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Vol. 12 December 11, 1964 No. 25

MONTHLY TOTALS

Following is a table giving a comparison of the cases filed, terminated and pending during the first four months of fiscal year 1964 and 1965.

	First 4 Months Fiscal Year 1964	First 4 Months Fiscal Year 1965	Increase or Decrease Number	%
Filed				
Criminal	11,200	11,065	- 135	- 1.21
Civil	9,391	9,362	- 29	- 0.31
Total	20,591	20,427	- 164	- 0.80
Terminated				
Criminal	9,849	9,381	- 468	- 4.75
Civil	8,366	8,668	+ 302	+ 3.61
Total	18,215	18,049	- 166	- 0.91
Pending				
Criminal	11,181	11,780	+ 599	+ 5.36
Civil	23,453	23,965	+ 512	+ 2.18
Total	34,634	35,745	+ 1,111	+ 3.21

During each of the first four months of fiscal 1965 filings were considerably ahead of terminations with the exception of September. For the entire period, however, the gap between criminal filings and terminations is considerably greater than the same gap in civil cases.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,321	2,460	4,781	2,230	2,391	4,621
Aug.	2,176	2,224	4,400	1,846	1,590	3,436
Sept.	3,284	2,214	5,498	2,054	2,556	4,610
Oct.	3,284	2,464	5,748	3,251	2,131	5,382

For the month of October, 1964 United States Attorneys reported collections of $3,978,650. This brings the total for the first four months of this fiscal year to $16,922,960. This is a decrease of $4,574,306 or 21.28 per cent from the $21,497,266 collected during that period.

During October $18,196,426 was saved in 97 suits in which the government as defendant was sued for $1,083,712. 42 of them involving $12,214,288 were closed by compromises amounting to $403,408 and 30 of them involving $2,463,261 were closed by judgments amounting to $680,304. The remaining 25 suits involving $4,602,589 were won by the government. The total saved for the first four months of the current fiscal year was $55,048,874 and is an increase of $38,181,023 or 226.35 per cent over the $16,867,851 saved in the first four months of fiscal year 1964.

The cost of operating United States Attorneys' Offices for the first four months of fiscal year 1965 amounted to $6,281,354 as compared to $5,855,745 for the first four months of fiscal year 1964.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of October 31, 1964.

CASES

Criminal

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

CASES

Civil

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

CASES (Cont.)

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Ohio Newspaper Sued For Violations of Sherman Act and Clayton Act. United States v. The Lima News, et al., (N.D. Ohio) D.J. No. 60-127-60. On November 19, 1964, a civil action was filed at Toledo against The Lima News, a partnership engaged in publishing a daily newspaper of general circulation in Lima, Ohio; Freedom Newspapers, Inc., which is a partner in The Lima News, and owns or controls at least eight other newspapers; Raymond C. Hoiles, a partner in The Lima News and president of Freedom Newspapers; Clarence H. Hoiles, a partner in The Lima News and vice president of Freedom Newspapers; and E. Roy Smith, the managing partner in The Lima News.

The complaint charges a combination and conspiracy to monopolize and unreasonably restrain interstate trade and commerce in the dissemination of news and advertising through daily newspapers of general circulation in Lima, Ohio. It also charges that defendants secured agreements from various persons in Lima not to compete with the News and other newspapers in the Freedom chain; that such agreements and other practices unreasonably restrain trade and commerce in the dissemination of news and advertising through daily newspapers of general circulation in Lima, Ohio, and also constitute an attempt to monopolize such trade and commerce; that defendants monopolized the Lima newspaper market by engaging in the aforesaid activity and by purchasing the assets of the Citizen on January 3, 1964; and that this purchase also violates Section 7 of the Clayton Act.

In February 1956, Freedom Newspapers, Inc., purchased the Lima News Publishing Company, publisher of the Lima News at a cost of about $2,800,000. In about July 1957, The Lima Citizen Publishing Company began to publish and circulate a daily newspaper called The Lima Citizen. In an attempt to eliminate the Citizen as a competitor, defendants intentionally operated the News at substantial annual losses, and subsidized such losses from the profits derived by Freedom Newspapers, Inc., from the other papers in the chain. The News sustained losses of almost $7 million over the six years in which it competed with the Citizen.

From about August 1957 to April of 1963, The Lima News published and circulated a free advertising throw-away called The Lima Shopper. Advertising in The Shopper was tied to advertising in the News. The News charged such low advertising rates for The Lima Shopper that revenue produced therefrom was substantially less than the cost of its publication.

The News also sold substantial numbers of subscriptions at special unreasonably low rates; maintained display, classified and national advertising rates at unreasonably low levels; provided selected national advertisers who also advertised in the News with free billboard space in Lima; and secured various features, services, comics, and syndicated columns for the primary purpose of foreclosing them to the Citizen.

Defendants continually attempted to purchase the assets or stock of the Lima Citizen Publishing Company, or to merge the Citizen with the News; and adopted the other above-described practices as temporary expedients which were to be utilized only until the Citizen was eliminated.

On September 1, 1963, Freedom Newspapers, Inc., secured an agreement with E. R. McDowell, former managing partner of the News, whereby he agreed not to compete with the News and various other papers in which Freedom Newspapers has an interest. On January 3, 1964, The Lima News entered into an agreement with The Lima Citizen Publishing Company whereby the assets of the Citizen were purchased for $400,000. At the same time, The News agreed to pay $862,000 for promises on the part of nine of the Citizen's key personnel not to compete for five years in the newspaper business in Lima or other communities where defendants operate a newspaper.

The complaint seeks to force defendants to divest themselves of their interest in the News and to forbid them from reacquiring an interest in the News or its successors. It also seeks to enjoin and restrain defendants (1) from enforcing the covenants not to compete entered into by the defendants and various persons in Lima, Ohio; and (2) from intentionally operating a Lima newspaper at a loss in order to eliminate a competitor, and shifts the burden to defendants to prove that any losses are not for such purpose.

Staff: Norman H. Seidler, Frank B. Moore and Paul Y. Shapiro (Antitrust Division)

Five Companies in Glass Fiber Industrial Fabrics Industry Charged With Sherman Act Violation. United States v. Coast Manufacturing & Supply Company, Inc. (N.D. Calif.), United States v. Burlington Industries, Inc. (S.D. N.Y.), United States v. Clark-Schwebel Fiber Glass Corporation (S.D. N.Y.), United States v. J. P. Stevens & Company, Inc. (S.D. N.Y.) and United States v. United Merchants & Manufacturers, Inc. (S.D. N.Y.) D.J. Nos. 60-14-57, 60-14-56, 60-14-58, 60-14-59, and 60-14-60. On November 23, 1964, five civil cases were filed against the Nation's five largest producers of glass fiber industrial fabrics alleging their participation in separate conspiracies with their distributors to fix prices and allocate sales territories.

The companies are: Burlington Industries, Inc., the Nation's largest weaver and seller of glass fiber industrial fabrics, with total sales of $70 million since 1956, when the alleged conspiracy began, and $10.6 million sales in 1962; J. P. Stevens & Co., Inc., the second largest producer, with $50 million sales since 1956 and $11 million in 1962; United Merchants and Manufacturers, Inc., third largest, with $36 million since 1956 and $4.8 million in 1962; Coast Manufacturing & Supply Co., Inc., fourth largest, with sales of $15 million and $2.4 million for the dates above; and Clark-Schwebel Fiber Glass Corp., fifth largest, with sales of $13 million and $5.7 million.

The five companies, which comprise about 90 percent of the fiber glass industrial fabrics industry, were charged on October 9, 1964, in civil and criminal antitrust suits with conspiring with one another to fix prices. The

instant suits, however, alleged vertical conspiracy with their respective independent distributors. The distributors were named as co-conspirators, but not as defendants.

Glass fiber industrial fabrics are used by manufacturers in many fields, including boat, ship and submarine manufacturing; air craft; spacecraft and missile manufacturing; fishing rods; golf clubs shafts, and electrical equipment manufacturing. The fabrics have unique application because of their high tensile strength; high temperature resistance; shrinking and stretching resistance; non-water absorption; and non-corrosive characteristics.

