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Assistant Attorney General Donald F. Turner

SUPREME COURT

SHERMAN ACT

SUPREME COURT HOLDS TERRITORIALIZATION TO CONSTITUTE PER SE VIOLATION OF SECTION 1 OF ACT.

United States v. Sealy, Inc. (No. 9 - O. T. 1966; June 12, 1967; D. J. File 60-89-15)

The United States brought this civil action in the Northern District of Illinois, charging that Sealy, Inc. had violated Section 1 of the Sherman Act by (a) setting the retail prices of bedding products sold under the Sealy label, and (b) dividing the country into mutually exclusive marketing regions. The Sealy organization is comprised of some 30 independent bedding manufacturers, many of whom also sell bedding products under private brand labels. Sealy, Inc. itself does no manufacturing; it functions basically as a franchiser, assigning territory to the licensee-manufacturers and overseeing their operations.

After trial, the district court (per Austin, J.) found that Sealy, Inc., together with its licensees, had conspired to fix minimum retail prices on all bedding products bearing the Sealy name, thereby violating Section 1. Defendant was enjoined from this conduct, and did not appeal that order. However, on the territorialization charge, the trial court dismissed the Government's charge that the market allocation constituted a per se violation of Section 1. The United States appealed on this issue.

The Supreme Court, Justices Clark and White not taking part, reversed the district court's holding with respect to territorialization. In an opinion by Mr. Justice Fortas, the Court found the restraints involved in Sealy to be horizontal in character, and accordingly held the territorialization to constitute a per se violation of Section 1. The licensees together own more than 90% of the Sealy stock, and all 5 of the acting members on the board of directors (which controls and manages Sealy, Inc.) are licensee-stockholders. Thus, although the Court recognized that Sealy, Inc. functioned as a viable and legitimate entity, the territorial restraints, it said, must be regarded as emanating from the licensees themselves. As such, the division of markets in Sealy is horizontally imposed, thereby distinguishing this case from White Motor Co. v. United States, 372 U.S. 253, where the Court declined, on summary judgment, to strike down certain vertically

imposed restraints. The Court also took note of the trial court's finding on price fixing, which was achieved by "the 'stockholder representatives' acting through and in collaboration with Sealy mechanisms." The Court held that this "underlines the horizontal nature of the enterprise", and refutes defendant's argument that the allocation of markets should be justified as ancillary to the trademark licensing program.

In a dissent, Mr. Justice Harlan contested the majority's conclusion that the restraints are horizontal. In his view Sealy, Inc. has lawful and genuine purposes apart from those of its licensees, and therefore an inquiry into the reasonableness of the restraints would have been appropriate. However, since the Government insisted on the per se approach during the trial below, Harlan would have affirmed the district court's dismissal of the Government's charge relating to territorialization.

The case was argued by Daniel M. Friedman of the Solicitor General's office.

Staff: Richard A. Posner (Solicitor General's office); Robert B. Hummel and Richard A. Wegman (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Carl Eardley

COURTS OF APPEALS

ADMINISTRATIVE LAW

DISTRICT COURT LACKED JURISDICTION TO ENJOIN FEDERAL TRADE COMMISSION HEARING -- IN VIEW OF PROVISION FOR EXCLUSIVE REVIEW BY COURT OF APPEALS OF FINAL ORDERS OF THE AGENCY.

Frito-Lay, Inc. v. Federal Trade Commission (C. A. 5, No. 23811; June 21, 1967; D. J. File 102-1227)

This action for injunctive and declaratory relief was brought in the district court to prevent the Federal Trade Commission from conducting an adjudicatory proceeding to determine whether Frito-Lay's merger activities violated Section 7 of the Clayton Act. Frito-Lay complained that the proceedings were beyond the Commission's jurisdiction; that in its prehearing proceedings the Commission had violated certain sections of the Administrative Procedure Act; and that a letter written by complaint counsel to prospective witnesses advising them they might or might not speak to Frito-Lay's counsel, as they chose, was prejudicial.

