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UNITED STATES DEPARTMENT OF JUSTICE

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Assistant Attorney General Donald F. Turner

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United States v. Owens-Corning Fiberglas Corp., et al. (N. D. Calif., Cr. 40052, July 31, 1967; D. J. 60-14-61)

On July 31, 1967 Judge Oliver J. Carter, in a written Memorandum and Order, denied all of the below described motions of the remaining twenty defendants in this case.

An information filed charged the corporate and individual defendants with a conspiracy to rig bids in acoustical tile ceilings in the greater San Francisco Bay Area, in violation of Section 1 of the Sherman Act.

Judge Carter held, among other things, that there was no abuse of the grand jury system and no deceit practiced on the defendants by the Government; that the greatest producer of glass fibers was the defendant, Owens-Corning Fiberglas Corporation, which had its principal place of business within the Northern District of Ohio; that the Government called to the attention of the grand jury in the Northern District of Ohio possible violations of the antitrust laws in their own district.

The corporate defendants also argued that when grand jury subpoenas duces tecum were served upon them in the eighth month of the grand jury investigation, relating to the furnishing of records and documents located at their offices in the Northern District of California, it was known to Government attorneys that no overt acts had taken place in the Northern District of Ohio and, consequently, the grand jury in Ohio had neither venue nor jurisdiction to inquire into any price fixing practices in California. The Court held that the defendants' arguments were not well taken as a properly constituted grand jury may inquire into acts occurring in another district if such acts are relevant to possible offenses within the grand jury's jurisdiction (citing cases), and that the grand jury in Ohio had jurisdiction to investigate possible agreements made within its district by the largest producer of glass fibers, with others, to restrain trade in the Northern District of California.

Defendants further contended in additional motions that at the time grand jury subpoenas were issued the particular grand jury which had originated the investigation had been dismissed without returning an indictment, and that the Government had merely used the device of the subpoena for its own purposes after the grand jury investigation had ceased. Judge Carter held that the weakness of this contention is that the grand jury making the investigation was called into being by a properly qualified United States District Court under the provisions of Rule 6, Federal Rules of Criminal Procedure, was operating well within the eighteen month time limitation set by the Rule, and that any examination into those proceedings should have been pursued by the defendants in the Northern District of Ohio.

Certain individual defendants also filed motions to dismiss them as defendants on the ground that they incriminated themselves when they complied with the subpoenas duces tecum served on their corporations, and claimed a Fifth Amendment privilege. In addition, they stated that the evidence finally submitted to the Government was in the form of a series of compilations of matter contained in the corporate documents and records, and not the documents and records themselves, and that they had the privilege to withhold information contained in the compilations insofar as it was incriminatory to them. The defendants further contended that when the negotiations with the Government for the submission of compilations in lieu of documents began the attorneys for the Government had the duty to warn them of their constitutional rights to counsel, and of their privilege against self-incrimination; that when an investigation begins to "focus" on an individual as a possible defendant he should be advised of his right to counsel under the Sixth Amendment because of the Supreme Court holding in the Escobedo case; that when the investigation in the instant case began to "focus" on them they should have been so advised. The corporate defendants also contended that the holding in Escobedo with respect to right to counsel also applied to them so that while a coporation has no privilege against self-incrimination under the Fifth Amendment, it has such a right under the Sixth Amendment by virtue of the Escobedo case; that officers of the corporation should be warned of the corporation's right before statements are elicited. The Court held that "the Supreme Court in Miranda v. Arizona made it clear that Escobedo was concerned with the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself. Thus, as a corporation has no right against self-incrimination, Escobedo and Miranda have no application as to them." Judge Carter also held that while the defendant officers do have a constitutional privilege against self-incrimination, a review of the facts shows that the officer defendants did not come within the scope of the safeguards laid down by Escobedo and Miranda for the reason that: "None of the defendants was taken into custody or otherwise deprived of his liberty. None of the defendants was held incommunicado in a room cut off from the outside

world. None of the defendants was subjected to questioning in a police-dominated atmosphere." The Court further held that the compilations above referred to were the products of the defendant officers' own efforts working from the corporate documents and records, free from the supervision of law enforcement officers, with ample opportunity to consult with counsel. The Court further found that defendants knew that they had a duty to comply with the subpoenas duces tecum emanating from the Ohio grand jury and that as a matter of their own convenience they chose to comply with them by submitting compilations in lieu of records.

