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MONTHLY TOTALS

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

	First 5 Months Fiscal Year 1964	First 5 Months Fiscal Year 1965	Increase or Decrease Number	%
Filed				
Criminal	14,013	13,562	- 451	- 3.22
Civil	11,180	11,367	+ 187	+ 1.67
Total	25,193	24,929	- 264	- 1.05
Terminated				
Criminal	12,904	12,122	- 782	- 6.06
Civil	10,172	10,800	+ 628	+ 6.17
Total	23,076	22,922	- 154	- 0.67
Pending				
Criminal	10,933	11,533	+ 600	+ 5.49
Civil	23,324	23,837	+ 513	+ 2.20
Total	34,257	35,370	+ 1,113	+ 3.25

Following is an analysis of the number of cases filed and terminated monthly during the first five months of fiscal 1965.

	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
Nov.	2,497	2,005	4,502	2,741	2,132	4,873

For the month of November, 1964 United States Attorneys reported collections of $14,238,124. This brings the total for the first five months of this fiscal year to $31,175,736. This is an increase of $4,404,995 or 16.45 per cent over the $26,770,742 collected during that period in fiscal 1964.

During November $4,592,295 was saved in 97 suits in which the Government as defendant was sued for $5,627,989. 57 of them involving $4,247,649 were closed by compromises amounting to $843,398 and 25 of them involving $898,790 were closed by judgments amounting to $192,296. The remaining 15 suits involving $481,550 were won by the Government. The total saved for the first five months of the current fiscal year was $59,641,169 and is an increase of $15,685,685 or 35.69 per cent over the $43,955,484 saved in the first five months of fiscal year 1964.

The cost of operating United States Attorneys' Offices for the first five months of fiscal year 1965 amounted to $7,801,354 as compared to $7,195,573 for the first five months of fiscal year 1964.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Complaint Charging Violation of Section 1 of Sherman Act. United States v. Concentrated Phosphate Export Association, Inc., et al., (S.D. N.Y.) D.J. No. 60-44-28. On December 21, 1964, a civil action under Section 1 of the Sherman Act was filed in New York against Concentrated Phosphate Export Association, Inc. (CPEA), a Webb Pomerene Association, and its five members, the major producers of concentrated phosphate fertilizers. The defendant members are W. R. Grace & Co., Tennessee Corporation (subsidiary of Cities Service), Socony Mobil Oil Company, American Cyanamid Company and International Minerals & Chemical Corporation.

The complaint alleges that CPEA was formed in 1961 and thereafter handled all sales by its members of concentrated phosphates for the foreign aid program for Korea. The Association quoted a single price on each procurement and then allocated the resulting orders among its members. During this period, a "Buy America" preference policy was in effect which limited procurements substantially to United States sources. Sales by CPEA for the Korean foreign aid program amounted to over 700,000 metric tons and U.S. funds of $46,000,000 were expended for such purchases.

Initially, CPEA sold to independent exporters, but in 1963 it sold directly to the procuring agency. At times, procurement was handled by the Korean Government but AID regulations were applicable to the purchase and compliance with these regulations was required of the seller before payment could be obtained from U.S. Government AID funds. In other cases, procurement was handled by GSA with delivery being made to the U.S. Government dockside.

Alleging that defendants deprived the United States of the right to have its foreign aid program procurement made at free and competitive prices, the suit asks dissolution of the Association and an injunction against further fixing of prices and allocation of business. Since the Webb Pomerene Act was designed to enable American producers to compete abroad with foreign competitors, it is the Government's position that defendants' actions were outside the permissible use of an export association.

Staff: Burton R. Thorman, E. Leo Backus and Peter Adang (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

SUPREME COURT

GOVERNMENTAL PRIORITY

Supreme Court Upholds Application of 31 U.S.C. 192 -- Which Imposes Personal Liability for Violation of Government's Debt Priority Under 31 U.S.C. 191 -- to Court-Appointed Distributing Agent in Chapter XI Proceeding. Elizabeth Simonson King v. United States (S.Ct., No. 16, December 14, 1964). D.J. No. 77-48-704. The Government brought this action against George Stewart King, the distributing agent of a bankrupt corporation in a Chapter XI proceeding, and against the surety on King's bond, alleging that although the United States filed a claim in the proceeding which was entitled to priority under 31 U.S.C. 191, King paid out almost all of the corporation's assets to nonpriority creditors, thus preventing the United States from receiving payment in full on its claim. The action sought to subject King, who had been president of the corporation, or his surety to the extent of its bond, to personal liability under 31 U.S.C. 192 for the unpaid portion of the Government's claim. Although King died after the commencement of the action, the suit continued unabated against his executrix. See United States v. Dewey, 39 Fed. 251.

