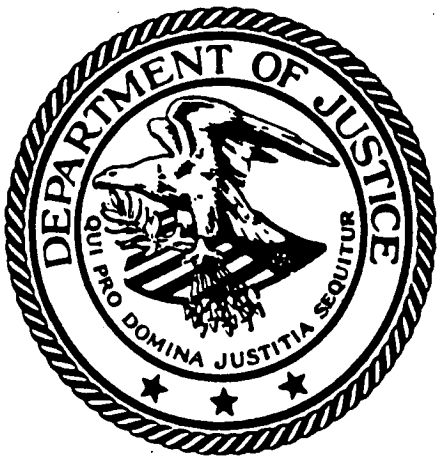
Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

September 17, 1954

Kinnison

United States
DEPARTMENT OF JUSTICE

Vol. 2 No. 19



UNITED STATES ATTORNEYS
BULLETIN

RESTRICTED TO USE OF

DEPARTMENT OF JUSTICE PERSONNEL

UNITED STATES ATTORNEYS BULLETIN

Vol. 2 September 17, 1954 No. 19

PUBLICITY IN FHA MATTERS

Department activities in FHA matters, both Civil and Criminal, are receiving and will continue to receive widespread publicity. The Public Information Office wishes to thank all United States Attorneys who provided summaries of criminal prosecutions in response to its memorandum of July 30, 1954. That Office now requests that it be informed of all new actions as they occur including (1) indictments, (2) guilty pleas or conviction after trial and (3) sentences. The Department press release for September 1, 1954 will indicate the type of material desired. Additionally, reports on any civil actions also are requested. These should be directed to Mr. G. Frederick Mullen, Director of Information, Department of Justice, Washington 25, D. C.

The activities of the Information Office in housing matters are intended to supplement and summarize, rather than replace, any information which may be given to the press locally.

* * *

NOTIFICATION TO WITNESSES

In a number of instances United States Attorneys and their Assistants have failed to notify witnesses and agents of investigative agencies of the postponement or continuance of cases in which they have been scheduled to testify. Such oversight requires the payment of additional expense for per diem payments which would not be necessary if sufficient prior notice were given to prospective witnesses.

United States Attorneys and their Assistants are reminded of the need for immediate notice to witnesses of any change in date of the proceeding in which such witnesses are expected to testify. Upon notification by the Court of any change in date, the case file should be examined for the names of all witnesses, and notices sent out immediately acquainting them of the change and instructing them as to the new date upon which they are required to appear.

* * *

GREATER PUBLICITY FOR ACCOMPLISHMENTS

United States Attorney Raymond del Tufo, Jr. of the District of New Jersey and United States Attorney J. M. Baley, Jr. of the Western District of North Carolina have prepared complete reports on the work done by their offices during the past fiscal year ending June 30, 1954, and have forwarded copies of such reports to the newspapers in their districts as a means of acquainting the people with the accomplishments of their offices during this period.

It is the view of the Department that the publication of such reports is a splendid aid to securing for the United States Attorney's office the cooperation and assistance of the local community.

United States Attorneys are urged to take this means of publicizing their achievements as a service to the public and as a medium through which to encourage interest in and cooperation with the work of their offices.

* * *

JOB WELL DONE

The F.B.I. Special Agent in Charge at Minneapolis, Minnesota, has written to United States Attorney George E. MacKinnon of the District of Minnesota, commending the splendid efforts of Mr. MacKinnon and Assistant United States Attorney Alex Dim in the successful prosecution of 33 White Slave Traffic Act matters. In addition to pointing out that this number was a decided increase over the number of such cases successfully prosecuted in 1953, the Special Agent in Charge commented favorably upon the close liaison and full cooperation which exists between his office and the office of the United States Attorney.

A letter has been recently received by the office of the United States Attorney for the District of New Jersey, from Mr. Chester J. Tyson, Jr., State Director with the Department of Agriculture, commending the fine work of that office and the splendid cooperation his agency is receiving. The United States Attorney advises that this commendation would especially apply to the following Assistants: Messrs. Clyde V. Creato, A. Sherburne Hart and Pierre P. Garven.

* * *

VISITORS

The following United States Attorneys were recent visitors at the Executive Office for United States Attorneys:

Malcolm R. Wilkey, Texas, Southern
George C. Doub, Maryland
John W. McIlvaine, Pennsylvania, Western
Leonard P. Moore, New York, Eastern
Joseph C. Hines, South Carolina, Western
Simon S. Cohen, Connecticut
Charles F. Herring, Texas, Western
L. S. Parsons, Jr., Virginia, Eastern
Wendell A. Miles, Michigan, Western
Fred W. Kaess, Michigan, Eastern

The following Assistant United States Attorneys were also visitors:

William F. Mosner, Maryland
Robert D. Inman, Colorado
Charles H. Hoens, Jr., New Jersey
Edward G. Maag, Illinois, Eastern
Mitchell S. Rieger, Illinois, Northern
Frank J McGarr, Illinois, Northern
Alexander O. Walter, Illinois, Northern
Alfred P. O'Hara, New York, Southern
R. L. Gavin, North Carolina, Middle
D. M. Anderson, Jr., Pennsylvania, Western
Howard R. Harris, California, Southern
Robert M. FitzGerald, Connecticut
Francis J. McNamara, Jr., Connecticut

NEW UNITED STATES ATTORNEYS

Paul W. Cress, Western District of Oklahoma appointed August 4, 1954.

