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UNITED STATES ATTORNEYS

BULLETIN

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Vol. 8 August 26, 1960 No. 18

SPECIAL NOTICE

Resignations among the legal staff are sometimes disrupting but such disruption can be held to a minimum if the United States Attorney will arrange for the release of the Assistant at a time most convenient for the work of the office. Thus, where a heavy trial calendar is impending every effort should be made to defer the employee's release to a date when the loss of an experienced employee will not have such a severe impact. Needless to say, such arrangements should also be made with regard to annual leave, particularly in the smaller offices where the absence of more than one person at a time seriously handicaps the efficient performance of the work. United States Attorneys should insist upon receipt of sufficient notice from persons planning to resign to permit the obtaining of an adequate replacement. The present budgetary situation does not permit the payment of overlapping salaries, therefore new appointees should not enter on duty until the leave of their predecessors has expired.

CORRECTIONS FOR UNITED STATES ATTORNEYS

MANUAL AUDIT SHEET NO. 6, August 1, 1960. The following typographical errors in the last Manual Audit Sheet should be corrected:

TITLE 8:

Page 1-2 (4/1/60-12/1/59) change to 4/1/60.

Page 38.9 - (12/1/59) should be added.

Page 42.6g - (4/1/58) deleted.

Page 51-52 - (2/1/59-9/1/59) change to 8/1/60.

Page 52.1-52.2 (8/1/60) change to 8/1/55.

APPENDIX:

TITLE 8:

Page III (8/1/60) Add the following:

60	Superior Officer's Statement in connection with Application for Total Disability Retirement	SF 2801-A
61	Physician's Statement in Connection with Application for Total Disability Retirement	SF 2801-B
62	Instructions Re Federal Employees Group Life Insurance Upon Retirement	DJ-44a Rev.

Page 190.1 (10/1/53) deleted.

Page 196 (9/1/57) should be crossed out.

Page 197 (9/1/57) deleted.

Page 237 (2/1/59) deleted.

JOB WELL DONE

The Director, Bureau of Inquiry and Compliance, ICC has expressed his appreciation for the fine cooperation the Commission received from United States Attorney Hubert I. Teitelbaum and Assistant United States Attorney W. Wendell Stanton, Western District of Pennsylvania, in three recent cases. All three cases ended in results favorable to the Government, and in two of the cases fines totaling $12,000 were assessed.

Assistant United States Attorneys Frederick H. Mayer, William M. James, and William C. Dale, Jr., Eastern District of Missouri have been commended by the District Director, IRS, for the excellent manner in which they handled a recent case which required two weeks to try and which involved the presentation of over 150 witnesses and the introduction of over 350 exhibits. The defendant was convicted on two counts of income tax evasion and sentenced to a term of three years and a fine of $2500 on each count, the sentences to run concurrently.

United States Attorney Robert Tieken, his staff, and especially Assistant United States Attorney John Grady, Northern District of Illinois, have been commended by the Chief Postal Inspector for their diligence in the preparation and presentation of an advance fee case to a grand jury which resulted in the return of a 155 count indictment against 18 defendants.

The Commanding Officer, Boston Naval Shipyard has expressed his appreciation for the efforts spent in his behalf by Assistant United States Attorney George C. Caner, Jr., District of Massachusetts in a recent civil action against the Commanding Officer. The Commander stated that Mr. Caner handled the presentation in a skillful and most effective manner.

The District Engineer, U. S. Army Corps of Engineers, has expressed commendation for the thorough preparation of condemnation trials in connection with the Buckhorn Reservoir Project by Assistant United States Attorney N. Mitchell Meade, Eastern District of Kentucky, and for his trial of the cases, with the aid of Assistant United States Attorney Moss Noble.

The Director of Personnel of the Office of the Chief of Engineers has expressed to the Department the appreciation of that office for the excellent services rendered by United States Attorney Daniel H. Jenkins, Middle District of Pennsylvania, and for his personal interest in the land acquisition program of the Corps of Engineers. The letter states that the activities of Mr. Jenkins in discussions with both representatives of the Corps of Engineers and landowners, negotiations of

settlements and similar activities have brought favorable relations between the Government and the landowners, have avoided delays and have produced satisfactory settlements and trials.

The FBI Agent in Charge has commended Assistant United States Attorney Nathan K. Trynin, Eastern District of New York, for the excellent manner in which he handled all phases of a recent case. The letter stated that Mr. Trynin's accurate analysis of the case enabled the Government to bring it to a logical conclusion in a most efficient and noteworthy manner, and that a large measure of the Government's success in obtaining guilty pleas was a direct result of Mr. Trynin's tenacity and perseverance in pursuing the case.

The Foreman of the Grand Jury investigating gambling in the Northern District of New York has commended United States Attorney Theodore F. Bowes of that district on the assistance and cooperation rendered by his office in the investigation, and, in particular, commended Assistant United States Attorney Kenneth P. Ray, who was assigned as counsel for the jury and whose work was termed outstanding. Mr. Ray has also been commended by a professor at the Syracuse University College of Law, for the excellent address he gave to a seminar at that institution.

The District Manager, Railroad Retirement Board, has expressed appreciation to United States Attorney Clifford M. Raemer, and his staff, Eastern District of Illinois, for the very vigorous and capable way in which a recent prosecution was handled. Mr. Raemer has also been commended by the Special Assistant Attorney General, State of Illinois, for the results obtained in a recent condemnation case in which the results obtained were most satisfactory to the Government.

The State Supervisor, Bureau of Land Management, Department of Interior, has expressed appreciation and admiration for the manner in which Assistant United States Attorney Robert E. Woodward, Northern District of California, has handled criminal timber trespass cases for that agency over the past three years. The letter stated that Mr. Woodward's presentation of the evidence and important factors in the trial of such cases is outstanding and that he has the ability to present extremely difficult and complex technical data to a jury in terms that can be comprehended. The letter further stated that the five convictions obtained by Mr. Woodward have had a profound effect on loggers in Northern California with the result that the number of deliberate invasions of public land has noticeably declined over the past three years.

The State Director, FHA, has expressed personal thanks to Assistant United States Attorney Lawrence J. Feroli, Southern District of New York, for his excellent cooperation in the handling of proceedings involving two large apartment developments. As a result of Mr. Feroli's efforts, ownership of such property has been transferred to the United States Government.

PERFORMANCE OF DUTY

United States Attorney C. E. Luckey, District of Oregon, has expressed thanks for the fine cooperation rendered by United States Attorney Oliver Gasch, District of Columbia, in connection with a difficult and complicated case recently tried by Mr. Luckey. In response to Mr. Luckey's inquiry concerning a court instruction given in two cases tried in the District of Columbia, which instruction was of particular importance to the case being tried in Oregon, Mr. Gasch initiated immediate research although the inquiry was received late in the work day. He immediately communicated his findings to Mr. Luckey in time to be of material assistance in the case.

