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Assistant Attorney General Donald F. Turner

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United States v. Pioneer Builders, Inc., et al. (Cr. 27439; October 27, 1967; D.J. 60-12-124)

On October 27, 1967, a three judge court comprised of Chief Judge Thomsen and Judges Northrop and Kaufman filed an opinion denying motions to dismiss criminal indictments in some fifteen cases, including the antitrust case of U.S. v. Pioneer Builders, Inc., et al., in which motions had been consolidated for hearing. In these criminal cases, the defendants moved to dismiss on the grounds that the indictments were returned by unconstitutionally constituted grand juries. Said motions were predicated substantially upon the recent decision in Rabinowitz v. United States, 336 F. 2d 34 (C.A. 5, 1966).

Counsel for the several defendants requested, and were given the opportunity, to examine the records of the Clerk and Jury Commissioner of the District Court relating to the selection of jurors over a period of five years and to interview the Clerk, the Jury Commissioner and former jurors. The court heard testimony from a number of witnesses including a statistician, a sociologist, the Clerk of the Court and District Judge R. Dorsey Watkins who had been designated to confer with the Clerk on jury selection problems. Counsel for the defendants conceded that there had been no deliberate or intentional discrimination against any group and that there had been no disproportion with respect to race, religion, or political affiliation. The court found from the evidence that the Clerk and the Jury Commissioner achieved almost perfect proportions with regard to these classifications. The three judge court in its opinion reviewed the procedure followed in the selection of jurors and the several recent court decisions, committee reports and other commentaries on this subject.

Although the movants conceded that there was no substantial imbalance in the jury selection process, they complained that the percentages of members of various groups or classifications of citizens in the District did not conform with mathematical precision to the representation of such groups on the juries. The court pointed out that neither the Clerk and the Jury Commissioner of the court nor their counterparts in other federal district courts hold degrees in statistics or sociology and that neither were the Clerk's offices equipped with

computers to assure that jury lists mirror the community with exact statistical perfection.

The court ruled that no intentional or negligent discrimination occurred in the selection of the grand juries and that no substantial lack of representation of any identifiable groups exists in connection with the juries under attack.

Staff: Assistant United States Attorneys Arthur G. Murphy and Thomas P. Curran; Wilford L. Whitley, Jr. and Ernest T. Hays (Antitrust Division)

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# CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

## COURTS OF APPEALS

### APPEALS

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United States v. Fabric Garment Co., Inc., et al. (C.A. 2, No. 31510; October 17, 1967; D.J. 52-51-192)

The United States brought supplementary proceedings to collect a judgment against one Joseph Abrams. During those proceedings the Government called as a witness Mrs. Abrams, who objected to certain questions on the ground of her privilege against self-incrimination. Mrs. Abrams' objections were overruled, and she appealed. The Second Circuit, on its own motion, dismissed the appeal for want of jurisdiction. The Court held that an order "which merely directs a witness to answer questions in a pending judicial proceeding is not a final decision within 28 U.S.C. § 1291". The Court noted that Mrs. Abrams would be protected from improper questioning by her right of review from a judgment of contempt.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Howard L. Stevens (E.D. N.Y.)

### FRAUD

CONFLICT OF INTEREST ON PART OF CONTRACT NEGOTIATOR HELD NOT TO INVALIDATE GOVERNMENT CONTRACT WHERE EXORBITANT AND UNCONSCIONABLE PROFITS DID NOT RESULT.

United States v. The Goldfield Corp. (C.A. 10, No. 9143; November 2, 1967; D.J. 46-958)

While negotiating for a contract to mine and sell chromium for the national stockpile, the American Chrome Company (predecessor to The Goldfield Corporation) offered employment to John Lukens, a member of the Government negotiating team, and Lukens accepted employment before the contract was signed. After the contract was completed, the United States brought this action for an accounting and restitution of exorbitant and unconscionable profits realized from the contract. The Government's theory was

that Lukens, because of his expectation of obtaining employment with American Chrome, caused to be inserted in the contract a two-year limitation on the price redetermination provision. Because price redetermination was limited to the first two years of the contract, the company's declining costs after the first two years did not result in a proportionate reduction price, and large profits resulted. In the district court, the pretrial order stated that the issue was whether the conduct of American Chrome in offering a job to Lukens was designed to affect the price redetermination provision and whether this resulted in exorbitant and unconscionable profits. The district court found that American Chrome's conduct was not designed for this purpose; that the price redetermination provision, including the two-year limitation, was decided upon before Lukens was offered a job; and that American Chrome's profits were not exorbitant and unconscionable.

