Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

December 16, 1960

United States

DEPARTMENT OF JUSTICE

Vol. 8 No. 26

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 8 December 16, 1960 No. 26

MONTHLY TOTALS

As of October 31, 1960, total filings of both civil and criminal cases had decreased over the same period in fiscal 1959. Total terminations of criminal cases also decreased in the first four months. While the rate and cumulative increase in the pending caseload was reduced to one-half the rate for the first three months of fiscal 1961, the rise in the number of civil cases pending was especially marked. Set out below is a comparison of the work accomplished during the first quarter of fiscal years 1959 and 1960.

	1st 4 Months F. Y. 1960	1st 4 Months F. Y. 1961	Increase or Decrease Number	Increase or Decrease %
Filed				
Criminal	10,097	9,807	- 290	- 2.9
Civil	8,116	8,054	- 62	- .8
Total	18,213	17,861	- 352	- 1.9
Terminated				
Criminal	8,681	8,677	- 4	- .0
Civil	7,062	7,172	↑ 110	↑ 1.6
Total	15,743	15,849	↑ 106	↑ .7
Pending				
Criminal	8,992	8,799	- 193	- 2.1
Civil	19,351	20,182	↑ 831	↑ 4.3
Total	28,343	28,981	↑ 638	↑ 2.3

	July	August	September	October
Filed				
Criminal	1,709	2,346	3,201	2,551
Civil	1,863	2,304	1,897	1,990
Total	3,572	4,650	5,098	4,541
Terminated				
Criminal	1,600	1,772	2,328	2,977
Civil	1,463	1,906	1,798	2,005
Total	3,063	3,678	4,126	4,982

Collections for October dropped appreciably under those for August but aggregate collections are still well ahead of those for the prior fiscal year. For the month of October 1960, United States Attorneys reported collections of $2,237,122. This brings the total for the first three months of this fiscal year to $9,971,065. This is $1,351,927 or 15.6 per cent more than the $8,619,138 collected in the first four months of fiscal year 1960.

During October $2,991,195 was saved in 101 suits in which the Government as defendant was sued for $4,570,426. 69 of them involving $2,159,884 were closed by compromise amounting to $615,965 and 27 of them involving $2,303,121 were closed by judgment against the United States amounting to $963,266. The remaining 5 suits involving $107,421 were won by the government. The amount saved for the first four months of the current year was $8,071,030 and is a decrease of $601,599 from the $8,672,629 saved in the first four months of fiscal year 1960.

DISTRICTS IN CURRENT STATUS

As of October 31, 1960, the districts meeting the standards of currency were:

CASES

Criminal

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

CASES

Civil

Ala., N.	Fla., N.	Ind., S.	La., W.	Minn.
Ala., S.	Ga., S.	Iowa, S.	Me.	Miss., N.
Ariz.	Hawaii	Kan.	Md.	Mo., E.
Ark., E.	Idaho	Ky., E.	Mass.	Mont.
Dist. of Col.	Ind., N.	Ky., W.	Mich., E.	Neb.

CASES

Civil (Cont'd.)

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

MATTERS

Criminal

Ala., M.	Idaho	Mass.	N. D.	Tenn., W.
Ala., S.	Ill., E.	Mich., E.	Ohio, S.	Tex., E.
Ariz.	Ind., N.	Miss., N.	Okla., N.	Utah
Ark., E.	Ind., S.	Miss., S.	Okla., E.	W. Va., N.
Ark., W.	Iowa, N.	Mont.	Okla., W.	W. Va., S.
Calif., N.	Iowa, S.	Neb.	Pa., E.	Wis., E.
Colo.	Ky., E.	N. J.	Pa., W.	Wyo.
Conn.	Ky., W.	N. Y., E.	P. R.	C. Z.
Del.	La., W.	N. C., M.	R. I.	Guam
Hawaii	Md.	N. C., W.	S. D.	V. I.

Civil

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

JOB WELL DONE

The Acting Regional Attorney, Department of Agriculture, has extended thanks and commendation to Assistant United States Attorney Leo C. Rodkin, Southern District of California, for the excellent handling of a recent case arising under the new mining law. In expressing appreciation for successful outcome of this novel and difficult

case, the letter stated that there has been no other instance of the Government having obtained a verdict against a mining claimant on the basis of his depredations on public lands in the guise of a miner, and that the case will serve as a valuable precedent.

United States Attorney Clarence E. Luckey, District of Oregon, has been commended by the Regional Commissioner, Immigration and Naturalization Service, for his fine efforts in resisting final efforts to forestall deportation in two recent cases. The letter stated that the interest of the Government in these difficult cases was well represented, and that Mr. Luckey's cooperation and his skillful and vigorous advocacy of the cause in the lower and appellate courts are deeply appreciated.

The Chief Postal Inspector has expressed his appreciation for the manner in which Assistant United States Attorney Erwin A. Cook, Western District of Oklahoma, handled a recent mail fraud case. The letter stated that it was most gratifying that this advance fee loan scheme resulted in an indictment, and that each successive action in such cases represents another accomplishment in the joint program to protect the public from the evils of racketeers.

Assistant United States Attorneys Jack K. Anderson and Richard F. Matsch, District of Colorado, have been commended by the Chief Postal Inspector, for their excellent preparation of a recent mail fraud case. The letter stated that the highly concealed fraud scheme was so capably presented to the jurors that the resulting convictions of the two "advance fee" racketeers were assured, and that the valuable assistance and guidance furnished by Messrs. Anderson and Matsch during the investigation are sincerely appreciated.

The General Counsel, U. S. Naval Training Device Center, has expressed thanks and appreciation for the valuable assistance rendered in a recent matter by Assistant United States Attorney Lawrence S. Levine, Eastern District of New York. The letter stated that with the cooperation of Mr. Levine it was possible to protect the Government's interest in property involved in contracts with the bankrupt and also maintain a valuable training program which otherwise would have been unduly delayed. The letter further stated that Mr. Levine handled the entire matter with intelligence and foresightedness.

PERFORMANCE OF DUTY

At the request of the United States Attorney's office, Northern District of Georgia, Assistant United States Attorney Carl F. LaRue, Northern District of Ohio, was assigned to represent the Government at depositions, and is making arrangements with doctors for medical examinations and reports on four plaintiffs involved in several tort suits filed in the Northern District of Georgia. United States

Attorney Charles D. Read, Jr., stated that without Mr. LaRue's ready and efficient response to the requests for assistance, and the valuable services he rendered, the cases would have been much more difficult to settle. The three cases were settled for $50,000, and contributions were made by the insurance carrier for the Government driver and other parties alleged to be joint tort feasors.

The District Engineer, Tulsa District, U. S. Army Corps of Engineers, has expressed appreciation to United States Attorney William B. West, III, Northern District of Texas, for the prompt filing of a complaint in condemnation in connection with the Altus Missile Complex Inter-Site Communication Systems, expressing particular appreciation for the services of Assistant United States Attorneys Joseph McElroy and Clayton Bray.

The Director of Personnel of the Office of the Chief of Engineers, Department of the Army, has expressed appreciation for the able and vigorous manner in which Assistant United States Attorney Robert J. Kay, Western District of Wisconsin, conducted a recent jury trial in a condemnation proceeding in connection with Truax Field.

