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DEPARTMENT OF JUSTICE

Vol. 13 No. 17

UNITED STATES ATTORNEYS

BULLETIN

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Vol. 13 August 20, 1965 No. 17

APPOINTMENTS--DEPARTMENT

The nomination of the following appointee has been confirmed by the Senate:

Solicitor General--Thurgood Marshall

APPOINTMENTS--UNITED STATES ATTORNEYS

The nominations of the following United States Attorneys to new four-year terms have been confirmed by the Senate:

Idaho--Sylvan A. Jeppesen
North Dakota--John O. Garaas*
New Jersey--David M. Satz

* The nomination of Mr. Garaas was erroneously reported as a confirmation in the July 9th issue of the Bulletin.

DISTRICTS IN CURRENT STATUS

The following districts were current in all four categories of work (criminal cases, criminal matters, civil cases, civil matters) in all twelve months of fiscal 1965 - a perfect record:

Arizona
Colorado
Guam
Kentucky, Western
Louisiana, Western
Montana
North Carolina, Middle
Oklahoma, Eastern
Oklahoma, Western
Pennsylvania, Western
Texas, Northern
Texas, Southern
Utah

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ADMINISTRATIVE DIVISION

Assistant Attorney General for Administration S. A. Andretta

ORDERING FORMS

When a new form is put into effect, field offices frequently over-order on their initial requisition. In addition to being uneconomical, this inflates the estimates of monthly and yearly usage and leads to over-stocking in the supply room. The United States Attorneys are requested to assist in the President's economy drive by ordering no more than a year's supply at a time.

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 14, Vol. 13, dated July 9, 1965:

MEMOS	DATED	DISTRIBUTION	SUBJECT
396-S1	6/16/65	U. S. Attorneys	Mail Covers
406-S1	7/29/65	U. S. Attorneys	Right to Counsel
ORDERS	**DATED**	**DISTRIBUTION**	**SUBJECT**
346-65	7/16/65	U. S. Attorneys & Marshals	Placing Assistant Attorney General Donald F. Turner in Charge of Antitrust Division.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Oil Company Charged With Violation of Section 7 of Clayton Act. United States v. Pennzoil Company, et al. (W.D. Pa.) D.J. File No. 60-0-37-864. On August 4, 1965, a suit was filed challenging the merger of Kendall Refining Company into Pennzoil Company under Section 7 of the Clayton Act. On the same date the Government also filed motions for a temporary restraining order and for a preliminary injunction prohibiting the merger until such time as the matter could be decided on its merits.

Pennzoil is the largest producer, purchaser, refiner and transporter of Penn Grade crude oil. Kendall is the second largest producer and third largest purchaser and refiner of such crude oil. Penn Grade crude oil is only produced in Southwestern New York, Western Pennsylvania, Eastern Ohio and West Virginia. It is known for its high yields of lubricating oils and has generally commanded premium prices.

In 1964, Pennzoil produced 25% of the total Penn Grade crude production; purchased 26%; and owned about 40% of total Penn Grade crude refining capacity. Kendall, in 1964, produced 3% of the total Penn Grade crude production; purchased about 8%; and owned about 14% of the total Penn Grade crude refining capacity.

Refiners of Penn Grade crude are the only purchasers of such crude. In 1928, there were 48 refiners processing Penn Grade crude. Today there are only 10, which are owned by but six companies, including Pennzoil and Kendall. The three largest refiners account for approximately 85% of the total refining runs.

The complaint alleges that (1) competition between the merging companies in the purchase of Penn Grade crude will be eliminated; (2) Kendall will be eliminated as a substantial factor in the purchase of such crude; and (3) concentration in the production and purchase of Penn Grade crude will be substantially increased.

On August 4, 1965, Judge Rosenberg, after a two-hour hearing on Government's motion for a temporary restraining order, advised defendants' counsel that the Court was going to sign the order unless defendants would stipulate to put the merger off until the Court could rule on the Government's motion for a preliminary injunction. As a result it was stipulated that the hearing on the preliminary injunction motion would be held on September 14, 1965, and that merger would not be consummated until after the Court had ruled on the motion.

Staff: John H. Waters and David R. Melincoff (Antitrust Division)

Insurance Companies Charged With Violation of Sections 1 and 2 of Sherman Act. United States v. Associated Aviation Underwriters, et al. (S.D. N.Y.) United States v. United States Aviation Underwriters, Inc., et al. (S.D. N.Y.) D.J. Files 60-169-52 and 60-169-53. On August 5, 1965, two civil complaints

were filed alleging separate conspiracies by two underwriting pools to restrain and monopolize interstate and foreign trade and commerce in aviation insurance and reinsurance, in violation of Sections 1 and 2 of the Sherman Act.

Defendants in the first complaint are Associated Aviation Underwriters, Chubb & Son, Inc. and Marine Office of America. Associated Aviation Underwriters is an association of 17 insurance companies that manages a pool accounting for about $65 million in premiums a year, or about 45 percent of the $125 million annual aviation insurance business in the United States.

Defendants in the second suit are United States Aviation Underwriters, Inc. and United States Aircraft Insurance Group. United States Aviation Underwriters, Inc. manages a pool of 31 insurance companies and accounts for about $43 million in premiums a year or about 35 percent of the national market.

Both complaints allege that the principal terms of each conspiracy included the following: (1) to prohibit each member company from engaging in aviation insurance and reinsurance, except in combination with the other member companies; (2) to allocate to each member company a certain participation quota in the total aviation insurance business of the members' pool; (3) to exclude certain types of insurance companies from each pool; (4) to suppress competing aviation insurance underwriters; and (5) to prevent the forming of new aviation insurance pools.

According to the complaints, the effects have been that airlines and other operators of aircraft have been denied the benefits of unrestricted competition in sales of aviation insurance policies; that insurance companies have been restrained and prevented from doing aviation insurance business; and that the defendant pools dominate the aviation insurance business in the United States.

In both complaints it is asked that the Court decree, among other things, the dissolution of defendants' aviation insurance pools, and that the Court regulate any future group activities of defendants in the field of the aviation insurance and reinsurance.