Defendants filed further motions to dismiss the information contending that they had been denied their constitutional right to a speedy trial by the Government's delay in filing the information. This delay, the defendants alleged, was caused by the Government's decision to use a grand jury in the Northern District of Ohio. The defendants claimed that the Government became aware of the matters charged in the information in 1963, but did not file the information in the Northern District of California until December 1964. The Court held that the records in the case at bar fall short of showing any deliberate plan or scheme on the part of the Government to delay defendants' trial.

Staff: Samuel B. Prezis (and Lawrence Kill, formerly with the Antitrust Division)

* * *

CIVIL DIVISION

Acting Assistant Attorney General Carl Eardley

COURTS OF APPEALS

AGRICULTURE

COUNTY COMMITTEE DETERMINATION COMPLYING WITH REGULATIONS MAY NOT BE REOPENED BY SECRETARY AFTER TIME FOR APPEAL BY FARMER HAS RUN.

United States v. Kopf (C. A. 8, No. 18,651, June 28, 1967; D. J. 136-45-563)

In this case, a county committee operating under the Feed Grain Program revised downward its prior determinations of the payments to which plaintiff farmers were entitled for taking acreage out of production in 1962 and 1963. The revised determination was made after the 1963 planting season on the ground that the prior determinations had been based, in part, on evidence which internal departmental instructions prohibited the committee from considering. These instructions were not, however, included in the regulations. Plaintiffs sued in the district court for the difference between the amount they were paid under the revised determination and the amount to which they were found entitled under the original determinations. The Government contented that 7 C. F. R. 775.128 and 775.227 constituted a general grant of authority to reopen prior determinations. The district court entered judgment for plaintiffs; it rejected the Government's contention and held that the original determinations became binding as contracts when the farmers started planting in reliance on them.

The Court of Appeals affirmed on the basis of 7 U.S.C. 1385. That section provides that the facts constituting the basis for any payment under the Soil Conservation and Domestic Allotment Act, "when officially determined in conformity with the applicable regulations . . . shall be final and conclusive and shall not be reviewable by any other officer or agency of the Government". Since there was no showing that the proceedings in which the original determinations were made violated the regulations, the Eighth Circuit held that those determinations could not be reopened.

Staff: Robert V. Zener (Civil Division)

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

BY-LAW THAT CANDIDATES FOR OFFICE MUST HAVE SERVED IN UNION'S LEGISLATIVE BODY OR EXECUTIVE BOARD IS REASONABLE QUALIFICATION FOR CANDIDACY; SECRETARY OF LABOR MAY SEEK TO

SET ASIDE UNION ELECTION ONLY ON GROUNDS SET FORTH IN COMPLAINT FILED WITH HIM BY UNION MEMBER; DISTRICT COURT MAY NOT ENJOIN FUTURE VIOLATIONS IN LMRDA ELECTION CASES.

Wirtz v. Hotel, Motel & Club Employees Union, Local 6 (C. A. 2, No. 31,272, July 28, 1967; D.J. 156-51-742)

Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481, et seq., prescribes certain standards for union elections and authorizes the Secretary of Labor, upon the complaint of any union member, to bring suit to set aside any union election where a violation of the Act may have affected its outcome. One requirement of Title IV is that all members in good standing must be allowed to run for office, subject only to "reasonable qualifications". The defendant union in this case disqualified several candidates because they failed to meet a by-law requirement that candidates for union office must have served for at least one year on the union's executive board or assembly. The Secretary contended that the by-law was an unreasonable qualification upon candidacy because only a small percentage of the union's members met it and because the practical effect of the qualification was to restrict eligibility for office to those members who had the approval of the incumbent administration. The district court agreed that the by-law was unreasonable and therefore invalid, but refused to set aside the election on the ground that the by-law could not have affected the outcome of the election since the overwhelming probability was that the candidates disqualified under it would not have won the election in any event. However, although not asked to do so by the Secretary, the district court enjoined application of the by-law in future elections. In addition, the Secretary's complaint in the district court had alleged other violations of the Act; the district court refused to consider these violations and struck the allegations from the complaint on the ground that no union member had properly complained to the Secretary about such violations.

The Court of Appeals affirmed the lower court's refusal to set the challenged election aside. The appellate court held that the union's candidacy qualification was not an unreasonable one. Noting that the Act "strictly limits official interference in the internal affairs of unions" and "prescribes only certain basic minima and leaves the area not covered by these minimum prescriptions to the decisions of the unions themselves", the Second Circuit concluded that "it is not self-evident that basic minimum principles of union democracy require that every union entrust the administration of its affairs to untrained and inexperienced rank and file members". The Court conceded that the by-law rendered ineligible for office all but about 1700 of the 26,000 union members, but determined that "when this number is combined with the fact that all members in good standing for one year have the opportunity of becoming eligible for office by getting themselves elected to seats in the 400-odd member assembly, the numbers, per se, do not seem to us to establish unreasonableness". Having decided this question, the Court did not reach the

Secretary's contention that the district court erred in refusing to find that the alleged violation may have affected the outcome of the election.