* * *

OFFICE OF ALIEN PROPERTY

Director Dallas S. Townsend

Trading with the Enemy Act; Doing Business Within Enemy Territory; Resident of Neutral Country Exercising Direction and Control of Firm in Italy. Horst von Hennig v. Rogers (Dist. Col., November 29, 1960). This was a suit under Section 9(a) of the Trading with the Enemy Act to recover approximately $1,100,000, representing the proceeds of stock in a New York corporation vested as the property of two German nationals. Plaintiff, a resident of Switzerland, contended that the Germans had exchanged this stock and other assets in 1938 for property owned by plaintiff and located in Germany. The Government denied the validity of the purported assignment and plaintiff's claim to ownership deriving therefrom, and also asserted that the original plaintiff, who died after the institution of suit, was not eligible to maintain an action under Section 9(a) because, as an individual residing outside of the United States and doing business within the territory of a nation with which the United States was at war, he was an enemy as that term is defined in Section 2(a) of the Act.

The Government's defenses were separated for trial by Court order and the issue as to the enemy status of the original plaintiff was advanced for trial. At the trial of this issue it was stipulated that the original plaintiff, Carlo von Wedekind, owned a substantial interest in an Italian firm of that name; that the firm did a retail business in Italy during the war; and that until 1943 the business was managed by an individual pursuant to a power of attorney conferred on him by Carlo von Wedekind. Evidence was admitted showing that the attorney-in-fact reported to and conferred with the original plaintiff concerning the affairs of the company and the Court found that Carlo von Wedekind was carrying on business in Italy through Carlo Wedekind & Company.

Plaintiff's attempt to prove that the business of the Italian firm could not be attributed to plaintiff because of the character of the organization under Italian law of Carlo Wedekind & Company, a societa in nome collettivo, was unsuccessful. Based on the testimony of experts at the trial, the Court concluded that such a societa under Roman law was analogous to a general partnership under American law, but added that even if a societa in nome collettivo were to be regarded as a corporation, equity would pierce the corporate veil of this particular closely held family organization and would conclude that the original plaintiff was doing business in Italy during the crucial years and therefore was an enemy ineligible to maintain suit under the Trading with the Enemy Act.

The action was accordingly dismissed on the merits.

Staff: The case was tried by Mary P. Clark
(Office of Alien Property)

* * *

ANTITRUST DIVISION

Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Court Holds for Government in Television Block-Booking Cases. United States v. Loew's Incorporated, United States v. C & C Super Corp., United States v. Screen Gems, Inc., United States v. Associated Artists Productions, Inc., United States v. National Telefilm Associates, Inc., United States v. United Artists Corporation (S.D. N.Y.). On December 2, 1960, the District Court New York rendered a 78 page opinion in the so-called television block-booking cases, finding in each case that defendant company had entered into contracts with television stations conditioning the licensing or sale of feature motion pictures upon the licensing of certain other feature pictures (block-booking) in violation of Section 1 of the Sherman Act. The opinion followed the consolidated trial of the six separate cases.

The Court found that these six companies had entered into in excess of 25 such block-booking contracts and that television stations had been forced to take and pay for certain motion pictures that they did not want, and, in some instances, could not use.

The opinion is significant in a number of respects. The block-booking (tie-in) holding of the Paramount case is extended to the television industry. The Court construes the Paramount block-booking holding to have been independent of the monopoly and the other practices involved in that case. In the instant cases the licensing of some picture on the condition that Television stations also purchase a license on others is held to be illegal, even if implicit, and irrespective of whether or not the buyer specifically requested less than all the films in a package. The opinion states that there is no need to show market dominance since each film is unique and copyrighted, and hence each defendant is in a monopoly position as to the tying product, its own feature films. While the Court did not expressly hold that block-booking is per se unreasonable, it quoted extensively from a recent case which said that it was difficult to see how the block-booking case (Paramount) and Northern Pacific could be construed "other than as a condemnation of every practice in which a party owning a legal monopoly over an article conditions the sale or licensing of that article. . ." on the purchase of another. [Emphasis supplied].

The general policies of two of the companies received special attention. As to defendant Loew's the Court noted that the company's initial policy, which was in effect from August, 1956 to about March, 1957, was to license its library of over 700 films on a full library basis only. (The Court did not, however, hold illegal any of the contracts entered into during this period). It was held that the defendant company entered into some block-booking contracts even after filing of the suit. As to C & C, which bartered its pictures to television stations in

exchange for TV spot time, the Court found that it had adhered to a firm policy of block-booking by reason of a requirement that each station pay a minimum number of spots for each package. In other words, C & C did not say "must take all", but did say "must pay for all." This, the Court said, had the effect of forcing sale in packages. The policy was said to be the result of a contract between C & C and International Latex which "forced C & C to adopt a company policy of block booking."

In general, the opinion observes that the companies had not priced their pictures individually, that a number of block-booking contracts had been entered into even after institution of the suits, that such conditioning violates the law regardless of the number of pictures required to be taken and even if limited selection is permitted.

The Court ruled that a decree of violation would be entered in each case, that injunctions as to conditioning would be issued, but, as anticipated by previous statements of the Court prior to trial, relief relating to renegotiation of the block-booking contracts was denied.

Staff: Leonard R. Posner, Eugene J. Metzger, George A. Avery, Lewis A. Rivlin, Jack L. Lipson and Melvin Spaeth (Antitrust Division)

Milk Case Settled by Consent Judgment. United States v. Maryland & Virginia Milk Producers Association, (Dist.Col.). On November 22, 1960, Judge Alexander Holtzoff entered a consent judgment which terminated this case and disposed of charges that defendant had monopolized and attempted to monopolize the supplying of raw milk to dealers in the Washington metropolitan area. (Other allegations of the complaint charging that defendant had violated Section 3 of the Sherman Act and Section 7 of the Clayton Act were tried before Judge Holtzoff in 1958. In the first judgment ordering divestiture in a litigated amended Section 7 case, Judge Holtzoff required defendant to divest assets of Embassy Dairy which it had acquired for $4 million in 1954. 167 F.S. 799. This ruling was appealed by defendant to the Supreme Court which, on May 2, 1960 upheld the order of divestiture. 362 U.S. 458. The Government's charges of violation of Section 2 of the Sherman Act which had been dismissed by the trial court, 167 F. Supp. 45, were reinstated by the Supreme Court in the same opinion.)

The consent judgment requires defendant also to divest assets and stock of Richfield and Wakefield Dairies, which were acquired in 1957, and bars defendant for a 5-year period from engaging in any phase of distribution and sale of fluid milk in the Washington area other than sales to the Armed Forces. Other provisions of the judgment include prohibitions against: refusal to sell milk to any dealer; use of any sales plan which assigns purchase quotas to dealers or which makes the price dependent upon the percentage of a dealer's total requirements purchased from defendant; coercion of dealers or interference with their sources of supply; boycotts to compel milk purchases; discrimination among customers; other acquisitions except upon a showing that they will not substantially lessen competition or tend to monopoly.

In addition, the judgment requires defendant to: give written price notification to all dealers; release upon request milk producers who supplied Embassy Dairy prior to the 1954 acquisition; and modify existing membership contracts to permit termination at the end of each year.

At the hearing on November 22, 1960, Judge Holtzoff, without objection by the Government, approved the sale of the Embassy-Richfield-Wakefield assets, which defendant is required to divest, to Washington area corporation which will operate the dairy business in conjunction with a frozen food business. The divestitute is expected to be consummated no later than January 1, 1961, restoring the acquired businesses to independent status.