Staff: Marshall C. Gardner and Herbert F. Peters, Jr. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

AGRICULTURAL ADJUSTMENT ACT

Commodity Allotments Lost Through Eminent Domain Proceedings May Be Re-acquired Only For Re-Establishment of Farming Operations; Review Committee Has Jurisdiction Over Even Those County Committee Actions Dictated by State Administrator. Chandler v. David (C.A. 5, No. 2117, July 28, 1965), D.J. No. 106-76-163. Section 378 of the Agricultural Adjustment Act, 7 U.S.C. 1378, provides for the transfer of commodity allotments following the loss, through the exercise of the right of eminent domain, of the land to which the allotments pertained. Regulations promulgated by the Secretary of Agriculture in implementation of that Section provide, inter alia, that upon written application by a displaced owner to the County Agricultural Stabilization and Conservation Committee of the county in which the new farm is located, the county committee shall determine whether there is a bona fide transaction for the purpose of reestablishing farming operations of the displaced owner or whether there is a scheme or device to sell the allotment or transfer it for the benefit of a person other than the displaced owner. If the former, the allotments are to be transferred. Pursuant to Section 378, fifteen of the appellants secured transfers of allotments to new farm lands which they allegedly acquired. A subsequent investigation disclosed, however, that the transfers had not been for the purposes of enabling the displaced farmers to re-establish their farming operations, but rather to transfer the allotments to the remaining appellant. Accordingly, the transfers were cancelled and over-production penalties assessed. Appellants argued first that Section 378 gives the farmer whose land is condemned an absolute right to secure a transfer of his otherwise lost allotment to any land he owns regardless of the purpose underlying the transfer or the use for which the land is intended. That is, it was argued that the regulation, in requiring a reestablishment of farming operations, legislates a condition not found in Section 378. Additionally it was argued that the review committee had no jurisdiction to review the cancellation action of the county committee since that action was predicated upon a directive issued by the State Administrator. Finally, appellants argued that there was no basis for the review committee's determination that the transfers were obtained by virtue of misrepresentations. The district court rejected these arguments in upholding the administrative action and the Court of Appeals affirmed.

Staff: Edward Berlin (Civil Division)

CIVIL SERVICE REMOVAL

Excepted Civil Service Employee Entitled to Judicial Review of Civil Service Commission Affirmance of Dismissal Where Reorganization Abolishing Job Is a Sham: Civil Service Commission Ruling That Reorganization Was Bona Fide Supported by Substantial Evidence. Pence v. Tobriner, et al. (C.A.D.C.,

No. 19136, July 15, 1965), D.J. No. 35-16-229. Plaintiff, a District of Columbia Government employee in the excepted civil service, was dismissed when his job was abolished through an internal reorganization of his department. He appealed his dismissal to the Civil Service Commission, contending that the reorganization was a ruse planned by his superior to get rid of him. The Civil Service Commission upheld the dismissal and the district court affirmed the Commission's action.

The Court of Appeals, in affirming the district court, held that the federal courts have jurisdiction to consider the claims of civil service employees that the abolition of their jobs is not bona fide but that the record provided substantial evidence to support the ruling that the abolition in this case was genuine.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Frank Q. Nebeker, Carol Garfiel, and Arnold F. Aikens (Dist. Col.)

FEDERAL TORT CLAIMS ACT

United States Held Liable Under Texas Law For Negligence of Servicemen in Driving Their Private Automobiles to New Duty Station. United States v. Culp (C.A. 5, No. 21837, May 19, 1965, petition for rehearing denied, July 13, 1965), D.J. No. 157-73-162. The Court of Appeals held that under the law of Texas, a serviceman traveling in his own automobile under orders to effect a permanent change of duty stations, and who was compensated for the time engaged in travel and paid a travel allowance, was acting within the scope of his employment while so traveling.

Staff: Walter H. Fleischer (Civil Division)

Negligence; Comparative Negligence; Findings of District Court Not Clearly Erroneous. Gilsoul v. United States and Schaut (C.A. 7, Nos. 14877, 14878, June 24, 1965), D.J. Nos. 157-85-81 and 157-85-82. A Government vehicle struck a motorcycle in an intersection on a rainy evening. The motorcycle had sped past two cars headed in the same direction just as the light turned green at the intersection. The motorcycle entered the intersection at approximately 22 to 25 miles per hour. The Government vehicle originally headed in the opposite direction, collided with the motorcycle in the course of completing a prohibited left turn. The evidence was in conflict as to whether the Government vehicle had signaled for a left turn. There was no conflict as to the fact that the motorcycle driver had been drinking. The district court, applying the Wisconsin comparative negligence rule, found that the Government was 65% negligent in the accident and that the driver of the motorcycle was 35% negligent. No negligence was attributed to a passenger on the motorcycle. The motorcycle operator appealed, claiming that the finding of 35% responsibility as to him was clearly erroneous.

The Seventh Circuit affirmed the judgment of the district court. The Court of Appeals stated that in view of the evidence, it could not say that

the district court's finding as to the percentage of the motorcycle operator's negligence was clearly erroneous. "It is only in unusual fact situations that an appellate court will disturb the apportionment of comparative negligence between the parties."

Staff: James B. Brennan, United States Attorney (E.D. Wis.)

Application of "Clearly Erroneous" Rule to Findings That Government Employees Were Not Negligent in Conduct of Their Work. Hinds v. United States, et al. (C.A. 9, No. 19,787, July 7, 1965), D.J. No. 157-12-1213. Plaintiff, the owner of certain property, alleged that his property was damaged by a fire originating in a refuse dump owned by the Federal Government in Inyo National Forest. The dump was used by Forest Service personnel to burn refuse placed in the dump by campers. The dump was last used by Government personnel for this purpose seven days prior to the injury to plaintiff's property. The Forest Service personnel who had lighted the fire testified that they were experienced in dump burning and the control of fires; that they took elaborate precautions to insure the extinguishment of the fire; that when the dump burning was completed there was no evidence or indication of smoke or fire; and that they returned to the dump two days later and found the dump area "cold." The district court found that the Forest Service employees were not negligent in attending or extinguishing the dump fire and that this dump fire was not a cause of damage to plaintiff's property.

The Court of Appeals affirmed, holding that the findings of the district court were not clearly erroneous. Regarding the clearly erroneous rule of F.R. Civ. P. 52(a), the Court of Appeals said, "We may hold a finding to be 'clearly erroneous' even though there is evidence to support it but we cannot disturb such a finding unless from the entire evidence, we are 'left with a definite and firm conviction that a mistake has been committed.'"

Staff: United States Attorney Manuel L. Real; Assistant United States Attorneys Donald A. Fareed, and Dzintra I. Janavs (S.D. Calif.)

IMMUNITY OF GOVERNMENT OFFICIALS

Civilian Employee of Government Held Immune From Suit by Enlisted Man Under His Supervision. Garner v. Rathburn (C.A. 10, No. 7964, June 2, 1965), D.J. No. 145-14-472. The Court of Appeals affirmed the decision of the district court holding defendant, a civilian construction foreman at Lowry Air Force Base in Colorado, immune from a suit for damages brought by an enlisted man under his supervision. The complaint had alleged that plaintiff had suffered severe injuries to his leg as the result of defendant's negligent conduct of the work operations and his negligently causing defective equipment to be used. The Court of Appeals stated that defendant's functions, in relation to an important military installation, were such that "to expose him to damage suits for his acts would likely inhibit the performance of his duties to the public's detriment," and that he was therefore immune from suit under

the principle established in Barr v. Matteo, 360 U.S. 564, that federal officials cannot be held personally liable in damages for discretionary acts committed within the general scope of their authority and in pursuance of their official duties.