The United States Attorney at Atlanta, Georgia, has expressed appreciation for the assistance furnished by Assistant United States Attorney Frank H. Cormany, Sr., Eastern District of South Carolina, in aiding in trials in such a manner as to reflect credit upon the Department, stating that "he merited and received the approbation of the Court and of all the jurors with whom I talked."

United States Attorney Read, Northern District of Georgia, has commended United States Attorney Walter E. Alessandroni, Eastern District of Pennsylvania, upon the splendid and prompt cooperation he rendered in arranging for a medical examination on a defendant who was in a hospital in Philadelphia. The letter stated that immediately after Mr. Read's telephone call, Mr. Alessandroni obtained a court order for a medical examination, arranged for a cardiologist, and rendered a report on the preliminary examination. Moreover, within a short time Mr. Alessandroni had furnished Mr. Read with a complete report on the examination.

* * *

ANTITRUST DIVISION

Assistant Attorney General Robert A. Bicks

Court Ruling on Protective Order. United States v. Standard Oil Company (New Jersey), et al., (W.D. Ky.). On May 23, 1960 the Court heard argument in chambers on defendants' motion for a protective order.

Defendants sought to seal all material produced pursuant to pre-trial discovery, as well as the documents originally produced by defendants before the Alexandria grand jury which defendants allowed the Government to retain. Their motion also sought to restrict the Government's use of such material to the attorneys assigned to the case and their superiors for purposes of this case only.

The Government urged the Court to deny defendants' motion in toto, advancing in support thereof the policy favoring public legal proceedings, the Government's duty to enforce the law, and failure of defendants to show good cause, as required by Rule 30(b).

On July 15, 1960 the Court entered the following order which was prepared at its request by the parties to this proceeding.

IT IS ORDERED THAT:

1. (a) Any answer submitted and any document or other material produced by a defendant, pursuant to "Plaintiff's Interrogatories Dated April 27, 1959, As Modified" and to subsequent pre-trial discovery herein with respect to which a claim of confidentiality is made by that defendant shall be so designated and the grounds for such claim briefly stated at the time of submission or production. Except in connection with other litigation involving the Department of Justice (see subparagraph (e) below) that answer, document or other material shall, pending further order of the court,

(i) be kept confidential by the plaintiff and not disclosed to anyone other than the court, counsel for other defendants, and personnel of the Department of Justice, and

(ii) if filed with the court, be retained under seal.

(b) a defendant may, at its option, designate answers, documents or other materials as to which a claim of confidentiality is made by categories according to subject matter or otherwise and state the grounds for the claim in terms of such categories.

(c) If plaintiff disputes the claim for confidential treatment of any document, answer or other material or category thereof, and the parties are unable to resolve the matter among themselves, plaintiff may apply to the court for a ruling. At the hearing on the claim for such

confidential treatment, the burden will rest on the defendant asserting the claim to establish good cause for confidential treatment in accordance with Rule 30(b) of the Federal Rules of Civil Procedure. Pending such ruling, the confidential treatment shall be maintained.

(d) If plaintiff determines that it will wish to introduce into evidence at the trial of the case any answer, document or other material designated confidential, the court will rule at the appropriate time as to whether confidential treatment should be granted. At that time, the burden will rest on the defendant asserting the claim to establish good cause for confidential treatment.

(e) If plaintiff determines that, in connection with other litigation involving the Department of Justice, it is necessary to make further disclosure of any of the pre-trial answers, documents or other materials designated confidential by any defendant in this action, it shall give reasonable notice of such determination to the defendant which made a claim of confidentiality. That defendant may make application within 7 days of receipt of said notice for a ruling as to whether such further disclosure, or the conditions under which such further disclosure, should be permitted; pending such ruling the confidential treatment referred to above shall be accorded. Absent such application, such further disclosure may be made.

2. All documents which were produced by defendants or the former Esso Standard Oil Company to plaintiff pursuant to subpoenas issued by a Grand Jury sitting in Alexandria, Virginia, from February 1957 to May 1958 and which plaintiff has been permitted to retain for purposes of this case, shall, pending further order of the court, be treated as if they were produced by a defendant pursuant to pre-trial discovery in this case under a claim of confidentiality supported by a statement of the grounds for such treatment.

Dated: Louisville, Kentucky

July , 1960

Henry L. Brooks
USDJ

Staff: Gordon B. Spivack, Harry W. Cladouhos and Melvin J. Duvall, Jr. (Antitrust Division)

Indictment Filed Under Section 3 of the Sherman Act. United States v. Carbonated Beverage Manufacturers' Association of Washington, D.C., Inc., et al., (D. Columbia). On August 8, 1960 a federal grand jury returned an indictment charging seven manufacturers of bottled soft drinks and an industry trade association with price fixing of bottled soft drinks in the Washington, D.C. metropolitan area in violation of the Sherman Antitrust Act.

In 1959 the wholesale sales of bottled soft drinks in the Washington metropolitan area exceeded $19,000,000 and the retail value of such sales were approximately $30,000,000. The price rises resulted in a 100% increase in the price of bottled Pepsi-Cola and Coca-Cola sold through coin operated vending machines.

Arraignment is scheduled for August 19, 1960.

Staff: Wilford L. Whitley, Jr. and Sidney Harris (Antitrust Division)

* * *

CIVIL DIVISION

Acting Assistant Attorney General George S. Leonard

COURTS OF APPEAL

BONDS OF FEDERAL DISBURSING OFFICERS

Statute of Limitations on Suits Against Sureties on Bonds of Government Disbursing Officers (6 U.S.C. 5) Starts to Run From Date of Statement by the General Accounting Office, and Not From Date of Statement by Accounting Officers Within the Operating Departments or Agencies. United States v. Standard Accident Insurance Co. (C.A. 1, July 21, 1960). Shaw, a disbursing officer of the United States Naval Reserve, embezzled government funds. His court martial conviction for embezzlement was affirmed by the Secretary of the Navy in February 1950. On the same day, the Navy Bureau of Supplies and Accounts made a statement of the balance due from Shaw to the Government. In February 1954, the General Accounting Office restated the account, making various adjustments. The United States filed suit against the surety company on Shaw's bond in May 1955, more than 5 years after the statement of account by the accounting officers of the Navy, but less than a year and a half after GAO's restatement. The district court granted the defendant's motion for summary judgment on the ground that the action was time barred under 6 U.S.C. 5, the 5 year statute of limitations applicable to such suits. The statute provides that the 5 year period is to commence "upon the statement of the account * * * by the accounting officers." The court reasoned that the time had begun to run in the instant case when the Navy made its statement.