The Court of Appeals also rejected the Secretary's contention that the district court erred in refusing to consider evidence with respect to violations as to which no union member had filed a complaint with the Secretary. Citing the Act's legislative history, the Court reasoned that the Secretary's function under Title IV was to act as "the complaining union member's lawyer". Accordingly, only issues initially raised by the complaining union member could be litigated in court.

Finally, although its holding that no violation had occurred made it unnecessary to reach the question, the Second Circuit agreed with the Secretary's concession that the district court had no power under the Act to issue an injunction against violations at future elections.

The Secretary has filed a petition for a rehearing en banc.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Robert Kushner, Arthur Olick and Martin P. Soloman (S.D. N.Y.)

SECRETARY MAY INVALIDATE UNION ELECTION ONLY ON GROUNDS INCLUDED IN COMPLAINT MADE TO HIM BY UNION MEMBERS.

Local Unions No. 545, etc., International Union of Operating Engineers v. Wirtz (C.A. 2, No. 31,225, July 28, 1967; D.J. 156-50-69)

In this suit under Title IV of the LMRDA, the district court set aside a union election and ordered a new election held under the supervision of the Secretary of Labor on the basis of three violations of the Act. Two of these violations had been the subject of internal complaints within the union by union members and had been raised in complaints filed by these members with the Secretary. The union did not appeal as to these violations, but conceded that the district court had properly set aside the election and ordered a new one. However, the union appealed the district court's ruling that its branch membership rule was illegal and should not be applied at the supervised election. This rule prohibited any member of the union's branches (to which 80% of the membership belonged) from running for union office although the branches were governed by the union officers and had no separate officers of their own. This rule had not been included in the union members' internal complaint or in their complaint to the Secretary. While the appeal was pending, the new election ordered by the district court was held. (Title IV forbids staying a supervised election during the pendency of an appeal.) At this election, no member of the union's branches was elected.

The Court of Appeals stated that the district court had erred in passing on the validity of the branch membership rule and in directing that the rule should not apply at the new election, since no union member had complained to the Secretary of this rule. However, the Court affirmed the decision below on the ground that this error was harmless since no branch member won office at the new election. In view of this determination, the appellate court did not pass on the validity of the branch membership restriction.

The Second Circuit also stated that it would

> leave open the question as to whether there may be cases where a union eligibility rule is so clearly unlawful that, in directing, pursuant to Section 402(c) of the Act, that a new election be held 'so far as lawful and practicable, in conformity with the construction and bylaws of the labor organization,' the district court may determine that a provision of the constitution or bylaws is unlawful and hence that it shall not apply to the new election, even though this provision was not a ground of the court's decision invalidating the prior election.

Staff: Robert V. Zener (Civil Division)

SOCIAL SECURITY ACT

STATE PRESUMPTION IN FAVOR OF VALIDITY OF SECOND MARRIAGE HELD REBUTTED BY EVIDENCE. PRESUMPTION NOT EXTREMELY STRONG WHERE NEITHER LEGITIMACY NOR INHERITANCE INVOLVED.

Dolan v. Celebrezze (C.A. 2, No. 31153, July 18, 1967; D.J. 137-52-221)

Claimant Elizabeth Dolan applied for Social Security Act widow's benefits. Under 42 U.S.C. 416, she had to prove that the New York courts would find that she was the wife of the deceased insured. Claimant married the deceased insured in 1914, and he later deserted her. In 1942, claimant "married" another man, writing on her application for a marriage license that she was a "widow". The second husband died and the deceased insured (the first husband) returned and resumed living with claimant. The Hearing Examiner found that claimant had never been divorced from her first husband and awarded her benefits. The Appeals Council of the Social Security Administration, relying primarily on the presumption of the validity of a second marriage afforded by the New York decisions, found the first marriage void and denied her application for benefits. The district court affirmed the denial, but the Court of Appeals reversed.

The appellate court thoroughly reviewed the New York cases establishing the presumption of the validity of a second marriage and ruled that the presumption could be rebutted by strong evidence to the contrary. It also determined that the credibility findings of the Hearing Examiner were entitled to great weight and overcame the presumption in this case. The Second Circuit stated that the presumption of the validity of a second marriage was designed to effectuate the public policy of declaring legitimate children born out of a subsequent marriage, and preventing their disinheritance. Since neither legitimacy nor inheritance rights were dependent upon the validity of the second marriage, the Court of Appeals implied that the presumption was not extremely strong and concluded that the New York courts would find that the evidence rebutted the presumption.