Staff: Joseph J. Saunders, Edna Lingreen, J. E. Waters and Harry Bender (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEALS

ADMINISTRATIVE LAW

Court of Appeals Has No Jurisdiction to Review Directly Administrative Decision Under Federal Airport Act. Schwab v. Quesada, Administrator, Federal Aviation Agency (C.A. 3, November 7, 1960). Petitioner Schwab is the owner of land adjoining a municipal airport. Acting under the Federal Airport Act, 49 U.S.C. 1108, the Administrator, Federal Aviation Agency, approved a grant-in-aid of expansion and improvement of the airport. Petitioner sought direct appellate review of the administrative decision. On the Administrator's motion, the petition for review was dismissed. The Court of Appeals held that appellate jurisdiction to review the decision was not conferred by 49 U.S.C. 1486(a) since that provision authorized direct appellate review only of administrative decisions made under the Federal Aviation Act, Chapter 20 of Title 49, U.S.C. Further, appellate jurisdiction was not conferred by Section 10(b) of the Administrative Procedure Act, 5 U.S.C. 1009(b). The provision for review by "any applicable form of legal action"(5 U.S.C. 1009(b)) deals not with appellate court review but with review by an original action in a court of competent jurisdiction.

Staff: V. Judson Klein (Civil Division)

ADMIRALTY

Exhaustion of Standard Disputes Procedure Under Maritime Contract Does Not Stay Accrual of Cause of Action or Toll Running of Jurisdictional Statute of Limitations. States Marine Corp. v. United States (C.A. 2, November 22, 1960). States Marine Corp. filed a libel against the United States under the Suits in Admiralty Act alleging that it was entitled to recover $93.93 for damage to fitted sweat battens aboard the ALCOA PEGASUS. Recovery was claimed under the terms of a space charter under which the United States agreed to pay for any damage to the vessel's equipment caused by the Government, its agents or its contractors during the discharge of cargo. The damage allegedly occurred on December 13, 1954 while the vessel was being discharged at Inchon, Korea, by a stevedore contractor retained by the Government. Sixteen months after the damage had occurred, States Marine filed a claim with the contracting officer under the standard disputes clause contained in the contract. The contracting officer denied the claim on the ground that proper notice had not been given to the Government as required by the contract. Libellant took a timely appeal from this decision to the Armed Service Board of Contract Appeals, which affirmed the contracting officer's decision on July 30, 1957. This libel was filed September 25, 1957, 33 months after the damage occurred. The district court dismissed the libel on the ground that it was brought more than two years after the cause of action had accrued and was, therefore,

barred by the two-year statute of limitations contained in Section 5 of the Suits in Admiralty Act, 46 U.S.C. 4075.

The Second Circuit unanimously affirmed. It held that the cause of action arose when the damage occurred. The fact that the parties entered into a contractual arrangement requiring exhaustion of the disputes procedure did not change the nature of the cause of action or extend the statute of limitations. The Court noted that no time limit was fixed for the submission of claims to the contracting officer so that, under his theory, by delaying the submission of a claim, libellant could postpone indefinitely the running of the statute. Further, because the statute of limitations in the Suits in Admiralty Act is a limitation upon the jurisdiction of the district court, its operation cannot be tolled by administrative delay while a claim is being considered. To protect itself, libellant could have begun a timely suit, and obtained a stay of proceedings until the disputes procedure was completed.

Staff: Howard E. Shapiro (Civil Division)

SOCIAL SECURITY ACT

Denial of Claim for Disability Benefits Reversed With Instructions to Take Additional Evidence on Extent of Claimant's Impairment and Availability of Suitable Employment. Kerner v. Flemming (C.A. 2, November 18, 1960). Plaintiff filed a claim for disability insurance benefits under Section 223 of the Social Security Act, 42 U.S.C. 423. He submitted evidence showing that he was suffering from a heart condition and diabetes which allegedly rendered him unable to participate in gainful activity. His application was denied by a referee of the Department of Health, Education and Welfare on the ground that he had failed to establish that he was unable to engage in any substantial gainful activity. This finding was sustained by the district court.

The Second Circuit reversed and instructed the district court to direct the Secretary to take further evidence under Section 205(g) of the Act, 42 U.S.C. 405(g), on the extent to which plaintiff was actually disabled and the availability of suitable employment. The Court recognized that the Secretary's findings must be accepted if supported by substantial evidence and that plaintiff had the burden of showing disability under the Act. However, it pointed out that the record was incomplete on the points remanded for further development, and that plaintiff was not represented by counsel at the agency hearing. The Court was careful to note that it was not requiring the Secretary to conduct a full trial. It emphasized that all the Act required was an adequate record for making the necessary determinations.

Staff: United States Attorney Cornelius W. Wickersham, Jr. and Assistant United States Attorney Malvern Hill, Jr. (E.D. N.Y.)

TORT CLAIMS ACT

Pilot of Landing Aircraft Is Primarily Responsible for Avoidance of Collision With Ground Vehicles. New York Airways, Inc. v. United States (C.A. 2, November 1, 1960). After having been cleared to land in the terminal area at Newark Airport on October 17, 1953, New York Airway's helicopter descended onto a truck, owned by Eastern Airlines, which was proceeding across the terminal area. New York Airways sued the United States, alleging that the collision was the result of negligence by the Civil Aeronautics Authority Traffic Air Controller who granted clearance to land. The district court held that plaintiff failed to sustain its burden or proving freedom from contributory negligence.

On appeal, the judgment for the United States was unanimously affirmed. The Court relied on the district court's finding that the pilot did not engage in maneuvers that would have increased his visibility in the touchdown area. It held this and other findings to be fully sustained by the record. It also rejected as incredible, New York Airway's contention that the only person under a duty to watch the area in which the helicopter was going to land was the air traffic controller. The fact that a pilot has received clearance from an air traffic controller does not absolve him from exercising a reasonable degree of caution in performing the maneuvers authorized.

Staff: Howard E. Shapiro (Civil Division)

VETERANS INSURANCE

Findings of District Court on Total Disability Supported by Substantial Evidence. Bohrer v. United States (C.A. 2, November 25, 1960). Plaintiff, widow of a World War I veteran, brought suit under a private bill waiving the statute of limitations for the proceeds of her husband's war risk insurance policy. The issue before the trial court was whether her husband had been "totally disabled" within the meaning of the policy on September 1, 1927. If he had not, the policy lapsed on that date for non-payment of premium.

It was undisputed that plaintiff's husband was diagnosed as having an incurable disease known as diabetes insipidus, in July, 1930. Plaintiff sought to establish that her husband was thus totally disabled in September of 1927 since he must have been suffering from the latent origins of his disease at that time. Based on the documentary evidence showing no visible disability in September 1927, the District court found that plaintiff's husband was not "totally disabled" at that time, and dismissed the complaint.

The Second Circuit affirmed, holding that there was substantial evidence to support the district court's findings of fact and thus

they were not clearly erroneous.

Staff: United States Attorney Neil R. Farmelo and Assistant United States Attorney Robert J. Plache (W.D. N.Y.)