Staff: Walter H. Fleischer (Civil Division)

OIL IMPORT PROGRAM

Oil Import Appeals Board's Allocation and Licensing to Import Crude Oil into United States; Definition of "Importing History." Pancoastal Petroleum Ltd. v. Udall, et al. (C.A.D.C., No. 19118, July 6, 1965), D.J. No. 145-7-292. This was a suit brought to review a determination by the Oil Import Appeals Board that appellant had no history of importing oil into the United States, and therefore could not be considered for an allocation to import crude oil into the United States. The Court of Appeals ruled that the Board had acted reasonably in limiting the class of persons deemed to have an "importing history" to those by or for whose account a domestic entry for consumption or withdrawal from warehouse for consumption had been made. Appellant had merely sold oil in Venezuela to persons who brought it into the United States on their own account; therefore the Board ruled that appellant had no importing history and this ruling was sustained.

Staff: Walter H. Fleischer (Civil Division)

RAILWAY LABOR ACT

United States Has Standing to Bring Suit to Enforce Provisions of Railway Labor Act; Railroad Faced With Lawful Strike May Not Institute Changes in Rates of Pay, Rules and Working Conditions Prior to Completion of Statutory Mediation Process Except to Extent Specifically Authorized by District Court Upon Showing of "Reasonable Necessity." Florida East Coast R. v. United States (C.A. 5, No. 22134, July 21, 1965), D.J. No. 124-17M-4. This is the first suit brought by the United States to enforce the "status quo" provisions of the Railway Labor Act, which require a carrier to exhaust the mediation procedures set forth in the Act before instituting changes in rates of pay, rules and working conditions of its employees. The Florida East Coast Railway, when faced with a lawful strike resulting from a dispute about wages concerning which mediation had been completed, unilaterally instituted sweeping changes in rates of pay, rules and working conditions. In effect, the railroad attempted to rid itself of what it considered to be featherbedding practices unilaterally, and without negotiations with the unions representing its employees.

The Court of Appeals ruled that the United States had standing to bring this suit under the Commerce Clause of the Constitution, to enjoin conduct by the carrier which constituted "a substantial threat to the free flow of interstate commerce." The Court further ruled, adhering to its earlier decision in Florida E.C. R. Co. v. Brotherhood of Ry. Trainmen, 336 F. 2d 172, certiorari denied, 379 U.S. 990, that the railroad could not unilaterally abrogate its

collective bargaining agreements during the course of a lawful strike, but that upon the express authorization of the district court, it could institute such departures from its agreements as were "reasonably necessary to effectuate its right to continue to run" during the strike period. The Court rejected FEC's contention that its agreements were "suspended" during the strike and the Government's contention that the Act permitted no such departures.

Staff: Walter H. Fleischer (Civil Division)

SOCIAL SECURITY ACT

Social Security Disability Claim; To Justify Denial of Benefits Secretary Must Find That Work Which Claimant Is Able to Perform Is Available in or Near Geographic Area in Which He Resides. Clifford Hall v. Celebrezze (C.A. 4, No. 9848, June 28, 1965), D.J. No. 137-84-243. In this Social Security disability case, the Secretary found that claimant was able to engage in substantial gainful activity and also made specific findings as to the type of work he might perform, considering his residual physical capacity, age, education and training. The district court affirmed the Secretary's denial of benefits and a period of disability.

The Court of Appeals remanded the case to the Secretary to find whether the work claimant was capable of performing was available to him in or near the geographic area in which he resided and to ascertain whether he desired to file a new application for benefits claiming onset of disability at a later date.

Staff: J. F. Bishop (Civil Division)

Eligibility for Disability Benefits; Wage Earner Must Be Disabled at Time of Application; Subsequent Disability Irrelevant Under Act Unless New Application Filed. Hayes v. Celebrezze (C.A. 5, No. 21696, July 12, 1965), D.J. No. 137-1-140. The disability claimant was found by the Secretary not to be disabled when he filed his application for benefits in November 1957. The Secretary's decision was reversed by the Court of Appeals and remanded for further proceedings. The Secretary reiterated his finding that claimant was not disabled in November 1957 and held that, while it was clear that in March 1961 he was disabled, he had failed to file a new application at that time. Therefore the Secretary denied the 1957 application. The district court affirmed.

The Court of Appeals held that there was substantial evidence to support the Secretary's finding of nondisability in 1957 but then raised the question whether the 1957 application should be treated as continuing and effective more than three years later when claimant was admittedly disabled. The Court answered its own question in the negative, relying on the express language of Section 223(a)(1) of the Social Security Act, 42 U.S.C. 423(a)(1) that "Every individual who . . . is under a disability . . . at the time such application is filed, shall be entitled to a disability benefit . . . ."

Staff: United States Attorney Macon L. Weaver; Assistant United States Attorney L. Wayne Collier (N.D. Ala.)

Social Security Disability Benefits; Substantial Evidence Supports Secretary's Denial of Benefits. Mark v. Celebrezze (C.A. 9, No. 19,862, July 6, 1965), D.J. No. 137-82-103. Claimant alleged disability based primarily upon severe headaches. There was no evidence to show that the headaches were organic in nature but rather the record showed that the headaches were psychogenic in origin and purely subjective. The Secretary denied benefits because no disability by reason of a medically determinable physical or mental impairment was established by claimant. The Court of Appeals held that there was substantial evidence in the record to support the Secretary's action.

Staff: United States Attorney William N. Goodwin;
Assistant United States Attorney Ronald G. Newbauer
(W.D. Wash.)

Denial of Social Security Disability Benefits Held Not Supported by Substantial Evidence. Lackey v. Celebrezze (C.A. 4, No. 9665, July 2, 1965), D.J. No. 137-84-215. Claimant, a 46 year old illiterate coal miner, sought benefits and a period of disability on the basis of alleged impairment of the heart, lungs, and foot. There was no question that claimant suffered from hypertension and emphysema but the extent to which these conditions impaired his ability to work was in conflict. There also was some conflict as to whether certain complications from the hypertension had appeared during the effective period of his application.