The district court dismissed the complaint, holding that King, as a distributing agent in bankruptcy, was not within the class of persons subjected to liability by 31 U.S.C. 192. 208 F. Supp. 697. The Third Circuit reversed and directed that judgment be entered in favor of the United States. 322 F. 2d 317. On the basis of an acknowledged conflict between the Third Circuit's decision in this case and the Ninth Circuit's decision in United States v. Crocker, 313 F. 2d 946, as well as the Fifth Circuit's holding in United States v. Stephens, 208 F. 2d 105, with respect to the proper interpretation and reach of 31 U.S.C. 192, the Supreme Court granted certiorari.

By a vote of 7 to 2, the Supreme Court affirmed the decision below. It held that 31 U.S.C. 192 could be applied to King as a court-appointed distributing agent in a Chapter XI proceeding even though such a fiduciary is not mentioned by name in the section and even though he acts primarily for the court which appointed him rather than for the debtor. The Court stated that whether or not a fiduciary not mentioned by name falls within the ambit of section 192 depends not on the title of his position or the mode of his appointment, but upon the degree of control he is in a position to assert over the allocation among creditors of the debtor's assets in his possession. The Court concluded that not only was King possessed of the requisite degree of control, but that also, since he had been president of the corporation for which he acted, he obviously knew or should have known of the Government's priority claim.

Staff: Alan S. Rosenthal and Frederick B. Abramson (Civil Division).

COURT OF APPEALS

ADMIRALTY

District Court Erred in Refusing to Allow Plaintiffs to Amend Complaint, Which Stated Action of Maritime Tort, in Order to Allege Jurisdiction Under Suits in Admiralty Act Instead of Federal Tort Claims Act. Judith Beeler, a Minor by Charles Beeler and Ruth Beeler, Her Parents, et al. v. United States (C.A. 3, No. 14784, November 20, 1964). D.J. No. 157-64-179. Plaintiff was injured when a boat in which she was a passenger was swept over a dam in the Allegheny River. The complaint alleged that the accident was caused by the failure of the Corps of Engineers to warn water craft of the presence of the dam. Jurisdiction was alleged under the Federal Tort Claims Act. The Government moved for summary judgment. Pending disposition of this motion, plaintiffs sought to amend their complaint by substituting the Suits in Admiralty Act for the Tort Claims Act in the jurisdictional averment. The district court, subsequent to entering summary judgment for the United States, entered an order refusing to amend on the ground that it was without jurisdiction to do so. Since the two-year limitation of the Suits in Admiralty Act had expired, plaintiffs could not institute a new action.

The Court of Appeals, in reversing and remanding, rejected the Government's argument that plaintiffs' failure to invoke the Suits in Admiralty Act by a reference to it in the complaint deprived the district court of (1) jurisdiction to entertain an otherwise well pleaded cause of maritime tort and (2) power to amend the complaint or transfer the cause to the admiralty docket. The Court noted that the complaint accurately and succinctly stated a cause of action created by the Suits in Admiralty Act. It was of the view that plaintiffs should not be deprived of their right to recovery merely because they cited the wrong statute. The allowance of the amendment, the Court stated, would not have adversely affected the United States, while the refusal to allow it would put an end to plaintiffs' right to pursue their cause of action. The Court held that there was no merit to the Government's argument that the 1960 amendment to the Suits in Admiralty Act indicated that Congress did not intend to permit the courts to transfer suits from law to admiralty and vice versa.

Staff: Leavenworth Colby, Lawrence F. Ledebur and Daniel E. Leach (Civil Division).

FEDERAL POWER ACT

Private Downstream Power Projects Must Pay Portion of Interest, Maintenance and Depreciation Costs of United States' Upstream Improvement Where Downstream Projects Are Benefited Thereby; No Offset Permitted For Benefit Conferred Upon Government Project. South Carolina Electric & Gas Co. v. Federal Power Commission and United States (C.A. 4, No. 9091, November 9, 1964). D.J. No. 91-169. Section 10(f) of the Federal Power Act (16 U.S.C. 803(f)) requires the Federal Power Commission to assess, against a downstream power project, a portion of the designated costs of a headwater improvement where that improvement confers energy gains on the downstream project. Pursuant to that mandate, the Commission instituted an investigation directed at determining what benefits, if any, petitioner's Stevens Creek hydroelectric power project located on the Savannah River enjoys as a result of the construction and operation, by the United States,

of the upstream Clark Hill improvement. Stevens Creek was constructed in 1913 pursuant to an Act of Congress and a permit issued by the Secretary of War; the Clark Hill dam was constructed in 1950. Finding significant energy gains, the Commission ordered petitioner to pay an equitable portion of the interest, maintenance, and depreciation costs incurred by Clark Hill in conferring that benefit.