VETERANS' PREFERENCE ACT

USIA Appointees Hired Under Foreign Service Act Protected by Veterans' Preference Act; Preference Act Coverage of Only "Indefinite or Permanent" Appointees Includes Appointee for "Four Years or Need of Employee's Service, Whichever Is Less." Born v. Allen (C.A.D.C., November 28, 1960). Born, an honorably discharged ex-serviceman, was appointed for service in Manila by the United States Information Agency in February 27, 1956, for "four years or need of employee's services, whichever is less." He was hired under the Foreign Service Act of 1946, 22 U.S.C. 801, as a Foreign Service Staff Officer. He was later transferred to Washington, D.C., where he served until September 5, 1957, when his appointment was terminated for lack of funds.

Born appealed to the Civil Service Commission, claiming that his removal violated the Veterans' Preference Act of 1944, 5 U.S.C. 851-69. The Commission sustained his contention and recommended reinstatement. USIA however refused to reinstate Born on the ground that Foreign Service Staff Officers in USIA are not covered by the Veterans' Preference Act, thus Born's employment was not within the jurisdiction of the Commission.

Born sought relief from the district court which held that Born's appointment for four years or less did not constitute a "permanent or indefinite" appointment, which is a requirement for coverage by the Veterans' Preference Act. See 5 U.S.C. 863.

The Court of Appeals reversed, holding (1) any appointment for more than a year which does not have a fixed, inflexible termination date is "indefinite" within the meaning of section 863; and (2) the Veterans' Preference Act applies to USIA employees hired under the Foreign Service Act. In reaching the latter conclusion, the Court rejected the Government's contention that the Veterans' Preference Act does not apply to any person hired under the Foreign Service Act because of (1) the importance of keeping the vital function of the Foreign Service free from interference from other independent agencies; (2) the inconsistencies between the two statutory schemes as concerns appointments, ratings, promotions, leave computations, salary scales, classification, and discharges; and (3) the provision in the Foreign Service Act, 22 U.S.C. 987, making Foreign Service personnel records confidential except to the President, congressional committees, and the Secretary of State and various subordinates to him.

Staff: United States Attorney Oliver Gasch; Assistant United States Attorneys Carl Belcher and Frank O. Nebeker (Dist. Col.)

DISTRICT COURTS

ADMIRALTY

Federal Tort Claims Act; Government Not Negligent in Failing to Assist Small Boat Coming Alongside Chartered Vessel. Mixon v. United States (S.D. Fla., November 17, 1960). The Department of the Air Force undertook operations to recover the wreck of an Air Force plane which had crashed in Boca Ciega Bay, Florida, on April 14, 1956. The Government contracting officer chartered a dredging barge to lift the wreck and to serve as a landing stage for Air Force technicians. Mixon's motorboat was also chartered to ferry men and equipment between the barge and the shore. In making an approach alongside the barge, plaintiff thrust his hand in the casing of a spud anchor used to moor the dredge. The barge shifted, locking Mixon's hand in the casing and damaging three of his fingers. Plaintiff's Federal Tort Claims Act suit alleged negligence in the failure of Government employees to render assistance in bringing the boat alongside. The trial court held for the United States, finding that there was no negligence on the part of Government employees and concluding that the injuries resulted from plaintiff's failure to use due care for his own safety.

Staff: Alan Raywid (Civil Division)

CONSTITUTIONAL LAW

Unconstitutionality of Application of State Minimum Milk Price Law to Purchases at Federal Military Installations. United States v. Warne (N.D. Cal., November 29, 1960). In two actions brought by the United States to determine the constitutionality of the application of the California Milk Stabilization Law (under which minimum prices for the sale of dairy products are established) to purchases of dairy products for mess hall consumption and commissary sales at the Oakland Army Terminal and at Travis and Castle Air Force Bases, a three-judge district court held that the Federal Government had acquired the land comprising these military installations (or parts thereof) in full compliance with the California statutes imposing certain conditions on the acquisition of exclusive jurisdiction by the Federal Government; and that in accordance with Pacific Coast Dairies v. Department of Agriculture, 318 U.S. 285, the California milk law could not constitutionally be applied to purchases of milk by the Government at such areas of exclusive jurisdiction.

The Court also held that the California milk law was in conflict with federal procurement statutes and policy to obtain commodities by competitive bidding at minimum prices and that the California law was, therefore, unconstitutional as a violation of the supremacy clause of the Federal Constitution, in accordance with California Public Utilities Commission v. United States, 355 U.S. 534.

The Court rejected California's contention that it should abstain from consideration of these issues until the statute had been interpreted by the California State courts, on the ground that the issue as to whether the Government had acquired exclusive jurisdiction over these installations is a federal question. The Court also rejected California's contention that the criminal provisions of the California milk law remain in effect under the Assimilative Crimes Act, on the ground that the Assimilative Crimes Act does not operate to adopt any state penal statutes which are in conflict with federal policy.

Staff: Donald B. MacGuineas and Harland F. Leathers (Civil Division)

STATE SUPREME COURTS

RAILROAD RETIREMENT ACT

State Court Does Not Have Jurisdiction to Review Award of Benefits by Railroad Retirement Board. Dettore v. Davenport (Sup. Ct. of Ore., November , 1960). Dettore had been designated by Malo as beneficiary of Malo's retirement benefits under the Railroad Retirement Act, 45 U.S.C. 228, et seq. However, the Railroad Retirement Board, a federal agency, held that Malo's designation was rendered invalid by a subsequent act of Congress and denied Dettore's claim.

Dettore then filed a claim against Malo's estate in state court, asserting Malo's designation as a basis for recovery. Other heirs of Malo objected and suit followed. The lower court rejected Dettore's claim and he appealed.

The Oregon Supreme Court limited its decision to the question of whether a state court had jurisdiction to review an award or denial of benefits by the Railroad Retirement Board. It held that review was precluded in state courts under the terms of the Railroad Retirement Act which incorporated, by reference, provisions of the Railroad Unemployment Insurance Act limiting review to United States courts of appeals. Thus the Oregon Supreme Court refused to pass on the propriety of the Board's decision on Dettore's claim and directed him to exhaust his administrative remedies in that agency before seeking review in a federal court of appeals if he still felt it necessary.

Staff: Morton Hollander (Civil Division); Myles F. Gibbons, General Counsel; David Schreiber, Louis Turner and Ernest O. Eisenberg (Railroad Retirement Board)

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Harold R. Tyler, Jr.

Habeas Corpus; Timeliness of Issuance of Warrant for Retaking of Conditional Release Violation. Taylor v. Godwin; Taylor v. Portwood (C.A. 10). Appellees were conditionally released from federal penitentiaries pursuant to 18 U.S.C. 4163. While in conditional release status, which is made equivalent to parole status by 18 U.S.C. 4164, appellees committed conditional release violations. The Board of Parole, after the termination of the statutory periods of their conditional releases (under 18 U.S.C. 4164, their maximum terms less one hundred and eighty days), but before the expiration of their maximum terms, issued violator warrants for their retaking. On habeas corpus, the District Court for the District of Kansas held the warrants invalid and released the appellees. The Court of Appeals reversed, holding that the releasee's right under section 4164 was merely a contingent one, and that, in any event, under 18 U.S.C. 4205, a warrant for the retaking of a conditional release violator may be issued at any time within the maximum term (not merely the maximum term less one hundred eighty days).