The district court dismissed the complaint for lack of jurisdiction.

The Fifth Circuit affirmed. The appellate court held that the statutory right to review by the court of appeals--of the order the Commission would enter at the end of the adjudicatory proceedings--was Frito Lay's exclusive remedy.

Staff: Robert V. Zener and Harvey L. Zuckman (Civil Division)

ADMIRALTY - LONGSHOREMEN'S ACT

CLAIM UNDER LONGSHOREMEN'S ACT DOES NOT BAR LATER ASSERTION OF STATUS AS SEAMAN, FOR PURPOSES OF JONES ACT RECOVERY.

Boatel, Inc., & P. J. Donovan v. Emile R. Delamore (C. A. 5, No. 21459; June 21, 1967; D. J. File 83-32-67)

Claimant Delamore was injured while employed in operating a motor on a drilling craft in the Gulf of Mexico off the Louisiana coast. His injury was followed by payments by his employer, Boatel, Inc., under the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, et seq. Claimant, contending that he was a "member of a crew of a vessel" excluded from the Compensation Act's coverage, later attacked the Deputy Commissioner Donovan's jurisdiction to make any award under the Compensation Act. (As a crew member, claimant was free to sue his employer for negligence under the Jones Act.) The Deputy Commissioner, noting that claimant was employed essentially in drilling work, ruled that he was not a member of a crew. The district court set aside the Deputy Commissioner's determination.

The Fifth Circuit affirmed. The Court held that claimant was not estopped to deny the applicability of the Longshoremen's Act merely because he had accepted benefits under the Act and had invoked its jurisdiction by filing a formal claim. The Court also held that the Deputy Commissioner was wrong as a matter of law in finding that claimant was not a "member of a crew of a vessel". It pointed out that claimant was assigned permanently to a vessel and performed duties which contributed to the vessel's function.

Staff: David L. Rose (Civil Division)

INTERSTATE COMMERCE COMMISSION

VALIDITY OF INTERSTATE COMMERCE COMMISSION EMERGENCY CAR SERVICE ORDER MAY NOT BE CHALLENGED IN ENFORCEMENT ACTION; SUCH ORDERS MAY BE CHALLENGED ONLY BEFORE THREE-JUDGE COURT AFTER EXHAUSTION OF ADMINISTRATIVE REMEDIES.

United States v. Southern Railway Co. (C.A. 4, No. 10,769; May 30, 1967; D.J. File 59-14-228).

Finding that unjustifiable delays in the placement and removal of such cars were impairing effective utilization of freight car capacity, the ICC declared the existence of an "emergency" and issued Car Service Order No. 947. That order limited the time for positioning cars for unloading after arrival at the carriers' yards and for removing empty or loaded cars. The Order was issued under the Commission's summary power in 49 U.S.C. 1(15) which permits the Commission to dispense with a hearing whenever it is of the "opinion that * * * [an] emergency requiring immediate action exists * * *."

The Government brought this action in the district court against the railroad to recover statutory penalties for several violations of the Order. The railroad defended on the ground that the Order was outside the emergency powers of the Commission. In response to that contention, the Government asserted that the railroad could not challenge the validity of the Commission's Order except before a three-judge district court under conditions prescribed by statute. Moreover, the Government contended that the Order was valid in any event. The district court rejected both contentions of the Government, holding that it had jurisdiction and further that the Order was invalid.

On our appeal, the Fourth Circuit reversed. Analyzing the statutory provisions governing review of Commission orders, the Court accepted our position regarding the district court's jurisdiction, and held that the regular one-judge district court lacked jurisdiction to invalidate the Order. The Court of Appeals noted that the statute confined a challenge to the validity of an order to a three-judge district court in accordance with 28 U. S. C. 2321-2325, after the carrier had filed and the Commission had ruled upon a petition for rehearing, reargument or reconsideration, as set forth in 49 U. S. C. 17(6) and 17(9). In so holding, the court followed the decision of the Fifth Circuit in United States v. Southern Railway Co., 364 F. 2d 86, certiorari denied, 35 L. W. 3391 (May 8, 1967), a substantially identical case.