South Carolina challenged that order on several grounds. It contended that the assessment provision, which in relevant part was not enacted until 1935, could not constitutionally be applied to its pre-existing facility; that it was entitled to an offset in the amount of benefits its downstream facility confers, by way of reregulation, upon the upstream Government dam; that the Commission erroneously found that Stevens Creek enjoyed energy gains as a result of the construction and operation of Clark Hill and assessed an inequitable portion of the headwater costs against it; and that the Commission improperly imposed against it a portion of the costs incurred in conducting the investigation.

The United States intervened on behalf of the Department of the Interior and urged rejection of each of petitioner's contentions. In a detailed opinion the Court agreed entirely with the United States and the Commission. Two of its holdings are particularly significant as the questions had not previously been the subject of judicial inquiry. First, it held that the 1935 amendment to the Federal Water Power Act -- which broadened the scope of the Act's headwater assessment provision (16 U.S.C. 803(f)) to embrace "unlicensed" power projects (petitioner is unlicensed since it was constructed prior to the 1920 passage of that Act which imposed the licensing requirement) -- is, notwithstanding the objections based on alleged constitutional obstacles and legislative intent, prospectively applicable to projects in existence prior to the effective date of the amendment. Second, that the assessment provision in the Act is concerned solely with headwater benefits conferred upon downstream power projects and does not embrace benefits (e.g., reregulation) such projects may confer upon upstream facilities. The Court recognized that in no event may an assessment be levied against a federal project.

Staff: Edward Berlin (Civil Division), Paul A. Sweeney (Federal Power Commission).

FEDERAL RULES OF CIVIL PROCEDURE

Government's Litigation of Item of Special Damages Overcomes Its Objection That Plaintiff Failed to Plead Item Specifically; No Abuse of Discretion by District Court in Denying Government's Motion for New Trial Based on New Evidence, Where Evidence Could Have Been Discovered, With Due Diligence, Before Trial. Arthur W. Niedland, et al. v. United States (C.A. 3, No. 14,829, November 5, 1964). D.J. No. 157-15-46. Plaintiff sued the Government for personal injuries sustained in a collision involving a Post Office Department truck. The Government conceded liability and only the issue of damages was tried. Part of the $9,463 damages awarded plaintiff was for the salary paid by plaintiff to an assistant to replace him as manager of a dance studio during the time he was unable to work. The Government moved to amend its judgment, deleting that item of damage on the ground that Rule 9(g), F.R.C.P., requires that "when items of special damage are claimed, they shall be specifically

stated" and in the case at bar, plaintiff failed to plead specifically that item of damage. The Government also moved for a new trial based upon affidavits executed by four persons who had averred that plaintiff had deliberately misled the court as to the seriousness of his injuries. The district court denied both the motion to amend and for a new trial. The latter was denied on the ground that the Government, by the exercise of due diligence, could have discovered the evidence contained in the affidavits prior to trial.

The Third Circuit affirmed the court below. The Court noted that Rule 15(b), F.R.C.P., provides that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." It stated that the Government not only failed to object to plaintiff's introduction of evidence as to the salary paid the assistant but vigorously litigated the issue. Accordingly, the Court upheld the contested item of damages.

The Third Circuit also rejected the Government's claim that the district court abused its discretion in denying a new trial. The Court of Appeals agreed with the lower court that the allegedly newly discovered evidence could have been discovered, with due diligence, prior to trial, and that the accuracy of the affiants' knowledge, whether they are prejudiced and whether they would or would not be convincing witnesses, "raises only a doubt, although perhaps a disturbing doubt," that there may have been a miscarriage of justice.

Staff: United States Attorney Alexander Greenfeld and Assistant United States Attorney Stanley C. Lowicki (D. Del.).

