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COMMENDATIONS

Assistant United States Attorney Bernard Dempsey of the Middle District of Florida, was commended for his professional competence in the prosecution of Nick Scaglione. The Special Agent in Charge of the FBI field office stated:

> His zeal and perseverance in the courtroom, which assured the acceptance of the evidence by the court and insured that the Jury understood its implications, is also highly commendatory.

* * *

Judge W. T. Sweigert, Northern District of California, commended Assistant United States Attorney Paul Sloan for handling an extremely difficult presentation in United States v. Owsley Stanley.

* * *

Recently Charles Gordon, General Counsel, Immigration and Naturalization Service, praised the Los Angeles and Chicago United States Attorneys' offices for the efficient manner in which they have handled frivolous and dilatory petitions in immigration matters.

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POINTS TO REMEMBER

Recently, copies of some transcripts received by the Department have had a heavy red line down the center of each page. This is very distracting to those reading or studying the transcript and evidently is done to prevent duplication. The Department orders and requires a clean copy of a transcript, and if the reporter does not furnish it, payment by the U. S. Marshal should not be authorized.

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

CASE FILED IN TERRITORY OF AMERICAN SAMOA CHARGING VIOLATION OF SECTION 3 OF ACT.

United States v. Standard Oil Co. of California (N.D. Calif., No. 52334; September 30, 1969; D.J. 60-57-193)

On September 30, 1969, a civil action was filed in the U.S. District Court for the Northern District of California under Section 3 of the Sherman Act, charging Standard Oil Company of California (SoCal) with monopolizing and restraining trade in the distribution and sale of petroleum products in the Territory of American Samoa.

In 1956, SoCal obtained a long-term lease on the Territorial Government's petroleum storage facilities in American Samoa which the Government has no right to terminate until the year 2006. Since then SoCal has been the sole supplier of petroleum products in the Territory. The complaint charges that the defendant has engaged in a combination or conspiracy in unreasonable restraint of, and in a combination or conspiracy to monopolize, the sale of petroleum products in American Samoa, in effectuation of which it: (a) entered into long-term requirements contracts for the purchase of diesel fuel with the two tuna canning companies (Van Camp and Star-Kist), whose fishing fleets constitute the largest customers for diesel fuel in American Samoa; and (b) reduced its prices for petroleum products with the purpose of dissuading or otherwise discouraging competitors from entering the market.

In 1966, more than 20,000,000 gallons of petroleum products with a value in excess of $3,500,000 were imported into the Territory; they included diesel fuel, aviation gasoline, jet fuel, and gasoline and oil for motor vehicles. All of these products are transported by tanker from SoCal's refinery and plant in Hawaii to American Samoa where they are stored in the Government's facilities under lease to SoCal. Diesel fuel, which accounts for about 65% of all petroleum products imported, is used by the Government of American Samoa to generate the electricity required by the Territory.

The complaint alleges that the defendant's activities have had the following effects: (a) the Territorial and Federal Governments and other consumers in American Samoa, have been deprived of the benefits of free and open competition in the purchase of petroleum products; (b) potential

competitors have been excluded from the market; (c) consumers in American Samoa have been forced to pay higher prices for electricity because of SoCal's pricing of diesel fuel; and (d) the defendant has maintained an absolute monopoly in the sale of petroleum products in the Territory.

The suit seeks to enjoin SoCal from continuing or renewing its alleged violations of the Sherman Act, and to terminate or modify both SoCal's 50 year exclusive lease on the Territory's petroleum storage facilities and its long-term requirements contracts with the two tuna canneries (Van Camp and Star-Kist), as necessary to restore competition.

This is the first antitrust suit ever filed by the Department attacking restraints of trade in this U.S. South Pacific Territory. The case has been assigned to Judge Sweigert.