Staff: Kathryn H. Baldwin (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURT OF APPEALS

GAMBLING

UNDER 18 U.S.C. 1952 USE OF INTERSTATE FACILITY NEED ONLY BE WITH INTENT TO FACILITATE CARRYING ON OF BUSINESS ENTERPRISE INVOLVING GAMBLING IN VIOLATION OF STATE LAW; INTENT TO VIOLATE FEDERAL LAW NOT NECESSARY; DEFENDANT NEED NOT PERSONALLY USE INTERSTATE FACILITY.

United States v. Miller and United States v. Bash and Woods (C.A. 7; June 9, 1967; D.J. File 164-26-11)

Appellants were convicted on indictments charging them with using an interstate wire ticker tape facility which they had installed in their poolrooms for the purpose of promoting and facilitating the carrying on of gambling activity which they knew to be in violation of state law by the posting of scores from the machine to a blackboard on the premises, all in violation of 18 U.S.C. 1952 and 2. On appeal, appellants argued that under Section 1952 an interstate facility must be used knowingly, wilfully or intentionally and thus the jury should have been instructed that ignorance on their part that they were violating a federal law was a relevant factor in determining whether they were guilty. In squarely rejecting this contention and in finding that Section 1952 does not require an intent to violate the federal law by using a facility in interstate commerce, the Court referred to the wording of the statute and concluded that Congress did not require any mens rea with respect to the use of an interstate facility. The Court found that Congress only required that there be an intent to facilitate the carrying on of any business enterprise involving gambling in violation of state laws. If Congress had intended to require specific intent with respect to the use of the interstate facility, the phrase "with intent to" or its equivalent would have been juxtaposed to modify "uses" in Section 1952(a). Thus, "intent" as employed in Section 1952 refers to a violation of state laws and a defendant's ignorance of the federal statute is wholly irrelevant. The Court approved the district court's conclusion that "the use of a facility in interstate commerce is a necessary jurisdictional element of an offense under 18 U.S.C. 1952, but that no specific mental element or specific intent *** need be shown with reference to such use," 258 F. Supp. 807, 812 (1966).

Although there was no evidence that Woods or Bash personally posted scores obtained from the ticker tape, the machine was used in their

establishment to tabulate baseball scores to compute winning tickets on their baseball pools. The Court ruled that the applicability of the statute does not depend on whether the defendant personally uses the interstate facility in conjunction with illegal gambling activity. The defendants knew that their customers used the ticker to check baseball scores and to post these scores on blackboards provided by the defendants. Thus, the Court held that with the defendants' knowledge and approval, their customers promoted the baseball pool by posting the scores obtained from the ticker tape. These activities constituted a "use" of an interstate facility by the defendants. Additionally, in this factual context, 18 U.S.C. 2(b) rendered the defendants punishable as principals.

With reference to the use of the interstate facility itself, the Court noted that Section 1952 does not require that the facility be "essential" to the gambling operation; it need only "facilitate" the carrying on of the illegal gambling. As used in this statute, "facilitate" means "to make easy or less difficult". United States v. Barrow, 212 F. Supp. 837, 840 (E.D. Pa. 1962).

Finally, the legislative history of Section 1952 was cited to demonstrate that this statute was enacted to condemn the use of an interstate facility and local gambling activities facilitated by the use of the interstate facility. See House Report No. 966, 2 U.S. Code, Congressional and Administrative News, 87th Cong., 1st Sess. (1961) at p. 2665: Congress fully intended this statute to apply to local gambling, for it "decided that the facilities of interstate commerce become tainted when they are used by persons with evil motives and who perform evil acts". United States v. Barrow, supra, at 842.