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

TRADING WITH THE ENEMY ACT

ENEMY CORPORATION'S NOTICE OF CLAIM FOR RETURN OF VESTED PROPERTY DID NOT CONSTITUTE NOTICE OF CLAIM BY INDIVIDUAL NON-ENEMY SHAREHOLDERS FOR RETURN OF PRO RATA SHARE OF CORPORATE PROPERTY.

Agajan v. Ramsey Clark (C.A.D.C., No. 20520, June 30, 1967; D.J. 9-21-2945)

Plaintiffs, claiming to be non-enemy shareholders of an enemy corporation, instituted this action in the district court under Section 9(a) of the Trading with the Enemy Act (50 U.S.C. App. 9(a)) for the return of a portion of an enemy corporation's property which had been previously vested by the Alien Property Custodian. The filing of a timely administrative "notice of claim" is a jurisdictional prerequisite to the maintenance of a suit under Section 9(a). Though the corporation had given a timely notice (its administrative claim was denied in 1964), the plaintiff-shareholders had not filed such a notice in their own names. The district court dismissed the action because of the shareholders' failure to file a timely notice of claim prior to commencing suit.

The Court of Appeals affirmed. The appellate court held that the corporation's notice of claim was its own, not that of its shareholders, and that the pendency of the administrative claim filed by the corporation did not toll the time within which the shareholders were required to sue. See 50 U.S.C. App. 33. The Court of Appeals distinguished this case from Honda v. Clark, 386 U.S. 484, and refused to invoke an equitable tolling encompassing the time the corporation's claim was pending. Because of the plaintiffs' failure to file a notice of claim, the Court did not deem it necessary to discuss the question

whether non-enemy shareholders of an enemy corporation, who have filed a timely notice of claim, possess a sufficient interest in the corporate property so as to entitle them to maintain a suit for the return of an aliquot part of such property in their own right. Cf. Kaufman v. Societe Internationale, 343 U.S. 156, 160.

Staff: Bruno A. Ristau (Civil Division)

DISTRICT COURTS

ADMIRALTY

NORTH ATLANTIC TREATY STATUS OF FORCES AGREEMENT DIVESTS COURT OF JURISDICTION OF SUIT UNDER PUBLIC VESSELS ACT FOR DAMAGES RESULTING FROM COLLISION ALLEGEDLY CAUSED BY U.S. NAVY VESSEL IN TERRITORIAL WATERS OF NATO COUNTRY.

Shafter v. United States (S.D.N.Y., 65 Ad. 1136, July 25, 1967; D.J. 61-51-4424)

In February 1964, a United States Navy vessel collided with a German coaster on the Weser River in the territorial waters of the Federal Republic of Germany. Six members of the coaster's seven-man crew died as a result of the collision. Suit was brought by the representative of the decedents and by the sole survivor under the Public Vessels Act, 46 U.S.C. 781, et seq., to recover damages attendant upon the deaths and for personal injuries.

The Government moved for summary judgment dismissing the suit for lack of jurisdiction. The district court granted the motion and dismissed. The court agreed with the Government that the matter had been withdrawn from the court's jurisdiction under the Public Vessels Act by the provisions of the North Atlantic Treaty Status of Forces Agreement of June 19, 1951, 4 U.S.T. 1792, to which the Federal Republic acceded by a Supplementary Agreement of August 3, 1959, 14 U.S.T. 531. (The treaty became effective after enactment of the Public Vessels Act and accordingly displaced it pro tanto.) The treaty creates a comprehensive and exclusive scheme for the adjudication and settlement of claims for damages arising out of the activities of U.S. Forces stationed in the territories of NATO countries. Under the treaty, plaintiffs must submit their claims against the United States to German administrative agencies and courts, and if successful, they will be paid by the German Government. The United States will then reimburse the German Government for 75% of any amounts thus paid out.

Staff: Bruno A. Ristau and Philip A. Berns (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

FRAUD

DIRECT REFERRAL OF FRAUD MATTERS BY THE DEPARTMENT OF AGRICULTURE

An understanding has been reached with the Department of Agriculture to the effect that all matters under the jurisdiction of the Fraud Section, Criminal Division will be referred directly to the appropriate United States Attorney. This revised procedure is not intended to preclude the Department of Agriculture from referring to the Criminal Division, for initial consideration, any matters which in Agriculture's opinion may involve Constitutional issues, a new or important question of law, policy or interpretation of regulations, a complicated or unusual factual situation, or a question of venue. Also, it is not intended that this procedure will alter the existing requirement that matters involving violations of Federal criminal statutes be referred to the Department of Justice, but merely that they be referred directly to United States Attorneys.