Louis B. Blissard, Hawaii, appointed August 7, 1954.

Thedore E. Munson, District of Alaska, Division No. 1, appointed August 12, 1954.

Robert Vogel, North Dakota, appointed August 12, 1954.

Phil M. McNagny, Jr., Northern District of Indiana, appointed August 31, 1954. (Recess appointment)

* * *

CRIMINAL DIVISION

Assistant Attorney General Warren Olney III

ANNUITY AND RETIREMENT BENEFITS - LIMITATIONS LEGISLATION

Prohibition of Annuity and Retirement Pay Benefits to Officers and Employees of United States Convicted of Certain Offenses. Public Law 769, 83d Cong., 2d Sess., approved September 1, 1954 marks the successful culmination of several efforts made by Congress to deprive persons convicted of certain types of offenses of their retirement benefits.

The Act enumerates the criminal violations which are the grounds for barring annuities or retired pay and also specifies that no person shall receive such a benefit who fails to testify, upon grounds of self-incrimination, with respect to his service as an officer or employee of the Government or his connection with a foreign Government.

It is also worthy of note that these benefits are denied to any person who knowingly and willfully makes any false statement concerning his affiliation with the Communist Party.

The legislation provides that any amounts contributed toward the annuity, the benefits of which are denied, less any sums previously refunded or paid as annuity benefits shall be refunded and that no person shall be required to repay any annuity properly received by him, which is in excess of the amount of his own contributions with interest. The right to receive an annuity or retired pay is restored to any person having received a pardon from the President.

The Congress has excluded from the terms "annuity" and "retired pay" benefits provided under laws administered by the Veterans' Administration and pay or retirement benefits awarded or granted prior to the date of enactment to persons convicted, prior to such date, of the offenses enumerated in, or commission of violations defined by, the Act.

Extension of General Criminal Statute of Limitations. Of particular importance is the final section of the new law which amends Section 3282 of Title 18 U.S.C. by extending from three to five years the period of limitations applicable to general criminal offenses. Under the statute as amended, indictments may now be found and informations instituted within five years after the commission of such offenses. The amendment applies to offenses committed subsequent to the date of enactment as well as those committed prior thereto, if prosecution is not barred by any provision of law in effect prior to such date.

NOTICE TO ALL UNITED STATES ATTORNEYS

DENATURALIZATION AND DEPORTATION - "TOP PRIORITY" CASES

As you are aware, for some time it has been the policy of the Department, publicly announced, to proceed with vigor under the Immigration and Naturalization laws against major racketeers and subversives who are either aliens or naturalized citizens with a view to denaturalizing and deporting as many as possible of such persons with the utmost dispatch consistent with good government and the rights of the parties involved. In order to achieve this objective, designated representatives of the Attorney General's Office, Deputy Attorney General's Office, Federal Bureau of Investigation, Immigration and Naturalization Service, and Criminal Division, jointly, were charged with the responsibility of formulating and executing administrative plans and procedures within the framework of a program which, you may recall from your orientation week at the Department, was known as the Attorney General's Denaturalization and Deportation Program. Recently, the Commissioner of Immigration and Naturalization Service was assigned full responsibility for all administrative functions and duties of this program. Consequently, the designation "Attorney General's Denaturalization and Deportation Program" shall no longer be used to refer to these cases. Hereafter, they shall be designated "TOP PRIORITY - RACKETEER (SUBVERSIVE)." In order to insure that maximum effort shall be expended on "TOP PRIORITY" cases and those future cancellation and deportation cases involving notorious racketeers and top-level subversives, all correspondence referring to these particular classes of cases shall be conspicuously marked "TOP PRIORITY - RACKETEER (SUBVERSIVE)."

SOCIAL SECURITY ACT VIOLATIONS

False Statements. The Department wishes to bring to the attention of United States Attorneys its interest in effective enforcement of the penal provisions of the Social Security Act, notably 42 U.S.C. 408. This section proscribes the making of false statements and representations, and the submission of false information in, or in connection with, applications for payments under the Act.

Possible violations of the Social Security Act are viewed by the Department in much the same light as violations of the Railroad Unemployment Insurance and Railroad Retirement Acts. With respect to the latter cases, the Department has expressed its position at pages 94-95 of the United States Attorneys Manual, Title II, urging vigorous prosecution where wilful fraud is indicated, since the very magnitude of the program with its numerous beneficiaries requires prosecution as a deterrent to the dishonest and unscrupulous who would defeat the purpose of the legislation. The Department's position is equally applicable to cases involving violations of the Social Security Act, an equitably administered program of Social Security being of the

greatest importance to the national welfare. Accordingly, increased emphasis should be placed upon criminal prosecution in Social Security Act cases where the circumstances of intentional fraud are present.