FEDERAL TORT CLAIMS ACT

Question of Whether Mail Carrier Caused Multi-Car Accident Held One of Fact; Lower Court's Causation Finding in Government's Favor Held Not Clearly Erroneous. Jo Ella Michael, et al. v. United States (C.A. 6, No. 15632, November 18, 1964). D.J. No. 157-30-38. In this case, plaintiffs were injured when the car in which they were riding was struck head-on by an automobile driven by Johnie Brown. Brown had been driving north on U.S. Highway 25 in Scott County, Kentucky when he observed two vehicles in his lane stopped on the highway. The vehicle farthest away from Brown was operated by a U.S. mail carrier, who was servicing from his automobile a mail box located on the edge of the road. Brown attempted to avoid colliding with the car ahead of him, but because of his high rate of speed and the complete failure of his brakes, he ran into the rear end of the car which had stopped behind the mail carrier, caromed across the center line and struck plaintiffs' southbound car. The district court held that the United States was not liable since the conduct of the rural mail carrier was not the proximate cause of the collision.

The Court of Appeals for the Sixth Circuit affirmed, stating that the issue of whether an act of negligence proximately contributes to a tortious act is a question of fact. In that connection, the Court held that the lower court's finding -- that the mail carrier's conduct was not the proximate cause of plaintiffs' injuries -- was not clearly erroneous.

Staff: United States Attorney George I. Cline and Assistant United States Attorney Arthur L. Brooks, Jr. (E.D. Ky.).

Ninth Circuit Looks to Uniform Vehicle Code in Determining Whether Pedestrian Is Relieved of Duty to Exercise Care for Own Safety by Virtue of Provision in Washington Statute. Milda Diabol v. United States (C.A. 9, No. 18,935, September 9, 1964). D.J. No. 157-82-298. While crossing a street in a marked crosswalk not controlled by a traffic signal, plaintiff passed in front of a vehicle stopped halfway across the crosswalk in the first lane and walked into the side of a slow moving Air Force vehicle in the next lane. The district court concluded that plaintiff was guilty of contributory negligence as a matter of fact and also as a matter of law. Plaintiff appealed on the ground that under Section 46.60.250 of the Revised Code of Washington, the Air Force driver was negligent as a matter of law in passing a vehicle which had stopped to permit her to cross the street.

The Court of Appeals affirmed, one member of the panel dissenting. The court stated that unless R.C.W. §46.60.250 created a special statutory immunity, the physical facts found by the trial court were sufficient to support the lower court's conclusion that plaintiff was negligent as a matter of law. The Court then noted that the first paragraph of the R.C.W. §46.60.250 provides in part that where there are no operating traffic signals a vehicle must yield the right of way to a pedestrian crossing in a crosswalk, but the pedestrian shall not move suddenly from a place of safety into the path of a vehicle so close that the driver cannot yield. This provision, the statute adds, "shall not apply under the condition stated hereinafter." Plaintiff argued that in light of the second paragraph of the statute -- which provides that when a vehicle is stopped to permit a pedestrian to cross, vehicles approaching the stopped vehicle from the rear shall not pass -- she was not subject to the provisions in the first paragraph regarding the conduct expected of a pedestrian. In rejecting this argument, the Court looked to the law in those states which have adopted the Uniform Vehicle Code of 1944, since the provisions therein were virtually identical to R.C.W. §46.60.250, and noted that the duties imposed upon pedestrians by the first paragraph were deemed to be inapplicable only in that situation -- which was described in the fourth paragraph of R.C.W. §46.60.250 -- when a pedestrian crosses a roadway at a point at which a tunnel or overpass is available to him. The Court also reasoned that if the Washington legislature "had wished to exclude contributory negligence as a defense to the claim of a pedestrian under paragraph 2, it would have employed a more direct means of saying [it]."

Staff: United States Attorney Brockman Adams and Assistant United States Attorney Charles W. Billinghurst (W.D. Wash.).

SOCIAL SECURITY ACT

Fifth Circuit Reverses Lower Court's Decision Overturning Secretary's Denial of Disability Benefits; Holds That Credibility Findings Are for Secretary and That Its Task Would Be Easier if District Court, in Reversing Would Have Analyzed Evidence and Set Forth Reasoning for Its Holding. Celebrezze v. Zimmerman (C.A. 5, No. 21465, December 17, 1964). D.J. No. 137-73-87. In this Social Security disability case, the Fifth Circuit reversed the district court's order that benefits be paid the claimant. The appellate court, in a per curiam opinion, found that even on "the most casual reading of the record" there was substantial evidence to support the Secretary's decision. It specifically noted that the Secretary questioned the credibility of certain evidence

favorable to the claimant and that "credibility findings are, of course, for the Secretary and not for the trial court." The Court also rejected the district court's statement that claimant suffered an impairment and "is therefore" incapable of obtaining substantial gainful employment, noting that "many persons suffer from a medically determinable physical impairment which does not make them incapable of obtaining substantial gainful employment.