While it will not be necessary for United States Attorneys to advise the Fraud Section of the action taken in these matters, assistance and advice will be rendered upon request. Appropriate changes will be made in the United States Attorneys Manual concerning this change in referral procedure.

MAIL FRAUD

CHAIN REFERRAL SCHEMES - PROSECUTIONS

In Vol. 14, No. 25 of the United States Attorneys' Bulletin, the interest of the Fraud Section was expressed with respect to the prosecution of chain referral schemes. Since that time, progress has been made in these prosecutions. Of particular interest in one conviction, the district court found that the manufacturer of a vacuum cleaner was chargeable with knowledge of the misrepresentations made by its franchise dealers. (United States v. Interstate Engineering Corp., et al., D. J. File 36-47-14.)

In another case, the convictions of Howard A. Blachly and Robert L. McMillen were affirmed by the Court of Appeals for the Fifth Circuit on July 11, 1967 (DJ File 36-33-82). The defendants had sold water softeners under a referral selling plan and, on appeal, questioned whether such plan constituted a violation of the mail fraud statute. The Court of Appeals had no doubts that a scheme to defraud was involved since the plan, "as con-

ceived by the parties and represented to the purchasers, could not possibly work." Also, the execution of the plan "was accomplished by the most base form of deceit - a misrepresentation of the true nature of the obligation being assumed by the purchaser". The Court noted that very few purchasers knew or were informed that they were executing a promissory note for the balance of the contract price, and not one realized that he had executed as security for the debt a real estate mortgage on his home. Blachly had received a sentence of three years in prison; McMillen was sentenced to one year.

Staff: United States Attorney Louis M. Janelle, Special Assistant
United States Attorney John Wall (D. N. H.)

United States Attorney Edward L. Shaheen, Assistant
United States Attorney E. V. Boagni (W. D. La.)

RIOTS

RIOT CONTROL PUBLICATION

The Federal Bureau of Investigation has made available copies of the booklet entitled "Prevention and Control of Mobs and Riots" for dissemination. One copy has been mailed to each United States Attorney's office for your reference. Copies have been made available to local authorities as well.

COURTS OF APPEAL

PROBATION - REVOCATION

REVOCATION OF PROBATION WHICH HAD BEEN GRANTED ON BASIS OF FALSE INFORMATION AND FRAUDULENTLY CONCEALED FALSEHOODS CONTAINED IN BANKRUPTCY PETITION AND SCHEDULES, HELD PROPER.

Pat Trueblood Longknife v. United States (C. A. 9, July 24, 1967; DJ 49-21-46)

Longknife was indicted for failing to disclose assets in a bankruptcy proceeding filed in 1965. He entered a plea of nolo contendere and was placed on probation for three years. Thereafter, his probation officer found that, in 1961, Longknife had filed a bankruptcy petition under the name of Dorman Pat True Long and had given false information in the 1965 proceeding about prior bankruptcy proceedings. A petition for revocation of probation was filed, a hearing held, and probation was revoked.

On appeal, it was contended that the district judge acted beyond the scope of his discretion since the defendant had committed no acts during his probation upon which a revocation could be based. The Court of Appeals for the Ninth Circuit rejected this contention, relying on Burns v. United States, 287 U.S. 216(1932). The Court held that, in Burns, "the only limit placed upon the exercise of the judge's discretion is that he must be satisfied that his actions will subserve the ends of justice and the best interests of both the public and the defendant". The Court of Appeals went on to say that the district judge had made it quite clear that had he known about the defendant's prior bankruptcy, his use of an alias, and his failure to disclose this information, probation would not have been granted. It was within the discretion of the judge to revoke probation, otherwise he would be irrevocably bound by his initial, albeit erroneous, grant of probation which would not serve the best interests of both the public and the defendant.

The Court of Appeals did not reach the question whether a judge may base a revocation of probation upon a valid assertion of the privilege against self-incrimination at the hearing on revocation.

Staff: United States Attorney Yoshimi Hayashi; Assistant United States Attorney James F. Ventura (D. Hawaii)

* * *

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

SPECIAL NOTICE

GOVERNMENT ATTORNEYS MUST INSIST ON RECORDING OF ARGUMENTS TO JURY BY COURT REPORTER AT RISK OF REVERSAL OF FAVORABLE JUDGMENT.