The Court of Appeals affirmed on the ground that the evidence supported these findings. It rejected the Government's contention that, since the decision was based on documentary evidence rather than live testimony, the "clearly erroneous" standard of Rule 52(a) would not apply. On appeal, the Government argued that the existence of the conflict of interest on the part of Lukens should be sufficient to invalidate the contract, without a showing that the terms of the contract or the level of profits derived from the contract were affected. The Court of Appeals rejected this argument, noting that it had not been presented to the trial court. The Court of Appeals also went on to hold that automatic invalidation of a contract was precluded by the district court's finding that the profits were not excessive and unconscionable.

The decision of the Court of Appeals will probably have very limited importance, and should not be taken to preclude in another case the contention that a Government contract is automatically invalidated, without proof that the terms of the contract or the level of profits were affected, if one of the Government negotiators, simultaneously with the contract negotiations, privately negotiates with the prospective contractor for employment. In the instant case the theory of automatic invalidation was raised for the first time on appeal, and the opinion of the Court of Appeals stresses this fact. Moreover, no claim of statutory violation was made in the instant case. However, after the contract in the instant case was negotiated, the conflict of interest statutes were revised, and 18 U. S. C. 208 now makes it a felony for a Government employee to participate personally and substantially in a contract negotiation in which any organization with whom he is negotiating concerning prospective employment has a financial interest. Under the Dixon-Yates case, United States v. Mississippi Valley Generating Co., 364 U. S. 520, this should be sufficient to invalidate automatically the contract, without proof that the terms of the contract were affected.

Staff: Robert V. Zener and Jack H. Weiner (Civil Division)

## REMOVAL

CONTEMPT ACTION AGAINST FEDERAL OFFICER IN STATE COURT IS REMOVABLE TO DISTRICT COURT UNDER 28 U. S. C. 1442.

State of North Carolina v. Gordon S. Carr (C. A. 4, No. 11, 292; November 6, 1967; D. J. 233279-142)

An FBI agent who was called as a witness in a private civil action on trial in a North Carolina State court refused to answer questions or produce documents pertaining to his official investigation of a purported larceny of the automobile which was the subject of the State court suit. The basis for his refusal was the Attorney General's Order No. 324-60, 28 C. F. R. 16. 1, which forbids such testimony or production without the prior approval of the Attorney General. The State court judge summarily held the agent in contempt and sentenced him to imprisonment until he complied with the subpoena, but stayed execution until completion of the case. Immediately, the United States Attorney removed the contempt action to the district court under 28 U. S. C. 1442. The State moved for remand on the ground that contempt was not within the scope or intent of the federal removal statute. The district court denied the motion, holding that the action was removable, and determining on the merits that the agent was not guilty of contempt.

On the State's appeal, the Court of Appeals held that 28 U. S. C. 1442 looked to the substance rather than the form of the State court proceeding, and that irrespective of whether the contempt action was a "civil action" or "criminal prosecution" or was, as the State argued, "sui generis", it was removable as within the language and intent of the federal statute. The Court pointed out that it was the central concern of the statute that federal officials should not be held liable in state courts for actions done within their official duties, and that insistence upon the right of removal had been declared "essential to the integrity and preeminence of the Federal government within its realm of authority."

During the course of argument it was brought out that the State civil action had then been finally determined and was no longer in existence. Therefore, the Court considered it unnecessary to consider the merits of the contempt citation and dismissed the appeal as moot.

Staff: United States Attorney William Medford (W. D. N. C. );
John C. Eldridge and Kathryn H. Baldwin
(Civil Division)

## SOCIAL SECURITY ACT - DISABILITY BENEFITS

DETERMINATION CONCERNING DISABILITY, MADE PRIOR TO 1965 AMENDMENTS TO ACT, HELD RES JUDICATA IN SUIT ON SAME CLAIM AFTER 1965 AMENDMENTS.

James v. Gardner (C. A. 4, No. 11,139; October 12, 1967; D. J. 137-80-192)

In 1960, the claimant applied for disability benefits, seeking to establish that he was disabled on or before December 31, 1959. The Secretary ruled that he was not disabled because his impairments were not severe enough to disable him from engaging in any substantial gainful activity. On appeal to the courts, this ruling was affirmed.

