 29, 1964, in the District of Columbia, on one count of obstruction of justice and one count of conspiracy, relating to attempts to influence the testimony of an alleged abortion victim who had been the primary Government witness in a February, 1963, abortion trial of Laughlin's client. The defendant in the prior case, who had been acquitted of the abortion charges, was also convicted of conspiracy and obstruction of justice.

Julius Lucius Echeles was convicted on May 6, 1964, in the Northern District of Illinois, of subornation of perjury, obstruction of justice, and conspiracy, in connection with perjured testimony given during a May, 1963, narcotics trial in which Echeles represented the defendant, Arrington. Arrington, who had pleaded guilty to the narcotics charge, was convicted of perjury, subornation of perjury, obstruction of justice, and conspiracy.

Staff: United States Attorney David C. Acheson; Assistant United States Attorney Joseph A. Lowther (D. D.C.); United States Attorney Edward V. Hanrahan; Assistant United States Attorneys Raymond F. Zvetina and John P. Crowley (N.D. Ill.)

LIQUOR REVENUE

Proof Not Necessary to Show Defendants in Exclusive Possession of Refilled Liquor Bottles Nor Was It Necessary to Show Knowledge That Bottles Were Refilled. United States v. Theodore P. Wasik, et al. (W.D. Pa., April 16, 1964). D. J. File 23-64-818. Defendants, owners and operators of a bar, were charged with

possessing three liquor bottles in violation of Sections 5301(c)(2) and 5606 of the Excise Tax Technical Changes Act of 1958, 26 U.S.C. 5301(c)(2), 26 U.S.C. 5606, and fourteen liquor bottles in violation of 26 U.S.C. 5301(c)(4) and 26 U.S.C. 5606.

Defendants, on motion to dismiss charged the indictment was defective because it failed to allege that they were in exclusive possession of the bottles and that they had knowledge that their possession was, in fact, illegal.

The Court in denying defendants' motion stated, "The Act does not specifically require the illegally refilled or altered bottles to be in the exclusive possession of the person charged with the offense . . . It is within the contemplation of the statute that the acts which make defendants' possession illegal could have been performed by someone else. The offense with which they are charged is possessing the bottles after they were refilled or the contents altered . . . defendants' contention that the bottles were at times also in the possession of an employee is of no avail."

Defendants also contended that the indictment was defective in that it failed to allege that their possession was accompanied by knowledge that the bottles had been refilled and the contents altered. The Court in stating that, "The Act does not specifically provide, except as to officers, directors or agents of a corporation, that the violation be committed with knowledge" (26 U.S.C. 5606), reviewed the legislative history of the Act. In 1958 the Act was amended and the offense was reduced from a felony to a misdemeanor. Senate Report 2090 states: "Consistent with the reduction of the penalty from a felony to a misdemeanor the provision of existing law that the offense be wilful is omitted." 3 U.S. Code Congressional and Administrative News, p. 4581 (1958).

The Court goes on to state that by omitting the word "wilfully" and failing to incorporate the word "knowingly" it is clear that Congress did not intend to require a "mental element or process on the part of the violator to be proved before a conviction could be obtained for this offense."

In conclusion the Court cited Morissette v. United States, 342 U.S. 246 (1952), in distinguishing offenses carried over from the common law which incorporated "a mental element" without statutory authority, and offenses that are created by the legislature which do not include a "mental element." "While the Morissette case does not directly rule upon the question involved here, it leads to the conclusion that no element of knowledge need be proved to obtain a conviction under this Act."

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

COUNTERFEITING AND FORGERY

Attempt to Utter Treasury Check Bearing Forged Endorsement Not Violation of 18 U.S.C. 472 or 495. Roberts v. United States (C.A. 9, April 27, 1964). D. J. File 48-11-352. Defendant was convicted of knowingly attempting to pass, utter, and publish a United States Treasury Check bearing a forged endorsement

of the payee, with intent to defraud the United States, ostensibly in violation of 18 U.S.C. 472. On appeal from the denial of a motion under 28 U.S.C. 2255, the Court of Appeals for the Ninth Circuit held that a security bearing a forged endorsement is not a "falsely made, forged, counterfeited, or altered obligation or other security of the United States" within the meaning of Section 472, and, therefore, that an attempt to utter such a security does not violate that section. This result follows from Prussian v. United States, 282 U.S. 675 (1931), where the Supreme Court held that a security bearing a forged endorsement did not fall within the predecessor of Section 471, which prohibits the forging and counterfeiting of Government obligations and securities. The courts reasoned that the Treasury check is a complete obligation when issued to the payee, and that the endorsement is, in itself, neither a check nor a draft and is a purported obligation of the payee rather than of the United States.