Finally, referring to our argument that as a matter of proper judicial administration the appellate court should disapprove of the district court's practice of reversing without an opinion stating its reasons for reversal, the Fifth Circuit stated that "in the rare case in which it is appropriate for the trial court to reverse the Secretary's findings because there is no substantial evidence to support them, it would make it much easier for this Court, on appeal, to have the benefit of the trial court's analysis of the evidence, and the reasoning by which it arrives at its determination that it is unable to find support in the record for the Secretary's findings."

Staff: Sherman L. Cohn and Robert J. Vollen (Civil Division).

DISTRICT COURT

FEDERAL HOUSING ADMINISTRATION

Federal Housing Commissioner, as Assignee of Valid Mortgage, Has Clear Right to Foreclose Mortgage. United States v. Lawrence Towers, Inc. (Civ. No. 64-C-141, E.D. N.Y., December 7, 1964). D.J. No. 130-52-5720. This is an action to foreclose a mortgage of $2,719,800, assigned to the Federal Housing Commissioner, covering a multi-family project in Brooklyn, New York. A large number of unpaid subcontractors filed mechanic's liens at about the time foreclosure became imminent. All were joined as parties defendant. Two groups of such lienholders filed answers alleging that the financial institution, which was the original mortgagee, and the Federal Housing Commissioner, who insured the mortgage, violated the statutes and regulations applicable to the insuring of the mortgage. We filed a motion for summary judgment, admitting the violation for the sole purpose of disposing of the motion, but contending that we were still entitled to foreclosure of our mortgage. (Defendants relied on Accardi v. Shaughnessy, 347 U.S. 260 (1954), and Service v. Dulles, 354 U.S. 363 (1957), but the court rejected both as being inapposite.)

The District Court found that there was nothing in the Act or the regulations to indicate that the Commissioner, who did not make the loan but only insured it, owed any duty to the subcontractor or to indicate that violation of the Act or regulations invalidated the lien of a mortgage. The Court said that the conclusion was inevitable that the Government as assignee of a valid mortgage has a clear right to foreclose and that defendants are subordinate lienholders without any relationship to the Government entitling them to any rights in this proceeding arising out of any violation of the Act or the regulations. Compare United States v. Sylacauga Properties, Inc., 323 F. 2d 487 (C.A. 5).

Staff: United States Attorney Joseph P. Hoey, Assistant United States Attorney Thomas J. Lilly (E.D. N.Y.); George H. Vaillancourt (Civil Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

ILLEGAL REENTRY AFTER DEPORTATION

Prosecution Policy Under 8 U.S.C. 1326 Where Deported Alien Later Found in United States Without Authority. In the ordinary case involving an alien subject to criminal liability under 8 U.S.C. 1326, where the place of reentry is known and can be proved, the prosecution should be brought in the district where the reentry occurred. The "found" provision of the statute may be invoked where (1) the place of reentry and hence venue cannot be established; or (2) the alien is found in the United States at a location far removed from the place of reentry; or (3) prosecution at the place of such reentry is otherwise impracticable or inadvisable.

Where it is known that the illegal reentry took place more than five years previously, so that prosecution for the reentry itself is barred by the statute of limitations, the "found" provision should not be used without prior authorization from the Criminal Division.

IMPERSONATION

Impersonation of Creditor of United States. In United States v. Charles Allen and Dorothy Ann Lomma (S.D. Calif.). D.J. No. 48-12-1481, 18 U.S.C. 914 was utilized as the basis of prosecution recently in an unusual situation arising out of endorsement of a Government check. Allen stole from the mails a Treasury check in the amount of $101 payable to "Dorothy L. Clark". Lomma negotiated the check by endorsing it "Dorothy L. Lomma", representing that she was the payee but had recently married and that the check was payable to her in her maiden name. She therefore signed her true name as endorser, except that she changed the middle initial to conform to that of the named payee.

Pertinent cases indicate the purported endorsement probably was of insufficient legal efficacy as an endorsement of the payee's name to pass title to property in the check; thus it is doubtful that the purported endorsement violated 18 U.S.C. 495. However, inasmuch as Lomma knowingly and falsely represented both orally and by the purported endorsement that she was in fact the payee, she was charged with personating a true and lawful holder of "any ... dividend, pension, wages, or other debt due from the United States" in violation of Section 914. Allen was charged as a principal with aiding and abetting in the personation offense, and was also charged with theft of the check from a mail depository.