Staff: United States Attorney Wilbur G. Leonard (D. Kan.)
Harold H. Greene, David Rubin and Gerald P. Choppin
(Civil Rights Division)

Habeas Corpus; No Credit for Service of Sentence (1) for Period Petitioner Had Been Released on Habeas Corpus to Date Notice of Appeal Was Filed; (2) Because of Failure to Accept Prisoner Into Custody Prior to Official Notification to Take Such Action and (3) Because of Unauthorized Restrictions Placed on Prisoner Who After Commencing Service, was Released on Bail and Was Simultaneously on Probation. Binion v. U.S. Marshal (D. Nev.). Petitioner, after having been placed on probation for five years by the District Court of Nevada, was sentenced to serve five years by the District Court for the Western District of Texas. After serving about three years, petitioner filed a motion to correct the latter sentence under 28 U.S.C. 2255 and was released on bail pending a ruling by the Supreme Court which would govern his case.

After release, petitioner reported to the probation officer pursuant to his Nevada sentence and was instructed to make more frequent contacts than was required under the terms of the probation. He reported in this fashion until about 50 days after his probation had terminated.

After the Supreme Court decided adversely to his position, petitioner surrendered to the U.S. Marshal, Philadelphia, Pa., where he immediately petitioned for a writ of habeas corpus and was released on bail. The District Court for the Eastern District of Pennsylvania ruled that he was "de facto" on parole for the period he reported and granted the petition. The Court of Appeals for the Third Circuit modified this order, ruling that petitioner was not entitled to credit for the period his Nevada probation was in effect. Binion v. United States, 273 F. 2d 495, cert. den. 362 U.S. 920.

On June 10, 1960, petitioner attempted to surrender to the Marshal at Las Vegas, Nevada, before the Marshal had been officially advised of the disposition of this case. The Marshal refused to take him into custody. However, on July 12, 1960, petitioner was taken into custody, again immediately filed a petition for a writ of habeas corpus, and was released on bail. This petition claimed, inter alia, that petitioner is entitled to credit from the time he was freed by the District Court in Philadelphia until the date the Government filed its notice of appeal; that he is entitled to credit from June 10, 1960, because the Marshal wrongfully refused to take him into custody; and that he is entitled to credit because of the restrictions wrongfully placed upon him by the Probation Officer.

The District Court for the District of Nevada ruled that the petitioner could get no credit for the period after release by the District Court in Philadelphia, pointing out that mere lapse of time without imprisonment or other restraint contemplated by law doesn't constitute service of sentence. It also ruled that the Marshal had no legal authority to take petitioner into custody prior to the time he was actually surrendered. Further, the Court disagreed with that portion of the Court of Appeals' opinion which would give credit to petitioner for the period he reported after his probation had terminated, stating "that the Court correctly stated the law to be that where an individual's liberty is restrained by the act of an officer of the United States having authority to exercise restraint, such individual is entitled to credit for the period of that restraint toward the service of his sentence. Misapplying this rule to the facts here involved, the Court ..... went on to reach the incorrect conclusion that the relator was entitled to credit for a period during which he was restrained by an officer of the United States without any authority to do so ..... Relief in the nature of declaring a portion of relator's remaining sentence to have been served on de facto parole was not within the jurisdiction of that Court." The Court discharged the writ of habeas corpus and ordered the petitioner remanded to the custody of the Attorney General.

Notice of appeal was filed on November 10, 1960.

Staff: United States Attorney Howard W. Babcock (D. Nev.); Eugene N. Barkin (Civil Rights Division)

Supremacy Clause; School Desegregation. United States v. Louisiana; Bush v. Orleans Parish; Williams v. Davis, (E.D. La.). A full discussion of the above cases involving State defiance of federal decrees for school desegregation is set out in the Bulletin for December 2, 1960. (Vol. 8, No. 25, pp. 746-747). The decision of the three-judge court was handed down on November 30. In sweeping language the Court declared the interposition measure, enacted by the Louisiana Legislature just prior to the effective date of the desegregation decree, to be "illegal defiance of constitutional authority," if taken seriously, but actually no more than an escape valve for the relief of legislative tensions. The Court declared this and the rest of the package of laws enacted in November by the first

extraordinary session of the Louisiana Legislature, unconstitutional, as part of an obvious scheme to evade the Court decree, and enjoined their enforcement by the Governor, the Legislature, and all public officials concerned. The Court also denied the School Board's motion to postpone integration. Citing Cooper v. Aaron, 353 U.S. 1, 15, the Court held: "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature."

The State appealed the decision to the Supreme Court and has filed a motion to stay the District Court order pending appeal. The United States has filed a motion in opposition and requested that the hearing on the merits be expedited. A motion to affirm will be filed as soon as appellants file their jurisdictional statement. The School Board has also appealed to the Supreme Court, since a definitive decision is imperative in order to reestablish the authority of the Board to control school finances, an authority purportedly assumed by the Legislature under a continuing stream of legislative acts and resolutions.

Staff: United States Attorney M. Hepburn Many (E.D. La.); St. John Barrett, Harold H. Greene, Gerald P. Choppin, Isabel Blair, David Rubin, and Howard A. Glickstein (Civil Rights Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

AVIATION

Federal Aviation Act Civil Penalty Cases; Direct Referrals; Compromise Settlements. Since enactment of the Federal Aviation Act of 1958 a number of inquiries have been received from United States Attorneys concerning the handling of civil penalty cases under that Act. Instructions for the handling of such cases will be incorporated in the United States Attorneys' Manual in the near future.

In the meantime, United States Attorneys are authorized to accept the direct referral of such cases from the Federal Aviation Agency, including the Regional Attorneys thereof, and are authorized to effect compromise settlement of the civil penalty provided in 49 U.S.C. 1471 without the prior approval of the Department's Criminal Division in those instances where the amount of the compromise is acceptable to the Federal Aviation Agency. If the United States Attorney believes that a compromise settlement should be effected in an amount less than is acceptable to that Agency, the matter should be submitted to the Criminal Division for decision. Such compromise settlements may be made without filing suit or at any time before a judgment is obtained, in which event it is not required that the settlement be reduced to a judgment although that may be done if the United States Attorney thinks it advisable. However, in addition to the principal amount the settlement should include any costs to which the Government is entitled.

The above-indicated procedure for compromise settlement before judgment was established on the basis of the provisions of the statute specifically authorizing compromise settlement of the civil penalty involved. See 49 U.S.C. 1471 and Section 5 of Executive Order No. 6166 (following 5 U.S.C. 132). This procedure does not apply to civil penalties generally under other statutes.

FALSE STATEMENTS

Personnel Questionnaires. Shortly after the Post Office announced it would be hiring extra help for Christmas, Assistant United States Attorney Charles Le Master of Fort Wayne, Indiana, in an effort to deter the filing of false employment forms, publicized a warning that it is a federal offense to conceal information or make false statements when applying for Government employment. Specific mention was made of concealment of arrest records and the investigative function of the Federal Bureau of Investigation. A brief statement of the penalty provisions of 18 U.S.C. 1001 was also made. Such timely notice may dissuade those who would be inclined to conceal or falsify information in the belief that the misinformation will be overlooked.