The Secretary found, in general terms, that the impairments shown to exist did not preclude claimant from engaging in substantial gainful activity, and accordingly, denied benefits and a period of disability. The district court affirmed. The Court of Appeals reversed, stating that the Secretary failed to evaluate the effect of claimant's various ailments in combination. Additionally, it pointed out that where, as here, claimant could not return to the coal mines (the Court noted that the examiner had not made this specific finding) it is incumbent upon the Secretary to show what kind of work claimant could perform and the employment opportunities available to him.

Staff: Robert C. McDiarmid (Civil Division)

Substantial Evidence to Support Secretary's Denial of Disability Benefits; Determination on Ground That Evidence Supporting Secretary's Position Was Inconclusive. Celebrezze v. Walter (C.A. 5, No. 21897, June 8, 1965), D.J. No. 137-76-60. This claimant for disability benefits alleged severe chest pains and shortness of breath upon the slightest exertion, preventing her from performing even the mild secretarial work which she had performed in the past. Her family doctor diagnosed severe heart disease. Two consultants stated that there was no electrocardiographic evidence of severe heart disease and said it would be unusual but not impossible for a person to experience the symptoms alleged by claimant without such evidence. The Secretary relied on the consultants' reports in denying benefits. The Court of Appeals affirmed the district court's reversal of the Secretary, stating that "the reports of the physicians on which the Secretary relied were of a purely negative nature and their findings were inconclusive."

Staff: Robert V. Zener (Civil Division)

WALSH-HEALEY ACT

Two Minimum Wages For Machine Tool Industry Under Walsh-Healey Act: Remand to Secretary of Labor For Findings Whether More Than One Minimum Wage Is Justified by Policy And Other Considerations. Wirtz v. Barber-Colman Co., et al. (C.A.D.C., No. 18,441, June 21, 1965). Following a survey of prevailing minimum wages in the machine tool industry, the Secretary found a $1.80 an hour prevailing minimum wage for all covered employees except for blueprint machine operators and draftsmen. The prevailing minimum wage as to them was found to be $1.65 an hour. The Secretary ordered that these two prevailing minima be stipulated in Government contracts with the machine tool industry from May 23, 1963. On judicial review of this order, the district court enjoined enforcement of the order on the ground that the Walsh-Healey Act did not authorize the Secretary to establish more than one minimum wage for all employees in an industry.

On appeal the Secretary of Labor argued that he had exercised such authority in the past and that the setting of a single minimum wage for all covered workers in an industry is often an unrealistic and wholly ineffectual means of promoting the purposes of the Act. The District of Columbia Circuit held that the Secretary had made no findings supporting the need for two separate minimum wages in the machine tool industry. The appellate court, one judge dissenting, therefore remanded the record to the district court with instructions to hold it in abeyance to permit further proceedings by the Secretary in which such findings might be made and further evidence taken. The Court of Appeals expressly stated that it did not reach the issue whether the Secretary has authority to establish more than one minimum wage for the machine tool industry.

One judge dissented on the ground that the question of the Secretary's authority to establish more than one minimum wage was properly before the court and should have been decided.

Staff: Bessie Margolin, Associate Solicitor of Labor;
Sherman L. Cohn and Robert V. Zener (Civil Division)

DISTRICT COURT

BILLS AND NOTES

Carrier Estopped to Collect Freight Charges Against Consignee United States Where Carrier Marked Straight Bill of Lading "Prepaid" When in Fact Insolvent Consignor Had Failed to Make Such Prepayment. Southern Pacific Co. v. United States (D. Del., No. 1611), D.J. No. 78-15-15. The Navy purchased goods in California for shipment to a naval base in Rhode Island. The contract price included freight charges to Rhode Island which were to be paid by the consignor. Although these freight charges were not paid by the consignor, plaintiff carrier delivered to the United States, as consignee, a "Freight Bill for Prepaid Charges." The United States accepted the shipment without knowledge of the lack of prepayment and paid the insolvent consignee

the full contract price. Plaintiff, unable to collect the freight charges from the consignee, sued the United States. The District Court held that plaintiff was estopped to collect the freight charges because of its conduct in misleading the consignee United States as to the lack of prepayment.

Staff: United States Attorney Alexander Greenfield; Assistant United States Attorney William J. Wier, Jr. (D. Del.)

CONTRACTS

Breach of Automobile Liability Insurance Contract; United States, a "Person or Organization" Under Driver's Policy, Awarded Judgment Against Insurer For Insurer's Refusal to Defend Administrative Personal Injury Claim Filed With Government Pursuant to Federal Tort Claims Act, 28 U.S.C. 2672. United States v. National Insurance Underwriters (S.D. Miss., No. 3549(J), July 7, 1965), D.J. No. 77-41-361. Arthur Burgess was injured by a private automobile owned and operated by Rod E. Murray, a United States rural mail carrier. At the time of the accident Murray was on official Government business. Murray carried liability insurance on his car with National Insurance Underwriters. Murray was the named insured in the policy. The policy defined "insured" to include, in addition to the named insured, any "person or organization legally responsible for the use" of the insured automobile. The policy was in full force at the time of the accident. Burgess filed an administrative claim for his personal injuries with the Post Office Department pursuant to the Federal Tort Claims Act, 28 U.S.C. 2672. The Government asserted that it qualified as an additional insured under its employee's policy and called upon the insurance company to undertake the defense of the claim, but such tender of defense was refused. The Government thereupon settled the claim for $2,000 without admitting its liability and without forfeiting its right to recover from the insurance company. Following the insurer's refusal to reimburse the Government for payment of the claim, the United States brought suit against the insurer for breach of its liability insurance obligations.

The Court on July 7, 1965, rejected the insurance company's contention that its policy contract obligation was inconsistent with (if not released by) the Federal Tort Claims Act and that consequently the United States could not qualify for coverage thereunder as an insured. The Court held the insurance company had breached its contract of insurance when it refused to undertake the defense of the claim and to reimburse the United States for the settlement. The United States was awarded judgment for $2,000, plus interest and costs. This is the first case in which the Government has been allowed recovery against an automobile liability carrier for its refusal to undertake the defense of an administrative or pre-suit claim.

Staff: United States Attorney Robert E. Hauberg; Assistant United States Attorney E. R. Holmes, Jr. (S.D. Miss.); James B. Spell (Civil Division)

FEDERAL TORT CLAIMS ACT

United States Not Charged With Negligence of Employees of Independent Contractor Even Under Non-delegable Duty Rule of Tennessee. Sanders v. United States (E.D. Tenn., No. 5181, July 22, 1965), D.J. No. 157-70-216. Plaintiff, an employee of Union Carbide Corporation, an independent contractor for the United States, through the Atomic Energy Commission, was burned when his cigarette ignited an excessive amount of oxygen which was coming through his space suit. He charged the United States with a failure to furnish him with a safe place to work, negligent maintenance of his equipment and failure to specify high safety standards for work under extremely hazardous conditions.