Lomma pleaded guilty, testified for the Government against her co-defendant, and received a sentence of 4 months' imprisonment. Allen, tried and convicted by a jury on both counts, has not yet been sentenced.

It is thought that Section 914, seldom utilized in the past as the basis of prosecution, may be of considerable prosecutive value in novel situations of the Lomma type.

Staff: Assistant United States Attorney Robert Talcott (S.D. Calif.)

NATIONAL MOTOR VEHICLE THEFT ACT

Interstate Transportation of Stolen Motor Vehicle; Intent to Default at Time of Purported Assumption of Chattel Mortgage as Evidence of Intent to Deprive Owner in Relation to Meaning of Word "Stolen". Henry Lake v. United States (C.A. 10, November 30, 1964). D.J. No. 26-13-501. The Tenth Circuit affirmed conviction of defendant by a jury in the District of Colorado under 18 U.S.C. 2312 for transportation of an automobile from California to Colorado.

The question involved was whether upon the facts the car was stolen within the meaning of the Act. DeZeeuw, owner of the car, advertised it for sale to anyone who would agree to assume the payments under an existing chattel mortgage. Posing as one Richard Baker in the used car business, Lake offered to purchase it, indicating his desire to pay off the mortgage rather than assume the monthly payments, and representing that he had already taken the liberty of securing the proper transfer documents in order to expedite the sale. The owner signed a bill of sale and gave Lake the certificate of registration and the keys to the car. Lake drove the vehicle away as his own, but made no payments on the mortgage nor did he ever contact the finance company to explain his failure to do so. He drove the car into several states, including Colorado, and abandoned it about four months later in Kansas, where he was involved in an automobile accident.

Lake contended on appeal that since he acquired unqualified possession and title to the car upon his promise to discharge the mortgage at some future time, the car was not "stolen" within the Act - i.e., it was not a crime to default on his obligation. The Tenth Circuit noted that "stolen" as used in the statute is not limited to common law larceny but includes all felonious takings with intent to deprive the owner of the rights and benefits of ownership, including false pretenses and larceny by trick. On the record it could be assumed that the trial court, as it might have, properly instructed the jury that if Lake had formed the intent to obtain title and possession by representing to the owner that he would pay the mortgage indebtedness, but without any intention of discharging such obligation, and if he thereafter transported the vehicle in commerce and willfully failed to make payments on the indebtedness, he should be found guilty of the offense charged.

The Court of Appeals was careful to point out that the mere fact of default on the promise to pay does not of itself justify inference of the requisite fraudulent intent, but that the fact of default in context with all the facts may bear upon the accused's state of mind at the time of the transaction. The Court decided it could not say all the facts in this instance were insufficient to support the inference of fraudulent intent.

Staff: Assistant United States Attorney Milton C. Branch (D. Colo.)

BANKING

False Statements to Savings Institution to Secure Advance of Funds; Proof. Kovens, et al. v. United States (C.A. 5, No. 20,140, Nov. 27, 1964). D.J. No. 29-18-479. Defendants were charged with making false statements in Construction Draws to a savings institution for funds expended for the purposes enumerated therein, when in fact the funds were not spent as alleged, in violation

of 18 U.S.C. 1014. It was the contention of defendants that the Government must prove that at the completion of construction some part of the funds had been diverted or not expended for the sole purpose of construction. The appellate court held the test was whether or not the funds were spent as enumerated in the Construction Draws as of that date.

Staff: William A. Paisley and Richard W. Schmude (Criminal Division)

BANKRUPTCY FRAUD
(18 U.S.C. 152)

Concealment of Assets; False Oath; Subsequent Disclosure Not Defense. United States v. Lawrence J. Young (C.A. 7, Dec. 17, 1964). D.J. No. 49-23-552. Defendant was convicted in the United States District Court for the Northern District of Illinois, E.D. on a three count indictment charging concealment of assets and false oath in connection with the failure to schedule his interests as contract vendee in certain residence property and as sole legatee in an estate then pending in the Probate Court of Cook County, Illinois. The existence of these assets was subsequently disclosed during the bankruptcy proceedings.

The Court, in affirming the conviction, rejected defendant's contention that elements of the offenses were not proved because of subsequent disclosure of the assets and the absence of a demand by the trustee. The Court held that the failure to schedule the assets constituted a concealment and the offense of making a false oath was completed when the knowingly false schedules were sworn to and filed.