DEFENSE PRODUCTION ACT

Priorities and Allocations Violation; Sizable Fine Imposed Following Guilty Plea. United States v. Michael J. Genzale, d/b/a Electro Plating Co. (E.D. N.Y.). On September 9, 1960 a seven-count indictment was returned against Genzale based on investigations covering the period October 1, 1954 to December 31, 1955. He was charged in the first six counts with placing, on six different occasions, false priority-rated and certified purchase orders for nickel anodes with various companies, in violation of Section 103 of the Defense Production Act of 1950, as amended, 50 U.S.C. App. 2073, and in the seventh count with unlawfully disposing of a quantity of nickel anodes contrary to Sections 17 and 27 of BDSA (formerly NPA) Regulation 2, as amended March 23, 1953, 18 F.R. 1684, and June 1, 1954, 19 F.R. 3254, and in violation of Section 103, supra.

Following a guilty plea to Count 7, Chief Judge Walter A. Bruchhausen on November 10, 1960, sentenced Genzale to pay a fine of $7,500 to stand committed until paid, payment being stayed until November 28, 1960. In addition, the Court suspended imposition of a jail sentence and placed Genzale on probation for one year.

The General Counsel of the Department of Commerce in a letter to the Attorney General dated November 22, 1960, expressed particular gratification respecting the fine and sentence imposed in this case. He stated that while there are practically no present areas of shortage, and occasions for regulatory enforcement are relatively rare, the Business and Defense Services Administration of the Department of Commerce maintains a compliance and enforcement organization under the repeatedly extended Act. He further stated that "Mandatory priorities and allocations regulations still govern all military production and construction programs, including those of the Atomic Energy Commission and the National Aeronautics and Space Administration," and emphasized the "important exemplary value of adequate disposition of cases arising under the Act."

Staff: United States Attorney Cornelius W. Wickersham, Jr.; Assistant United States Attorney Francis W. Rhinow (E.D. N.Y.).

FAIR LABOR STANDARDS ACT

Conviction of Finance Company for Wage and Hours Violations; Record Amount of Restitution Agreed Upon. United States v. Kentucky Finance Company, et al. (W.D. Ky.). Investigation by the Wage and Hour Division of the Department of Labor disclosed that the finance company and its former and present managers had been and were continuing to violate the minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act. The defendants were well aware of the requirements of the Act because civil action had been instituted against them as long ago as 1944. In that case the District Court upheld the Government, but the Court of Appeals for the Sixth Circuit

held that the employees came within the retail exemption provided by Section 13(a)(2) of the Act, and reversed the trial court. However, the Supreme Court on April 20, 1959, held that "Congress did not intend that businesses like those of respondents be exempted from the overtime and record-keeping provisions of the statute by § 13(a)(2) * * *" and reversed. Mitchell v. Kentucky Finance Co., 359 U.S. 290, 296.

In the criminal case, the Court accepted pleas of nolo contendere over the objection of the United States Attorney, and the corporation was fined $500 on each of the five counts, the former manager was fined $500 on each of four counts, and he and the present manager were each fined $250 on count five, the record-keeping count. The fines totaled $5,000. Further, the Company agreed to make restitution of all back wages found due by the Wage and Hour Division. A total of $44,325.70 was computed to be due 249 employees in twenty separate branch offices. This is believed to be one of the largest, if not the largest, sum ever found and admitted to be owing employees under the Fair Labor Standards Act in a case of this kind. In addition, a consent judgment was entered on October 19, 1960, restraining the defendants from further violating the provisions of the Fair Labor Standards Act.

Staff: United States Attorney William B. Jones (W.D. Ky.).

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to Violate Espionage Statutes. United States v. Robert Soble (S.D. N.Y.). On November 29, 1960 a grand jury for the Southern District of New York returned a two-count indictment charging Robert Soble with having conspired from 1940 to the date of the indictment to commit espionage against the United States on behalf of the Soviet Union. The indictment named several Soviet officials as co-conspirators. The statutes invoked are 18 U.S.C. 793 which carries a maximum penalty of a fine of $10,000 and imprisonment for 10 years, and 18 U.S.C. 794 which carries the death penalty or imprisonment for any number of years or for life. Defendant was arrested and arraigned on November 29, 1960 and entered a plea of not guilty. He has failed to make bail which was set at $75,000. The defense was given until December 20, 1960 to file preliminary motions, at which time the case will be put on the calendar for trial. Defendant is a medical doctor employed as a psychiatrist by the Rockland State Hospital at Orangeburg, New York. He is the brother of Jack Soble who pleaded guilty in 1957 to an indictment which similarly charged a conspiracy to commit espionage.

Staff: United States Attorney S. Hazard Gillespie, Jr.; Chief Assistant United States Attorney Morton Robson and Assistant United States Attorney Richard Casey (S.D. N.Y.); James Lee Weldon, Jr. (Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Mineral Leasing Act of 1920; Construction of Rental Provision of Noncompetitive Oil and Gas Lease; Sovereign Immunity from State Statutes of Limitations. United States v. Essley (C.A. 10, November 8, 1960). Acting under Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. 226, the Secretary of the Interior issued to defendant four noncompetitive oil and gas leases on public lands in Colorado. Each was for five years and required the lessee to pay "a rental of 50 cents for each acre or fraction thereof for the first lease year, and a rental of 25 cents for each subsequent lease year * * *; Provided, That * * * no rental is required for the second and third lease years * * *." The lessee made no rental payments after the first year except for the fourth year on one lease. When the United States brought this action to recover the delinquent rentals, the lessee pleaded the Oklahoma statute of limitations and also that the leases required the payment of only 25 cents for the fourth and fifth years of their terms, not 25 cents per acre per year. The district court rejected the first defense but accepted the second, entering judgment for the United States for $2.93. Both parties appealed.

The Court of Appeals said that it is well established that, in interpreting a written contract, a court should, as far as possible, place itself in the position of the parties at the time of its execution, and then, from a consideration of the instrument itself, its purposes and the circumstances surrounding its execution, ascertain the intention of the parties. The intention of the parties is not to be deduced from any specific provision or fragmentary part of the instrument, but from its entire context. Turning to the specific circumstances of this case, the Court first cited the applicable provisions of the Mineral Leasing Act and of the Secretary's implementing regulations, each of which require a rental of 25 cents per acre per year for the fourth and fifth years. In general, unless a contract discloses a contrary intention, an existing statute will be read into it to the same effect as an express provision, but such a reading was unnecessary here where the statute and the regulations had been made part of the leases by specific reference. Considering next the specific language of the rental provision, the Court pointed out that it called for a rental for the first year of 50 cents "per acre," and then went on to say: "It would be wholly unrealistic to hold that the rentals for subsequent years provided for in the same sentence were limited to a total payment of 25 cents per lease because the term 'per acre' was not included there." The trial court's holding would have required, despite variations in tract size of more than 500%, the same rental for every lease irrespective of the amount of land involved. Furthermore, the Secretary had no authority to lease for less than 25 cents an acre. The Court therefore concluded: "Considering the leases as a whole, together with the Mineral Leasing Act of 1920, as amended, and the Regulations adopted pursuant thereto, it is too clear for any

doubt that the parties intended the rentals for the 4th and 5th years to be 25 cents per acre, and not 25 cents per tract of land."