The Court in the Prussian case held that the forging of the endorsement on the Treasury check did violate the predecessor of Section 495, in that it constituted a forging of an "other writing" for the purpose of obtaining money from the United States. Neither Section 495 nor any other section of Title 18 makes criminal attempts to utter forged instruments, and there is no general Federal criminal statute prohibiting attempts. Therefore, the Court in the instant case concluded that an attempt to utter a check bearing a forged endorsement is not a Federal crime.

In our opinion, the decision in the instant case is correct and follows that of the Court of Appeals for the Eighth Circuit in Webster v. United States, 59 F. 2d 583, 585-86 (1932), certiorari denied 287 U.S. 629. United States Attorneys should be careful to draw indictments relating to forged endorsements under Section 495 rather than Sections 471 or 472, and to refrain from indicting for attempts to commit the acts set forth in Section 495.

FRAUD

Violations of Securities Laws; Use of Mails to Clear Checks. Little v. United States (C.A. 8, May 6, 1964). Appellant was convicted on eight counts of an indictment charging violations of Section 17(a) of the Securities Act of 1933 (15 U.S.C. 77q(a)), and was given concurrent sentences. Each count of the indictment charged that appellant employed a scheme and artifice to defraud and caused a check to be delivered through interstate commerce, after deposit in Memphis, Tennessee, to the Federal Reserve Bank of St. Louis, Missouri.

Although appellant's bank in Memphis accepted the deposit subject to collection, he contended that the bank credited his account immediately and permitted withdrawals, hence the subsequent mailings to the Federal Reserve Bank of St. Louis could not have been caused by him within the meaning of Section 17(a).

The Court of Appeals in affirming the conviction stated that a scheme to defraud in relation to a sale of securities, and the use of the mails in consummation thereof, is the gist of the crime denounced by the Congress in Section 17(a), and the use of the mails need not be central to the scheme to defraud. "It is sufficient if the use of the mails is merely incidental to the

fraudulent conduct which the Congress intended to reach and punish by the provisions of the Securities Act of 1933."

The Court held that appellant knew and intended to have the checks cleared and charged against the victims' accounts in the usual course of business. "Under such a scheme the 'impact' of his fraud on such investors did not with finality occur until the checks he obtained from them, as a step in his unlawful scheme and artifice, reached the investor's bank and the sum of the check was charged against the duped investor's bank account. Then, and only then, did the impact of appellant's fraud fall upon those whom he intended to, and did, defraud."

Appellant also alleged error arising out of the fact that one of the jurors had a conversation with a Government witness. The matter had been brought to the attention of the district judge, who held a hearing and satisfied himself that the case had not been discussed. The Court of Appeals noted that there is a presumption that a private communication with a juror is prejudicial and the burden is upon the Government to prove that the communication was harmless to the defendant. The Court held, however, that the resolution of the question of prejudice must be left to the discretion of the trial court, and its decision will not be reversed unless clearly erroneous.

Staff: United States Attorney Richard D. FitzGibbon, Jr.; First Assistant United States Attorney Frederick H. Mayer (E.D. Mo.)

CREDIT CARD PROSECUTIONS

Attached to this issue of the Bulletin being sent to all United States Attorneys is a copy of a memorandum concerning "Credit Card Prosecutions."

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Denial of Visa Petition Reviewable Under 8 U.S.C. 1105a. Efthemios A. Skiftos v. INS (C.A. 7, No. 14442; May 26, 1964). Petitioner, an alien, sought review under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a, of the rejection by the Immigration and Naturalization Service of his petition for a first preference immigrant visa.

In 1961, in an administrative deportation hearing, petitioner was found deportable and granted leave to depart from the United States voluntarily in lieu of an order of deportation. He did not take an administrative appeal nor seek judicial review of the finding of deportability. Subsequently, a petition for the issuance to him of a first preference immigrant visa was filed by the St. Francis Hospital, Evanston, Illinois. The petition was returned by the Service with the information that it must be accompanied by a clearance order from the United States Employment Service, which order was not obtainable. After being ordered to leave the United States, this petition for review was filed.

Respondent questioned the jurisdiction of the Seventh Circuit to review under Section 106(a), supra, its failure to grant petitioner the requested visa because such Section provides, in specific terms, for review only of final orders of deportation. The Court noted that the same question had been presented in Roumeliotis v. Immigration and Naturalization Service, 304 F. 2d 453 (C.A. 7, 1962), and that it had held in that case that the Court had ancillary jurisdiction. The Court further noted that the ruling in Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963), involving the construction of Section 106(a), did not require the Court to modify its holding in Roumeliotis.