In the 1965 amendments to the Social Security Act, the Congress changed the definition of "disability" from an impairment "which can be expected to result in death or to be of long-continued and indefinite duration" to an impairment "which has lasted or can be expected to last for a continuous period of not less than 12 months". The claimant in 1965 then filed for a new determination that he was disabled on or before December 31, 1959, alleging the same type of disability and introducing essentially the same evidence that he had introduced in the prior proceedings. The Secretary ruled that under the 1965 amendments, the only issue in this case was the duration of the claimant's disability, and that the prior determination was res judicata as to the non-disabling nature of his impairments. Accordingly, the Secretary denied benefits. This ruling was upheld by the district court.

The Court of Appeals affirmed. The Court pointed out that the 1965 amendments only altered the period of time that a disability, if established, must be likely to endure before the plaintiff was entitled to benefits; it did not change the required severity of the impairment. Consequently, since in the earlier proceedings the severity of the claimant's impairments was fully litigated, the decision there adverse to claimant was res judicata of the present claim.

Staff: Assistant United States Attorney William C. Breckinridge (W. D. Va.)

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# CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

## SPECIAL NOTICES

### NARCOTIC ADDICT REHABILITATION ACT

Your attention is called to Supplement No. 1 to Memorandum No. 506, sent to you on July 18, 1967. In the Supplement, it was pointed out that an appropriation to the Public Health Service had made possible the use of Titles I, II, and III of the Narcotic Addict Rehabilitation Act of 1966, Public Law 90-21. Since that time an appropriation for implementation of the Act has also been received by the Bureau of Prisons.

For the time being, all diagnostic examinations and institutional treatment under all three commitment Titles of the Act will take place at the Public Health Service Clinical Research Centers at Lexington, Kentucky, and Fort Worth, Texas.

Any questions with respect to use of Titles I and III of the Act should be referred to the Legislation and Special Projects Section of the Criminal Division; questions relating to use of Title II should be referred to the Legal Counsel of the Bureau of Prisons.

### DIRECT REFERRAL OF PROSECUTIONS FOR VIOLATIONS OF THE UNITED STATES WAREHOUSE ACT, 7 U.S.C. 241-273

A review of cases involving recommendations by the Office of the General Counsel of the Department of Agriculture for the initiation of prosecutions for violations of the United States Warehouse Act, 7 U.S.C. 241-273, reveals that in most instances review of those recommendations is unnecessary. Accordingly, the Office of the General Counsel has been advised that all matters involving violations of the United States Warehouse Act should be forwarded directly to the appropriate United States Attorneys.

United States Attorneys are hereafter authorized to review all such submissions and to determine whether or not prosecution is justified.

The Criminal Division will provide any advice or assistance upon the request of the United States Attorney or his Assistant.

## COURTS OF APPEAL

### ARREST

COMMAND TO DISGORGE CONTENTS OF POCKETS HELD TO CONSTITUTE ARREST.

Samuel Wrieole v. United States (C. A. 3, No. 16106; June 16, 1967, 379 F. 2d 394; D. J. 160-48-312)

Wrieole was engaged in the business of accepting wagers and was convicted of failing to pay the taxes and supply the information required by 26 U. S. C. 4401, 4411 and 4412. He was arrested by a state trooper in a combined State and Federal raid. He contended that his arrest was illegal and therefore the evidence on his person at the time of his arrest was wrongfully obtained.

In affirming the district court's opinion, the Third Circuit cited with approval the holding of the New Jersey Supreme Court in State v. Contursi, 44 N. J. 422, 433-434 (1965): "The restraint of the person and restriction of liberty of movement was sufficient, in the circumstances (where object was not merely to question), to constitute an arrest." The Court of Appeals found that an arrest was made when the State trooper ordered the defendant to empty his pockets. The facts were found to justify the arrest as the trooper had probable cause to believe Wrieole was violating the New Jersey statute prohibiting the possession of lottery paraphernalia. Because the arrest was found to be lawful, the search of appellant's person was reasonable incident to that arrest.

Staff: United States Attorney David M. Satz, Jr. and Assistant United States Attorney Richard D. Catenacci (D. N. J.)

## FALSE DOCUMENTS

INDICTMENT WITH SEPARATE COUNT FOR EACH FALSE DOCUMENT SUBMITTED TO FHA HELD NOT DUPLICITOUS.