The defendant companies and their independent distributors assertedly entered into a conspiracy, in violation of Section 1 of the Sherman Act, to fix minimum resale prices, to allocate exclusive geographical sales territories, and to guarantee that the distributor would not handle fabrics made by companies other than the defendant. As a result, the complaints charge prices were fixed by private agreement, competition was prevented, and consumers -- including the United States Government -- were barred from buying glass fiber industrial fabrics at competitive prices.

Each suit asked the Court for injunctive action to halt the conspiracies and to order each defendant firm to inform its distributors that they are free to buy the fabrics from whomever they wish and to sell to whomever they wish at such prices as they deem proper.

Staff: Samuel B. Prezis, William F. Costigan and Lawrence Kill
(Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

ADMIRALTY

Seaworthiness Doctrine Does Not Apply to Shore-based Employees Injured On Board a U. S. Vessel In the Control of an Independent Contractor. Kenneth McQuaid v. United States v. Keystone Drydock & Ship Repair Co. (C.A. 3, No. 14799, decided October 28, 1964). D.J. No. 61-62-339. Appellant, a shoreside employee of Keystone, brought a libel in personam against the United States as owner of a Navy vessel on which appellant was injured. The ship was undergoing extensive repairs and overhauling preparatory to going back into service. The Government impleaded Keystone. In the libel, appellant alleged that the vessel was unseaworthy and, in the alternative, that the United States was negligent in failing to provide him with a safe place to work. Appellant had been injured when, while working with air hammer and chisels in a room on board the vessel, he felt a blow on his head. Upon recovery of consciousness he saw a large plank on the floor which had theretofore been part of a scaffold on which men had been working, approximately six feet above. The district court, in dismissing the libel, held that the warranty of seaworthiness did not apply to libelant and that he failed to establish negligence.

The Court of Appeals affirmed, holding that the seaworthiness doctrine was not applicable here since appellant's work did not bear any resemblance to maritime navigation and the complete overhauling of the ship was not in the control of the owner or operator but in the control of a contractor. With respect to the charge of negligence, the court held that appellant failed to sustain his burden of proof in not showing exactly how the accident occurred. The court stated that the trial court's findings of fact were not clearly erroneous.

Staff: Morton Hollander and J. F. Bishop (Civil Division).

Dismissal of Libel by Lower Court for Willful Failure To Answer Interrogatories, Pursuant to Admiralty Rule 32(d), Upheld by First Circuit. Peter G. Kelley v. United States of America (C.A. 1, No. 6369, decided November 16, 1964). D.J. No. 61-36-177. In this case, the First Circuit affirmed the district court's dismissal of a longshoreman's libel against the Government under the Public Vessels Act, 46 U.S.C. 781, in which it was claimed that the libellant was injured due to the negligence of the Government and the unseaworthiness of a government ship. The libel was dismissed because of the libellant's willful failure to answer several interrogatories propounded by the Government. On appeal, the libellant conceded that there had been a willful failure to answer interrogatories, but argued that it was the fault of libellant's trial counsel, not of the libellant, and that, therefore, the district court should have imposed a sanction upon counsel instead of dismissing the action. In rejecting this argument, the court of appeals pointed out that the dismissal for failure to answer interrogatories was expressly authorized by Admiralty

Rule 32C(d). The First Circuit went on to hold that the libellant was bound by the actions of his trial counsel, and that it was immaterial whether the willful failure to comply with the discovery procedures was that of counsel or client.

Staff: John C. Eldridge (Civil Division).

California One Year Statute of Limitations Held To Apply to Bar Libel In Personam Action Which Was Brought Against the United States, Less Than Two Years After Injuries Occurred, for Damages Sustained Within California Waters. Earline Allen, et al. v. United States of America (No. 18,749, C.A. 9, decided November 5, 1964). D. J. No. 61-11-1056. J. D. Allen died as a result of injuries sustained when he fell from a scaffold while painting a public vessel of the United States which was in drydock, within territorial waters of California. Allen's widow brought this libel against the United States claiming that the injuries were caused by the Government's negligence and the vessel's unseaworthiness. The action was filed more than one year, but less than two years, after decedent's death. Jurisdiction was alleged under the Public Vessels Act, the Suits in Admiralty Act and under General Maritime Law. The district court dismissed the libel on the ground that it was not filed within the one year limitation period prescribed by Section 340(3) of the Code of Civil Procedure of the State of California.

The court of appeals affirmed. The court stated that admiralty courts will entertain a libel in personam against the United States for a tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act. The court rejected the libellant's contention that the applicable limitation period was two years, as provided for in the Suits in Admiralty Act and held that the California one year statute of limitations applied. The court adopted the reasoning of the court below, which had stated that, since a court, sitting in admiralty, must look to and follow a state-created right of action, it must then adopt and enforce such right as an integrated whole with whatever conditions and limitations the creating state has attached.

Staff: United States Attorney Cecil F. Poole (N.D. Calif.), Special Assistant to the Attorney General, Keith R. Ferguson, Leavenworth Colby (Civil Division).

FEDERAL EMPLOYEE DISCHARGE

Ninth Circuit Adopts Principle of Limited Scope of Review in Government Employee Discharge Case. Mary E. Seebach v. Joseph M. Cutlen, District Director, Bureau of Internal Revenue, et al. (C.A. 9, No. 19,145, decided November 6, 1964). D. J. No. 35-11-7. Appellant, an Internal Revenue agent, was dismissed from the federal service under the Lloyd-LaFollette Act, 5 U.S.C. 652(a), upon charges of inefficiency and emotional instability. She then instituted this action in the district court challenging her removal. The lower court granted our motion for summary judgment.

On Appeal, appellant attacked the removal proceedings on the grounds that (1) she could not be removed for conduct occurring during a period for which she had received satisfactory performance ratings; (2) the Service failed to provide her with a trial-type hearing with cross-examination of witnesses; and (3) no findings were made as to the truth or falsity of various examples of inefficiency and emotional instability contained in the letter of charges.

The court of appeals rejected all of these arguments, holding that judicial review of a governmental employee's dismissal "is limited to a determination of whether the required procedural steps have been substantially complied with," and that, in the instant case, no procedural error had occurred. Specifically, the court agreed with the Court of Appeals for the District of Columbia Circuit that an employee may be removed for conduct occurring during a period for which satisfactory performance ratings were received. See Thomas v. Ward, 225 F. 2d 953 (C.A.D.C.), certiorari denied, 350 U.S. 958. The Ninth Circuit also held that findings need not be made with respect to the truth or falsity of examples of improper conduct, as distinguished from the charges. As long as the employee is informed of the reasons for the action, there is no procedural error in this respect. As the Lloyd-LaFollette Act specifically states that employees shall not be entitled to trial-type hearings with cross-examination, the court did not deem this question sufficiently substantial to discuss.

The case is the first employee discharge appeal decided by the Ninth Circuit pursuant to the Act of October 5, 1962, 28 U.S.C. 1361, 1391(e), the effect of which is to give courts outside of the District of Columbia jurisdiction over this type of case. It is significant that the Ninth Circuit adopted the principle of a limited scope of judicial review in governmental employee discharge cases, which had previously been developed by the Court of Appeals for the District of Columbia Circuit.

Staff: John C. Eldridge (Civil Division).

FEDERAL TORT CLAIMS ACT

No Jurisdiction Lies Under Tort Claims Act To Entertain Action for Damages Allegedly Resulting From Release by Government Agencies of Information Concerning Plaintiff. Roger F. Vorachek v. United States of America (C.A. 8, No. 17,588 decided November 3, 1964). D. J. No. 151-56-79. Appellant, acting pro se, brought this action for damages which allegedly resulted from the disclosure by Department of Defense and Veterans' Administration employees of certain information in their possession concerning his mental condition. The district court dismissed the complaint and the court of appeals affirmed.

The court of appeals held, in effect, that there was no jurisdiction in the district court under the Tort Claims Act to entertain this action. The court noted that the "discretionary function" exception of Section 2680(a) probably applied and immunized the Government from any liability as a result of the decision to disclose information about appellant. The court stated that, since the release of libelous or false information was excepted from the Act's

coverage by 28 U.S.C. 2680(h), Congress could not be presumed to have intended to permit an action, such as the instant one, which was based upon the release of truthful information.

Staff: United States Attorney John O. Garaas (D. N.D.).