Staff: United States Attorney Edward V. Hanrahan; Assistant United States Attorneys John Peter Lulinski, John Powers Crowley and William M. Coffey (N.D. Ill.)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Ex Parte Enlargement of Administrative Record Not Permitted. Candida Scalzo v. Hurney (C.A. 3, No. 14811, November 18, 1964) D. J. No. 39-62-239. Appellant, an Italian national, sought unsuccessfully in the lower court to have an order for her deportation set aside and to be granted the status of a permanent resident alien.

Included as a part of the appeal record in the case was a deposition of appellant's husband which was taken on November 29, 1962, and filed in the lower court prior to the taking of the appeal. The Third Circuit noted that the deposition was taken over the objection of the District Director and should not have been filed without leave of the court. The Court struck the deposition from the record, ruling that only the record of the administrative proceeding itself was pertinent and relevant in this type of action. The Court further ruled that an examination of the briefs, administrative record and oral arguments in the case disclosed no error in the judgment of the court below and affirmed it.

Staff: United States Attorney Drew J. T. O'Keefe and Assistant United States Attorney Joseph R. Ritchie, Jr. (E.D. Pa.)

Petition to Review Deportation Order Dismissed Because Not Timely Filed. Eleftherios Liadakis v. Immigration and Naturalization Service (C.A. 4, No. 9442, December 7, 1964) D. J. No. 39-16-495. Petitioner is a deportable alien who sought to have his deportation stayed under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h). The Board of Immigration Appeals denied a stay by order of April 18, 1963. Within six months of the Board's order, petitioner challenged its validity by filing an action in the United States District Court for the District of Columbia. Under stipulation this action was held in abeyance pending the outcome of Foti v. Immigration and Naturalization Service, 375 U.S. 217.

On April 10, 1964, after the decision in Foti, petitioner filed the present action under Section 106(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), and requested the Fourth Circuit to review the order of the Board denying him a stay of deportation. The Court observed that the petition for review had not been filed within six months of the Board's order as required by Section 106(a) and dismissed it as untimely. The delay occasioned by awaiting the decision in Foti did not, in the Court's opinion, authorize an extension of the period fixed by statute within which a petition for review of a deportation order must be filed. The Court declined to decide

whether petitioner could challenge the deportation order in habeas corpus proceedings should he be taken into custody for deportation.

Staff: United States Attorney C. V. Spratley, Jr. and
Assistant United States Attorney Samuel W. Phillips (E.D. Va.)
Of Counsel:
Maurice A. Roberts (Criminal Division)

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Federal Tax Lien Has Priority Over Landlord's Lien Which Had Not Been Perfected at Time Assessment Was Made. United States v. New Rose Development Corporation (Sup. Ct. of Appeals of Virginia, November 30, 1964.) The United States made an assessment for federal withholding taxes on May 3, 1962 against a subtenant-taxpayer, and recorded its lien in the proper state office on May 9, 1962. New Rose Development Corp., the landlord, caused to be issued on May 3, 1962, a distress warrant for rents due, and on May 6, 1962, a levy was made against the property of the taxpayer. The Corporation Court of the City of Norfolk entered its order that New Rose's claim for rent, as established by the levy of the distress warrant, was entitled to priority over the tax lien of the United States despite the fact that the assessment was made before the levy occurred. The United States appealed, and the Supreme Court of Appeals of Virginia, relying upon its own earlier decision in United States v. Lawler, 201 Va. 686, 112 S.E. 2d 921 (1960), reversed the Corporation Court. Since the landlord's lien was in the process of judicial enforcement at the time the tax assessment was made, it was inchoate vis-a-vis the federal tax lien. Until the landlord's lien attached to specific property of the subtenant and became fixed in amount, it was inchoate in the federal sense, however perfected it might be regarded for state law purposes.

Staff: Morton K. Rothschild and Joseph Kovner, (Tax Division); United States Attorney Claude V. Spratley, Jr.