FRAUD

Falsification of Application for Federal Employment. United States v. James Madison Bryan (S.D. Fla.). On June 25, 1954, defendant pleaded guilty to a one count information charging him with violating 18 U.S.C. 1001 by wilfully and knowingly making a false statement concerning his arrest record in his application for employment as a janitor with General Services Administration. Defendant answered affirmatively the question whether he had been arrested since his sixteenth birthday but in explaining his answer he listed one arrest for speeding, omitting to list four other arrests, including two instances of driving while intoxicated. On July 16, 1954, he was sentenced to 18 months, suspended, and placed on 18 months supervised probation with the special provision that he refrain from the use of liquor.

CIVIL RIGHTS

Brutality by Police - Summary Punishment. United States v. Thomas Middleton (D. Md.). On August 31, 1954, defendant, a Baltimore City police officer, was indicted for violating 18 U.S.C. 242 by depriving Ace Armentrout, a paratroop sergeant, of his rights under the Fourteenth Amendment, particularly his right to be immune from summary punishment and not to be subjected to punishment without due process of law. The indictment charges defendant broke Armentrout's jaw and knocked his teeth out while Armentrout was drunk and in custody at a police station. There were three Military Police witnesses to the alleged beating of Armentrout. A state grand jury had previously refused to indict Middleton.

Staff: United States Attorney George Cochran Doub (D. Md.).

* * *

CIVIL DIVISION

Assistant Attorney General Warren E. Burger

COURT OF APPEALS

TUCKER ACT

Applicability of Domestic or Export Rate to Shipment Intended for Export But Diverted -- Denial of Stay and Referral of Question to ICC. United States v. Chesapeake & Ohio R.R. Co. (C.A. 4, August 14, 1954). This was an appeal from a judgment in favor of the Chesapeake & Ohio R.R. Co. in a suit against the United States under the Tucker Act to recover the difference between the domestic freight rate and the export rate on certain shipments from Pontiac, Michigan to Newport News, Virginia in 1941 and 1942. The freight was shipped on Government bills of lading showing that they were intended for export to China via Rangoon, Burma. The shipments were made in good faith with the intention that they would be exported and but for the fall of Rangoon to the Japanese they would have been so shipped. After the fall of Rangoon the shipment was allowed to remain in Newport News since it was impossible to transport it to China by way of that port. The Government thereupon shipped the freight to storage centers in the United States. The Railroad Company billed the Government for the domestic tariff rate which was duly paid. Subsequently, the General Accounting Office exercised its statutory right (49 U.S.C. 66) to deduct from other amounts due the railroad the difference between the domestic rate and export rate, which was lower. The present action was instituted by the railroad to recover the amount of this deduction. The District Court entered judgment in favor of the railroad for $2,671.43. The court held that the Government's good faith and intention at the time the shipments were started were not controlling; that the rate on file with the I.C.C. for purely domestic shipments from Pontiac to Newport News and another rate for export shipments initially moving between those two points "determined" the reasonableness of both rates; and that the tariff requirement for actual proof of exportation for application of the export rate was a reasonable safeguard. The court further held that the shipments herein involved never acquired an export status and that the Government made no attempt to ship the equipment anywhere abroad.

On appeal, the Court of Appeals for the Fourth Circuit affirmed. The appellate court held that the Government's intention to export was abandoned after the fall of Rangoon and that the shipment was converted into one ending in this country, to which the domestic rates applied. The court held that this was not a case of frustration of the enterprise since the Government was not prevented from exporting the equipment to countries other than China, and that its voluntary conversion to a domestic shipment called for the payment of the higher

domestic rate. The appellate court stated that the reasonableness of the rates was not before it but only the question of which rate was applicable. The Fourth Circuit went on to hold that while the I.C.C. may pass on the reasonableness of rates, the courts may not, but must approve Commission rates.

The Government contended that the District Court should have stayed the proceedings and referred the case to the I.C.C. for an adjudication of the reasonableness of the domestic rate in relation to the shipments. The appellate court ruled that aside from the fact that no such action was asked of the court below the question of a stay of proceedings was a matter resting in its sound discretion and no court would reasonably have exercised that discretion for a stay and referral when both parites, as here, were barred by limitations from asking the Commission for relief.

Staff: Alan Rosenthal (Civil Division)

DEFENSE PRODUCTION ACT OF 1950

Delivery Without Sale With Return or Sale Dependent on Rise in Ceiling Price, Held No Violation of Price Regulation. Orville B. Saunders, et al. v. United States of America (C.A. 10, July 27, 1954). In this case the Government brought an action under the Defense Production Act of 1950 (50 U.S.C. 2105) and Ceiling Price Regulation 53 (16 F.R. 6381) to recover damages for the sale and delivery of battery lead scrap at over-ceiling prices. Defendants comprised an Oklahoma partnership in the business of buying and selling scrap metals. One of their customers who purchased battery lead scrap was the Eagle-Picher Co. of Texas. Early in October, 1951, the ceiling price of scrap lead was 17¢ per pound. On October 2 and 3, 1951, defendants and Eagle-Picher received brief telegrams from responsible sources in the trade that OPS had advanced the ceiling price of lead to 19¢. Relying on this information, defendants contracted in writing to sell Eagle-Picher a quantity of lead at 19¢ and two car load deliveries were immediately made and paid for under this contract. Within a week, however, both parties learned that the telegraphed information was erroneous, that sales at 19¢ were illegal. But apparently expecting such a rise in the ceiling price, they thereupon orally agreed that defendants should continue shipping quantities of scrap lead, that the scrap would remain in the possession of Eagle-Picher, but that no sale actually would take place until a price could be agreed upon or until the ceiling price was raised to 19¢. If the price did not advance to 19¢ or if the parties did not agree on a price, it was agreed that Eagle-Picher would return the lead or similar material.