District Court's Finding -- That Thirteen Year Old Boy Was Negligent in Running into Sawed-Off Pipe While Playing in Area under Control of Air Force -- Held Not Clearly Erroneous. Thessolonia Smith, et al. v. United States of America (No. 19,258, C.A. 9, decided September 11, 1964). D. J. No. 157-6-105. A thirteen year old boy was practicing with his Pony League baseball team on a playing field under the control of the Air Force. During the course of the practice session, he was sent over a fence into another baseball field to recover a ball. As soon as he threw the ball back to his teammates another ball was hit over the fence and Thessolonia ran after it, crashing into a standing, short piece of pipe. The pipe had been "sawed off" but the stub had not been removed from the playing field by the Air Force. The boy's mother brought a Tort Claims action on behalf of her son and herself, since the child lost an eye as a result of the accident. The district court found the Government to be free from negligence and determined that the injury was due to the boy's own negligence.

The court of appeals affirmed. The court stated that the Air Force owed the boy, an invitee, a duty of reasonable care. It determined that the Air Force was careless in leaving a decommissioned flagpole on a field where it could do nothing but cause trouble, but held that the district court's finding that the boy was negligent was not clearly erroneous. The court stated that it found "no pleasure" in ruling as it did in this case.

Staff: United States Attorney Warren Colver, Assistant United States Attorney James R. Clouse, Jr. (D. Alaska)

SOCIAL SECURITY ACT

Disability Claimant Was Not Denied His Constitutional Right to a Fair and Impartial Hearing by Social Security Administration Since He Was Afforded Every Opportunity to Complete the Administrative Record As He Saw Fit. Paul v. Celebreeze (C.A. 9, No. 19,115, decided October 16, 1964). D. J. No. 137-12-297. Claimant filed an application for disability benefits, alleging that he became unable to continue working as of August 3, 1959, due to cataracts in both eyes. Claimant had been employed principally in a supervisory capacity in the tool and die-making and pantograph engraving trade. The Secretary found claimant not to be disabled within the meaning of the Social Security Act. Claimant sought review of the Secretary's denial of benefits in the district court. The court granted our motion for summary judgment.

On appeal, claimant contended (1) that the record did not contain substantial evidence to support the Secretary's findings and (2) that he was not afforded a fair and impartial hearing before the administrative agency. The court of appeals rejected these contentions and affirmed the decision of the district court upholding the Secretary. The court of appeals stated that taking the

record as a whole there was substantial evidence to support the Secretary's decision that claimant's impairments were not so severe as to prevent him from working. With respect to claimant's allegation that agency officials omitted significant documents from his file when his case was delivered to the hearing examiner, the court found that there was no support for this claim and thus concluded that claimant was not denied his right to a fair and impartial hearing. The court noted that the Social Security Administration had afforded claimant every opportunity to complete the administrative record as he saw fit.

Staff: United States Attorney Francis Whelan, Assistant United States Attorneys Donald Fareed and Dzintra I. Janavas (S.D. Calif.)

AGRICULTURAL MARKETING AGREEMENT ACT

Judicial Officer Authorized To Make Decision on Behalf of Secretary of Agriculture; Court Rejects Device Used by Dairy To Avoid Terms of Milk Marketing Order. United States v. Brown, et al.; Brown, et al. v. Freeman, (D.C. Colo., Civil Action Nos. 7459 and 8511, October 27, 1964). D.J. No. 106-13-155. While proceedings leading to the promulgation of the Eastern Colorado Milk Marketing Order were taking place, Fred A. Brown and Jennie B. Brown, d/b/a Gem Dairy, entered into a series of contracts with the farmers who had been supplying them with milk. These contracts provided that the dairy, for a price of $15 per cow, purchased a one-tenth interest in each cow owned by each of the farmers. The farmers retained possession of the cows, cared for and milked them, but by the terms of the contracts the milk belonged to the dairy. The farmers were paid for their work in caring for the cows according to the amount of milk delivered, and at the current price of milk set by the Milk Marketing Order.

The dairy contended that the milk received was its own and that it was therefore a producer-handler exempt from the terms of the Milk Marketing Order. The Marketing Administrator ruled that the dairy was not a producer-handler and owed payments to the producers' settlement fund.

The United States brought an enforcement action against the defendant dairy under the provisions of Section 8(a)(6) of the Agricultural Marketing Agreement Act, 7 U.S.C. 608(a)(6), to require the dairy to make payments to the fund. The court stayed action on the enforcement proceeding pending filing of an administrative review proceeding by the dairy before the Secretary of Agriculture.

Upon completion of the administrative proceeding, the judicial officer, acting on behalf of the Secretary of Agriculture held that the dairy was not a producer-handler and was subject to the marketing order. The dairy filed a motion for reconsideration which was rejected and on the twentieth day after the final order, filed a second motion for reconsideration, not provided for in the agency's rules. This second motion was rejected, whereupon the dairy commenced a review proceeding under 7 U.S.C. 608(c)(15)(B).

The court granted judgment for the government in both the enforcement action and the review proceeding. The court first held that it had jurisdiction

over the review proceeding even though it was filed four days beyond the twenty day time limit on the ground that it already had jurisdiction over the enforcement action and the review action involved identical issues. The court went on to hold that the Secretary of Agriculture had properly delegated to the judicial officer the right to determine the proceeding so that the judicial officer's decision was the final decision of the defendant Secretary.

The court next held that there was substantial evidence in the record to support the judicial officer's determination that the dairy was not a producer-handler, and that the contracts were a transparent effort to avoid the effect of the Milk Marketing Order. The court finally concluded that there was no violation of due process in having the Milk Administrator make a determination that the dairy was subject to the marketing order upon an ex parte investigation, pointing out that the Act guaranteed to the dairy an opportunity to be heard at some stage in the proceedings, which was all that was necessary.

Staff: Assistant U.S. Attorney Robert E. Long (D. Colo.), William E. Nelson (Civil Division), John A. Campbell (U.S. Department of Agriculture).

FEDERAL EMPLOYEES DISCHARGE

National Guard Caretaker Technicians Held Not To Be Federal Employees and Thus Not Entitled to Any of the Procedural Rights and Protections Inuring to Such Individuals. Anthony J. Anselmo, et al. v. Stephen Ailes, Secretary of the Army, et al. (E.D.N.Y., No. 64-C-47, decided October 20, 1964). D. J. No. 145-4-1362. Plaintiffs, employed as civilian technicians by the New York Army National Guard, worked at the Federal Missile Base, Lido Beach, Long Island, rendering care to equipment loaned by the U.S. Army to the National Guard. Pursuant to a regulation promulgated by the Secretary of the Army, which empowered the adjutants general of the several states to "discharge technicians," plaintiffs were removed from their jobs. They were accorded none of the procedural rights and protections inuring to employees in the federal civil service. After exhausting their administrative remedies, plaintiffs instituted this suit in the district court.

The district court held that plaintiffs were not entitled to reinstatement since they were not federal civil service employees at the time of their discharge from employment. The court reasoned that, although National Guard caretaker technicians are federal employees to the extent that injuries inflicted on other persons by their negligent operation of equipment subjects the United States to liability under the Tort Claims Act, this rule should not be extended so as to bring within the ambit of civil service coverage untold thousands of persons not specifically denominated federal employees by statute. The court stated that, since Congress has not promulgated an employee status for civilian caretakers such as plaintiffs, it would recognize as valid and binding the long established holdings of federal agencies which deny this status to persons circumstanced as plaintiffs.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Thomas J. Lilly (E.D.N.Y.).

FEDERAL TORT CLAIMS ACT

United States Held Not Liable for Injuries to Employee of Independent Contractor Working on Premises Owned by the Government. C. L. Parker v. United States (E.D. Tenn., decided November 6, 1964). D. J. No. 157-70-199. Plaintiff was a flagman employed by a construction company which had contracted with the United States to construct a Propulsion Engine Altitude Test Cell. He instituted suit under the Federal Tort Claims Act for injuries incurred when he slipped and fell while walking on the limestone dust, mud and rocks surrounding the huge excavation pit where he worked. Plaintiff alleged that the United States was liable (a) through the negligence of the construction company in not providing him a safe place to work and (b) in not performing its duty to remove ultra-hazardous or inherently dangerous conditions from the construction site. Plaintiff contended that his employer was not an independent contractor of the United States but was, in actuality, an agent of the Government since Corps of Engineers inspectors were on the job.