After a trial, the Court held that Carbide was an independent contractor. It found Carbide negligent in allowing too much oxygen to get into plaintiff's airline thus causing a highly combustible situation to exist and held the Government not chargeable with the negligence of Carbide's supervisory employees. While the Court stated that generally an employer may be held liable under the local non-delegable duty rule if guilty of negligence even though hazardous work is performed by an independent contractor, nevertheless, the Court here held the Government free from liability under the local non-delegable duty rule since the AEC's Oak Ridge inspectors were work quality inspectors only and were not charged with any responsibility for guarding against potentially unsafe conditions.

Staff: Assistant United States Attorney G. Wilson Horde (E.D. Tenn.); Mrs. Alice K. Helm (Civil Division)

JUDGMENTS

Allowance to United States of Reasonable Attorneys' Fees. United States v. State Farm Automobile Insurance Co. (D. Ore., No. 64-398), D.J. No. 157-61-1110. The United States took the position that it was an additional insured under a Government driver's private liability insurance policy with respect to any liability that might arise out of an accident in which the insured driver was involved while on duty. With respect to such an accident, the insurer denied coverage, refused to represent the United States in an action arising therefrom, and refused to pay the judgments entered after trial. The United States was allowed to recover, in addition to the amount of the judgments, a reasonable allowance for attorneys' fees in this case, $1500. This is the first case of this kind, wherein the United States was allowed reasonable attorneys' fees.

Staff: United States Attorney Sidney I. Lezak; Assistant United States Attorney Victor E. Harr; Eugene N. Hamilton (Civil Division)

CALIFORNIA SUPREME COURT

TRADING WITH THE ENEMY ACT

Alien Property; Attorney General Entitled to Retain Interest in Estate Vested Under Trading With Enemy Act Despite Fact That Decree of Distribution Had Not Been Entered Prior to Date on Which Cut-off Statute Took Effect. Estate of Frieda Hogemann (Calif. Sup. Ct., L.A. No. 27773, July 2, 1965), D.J. No. F-28-2787. Public Law 87-846 provides that alien property vested by the Attorney General (as successor to the Alien Property Custodian) is divested unless it had become "payable" or "deliverable" to, or "vested in possession," by the Attorney General by December 31, 1961. In this case a legacy was vested in 1950 by order of the Attorney General. The testator had died in 1942. In 1960 the probate court decreed distribution of the portion of the estate not affected by the vesting order but allowed the German legatees affected by the vesting order additional time to investigate its effectiveness. The probate court stated that, except for this investigation, the estate was ready for distribution. The German legatees never presented a challenge to the effectiveness of the vesting order; however no decree of distribution was entered prior to December 31, 1961. The probate court and the district court of appeal held that a decree of distribution was necessary under California law to make the property "payable" or "deliverable" or "vested in possession" in any legatee, since until such a decree is entered, one cannot tell who the legatees are. The Supreme Court of California reversed and held that the Attorney General's interest was not affected by Public Law 87-846. The Supreme Court pointed out that in the circumstances of this case there was no doubt as to the identity of the legatees, no question as to the effectiveness of the Attorney General's vesting order and no genuine obstacle to the distribution of the estate before December 31, 1961.

The case is the first appellate decision under Public Law 87-846.

Staff: Sherman L. Cohn and Robert V. Zener
(Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

PERJURY

Subject of Grand Jury Inquiry, When Subpoenaed by Grand Jury, Is Subject to Charge of Perjury Even if Not Advised of Right to Counsel. United States v. Hyman Winter, No. 29608 (C.A. 2, July 2, 1965). D.J. File 51-52-192. Defendant appealed his conviction of perjury claiming that to make him the subject of a grand jury subpoena when he was a subject of inquiry compelled testimony in violation of his right to counsel and his privilege against self-incrimination. He also contended that, even if his constitutional rights were not violated, the actions of the Government and the grand jury were so unfair as to warrant the invocation of the Court's supervisory power over the administration of criminal justice and consequent reversal.

A Federal grand jury was investigating charges of bribery, graft and extortion allegedly involving F.H.A. employees and local builders. Testimony was received by the grand jury that defendant, a construction supervisor employed by F.H.A. had received bribes. Defendant was then subpoenaed by the grand jury and was advised of his privilege against self-incrimination. He testified before the grand jury and was subsequently indicted and convicted of perjury when his testimony was proven false.

The Court of Appeals affirmed the conviction, stating that a "potential" defendant is not immune from being summoned before a grand jury. The Court further ruled that even if a "potential" defendant were entitled to be advised that he had a right to counsel before testifying before a grand jury, the omission to so advise him is no defense to a charge that he thereafter perjured himself in the grand jury room. The Court distinguished preventing the use of testimony, acquired after a denial of the right to counsel, as evidence to secure an indictment on a conviction of crimes being investigated, from allowing a witness to perjure himself with impunity in the hope of avoiding the return of a true bill. To permit such a witness to perjure himself with impunity would degrade the oath, and confer permanent immunity on the perjurer. The perjury is not a result of Government misconduct but rather the result of conduct of the perjurer before the grand jury, and, as such, is not protected by the omission to advise the defendant of his right to counsel or even of his privilege against self-incrimination. United States v. Orta, 253 F. 2d 312 (C.A. 5, 1958); United States v. Parker, 244 F. 2d 943 (C.A. 7, 1957).

In rejecting defendant's contention that it was unfair of the Government to subpoena him as a grand jury witness, the Court pointed out that there is no duty to inform a witness of the testimony of other witnesses before the grand jury, or to warn him against committing perjury; that if the truth were incriminatory, defendant had the right to refuse to reveal it; and that if indicted for perjury, his assertion of the privilege against self-incrimination could not have been used against him at the trial.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorneys Raymond Grunewald and Jerome C. Ditore (E.D.N.Y.).

MEAT INSPECTION ACT

Offering of Uninspected Meat For Interstate Shipment to Be Accomplished by Retail Merchant Violates 21 U.S.C. 78; Offer For Transportation Need Not Be Made to Common Carrier, Notwithstanding Some Statement to Contrary in Legislative History. United States v. Vollwerth & Company (W.D. Mich.). D.J. File 98-38-8. Defendant corporation was indicted for offering for transporation in interstate commerce improperly inspected meats in violation of 21 U.S.C. 78. The meats were sold at Iron Mountain, Michigan, to certain retail dealers who were to transport the meat in their own vehicles to points outside the State. Defendant moved to dismiss, arguing that the purchasers were not common carriers and that the legislative history established Congressional intent to prohibit only "the offering for transportation [of improperly inspected meats] by any person, firm or corporation to any common carrier" (H.R. No. 4953, 59th Cong., 1st Sess., p. 6). The District Court considered the wording of 21 U.S.C. 78 awkward--to wit, "no person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate commerce shall transport or receive for transportation" [improperly inspected meats]--but the Court held that the statute was so clear that judicial construction was not justified, and no resort should be had to the legislative history (which was not deemed persuasive in any event). The motion to dismiss was denied, and defendant was convicted upon trial.