Staff: Bernard M. Hollander and Donald H. Mullins
(Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURT OF APPEALS

CIVIL SERVICE DISCHARGE

CT. HOLDS THAT IT MAY REVIEW DISMISSAL OF CIVIL SERVICE EMPLOYEE TO DETERMINE WHETHER IT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

George N. Charlton, Jr. v. United States & John W. Macy, Jr., J. Ludwig Andolsek & Robert E. Hampton, Members of the U.S. Civil Service Commission (C.A. 3, No. 16670; decided June 2, 1969; D.J. 35-64-8)

The plaintiff was dismissed from his position as a special investigator for the Internal Revenue Service on the grounds of failure to report an attempted bribery and failure to properly care for official documents. The Civil Service Commission sustained the agency's action in dismissing the plaintiff. Plaintiff then filed the present action in the district court which, however, dismissed the action on the ground that the proper procedures had been followed, and that no review of the merits of the discharge is permissible.

The Third Circuit reversed and remanded the cause to the district court for further proceedings. The Court held that the district court should have inquired into the merits in order to determine whether the agency's action in dismissing the employee was supported by substantial evidence. The Court of Appeals based its decision on the ground that the traditional rules limiting the scope of review of employee discharge proceedings has been made "irrelevant" by the Administrative Procedure Act. See 5 U.S.C. 706. According to the Court, the Act imposes on a federal court "the mandatory duty to 'review the whole record /of the administrative proceedings/ or those parts of it cited by a party', and to determine therefrom whether the agency's action was in accordance with procedures required by law and supported by 'substantial evidence', or alternatively, capricious, arbitrary, an abuse of discretion, or otherwise not in accordance with law." Judge Stahl dissented on the ground that the proper scope of review in cases of this type is limited to ascertaining whether appellate procedural requirements have been met and whether the agency action was arbitrary, capricious, or an abuse of discretion.

The Court's opinion is in conflict with that taken in virtually every other Court of Appeals, and the opinion of Judge Stahl represents the view

taken in the majority of cases. In further litigation, the Government will not acquiesce in the correctness of the Third Circuit's decision.

Staff: Former United States Attorney Gustave Diamond and Former Assistant United States Attorney Stanley W. Greenfield (W.D. Pa.)

FEDERAL TORT CLAIMS ACT

GOVT. LIABLE FOR AIR TRAFFIC CONTROLLER'S INADEQUATE WARNINGS.

Florence W. Hartz, et al. v. United States (C.A. 5, No. 26,923; September 11, 1969; D.J. 157-19-175 and 177)

This is the second time that this case involving the crash of a small plane at the Atlanta Airport has been before the Fifth Circuit. The plane encountered vortex turbulence from a departing DC-7 that immediately preceded it on the runway and crashed.

The previous decision by the Court of Appeals reversed the district court's determination that pilot negligence was the sole proximate cause of the accident and held that the failure of the air traffic controller to use the prescribed phraseology in warning the pilot of the hazards of turbulence was a proximate cause of the crash. On remand the district court held that the opinion in the Fifth Circuit did not preclude a finding that the pilot was contributorially negligent within the meaning of the Georgia comparative negligence doctrine. An award of $600,000 reduced by 25% for comparative negligence was made.

On the second appeal the Fifth Circuit held that its previous decision had foreclosed any further consideration of pilot negligence, and further reiterated that the controller's failure to use the prescribed cautionary phraseology made him entirely responsible for the crash.

On the issue of damages the Court also held that under the Federal Tort Claims Act deductions were to be made for state and federal income taxes the decedent would have been required to pay had he lived.

Staff: Reed Johnston, Jr. (Civil Division)

INTERSTATE COMMERCE COMMISSION

SHIPPER'S ACQUISITION OF LAND FROM RAILROAD BY MEANS OF AN INTEREST FREE PURCHASE MONEY MORTGAGE HELD TO BE VIOLATION OF ELKINS ACT.

United States v. Food Fair Stores, Inc. (C.A. 5, No. 27,173; September 30, 1969; D.J. 59-8-836)

Defendant, a large shipper by railroad, purchased land from a railroad upon which defendant was to build a warehouse. Under the terms of the land purchase agreement, the railroad conveyed title to the defendant with most of the purchase price deferred for approximately a year and a half. No interest was charged by the railroad upon the deferred payment. Nevertheless, the railroad made a slight profit upon the land sale.

