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UNITED STATES DEPARTMENT OF JUSTICE

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Acting Assistant Attorney General Carl Eardley

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Manemann v. United States (C.A. 10, No. 9302, August 23, 1967, D.J. 157-13-162)

Appellant's complaint under the Tort Claims Act alleged that in early 1962 appellant, then a minor, was living in Taiwan as the dependent of his stepfather, a member of the armed forces of the United States on active duty in Taiwan; that a chest X-ray of appellant, taken on Taiwan in January 1962, indicated that appellant had tuberculosis infection; and that a physician attached to the American military facility on Taiwan negligently misread the X-ray as negative, and erroneously informed appellant that he did not have tuberculosis. The complaint further alleged that appellant's family subsequently moved to the State of Colorado, where he underwent a physical examination in March 1965 that indicated the presence of tuberculosis infection; that appellant was subsequently hospitalized and underwent surgery; and that appellant now suffers from a partial disability which will continue for a substantial period of time, if not for life. The complaint alleged that if appellant's tuberculosis condition, as it existed in January 1962, had been diagnosed properly by the army physician on Taiwan, he would not have been required to undergo subsequent hospitalization and surgery; and that appellant's partial disability resulted from the advance of his tuberculosis infection between January 1962 and March 1965, the date of his hospitalization.

The district court granted the Government's motion for summary judgment and dismissed the action, holding that " [s]ince the acts of negligence relied upon were committed in a foreign country", the suit was barred by the provision of the Federal Tort Claims Act, 28 U.S.C. 2680(k), that excludes coverage of "[a]ny claim arising in a foreign country".

In affirming, the Tenth Circuit held that the case was controlled by United States v. Spelar, 338 U.S. 217, and Richards v. United States, 369 U.S. 1. The Court of Appeals ruled that, under Richards, Taiwan law would govern appellant's claim under the Tort Claims Act since the alleged acts of negligence occurred in Taiwan. However, the Court ruled, such a suit would be barred by the "foreign country" exception in the Act, 28 U.S.C. 2680(k), for, as the Supreme Court ruled in Spelar, 338 U.S. at 221, Congress "was unwilling to subject the United States to liabilities depending upon the laws of a foreign power". The Court of Appeals held that the question of when a claim accrues for purposes of the statute of limitations was irrelevant to the issue before it, viz, the applicability of the "foreign country" exception.

Staff: Leonard Schaitman (Civil Division)

HATCH ACT

PROCEDURAL REQUIREMENTS COMPLIED WITH BY FURNISHING EMPLOYEE WITH LIST OF WITNESSES IN ADMINISTRATIVE PROCEEDING; SUBSTANTIAL EVIDENCE SUPPORTED DECISION OF CIVIL SERVICE COMMISSION.

C. O. Jarvis v. United States Civil Service Commission, et al. (C.A. 6, No. 17,300) and Commonwealth of Kentucky v. United States Civil Service Commission (C.A. 6, No. 17,301) (D.J. 145-156-53 and 35-30-1)

In a proceeding under Section 12 of the Hatch Act, 5 U.S.C. 118k, the Civil Service Commission had found that the conduct of a state employee violated the Act in that the employee had directly or indirectly coerced, attempted to coerce or advise his subordinates to contribute to the Democratic Party, and also that he had solicited contributions. The employee, who was the supervisor of a small office, had presided over a staff meeting in which it was discussed how to dispose of two tickets to a political party dinner; he had given his permission for and attended a drawing held during working hours for the purchase of those tickets; and he had asked for and received the $15 checks of several of his employees as their contribution to the drawing.

The district court reversed the decision of the Commission on the procedural ground that the Commission had failed to inform the employee prior to the administrative hearing of the names of all the employees he was accused of having coerced, solicited, or advised. The district court rejected the Commission's contention that all that was required was that they furnish the employee with the names and addresses of all the co-employees whom the Commission intended to call to support the charges.

The Sixth Circuit reversed the decision of the district court, ruling that by furnishing the employee with the names and addresses of the witnesses the Commission had complied with the requirements for fair administrative procedure. The Sixth Circuit then ruled on the merits that the decision of the Commission was supported by substantial evidence.