Staff: United States Attorney Harold D. Beaton (W.D. Mich.).

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LANDS DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Condemnation: Measure of Value; Application of Substitute Facilities Doctrine to Partial Taking of Schoolyard. United States v. Certain Land in the Borough of Brooklyn, et al. (C.A. 2, No. 29215, June 9, 1965) D.J. File 33-33-951. The United States condemned 15,000 square feet of land in Brooklyn owned by the City of New York and scheduled for use as part of a public school playground. The city had acquired the property as part of a larger parcel of 100,000 square feet two years earlier, through its condemnation power. At that time the property contained numerous improvements which were subsequently demolished by the city in order to build the school and playground. The United States took the property after it had been cleared and before the playground had been constructed.

At the trial to determine just compensation the United States contended that it was required to pay fair market value for the property as it existed on the date of taking, i.e., a vacant, unimproved tract, and presented evidence on that basis. The city contended that it should be allowed to recover the cost of the property plus the expenses of demolishing the improvements, relocating tenants and various other fees. In support of that theory, the city offered evidence of its actual cost and expenses and also offered an appraisal of the property made at the time the city acquired it in its improved condition. The trial court rejected this evidence as being too remote from the question of value on the date of the taking by the United States. Since no other evidence was offered by the city, the court awarded compensation in the amount of the Government's testimony.

The Second Circuit reversed the trial court. First, the appellate court ruled, the cost of the property and the appraisal made at the time the city acquired it were relevant to the inquiry as to maket value on the date of taking because these factors would be considered by a buyer and seller in the market place. However, the Court agreed that the fees connected with the acquisition were not pertinent. Second, the appellate court ruled, the trial court should have considered the cost to the city of providing necessary substitute facilities to replace the playground (even though the city had not proceeded on this theory in the trial court). If the city cannot show that replacement of the playground is necessary, then compensation would be based on the market value of the property considering the evidence found by the Court to have been erroneously excluded.

Staff: Richard N. Countiss (Lands Division)

Public Lands; Mineral Leasing Act of 1920; Agreement Among Oil And Gas Lease Applicants to Apply For Same Lands in Drawing Held Collusive And in Violation of Departmental Regulations Requiring Disclosure of Agency Agreements; Departmental Hearings on Rejection of Lease Offers Complied With Procedural Due Process. Robertson v. Udall (C.A. D.C., 1965) D.J. File 90-1-18-611. The Department of the Interior opened four million acres in Alaska for noncompetitive leasing under the Mineral Leasing Act of 1920. The land was to be leased

in blocks of 2,500 acres each, and the regulation provided that each offeror may file only one offer for each block. In case more than one offer was made during the simultaneous filing period, priority was to be determined by a drawing. One John J. King and other associates developed a plan whereby 59 individuals filed applications on each of the 39 blocks considered to have the greatest mineral potential. There were elaborate agreements providing for disposal of blocks in case any of the individual applicants were successful in securing leases. The existence of such agreements was not disclosed to the Department of the Interior. Upon protest of a subsequent applicant, Duncan Miller, an extensive investigation was made which revealed the agreements. The Secretary declared all who had participated in the scheme to be disqualified, both because of the collusive nature of the agreements and also because they violated regulations requiring disclosure of agency agreements. The district court, in an action brought to review the Secretary's decision, granted summary judgment for the Secretary. On appeal, this was affirmed.

The Court of Appeals held there was a patent failure to comply with the regulations relating to disclosure of the agency relationship. In reply to the argument that there was a departmental practice not to require disclosure of such agreements in other cases, the Court held that, whatever may have been the departmental practice on other occasions, the Secretary was not disabled from applying the regulation in this instance in what is clearly its letter and its spirit. The Court held itself bound by the Secretary's interpretation of his own regulations, so long as it was not contrary to reason or authority.

The Court held the argument, that the administrative proceeding was such as to deprive appellants of a fair hearing, to be lacking in substance. It was pointed out that transcripts of interviews made during the investigation were in the record and available to appellants. When an appeal was taken to the Secretary from the adverse decision of the Bureau of Land Management, additional evidence was allowed to be submitted by appellants. The Court said that the appellants failed to convince the Secretary, not because they were denied an opportunity to do so, but because of the primary facts which were not essentially in dispute.

Staff: A. Donald Mileur (Lands Division)

Public Lands; Mineral Leasing Act of 1920; Where Drawing Not Properly Conducted For Simultaneous Oil and Gas Lease Offers, Secretary May in His Discretion Order Lands Reoffered at New Drawing Open to All Rather Than Given to First Applicant Subsequent to Faulty Drawing. Miller v. Udall (C.A. D.C. 1965) D.J. File 90-1-18-604. This case arises out of the same facts as Robertson v. Udall, reported above. At the drawing, the manager of the local land office announced orally that only three names would be drawn for each lease block and the remaining offers would be returned unopened. He further stated, if none of these three qualified, the next valid offer filed would be adjudicated. After the drawing, Duncan Miller filed lease applications on five of the lease blocks and then filed a protest against the earlier applicants whose names had been picked at the drawing. The final decision of the Secretary disqualified all applicants whose names were drawn and ordered a new drawing because of

failure to follow the regulation that all offers submitted on each lease block should be given a priority at the drawing. Miller's suit to review this administrative decision resulted in summary judgment for the Secretary in the district court which was affirmed on appeal.

The Court of Appeals held that, in the exercise of his broad authority to administer the public lands equitably, the Secretary could properly follow the course of action he proposes. The Secretary could rationally regard it as unfair for Miller to get the leases in the circumstances of this case where there may have been other unsuccessful applicants at the original drawing whose applications were returned unopened and who should have been given a priority. The Court held that "At least we cannot say that the Secretary's choice in this regard is so at odds with the Congressional purposes as to justify judicial nullification."

Staff: A. Donald Mileur (Lands Division)

Condemnation: Evidence Sufficient to Warrant Submission of Limestone Enhancement Issue to Jury; Residential Development Issue Not Admissible Since Such Value Was Created by Government Project; Landowners Bound by Post-trial Stipulation as to Value of Land For Grazing Purposes. Willa Hembree, et al. v. United States (C.A. 8, No. 17,848, June 23, 1965) D.J. File 33-26-445-1. The United States condemned two adjacent tracts of land in Cedar County, Missouri, in connection with the Stockton Dam and Reservoir Project. It was stipulated that a limestone quarry was located on one of the tracts but that it was not being operated on the date of taking and that there was a deposit or stratum of limestone of the compton variety located beneath both tracts.