Staff: United States Attorney Alfred W. Moellering and Assistant United States Attorney Richard F. James (N.D. Ind.); Philip Wilens and Robert M. Ornstein (Criminal Division)

REINDICTMENT

ADDITION OF COUNTS ON REINDICTMENT AFTER VACATED CONVICTION

The addition of counts to a new indictment after a conviction has been reversed on appeal is both undesirable as a matter of policy and questionable as a matter of law. Although this practice has not yet been successfully challenged, three members of the Supreme Court have expressed strong doubts as to its legality. See United States v. Ewell, 383 U.S. 116 (1966), dissent of Justice Fortas at 126.

In the typical narcotics case, for example, when the defendant was originally indicted under 21 U.S.C. 174 or 26 U.S.C. 4705(a), the addition of

counts under 26 U.S.C. 4704(a) is unwarranted except in those situations where it is intended that the defendant be permitted to plead to an offense with a lower minimum penalty or that the judge be afforded an opportunity to take account of the time already spent in prison.

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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

CERTIFICATION OF JUDGMENTS

The certification by clerks of court of judgments for registration in other districts has been made uniform and the use of a new Certification of Judgment form has been prescribed. United States Attorneys are advised that the Certification of Judgment form must accompany the judgment (civil or criminal) when sent to another district for registration.

APPOINTMENTS

UNITED STATES ATTORNEY

The nomination of the following United States Attorney has been confirmed by the Senate:

Missouri, Eastern - Veryl L. Riddle

Mr. Riddle was born December 6, 1921 in Dunklin County, Missouri, is married and has four children. He attended Southeast Missouri State College, Cape Girardeau, Missouri, and the University of Buffalo, Buffalo, New York from 1939 to 1946. Mr. Riddle attended Washington University School of Law, St. Louis, Missouri from 1946 to 1948 when he received his LL.B. degree. He was admitted to the Missouri Bar in 1948. Mr. Riddle was with the Immigration and Naturalization Service, Department of Justice, from 1943 to 1944 and in 1946. He served in the United States Army as a Special Agent, Intelligence Corps, from 1944 to 1946. Mr. Riddle was a partner in a private law firm in Malden, Missouri from 1948 to 1950 and a prosecuting attorney in Dunklin County, Missouri from 1951 to 1952. Since 1952 he has been a senior partner in a private law firm in Malden, Missouri.

ASSISTANT UNITED STATES ATTORNEYS

Kansas - KENNETH F. CROCKETT, ESQ.; Washburn School of Law, LL.B., and formerly in private practice.

Louisiana, Eastern - ROSS T. SCACCIA, ESQ.; Tulane University, LL.B., formerly Assistant D.A. and in private practice.

Louisiana, Eastern - JOAN E. CHAUVIN; Loyola University, LL.B., formerly Assistant D.A. and in private practice.

Massachusetts - HAROLD J. KEOHANE, ESQ.; Harvard, LL.B., formerly in private practice.

Oregon - MALLORY C. WALKER, ESQ.; Northwestern College, LL.B., and formerly Oregon Assistant Attorney General.

District of Columbia - JOAN A. BURT; Howard University, LL.B., and formerly in private practice.

Wisconsin, Eastern - ROCH M. CARTER, ESQ.; Marquette University LL.B., and formerly Law Clerk U.S. District Court.

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURT OF APPEALS

INDIANS

NON-REVIEWABILITY OF ADMINISTRATIVE DETERMINATION AS TO INDIAN'S RESTRICTED ESTATE, 25 U. S. C. 372, 373 -- DISCRETIONARY EXCEPTION TO ADMINISTRATIVE PROCEDURE ACT

Heffelman v. Udall, (C. A. 10; May 24, 1967; DJ File No. 90-2-4-92)

The United States District Court for the Northern District of Oklahoma decided it had no jurisdiction to entertain appellant's petition for judicial review of the Secretary of Interior's determination that he was not the common law husband of a deceased Quawpaw Indian who had willed one-third of her restricted estate "to [her] husband should she remarry." Before the Tenth Circuit appellant contended that, although determinations by the Secretary made under Section 1 of the Act of 1910 (25 U. S. C. 372) were expressly final and conclusive, the Secretary's action under Section 2 of that Act (25 U. S. C. 373) dealing with Indian's wills were reviewable and that such had been held by the District of Columbia Circuit in the case of Homovich v. Chapman, 191 F. 2d 761 (1951).