The Government brought suit against the defendant under the provisions of the Elkins Act, 49 U.S.C. 41(3), seeking damages in the sum of three times the amount of interest, at the usual rate, for purchase money mortgage loans. The district court found that the defendant had violated the provisions of the Elkins Act, making it unlawful for a shipper by common carrier to accept any favorable consideration as a rebate against regular transportation charges. Judgment accordingly was entered for three times the $14,000 in interest charges the defendant did not pay on the land purchase transaction. The Court of Appeals for the Fifth Circuit affirmed. The Court of Appeals found without merit defendant's contention that because the railroad made a profit on the land sale without charging interest, there was no concession or rebate in violation of the Elkins Act. The Court ruled that the dispositive question for liability under the Elkins Act was whether the carrier had assumed a cost which would have otherwise fallen on the shipper. Finding interest charges were such a cost which indirectly reduced transportation charges, the Court concluded there was a violation of the Elkins Act.

Staff: Norman Knopf (Civil Division)

STANDING - AGENCY DISCRETION - URBAN MASS TRANSPORTATION ACT

BUS CO. LACKS STANDING TO CHALLENGE GRANT OF FED. FUNDS TO COMPETING MASS TRANSPORTATION SYSTEM.

South Suburban Safeway Lines v. City of Chicago, et al. (C.A. 7, No. 17,179; October 6, 1969; D.J. 59-12-1418)

The Secretary of Transportation authorized a fifteen million dollar grant under the Urban Mass Transportation Act, 49 U.S.C. 1601 et seq., to the City of Chicago for the construction of a 9.5 mile rail rapid transit line to be operated by the Chicago Transit Authority. Because the grant would be used to operate mass transit facilities in competition with, or supplementary to, service provided by existing companies, the Secretary had made certain findings required by the Act with respect to the necessity

for the facilities and with respect to whether the program for a transportation system for the urban area provided for the participation of privately-owned companies "to the maximum extent feasible". 49 U.S.C. 1602(c), 1603(a), 1604.

South Suburban Safeway Lines, a bus company operating in the Chicago area, brought this action, claiming it would suffer economic injury from competition from the proposed rail line and seeking to enjoin the grant by challenging the constitutionality of the Act and the validity of the Secretary's findings thereunder. The district court held that the plaintiff lacked standing and dismissed the action.

The Seventh Circuit affirmed. That Court first held that South Suburban's status as a taxpayer did not confer standing upon it; that South Suburban had no legal right to be free from competition from the Chicago Transit Authority which could give it standing; and that the Administrative Procedure Act "does not create standing which would not /otherwise/ exist * * * by virtue of general principles or other statutes". It then went on to consider South Suburban's claim that the Urban Mass Transportation Act was intended to protect the competitive interests of privately-owned companies and thus that it had standing, under the doctrine of Hardin v. Kentucky Utilities Co., 390 U.S. 1, to assert that the Act's provisions had been violated. The Court rejected this claim, holding that the Act did not have "the clarity of purpose to prohibit competition which was manifest" in the statute under consideration in Hardin. Thus, the Court concluded that South Suburban lacked standing to maintain the action.

The Government had also contended that, even if South Suburban had standing, the determinations made by the Secretary were fully committed to his discretion and were, therefore, non-reviewable. In this connection, the Court noted that the Act required no hearing, that there was no record to examine, that "surely Congress intended no trial de novo", and that the Secretary's findings involved elements which were "discretionary, essentially more quasi judicial". The Court, concluding that the Secretary had addressed himself "in a rational manner" to the questions posed by the Act and had made the findings required by the Act, then held that review was "so limited that South Suburban cannot succeed".