The court found that even though inspectors were on the job site to give safety instructions and to ascertain whether the contractor performed its work pursuant to the terms of the contract, this did not convert the plaintiff's employer from an independent contractor to a governmental agent. Therefore, the court concluded, the negligence, if any, of the plaintiff's employer was not imputable to the United States. In addition, the court recognized that under the Tennessee law a property owner has a non-delegable duty to see that appropriate preventive measures are taken by which mischievous consequences might be prevented from occurring, but found that the plaintiff had not shown that there was any negligent omission on the part of the United States to perform its duty. The court stated that the liability of the United States did not arise by virtue of its ownership of inherently dangerous property or by virtue of its engaging in extra-hazardous activity.

Staff: United States Attorney J. H. Reddy, Assistant United States Attorney Otis B. Meredith (E.D. Tenn.)

The Fact That Army Officer's Wife Slipped and Fell on Newly Waxed Floor at Officer's Club Did Not Show Negligence or Raise Presumption of Negligence on Part of United States. Graham v. United States (M.D. Ga., No. 1916-17, decided October 1964). D. J. Nos. 157-19M-163 and 157-19M-164. Mrs. Graham, wife of a Colonel stationed at the Robbins Air Force Base in Georgia, slipped and fell, breaking her left leg while crossing a recently waxed floor of the Base Officers' Club. Mrs. Graham was one of a number of officers' wives planning a SAC luncheon and was helping to decorate the dining room at the time of her accident.

The district court found that: (1) the United States had used a wax product that had been carefully tested for durability and adequate slip resistance and its employee had applied it in accordance with good cleaning practice; (2) the mere slipping of plaintiff on the waxed floor did not show negligence nor did it raise a presumption of negligence on the part of defendant; (3) no more than an ordinary slippery condition was created by the waxing operation; (4) the Government was not an insurer of the safety of its invitees;

(5) Mrs. Graham was, or should have been aware of the waxing operation being performed by the Club employee; (6) Mrs. Graham did not exercise ordinary care for her own safety in the circumstances.

Staff: United States Attorney Floyd M. Buford, Assistant United States Attorney Wilbur D. Owens, Jr. (M.D. Ga.), Mrs. Alice K. Helm (Civil Division)

Noise, Shock and Vibration from Jet Engine Testing Program at Shaw AFB Not a "Taking" of Plaintiffs' Property; Discretionary Function Exception Applies to Location of Testing Pad on Base Area Near Plaintiffs' Properties and Bars Suit under FTCA; Plaintiffs' Personal and Property Damages Are Consequential to Operation of Base and thus Damnum Absque Injuria. Mrs. Alice M. Leavell, Exec. v. United States and Mrs. Alice M. Leavell v. United States (E.D.S.C., Civil Nos. AC-704 and AC-705, decided October 15, 1964). D. J. Nos. 157-67-239 and 157-67-240. The plaintiffs owned property immediately south of the Shaw AFB, Columbia, South Carolina, just across U.S. Highway 76. The Leavells had owned this property since 1941 at which time only propeller driven aircraft were operated at the Base. During the time in question, 1957-1962, the Base commander and his staff decided to locate the "jet engine trim pad" in an area at the southeast corner of the Base, approximately 2,000 feet from plaintiffs' residential and rental property, which decision was made after extensive investigation to ascertain the area of greatest efficiency and safety. This was a temporary measure pending construction of a jet engine test cell which could accommodate the other jet planes and upon completion thereof the Air Force ceased testing engines on this trim pad, except on very infrequent occasions. During entire period from 1956-1963, the plaintiffs lived on the property. (Mr. Leavell died in the summer of 1961.)

Although the court found substantial interference with use and enjoyment of the plaintiffs' properties during the period May 1957 to November 1962 (while the testing pad was operated in relatively close proximity to the plaintiffs' properties) there was no actual invasion of her property rights by over flights or otherwise and the damages suffered were held to be consequential to the operation of the Air Force Base and hence damnum absque injuria. This denial of damages by noise, shock and vibration without physical invasion of the property on the surface or air space above was held not to be a "taking." The court relied upon Batten v. United States, 306 F. 2d 580, 583 (C.A. 10, 1962).

It further held the decision of the Base commander as to the location upon the Base of the jet test pad to have been a discretionary function on the planning level within the doctrine of Dalehite v. United States, 346 U.S. 15 (1953) and not discretion at the operating level. Cf. White v. United States, 317 F. 2d 13, 17 (C.A. 4).

Staff: United States Attorney Terrell L. Glenn; Assistant United States Attorney George E. Lewis (E.D.S.C.); Irvin M. Gottlieb (Civil Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

SUBPOENA OF PERSONS AND DOCUMENTS IN FOREIGN COUNTRIES

Title 28 U.S.C. 1783, referred to by Rule 17 of the Federal Rules of Criminal Procedure, was amended on October 3, 1964 by Section 10 of Public Law 88-619 entitled, "An Act to improve judicial procedures for serving documents, obtaining evidence, and proving documents in litigation with international aspects."

Subsection (a) of the amended Section 1783 permits the issuance of a subpoena to be served in a foreign country upon a national or resident of the United States requiring his appearance in all criminal proceedings, including grand jury proceedings if the court shall find that the issuance of such a subpoena is in the interest of justice. Under the former Section 1783, the Court of Appeals for the Second Circuit had held in United States v. Thompson, 319 F. 2d 665 (1963), that Title 28 U.S.C. 1783 did not authorize a Federal court to subpoena a citizen of the United States who was in a foreign country to appear before a grand jury, but only authorized the issuance of such a subpoena to appear at an actual criminal trial. The new Section 1783 has effectively nullified the results of the Thompson case by the addition of the following language contained in subsection (a): "A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it ..."

In addition to the modification discussed above, the amended Section 1783 explicitly provides for the subpoenaing of documents or other tangible evidence in the possession of a national or resident of the United States in a foreign country for use in all criminal proceedings, including grand jury proceedings. Prior to the enactment of the amended Section 1783, there was no explicit statutory provision for subpoenaing such evidence when it was located in a foreign country.

AIRCRAFT

Attempt to Board Aircraft with Concealed Weapon in Coat Pocket (49 U.S.C. 1472(l). United States v. Ezequiel Manual Zorrilla (E.D. N.Y., Nov. 2, 1964). D.J. File No. 95-52-117. The defendant was found guilty of attempting to board an aircraft while having on or about his person a concealed weapon, in violation of 49 U.S.C. 1472(l). The defendant had purchased a plane ticket, delivered his hand baggage to the airline for carriage on its flight, and had received a boarding pass and seat assignment for the flight which was to leave at 6 p.m. Between 5:30 and 6:00 p.m. while the defendant waited at the unopened gate to the passage leading to the flight, he was paged, and proceeded to an airline office where he was met by four policemen and a Customs inspector.

The defendant was searched and an automatic pistol in which there was a loaded clip of live ammunition was found in the pocket of a raincoat or topcoat that the defendant was carrying over his arm when he entered the room. The defendant did not board the flight; however, the court found, absent evidence to the contrary, that he had intended to board the flight and to carry aboard the aircraft his topcoat or raincoat with the loaded pistol in the pocket. He was prevented from boarding the aircraft by the action of the police, Customs inspector, and the FBI.

The court found that the defendant's conduct constituted an "attempt" to board the aircraft. The court held that an attempt could be found where "the complete offense is in course of commission, with a necessarily deliberate organization of acts in process of happening in their programmed way, commission is imminent and will eventuate unless the course of events already in train is deflected, and there is no evidence of any wavering of the purpose of committing the offense when uninvited acts of third parties frustrate commission." The contention that "attempt" should be "confined to a group of acts so far advanced toward commission that only violent prevention can avert commission was rejected." Similarly, the court refused to deny the applicability of the term to a group of facts "on the ground that opportunity still remains to give up the criminal purpose."

Staff: United States Attorney Joseph P. Hoey;
Assistant United States Attorney Donald McCaffrey
(E.D. N.Y.).