With respect to the defense that the action is barred by the Oklahoma statute of limitations, the Court repeated the well established rule that, without a clear manifestation of Congressional intent, the United States is not bound by state statutes of limitations or subject to the defense of laches in enforcing its rights. The lessee argued that the United States, in leasing the public domain, acts in a proprietary capacity and therefore is subject to state limitations. But the Court answered this argument by referring to the familiar principle that the United States, in performing functions reserved to it in the Constitution, acts only in a governmental capacity. "Of course the United States is bound by the terms of a contract lawfully entered into, but in executing an oil and gas lease to a portion of its public domain, it is performing a governmental function, not a proprietary function * * *."

Staff: Hugh Nugent (Lands Division)

* * *

TAX DIVISION

ASSISTANT ATTORNEY GENERAL CHARLES K. RICE

Nolo Pleas. With respect to the Attorney General's policy announced in 1953 of opposing nolo contendere pleas in criminal cases, it is interesting to note, as far as criminal tax cases are concerned, that the number of cases disposed of on the basis of such pleas has dropped sharply in the past few years. The decrease since 1953 has been steady and, in the past four years, the figures show the following:

Nolo Pleas in Tax Fraud Cases

1960	1959	1958	1957
78	94	170	199

CIVIL TAX MATTERS
Appellate Court Decisions

Income Tax: Deduction of "Prepaid Interest" on Single Premium Annuity Contracts Used as Tax Avoidance Plans. Knetsch v. United States (Sup. Ct., November 14, 1960). Section 23(b) of the Internal Revenue Code of 1939 and Section 163(a) of the Internal Revenue Code of 1954 permit deductions from gross income paid or accrued within the taxable year on indebtedness. Interest has been judicially defined as compensation for the use or forbearance of money, and it has been generally held that the underlying obligation must be bona fide if a deduction is to be allowed. A few insurance companies devised and offered a plan attractive only to taxpayers in high income tax brackets whereby annuity savings bonds of large denominations were sold to taxpayers as part of a single premium annuity contract. The bonds were sold with a nominal down payment, the balance in notes bearing interest at 3 1/2% secured by the bonds. The bulk of the interest, payable in advance, was promptly refunded to the taxpayers in the form of loans. The actual insurance benefit to taxpayers under the plan was in a trifling amount. With the exception of the United States Court of Appeals for the Fifth Circuit, all of the courts which passed upon the question of whether an interest deduction was allowable in these circumstances refused to allow the deduction, pointing out that from an investment or insurance viewpoint, the transaction was devoid of economic substance and was nothing more than a device for the production of artificial tax deductions. In this case, the Supreme Court, after granting taxpayer's petition for certiorari from a decision of the Ninth Circuit, concluded in a 6-3 decision that the transaction was a sham which did not produce an "indebtedness" within the meaning of the statute. Taxpayer's principal argument before the Supreme Court had been that, sham or not, this type of transaction had

been specifically considered by Congress, that Section 264(a) (2) of the 1954 Code denied a deduction for interest in respect to annuity contracts only as to contracts purchased after March 1, 1954, and that his contract was executed before the loophole was closed. The Supreme Court disposed of this contention by construing Section 264(a) (2) as merely another step in the consistent legislative program for cutting down interest deductions in respect to partially exempt income. It found nothing in the legislative history indicating any intention to protect sham transactions as regards pre-1954 annuity contracts.

Staff: Grant W. Wiprud (Tax Division).

District Court Decisions

Res Judicata: Denial of Motion of United States to Intervene in Suit Against District Director to Quash Levy Is Not Res Judicata as to Subsequent Suit to Foreclose Tax Liens. United States v. Gilberton Contracting Co., Inc. (E.D. Pa., September 26, 1960). Prior to the filing of this suit, Gilberton brought a suit against the District Director seeking to quash a tax levy on certain property whose ownership was claimed by Gilberton and the taxpayers, and the Government's motion to intervene therein and bring in additional parties was denied. The United States then instituted this action to foreclose its tax liens against this property. Gilberton moved for dismissal on the ground that denial of the Government's motion in the pending injunction suit invoked the doctrine of res judicata to bar the present action.

The Government asserted in its brief and oral argument that several tests of the applicability of the res judicata rule, i.e. a final judgment on the merits, identity of the parties and identity of the cause of action, must be met and that these essential elements were not present here. The Court held that, although there was possibly a similarity, there was no identity of issues; however, the primary basis for denial of Gilberton's motion was that denial of the Government's motion to intervene in the injunction suit did not constitute a final judgment upon which the res judicata contention could be predicated.

Staff: United States Attorney Walter E. Alessandroni;
Assistant United States Attorney James Paul Dornberger (E.D. Pa.)
Mary Jane Burruss (Tax Division)

Lien Filed of Record Gives Constructive Notice Under Section 6323 of Such Facts as Would Have Been Learned from Record if Examined and from Inquiries Suggested from Record. Prior Directions by Taxpayer Re Application of His Payment on One of Two Tax Liens Does Not Establish Course of Conduct Raising Inference as to Future Payments. F. P. Baugh, Inc. v. Little Lake Lumber Company, 185 F. Supp. 628, 60-2 U.S.T.C. Par 9757 (N.D. Calif., July 12, 1960). The first issue was concerned with adequacy

of notice under Section 6323 as to the federal tax lien on the property of a partnership. The notice of the federal tax lien for the partnership's withheld taxes was filed prior to the recording of the chattel mortgage involved. The notice as filed listed one of the partners on the line designated "Name of Taxpayer." However, it listed the delinquent partnership on the address line. Also, it was indexed under the names of both the named partner and partnership.

In construing Section 6323, which requires notice of the tax lien to perfect the right of the United States against a subsequent mortgagee, the Court held that under federal law such notice was present. The Court reasoned that the recorded lien not only imparts constructive notice of its own contents, but of such facts as would have been learned from the record if examined, and from inquiries suggested from the record. Such an inquiry, the Court held, would have disclosed that the lien filed of record included both the partner and the partnership.

The second issue involved application of seven payments by the taxpayer-partnership to the United States. The United States held two tax liens on the property of the taxpayer-partnership, one of which was senior to the chattel mortgage involved, and one of which was junior. The taxpayer directed that two of the payments to the United States be applied to the senior tax lien, but made no directions as to application of the other five payments, some of which followed the directed payments. The District Director applied all seven payments to the junior lien.

The Court held that the two payments must be applied to the senior tax lien, as taxpayer directed. However, it held as to subsequent payments by taxpayer, that the Director, as any other creditor, may direct application to the junior tax lien, since taxpayer had failed to direct payment. The Court reasoned that no course of conduct was established in the taxpayer's prior directions which would raise an inference as to future payments.

Staff: United States Attorney Laurence E. Dayton; Assistant United States Attorney Charles Elmer Collett (N.D. Calif.)

Jurisdiction; Interpleader; Removal to Federal Court; Liens; Federal Court's Jurisdiction Held Derivative on Removal and United States Had Not Waived Immunity to Suit by Removing Action. S. & E. Building Materials Co. v. Joseph P. Day, Inc., et al., 60-2 U.S.T.C. Par. 9796 (E.D. N.Y.). A materialman brought an action to foreclose a mechanic's lien, joining the property owner, the lessee, the general contractor and his surety, two other lienors and the subcontractor to whom it had supplied materials as defendants. The general contractor and the lessee interpleaded the United States and the State of New York claiming that the subcontractor was indebted to both for taxes and that they had the right to sue the United States under 28 U.S.C. 2410. The United States removed the action to federal court under 28 U.S.C. 1444 which allows such removal in state court actions in which the United States is named as a

defendant pursuant to 28 U.S.C. 2410.