Staff: John C. Eldridge and Robert E. Kopp (Civil Division)

HOME OWNER'S LOAN ACT

DISTRICT COURT HAD NO AUTHORITY TO ADOPT REVISED MERGER AGREEMENT AND DISTRIBUTION PLAN OF FEDERAL SAVINGS AND LOAN ASSOCIATION AND STATE BANK WHICH HAD NOT BEEN APPROVED BY FEDERAL HOME LOAN BANK BOARD AND STATE COMMISSION; ACTION TO SET ASIDE APPROVED PLAN BARRED FOR LACHES.

Federal Home Loan Bank Board, et al. v. Sidney Elliott, et al. (C.A. 9, No. 20,378, D.J. 111-12-25); Federal Home Loan Bank Board, et al. v. Equitable Savings and Loan Association, et al. (C.A. 9, No. 20,447, D.J. 111-12-26); Federal Home Loan Bank Board, et al. v. Equitable Savings and Loan Association (C.A. 9, No. 20,522, D.J. 111-12-27, consolidated appeals decided August 18, 1967)

In 1962, the Federal Home Loan Bank Board, and the Federal Savings and Loan Insurance Corporation, entered into an agreement with the Long Beach Federal Savings and Loan Association whereby actions against Long Beach for unsound management were dismissed and the bank was returned to private management. Pursuant to the agreement, Long Beach was permitted, under a specified plan, to liquidate by transferring its accounts and some of its assets to Equitable, a California state guarantee stock company, and distributing the remaining assets to Long Beach shareholders on a pro rata basis.

Thereafter Long Beach and Equitable proposed a merger plan whereby all of Long Beach's assets would be transferred to Equitable, and Long Beach stockholders would receive Equitable stock rather than assets. However, because of a heavy influx of large deposits into Long Beach, restrictions were placed on proposed distributees of the Equitable stock, taking care to exclude certain new depositors of large sums of money so as not to dilute the equity of the other Long Beach shareholders. That revised merger plan--with its restrictions--was approved by the Board, the State Commissioner, and the relevant stockholders, and the merger was consummated on September 10, 1963.

On that very date, these actions were instituted in the district court by stockholders of Long Beach and others to test the validity of the approved restrictions on distributees of the Equitable stock.

The district court found the restrictions invalid and required pro rata distribution of Equitable stock to all eligible holders of Long Beach share accounts.

On Appeal by the Board and the State Commissioner the Ninth Circuit reversed. The Court held that under the Home Owner's Loan Act, the plan adopted by the district court for the merger and distribution of stock required approval of the Board, and lacking such approval, the court was without power to implement the plan.

Moreover, even assuming that the restrictions in the Board-approved merger plan were invalid, the Court of Appeals held that the plaintiffs could not have the merger set aside, since they were guilty of laches in waiting until the very day of merger to institute their action--despite their knowledge of all the facts for nearly three months. To permit the setting aside of the merger at this point would prejudice substantial rights, would cause significant turmoil, would present the coercive factor of a fait accompli, and would involve new stockholders not involved in the prior consideration.

Thus, the Court reversed the judgment of the district court and remanded the case for dismissal of the actions.

Staff: Carl Eardley, Acting Assistant Attorney General
(Civil Division)

INTERSTATE COMMERCE ACT

FORFEITURE PROVISIONS OF SECTIONS 16(8) AND (9) OF ACT HELD APPLICABLE TO VIOLATION OF "LEGISLATIVE ORDERS" OF I. C. C.

United States v. Western Pacific R. and United States v. Denver & Rio Grande Western R. (C. A. 10, consolidated, Nos. 8855 and 8856, August 8, 1967; D. J. 59-8-885)