LIQUOR REVENUE

Refilling Liquor Bottles with Distilled Spirits; No Need to Prove that Liquor Used to Refill Bottle Was Non-Taxed. Stilinovic v. United States (C.A. 8, Oct. 12, 1964). D.J. File No. 23-42-498. Defendant was convicted of violating 26 U.S.C. 5301(c)(1) in that he refilled liquor bottles with distilled spirits other than those contained in such bottles at the time of stamping. The Government was unable to state the brand of whiskey with which the bottles were refilled or whether or not the tax had been paid upon the distilled spirits used to refill the bottles.

On appeal, defendant contended that (1) the statute does not apply to the combining of two partially used bottles of taxed whiskey, or (2) if it does, it is unconstitutional. The Court rejected both arguments, holding that it was the intent of Congress in passing the present version of the statute to resolve the very issue raised by defendant to the converse of his position. In this, the Court followed its previous decision in Vinyard v. United States, 335 F. 2d 176 (C.A. 8, 1964), reversing Wisniewski v. United States, 247 F. 2d 292 (C.A. 8, 1957), which was based upon a previous regulation.

Staff: United States Attorney Richard D. FitzGibbon, Jr.;
Assistant United States Attorney William C. Martin
(E.D. Mo.).

FRAUD

False Statements to Federal Savings and Loan Association; Involvement of Officer of the Association in Scheme Does Not Immunize Defendants from Culpability. United States v. Louis P. Niro and Michael A. Niro (C.A. 2, Nov. 13, 1964). D.J. File No. 151-53-626. Defendants were convicted of violations of 18 U.S.C. 1014 for submitting inflated purchase price figures to a Federal Savings and Loan Association in order to obtain higher mortgage amounts. They argued on appeal that the former President of the Savings and Loan Association, deceased at the time of trial, had suggested the fraudulent scheme to them. Accordingly, said the defendants, the false statements could not have been made "for the purpose of influencing" the action of the Association. The Court of Appeals held that such an argument was a non sequitur; however "influenced" the former President might have been, said the Court, other Association officials who made the final decision on loans, including the Board of Directors, still remained to be influenced. "The words 'for the purpose of influencing' were included in the statute to define the quality of the required intent, not to immunize a party from criminal liability because an officer of the bank was involved in the fraudulent scheme."

Staff: United States Attorney John T. Curtin; Assistant United States Attorney Charles F. Crimi (W.D. N.Y.).

Securities Violations; Investment Contracts. United States v. Walter E. Herr and William O. Gillentine (C.A. 7, Oct. 27, 1964). D.J. File No. 113-23-49. The Court of Appeals for the Seventh Circuit affirmed the convictions of the defendants on charges of mail fraud and the fraudulent sale of securities by mail. The defendants organized American Sales Training Research Associates, Inc. (ASTRA), to sell various types of phonograph records, including records known as "Strangest Secret," "Think and Grow Rich" and "The Money Machine." The defendants sold what they designated as distributor agreements and in one year obtained more than $150,000 from 72 investors. These investors were promised a return on their investments of 60% a year. The investors could participate actively or inactively. If they were unable to carry on a regular sales program, ASTRA would provide a sales force to sell the records and monthly earnings checks would be distributed. As a matter of fact, ASTRA operated at a loss, and any "earnings" paid were a return of the money paid by the investors.

The defendants relied on the statement in the agreement that the relationship between the parties was that of vendor and purchaser. The Court of Appeals rejected the contention, finding that the agreement was an investment contract and, accordingly, a security as defined in the Securities Act of 1933. The inactive investors "were led to believe that they could expect profits solely from the efforts of others."

In connection with another point raised by the defendants, the Court reaffirmed the long held view that verdicts on various counts of an indictment need not be consistent.

Staff: United States Attorney Edward V. Hanrahan; Assistant United States Attorneys John P. Lubinski, John P. Crowley and Charles H. Turner (N.D. Ill.).

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

CIVIL SECTION

Subversive Activities Control Act of 1950. Registration of Communist Party Members. Attorney General v. Michael Saunders et al. (N. Ill. - D.J. File No. 146-7-51-761) On November 13, 1964, the Subversive Activities Control Board issued two orders directing Michael Saunders and Daniel Queen, of Chicago, Illinois, to register as members of the Communist Party, pursuant to the provisions of Section 8(a) and (c) of the Subversive Activities Control Act of 1950.

Staff: Oran H. Waterman, James A. Cronin, Jr., and Earl Kaplan

Communist Political Propaganda. Leif Heilberg v. Fixa et al. (N.D. Cal. No. 41660). D.J. File No. 145-5-2580. On November 17, 1964, a three-judge district court sitting in the Northern District of California, pursuant to the provisions of 28 U.S.C. 2282 and 2284, held unconstitutional the provisions of Section 305(a) of the Postal Service and Federal Employees Salary Act of October 11, 1962, 76 Stat. 840, 39 U.S.C. 4008, which section had the effect of requiring certain addressees of unsealed foreign communist political propaganda, such as plaintiff, to respond to an inquiry and signify to the Postmaster General a desire to receive such mail as a condition to its delivery. The court held that such an inquiry was an infringement of an addressee's First Amendment rights and that the Government had not proved any overriding state interest which would justify the burden imposed by the statute on the free exercise of such addressee's First Amendment rights.

Although the Postmaster General had regarded plaintiff's complaint as an expression of his desire to receive delivery and had notified plaintiff that in the future such mail would be delivered to him without further inquiry, the court, unlike the three-judge district court which had decided the Lamont case, 229 F. Supp. 913 - see Vol. 12, No. 11, U.S. Attorneys Bulletin, page 273 - was unable to agree with the Government that the case had been rendered moot by the aforementioned action of the Post Office Department.

On the application of the Government, the court stayed its injunction until December 17, 1964, and if the Government should appeal to the Supreme Court by that date, for the duration of the appeal.

Staff: Assistant United States Attorney Charles Elmer Collett (N.D. Cal.) and F. Kirk Maddrix, Benjamin C. Flannagan, and Thomas H. Boerschinger (Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation: Right of Government to Enlarge Building Site to Eliminate Adjoining Unsafe Buildings Upheld. United States v. Certain Land in Manhattan (306 Broadway Realty Corp., et al.) (C.A. 2, August 6, 1964; D.J. File No. 33-33-966). A prior appeal of this case on the Government's right to immediate possession is reported in 12 U.S. Attys Bull. No. 14, p. 355. In summary, after the Government commenced construction of its 41-story office building at Foley Square in New York City, settlement and lateral movement of adjoining buildings made them unsafe. Because it was less expensive, the Government proceeded to condemn them for demolition rather than try to underpin their more than 60-year-old foundations. Some of the tenants contested the right of the Government to take this additional land to be added to the building site because express approval of the Public Works Committees of Congress to add these specific parcels had not been obtained. The Government contended that the general authority given under Section 5(a) of the Public Buildings Act of 1959, 73 Stat. 479, 40 U.S.C. 604(a), authorized condemnation in this case. It was further the Government's contention that the Committee approval of a prospectus required as a condition precedent to the appropriation of money for a public building project under Section 7(a) of the Public Buildings Act of 1959 had been obtained and that, just as Congress had never been asked for nor given express approval of the metes and bounds description of the original building site, neither was it required to expressly approve the addition of these parcels to the building site. The district court, in an unreported decision dated June 30, 1964, upheld the Government's right to take. On appeal, the Second Circuit affirmed in a per curiam decision. One of the tenants has filed a petition for a writ of certiorari which is now pending.

Staff: A. Donald Mileur (Lands Division).

Condemnation: Government Granted Possession of Condemned Unsafe Buildings Adjoining Public Building Site. United States v. Certain Land in Manhattan (306 Broadway Realty Corp., et al.) (C.A. 2, August 14, 1964; D.J. File No. 33-33-966). This is the third appeal taken to the Second Circuit on the same condemnation proceeding. The second appeal, upholding the Government's right to take the adjoining unsafe buildings, is reported immediately above. The opinion in the first appeal is reported at 332 F.2d 679. The Government filed its declaration of taking in this case on April 30, 1964, asked the district court for immediate possession, and requested the tenants to vacate by May 9, 1964, the two blocks of business buildings on lower Broadway. The tenants claimed there was no urgency or immediate hazard and asked the court to stay the order of immediate possession. On appeal, the Second Circuit held that the district court should have held a hearing where each side was to present expert witnesses on whether these buildings constituted an immediate hazard. Such hearing was held the latter part of June 1964. On August 5 and 6, the district court wrote an extensive opinion reported at 233 F. Supp. 899, in which it concluded that there was an immediate hazard insofar as the 16-story office building at 320 Broadway was concerned. It granted the Government immediate possession of this

building. The Government was granted possession of the remaining buildings as of November 1, 1964. On appeal, the Second Circuit affirmed per curiam.