The Court then went on to consider the merits of the case and ruled that the Immigration and Naturalization Service had no choice but to follow the regulation 8 CFR 204.2 which requires the submission with first preference visa petitions of a clearance order from the United States Employment Service. The action of the Immigration and Naturalization Service was affirmed.

Staff: United States Attorney Edward V. Hanrahan,
Of Counsel: Assistant United States Attorneys
John Peter Lulinski and John Powers Crowley (N.D. Ill.)

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation; Interpretation of Complaint and Declaration of Taking; Federal Law Controls Such Interpretation; Interest of United States Is Relevant in Such Interpretation. United States v. Pinson (C.A. 5, May 11, 1964), D. J. File No. 33-11-366-611. The United States condemned lands for a reservoir project taking "the fee simple title, subject to existing easements for public roads and highways, public utilities, railroads and pipe lines." Georgia Power Co. owned flowage easements over the land. Compensation for the value of the land was determined by jury trial and stipulation and $5,000 was retained in court until the value, if any, of the flowage easements was determined. On motion for distribution by the fee owners, the district court held that Georgia Power's flowage easements were public utility easements and came within the exception of the complaint and declaration of taking. Consequently, it held the easements were not taken and compensation therefor could not be awarded in this proceeding. As a result, the $5,000 was disbursed to the fee owners.

The Fifth Circuit reversed on the Government's appeal, holding that federal law controlled and the intention of the United States was relevant in construing the exception. Since the condemnation was for a reservoir and in some instances only flowage easements were taken with the same exception language, "It would be patently absurd to hold that the Government, in taking by eminent domain a flowage easement, intended at the same time to preserve a prior flowage easement held by another on the same land." This intent, of course, carried through the entire taking whether of flowage easements or fee title. The Court found additional support for its interpretation in the use of the preposition "for" which indicated that the exception related only to easements necessary for the construction and maintenance of facilities rather than easements belonging to public utility companies. The Court also said that the fact that Georgia Power was named was pursuasive that the Government did not intend to except the flowage easements.

A motion to dismiss was filed on the grounds that the United States had no interest in a distribution order and its appeal was filed out of time. The motion to dismiss was denied.

Judge Gewin dissented.

Staff: Edmund B. Clark (Lands Division)

Mineral Leasing Act; Discretion to Lease. Pease v. Udall (C.A. 9, April 29, 1964), D. J. File No. 90-2-18-89. After dismissing an identical case in the District of Columbia, plaintiff brought this suit in the United States District Court for Alaska to require the Secretary of the Interior to issue Mineral Leasing Act oil and gas leases covering some 25,000 acres of land which, in 1915, had been reserved for the "Bureau of Education." Plaintiff's applications had been filed shortly before a producing gas well had been brought in on a state lease in nearby Cook Inlet. While these applications were still pending, the Department of the Interior determined that the land should be offered for lease

promptly under some form of competitive bidding. It then advertised for bids on the basis of an implied authority to lease in order to prevent drainage, and stated that all proceeds of the sale would be held in escrow pending adoption of additional legislation. Plaintiff's Mineral Leasing Act applications (based on the non-competitive provisions of that Act -- which require no bonus payments) were then rejected solely on the ground of an asserted discretionary authority.

Following some legal maneuvering by third parties, the Secretary determined that the lands could be leased as lands withdrawn "for Indian purpose" pursuant to the provisions of 25 U.S.C. 398(a). He thereupon cancelled the originally scheduled sale and readvertised under the foregoing code provisions.

The trial court dismissed plaintiff's suit on the ground that the lands had been withdrawn for Indian purposes. On appeal it was contended that the Secretary, having indicated his willingness to lease the area prior to the time appellant's applications were rejected, was bound by specific provisions of the Mineral Leasing Act to grant her a lease as the first qualified applicant. McKay v. Wahlenmaier, 226 F. 2d 35 (C.A. D.C. 1955). The Court of Appeals rejected this contention. It held that in refusing to lease under the Mineral Leasing Act the Secretary was not, in effect, leasing to someone other than the first qualified applicant. It held further that the Secretary's decision not to lease to plaintiff was within his discretionary authority.

Because the competitive lease sale had been scheduled for May 6, the Court advanced the case to April 27 for argument and handed down its affirming decision on April 27. With removal of the threat that the litigation represented with respect to the leasing availability of the lands, the May 6 sale brought in bonus offers of more than $12,000,000.