We have long urged United States Attorneys and their Assistants always to have closing arguments of counsel to the jury in condemnation proceedings recorded by a court reporter. Frequently, it will not be necessary to have them transcribed. But in many cases the argument of counsel to the jury is an essential tool to show prejudicial error. Thus, for example, it can clearly show how counsel used allegedly erroneous evidence to sway the jury. Otherwise, the evidence might appear to be ambiguous or innocuous, and hence, harmless error. To bolster our persistent urgings on this point, we advert to the recent decision by the Fifth Circuit in Clay Calhoun v. United States, No. 23282 (July 19, 1967), reported below. There the Court reversed a condemnation judgment because the closing arguments to the jury were not recorded as required by 28 U. S. C. 753(b). Only by express consent of the parties and the judge can such requirement be waived. We repeat: It is never wise to waive the requirement, because you cannot tell in advance of the argument whether you may need the recording.

COURTS OF APPEALS

CONDEMNATION

COURT REPORTER RECORDING OF ARGUMENTS TO JURY; FAILURE TO INSIST ON RECORDING REQUIRES REVERSAL UNDER 28 U. S. C. 753(b).

Calhoun v. United States (C. A. 5, No. 23282, July 19, 1967; D. J. 33-25-315-62)

In this condemnation case, after closing arguments to the jury and after the Court had charged the jury, counsel for the landowners asserted that Government counsel, in his argument to the jury, had made an inflammatory and prejudicial statement and requested a curative instruction. This was refused by the district court. The arguments of counsel had not been recorded by a court reporter.

The Court of Appeals, rejecting the argument that appellants objected too late, reversed and remanded for a new trial. It held that 28 U. S. C.

753(b) was mandatory, not permissive, in requiring a court reporter to record the proceedings unless the parties and the judge expressly agree to the contrary. It found that "appellants are prejudiced by the failure of the reporter to transcribe the entire proceedings and that the record, though incomplete, is sufficient to demonstrate prejudicial error".

The force of this holding is emphasized by the fact that it had been the practice of judges and counsel in this district court for a great many years to assume a tacit waiver of the recording of arguments to a jury unless a party or the court expressly asked for it. In addition, if a recording had been made here, it would have shown remarks by appellants' counsel in his closing argument which the Court of Appeals might well have regarded as justification for the allegedly prejudicial remarks of Government counsel and would have shown that, in context, the remarks did not justify reversal.

The present case is a prime example of why it is imperative that the closing arguments be recorded. It is not necessary in all cases that the closing arguments be transcribed in the record but, if they are recorded and there is any question as to prejudicial remarks in the closing statements, the statements can be subsequently transcribed and costly retrials and the danger of higher judgments can thereby be avoided.

Staff: Roger P. Marquis (Land and Natural Resources Division)

PUBLIC LANDS

NATIONAL PARK SERVICE: STATUTORY INTERPRETATION OF JURISDICTION.

Washington Metropolitan Area Transit Commission, et al. v. Universal Interpretive Shuttle Corporation (C. A. D. C., June 30, 1967; D. J. 90-1-4-155)

During the summer of 1966 the National Park Service conducted an experimental "minibus" operation designed for the benefit of the numerous visitors to the Mall Area in the Nation's Capital, which includes the Smithsonian buildings, the Lincoln Memorial and the Jefferson Memorial. When the experiment proved popular, the National Park Service sought bids from private companies covering a somewhat expanded service to be conducted by trained guides capable of discoursing on the history and significance of the various points of interest. The contract, which was eventually awarded to the Universal Interpretive Shuttle Corporation, contained detailed provisions relating to the routes to be followed, the number of trips and the charges to be made. In effect, the contract retained complete control of operations in the National Park Service.

When award of the contract was announced, a suit was filed in the United States District Court for the District of Columbia by the Washington Metropolitan Area Transit Commission, seeking to enjoin commencement of the service until a certificate of public convenience and necessity had been obtained from the plaintiff Commission. Thereafter, D. C. Transit System, Inc., and two other companies conducting sightseeing operations were permitted to intervene. The plaintiff Commission, composed of representatives of Virginia, Maryland and the District of Columbia, was created in 1960, by compact, to exercise unified control over commuter bus operations in the Washington Metropolitan Area. It took the position, in this litigation, that because the compact and the approving act of Congress declared that no transportation-for-hire activities are to be conducted in the Washington Metropolitan Area without a certificate of public convenience and necessity the Commission's authority necessarily extended even to a contract minibus operation established by the Secretary of the Interior, in the exercise of his longstanding administrative authority, for the convenience of visitors to the Mall. The United States was permitted to file a representation of interest.