Staff: Roger P. Marquis (Lands Division).

Condemnation: Authority to Condemn Land on Indian Reservation; Finality of Administrative Determination of Necessity. Seneca Nation of Indians v. United States (C.A. 2, No. 468, October 29, 1964; D.J. File No. 33-33-881-9). The United States in connection with the Kinzua Dam project condemned easements through the Seneca Reservation sufficient to relocate a two-lane road destroyed by the project as a four-lane road. The Nation denied the authority to condemn more land than was needed for a two-lane road. The district court upheld the Government's authority.

The Court of Appeals affirmed on the grounds that, since the condemnation of Indian land in connection with the Kinzua project had been authorized by Congress, the Court would not interfere with the "administrative discretion as to the amount of land needed for relocation of the road." Judge Moore dissented.

Staff: Edmund B. Clark (Lands Division).

Condemnation: Benefits to Remainder; Valuation of Remainder for Subdivision Speculative; Comparable Sales. United States v. 2,635.04 Acres of Land in Allen and Barren Counties, Kentucky (C.A. 6, No. 15438, September 28, 1964; D.J. File No. 33-18-242-5). Appellants owned four tracts of land comprising 410 acres which were not contiguous, but were farmed as a unit. The Government condemned all except 29 acres which had a frontage of 4,600 feet on a blacktop road, with a depth of from 200 to 400 feet to the lake shore. The side bordering on the lake was on a bluff, which made access to the lake difficult. The landowners and the appraisers for both parties valued the 410 acres before the taking, and the 29 acres remaining. The Government's estimates of damage were $43,600 and $50,000, and that of the landowners and their appraisers $97,000, $118,500 and $135,000. One of the Government's appraisers valued the 29-acre remaining tract for a campsite or lake shore development, estimating that it could be subdivided into 46 lots, with frontages of 100 feet, at a profit of about $600 per acre, after cost of development. He arrived at his conclusion by a comparison with a development of 22 acres about a mile from this property, which was on the main road to the Port Oliver Dam and about one-half mile from the dam. This testimony was admitted over the landowners' objection. On this basis this witness valued the remainder at $15,000 and the other appraiser for the Government valued it at $17,500. The landowners' witnesses valued it at $2,000, $5,000 and $8,817, as a tract too small to farm profitably. The jury's verdict was $69,800. The landowners appealed principally on the valuation of the remainder.

The Court of Appeals reversed the judgment, stating: "Benefits that can only be realized by the expenditure of substantial sums of money in a project so uncertain as this lake shore lot development are not, in our judgment, the kind of benefits Congress contemplated in enacting Section 595, Title 33, U.S.C. This testimony is highly speculative and too remote to have any realistic effect

upon value. We regard it as incompetent and prejudicial to the rights of the appellants." A sale seven years before the date of taking, relied upon by the Government, was admitted over objection by the landowners. The Court held that comparability is essentially a question of fact and trial judges have a broad discretion in ruling on the admissibility of evidence of comparable sales. The Court found no abuse of discretion. The Court held there was no basis for a claim that the verdict is contrary to law. Being within the range of evidence, it cannot be said to be against the weight of the evidence. The court remanded the case for a new trial, stating that in a retrial with the incompetent testimony as to the value of the remainder eliminated, the range of evidence may be narrower and, consequently, the jury may arrive at a different conclusion.

Staff: Elizabeth Dudley (Lands Division).

Condemnation: Consequential Damage; Relocation of Highway; Loss of Business Not Compensable. Stipe v. United States (C.A. 10, No. 7649, October 28, 1964; D.J. File No. 33-37-267-619). Appellant owned 24 acres of land near Eufaula, Oklahoma, on the east side of U.S. Highway 69, which was also State Highway 9, and six acres on the east side of the highway on which he operated a filling station and restaurant. This was a popular stop for trucks. The United States condemned a strip across the 24-acre tract for the relocation of Highway 69, and two years later filed another proceeding to acquire .15 acre in the northwest corner of the east tract and additional acreage on the west tract. This included about three acres fronting on the old highway which appellant contended he used in connection with his service station for parking trucks. At a joint trial of both proceedings before a commission appointed pursuant to Rule 71A(h), F.R.Civ.P., appellant's witnesses valued the two tracts as a unit before and after the two takings. The Government's witnesses valued only the acreage taken from the west tract, and valued the east tract before and after the taking of the .15-acre tract. The Government elevated State Highway 9 gradually from about the center of the east tract to 11 feet at the point it adjoined the new highway, and constructed a ramp on the .15-acre tract for access from the north end of the east tract. Access from the highway at the south end was not changed. Appellant contended his business had been practically destroyed and sought total damages in the amount of $80,000. The Government's witnesses valued the land taken at around $5,000. It was the Government's contention that the loss of business was not compensable. The commission awarded $5,035, and held that the two tracts should not be valued as a unit, as the west tract was not essential to the business conducted on the east tract. The award was confirmed by the district court, and the landowner appealed.

The Court of Appeals affirmed the judgment, stating that there was a sharp conflict in the evidence as to the extent and necessity of the use of the property west of the highway in connection with the business. "This was a question of fact to be resolved by the commission. Sharp v. United States, 191 U.S. 341. * * * It will not be disturbed on appeal." The Court further held that the record as a whole discloses that the decrease in the value of appeallant's business resulted not from the taking of part of his land, but from the relocation of Highway 69, which diverted traffic over the highway away from the business operation and, whatever his loss, it is due to the destruction or frustration of his business, and not the taking of the property. Such losses

are not compensable, citing United States v. Powelson, 319 U.S. 266, 281-283 (1943), and others.

Staff: Elizabeth Dudley (Lands Division).

Public Lands-Mining Claims-Federal Procedure: Party Defending Against Motion for Summary Judgment Has Right Under Federal Rules of Civil Procedure to Be Heard at Oral Argument; Summary Judgment Held Appropriate Means of Reviewing Administrative Decision of Secretary of Interior Concerning Public Lands; Secretary Held Indispensable Party in Suit to Review His Decisions. Dredge Corp. v. J. Russell Penny, et al. (C.A. 9, November 13, 1964; D.J. File Nos. 90-1-18-507 and 90-1-18-529). These are consolidated appeals from companion district court cases to review decisions of the Secretary of the Interior holding 36 mining claims invalid. From summary judgments in favor of the defendant Department of the Interior officials the mining claimant took appeals and the Ninth Circuit reversed and remanded the cases for further proceedings. The ground for the reversal was that plaintiff had not been given an oral argument before granting defendants' motion for summary judgment. The Court construed the local rules of the district court as not permitting a person who opposes a motion to apply for oral argument. It was held that in view of the language of Rule 56 (c), F.R.Civ.P., and having in mind that summary judgment disposes of the case on its merits with prejudice, a district court may not preclude the opposing party from requesting oral argument on a motion for summary judgment unless the motion is denied. In a footnote the Court stated, "We do not specifically rest this conclusion on due process grounds, nor do we disclaim this basis for the view expressed," and concluded that due process requirements vary with the circumstances of each case.

In discussing the various contentions of the parties, the Court of Appeals reaffirmed its holding that in proceedings to review administrative decisions of the Secretary of the Interior the plaintiff is not entitled to a de novo hearing in the district court. The only factfinding function of the district court is to determine whether the administrative findings of fact are supported by substantial evidence. A judicial determination of whether a finding of fact is supported by substantial evidence presents only an issue of law, and therefore these cases are properly subject to disposition by summary judgment. The Court of Appeals also held that the Secretary of the Interior is an indispensable party to the present suit, and thereby narrowed its earlier holding in Adams v. Witmer, 271 F.2d 29, 35-36.