The court of appeals reversed, holding, in effect, that the phrase "the accounting officers" does not include accounting officers of the Navy or of other such operational Government Departments but only accounting officers of GAO. The court relied, in part, upon the history of the statute, which showed that prior to 1947, the statute had read "by the accounting officers of the Treasury", and that the functions of the accounting officers of the Treasury had been transferred to GAO by the Budget and Accounting Act, 31 U.S.C. 44. Since the GAO is the only agency with authority to determine and state an account binding upon the United States (31 U.S.C. 71), the court was of the view that the statute of limitations should not commence to run until the GAO had made its statement.

Staff: David L. Rose (Civil Division)

FEDERAL EMPLOYEES

Commissioner of Internal Revenue was Delegated Authority by Secretary of Treasury to Dismiss Employees of Internal Revenue Service; Hence Commissioner's Redelegation Through to District Director Effective to Permit Director to Make Removals. Zirin v. E. A. McGinnes, Director of Internal Revenue (C.A. 3, August 1, 1960). Plaintiff, an employee of the Internal Revenue Service, was dismissed from her position in 1955 by the District

Director in Philadelphia, Pennsylvania. She brought suit against the District Director, seeking reinstatement to her position on the ground that the dismissal had been unlawful. The district court granted the defendant's motion for summary judgment.

On appeal, plaintiff's primary contention was that her separation was invalid because the District Director lacked the authority to dismiss her. This argument was, in turn, based on the contention that the Commissioner of Internal Revenue had not been delegated authority from the Secretary of the Treasury to dismiss employees in the Internal Revenue Service. Plaintiff conceded that, if the Commissioner of Internal Revenue in fact had authority to dismiss her, this authority had been effectively redelegated through the Assistant Commissioner to the Regional Commissioner, and then to the District Director. The court of appeals, in the first instance, ruled that the authority to dismiss plaintiff had not been delegated to the Commissioner of Internal Revenue.

On a petition for rehearing, the Government relied for the first time on Supplement No. 5 to Personnel Circular No. 109 which provided that Heads of Bureaus were authorized " * * * to remove or separate employees for cause from positions to which they [Heads of Bureaus] are authorized to approve appointments." Personnel Circular No. 109 at the time also comprehended the authority of Heads of Bureaus to appoint employees. The Personnel Circular had been issued by the Director of Personnel, who had been delegated by the Secretary of the Treasury "[a]ll authority vested in [the Secretary] to take final action on matters pertaining to the employment, direction, and general administration of personnel under the Treasury Department * * *"

The court of appeals, sitting en banc, held, one judge dissenting, that the Supplement to the Personnel Circular applied to the Commissioner of Internal Revenue and that, consequently, the Commissioner had been delegated the authority to remove employees for cause. The court held also that it could not review the administrative action to inquire whether plaintiff's procedural rights had been safeguarded because the members of the Civil Service Commission were indispensable parties to such review, and they had not been made parties to the action.

Staff: Alan S. Rosenthal (Civil Division)

FEDERAL TORT CLAIMS ACT

United States Held Liable for Failure of Coast Guard and Navy to Reach Fishing Vessel in Distress in Time to Save Its Crew. United States v. Gavagan, et al. (C.A. 5, July 22, 1960). A shrimp boat became stranded in a storm off the coast of Florida during the night. The next morning, friends of the crew called the Coast Guard to report the boat overdue, and to request that the Coast Guard find the vessel and rescue her crew. Two Coast Guard ships, and two Naval aircraft searched unsuccessfully for the boat until, shortly after 4 P.M., when one of the aircraft spotted her and remained circling above the vessel to assist surface craft in locating her. Before any surface craft arrived on the scene, however, the shrimp boat sank and her crew drowned.

Plaintiffs, widows of the three deceased fishermen, sued the United States for the negligence of the personnel of the Coast Guard and Navy in failing to reach the vessel in time to rescue her crew. The district court found negligence in several particulars, and held that the negligence was the proximate cause of the deaths, awarding the plaintiffs judgment in the total amount of $100,000.

On appeal, the United States contended (1) that the liability of the United States was no greater than that of a private salvor (volunteer). Frank v. United States, 250 F. 2d 178 (C.A. 3), certiorari denied, 356 U.S. 962; and (2) a private salvor is not liable to the person he fails to rescue unless he negligently causes an injury independent and distinguishable from the original peril. Since there was no such independent and distinguishable injury caused by the Government personnel here, it was urged that the United States was not liable. The Government also contended that, since the activities of the Coast Guard and Navy in no way aggravated the peril of the shrimp boat, the United States could not be liable even under the normal (land) rules of good Samaritan liability.

The court of appeals affirmed. The court held that the activities of the Coast Guard and Navy in attempting to rescue persons in distress at sea were "uniquely governmental", because of the size and organization of the rescue efforts. It therefore concluded that the maritime rules of liability concerning private salvors were not applicable, and that the court was free "to fashion and mold" a new substantive law of maritime liability. The court then proceeded to fashion a rule of law holding the United States liable for failure to exercise due care. This holding was made in spite of the provisions of the Tort Claims Act which states that the United States is liable only "if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346.

Staff: David L. Rose (Civil Division)

NATIONAL HOUSING ACT

District Court Empowered to Appoint Receiver to Collect Rents and Profits During Foreclosure Proceeding on Property With Mortgage Insured Pursuant to the National Housing Act, at Least Where Security Inadequate and Debtor Insolvent. View Crest Garden Apartments, Inc., et al. v. United States (C.A. 9, August 2, 1960). The Federal Housing Commissioner, pursuant to Title IX of the National Housing Act, as amended, 12 U.S.C. 1750, et seq., provided mortgage insurance on a loan made to the defendant by a private bank. The Commissioner subsequently became the assignee of the note and of the mortgage, which was on apartment house properties located in the State of Washington. The mortgage, which was on an FHA form, provided that, in an action to foreclose, the holder would be entitled to appointment of a receiver to collect the rents due and becoming due during the pendency of the action. The Government brought this action to foreclose and sought also appointment of a receiver pendente lite to take charge of and manage the premises, collect the rents, and apply the proceeds on the debt. The district court entered an order appointing such

a receiver on the grounds that the security was inadequate, the debtor was insolvent, and that past and probable future delays in accomplishing foreclosure also justified appointment of a receiver.

On appeal, defendant urged that the Government was not entitled to a receiver as there had been no showing of danger that the property would be wasted or deteriorated. The Government contended that the action of the district court should be sustained, but argued that its right to a receiver must be judged solely by reference to the terms of the mortgage, irrespective of other considerations.