Following an expedited trial, the District Court (Judge Corcoran) dismissed the action, holding (a) that the transportation-for-hire jurisdiction of the W. M. A. T. C. related primarily to commuter bus operations and not to the incidental transportation within a federal enclave contemplated by the contract, (b) that the proposed activity was included in an exception of "transportation by the Government" in the compact legislation, (c) that the compact legislation did not purport to supersede the extensive grant of authority to the National Park Service to administer the National Park System and (d) that the franchise of D. C. Transit System, Inc., did not create any relevant right in that corporation. Following an expedited appeal proceeding, in which the United States appeared amicus curiae, the Court of Appeals reversed, with one judge dissenting. No opinions were written--the Court holding only that:

> * * * a majority of the court are of the opinion that the various relevant statutory provisions, construed in relation one to the other, especially in view of the physical location of the Mall in the metropolitan area of the District of Columbia, do not afford authority to the appellee Universal Interpretive Shuttle Corporation validly to engage in such transportation-for-hire in the Mall area as is contemplated by the contract between the Secretary of the Interior and appellee dated March 17, 1967, more fully described in the complaint, without a certificate of public convenience and necessity issued by the Washington Metropolitan Area Transit Commission authorizing such transportation * * *.

A motion for rehearing, with a request that rehearing be had en banc, has been filed and a brief amicus curiae in support of that motion has been filed on behalf of the United States.

Staff: Thomas L. McKevitt (Land and Natural Resources Division)

* * *

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

STATE APPELLATE COURT - CIVIL

LIENS

PRIORITY OF FEDERAL EMPLOYMENT TAXES IN DISTRIBUTION OF UNEXPENDED CONSTRUCTION TRUST FUNDS UNDER NEW YORK STATE STATUTE IS NOT DEFEATED BY PRIOR COMMENCED, BUT UNCOMPLETED, ACTION TO FORECLOSE MECHANIC'S LIEN WHICH REACHES SAME FUNDS.

Onondaga Commercial Dry Wall Corp. v. 150 Clinton Street, Inc., et al.; United States v. Onondaga Commercial Dry Wall Corp., et al. (App. Div. N. Y. S. Ct. (4th Dept.), No. 209, 1967; June 29, 1967; D. J. 5-50-2140)

This case involves an attempt by the United States to enjoin the progress of a mechanic's lien foreclosure action in order to permit the adjudication of claims asserted by New York statutory trust beneficiaries, which include employment tax claims of the United States, and the satisfaction of these claims. A mechanic's lien foreclosure action was instituted in the New York State Supreme Court of Jefferson County pursuant to Articles 2 and 3 of the New York State Lien Law. A conceded balance due to the defaulting contractor from the owner pursuant to a contract for the construction of certain apartment dwellings in Jefferson County, New York, was deposited with the Jefferson County Court pursuant to Court order. One day after the institution of the lien action, the mechanic lienor, professing to be a trust beneficiary as well, instituted a trust action under Article 3-A of the New York State Lien Law in Onondaga County on behalf of all the beneficiaries thereof. The trust action asserted the right to funds which had been deposited in the lien action.

Article 3-A affords the taxing authorities, as well as certain other beneficiaries, a preference. Accordingly, the United States intervened in the Article 3-A action and urged the New York State Supreme Court to enjoin the lien action in Jefferson County. The Government contended that the lien action, in effect, sought to recover the corpus of the statutory trust. Accordingly, failure to enjoin the lien action would permit the Jefferson County fund to be disbursed, and, although it might be determined subsequently that the Government had a right to a portion of the funds, it would be unable to satisfy that right. Nevertheless, the Special Term Justice refused to grant the injunction. He felt bound by the language of Section 79 of Article 3-A,

which provides that "Nothing in this article shall prevent the enforcement of any lien as provided in articles two and three of this chapter and neither such lien nor any satisfaction obtained thereby shall be deemed a diversion of trust assets or an unauthorized preference."