In affirming the finding of no jurisdiction the Tenth Circuit distinguished Homovich as dealing with the validity of a will and said that to base jurisdiction to review the Secretary upon the presence or absence of a will is to reduce an "Act of Congress to impotence by its contradictions." Accordingly, the Court concluded that the determination of no common law marriage came within the jurisdictional exception stated in Section 10 of the Administrative Procedure Act. The Court then went on to note that appellant's petition was not aided by conclusory allegations such as an "arbitrary and capricious denial of constitutional rights", "the denial of the right to introduce undesignated evidence" and "the denial of the right to cross-examine undesignated witnesses."

Staff: John G. Gill, Jr. (Land and Natural Resources Division).

COURT OF CLAIMS

NAVIGABLE STREAMS

FLOOD CONTROL; RIGHT TO SILT LAND BENEATH ORDINARY HIGH WATER MARK UNDER COMMERCE CLAUSE IN AID OF NAVIGATION AND FLOOD CONTROL WITHOUT PAYMENT OF COMPENSATION

Allen Gun Club v. United States, (C. Cls.; June 9, 1967; DJ File No. 90-1-23-1125)

As part of a flood control project Congress authorized the construction of a new channel for the Sangamon River in Illinois, whereby the flow of the Sangamon which formerly entered the Illinois River toward the north was redirected to flow through Hager's Slough and Muscooten Bay and enter the Illinois River at Beardstown, Illinois, flowing south. Hager's Slough and Muscooten Bay were used as navigable waters of the United States before the turn of the century. The floods on the Sangamon River had caused trees, stumps and snags to accumulate and become lodged in the riverbed interfering with its flow and causing the Sangamon River channel to become discontinuous and braided. When the new channel was constructed a large accumulation of silt flowed down into Hager's Slough and Muscooten Bay. Hager's Slough and Muscooten Bay and other lakes in the area were used for duck hunting. The silt from the Sangamon River tended to fill the watered areas and destroy its use for duck hunting purposes. When the initial load of silt was deposited the plaintiff brought suit for the damage to its property. The lawsuit was settled in exchange for an easement to silt and scour plaintiff's lands. The silt progressed to the point where it interfered with navigation and the ability to get dredges and other machinery through Muscooten Bay to maintain the new Sangamon River channel. The Army Engineers dredged a channel through the silt and plaintiff brought this present action. We defended on the basis that our work was done in aid of navigation and also pleaded res judicata.

The Court held that since Muscooten Bay and the surrounding area had at one time been used as part of the navigable waters of the United States it retained its character as navigable waters even though it had not been so used for many years. The Court said:

> The Government has an inherent easement in navigable waters up to mean high water, in the exercise of which it may erect works for navigation which impair the interests of the owner of the upland, without incurring Fifth Amendment liability. [Citing cases] This includes the right to dredge. Tempel v. United States, 248 U.S. 121 (1918). Private ownership of the stream bed, under Illinois law, makes no difference. Tempel, supra, at p. 129. Plaintiff established fairly that the "New Sangamon" was primarily for flood control, not for the passage of vessels. The work now in litigation, being supplementary to the original project, is for the same ends; however, plaintiff is in error in attaching legal significance to this showing. We have held that flood control works in the Mississippi River Basin are for navigation. Kirch v. United States, 91 Ct. Cl. 196 (1940). We said at p. 202:

> In the flood-control legislation and in the acts of the Government designed to carry out * * * such legislation, the Government assumed the lead and took upon itself the effort of controlling the flood waters of the Mississippi River for the purpose of improving the navigability of that river and for the purpose of protecting as much land and property along the Mississippi from the ravages of floods as far as it was feasible and possible to do so. * * *