The court of appeals affirmed. It held that "in an action brought to foreclose a mortgage insured under Title IX of the National Housing Act a District Court is empowered, under the terms of the mortgage and on application by the holder thereof, to appoint a receiver to collect the rents, issues and profits during the pendency of the foreclosure action, at least when he is satisfied the security is inadequate, or its adequacy is substantially doubtful, and the mortgagor is insolvent or of doubtful financial standing." The court added that the district court's granting to the receiver, the power not only to collect the rents and profits of the mortgaged premises, but, in addition, to manage the property during the pendency of the foreclosure action, was, under the circumstances, within its discretionary power as a court of equity.

Staff: United States Attorney Charles P. Moriarty (W.D. Wash.)

SECURITY INTERESTS

State or County Cannot Enforce Collection of Taxes Assessed Against Real Estate So As to Destroy Pre-existing Lien Held by Federal Resettlement Administration. United States v. Bernard E. Roessling, et al. (C.A. 5, July 19, 1960). The Resettlement Administration, acting pursuant to the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, and E.O. 7027, made a loan which was secured by a mortgage on real property owned by the mortgagors in Hillsborough County, Florida. When the County taxes assessed against the land were not paid, the County, in accordance with the provisions of a Florida statute, purchased the property at a tax sale, and then filed an action in a state court to quiet title. The United States was not made a party to the suit, as, under the Florida law, publication of notice to lienors was sufficient. The state court, following the provisions of the state law, entered a decree declaring title to the property involved to be vested in the County, free and clear of all pre-existing claims and liens. The County subsequently sold the property to private parties.

The United States brought suit against the mortgagors and the purchasers of the land to collect the loan and to foreclose the mortgage on the realty. The district court granted the Government an in personam judgment against the mortgagors for the debt, but denied foreclosure on the property. It ruled that the Government's mortgage lien was subordinate to the later County lien for taxes and, accordingly, was extinguished by the state proceeding to quiet title.

On the Government's appeal, the court of appeals reversed, holding that the state court decree had not effectively extinguished the Government's mortgage lien. The court pointed out that, while there is no constitutional prohibition against a state or county assessing taxes against property on which the United States holds a lien, the state or county is without authority, in the absence of congressional consent, to enforce the collection of the taxes thus assessed so as to destroy the pre-existing federal lien. The court concluded that the Emergency Relief Appropriation Act of 1935 does not contain such a consent to local taxation of property interests acquired by the Resettlement Administration under the Act.

Staff: William A. Montgomery (Civil Division)

SOCIAL SECURITY ACT

Lawyer's Income from Self-Employment After Retirement Applies to Reduce His Benefits; Social Security Act does not Grant Vested Rights. Price v. Flemming, etc., et al. (C.A. 3, July 27, 1960.) Plaintiff, a lawyer employed by a corporation, was retired at the age of sixty-five in 1954, and was awarded monthly Old Age Insurance benefits by the Social Security Administration. In 1955, in order to supplement his pension and benefits, he practiced law, earning in excess of $2,080. Up to January 1, 1955, a self-employed lawyer's income from the practice of his profession was neither covered by the Social Security Act, 42 U.S.C. 301, et seq. (1952 ed.), or deductible from benefits otherwise payable under it. Amendments, effective that date, modified Section 403 of the Act. 42 U.S.C. 403 (1958 ed.). A referee concluded that the amendments covered plaintiff's situation, and ruled that, pursuant to those provisions, plaintiff's 1955 income should have been applied to reduce the benefits paid to him that year. The referee ruled also that, in applying Section 403(e)(2)(D) which provides that no deductions should be charged to any month "[i]n which such individual did not engage in self-employment and did not render services for wages * * * of more than $80.00", the test with respect to a self-employed individual is not whether he received $80.00 a month, but whether he rendered substantial services in the form of work and activity in the prosecution of his profession.

After exhausting his administrative remedies, plaintiff brought this suit for declaratory judgment. The district court granted summary judgment for the Secretary. On plaintiff's appeal, the court of appeals affirmed. The court held that the relevant amendments to the Act made a lawyer's income operate to reduce his benefits under the Act. On the authority of Flemming v. Nestor, 363 U.S. ____, 28 L.W. 4476 (June 20, 1960), the court rejected plaintiff's contention that, since he had complied with the statute in 1954 and been awarded benefits at that time, he had acquired a vested right to receive those benefits, regardless of subsequent amendments to the statute. Finally, the court sustained the referee's construction of Section 403(e)(2)(D).

Staff: United States Attorney Chester A. Weidenburner (D. N.J.)

STATUTES

VETERANS' REEMPLOYMENT RIGHTS

Reemployment Rights of Veterans Extended and Clarified by Recent Enactment. The Universal Military Training and Service Act, 50 U.S.C. 459, and related statutes provide veterans returning from military training or service with the right to be reinstated in their pre-service positions without loss of seniority, status, or pay by virtue of their service and with protection, for a stated period of time, against discharge without cause from the position to which reinstated. Public Law 86-632 approved July 12, 1960 (74 Stat. 467) amends the Universal Military Training and Service Act to extend to members of the National Guard who have performed 3 to 6 month periods of active duty for training the same reemployment rights now available to members of the Ready Reserve performing comparable training duty, as is provided by Section 262(f) of the Armed Forces Reserve Act of 1952, as amended, 50 U.S.C. 1013(f). The latter section is repealed by Public Law 86-632 and its provisions are made a part of Section 9(g) of the Universal Military Training and Service Act.

The new statute provides assurance that training performed by members of the National Guard in State status but under Federal law will fall within the protection of the veterans reemployment statutes. In addition, the period of time within which short term training personnel must report back to their civilian employment has been reduced. The statute also makes it clear that employees cannot be required to take periods of military training on their own vacation time. For a more complete discussion of veterans' reemployment rights and the citation of precedents in this field of civil litigation, see the Veterans Affairs Practice Manual, p. 450, et seq.

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Harold R. Tyler, Jr.

Voting, Production of Records; Civil Rights Act of 1960. In re Crum Dinkens and Gallion v. Rogers (M.D. Ala.). In the Gallion case, the Attorney General of Alabama had secured an injunction from a state court prohibiting the Attorney General of the United States from seeking to enforce records demands under Title III of the Civil Rights Act of 1960 anywhere in the State of Alabama. The Dinkens case was the Government's affirmative effort to enforce a demand for records made on the voting registrars of Montgomery County, Alabama. This case was complicated by a counterclaim by the registrars for an injunction against enforcement of the 1960 Act, and their request for the convening of a three-judge court. The Government removed the Gallion case from the state court to the District Court pursuant to 28 U.S.C. 1442, then moved to dismiss on the ground that the state court had no jurisdiction. In the Dinkens case, the Government moved to dismiss the counterclaim, while the registrars moved to dismiss and to strike the application for enforcement of the records demand.