Under this oral agreement six additional shipments to Eagle-Picher were made by defendants. It was apparently the custom in the trade for the prospective purchaser to make advance payments upon receipt of the bill of lading. The "usual" advance percentage payments were made to defendants on these shipments, but the record does not indicate whether the payments were on the basis of 17¢ or 19¢ per pound.

On October 23, after these shipments had been received by Eagle-Picher and after these advance payments were made, OPS increased the ceiling price of lead to 19¢. Thereafter, defendants and their customer settled their accounts on the basis of sales at 19¢.

Alleging that these transactions were contrary to 50 U.S.C. 2105(a) which makes it unlawful "to sell or deliver" any material in violation of Ceiling Price Regulations, the Government brought this suit against the sellers, seeking triple the amount of the over-charges (aggregating approximately $11,500). Defendants conceded there had been violation as to the first two shipments, asserted that such had not been wilful, denied that the other six shipments were violative and argued that as to these there was neither a sale nor delivery of the lead within the meaning of the Act but only a bailment and that such is not prohibited. The District Court (per W.R. Wallace, D.J.) filed an opinion finding that although the remaining six transactions did not constitute sales, they were deliveries within the Act's prohibition; that the violations were not wilful; and that the Government was entitled to actual over-charges amounting to $3,749.32 rather than triple damages.

On appeal, the Tenth Circuit reversed. The opinion states that even if a delivery without a sale is a violation of the Act, such delivery would have to be for an amount above the ceiling price; that here, when delivery was made the agreement was that the material or its equivalent would be returned if the ceiling price did not advance to 19¢; that title did not pass; that the mere change of possession without the consummation of a sale until after the ceiling price was raised did not constitute a violation of the terms or purpose of the Act; nor does such a transaction tend to circumvent the Regulations.

Staff: Leonard L. Ralston, Assistant United States Attorney (W.D. Okla.).

DISTRICT COURT

LABOR MANAGEMENT RELATIONS ACT OF 1947

Injunction to Forestall Strike of Atomic Energy Workers. United States v. Union Carbide and Carbon Corp., et al. (Civil No. 2456, E.D. Tenn.). On July 6, 1954, the President issued Executive Order No. 10542 (19 F.R. 4117) creating a Board of Inquiry which was directed to advise him as to the causes and issues of a labor dispute or disputes between Union Carbide and Carbon Corp., and certain of its employees at gaseous diffusion plants of the Atomic Energy Commission situated at Oak Ridge, Tennessee, and Paducah, Ky. The Board made its report to the President on July 10, 1954, but the President deferred directing the Attorney General to institute suit for injunctive relief under Section 208 of the Labor Management Relations Act of 1947 (29 U.S.C. 178) since the men returned to work at both plants on July 10, 1954.

Subsequently, however, the same employees who had struck between July 6 and July 10 threatened a strike to commence at 8:00 a. m. on August 12, 1954. Accordingly, on August 11, 1954, the President directed the Attorney General to institute the suit and a temporary restraining order was obtained at 11:00 p.m. (E.S.T.) from Judge Taylor of the Eastern District of Tennessee. Upon service of the temporary restraining order, the strikes at Oak Ridge and Paducah which had been scheduled to begin at 8:00 a.m. on August 12, 1954, were called off.

On August 27, 1954, the Government's application for an injunction came on for hearing. The Government presented a representative of the Defense Department and two representatives of the Atomic Energy Commission. Carbide, although present and participating in the hearing, did not oppose the injunctive relief and took a more or less passive role at the hearing. The Union, however, vigorously opposed the Government's application and presented two witnesses of its own in addition to vigorously cross-examining the Government's witnesses as to the question of whether or not the strike imperiled the national safety, all of whom withstood such cross-examination. At the conclusion of the hearing Judge Taylor held that the Government had established the peril to the national safety and, therefore, was entitled to injunctive relief under the Act, since, the Union had conceded that a substantial part of the Atomic Energy industry was affected by the strike and that such industry was engaged in commerce within the meaning of the Act. The Court also rejected the Union's contentions that the President, in not directing the Attorney General to institute the suit for a period of 32 days after receipt of the report of the Board of Inquiry, had waited too long and that the Court did not have jurisdiction since the terms of the Act would require that the President receive a new report from the Board of Inquiry.

Staff: Warren E. Burger, Assistant Attorney General; George Stephen Leonard; Edward H. Hickey; John G. Roberts (Civil Division); John C. Crawford, United States Attorney (E.D. Tenn.).