Sections 16(8) and (9) of the Interstate Commerce Act, 49 U.S.C. 16(8) and (9) provide for a forfeiture of $5,000 for each offense by a carrier that fails to obey "any order" of the I. C. C. made under §3 of the Act. The I. C. C. commenced action in the district court under these provisions against two railroads to obtain a forfeiture for alleged violations of I. C. C. Ex Parte Order No. 73. Order No. 73, promulgated under section 3 of the Act after public hearings, limits to 120 hours the extension of credit by railroads to shippers. The railroads argued the $5,000 forfeiture provision applied only to a violation of an adjudicatory order of the I. C. C. made after a complete administrative hearing. The district court dismissed the action on the ground that the order limiting credit was not the type of order contemplated by sections 16(8) and (9) because it was "a general regulation" which was "legislative in character." On appeal, the Tenth Circuit reversed, holding the statutory language sufficiently broad to make the forfeiture provisions applicable to all section 3 orders of the I. C. C., both adjudicatory and legislative. The Court also found that the forfeiture proceedings in the district court provided the railroads with a full opportunity to be heard on the question of their violation of Order No. 73 and thus there was no reason why violations had to be adjudicated by the I. C. C. in advance of the court proceedings.

Staff: Norman Knopf (Civil Division)

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT

SIXTY-DAY LIMITATION ON SECRETARY'S FILING OF COMPLAINT UNDER ACT DOES NOT MAKE UNTIMELY AN ACTION BROUGHT BY SECRETARY ON SIXTY-FIRST DAY, WHERE SIXTIETH DAY FELL ON SUNDAY.

W. Williard Wirtz v. Peninsula Shipbuilders Assn. (C. A. 4, No. 11,160, August 29, 1967; D. J. 156-79-36)

Section 402(b) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. 482(b), provides that the Secretary "shall, within sixty days" after the filing with him of a complaint by a union member, institute an action in the district court if he finds the union member's complaint of violations to be supported by probable cause. In this case, the Secretary filed his complaint in the district court sixty-one days after the union member's complaint had been filed with him. However, the sixtieth day had fallen on a Sunday. For this reason, the Court of Appeals held that the Secretary's action had been timely filed. The Court based its decision on Rule 6(a), F. R. Civ. P., which provides:

> In computing any period of time prescribed or allowed by these rules . . . or by any applicable statute . . . . [t]he last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

The Court pointed out that computation of the sixty-day limitation in Section 402(b) in the manner prescribed by Rule 6(a) was both consistent with the express language and purpose of that rule and in accord with the policy underlying the Labor Management Reporting and Disclosure Act--the vindication of union members' rights.

Staff: Morton Hollander and Robert E. Kopp (Civil Division)

SMALL BUSINESS ADMINISTRATION - PRIORITY OF LIENS

"TAXES" IN 15 U.S.C. 646 DOES NOT INCLUDE INTEREST ON SUCH TAXES.

United States of America v. Consumer's Scrap Iron Corp. (C.A. 6, Nos. 17,082 and 17,529, decided August 30, 1967, D.J. 105-37-32)

The Sixth Circuit, reversing an adverse district court decision, has held that the word "taxes" in 15 U.S.C. 646, includes only the principal of the tax and not the interest thereon. 15 U.S.C. 646 provides that any security interest held by the SBA shall be subordinate to any lien of a local government on the secured property for "taxes" due on the property in those cases where the local lien was entitled to priority under state law. The Court held that the City of Detroit, which under 15 U.S.C. 646, concededly had priority over an SBA security interest for the principal amount of the local taxes on the property involved, was not entitled to priority for the interest on those taxes. In denying the City priority respecting the interest, the Court of Appeals relied on the doctrine that interest is not to be imposed against the United States in the absence of express Congressional consent.

Staff: John C. Eldridge and Robert E. Kopp (Civil Division)

SOCIAL SECURITY ACT - WIDOW'S BENEFITS

CASE REMANDED FOR FURTHER ADMINISTRATIVE PROCEEDINGS WHERE COURT'S DETERMINATION ON CLAIMS OF TWO COMPETING "WIDOWS" WAS MADE IN PROCEEDING TO WHICH ONE "WIDOW" WAS NOT A PARTY.

John W. Gardner v. Dorothy W. Oldham (C.A. 5, No. 24,130; August 15, 1967; D.J. 137-17M-32)

The Social Security Administration had been paying mother's insurance benefits to one of two competing "widows" of an insured wage earner under the Social Security Act. The other "widow" brought this action in the district court, declaring that she was the rightful "widow" and therefore entitled to benefits. The district court upheld her contention and directed payments of benefits to her in a proceeding to which both "widows" were not participants. The Secretary appealed contending, regardless of the merits, that the trial court erred in not remanding the case to the Secretary for further administrative proceedings to which the conflicting claims of both could be resolved because under the Act there could be only one widow of a wage earner that was entitled to an award of benefits. The Court of Appeals upheld the Secretary's contention that the judgment awarding payment of benefits must be vacated with directions to remand the case for further administrative proceedings at which the other "widow" would be given an opportunity to participate since she has never had "her day in court".