Appellants claimed value for agricultural limestone uses and residential development uses. The Government claimed a highest and best use for grazing purposes.

Appellants requested a jury trial and the court, by pre-trial order, held a hearing to determine whether appellants could make a prima facie case on their claims of highest and best use to warrant submission to a jury. It was developed that the quarry operator paid royalties to the landowners from 1953 to 1957. He ceased operations of the quarry in 1957, which was approximately the same time the ASC (Agricultural Soil and Conservation Service) withdrew its support payments for the type of limestone existing on the subject tracts. However, the operator testified he shut down because of illness. There were no further quarry operations on the subject tract and the date of taking was six years later.

Appellants' expert witness, whose qualifications were not questioned, testified to a "general market" but made no market study regarding the specific quarry in question.

Appellants' expert witnesses as to the alleged residential development issue could not testify as to this enhancement without considering the impact of the Government project.

Upon motion by the Government, the trial court found that the evidence was insufficient to warrant the submission thereof to a jury. Appellants and the Government then stipulated for the entry of a judgment on the basis that the highest and best use of the tract was for grazing purposes, without prejudice to appeal, and judgment was entered thereon.

The Court of Appeals remanded on the limestone issue, relying on Cade v. United States, 213 F. 2d 138 (C.A. 4, 1954); United States v. Rayno, 136 F 2d 376 (C.A. 1, 1943), cert. den., 320 U.S. 776; and National Brick Company v. United States, 131 F.2d 30 (C.A. D.C. 1942), and held that the evidence provided a sufficient factual background to require submission of the limestone issue to the jury, stating that the trial court's decision was "dictated by its evaluation of the weight of the evidence which turned in part at least on credibility."

The Court of Appeals affirmed on the residential development issue, holding the added value was created by the Government project.

The Court also held that appellants were bound by the post-trial stipulation as to the value of the land for grazing purposes.

The Court of Appeals further pointed out the dangers of a pre-trial hearing having the magnitude of this case--44 exhibits and a transcript of 350 pages, containing the testimony of five witnesses.

Staff: Robert M. Perry (Lands Division)

Indians; Trespass on Restricted Land; Leasing Regulated by Federal Law; Notice to Terminate Occupancy Under State Statutes Not Relevant. C. C. Bledsoe v. United States and Lorena Mashburn (C.A. 10, July 28, 1965) D.J. File 90-2-1-2402. Action was brought seeking to remove Bledsoe from 160 acres of restricted Osage Indian land. He was in possession of the land for 12 years under lease. He attempted to obtain a renewal of the lease but it was not executed or approved by the Superintendent of the Indian Agency, according to the regulations, and a properly executed and approved lease was awarded to Mashburn. Bledsoe sought to have the Mashburn lease set aside by the Secretary of the Interior, but it was upheld. Almost a year after his lease expired, Bledsoe was served with notice to quit the premises and rent was demanded. Payment of rent for the year beginning at the termination of his lease was accepted. After the institution of this action he tendered another year's rent, which was refused. He contended that he was a tenant at will and had not been given 30 days' notice required by the Oklahoma statute before termination of the tenancy, whereas the notice to quit demanded termination in three days. The district court held he was a trespasser and entitled to no notice, and also that the state statutes required no notice to quit where a lease provided for a specific termination.

The Court of Appeals affirmed. It held that the leasing of restricted Indian lands and the right to enter and remain thereon is a matter regulated by federal law, and that the lease to Mashburn was executed and approved in accordance with the regulations of the Secretary. The Court stated that, even

if Bledsoe's rights were not controlled by federal law, he was not a tenant at will under Oklahoma law, which required assent of the landlord and he did not have such assent. Payment of rent at the end of the year, and only after demand for payment had been made as part of the notice to quit, did not give him the necessary assent. Without such assent, the tenancy is merely at sufferance and no notice to quit is required under the statute. Bledsoe contended that he was entitled to have a review of the administrative determination of the Secretary's approval of the lease to Mashburn, but the Court stated that, having found the lease to have been properly executed, further discussion was unnecessary.

Staff: Elizabeth Dudley (Lands Division)

Condemnation; Landowner Held Entitled to Introduce Evidence of Damages Which May Be Reasonably Anticipated to Arise From Government Use of Flooding Easement; Facts and Law Held Too Unclear to Support Partial Summary Judgment That Landowner Cannot Present Claims For Lateral Underflooding and Impedance of Drainage in This Case. 2,953.15 Acres in Russell County, Ala. (Richard H. Bickerstaff, et al.) v. United States (C.A. 5, 1965) D.J. File 33-1-313-393. In the construction of the Walter F. George Lock and Dam Project on the Chattahoochee River, the Government condemned the right to flood certain adjacent tracts permanently to the 192 feet m.s.l. contour and intermittently between 192 and 221 feet. The answers to interrogatories by the landowners revealed that they were making a claim not only for the surface flooding, but also for damages arising from lateral underflooding, the alleged result of permanently raising the water level on the navigable Chattahoochee River to 192 feet. The district court entered a partial summary judgment, holding that, while it would be proper for the jury to consider damages to the land as a result of the flooding easements, it would not be proper "to enlarge the Government's declaration of taking to include prospective destruction of the clay and pecan trees--as separate items--due to possible underflowing and impedance to drainage upon the 'occasional flooding tracts' and adjoining tracts."

The landowners prosecuted an interlocutory appeal under 28 U.S.C. 1292(b). The Court of Appeals reversed, holding that summary judgment should not have been entered unless it appeared there was no genuine issue of fact and the moving party was entitled to judgment as a matter of law. "In the present state of this record, neither the facts nor the law are at all clear."

The Court of Appeals noted that the district court had not reached the question of whether the claimed underflooding would be a compensable taking under the Fifth Amendment, because it held the declaration of taking did not impose such an easement and, therefore, it was not compensable in this case, in any event. The Court of Appeals reiterated the long-standing rule that the courts have no power to enlarge a declaration of taking. However, the Court held that the Government would be liable in this suit for all damages reasonably to be anticipated from the use of the property for the purpose for which the condemnation is made. While suggesting that the landowners must bring their claim for such anticipated damages in this suit or not at all, and that it might be better for all parties to stipulate to leave out future damages until they occur, the Court of Appeals nevertheless held that "we cannot deny the

right of the landowners, if they so elect, to undertake to increase the compensation to be awarded by proof of damages which can be reasonably anticipated from the maximum use of the easement sought."