TORT CLAIMS ACT

28 U.S.C. 2401 -- Time Cause of Action Accrues -- Limitation of Statutory Period to Two Years Even Though Claim for $1,000 Filed Administratively. Wilroy Reid v. United States of America (S.D. Miss., August 19, 1954). Reid brought suit under the Tort Claims Act against the United States for $300,000 damages allegedly accruing because of the negligent failure of an army physician at Fort Benning, Georgia to advise him that x-ray pictures taken of his chest on March 7, 1949 indicated tuberculosis and that he should have further tests and treatment. The complaint herein was not filed until November 29, 1951, being more than two years after the cause of action accrued, according to the Government's theory. Plaintiff contended (1) that the cause of action did not accrue until he discovered the negligence when additional x-ray pictures of his chest were taken in April, 1950, and (2) that the statute was

tolled as he had filed a claim for $1,000.00 administratively which claim was not acted upon until November 9, 1951, and his complaint being filed November 29, 1951, was timely, being within six months after the denial of his administrative claim.

The Court sustained the Government's motion for summary judgment holding that the cause of action accrued in March, 1949, and that the claim for $1,000 administratively filed was not the same claim as that here sought to be maintained for $300,000. The court cited Aachen Munich Fire Insurance Company v. Morton, 156 F. 654 (C.A. 6); Pickett v. Aglinsky, 110 Fed. 2d 628 (C.A. 4); Silvertooth v. Shallenberger, 174 U.S. 365; Carnes v. United States, 186 F. 2d 648 (C.A. 10); United States v. Sharpe, 189 F. 2d 239, 241; Anderegg v. United States, 171 F. 2d 127; Barrett v. Jackson, (Ga) 162 S.E. 308.

Staff: Robert E. Hauberg, United States Attorney and E. R. Holmes, Jr., Assistant United States Attorney (S.D. Miss.)

* * *

ANTITRUST DIVISION

Assistant Attorney General Stanley E. Barnes

DISPOSITION OF ANTITRUST PROCEEDING

United States v. Owyhee Bottled Gas Service, et al. (Criminal Action No. 3434, D. Idaho). On August 27, 1954 Judge Clark at Boise, Idaho accepted, over the Government's objection, nolo pleas entered on behalf of all the defendants in the above-entitled case.

The Court assessed fines totaling $1,400 and stated that it had imposed nominal fines since it did not believe the defendants knowingly had violated the law.

The indictment filed on March 15, 1954 charged that defendants had engaged in an unlawful combination and conspiracy to suppress and eliminate competition in the sale and distribution of liquefied petroleum gas in the Boise Valley Area. The indictment also alleged that defendants had fixed prices, refrained from soliciting each others customers, formed a "fighting" company to combat competitors who sold below the established price, and threatened to boycott suppliers of competitors who sold below the established price.

Staff: Edward M. Feeney, John H. Waters and Gerald F. McLaughlin (Antitrust Division - Seattle Office)

DISMISSAL OF CRIMINAL ANTITRUST CASE FOLLOWING SUPREME COURT DECISION IN COMPANION CIVIL CASE

United States v. Bowman Dairy Co., et al. (Criminal Action No. 48CR360, N. D. Ill.). On September 2, 1954, Judge Julius J. Hoffman in Chicago dismissed the criminal indictment against eight major dairies in the Chicago area and nine of their officers in the above-entitled case. Judge Hoffman's dismissal followed the Government's motion of nolle prosequi.

The defendants were: Bowman Dairy Company; American Processing and Sales Company; Beloit Dairy Company; Meadowmoor Dairies, Inc.; Western United Dairy Company; William R. Boruszak; Hyman I. Freed; H. H. Inglehart; Walter F. Kettell; O. N. Koenig; Francis H. Kullman, Jr.; S. D. McGuire; D. Cameron Peck; and O. O. Smaha.

The indictment returned in 1948 charged defendants with conspiring to allocate a major part of the milk business in the area among themselves and to refrain from competing with each other for the business of store customers and public institutions.

The facts on which this case was based were identical with those which were tried last year before Judge Campbell in a companion civil case. Judge Campbell decided the civil case in favor of the defendants and his action recently was affirmed by the Supreme Court in United States v. The Borden Co., et al. The indictment, therefore, was dismissed since the failure of the Government to succeed in the civil case constituted res judicata insofar as the instant case was concerned.

Staff: Harry H. Farris, James E. Mann and Thomas A. Rothwell
(Antitrust Division - Chicago Office)

GOVERNMENT'S MOTION TO INSPECT GRANTED

Re: United States v. J. Myer Schine, et al. (Cr. 6279-C - W.D.N.Y.); United States v. Schine Chain Theatres, Inc., et al. (Civ. 223 - W.D.N.Y.) On August 6, 1954 District Judge John Knight denied a number of motions to dismiss filed on behalf of various respondents in these contempt proceedings, and granted a motion by the Government for the production and inspection of respondents' books and records, pursuant to Rule 34 of the Federal Rules of Civil Procedure.

Respondents had argued that the granting of discovery in a civil contempt proceeding would be prejudicial to their rights in the companion criminal contempt proceeding, but Judge Knight ruled that the inclusion in the decree alleged to have been violated of a so-called visitation provision, permitting access by the Government to relevant documents for the purpose of enforcement of the decree, disposes of any question of the right of the Government to examine relevant documents and records. A number of respondent corporations which were not parties to the original decree were also directed to produce their books and records on the basis of the Government showing that there had been such close connections and relationships between such corporations and the original defendants as to require such examination.

One of the motions to dismiss which was denied by Judge Knight in the civil contempt proceeding was based on the contention that the Government may not maintain civil contempt proceedings except in cases involving its proprietary interest. Some doubt had been created on this question by two prior adverse District Court decisions.