Tripp v. United States (C. A. 10, July 27, 1967, 381 F. 2d 320; DJ 130-12-4766; Rehearing denied September 14, 1967)

Tripp was convicted on twenty-two counts of a twenty-six count indictment charging that he and an unindicted individual had conspired to defraud the Federal Housing Administration and that Tripp had submitted false documents to the FHA in an attempt to get it to accept and guarantee loans on homes which he had constructed. The indictment listed a separate count for each false document even where several of the documents were submitted in support of a single application.

In affirming the conviction, the Court of Appeals for the Ninth Circuit held that such counts did not split a single statutory offense into multiple charges since under 18 U. S. C. 1010 the filing of each false document constitutes a crime. The Court further held that those counts which alleged

> ***that appellant made, uttered, and published a document containing false statements "for the purpose of influencing

> the action of the Federal Housing Administration" are not defective because they do not also allege that appellant acted "for the purpose of obtaining any loan or advance of credit*** with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance."

The Court pointed out that 18 U.S.C. 1010 is in the disjunctive and that either purpose is sufficient.

Staff: United States Attorney William M. Byrne, Jr. and Assistant United States Attorney Robert M. Talcott (C.D. Calif.)

DISTRICT COURT

## COPYRIGHT INFRINGEMENT

WILFUL INFRINGEMENT OF COPYRIGHT FOR PROFIT (17 U.S.C. 104).

United States v. Arthur L. Wimmer, Jr., and Jack McKinney (E.D. Texas, October 17, 1967; D.J. 28-344)

Under a provision of the copyright law any person, with certain enumerated exceptions, who wilfully and for profit infringes upon the copyright proprietor's exclusive right to vend his copyrighted property, shall be deemed guilty of a misdemeanor.

In this case the defendants, without authorization, sold geological maps of East Texas oil fields which were secured by copyrights. The copyright proprietor loaned or leased these maps to customers for a fee but retained the property rights therein, and prohibited their reproduction or sale.

In a two day trial a jury found Arthur Lloyd Wimmer, Jr., and Jack McKinney guilty of violations of 17 U.S.C. 104, in that they wilfully infringed a copyright for profit. The Government established that there was a valid copyright on the maps by direct testimony of the copyright proprietor, by introducing the certificate of registration of copyright as "prima facie evidence of the facts stated therein", pursuant to 17 U.S.C. 209, and by introducing into evidence photocopies of the maps certified as being copies of works deposited for registration with the Copyright Office, Library of Congress. The copyright proprietor testified further that he retained the property rights in the subject maps and prohibited reproduction or sale thereof. Sales made by the defendants were established by testimony of the purchasers.

The defendants were sentenced to a $500 fine on each of the six counts and six months confinement on each count, to run consecutively. Sentence was

suspended and defendants placed on probation, conditioned upon the payment of $600 in fines ($100 on each count).

It should be pointed out that the Government was not faced with the problem it had in the case of United States v. Wells (176 F. Supp. 630, S.D. Texas 1959), a case in which the defendant was charged with infringing the copyright of aerial survey maps. The copyright proprietor in the Wells case granted copyright licenses which did not specify that all copies published by licensees should remain the property of the copyright proprietor. Consequently, title to all copies published under the license belonged to the licensee and not to the copyright proprietor. The Court ruled there that the defendant was not guilty of the offense of infringing the copyright in the absence of a showing that the copies sold by the defendant were not published by one of the licensees under its license.

Staff: United States Attorney William Wayne Justice and Assistant United States Attorneys Earl W. Tews and Jacob F. Bumstead (E.D. Texas)

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## EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern, III

### SPECIAL NOTICE

### TRANSFER OF RESPONSIBILITY FOR HANDLING MATTERS ARISING OUT OF DEVISES AND BEQUESTS AND INTER VIVOS GIFTS TO UNITED STATES

By virtue of Departmental Order No. 385-67, dated October 30, 1967, responsibility for handling matters arising out of devises and bequests and inter vivos gifts to the United States has been transferred from the Office of Legal Counsel to the Civil Division. This work will be carried on by the General Claims Section of the Civil Division.

All future correspondence relating to gifts and bequests cases should be addressed to Edwin L. Weisl, Jr., Assistant Attorney General, Civil Division, attention: Chief of General Claims Section.

Telephone contacts should be with Miss Mary Folliard (Ext. 3450).

### APPOINTMENTS

### ASSISTANT UNITED STATES ATTORNEYS

Alabama, Northern - J. RICHMOND PEARSON; Howard University, LL. B.

Arizona - JOHN P. MORAN; Catholic University, LL. B., and former Deputy County Attorney.