Staff: Thos. L. McKevitt (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Tucker Act Suit to Recover Fair Rental Value of Premises From United States; Foreclosure of Lien for Taxes Against Prepaid Rental Payment. Maryland National Bank and Murnaghan, Trustee v. United States, Machiz, Celebrity Lounge, et al. (D. Md., March 18, 1964). (CCH 64-1 USTC ¶ 9375). This action was instituted by the plaintiff-lessors, Maryland National Bank, et al., against the United States to recover for rentals allegedly due for use of its premises to store property which was the subject of a levy by the United States against the taxpayer, Celebrity Lounge, Inc. The United States filed a counterclaim against plaintiff for $3,450, which was held by the lessor as a prepaid rent payment pursuant to the terms of its Lease Agreement with taxpayer; a cross-claim against taxpayer for the amount of taxes due; and a third-party complaint against the purchasers of the seized property for the additional rent due from the date of sale until removal by the purchasers.

On the original action, the Court held that the United States was liable to plaintiffs for rent on the theory that a contract for rent, implied in fact, existed between the parties, and that there was a taking of property in violation of the Constitution. On the counterclaim, the Court held for plaintiffs on the ground that under Maryland law, a prepaid rental payment becomes the property of the lessor at the time it is tendered and not on the date of default by the lessee. The United States was granted a default judgment against taxpayer on its cross-claim, and judgment against the purchasers of the seized property on its third-party complaint for the additional rent due from the date of sale until removal of the property from the lessor's premises.

Staff: United States Attorney Thomas J. Kenney; Assistant United States Attorney Robert W. Kernan (D. Md.); and John F. Beggan (Tax Division)

Tax Lien Against Taxpayer-Contractor Does Not Affix to Contract Proceeds Where Subcontractor Performing Work Has Not Been Paid. Russell Terns v. Kenneth J. Whispell and Louise Selderbeck, United States, Intervenor. (S.D. N.Y., March 16, 1964). (CCH 64-1 USTC ¶9336). The issue was raised in this case by cross-motions for summary judgment filed by the subcontractor and the United States. In July of 1957, taxpayer entered into a contract to perform a construction job. Thereafter, he engaged the subcontractor to perform the job, which was completed in January, 1958. In March of that year, the tax liens arose. The case involved the question of who was entitled to the fund - the Government by reason of its tax liens or the subcontractor who had not been paid for his work under the contract.

The Court determined that under the "trust fund" provisions of the New York Lien Law the taxpayer-contractor had no interest in the amount owed by Selderbeck to which the tax lien could attach, following Aquilino v. United

States, 10 N.Y. 2d 271. The United States argued that because Section 75 provided that no action to enforce a trust under the New York Lien Law could be maintained if commenced more than one year after the completion of the improvement on account of which the claim arose and because the instant action was commenced more than four years after the completion of the improvement, the "trust" had terminated, the money was owed to the contractor-taxpayer, and the tax lien attached thereto. The Court, relying on Davis & Warshow, Inc. v. S. Isor, Inc., 30 Misc. 2d 528, 220 N.Y.S. 2d 818, and after reviewing the legislative history of the New York Lien Law, held that Section 75 of the New York Lien Law was procedural rather than substantive, that the trust did not terminate one year after the completion of the improvement, that Section 75 served to add a further procedural remedy to the law rather than to substantively shorten the duration of this trust, and that it served only to afford a proper defendant a defense against the civil action brought under the New York Lien Law, Section 36-a, more than one year after the completion of the work in question.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Philip H. Schaffer (S.D. N.Y.); and Clarence J. Grogan (Tax Division)

Waiver of Time For Assessment and Collection of Taxes Valid; No Dispute of Material Fact; Summary Judgment. United States v. Clarence J. Prince. (E.D. N.Y., April 13, 1964). (CCH 64-1 USTC ¶9340). Taxpayer signed Form 870-AD waiver of time for assessment and collection of taxes with respect to his 1945 and 1946 tax liabilities. In his answer to the Government's complaint, he denied the amount of the tax liabilities and denied that the waiver had served to waive the statutory period for assessment and collection. The Government filed a motion for summary judgment and a motion to quash defendant's motion to take deposition, arguing that the Form 870-AD, unlike the Form 870, represented a contract between the Government and the taxpayer by which the deficiencies were agreed on both sides.

The Court held that Form 870-AD was not a closing agreement (which the Government had not contended it was) and although seemingly a bilateral exchange, did not operate as a contract unless and until equitable estoppel required it. Here the Court found no basis for equitable estoppel. However, the Court ruled that taxpayer had not questioned any material fact as to the assessments set out in the complaint, the Form 870-AD acted as a simple waiver, and, accordingly, summary judgment could be granted to the Government.

Taxpayer has filed a notice of appeal from the Court's amended order.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney William N. McKee, Jr. (E.D. N.Y.); and Maurice Adelman, Jr. (Tax Division)

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