In view of the statute permitting the Secretary of the Interior to be sued wherever the Public land is located, 28 U.S.C. 1391 (e), attention is directed to footnote 15 of this opinion. The Court there raises but does not decide whose duty it is to place the administrative record in evidence in these administrative review cases. At oral argument the Court expressed the view that, when the plaintiff alleges there is not substantial evidence to support the administrative findings and the Government makes its motion for summary judgment, thereby contending in effect that the findings are supported by substantial evidence, it is the duty of the Government to produce the record. In view of the language in footnote 15, the law in the Ninth Circuit on this matter is now an open question. Therefore, unless one is preparing a test case on the point,

the prudent course for the United States Attorneys would be to produce the record. N.B. the Court of Appeals says the exhibits as well as the transcript are part of the administrative record and must be produced also.

Staff: A. Donald Mileur (Lands Division).

Tucker Act; Exhaustion of Administrative Remedies; Loss of Profits. Neely v. United States (C.Cls., July 17, 1964, D.J. File No. 90-1-23-568). In this action, plaintiff sought to recover over $1,700,000 as damages for the breach of a coal mining lease issued to him by the United States pursuant to the Mineral Leasing Act of February 25, 1920, as amended, 30 U.S.C. 181, et seq. In 1950, plaintiff was the successful bidder for a coal lease of 2,162.71 acres of public land in Oklahoma and a lease dated September 1, 1950, was issued to him. He planned to strip mine the land and thereafter open an underground mine. The District Mining Supervisor of Geological Survey at McAlester, Oklahoma, who had supervision of operations under coal leases, was of the opinion from the available information that the development of the leased land by a large underground mine would result in the recovery of the maximum amount of coal, and that strip mining was not feasible. He informed plaintiff that he would not permit him to strip mine the land. Plaintiff appealed. By letter dated January 30, 1951, the Acting Director, Geological Survey, advised plaintiff that strip mining on the lease would not be permitted. By letter dated February 10, 1951, plaintiff asked the Director, Geological Survey, to withdraw the refusal to permit strip mining. In a letter dated May 2, 1951, the Acting Director advised plaintiff that "The Survey's decision of January 30, denying authorization for strip mining is affirmed subject to the right of appeal to the Secretary of the Interior." Plaintiff took no further action in the Department of the Interior.

In the meantime, plaintiff had written a letter to Senator McClellan, and on February 13, 1951, the latter wrote to the Department of the Interior. On February 28, 1951, an Assistant Secretary of the Interior wrote to Senator McClellan as follows:

> This will acknowledge receipt of your letter of February 13, and file in connection with the request of Mr. Neely to strip-mine under his coal lease BLM-C-018126 (Oklahoma).
>
> It is noted that you have in your file a copy of the Geological Survey's letter of January 30, to Mr. Neely and his response thereto under date of February 10.
>
> Further investigation of the case is presently being undertaken and you will be informed of the action taken.

In April 1951, plaintiff assigned the lease and the assignment was approved in July 1951. Thereafter, the assignee of the lease did extensive exploratory work which established that the land had practically no value for underground mining. A few years later another assignee of the lease did further exploratory work after which it was permitted to strip mine the land. Following trial before a commissioner of the Court of Claims the commissioner wrote an opinion in which he sustained the Government's defense that plaintiff had failed to

exhaust his administrative remedies by not taking an appeal to the Secretary of the Interior from the decision of Geological Survey. The commissioner recommended to the Court of Claims that the petition be dismissed. The Court of Claims disagreed. It held that the refusal to permit plaintiff to strip mine was a breach of the lease and that loss of profits was the proper measure of damages. With respect to the commissioner's recommendation the Court said:

> The Trial Commissioner thought plaintiff's failure to appeal to the Secretary of the Interior prevented his resort to the court. We do not think so, since Senator McClellan brought the matter to the attention of the Secretary, as evidenced by the acknowledgement of his letter, together with the file enclosed, by an Assistant Secretary, and the statement that further investigation was being undertaken. We think this was substantial compliance with the last step in the exhaustion of plaintiff's administrative remedy. The statute did not require plaintiff to pursue any prescribed administrative remedy as a prerequisite to suit.

The Court also held the refusal to permit strip mining was a breach of the lease and that loss of profits was an appropriate measure of damages. The Solicitor General declined to authorize certiorari.

A second trial was held before a commissioner for the purpose of determining the amount of plaintiff's recovery on the basis of loss of profits. Nearly 1,000 pages of additional testimony and numerous exhibits were received. The extensive evidence introduced by plaintiff supported his claim for $1,704,200, and defendant's evidence warranted recovery of loss of profits of only $154,446. The commissioner filed a supplemental opinion and eleven additional findings of fact. He recommended that a judgment be entered for plaintiff in the sum of $176,800. On July 17, 1964, the Court approved the commissioner's recommendation and entered judgment in the sum of $176,800. In our brief, we requested the Court to reconsider its previous holdings that plaintiff had exhausted his administrative remedies, that defendant had breached the lease and that loss of profits was the proper measure of damages. We also contended that plaintiff's remedy was a suit against the Secretary of the Interior in a federal district court and not a suit for damages in the Court of Claims. In its opinion of July 17, 1964, the Court did not discuss these points.

Staff: Walter H. Williams (Lands Division).

Indians: Jurisdiction of Federal Courts Over Tribal Matters; Control of Congress Over Tribal Assets; Indispensable Parties. Prairie Band of the Pottawatomie Tribe of Indians; Mrs. Minnie Evans, Whose Indian Name is Minnie Weshkeenoo; John P. Wahwassuck; Alfred Curtis Pequana; James P. Wabnosah and William Hale v. Stewart L. Udall, Secretary of the Interior; Philleo Nash, Commissioner of Indian Affairs, and Buford Morrison, Area Field Representative, Civil No. T-3412 (D. Kan., November 6, 1964, D.J. File No. 90-2-12-374). This action was brought in the name of the Prairie Band of Pottawatomie Indians by a minority faction seeking a declaratory judgment and injunction to determine the identity of the Indians who are entitled to share in the distribution of funds appropriated by Congress to pay awards made by the Indian Claims Commission

in favor of the Prairie Band and Citizen Band of Pottawatomie Indians. The Indian Claims Commission had entered a "McGhee type" judgment "for the benefit of all descendants of members of said (Pottawatomie) Nation" as it existed on the date of an 1846 treaty. The Commission expressly found, however, that the Prairie Band and the Citizen Band were the sole successors of the Pottawatomie Nation. Two awards of the Indian Claims Commission are involved. In one the judgment divided the award between the Citizen and Prairie Bands and in the other Congress provided for its division when appropriating the money. Congress also provided that the funds "may be advanced or expended for any purpose that is authorized by the respective governing bodies and approved by the Secretary of the Interior." Pursuant to this authority, the tribal authorities and the Secretary of the Interior proposed a distribution of the funds of the Prairie Band contrary to the contentions of the minority faction which instituted this action. The defendants were the Secretary of the Interior and other officials of that Department. (A similar suit against the tribal officials had previously been dismissed. Prairie Band of the Pottawatomie Tribe, et al. v. Mage N. Puckkee, et al., 321 F.2d 767 (C.A. 10, 1963).) Defendants filed a motion for summary judgment with supporting affidavit. In their reply brief, plaintiffs asserted that the funds in question were individual property of the descendants of members of the Pottawatomie Tribe as it existed in 1846. In a memorandum decision the Court allowed the motion for summary judgment, setting forth the following reasons for its decision:

1. The awards of the Indian Claims Commission are tribal and not individual property.

2. The United States District Court does not have jurisdiction of the subject matter or to grant the relief requested.

3. There is existing a tribal government recognized by the Secretary of the Interior having authority to represent the tribe; the action was not brought under the authority of the Prairie Band of Pottawatomie Indians; and the individual defendants do not have sufficient Interest in the tribal funds to enable them to maintain the action.

4. Congress has the exclusive power to prescribe how Indian Claims Commission awards shall be expended or distributed.

5. A determination of the right to share in tribal property is subject to the plenary power of Congress and not to judicial administration. It is a political rather than a judicial problem.

6. The funds in litigation are in the Treasury of the United States and the United States is an indispensable party to the action but has not consented to be sued.

7. The Prairie Band has an interest in the property. A final decree cannot be made without affecting that interest and therefore the Band is an indispensable party.