Missouri, Eastern - JON R. EDGAR; St. Louis University Law School, LL. B., Yale Law School, LL. M., and formerly in private practice.

New York, Eastern - HOWARD E. BABBUSH; St. John's Law School, LL. B., and formerly in private practice.

Ohio, Northern - CARL H. MILLER; Cleveland-Marshall Law School, LL. B., and formerly an attorney with the Tax Division of the Department of Justice.

Oklahoma, Western - RONALD L. HOWLAND; Oklahoma University, J. D., and formerly a law clerk, U. S. District Court.

Pennsylvania, Eastern - JOHN R. GALLOWAY; Georgetown University, LL. B., and formerly in private practice.

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## LAND AND NATURAL RESOURCES DIVISION

Acting Assistant Attorney General J. Edward Williams

### SUPREME COURT

### CONDEMNATION

JUST COMPENSATION FOR TAKING LAND RIPARIAN TO NAVIGABLE STREAM DOES NOT INCLUDE ANY ELEMENT ATTRIBUTABLE TO PORT SITE VALUE; SUCH EXCLUSION IS NOT INCONSISTENT WITH SETOFF OF BENEFITS FROM SUCH USE AGAINST COMPENSATION PAYABLE.

United States v. R. B. Rands et ux., ____U.S.____ (No. 54, Nov. 13, 1967; D. J. 33-38-564-247)

The United States condemned a tract of land owned by Rands riparian to the Columbia River in Oregon for use in connection with the John Day Lock and Dam Project. The land had been leased to the State of Oregon, with an option to purchase, it being contemplated that the State would use the land as an industrial park, part of it being most valuable for a port site. The United States condemned the land before the option was exercised, and then conveyed the land to the State. In the condemnation action, the trial court ruled that the special value of the land as a port site could not be considered. On appeal, the Ninth Circuit reversed, "apparently holding that the Government had taken from respondent a compensable right of access to navigable waters and concluding that 'port site value should be compensable under the Fifth Amendment'." The Supreme Court granted the United States petition for a writ of certiorari and unanimously reversed the Ninth Circuit for failure to follow United States v. Twin City Power Co., 350 U.S. 222 (1956).

The Supreme Court reiterated the rule that the Commerce Clause confers a unique position upon the Government in connection with navigable waters. Under the Commerce Clause, the Government may regulate the entire stream below the high water mark, even to changing the course of the stream or impairing or destroying a riparian owner's access. The damage resulting from the exercise of this power is not a taking of private property, but the lawful exercise of a power to which the riparian owners have always been subject. Consequently, when fast land is taken, the Government may disregard the value arising from the fact of riparian location. Hydroelectric power site value is disregarded on this principle. United States v. Twin City Power Co., supra. With regard to the constitutional duty to compensate a riparian owner, no distinction can be drawn between power site value and port site value.

The Supreme Court held there was no inconsistency between its holding in this case and the result in United States v. River Rouge Improvement Co.,

269 U.S. 411 (1926), that benefits from the Government's improvements could be offset against the condemnation award. In River Rouge, it was held that the riparian owner could be charged with benefits to his property, resulting from a river improvement, where part of his land was taken for such improvement. Cases such as Twin City do not deny that access to navigable waters enhances the value of riparian property as between private owners. But these rights and values are not assertable against the United States.

The Court again limited both Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), and the portion of United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) dealing with compensation for the lock and canal bypass, to the special facts of those cases. The Court also held respondent's reliance on the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301-1343, was misplaced. That Act expressly recognized that the United States retained all its powers to regulate and control navigable streams.

Staff: Robert S. Rifkind (Solicitor General's Office) [on the brief were Roger P. Marquis and A. Donald Mileur, Land and Natural Resources Division]

## COURT OF APPEALS

### PUBLIC DOMAIN

ADMINISTRATIVE LAW; MINERAL LEASING ACT; SECRETARY OF INTERIOR'S INTERPRETATION OF HIS REGULATIONS IS ENTITLED TO DEFERENCE; REJECTION OF OFFER FOR OIL AND GAS LEASE WAS PROPER WHERE STATEMENTS OF INTEREST OF ALL PARTIES INTERESTED IN OFFER HAD NOT BEEN TIMELY FILED.

Harvey v. Udall (C.A. 10, No. 9438, Nov. 8, 1967; D.J. 90-1-18-760)

This action was instituted by appellants to reverse the Secretary of the Interior's rejection of their offer for an oil and gas lease. Their offer had been successful at the drawing but was rejected because statements of interest of all parties interested in the offer had not been submitted within the time prescribed by regulation. The district court sustained the Secretary.