The Fifth Circuit carefully limited the scope of its holding, first by stating on the substantive question that it was expressing no opinion on the applicability of United States v. Kansas City Life Insurance Co., 339 U.S. 799 (1950). Later, in its conclusion the Court said that "On this incomplete record, we should not undertake to decide the important questions of constitutional law which may be presented." The Court then emphasized that its decision was limited to the holding that the district court erred in entering the partial summary judgment.

Staff: A. Donald Mileur (Lands Division)

Condemnation; Reproduction of Golf Course; Comparable Sales. United States v. 84.4 Acres of Land in Warren County, Pa. (C.A. 3, No. 14854, July 14, 1965) D.J. File 33-39-805-54. A golf course located in the scenic Allegheny Mountains was condemned for use in connection with the Allegheny River Reservoir Project. The Government's witnesses relied upon three sales of golf courses located 30 to 50 miles from the property, and also on the cost of reproducing the greens, tees and fairways of the subject course. They also testified that there were areas of cleared land in the vicinity. The landowner's witnesses stated there were no comparable sales and sought to rebut the sales relied upon by the Government. Their appraisals were based on the cost of reproducing the facilities on a similar site, and included in the cost $84,800 for clearing a mountain site of equal elevation, of woodland and stones. On objection of the Government on the ground that this was not reproduction evidence in the usual sense, as reproducing structures or other improvements on land, the district court refused to allow that item to go to the jury, but allowed the jury to consider reproduction of the greens, tees and fairways, as estimated by the witnesses for both parties. The verdict was in the amount of the valuation of one of the Government's witnesses, and the landowner appealed.

The Court of Appeals reversed and remanded the case for a new trial. It held that since the landowner's witnesses testified that no cleared comparable land was available, and the Government's witnesses testified to comparable sales, the jury should have been given an opportunity to determine whether comparable sites were available. If it accepted the landowner's conclusion that no cleared comparable land was reasonably available, it would be entitled to weigh his estimate of $84,800 as part of the reproduction cost of the property. If the jury concluded that the alleged uniqueness of the property was not significant, and that comparable cleared sites were available, they would ignore that figure. The Court stated that under the facts of the case, those alternatives should have been left open to the jury.

Staff: Elizabeth Dudley (Lands Division)

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TAX DIVISION

Acting Assistant Attorney General John B. Jones, Jr.

CIVIL TAX MATTERS

District Court Decision

Statute of Limitations; Six-Year Statute of Limitations on Instituting Tax Collection Suit Held to Apply to Responsible Officer Penalty Assessment. United States v. Benjamin Fine. (S.D. N.Y., March 3, 1965). An assessment of a responsible officer penalty had been made against defendant pursuant to Section 6672, I.R. Code, 1954, because of his failure to withhold and pay over certain payroll taxes. This suit was instituted to reduce the assessment to judgment, and defendant moved to dismiss contending that, although the suit was instituted prior to the six-year statute of limitations on instituting an action based on a tax assessment (Section 6502), this suit sought to collect a penalty and therefore the five-year statute of limitations on collecting penalties applied. Defendant relied on Section 6533(1), I.R. Code, 1954, which refers to 28 U.S.C. 2462 for the period of limitations for civil actions to collect penalties. That statute provides for a five-year period of limitations within which to commence such actions. This suit was admittedly not instituted within the five-year period.

The Court originally granted defendant's motion (65-1 U.S.T.C. ¶9152), but, upon reargument, vacated its prior order and denied the motion relying upon United States v. Havner 101 F. 2d 161 (C.A. 7), reversing 21 F. Supp. 855 (S.D. Iowa); Hector v. United States, 255 F. 2d 84 (C.A. 5); and United States v. Saslovsky, 160 F. Supp. 883 (S.D. N.Y.). The Court noted that United States' courts since 1939 have sustained the position of the Government that the six-year statute applied and the Government, as a matter of practice, had followed the same procedure used here.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney John R. Horan (S.D. N.Y.); and Charles A. Simmons (Tax Division).

State Court Decisions

Property Subject to Levy; Alimony Funds; Since Alimony Support Payments Are Not Specifically Exempt From Levy Under Code, Levy For Federal Income Taxes May Reach Alimony Funds Held By County Agency For Payment to Delinquent Taxpayer. Marie M. Campbell v. Edward H. Campbell (N.J. Superior Court, May 25, 1965). (CCH 65-2 U.S.T.C. ¶9447). Taxpayer secured a divorce in 1959 and was awarded weekly alimony and support payments. The Internal Revenue Service served a notice of levy on the County Probation Department with respect to alimony funds being held for taxpayer.

The Court, in deciding that the Internal Revenue Service levy may reach such funds, noted that the Internal Revenue Code, enacted to effectuate constitutional power, is the supreme law of the land and, if in conflict with state

law, the latter must yield. The Court concluded that to exempt alimony or support payments from levy would require amendment to the federal law because federal law does not exempt such property or rights to property and only property specifically exempted by Section 6334 of the Internal Revenue Code is not subject to levy for payment of federal taxes.

Staff: United States Attorney David M. Satz (N.J.)

Statute of Limitations; Probate; Claim of United States for Unpaid Taxes Held Not Barred by State Non-claim Statute Which Bars Claims Not Paid, Settled or Otherwise Disposed of Within Three Years Of Filing Claims if No Proceeding For Enforcement or Compulsory Payment Is Pending. In re Estate of George L. Cury, Deceased. (Judge's Court, Duval County, Fla., February 24, 1965). (CCH 65-1 U.S.T.C. ¶9426). The United States filed a proof of claim in this probate proceeding on January 31, 1956 for unpaid taxes. On April 17, 1964, the administrator filed a petition praying for an order authorizing payment of the tax claim. On April 28, 1964, taxpayer's widow filed a reply opposing the administrator's petition to distribute the cash balance of the estate to the United States on the ground that the Government's proof of claim was barred by Section 733.211 of the Florida Statutes. Under the provisions of this statute, claims against estates which are not disposed of after three years are barred.

The Court found this statute similar to Florida's non-claim statute (Section 733.16), requiring claimants to file claims within a certain period of time from the first notice to creditors, and previous decisions had exempted the Government from the latter statute on the basis that the United States is not barred by state statutes of limitation or non-claim statutes. United States v. Summerlin, 310 U.S. 414; United States v. Embrey, 145 Fla. 277, 199 So. 41. In view of the similarity of the statutes and previous decisions relating to Section 733.16, the Court held that Section 733.211 was, likewise, inapplicable to claims of the United States. Accordingly, the claim of the United States was held not barred.

Staff: United States Attorney Edward F. Boardman (M.D. Fla.)

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