After extended briefing and oral argument, the District Court (Johnson, J.) ruled in the Government's favor on all issues, dismissing the state court suit and the registrars' counterclaim and affirmatively requiring the registrars to make their records available for inspection within 15 days. In a lengthy opinion, the Court for the first time spelled out the constitutional validity and scope of Title III of the 1960 Civil Rights Act. The Court held on the constitutional issues that the Act clearly constitutes "appropriate legislation" within the meaning of the 14th and 15th Amendments; that under Hannah v. Larche, ____ U.S. ____ (1960), rights of confrontation need not be granted where the function being exercised is investigative even if the agency involved also has prosecutive duties, and that the Act did not violate the ex post facto clause, although documents predating its enactment might have to be surrendered to the federal authorities. With respect to the procedural questions, the Court stated (1) that disputes arising in connection with records demands under the Civil Rights Act are to be dealt with exclusively by the federal courts; (2) that state courts are without power to review the discretion or enjoin the acts of federal officials; (3) that a counterclaim is not well taken if it seeks to raise matters which can be disposed of defensively in the main action; and (4) that a three-judge court is not appropriate where issues as to constitutionality are raised defensively rather than by way of a complaint for injunction and where a counterclaim, which does raise these issues affirmatively, does not properly lie.

In other litigation concerning Title III of the 1960 Act, the Court of Appeals for the Fifth Circuit has denied a stay of an order of the District Court for the Eastern District of Louisiana requiring registrars to produce (In re Henry Earl Palmer, discussed in the July 29, 1960 issue

of the Bulletin). With the successful conclusion of the three cases decided so far under the Act, applications for enforcement will now be filed wherever there has been a failure to comply with demands for records.

Staff: United States Attorney Hartwell Davis (M.D. Ala.); Harold H. Greene and D. Robert Owen (Civil Rights Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

LARCENY AND FALSE PRETENSES

Violation of 22 D.C. Code 2201, 1202, and 1301; Theft from Swedish Embassy; Waiver of Sovereign Immunity. United States v. Per Ake Skantze (District of Columbia, June 22, 1960). This case involved sizable thefts of money from the Swedish Embassy. The ultimate defalcation amounted to about $85,000. In order to render the case manageable, nine transactions, concerning approximately $12,000, were selected for prosecution. The indictment in the case consisted of twenty-seven counts. Three counts related to each transaction, with each cluster of counts including one of larceny, embezzlement, and false pretenses.

Trial began June 13, 1960, and was completed by a jury verdict of guilty on eighteen counts of larceny and false pretenses on June 22, 1960. Before going to the jury the Government dismissed the nine embezzlement counts since proof indicated that the specific intent to steal preceded the taking. On June 30, 1960, the defendant was sentenced to serve three to nine years.

The interesting aspect of the case was that it involved a waiver of the sovereign immunity of the Kingdom of Sweden. The false pretense activity occurred on Swedish soil, that is, in the Swedish Embassy. The Government could not have tried the case had the Swedish Embassy not requested its investigative and prosecutive attention.

The Swedish Government was unable to prosecute Skantze in Sweden since Skantze had changed his status from diplomat to resident immigrant which precluded his deportation to Sweden.

Staff: United States Attorney Oliver Gasch;
Assistant United States Attorney Edward P. Troxwell (D. C.)

FRAUD

Violation of Securities Act of 1933; Misappropriation of Mutual Fund Payments. United States v. Floyd E. Duzan (D. Minn.). Duzan pleaded guilty on June 7, 1960 to two counts of a three-count indictment charging violations of the anti-fraud provisions of the Securities Act of 1933. He was sentenced to 3 years' imprisonment on Count 1; imposition of sentence was suspended on Count 2, and he was placed on probation for 5 years after service of the prison term.

Duzan was employed as a salesman of mutual funds for John G. Kinnard & Co., Le Sueur, Minnesota. However, he used stationery and advertising material containing only his name, and requested his customers to make all checks payable to him. In the course of his employment he acquired more than $90,000 from customers by appropriating the proceeds of checks made out to him in payment for purchases. Defendant concealed his misappropriations by issuing personal checks for dividends to his customers, which purported to be dividends on securities which had been purchased in the customers' names, and by depositing funds with Kinnard & Co. for purchases, but misinforming Kinnard & Co. as to the sources of the funds, thereby prolonging the time of discovery of the diversions.

Staff: United States Attorney Fallon Kelly; Assistant United States Attorney John J. Connelly (D. Minn.).

IMMIGRATION

Alien Registration; Use of Incriminating Statement Made Before Grand Jury. United States v. Abe Zeid (C.A. 3). On August 2, 1960, the Third Circuit sustained the conviction of Zeid, a leading Pennsylvania racketeer, on both counts of a two-count indictment, charging, respectively, (1) wilful failure to make application for registration as an alien under Section 262(a) of the Immigration and Nationality Act (8 U.S.C. 1302(a)) and (2) failure to give written notice of his current address to the Attorney General in accordance with Section 265 of the Act (8 U.S.C. 1305). As to the first of the two main points urged by Zeid, the Court of Appeals rejected his contention that there was lack of evidence from which the jury could reasonably conclude that he wilfully failed to make application for registration and to be fingerprinted. In reaching its conclusion the Court of Appeals relied on Zeid's testimony before a grand jury, statements to an investigator of the Immigration and Naturalization Service, and other evidence tending to show that Zeid had known for an extended period that he was an alien and, as such, was required to register.

The second main point was whether there was sufficient evidence to show that Zeid had failed to file an address card. The Government's initial proof in that respect consisted of a certification by the custodian of the records of the Immigration and Naturalization Service that a search had been made of those records and no evidence was found of an annual address report of Zeid for the year 1958. The Court of Appeals distinguished this case from United States v. Ginn, 222 F. 2d 289 (C.A. 3), where it was held that such proof, standing alone, would not be sufficient to sustain a conviction. In that connection, the Court of Appeals pointed out that Ginn had testified that he had filed an address card whereas Zeid not only had not done so, but, to the contrary, had sought to explain why he had not filed.

Zeid contended that the trial court had erred in admitting his grand jury testimony because the admission violated the privilege against self-incrimination in that he had not been warned that what he said might be used against him. In rejecting the contention, the Court of Appeals stated that there was no evidence that he had not been warned and that, even if it be assumed that he had not been, there was no error in the admission of the testimony because his appearance before the grand jury was related solely to an inquiry not directed at him and from which nothing involving him ever arose.

Staff: United States Attorney Hubert I. Teitelbaum; First Assistant United States Attorney John R. Gavin (W.D. Pa.).