The Court of Appeals affirmed, stating that (1) the Secretary's interpretation of his own regulations is entitled to deference; and (2) rejection of the offer is supported by policies enunciated by Congress in amendments to the Mineral Leasing Act of 1920, showing congressional concern over individuals and companies avoiding acreage limitations by use of "straw men", "dummies", or the like.

Staff: Raymond N. Zagone (Land and Natural Resources Division)

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# TAX DIVISION

Assistant Attorney General Mitchell Rogovin

## SPECIAL NOTICES

### PROCEEDINGS TO ENFORCE INTERNAL REVENUE SUMMONSES

In most districts summary proceedings to enforce Internal Revenue Service summonses under 26 U.S.C. 7402(b) and 7604(a) are initiated by verified petition and order to show cause. (United States Attorneys' Manual, Title 4, pages 36-38.) Recently a taxpayer has appealed a district court compliance order on the grounds that the court acquired no jurisdiction over him for failure to comply with 28 U.S.C. 1691, which provides:

> All writs and process issuing from a court of the United States shall be under the seal of the court and signed by the clerk thereof.

Since this defect may well void the entire proceeding, Insurance Co. v. Hallock, 73 U.S. 556 (1867), United States Attorneys are requested to review their procedures in initiating summons enforcement actions to insure that Section 1691 is satisfied. Tax Division attorneys should include a reference to 28 U.S.C. 1691 in their referral letters forwarding summons enforcement matters to the United States Attorneys.

### TRANSMITTAL OF DOCUMENTS IN CASES UNDER 28 U.S.C. 2410 WHERE RESPONSIBILITY IS ASSIGNED TO UNITED STATES ATTORNEY

The Federal Tax Lien Act of 1966 has now been in force one year and we believe your offices have become familiar with the changes effected by the Act in federal tax lien priorities. Effective immediately, therefore, in cases naming the United States under 28 U.S.C. 2410 where the responsibility has been assigned to the United States Attorney (mortgage foreclosures, quiet title actions, partition and condemnation suits), please forward to the Department only the Answer filed by your office. It will not be necessary to correspond further with the Tax Division with regard to these cases unless an offer in compromise is submitted or an appellate issue arises. If an appeal is taken by another party to the proceeding, please advise us promptly. If a decision is rendered adverse to the Government on an issue contested by your office, please submit your recommendation with sufficient data to evaluate the question of appeal.

DISTRICT COURT

## STATUTE OF LIMITATIONS

STATE STATUTE OF REPOSE IS NOT BAR TO ACTION TO ENFORCE FEDERAL TAX LIENS BY SETTING ASIDE FRAUDULENT CONVEYANCE OF LAND UNDER STATE LAW.

United States v. Ruth N. Ream (M. D. Pa., October 6, 1967; 67-2 U. S. T. C. par. 9703, D. J. 5-63-390)

This was an action to enforce federal tax liens by setting aside a fraudulent conveyance of real property, and the taxpayer argued, inter alia, that the Government's suit was untimely under state law. It was conceded that the United States is not bound by ordinary state statute of limitations, but the taxpayer asserted that a fraudulent conveyance action was governed by the Pennsylvania Statute of Repose, 12 P.S. § 83. This statute provides essentially that an action to enforce any trust as to realty must be brought within five years after the trust arose, and under the taxpayer's view, if a fraudulent conveyance exists, a constructive trust is imposed on the land at the time of the transfer for the benefit of the transferor's creditors. Accordingly, since this action was not commenced within five years after the transfer, and since the Government was bound by this state statute of repose under the holding of United States v. Schofield, 179 F. Supp. 332 (E. D. Pa., 1959), the instant action was untimely and should be dismissed.

The Court found that a fraudulent conveyance existed and rejected the taxpayer's argument that the state statute of repose was a bar to this action. Specifically, the Court observed that in a fraudulent conveyance action no implied or resulting trust is imposed as a vehicle for relief. A transfer of land by a debtor in fraud of his creditors is void, and thus, the statute of repose is not applicable.

The significance of this decision is that it shows that the holding in United States v. Schofield, supra, should be limited to an action where a trust is imposed on land and should not be extended to an action to set aside a fraudulent conveyance under state law in order to enforce federal tax liens against the transferor of the land.

Staff: United States Attorney Bernard J. Brown (M. D. Pa.); Donald J. Gavin (Tax Division)

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