Staff: Michael C. Farrar (Civil Division)

STANDING

PRIVATE POWER COMPANIES HAVE STANDING TO MAINTAIN SUIT PROTESTING FED. OPERATION OF COMPETING ELECTRICAL GENERATING FACILITY.

Public Service Co. of Indiana, et al, Inc. v. David A. Hamil, et al. (C.A. 7, Nos. 17,547 and 17,548; September 18, 1969; D.J. 145-8-509 and 145-8-812)

In this case the district court preliminarily enjoined at the behest of two private power companies, the operation by the Government of a multi-million dollar electricity generation and transmission facility located in Southern Indiana. The Government assumed control of the facility pursuant to Section 7 of the Rural Electrification Act, 7 U.S.C. 907, when the petitioner Rural Electric Cooperation, was held by the Indiana Supreme Court not to possess adequate state authority to operate.

The Court of Appeals held that the private power companies had the requisite standing to maintain the suit on the basis of a property right found to exist by virtue of their certificates of necessity and convenience and the indeterminate permits issued by the Public Service Commission of Indiana. On the merits the Court held, without deciding whether the Administrator had proper authority to make the loan under Section 4 of the Act, 7 U.S.C. 904, that Section 7 of the Act, 7 U.S.C. 907, nonetheless, conferred authority on the Administrator to take over and operate the facility in order to protect the security interest of the Government.

Staff: Reed Johnston, Jr. (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURTS OF APPEALS

BANKRUPTCY

ADMISSIBILITY OF DEBTOR'S TESTIMONY GIVEN DURING COURSE OF BANKRUPTCY PROCEEDING.

United States v. Thomas Piccini (C.A. 2, Docket No. 32,625; June 27, 1969; 412 F.2d 591; D.J. 49-52-290)

Appellant was convicted, along with his codefendants, of concealing assets of a bankrupt and conspiracy in violation of 18 U.S.C. 152, 371. On appeal his principal contention was that his testimony in the bankruptcy proceedings was privileged and that its use against him invalidates the conviction. Section 25(a)(10) of Title 11 essentially provides that at such times as ordered by the court the bankrupt shall submit to an examination but that no testimony given by him shall be offered in evidence against him in any criminal proceedings.

Appellant's testimony in the bankruptcy proceeding was not allowed in evidence at trial, but was before the grand jury. However, the indictment returned by the grand jury was not based solely on the questioned testimony. The Court of Appeals, therefore, refused to upset a conviction founded on an indictment based on sufficient legal and probative evidence because other evidence of doubtful admissibility was also before the grand jury. Left unresolved by the appellate court was whether the privilege extends to an officer of a bankrupt corporation, such as the appellant, who is ordered to testify at the first meeting of creditors.

Staff: Former United States Attorney Vincent T. McCarthy (E.D. N.Y.)

NARCOTICS

SELF-INCRIMINATION NOT GROUNDS FOR MOTION TO VACATE AFTER PLEA OF GUILTY.

Charles Eby v. United States (C.A. 10, No. 69-68; August 1969; D.J. 12-017-59N)

The Tenth Circuit Court of Appeals, following the Supreme Court decisions in Leary v. United States, and United States v. Covington, decided in May, 1969, has denied a motion by the defendant under

28 U.S.C. 2255 to reverse his conviction entered on a guilty plea to a charge of not paying the transfer tax on marihuana, 26 U.S.C. 4744(a)(1), and transporting and concealing marihuana in violation of 26 U.S.C. 4744(a)(2). The Court held the plea does constitute a waiver of the privilege against self-incrimination. The Court stated it was not unmindful of contrary decisions in the Fourth Circuit (U.S. v. Miller, 406 F.2d 1100), and the Eighth Circuit (Deckard v. U.S., 381 F.2d 77).

Staff: Former United States Attorney Lawrence A. McSoud and Assistant United States Attorney Robert P. Santee (N.D. Okla.)

NARCOTICS - AMPHETAMINES

QUANTITY OF TABLETS INVOLVED SUFFICIENT PROOF DEFENDANT NOT WITHIN EXCEPTION.