Staff: William D. Kilgore, Jr., Joseph E. McDowell, Lewis Bernstein
(Antitrust Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Condemnation

Power Site Value of Navigable Stream. United States v. Twin City Power Co. (C.A. 4). The United States condemned land on both sides of the Savannah River, a navigable stream, to use as a reservoir for the Clark Hill dam. The owner urged, and the district court agreed, that the land should be valued on the basis of its use in connection with the development of hydro-electric power from the Savannah River. The Government appealed from the award on the grounds that the value of land as a potential power site on a navigable stream is not an element of just compensation under the Fifth Amendment.

The Court of Appeals for the Fourth Circuit affirmed the judgment. It held that "we do not think that, because the availability of the land for water power purposes arises from the fact that it is appurtenant to a navigable stream, such availability should be ignored in appraising value for purposes of condemnation." The court purported to follow United States v. Chandler-Dunbar Co., 229 U.S. 53, saying: "that decision, we think, when properly interpreted supports our conclusion." As to Continental Land Co. v. United States, 88 F.2d 104 (C.A. 9), and Washington Water Power Co. v. United States, 135 F.2d 541 (C.A. 9), which denied recovery for power site value in a navigable stream, the Court of Appeals remarked "we think that this is contrary to what is clearly held by the Supreme Court."

There is presently pending in the Court of Appeals for the Fifth Circuit an appeal taken by the Government from judgments awarding similar compensation for the land on the Georgia side of the Savannah River.

Staff: John F. Cotter and Edmund B. Clark (Lands Division)

* * *

TAX DIVISION

Assistant Attorney General H. Brian Holland

DISCHARGE OF PROPERTY FROM FEDERAL TAX LIEN - NEW PROVISION IN 1954 INTERNAL REVENUE CODE

As most United States Attorneys are aware, the number of mortgage foreclosure suits in which the United States is named as a party defendant pursuant to 28 U.S.C. 2410, because of the existence of a federal tax lien on the property involved, is steadily increasing. In a very large percentage of these cases, the tax lien is of no value as applied to the particular property because the mortgage lien has priority and the fair market value of the property is such that no surplus will exist after satisfaction of the mortgage claim.

Under the 1939 Internal Revenue Code, it was not clear whether a mortgagee could secure an administrative discharge of the property from the tax lien without making some payment of the tax involved. In practice, the Internal Revenue Service frequently discharged property from a clearly worthless tax lien upon the payment of a nominal amount to be applied to the tax. Many mortgagees, however, were either unwilling to pay even a nominal part of another person's taxes; or did not realize that the property could be administratively discharged in this manner; or simply found it easier to commence their foreclosure actions and name the United States as a party defendant. As a result, the Department has on its hands a large amount of litigation in which the United States has no interest of value. Such litigation is, of course, expensive and time consuming.

The Tax Division has had this problem under study for some time in the hope of finding some way to eliminate the United States from participation in litigation which is wasteful and unproductive as far as it is concerned. It would appear that where the tax lien is clearly of no value, the property should be discharged from the tax lien administratively rather than as the result of litigation. In the hope of inducing mortgagees to seek administrative discharge of property from worthless tax liens, the Department recommended an amendment to the 1954 Internal Revenue Code to make it clear that the Revenue Service has the authority to release property from such a lien without the payment of even a nominal amount on the tax involved. This amendment was adopted and is now contained in Section 6325(b)(2) of the new Code.

United States Attorneys are urged to call the attention of attorneys in their districts to this new provision and to point out to them that property may be discharged from a worthless tax lien through administrative process, thus eliminating the necessity of joining the United States as a party defendant in a foreclosure action. The Revenue Service has advised that it is prepared to cooperate fully in this matter. It should be pointed out to practitioners that if the United States is joined as a party defendant in such cases, the United States has a right of redemption for one year from the date of sale (see 28 U.S.C., 2410(c)). Unless the

mortgagee secures a release of this right of redemption in some manner, it remains as a cloud on title for one year. Under the administrative process, a worthless tax lien can be completely discharged as to the mortgaged property and no right of redemption exists in the United States. Thus, there is a distinct advantage to mortgagees in pursuing the administrative process.

CIVIL TAX MATTERS
Appellate Decisions

Alimony Payments Taxable to Wife - Payments Made, Not by Husband, But by Surety on Separation Agreement. Luckenbach v. Pedrick (C.A. 2d), August 11, 1954. A separation agreement, which became incorporated into a divorce decree, provided for monthly payments to the taxpayer wife. At the same time, the husband's father became a party to an agreement under which he undertook to guarantee the payment of the alimony award. During the taxable years, the taxpayer received the stipulated payments from the father.

Affirming the decision of the lower court, the Court of Appeals held that the payments represented income taxable to the wife under Internal Revenue Code Section 22(k). While recognizing that the husband, who had not made the payments, would not be entitled to a deduction under Section 23(u) and that Congress intended to shift the tax burden to the wife and to relieve the financial burden of the husband, the Court held that there was nothing in the statute or its history which would justify the conclusion that the payments received by the wife are to be taxed to her only if the husband receives a corresponding deduction.