AIRCRAFT BOMB HOAX

False Report as to Attempted Destruction of Aircraft (18 U.S.C. 35). Robert James Smith v. United States (C.A. 6). Appellant was convicted by a jury in the Southern District of Ohio of violating 18 U.S.C. 35 by telephoning the federal agency in charge of the control tower at the Greater Cincinnati Airport, false information that a bomb was aboard an outgoing civil aircraft. He was fined $1,000 and sentenced to imprisonment for one year. In a decision dated August 3, 1960, the Sixth Circuit upheld appellant's conviction, finding that the telephone call constituted "plain violation of the statute." This decision is the first by an appellate court in a case involving an airplane bomb hoax.

Staff: United States Attorney Hugh K. Martin; Assistant United States Attorney Thomas Stueve (S.D. Ohio).

SECURITIES EXCHANGE ACT OF 1934

Failing to File Insider Reports and Obstructing Filing of Annual Report; Conspiracy. United States v. Alexander L. Guterma, Robert J. Eveleigh, et al. (C.A. 2, July 18, 1960). The Court of Appeals affirmed the convictions of Guterma and Eveleigh for failing to file insider reports (Form 4) for themselves and Guterma's personal holding company and obstructing the filing of an annual report (Form 10-K), in violation of 15 U.S.C. 78p(a), 78t(c), 78ff(a), and for conspiring to violate the above reporting provisions of the Securities Exchange Act of 1934.

The Court of Appeals upheld the constitutionality of the statutory and regulatory scheme requiring the filing of annual reports (Form 10-K) and insider reports (Form 4). The Court reversed the conviction for obstructing the filing of a current report (Form 8-K) based upon a deficiency in the Government's proof and the Court's instruction as to net book value. While it did not reach the constitutional question with respect to the requirement for filing current reports (Form 8-K),

the Court cast doubt upon whether the S.E.C.'s Form 8-K instructions are sufficiently intelligible to support a criminal conviction as a matter of due process.

The Court held that it was proper for the indictment to allege and for the Government to prove that defendants were looting the corporation, since it was this fact that defendants wished to conceal from the S.E.C. and the public by obstructing the filing of the annual report (Form 10-K). In reversing one of many counts involving insider report (Form 4), the Court said that an unauthorized sale of negotiable securities by a pledgee, if known to defendant, affects a change in beneficial ownership and must be reported. Distinguishing the Universal C.I.T. case, 344 U.S. 218, the Court held that separate crimes were committed in connection with the failure to file each required insider report and that cumulative fines were properly imposed.

Staff: United States Attorney S. Hazard Gillespie, Jr.; Assistant United States Attorneys Jerome J. Londin, David P. Bicks and George I. Gordon (S.D. N.Y.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Collateral Estoppel; Declaratory Judgment - Review of Deportation Proceedings; Scope of Review. Sifuentes v. Rogers (S.D. Calif., August 9, 1960). Plaintiff filed an action for a judgment declaring him to be a citizen of the United States and not subject to deportation. He was born in Kansas in 1921 and in 1932 was taken to Mexico by his parents where he resided continuously until October 8, 1946. Between November 16, 1943, and October 8, 1946, he knew of his duty to register for military service in the United States armed forces but intentionally did not register and voluntarily remained in Mexico to avoid such service.

On October 8, 1946, he was admitted to the United States as a citizen and, on the following day, registered with an El Paso draft board. On November 4, 1946, an information was filed (W.D. Texas) charging him with violation of 50 U.S.C. 311. On November 6, 1946, he was convicted on his plea of guilty. He was ordered deported as an alien (expatriated under sec. 401(j), Nationality Act of 1940 (8 U.S.C. 801(j)) on March 17, 1952.

The Court found that the aforementioned information and judgment, when considered in conjunction with the fact that he was admitted as a citizen on October 8, 1946, and registered the following day under the Selective Training and Service Act, show that his United States citizenship was necessarily adjudicated by the judgment of conviction.

Therefore, the Court held, in the absence of any evidence of a change in plaintiff's status subsequent to November 6, 1946, the Government and its privies are estopped to contend that plaintiff had earlier lost his nationality under sec. 401(j), or to deny that he was, on November 6, 1946, and is now a citizen of the United States; and further, that it was proper for the Court to consider the facts concerning his admission as a citizen, and his registration and conviction in order to determine whether his citizenship had been adjudicated by the judgment of conviction.

Judgment for plaintiff.

Constitutionality of Expatriation Statute; Declaratory Judgment - Determination of Citizenship; Expatriation by Foreign Voting - Voluntariness of Vote; Delgado-Garcia v. Rogers (S.D. Calif., August 9, 1960). Plaintiff in this declaratory judgment action to review an administrative finding of alienage and deportability was born in California in 1927 and lived in Mexico from 1938 to 1954. He voted in general elections in that country in 1946 and 1952. When he became 18 (July 7, 1945) he knew of his duty to register for United States military service but intentionally remained in Mexico to avoid such registration and service. He entered the United States in June 1954 and was ordered deported on October 9, 1957 after a finding that he had expatriated under section 401(j), Nationality Act of 1940 (8 U.S.C. 801(j)).

The Court found that, under the law of Mexico, plaintiff became a dual-national (U. S. and Mexico) at birth and that the constitution and laws of Mexico in force when he voted there imposed sanctions upon citizens of Mexico who, without justifiable cause, abstained from voting. HELD, plaintiff did not lose United States nationality under section 401 (e), Nationality Act of 1940 (8 U.S.C. 801(e)) because his voting in Mexico was not voluntary.

HELD FURTHER, plaintiff did not lose United States nationality under section 401(j) since that section is unconstitutional. This conclusion is based solely upon the decision of a brother judge of this Court in the case of Mendoza-Martinez v. Mackey, remanded on other grounds sub nom. Mackey v. Mendoza-Martinez, 362 U.S. 384 (1960); and without a re-examination of the constitutional question.

Judgment for plaintiff declaring him to be a national and citizen of the United States.

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LANDS DIVISION

Assistant Attorney General Perry W. Morton

Condemnation; Relief Under Rule 60(b), F.R.Civ.P., from Erroneous Judgment Not Allowed as Substitute for Appeal; Ejectment; Prior Unappealed Condemnation Judgment Is Res Judicata Although Erroneous. Annat v. Beard and United States, 277 F. 2d 554 (C.A. 5, 1960). The United States condemned all lands within a specified perimeter boundary for the Everglades National Park. Subsequently, it divided the area into numbered tracts according to ownership. The State of Florida had once owned all the land, but had conveyed some to private parties. These conveyances were by township, range and section. The State gave the Government a quitclaim deed to the entire area. Since most of the land had never been surveyed on the ground due to its swampy condition, the Government made a map of the area by projections from the few surveyed lines. This map was on the basis of standard 640-acre sections and the private ownerships were located thereon according to the deeds from the State. When the area was thus mapped from projections and divided into 640-acre sections, a hiatus appeared between several townships.