United States v. Robert Cerrito (C.A. 7, No. 17148; July 25, 1969; D.J. 21-23-542)

The defendant was convicted of conspiring to sell amphetamine tablets, offenses under 21 U.S.C. 331(q)(2) and (3) and with intent to defraud and mislead by dispensing counterfeit tablets held for sale, an offense under 21 U.S.C. 331(i)(3). A sale of 50,000 tablets was made to a narcotic agent. In affirming the conviction, the Court of Appeals upheld the constitutionality of the statutes. As to the defendant's contention that the Government did not sustain its burden to prove that he did not come within the exceptions of 21 U.S.C. 360a(a), (b), or (c), the Court stated:

> We think the evidence as to quantity of tablets possessed and sold is sufficient to justify the inference that the tablets were neither for personal use of, or /sic/ for administering to a dog owned by Cerrito.

Staff: United States Attorney Thomas A. Foran (N.D. Ill.)

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Shiro Kashiwa

COURTS OF APPEALS

PUBLIC LANDS

TAYLOR GRAZING ACT: NO CLAIM FOR COMPENSATION STATED UNDER 43 U.S.C. 135q.

Porter v. Resor (C.A. 10, No. 72-68; August 13, 1969; D.J. 90-1-4-160)

The executor of the estate of John Prather sought compensation from the Secretary of the Department of the Army under the provisions of 43 U.S.C. 315q for a reduction in the decedent's grazing permit caused by the Army's taking of some of the public domain covered by the permit. While the reduction or cancellation of a Taylor Grazing permit is not compensable, 43 U.S.C. 315q provides compensation at the Secretary's discretion if the reduction or cancellation was for national defense purposes.

Prather's permit was substantially reduced in 1957. Rather than make a claim for compensation under 43 U.S.C. 315q, Prather continued to use the withdrawn lands for grazing without any legal authority until his death in 1965. His estate discontinued this use of the land and then sought compensation. The Secretary denied compensation, stating that neither Prather nor his estate had "any claim" for the loss of the Taylor Grazing Act lands since he had not been deprived of the lands but "continued occupancy without payment of fees or rental". The Secretary also stated that "In the absence of any loss of use, hardship, equitable entitlement or damage, Mr. Prather is not entitled to compensation under the Act".

The district court sustained the Secretary's decision. The Court of Appeals affirmed, holding:

> It is sufficient to say that the compensation statute was passed in recognition of the actual losses that were being suffered through the withdrawal of public domain for defense and similar purposes. Resort to such an Act is obviously discretionary with the persons for whom it was intended to grant relief. The self-reliant Mr. Prather decided he did not need this relief; he did not seek it; and instead he had his own homemade remedy which was

effective and satisfactory to him for his remaining years. The executor acquired no claim, the Secretary so decided, as did the trial court.

Staff: Frank B. Friedman and Robert S. Lynch (Land and Natural Resources Division)

HOMESTEAD ENTRY CANCELLED FOR FAILURE TO MEET CULTIVATION REQUIREMENTS OF 43 U.S.C. 164, 279; SECY. OF INTERIOR'S DECISION BASED ON SUBSTANTIAL EVIDENCE; SECY. CAN INSTITUTE CONTEST TO CANCEL HOMESTEAD ENTRY EVEN THOUGH ENTRYMAN HAS SUBMITTED STATUTORILY REQUIRED PROOF OF COMPLIANCE.

Cecil R. Reed v. Udall, et al. (C.A. 9, No. 22754; September 17, 1969; D.J. 90-1-4-129)

Reed filed an application for a patent to lands included in a homestead entry, attaching the required affidavits that he had complied with the cultivation requirements of 43 U.S.C. 164. The Department of the Interior instituted a contest proceeding disputing his proof. A hearing was held and the hearing examiner ruled in favor of Reed. The Director of the Bureau of Land Management reversed, finding that the entry was not made or maintained in good faith and that insufficient acreage was cultivated. The Secretary affirmed.