Staff: United States Attorney J. Edward Lumbard, and Assistant United States Attorney Arthur S. Ecker (S.D. N.Y.)

Constitutionality of Sixteenth Amendment to the Constitution. Porth v. Brodrick (C.A. 10th), August 7, 1954. While this case will probably add nothing to the substantive body of tax law, it at least enjoys the distinction of raising a novel point of constitutional law. Seeking a refund of the estimated income tax paid with the filing of his declaration, the taxpayer alleged, among other things, that the Sixteenth Amendment was unconstitutional because it placed the taxpayer in a position of involuntary servitude, contrary to the Thirteenth Amendment.

The Court of Appeals stated "The claim is clearly unsubstantial and without merit."

Staff: Karl Schmeidler (Tax Division)

Time for Filing Notice of Appeal - Entry of Judgment. United States v. Dagmar S. Cooke (C.A. 9th), August 27, 1954. This case was previously discussed in Volume 2, No. 14 of the United States Attorneys Bulletin, pp. 26-27. Subsequently, the taxpayers filed a petition for rehearing showing that the complaint had set forth the amount of taxes paid, for which the refund was sought, and that the answer had admitted the payment. Accordingly, it was urged that a docket entry reciting that the judgment was in favor of the plaintiff showed the substance of the judgment within the meaning of Rule 79(a) of the Rules of Civil Procedure.

The Court of Appeals, adhering to its original position, held that the docket entry did not constitute the entry of judgment because it did not show the substance of the judgment. The Court stated that, "The fact that an examination of the Government's answer would show admissions that the sums claimed in the complaints were in fact paid does not give the entries the substance of those amounts."

Staff: Erwin A. Goldstein (Tax Division)

DISTRICT COURT DECISIONS

Suits for Refund of Taxes Allegedly Overpaid - Status of Annuity Purchased for Former Employee as Gift or Compensation For Past Services - Burden of Proof to Show Donative Intent. Samuel B. Peters v. Smith, Collector; United States, Intervenor (E.D. Pa.). The Bulletin of April 16, 1954 (p. 20), reported the case of Samuel B. Peters v. Smith, Collector and United States, Intervenor (E.D. Pa.), in which taxpayer took to the jury the question of whether an annuity policy bought for him by his former employer after retirement, and the tax paid on that annuity for the taxpayer by the former employer on the theory that the policy was taxable income to the recipient, were gifts or income. This appeared to be the first time that this fact question was taken to a jury. A verdict was returned for the taxpayer.

The Court has now set the verdict aside and entered judgment for the Government, on the ground that there was no evidence of donative intent. The Court's comment on the burden of proof is of particular interest:

> * * * the whole issue goes back to the question whether in promising $25.00 a week for life the Company intended the payments as compensation for past services or as a pure gift. The burden of proof was upon the taxpayer to establish his contention by clear proof that the parties intended that result and acted unequivocally in accordance with such intention.

The Court also held that valuation evidence should not have been permitted to go to the jury because the amount of taxable income realized by the beneficiary was measured by the actual cost of the policy (I.R.C. (1939), Sec. 22(b)(2)(B)).

Staff: Kurt W. Melchior (Tax Division)

Assignment of Income - Liquidation of Wholly Owned Subsidiary as Anticipatory Assignment of Income Represented by Distributions About to Be Made by Another Corporation Then in Process of Liquidation. Charles F. Glore, Jr., et al. v. United States (N.D. Ill.). This was a suit in which a refund of $128,660.57 of income taxes was sought. The assessment was made on the theory that an anticipatory assignment of income took place where, with Corporation A in process of liquidation, Corporation B liquidated and distributed as a liquidating dividend in kind, among other things, 20,000 shares of Corporation A to its sole stockholder, C. (C was a director of Corporation A, as well.). Shortly thereafter, Corporation A distributed its final liquidating dividends, which were received by C and reported by C on his tax return. The Commissioner determined that at the time of Corporation B's liquidation, the 20,000 shares of Corporation A no longer represented a distribution of shares in A as a going corporation, but represented a right to receive the liquidating dividends of A when they would shortly be declared, and assessed a tax against B as an anticipatory assignment of income under the rule of Helvering v. Horst, 311 U.S. 112. The assessment was attacked largely on the ground that the corporate existence of A was not sufficiently near termination at the time of B's liquidation to invoke the Horst rule.

In this unusual factual situation, the Court has recently rendered judgment for the taxpayers. No opinion has been filed as yet.

Staff: Assistant United States Attorney John A. Looby (N.D. Ill.), and Kurt W. Melchior (Tax Division)

Estate Tax - Transfers in Which Decedent Retained Interest for Life - Estoppel to Claim Refund. The Farmers & Merchants Bank of Los Angeles, Admr., etc. (Speed F. Hughes' Estate) v. United States, et al. (S.D. Cal.). This was an action to recover estate tax allegedly overpaid. It was decided in favor of the Government upon the two contested issues by the District Judge, sitting without a jury. Decedent died in 1946.