The Government claimed this hiatus under its deed from the State. The adjacent landowners claimed it on the ground that their deeds were on the basis of 800-acre sections. A pre-trial was had on this issue. The court ruled for the Government and then conducted a valuation trial on the basis of the acreages per tract shown on the Government's map. In 1952, judgment was entered in the amounts awarded by the jury. Two landowners appealed. The Court of Appeals reversed, holding that the district court should have used maps showing 800-acre sections. Paradise Prairie Land Co. v. United States, 212 F. 2d 170 (C.A. 5, 1954). In the meantime, after trial of all contested tracts in the area, the court entered an omnibus judgment in 1953, reciting all prior judgments and confirming title to the entire area in the United States. The hiatus area was included in this judgment as having been deeded to the Government by the State.

Appellant did not join the others in appealing from the 1952 judgment, but in 1957 commenced the present litigation: (1) an ejectment action to remove the Park Superintendent from the hiatus area located between her two tracts and (2) a motion under Rule 60(b), F.R.Civ.P., for relief from the 1953 condemnation judgment. She contended that title to the hiatus area was not included in the litigation resulting in the 1952 judgment, that entry of the omnibus judgment of 1953 shows that the prior judgment was not a final judgment, and that the 1953 judgment was void as to her because entered ex parte.

The district court held that the 1952 judgment finally adjudicated the extent of appellant's ownership and that, as to appellant's interests, the 1953 judgment merely recited what had already been done. It dismissed the ejectment action and denied the motion for relief. The Court of Appeals affirmed. It held that appellant's remedy was by appeal from

the 1952 judgment and, having not appealed for reasons no doubt regarded by her as sufficient at the time, she is now barred by the principle of res judicata.

Appellant has petitioned the Supreme Court for a writ of certiorari.

Staff: S. Billingsley Hill (Lands Division)

Condemnation; Acquisition for Sale or Lease to Private Developers in Urban Renewal Is Public Purpose; Steps in Planning Redevelopment Program Not Reviewable; Valuation - Reproduction Cost Not to Be Considered if Reproduction Not Prudent. Mamer v. District of Columbia Redevelopment Land Agency (C.A. D.C., Nos. 15656-7, June 30, 1960). Appellant's property was condemned under an urban renewal plan. She contended that the inclusion of her property in the program was arbitrary, capricious and illegal in that the purpose for which her property was taken was not a public purpose and that various actions of the authorities in planning the program were not in accordance with the authorizing statute. The district court granted the Government's motion for summary judgment on this issue on authority of Berman v. Parker, 348 U.S. 26 (1954), and Donnelly v. District of Columbia Redevel. Land Agency, 269 F. 2d 546 (C.A. D.C. 1959), cert. den. 361 U.S. 949. Those decisions treat the identical or the same type of challenges as were raised here. After final judgment awarding compensation, appellant appealed urging the foregoing points. She also contended that it was error to instruct the jury that reproduction cost may not be considered if no reasonably prudent person would reproduce the property at the cost figure given. The Court of Appeals affirmed per curiam.

Staff: S. Billingsley Hill (Lands Division)

Condemnation; Valuation - Cost of Past Improvements Correctly Excluded Where Only Part Can Be Substantiated; Reproduction Cost Not to Be Considered if Reproduction Not Prudent. Brabner-Smith v. District of Columbia Redevelopment Land Agency (C.A. D.C. No. 15655 June 30, 1960). Appellant's two properties were condemned under an urban renewal plan. He appealed from the judgment awarding compensation, urging, principally, that the district court erred in excluding his evidence of the amount he had spent improving the properties. The court permitted him to testify repeatedly concerning such costs, but after it was shown that he could substantiate only a small part of the asserted costs, the entire testimony was withdrawn from the jury. The Government contended that, since it is market value, not the owner's investment, which is safeguarded by the Constitution, past cost of repairs already performed is not admissible as direct evidence of value. The landowner also contended that it was error to instruct the jury not to consider reproduction cost if reproduction would not be prudent at such cost. The Court of Appeals affirmed per curiam.

Staff: S. Billingsley Hill (Lands Division)

Declaratory Judgment Action; United States Cannot Be Restricted in Disposing of Its Property in Which Title "Vested Absolutely" by Condemnation Decree. United States v. Sixteen Parcels of Land Located in City Block No. 193, of the City of St. Louis, State of Missouri, and Samuel J. Ridenour, et al., (C.A. 8, July 18, 1960). The property involved is the site of the old Post Office Building in St. Louis, Mo. The United States acquired the property by condemnation in 1872. In 1957, descendants of some of the original condemnees heard that the property was to be disposed of, and asserted that the acquisition had been one solely for public use and that upon a cessation thereof it would revert to the heirs of the condemnees. The Government instituted suit for a declaratory judgment to effect a quieting of its title in fee simple against the heirs of the original condemnees.

In 1872, an act was passed by Congress, 17 Stat. 43, authorizing the Secretary of the Treasury to purchase or to condemn "a suitable lot in the City of St. Louis for the purpose of erecting thereon a building, to be used for the purposes of a customhouse, post office, United States court, and other federal offices"; and providing that no expenditure should be made for the construction of the building until a valid title to the land should be vested in the United States and until the State ceded its jurisdiction to the United States. By Act of March 16, 1872, the Missouri Legislature gave consent to the acquisition by the United States of the "title in fee" to land needed for these purposes, and with the privilege, if condemnation was required, to "proceed in the same manner that is provided by chapter sixty-six of the General Statutes of Missouri."

The district court decreed that the condemnation proceeding had vested full fee simple title in the United States, and that defendants had no reversionary rights of any nature in the property, adding: "The Court does not mean to indicate the plaintiff may or may not be restricted by the act passed by the Missouri Legislature authorizing acquisition." No appeal was taken by defendants. The Government regarded this sentence as a cloud upon its title for disposal purposes, and appealed, seeking to have the decree modified by striking the sentence from the decree. The Court of Appeals granted the Government's request and ordered the sentence stricken. It held that the district court's reliance on a decision of the Supreme Court of the State of Missouri, from which it had taken the objectionable sentence, was not in any way applicable. The Court of Appeals stated:

> Clearly, the public use involved under the authorizing act of Congress was simply general governmental purposes. * * * mere expression of the purpose for which property is being taken, in the provisions of a federal enabling act, or in the recitations of a state consent statute, or in the allegations of a condemnation complaint, ordinarily constitutes simply an indication of the warrant for the condemnation, and it does not, without more, effect a dedication of the property to the use or purpose for which it is immediately taken. Only Congress can make a dedication of federal property; and a State cannot impose conditions in a consent statute to federal condemnation

which will operate to create a dedication without Congressional approval or acceptance thereof. * * *

The State of Missouri could not in its consent statute have inserted any provisions that would have operated to create a dedication as to the property, as against the enabling act of Congress. Nor did it here attempt to do so.