Staff: Assistant United States Attorney Elmer Hoge (D. Kansas)
Floyd L. France (Lands Division)

Easements; Scope of Transmission Line Right of Way. Coos County Sheep Co. v. United States, 331 F.2d 456 (C.A. 9, 1964, D.J. File No. 33-38-195-3343). The United States was assignee of an electrical power transmission line right-of-way easement providing in part that the assignee had the right "to remove the trees and make the clearing necessary or desirable for the purposes aforesaid, both on and adjoining said right of way." The purposes were to "erect, construct, repair, replace, maintain and use * * * poles, towers and wires suspended thereon."

The case arose when the United States, after the filing of condemnation proceedings, removed trees which, though they did not touch or overhang in a vertical plane any of the existing power apparatus, were situated so that, if they fell in the right direction, they would fall on or against the transmission facilities. The United States argued that it was merely exercising its rights as assignee under the easement, while appellant contended that this action exceeded its rights under the easement and was therefore a taking entitling it to just compensation for the trees.

The district court found that the United States had this right under the easement. In looking to local Oregon law to define the rights of the United States as assignee under the easement, the Court of Appeals used an Oregon Supreme Court decision interpreting this same language in an easement situation except that the words "both on and adjoining said right of way" did not appear as they do in the instant case. The Court saw that case as giving (1) the right to remove trees and to make such clearing as might have been necessary for the erection of the line and (2) the right to trim the overhanging branches of trees which interfere with its lines if such trimming is reasonably necessary to insure safe operation of the power line.

The Court held that the removal of these trees which had to fall in the right direction to touch the line was not reasonably necessary or desirable for the operation of the line to come within the rights as previously interpreted by the Oregon court and therefore appellant was entitled to just compensation for their destruction.

Staff: United States Attorney Sidney I. Lezak (D. Ore.).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS

Appellate Decision

Evidence; Defendant entitled to introduce net worth statement for the purpose of showing no deficiency in evasion prosecution based on bank deposits method of proof. Instructions; Defendant in evasion prosecution entitled to instruction that he should be acquitted if jury has reasonable doubt as to existence of deficiency. United States v. John Burton Moody, decided November 27, 1964 (C.A. 6th). The defendant was convicted under a four-count indictment charging him with wilfully attempting to evade and defeat his income taxes for the years 1956 through 1959. The Government showed that he had understated his income by a total of $23,429.73 in those years, and had attempted to evade and defeat $6,547.45 in taxes, by use of the bank deposits method of proof. The defendant claimed that a correct computation of his income for these years, including permissible deductions and excluding non-income receipts, would show no tax deficiency, and he attempted to prove this contention by introducing a net worth statement. The trial court accepted this into evidence but restricted its use to the issue of wilfulness, holding that in a bank deposits case a net worth statement is irrelevant as to the question of a deficiency. The trial court also refused to instruct the jury that they should acquit the defendant if they had a reasonable doubt as to the existence of a deficiency.

On appeal the case was reversed and remanded for a new trial. The Sixth Circuit held that the Government must prove that a tax was due and owing, and the defendant is entitled to attempt to prove, by any method, that he owed no additional tax beyond that shown on the return. They rejected the Government's argument that the net worth statement was inadmissible as not being on the evidence, holding that this question was not before them because the trial court, by admitting the statement, had found that it was based on the evidence. The court reversed on the grounds that the statement should have been admitted for all purposes, and that the jury should have been instructed to acquit the defendant if they had a reasonable doubt as to the existence of a deficiency.

Staff: United States Attorney Thomas L. Robinson and Assistant United States Attorney Odell Horton, Jr. (W.D. Tenn.)

CIVIL TAX MATTERS

District Court Decisions

Jurisdiction; Suits by Transferees to Enjoin the Collection of Taxes Dismissed for Lack of Jurisdiction Because Such Suits are Barred by the Internal Revenue Code and the Court Did Not Have Jurisdiction Under 28 U.S.C. 2410 To Inquire Into the Merits of the Assessments. Cooper Agency, Inc. v. Harold M. McLeod and United States. (E.D. S.C., Sept. 9, 1964). (CCH 64-2 U.S.T.C. ¶9776). Ten actions were instituted by members of the Cooper family and several

controlled corporations and associations to challenge jeopardy transferee assessments made against them in the total amount of approximately $9,000,000. The taxpayers sought to restrain the collection of these assessments contending that, despite the bar against such actions of Section 7421 of the Internal Revenue Code of 1954, the Court had jurisdiction to entertain the actions under 28 U.S.C. 1340, granting jurisdiction to District Courts in Internal Revenue matters and that sovereign immunity had been waived by 28 U.S.C. 2410, waiving sovereign immunity in certain foreclosure and quiet title actions.

In granting the Government's motion to dismiss, the Court concluded that the complaints failed to allege specific facts giving rise to the conclusion that the assessments were illegal and that the assessments were not made in good faith relying on the reasoning in Enochs v. Williams Packing Co., 370 U.S. 1, and, thus Section 7421 of the Internal Revenue Code of 1954 barred the actions. The Court further ruled that 28 U.S.C. 1340 is only a general grant of jurisdiction which must be buttressed by some other statute specifically waiving the sovereign immunity of the United States in a particular type of action. The waiver of sovereign immunity found in 28 U.S.C. 2410, the Court ruled, did not permit a taxpayer to inquire into the merits of an assessment against him by instituting a quiet title action involving his property, because this was not the legislative intent in amending Section 2410 to waive sovereign immunity in quiet title actions and because the allowance of such an action would circumvent the provisions of Section 7421 of the Internal Revenue Code barring such suits.

Staff: United States Attorney Terrell L. Glenn (E.D. S.C.); and Norman E. Bayles (Tax Div.).

Internal Revenue Summons; Bank Officer Not Held in Contempt Where He Produced Section of Report Specifically Pertaining to Taxpayer's Loans But He Was Ordered to Produce Entire Report or Specific Pages and Documents Which Referred to Taxpayer or to Corporations or Individuals With Whom He Was Connected and to Identify Persons, Including Other Bank Employees, Who Had Information About the Taxpayer's Transactions. In the Matter of Samuel W. Kearney. (S.D. N.Y., August 8, 1964). (CCH 64-2 U.S.T.C. ¶9754). In accordance with a prior order of the Court, a bank officer produced pages 160-191 of a report and supporting schedules concerning the taxpayer. However, he declined to produce the balance of the report or to state what it referred to, although he did state that the remaining portions of the report were not relevant to the tax liabilities of the taxpayer or to loans made to him by the bank. The Government sought to punish him for contempt because the prior order of the Court directed the bank officer to produce the portions of the report and accompanying documents which "related to" the specified subjects.

The Court ruled that, while the witness was not in contempt, the prior order had cast upon him the burden of discovering whether there were portions of the report other than the pages produced which related to the subject matter of the Revenue summons. Therefore, the Court directed the witness either to produce the entire report and accompanying schedules, work sheets and memoranda so that the Government could see for itself which parts were relevant or to

read the report and documents listed word for word and within ten days serve upon the Government and file with the Court an affidavit stating that he had done so and specifying the numbers of each and every page of the report and other documents which refer in any way to the taxpayer or to any of the corporations or individuals with whom he was allegedly connected. The Court also ordered the witness to produce the pages so specified for inspection by the Revenue Service and to identify bank employees and others who may have knowledge concerning the subject of the investigation.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Arthur S. Olick (S.D. N.Y.).

Alimony; Periodic Payments Received by Taxpayer from Her Former Husband Pursuant to Judgment of Separation Constitute Alimony and as Such are Taxable as Income to Her. United States v. Miriam Bass Rosenfield. (S.D. N.Y., Oct. 15, 1964). (CCH 64-2 U.S.T.C. ¶9809). In this suit to reduce tax assessments to judgment, the Government contended that weekly sums paid to the taxpayer in 1950 and 1951 by her former husband for her support and maintenance pursuant to a judgment of separation were alimony and, therefore, includible in her gross income for those years under Section 22(k) of the Internal Revenue Code of 1939, then in effect. In filing her tax returns for both those years the taxpayer had included in income the amounts so received, but had not paid the indicated tax thereon, except for $25.00 in each year. Subsequently and in this suit she contended that the periodic payments were not alimony but were principal payments for the purchase of shares of stock held by her in the family corporation managed by her former husband and were, therefore, erroneously reported as income. The Court found no substantiation for the taxpayer's contention in the record of the prior matrimonial litigation and held for the Government in the full amount of its claim for both years.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Arthur S. Olick (S.D. N.Y.).

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