See also 33 U. S. C. sec. 701a, declaring that "destructive floods upon the rivers of the United States * * * impairing and obstructing navigation * * * constitute a menace to national welfare * * *." Acc. United States v. West Virginia Power Co., 56 F. Supp. 298, 302 (S. D. W. Va., 1944). It is clear that all success in controlling floods in that area aids navigation, because, as the record now before us shows, it is lack of control of floods that admits silt, logs, snags, and debris into the navigable streams. The navigation easement enables the Government, under the commerce clause, to employ submerged lands under navigable water for a variety of purposes helpful to commerce, including flood control. United States v. Appalachian Power Co., supra, at p. 426. The works herein, separately considered, may have impaired navigation of Muscooten Bay; indeed, the Army Engineers seem to expect to fill the entire Bay with silt eventually, except for the one clear channel. But the Congress, and those to whom it has delegated authority, may without Fifth Amendment liability, employ land submerged under navigable water in the way that in their judgment helps to accomplish the over-all purpose even if, intentionally or not, they impair navigation for some purposes in some areas. [Citing cases.]

Staff: Howard O. Sigmond (Land and Natural Resources Division)

DISTRICT COURT

ADMINISTRATIVE LAW

ACTION TO REVERSE DECISION OF SECRETARY OF INTERIOR APPROVING INDIAN WILL; DISALLOWED ON GROUND THAT SECRETARY'S DECISION IS BASED ON SUBSTANTIAL EVIDENCE.

Matin v. Johnson, (Civil No. 6444, N. D. Okla.; June 2, 1967; DJ File 90-2-4-110)

This action was brought to set aside a decision by the Secretary of the Interior which approved and upheld the validity of a will of an Osage Indian. Plaintiffs argued that Secretarial approval was arbitrary and contrary to evidence before the hearing examiner that testator was incompetent.

Plaintiffs also contended that decision was based upon evidence which was improperly included in the administrative record.

The Court ordered the allegedly improper material to be deleted from the administrative record submitted for its review but decided that the Secretary's action was supported by other substantial evidence and therefore entered an order sustaining the Secretary's decision.

Staff: Assistant United States Attorney Hubert A. Marlow (N. D. Okla.).

* * *

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

COURT OF APPEALS

PRIORITY OF LIENS

ACTUAL KNOWLEDGE OF WAIVER OF LIEN PROVISION IN SUBCONTRACT DOES NOT BAR MATERIALMAN FROM FILING STOP NOTICE UNDER NEW JERSEY LAW; NEW JERSEY LAW ONLY IMPLIES WAIVER OF LIENS AGAINST PROPERTY IN ORDER TO PROTECT OWNER.

Shore Block Corp. v. Lakeview Apartments, et al. and United States, Intervenor (C. A. 3, No. 16155; May 18, 1967; DJ File 5-48-6455).

This case involves the priority of liens on a construction job, and the nature of the remedy of a stop notice under New Jersey law, a mechanism which stops the payment of funds where no mechanic's lien can be filed against the property. On June 10, 1964, Lakeview Apartments, the owner of certain real estate, entered into a building contract with the Donrich Corporation, the prime contractor. The building contract was filed in the office of the County Clerk on June 11, 1964. On July 8, 1964, the contractor entered into a subcontract with Douglas T. Construction Company, covering masonry work and materials. The subcontract was not filed. It provided that the Douglas T. waived its right to file "a lien of any kind, including *** a stop notice." Douglas T. in turn hired Shore Block Corporation to supply materials, and did so from July 23, 1964 to December 15, 1964. During this period, an officer of Douglas T. advised an officer of Shore Block of the no-lien provisions of the unfiled subcontract. After October 23, 1964, no further payments were made to Shore Block by Douglas T. Finally, on January 29, 1965, Shore Block filed a stop notice against all the other parties. Donrich paid into New Jersey state court an interpleader fund of $25,657, acknowledging that it owed that amount to Douglas T. After the filing of the stop notice, the United States filed a $12,257.92 tax lien against Douglas T. On account of its claim, the Government removed the case to the federal district court. The district court held that Shore Block had no priority on account of its stop notice because it had waived its right to any liens by continuing to supply materials after it was apprised of the no-lien provisions in the subcontract. Since the entire fund was held to be the property of Douglas T., the United States was entitled to satisfy its outstanding tax lien.