The first major question presented was whether certain transfers made by decedent to his son during the year 1934-1937, inclusive, were includible in decedent's gross estate as transfers under which decedent had retained an interest for his life or for any period either not ascertainable without reference to his death or which did not in fact end before his death, within the scope of Section 811(c)(1)(B)(i) of the Internal Revenue Code, as amended. The second major question was whether decedent's estate and his son (who was a principal beneficiary and residuary legatee under decedent's will) were estopped from asserting that the amount of above-mentioned transfers by decedent to his son should be excluded from decedent's gross estate.

During the years 1933-1936 decedent's son (David) created three trusts to which he transferred certain property. The income therefrom was payable to his mother (Zenia) for her lifetime, such income upon her death

to be paid equally to David and decedent if they both survived Zenia, with remainder over to beneficiaries other than decedent or his estate after the deaths of both decedent and his wife. During the years just mentioned, both decedent and his wife also had transferred certain real estate and securities to David.

The Court found and determined (1) that the transfers of assets by decedent to David were made in consideration of David's agreement to transfer assets of equivalent value to the trusts above mentioned, and that such agreement was fully carried out pursuant to an agreement between decedent, his wife and his son; (2) that in the filing of their respective gift tax returns for the years above mentioned and in their representations upon which such gift tax liabilities were determined, the value of the above transfers of property from decedent to his son was excluded from decedent's gift tax liability upon the basis that such transfers by decedent were made for valuable consideration and were not gifts; (3) that decedent's estate is now estopped from obtaining any refund of estate tax paid upon the assertion that such transfers are not includible in decedent's gross estate; and (4) that the value of the property so transferred by decedent to his son is includible in decedent's taxable estate.

Staff: Edward R. McHale, Assistant United States Attorney (S.D. Cal.)

CRIMINAL TAX MATTERS

Specific Items - Introduction of Evidence as to Items Other Than Those Specified in Indictment - Charge to Jury as to Necessity for Taxpayer to Use Ordinary Diligence in Preparation of Returns. Milton D. Hartman v. United States (C.A. 8), 545 CCH Par 9522, July 26, 1954. Taxpayer was convicted on two counts of evasion. The indictment charged that the defendant failed to report two specific items of income for the year 1945 and one specific item for 1946. The defense was that the taxpayer relied upon his bookkeeper and accountant and that they had failed to notice these items on the books in preparing the returns. At the trial, the Government introduced evidence of other specific items of unreported income in addition to those alleged in the indictment. In reversing the conviction, the Circuit Court held that there was error in admitting testimony about a family partnership taxpayer had set up, when the family partnership was not in issue, and evidence pertaining thereto merely served to mislead the jury. Another ground for reversal was the trial judge's error in instructing that the taxpayer was guilty of tax evasion if he did not use ordinary diligence as to the correctness of his tax return.

Besides the evidence of specific items alleged in the indictment, the Government also introduced a great deal of evidence to show other specific items of income which the taxpayer should have included in his

return. The Court of Appeals held that this evidence was irrelevant and prejudicial. It is arguable that most of this additional evidence was admissible to show the taxpayer's intent. However, the Court's position finds some support in the fact that certain items of unreported income were specifically alleged in the indictment. This indictment was not in the form presently used by the Department, and since the present form is now used in all cases, the precise question presented here is not likely to arise in the future. It can be reasonably expected, however, that this case will be used by taxpayers to restrict the Government's proof where the court grants a rather specific bill of particulars.

The trial court's ruling that the taxpayer could not answer a direct question as to whether he relied on the accountant when that was his defense appears to be clearly erroneous. Likewise, there is no support for the trial court's instruction on "ordinary diligence." The opinion of the Court of Appeals seems clearly correct on these latter two points.

Staff: United States Attorney Harry Richards, and
Assistant United States Attorney Robert C. Tucker
(E.D. Mo.)

* * *

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

WITNESS' ATTENDANCE CARDS

It has been decided that United States Attorneys, instead of United States Marshals, should issue attendance cards to witnesses. The card has been revised and is now numbered USA 563. It is similar to the old Form 563 and each day's attendance of the witness should be "punched" as heretofore. The new card has been so arranged as to permit its use as an index card.

The Attorneys Manual will be changed in the near future but in the meantime this notice will be your authority to furnish witnesses with the form. A small supply of forms was shipped to you on September 15. Thereafter they should be requisitioned in the usual manner.

OUTSTANDING OBLIGATIONS

In Memo No. 80 dated May 27, 1954, the Department requested that a list of outstanding obligations at the close of business June 30, 1954 be furnished.

It is now apparent that in many instances these lists were prepared with very little investigation into the past business activities of the office. The Department is becoming embarrassed by the steady flow of previously unreported items arriving in every mail. Forthcoming memos will deal with new legislation directed at such lax practices. Please take due notice that regulatory agencies in the future may not allow this Department to recognize such items for payment. Department Memos 17, 18, 27, 80 and Department Order 4168 and supplements should be thoroughly reviewed in this regard. Any United States Attorney's office which does not have copies of such memos and supplements, should immediately request the Department for copies thereof.

APPROPRIATION CHARGEABLE WITH PSYCHIATRIC EXAMINATIONS AND TESTIMONY

The United States Attorneys Manual will be changed in due course to provide on page 146 of title 8, under paragraph (4) at the bottom of the page that such examinations and testimony will be paid for from the appropriation "Fees and Expenses of Witnesses." This change in the Manual comes about from appropriation act changes.

* * *