The United States then moved to dismiss, claiming that the action was not within Section 2410 because under that section the private lien sought to be foreclosed must encumber the same property that the lien of the United States encumbers and that here the mechanic's lien encumbers a parcel of improved real property, whereas the lien of the United States encumbers a debt allegedly owed a subcontractor by the general contractor. Thus, the United States argued, the conditions of Section 2410 had not been met and, since the United States had not otherwise waived its sovereign immunity, the interpleader complaint should be dismissed.

In granting the Government's motion to dismiss, the Court held that the United States had been erroneously interpleaded in the state court and had not waived its immunity to suit. The Court stated that whether the removal be viewed as "proper" in order to test the interpleader complaint even though the motion to dismiss might have been made in the state court, or "improper" because the removal provision of Section 1444 presupposes an initially correct application of Section 2410, the result is the same: a case is in the federal courts that presents no basis for continuing federal jurisdiction. The sole claim to federal jurisdiction had been based on the presence of the United States as a party, and since the Government had been dismissed as a party, there was no further federal interest.

The Court also rejected the suggestion that the state interpleader action was for replevy of property detained by the United States and that, therefore, 28 U.S.C. 2463 be read as a grant of jurisdiction and a waiver of sovereign immunity in such actions, since by its terms that statute is a grant of jurisdiction based on bringing the action in a federal court. Here, the action was brought in a state court, and it is well established that jurisdiction on removal is "derivative" in the sense that if the state court had no jurisdiction because the matter is within the exclusive jurisdiction of the federal courts, the federal court on removal does not acquire jurisdiction, even though by hypothesis the action might have originally been brought in federal court.

In ordering the remand, the Court rejected an alternative proposal by the United States that it be allowed to intervene as a party plaintiff and thus cure the jurisdictional defect, stating that jurisdiction on removal does not rest on considerations of convenience when the delicate balance of power and interest between the federal and state sovereignties is at issue. Furthermore, the Court felt that there was a basic unfairness in continuing the case in a court whose jurisdiction was doubtful because it exposes the plaintiff to the hazard of having the fruits of his victory deprived him by a final decision that the federal court lacked jurisdiction.

Staff: United States Attorney Cornelius W. Wickersham, Jr.; Assistant United States Attorney Richard S. Harrell (E. D. N.Y.).

* * *

I N D E X

Subject	Case	Vol.	Page
A			
ADMINISTRATIVE LAW			
Reviewability of Fed. Airport Act Decision	Schwab v. Quesada, Admin. FAA	8	776
ADMIRALTY			
Disputes Clause; Tolling Statute of Limitations	States Marine Corp. v. U.S.	8	776
Fed. Tort Claims Act; Liability for Assisting Small Craft	Mixon v. U. S.	8	780
ALIEN PROPERTY MATTERS			
Trading with the Enemy Act; Doing Business Within Enemy Territory; Resident of Neutral Country Exercising Direction and Control of Firm in Italy	Horst von Hennig v. Rogers	8	772
ANTITRUST MATTERS			
Sherman Act:			
Court Holds For Govt. in Television Block-Booking Cases	U. S. v. Loew's Incorp.; U.S. v. C & C Super Corp.; U.S. v. Screen Gems, Inc.; U.S. v. Associated Artists Productions, Inc.; U.S. v. Nat'l Telefilm Associates, Inc.; U.S. v. United Artists Corp.	8	773
Sherman Act:			
Milk Case Settled by Consent Judgment	U.S. v. Md. & Va. Milk Producers Assn.	8	774
AVIATION			
Federal Aviation Act Civil Penalty Cases; Direct Referrals; Compromise Settlements		8	785
B			
BACKLOG REDUCTIONS			
Districts in Current Status		8	768
Monthly Totals		8	767

Subject	Case	Vol.	Page
	C		
CIVIL RIGHTS MATTERS Habeas Corpus; No Credit for Service of Sentence (1) for Period Petitioner Had Been Released on Habeas Corpus to Date Notice of Appeal Was Filed; (2) Because of Failure to Accept Prisoner Into Custody Prior to Official Notification to Take Such Action and (3) Because of Unauthorized Restrictions Placed on Prisoner Who, After Commencing Service, Was Released on Bail and was Simultaneously on Probation	Binion v. U.S. Marshal	8	782
Habeas Corpus; Timeliness of Issuance of Warrant for Retaking of Conditional Release Violation	Taylor v. Godwin; Taylor v. Portwood	8	782
Supremacy Clause; School Desegregation	U.S. v. Louisiana; Bush v. Orleans Parish; Williams v. Davis	8	783
CONSTITUTIONAL LAW Application of State Minimum Milk Price Law to Purchases at Fed. Military Installations	U.S. v. Warne	8	780
	D		
DEFENSE PRODUCTION ACT Priorities and Allocations Violation; Sizable Fine Imposed Following Guilty Pleas	U.S. v. Genzale, d/b/a Electro Plating Co.	8	786
	F		
FAIR LABOR STANDARDS ACT Conviction of Finance Company for Wage and Hours Violations; Record Amount of Restitution Agreed Upon	U.S. v. Kentucky Finance Co., et al.	8	786
FALSE STATEMENTS Personnel Questionnaires		8	785

Subject	Case	Vol.	Page
	I		
INTERNAL SECURITY MATTERS Conspiracy to Violate Espionage Statutes	U.S. v. Soble	8	788
	L		
LANDS MATTERS Mineral Leasing Act of 1920; Construction of Rental Provision of Noncompetitive Oil and Gas Lease; Sovereign Immunity from State Statutes of Limitations	U.S. v. Essley	8	789
	R		
RAILROAD RETIREMENT ACT State Court Jurisdiction to Review Award of Benefits by Railroad Retirement Board	Dettore v. Davenport	8	781
	S		
SOCIAL SECURITY ACT Disability Benefits; Remand for Further Findings	Kerner v. Flemming	8	777
	T		
TAX MATTERS Nolo Pleas		8	791
Jurisdiction; Interpleader; Removal to Federal Court; Liens; Federal Court's Jurisdiction Held Derivative on Removal	S. & E. Bldg. Materials Co. v. Joseph P. Day,	8	793
Lien Filed of Record Gives Constructive Notice Under Sec.6323 of Such Facts as Would Have Been Learned from Record	F. P. Baugh, Inc. v. Little Lake Lumber Co.	8	792
Prepaid Interest; Deduction on Single Premium Annuity Contracts Used as Tax Avoidance Plans	Knetsch v. U.S.	8	791
Res Judicata; Denial of Motion by U.S. to Intervene in Suit Against District Director to Quash Levy Is Not Res Judicata as to Subsequent Suit to Foreclose Tax Liens	U.S. v. Gilberton Contracting Co., Inc.	8	792

Subject	Case	Vol.	Page
	T (Contd.)		
TORT CLAIMS ACT Aircraft Collision With Ground Vehicles; Pilot's Responsibility	New York Airways, Inc. v. U.S.	8	778
	V		
VETERANS INSURANCE Total Disability; Findings Supported by Substantial Evidence	Bohrer v. U.S.	8	778
VETERANS' PREFERENCE ACT Foreign Service Officers; "Indefinite" Appointments	Born v. Allen	8	779