District Court Decisions

Internal Revenue Summons; Action for Damages; Taxpayer Cannot Sue Bank and I.R.S. Agent Because Bank Turned Over Its Records to Agent Pursuant to Command of I.R.S. Summons. Allen N. Brunwasser v. Pittsburgh National Bank and John S. Warwick. (W.D. Pa., Nov. 5, 1964). (CCH 64-2 U.S.T.C. par. 9871). Allen Brunwasser, a taxpayer under investigation, learned that the Pittsburgh National Bank had produced some of its records pursuant to the command of an Internal Revenue summons. Taxpayer commenced this action in a state court seeking money damages from the bank and the agent, and the suit was removed to the Federal Court. Taxpayer asserted inter alia that the records involved pertained to years previously audited by the Internal Revenue Service and thus, under the provisions of Section 7605(b) of the Internal Revenue Code, the examination was barred; that the summons was invalid since it did not name the person who was required to respond to it (the summons was addressed to the Pittsburgh National Bank); and it was responded to prior to the elapsing of ten days from the date

of its service, (See §7605(a), I.R.C. 1954). The Court granted motions for summary judgment filed by the bank and the agent determining that: (1) Section 7605(b), Internal Revenue Code, pertains to "a taxpayer's records or books," and since the records were those of the bank and not the taxpayer, the taxpayer had no standing to complain; (2) A summons is valid even though issued to the corporate respondent because the Government cannot be expected to address a summons to the heads of many departments of a large corporation; (3) The ten-day notice provision under Section 7605(a) is for the benefit of the person to whom the summons is directed and not the taxpayer, and, consequently, "plaintiff would have no standing to question the bank's waiver of this provision."

Staff: United States Attorney Gustave Diamond (W.D. Pa.); and Robert A. Maloney (Tax Div.).

Tax Liens; Cash Surrender Value of Insurance Policy Held Subject to Federal Tax Liens Securing Joint Liability of Husband and Former Wife Although Insurance Policy Was Transferred to Wife as Part of Divorce Proceedings Prior to Assessment of Tax. United States v. Gordon A. Campbell, et al. (W.D. Wash., November 9, 1964). (CCH 64-2 U.S.T.C. ¶9870). The United States brought a foreclosure action against taxpayers, Gordon Campbell and his former wife, and the Metropolitan Life Insurance Company to foreclose its tax liens against the cash surrender value of a life insurance policy issued in 1944 on Gordon Campbell's life with his former wife the designated beneficiary under the policy. Taxpayers were divorced on March 6, 1961, prior to the joint assessment of tax made against them, and, pursuant to the divorce decreee and property settlement, all right, title and interest in the policy was assigned to the beneficiary. The Court held that Gordon Campbell and his former wife were jointly and severally liable for the taxes and that the cash surrender value of the policy was subject to the Government's tax lien, and the Court ordered the wife to surrender the policy to Metropolitan and directed the insurance company to pay over the cash surrender value of the policy together with all accrued and terminal dividends to the United States to be applied against the joint liability.

Staff: United States Attorney William N. Goodwin and Assistant United States Attorney Gerald W. Hess (W.D. Wash.).

Tax Liens; Unrecorded Assignments of Proceeds of Insurance Policies Owned by Taxpayer Held Superior to Federal Tax Liens. In re Mile Hi Restaurants, Inc. (D. Colo., October 21, 1964). (CCH 64-2 U.S.T.C. para. 9853). Taxpayer owned two insurance policies issued by the Equitable Life Insurance Company and by the Connecticut General Life Insurance Company at his death. Orr and Grover, creditors of the taxpayer, claimed prior assignments of the policies as security for loans to him. Orr's assignment was based on his guarantee of a bank loan to taxpayer in which both policies were physically delivered to the bank. The bank notified the insurance companies of the assignments by telephone, but neither the bank nor Orr gave any written notice of the assignments, nor were the assignments recorded under the provisions of the Colorado Revised Statutes. Grover's claim arose also out of a loan to taxpayer for which it assigned as security the Connecticut policy, then in the possession of the bank,

but as to which a written notice of assignment was executed by taxpayer and forwarded to the insurer and entered on its records. However, this assignment was also not recorded under state law.

The Government contended that the tax liens, although coming into existence subsequent to the assignments, would nevertheless enjoy priority over the assignments for the reason that notices thereof were not recorded in accordance with the provisions of the Colorado Revised Statutes relating in general to the recording of notices of the assignments of accounts receivable.

The District Court held that the Orr assignment gave rise to a perfected prior lien as a pledge and the Grover assignment was a mortgage. It was further held that neither assignment had to be recorded under the statute for recordation of assignments of accounts receivable to protect its priority as to subsequent federal tax liens. The opinion in Landy v. Nicholas, 221 F. 2d 923 (C.A. 5), was relied upon by the Court in reaching this latter part of its decision.

Staff: United States Attorney Lawrence M. Henry and
Assistant United States Attorney James A. Clark
(D. Colo.).

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