The district court held that there was substantial evidence to support the Secretary's decision. The Court of Appeals affirmed, stating "The sole question presented is whether there is substantial evidence in the administrative record to support the position of the Secretary". The Court noted that the evidence before the Secretary included testimony that the land was desert in character and there was no evidence of tillage, crop planting or irrigation which would be essential to produce a crop on such lands. The Court also stated that the Department of the Interior was not required to accept the affidavits submitted by Reed as conclusive proof that he had cultivated the required acreage and could institute a contest proceeding. If it could not institute a contest proceeding, "the United States would be at the mercy of fraudulent homesteaders".

Staff: Frank B. Friedman (Land & Natural Resources Division)

CONDEMNATION

COMPARABLE SALES; PRIOR SALE OF LAND TAKEN FOR NEGLIGIBLE AMOUNT OF CASH AND EXTENSIVE MORTGAGES WITH

LIMITED SECURITY IS ADMISSIBLE AS COMPARABLE SALE PROVIDING EVIDENCE IS INTRODUCED SHOWING PRESENT CASH VALUE OF SALE.

Surfside of Brevard, Inc., et al. v. United States (C.A. 5, No. 26292; August 11, 1969; D.J. 33-10-580-250-26)

The landowners appealed from a pretrial ruling that a sale of the subject property shortly before the Gonernment condemned the land in 1962 should not be admitted into evidence as a comparable sale at the jury trial of just compensation because that sale was not for cash or its equivalent. The sale consisted of a $5,000 cash payment to the former landowners and notes secured by second mortgages totalling, on their faces, $3,438,500, subject to first mortgages totalling, on their faces, $62,000, secured only by the land and an $8,000 total capitalization of 14 corporations, created specifically to take title to the land. The mortgages provided for no interest or payment of principal for 15 years on either the first or second mortgages. The landowners did not attempt to furnish any evidence of present cash value of the sale at the trial and, as Chief Judge Brown's concurring opinion notes, were "justified in doing so in view of the Trial Judge's indicated determination to exclude all the evidence which we hold admissible".

The Court of Appeals reversed the exclusion of this sale, holding that:

> The circumstances surrounding the credit sale did not render the transaction inadmissible, but rather constituted evidence to be considered by the jury in determining the measure of the transaction's cash equivalent. The jury should be permitted to consider not only these aspects of the transaction but other proffered evidence relevant to the cash equivalent of the credit price. We believe this evidence and the jury's own general knowledge and understanding of credit conditions in the community, combined with a proper instruction by the court, should enable the jury to determine the cash value of the prior sale and, thereby, enable it to proceed more ably in its determination of market value.

Chief Judge Brown concurred in the opinion, noting that if this sale is admissible "*** it is a part of the burden of one attempting to prove 'equivalency' to offer proof of the present cash value of the deferred obligations and security. Standing alone it is, to me, just so much paper."

Staff: Frank B. Friedman (Land & Natural Resources Division)

DISTRICT COURT

INDIAN LANDS

ALLEGED MISDEMEANOR AGAINST FED. EMPLOYEE FOR DRILLING WATER WELL ON INDIAN RESERVATION WITHOUT LICENSE SPECIFIED BY NEVADA STATUTES DISMISSED AS SUIT AGAINST U.S.

Nevada v. Cope (D. Nev., R-2221; October 3, 1969; D.J. 90-1-4-192)

In June 1969, a federal employee drilling water wells on the South Fork Indian Reservation in Nevada as part of an Indian Health Service program was charged with a misdemeanor under Chapter 534 of Nevada Revised Statutes for drilling a well without a license. After removal to a federal court, the United States moved for dismissal of the suit as one against the United States which sought to make the United States subject to the licensing powers of the State of Nevada. The court granted the motion to dismiss.

Staff: United States Attorney Robert S. Linnell; Assistant United States Attorney Julien G. Sourwine (D. Nev.); James W. Moorman and David W. Miller (Land & Natural Resources Division)

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