On appeal, the Appellate Division of the Supreme Court, Fourth Department, reversed the determination of the lower court. Recognizing that the mechanic's lien was against the balance due the contractor by the owner, which, in effect, constituted the corpus of the trust, the Court narrowed the issue to a construction of the previously quoted Section 79. The appellate court reasoned that the construction of Section 79 by the Special Term Justice so as to preclude the satisfaction of Article 3-A trust beneficiaries is inconsistent and inharmonious with the rules of statutory construction. Accordingly, the Court accepted the contention of the United States and refused to construe Section 79 literally, stating "*** the satisfaction of liens in a completed or terminated mechanic lien action should not be considered trust fund diversions." Any lien action which had not been completed or terminated could be enjoined in favor of the more equitable trust proceeding. (See also Petrow v. Bonim Demolition & Construction Corp., 51 Misc. 2d 589 (1966), but see Hall v. Blumberg, 26 A. D. 2d 64 (3d Dept. 1966)).

Staff: Joseph Kovner and Donald A. Statland (Tax Division)

DISTRICT COURTS - CIVIL

LEVY

TAX LEVIES AGAINST ONE-HALF THE COMMUNITY WAGES FOR PREMARITAL LIABILITY ARE NOT WRONGFUL WHERE STATE LAW ALLOWS EXCEPTIONS TO GENERAL RULE OF IMMUNITY OF COMMUNITY PROPERTY.

Jim Prater and Evelyn Prater v. United States (D. Ariz.) Civil No. 6260-Phx.; May 26, 1967, D. J. 5-8-2017 (67-1 U. S. T. C. 9523)

The Internal Revenue Service levied upon one-half the husband-taxpayer's salary in Arizona -- a community property state -- for tax liabilities incurred by him prior to his marriage. When these levies were honored, the taxpayer and his wife brought suit for wrongful levy under Section 7426(a) and (b)(1) of the Internal Revenue Code of 1954. The suit was brought in the name of the marital community and sought the return of the money already surrendered as well as a permanent injunction against future levies. The plaintiffs contended that under Arizona law community property could not be taken or divided to satisfy a separate debt of either spouse. The Court admitted that, in general, state law made the husband's wages and other community

property not susceptible to liability for pre-marital debts of either spouse. But the Court pointed to the distinction made by state courts between contractual obligations and obligations arising by operation of law; alimony debts and state taxes had both been allowed as payable out of community property. In addition, the Court was persuaded by the Washington case of Draper v. United States, 243 F. Supp. 563 (W. D. Wash., 1965), which was based on a community property law similar to Arizona's; that decision held public policy required certain exceptions to the general rule of immunity, and such an exception was needed for taxes. This Court, accordingly, granted the Government's motion to dismiss the complaint.

Staff: United States Attorney Edward E. Davis and Assistant United States Attorney Richard C. Gormley (D. Ariz.); George W. Shaffer, Jr. (Tax Division)

PRE-INDICTMENT MOTION TO SUPPRESS

PRE-INDICTMENT INJUNCTION TO PREVENT USE OF BOOKS AND RECORDS OF CERTAIN CORPORATIONS PRODUCED PURSUANT TO SUMMONS ISSUED UNDER SECTION 7602 OF INTERNAL REVENUE CODE OF 1954 DENIED; ISSUES OF ALLEGED FOURTH AND FIFTH AMENDMENT VIOLATION NOT REACHED BY DISTRICT COURT.

John H. Birdsall, Jr., et al. v United States of America, et al. (Civil No. 67-1-Civ-CF; S. D. Fla.; Feb. 27, 1967; D. J. 5-18-7682; 67-2-USTC ¶ 9587)

Petitioner, whose income tax returns were being investigated, voluntarily produced books and records of certain corporations he controlled pursuant to summonses issued under Section 7602 of the Internal Revenue Code of 1954. After he was advised that the proposed criminal case had been referred to the United States Attorney for the Southern District of Florida, he filed a civil action seeking an injunction restraining the United States Attorney from using before a grand jury the various books and records of the corporations produced. The gravamen of his action was alleged Fourth and Fifth Amendment violations. He contended that his Fifth Amendment rights were violated in that the threat and compulsion of the penalties provided in Sections 7604(b) and 7210 of the Internal Revenue Code of 1954 prevented him from contesting the enforcement of the summonses issued; and his Fourth Amendment rights were violated in that the summonses were being issued to obtain evidence for use in a criminal prosecution and constituted an abuse of civil process.

The District Court relying upon Dibella v. United States, 369 U. S. 121, and Parrish v. United States, 256 Fed. Supp. 793, ruled that the action was

premature because there was no pending criminal proceeding. On the same day the decision was rendered, the case was argued before a special panel of the Court of Appeals for the Fifth Circuit and the appellant's petition for a stay of the lower court decision pending appeal was denied.

Staff: United States Attorney William A. Meadows, Jr. and Assistant United States Attorney Morton Orbach (S. D. Fla.); Harry D. Shapiro (Tax Division)

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