Staff: Roger P. Marquis and Elizabeth Dudley (Lands Division)

Condemnation; Appellate Jurisdiction of Dismissal of Part of Term Sought Absent Compliance With Rule 54(b), F.R.Civ.P., or 28 U.S.C. 1292(b). United States v. Gottfried, 278 F. 2d 426 (C.A. 2, 1960) The United States occupied a building under a lease for a term which was extendible upon advance written notice at a higher rental. It did not exercise that option but sought an agreement to remain in possession after the initial term without the increased rental. This was refused. The Government was advised that if it remained in possession beyond the initial term it would be regarded as a holdover tenant at a greatly increased rental.

Fourteen months after expiration of the initial term, the Government filed a condemnation complaint covering the past period from the expiration of the initial term and a future term of two years (extendible). The district court dismissed that part of the complaint which related to the period prior to the filing of the complaint. It ruled that the landowner had made a prima facie case that the Government's occupancy during that period was as a holdover tenant and that such a contract claim (exceeding $10,000) was triable only in the Court of Claims.

The Government appealed, contending that the Government's occupancy from the date of expiration of the lease was a single, uninterrupted exercise of its power of eminent domain and that a status of a holdover tenant could not be implied in the face of express refusals to pay the rent demanded. The Court of Appeals did not reach the merits. It dismissed the appeal for lack of jurisdiction. It held that if the interest prior to the complaint "be considered to be separate from the interest in the same land after that date, the action involved 'multiple claims' and Rule 54(b) applied and required the 'determination' therein prescribed" and, on the other hand, if the interest for that period "be deemed a part of the succeeding interest, only one interest was involved; the order was interlocutory for it did not dispose of the whole of that interest" so that "an appeal was permissible only under Sec. 1292(b) of Title 28."

While the Lands Division believes this decision to be erroneous, the Solicitor General has determined that it is not advisable to present the issue as presented in this case to the Supreme Court at the present time.

Staff: S. Billingsley Hill (Lands Division)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
District Court Decision

Assessment and Collection; Federal and State Tax Liens. Court Order Which Considered Only Propriety of Procedural Steps Taken to Validate Liens Did Not Implicitly Determine Merits of Tax Which Was Therefore Still Subject to Attack. United States v. 360 Acres of Land, (S.D. Calif., June 25, 1960.) As a result of a land condemnation proceeding, the sum of $414,025 was deposited in the Registry of the Court. Thereafter, the District Director of Internal Revenue filed a petition under 40 U.S.C. 258a to withdraw from this fund an amount sufficient to satisfy certain unpaid federal taxes claimed to be due from one of the parties entitled to the ultimate condemnation award. A similar petition was filed by the Franchise Tax Board of California claiming unpaid state taxes.

Both petitions were heard and thereafter the Court issued an order adjudging that "of the sum now held in the Registry of the Court * * *, a sum sufficient to pay said lien of the United States in the amount of $4313.14 together with interest * * * shall be retained by the Clerk and not paid to any defendant herein pending a final determination by the court of the respective rights of the United States under its tax lien and of the respondents and defendants in and to the fund." (Underscoring supplied.) Identical provisions were contained in an order segregating monies for the California tax claim.

Subsequently, a jury in the condemnation proceeding arrived at an award of $377,500 of which distribution was made except for the amounts segregated for the tax claims.

Thereafter, the District Director and the State of California both filed motions under 40 U.S.C. 258a claiming payment of the monies previously segregated. The portion of 40 U.S.C. 258a upon which the motions were predicated provides that in a land condemnation proceeding, the court shall have the power to make such orders regarding liens, taxes and other charges as shall be just and equitable.

At the hearing on the motions, both the United States and California argued that the earlier orders segregating the monies for the tax claims had adjudicated not only the validity of each lien but also the merits of the claims for taxes. The United States and California also argued in the alternative that if the merits of the claims had not been so adjudicated then the segregated monies should be respectively paid over to them and the taxpayer required to institute refund actions.

No evidence had at any time been offered either by the United States or California to show what taxable income, if any, the taxpayer had had during the years in question.

The Court, pointing to the language of the segregation order itself, observed that the order merely adjudicated the validity of the liens, i.e., the procedural steps necessary to the creation of the lien, "pending a final determination * * * of the respective right * * * in and to the fund."

The Court directed that the segregated monies be turned over to the United States and to California respectively, pointing out that the taxpayer would be able to have her day in court by way of refund actions. Additionally, the Court indicated that there was an alternative procedure whereunder the segregated monies could have been released directly to the taxpayer so as to compel both the United States and California to bring collection actions in order to determine the merits of the tax. This procedure, however, the Court refused to follow, observing that it would have served to invalidate the liens which had previously been adjudicated to be valid.

Staff: United States Attorney Laughlin E. Waters and
Assistant United States Attorneys Edward R. McHale
and Lillian W. Stanley (S.D. Calif.)
Clarence J. Nickman (Tax Division)

State Court Decision

Liens; Tax Lien Superior to Unperfected Lien of Judgment Creditor Where Garnishment Proceeding Was Defective; Creditor's Claim Subordinate to Tax Lien Where Based on Assignment for Past Due Consideration. F. S. Kozak v. John T. Mead, et al., 5 A.F.T.R. 2d 1658 (Cir. Ct., Mich.) The United States intervened in this action of interpleader brought by plaintiff to decide which of several claimants were entitled to money held in his possession for services performed by taxpayer. Firestone Stores intervened asserting priority by virtue of a judgment obtained against taxpayer on March 22, 1957 and subsequent garnishment actions commenced on January 15 and February 7, 1958. The tax liens were filed on January 28, 1958.

The Court found that the garnishment proceeding commenced on January 15, 1958 was defective because service of summons had been improperly made on a person other than the plaintiff, who was the proper garnishee defendant and there was no showing of compliance with a statute for substituted service on "someone in the family." The Court held that no valid lien of garnishment was created, since the court had not acquired jurisdiction. Therefore, the tax lien filed prior to the commencement of the second garnishment proceeding by Firestone Stores was given priority.

The Court further held that the claim of another defendant was

subordinate to the tax lien, because it was based upon an assignment from taxpayer for a past due consideration.

Staff: United States Attorney, Fred W. Kaess; Assistant United States Attorney, Elmer L. Pfeifle, Jr. (E.D. Mich.); Alben E. Carpens, (Tax Division).

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