On appeal by Shore Block, the materialman, the Court of Appeals reversed. It held that New Jersey law only implies a waiver of liens against property as to subcontractors, where the subcontractor knows of a contractual provision waiving the right to file liens. See Bates Machine Co. v.

Trenton and New Brunswick Railroad Co., 70 N. J. L. 684 (E. & A. 1904). The Court pointed out that the reason for this rule stems from a policy of protecting property owners from liens of subcontractors and materialmen, since if such parties could perfect liens against the property, the entire construction job would be disrupted. However, as the Third Circuit pointed out, the prime contractor stands in an entirely different position from the owner. He is the one who engages the subcontractors and, unlike the owner, requires no protection since he is in full charge of the conduct of the relations between himself and these parties.

The Court also held that there was no waiver in fact due to Shore Block's permitting a payment of $5,500 by Donrich to Douglas T. It indicated that this evidenced at most a pro tanto waiver, but not a total waiver of the right to file a stop notice.

In view of this holding, the Government's lien against Douglas T. could not be satisfied out of the interpleader fund, since Douglas T. had no property right to that fund. Whatever property interest Douglas T. might have had, it was effectively severed by the prior filing of a stop notice by the materialman.

Staff: Joseph Kovner, Mark S. Rothman and Stuart A. Smith (Tax Division)

DISTRICT COURT

PRIORITY OF LIENS

TAX LIEN HELD VALID, WITHOUT FILING, AS AGAINST LIEN OF CORPORATION ON ITS OWN STOCK.

Max B. Cohen, et al., and United States, Intervenor v. William J. Daniel (M. D. Fla., Civil No. 66-99-Civ. T.; May 25, 1967; D. J. File 5-17M-1453 (67-2 U. S. T. C. par. 9496)).

The Government intervened in this action for the purpose of collecting income tax assessments outstanding against Max B. Cohen in the total amount of $297,147.78 plus interest, and against Max & Bill, Inc., in the total amount of $18,781.55 plus interest. Cohen was the owner of two-thirds of the stock of the corporation and Daniel was the owner of one-third. There was no dispute that the assessments against the corporation were a first lien on the assets thereof, which consisted of certain real property and a judgment obtained in this action. Daniel claimed that the corporation had liens, under the corporate by-laws, on the stock owned by Cohen for indebtedness of Cohen to the corporation in the total amount of $53,924.78 plus

interest. The Government claimed that the corporation had no such liens, because Florida Statutes, Section 614. 17 (Section 15 of the Uniform Stock Transfer Act) provided that a corporation may not have a lien upon its stock unless stated upon the stock certificate, and there was no such statement on the stock certificates. The Court held that the corporation did have liens on Cohen's stock, on the ground that the purpose of Section 614. 17 is to protect good faith purchasers of corporate stock for value and persons who loan money upon the security of corporate stock. However, in accordance with the Government's alternative argument, the Court also held that, as against the liens of the corporation, the federal tax liens on Cohen's stock took priority from the dates of assessment, in accordance with Section 6322 of the Internal Revenue Code of 1954, rather than from the dates of filing notices thereof, since the corporation was not a "holder of a security interest, mechanic's lienor, or judgment lien creditor" within Section 6322(a) of the Internal Revenue Code of 1954, as amended by the Federal Tax Lien Act of 1966.

Staff: United States Attorney Edward F. Boardman and Assistant United States Attorney Robert B. McGowan (M. D. Fla.); Robert L. Handros (Tax Division).

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