Staff: Jack H. Weiner (Civil Division)

SOVEREIGN IMMUNITY

JUDGMENT AGAINST UNITED STATES BASED UPON CONTINGENT FEE CONTRACT HELD BARRED BY DOCTRINE OF SOVEREIGN IMMUNITY.

United States v. Transocean Air Lines, Inc. (C. A. 5, No. 23,933, August 15, 1967; D. J. 77-11-1838)

Transocean carried goods by air for the Government during the Korean War. It and other air carriers sued the Government in the district court under the Tucker Act (28 U. S. C. 1346(a)) to recover payment for ferry miles actually flown, which were in excess of the mileage specified in their bids. The district court awarded only a portion of the airlines' claims, and all parties appealed. The Court of Appeals held that the Government was liable for all ferry miles actually required to be flown by the carriers and remanded for further proceedings. United States v. Associated Air Transport, Inc., 275 F. 2d 827 (C. A. 5). Under a contingent fee agreement the attorneys who represented Transocean in the litigation had a one-third interest in any judgment obtained.

Upon remand, but before the amount due Transocean from the Government was determined, the company was adjudicated a bankrupt in another district court. Transocean's action for compensation was then dismissed by the district court clerk with prejudice pursuant to a settlement agreement between the Government and the bankruptcy trustee under the terms of which the Government agreed to set-off the sum of $75,000 against its larger claim in the bankruptcy proceeding. Transocean's attorneys then sought $25,000 for their services as a result of the compromise in the bankruptcy proceeding, and the district court vacated the dismissal, awarded $75,000 to Transocean on the basis of the bankruptcy compromise, and later gave the attorneys a charging lien of one-third ($25,000) on the judgment. The Government appealed from both the judgment for Transocean and the charging lien order, and the Court of Appeals affirmed both. United States v. Transocean Air Lines, Inc., 356 F. 2d 702 (C. A. 5).

On remand, the district court modified its prior judgment and order by reducing Transocean's award to $50,000 and changing counsels' charging lien into a judgment for $25,000 running directly against the United States. The United States appealed and the Court of Appeals reversed, expressly agreeing with the Government's contention that the district court's action on remand was not authorized by its opinion and mandate on the second appeal.

The Fifth Circuit stated that its affirmance of the district court's action was based on the grounds that the trustee in bankruptcy could not stipulate the dismissal since he was not a party to the litigation, and that the attorney's charging lien could not be defeated by the parties' stipulated dismissal in the absence of notice to them. The appellate court observed that the district court had misconstrued its language disposing of the Government's contentions concerning the second ground, as authorizing a judgment directly against the United States. The Court ruled that such a judgment was precluded by the doctrine of sovereign immunity since, while it was authorized by applicable state law, "[t]he right to sue the United States cannot be granted by State law nor acquired through contractual relationships with third parties."

In addition, the Fifth Circuit refused to hold counsels' suit authorized "as an assignment of Transocean's Tucker Act claim." It reasoned in this regard that the consent to sue granted by that Act was exhausted when Transocean obtained its final judgment, and that the "Act does not authorize continued assignments and suits against the sovereign." The Court of Appeals noted that Transocean's claim could not be validly assigned to counsel, since a contingent fee in a judgment against the United States was an assignment subject to the Anti-Assignment Act (31 U.S.C. 203), and since the $25,000 judgment entered by the district court would have deprived the Government of the right to set-off any debts owed to it by Transocean. (See 31 U.S.C. 227.)

Staff: Alan S. Rosenthal and Harvey L. Zuckman (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

SPECIAL NOTICES

ASSAULTS UPON INTERNAL REVENUE SERVICE PERSONNEL

The Internal Revenue Service has informed the Department that the number of attempts to interfere with Service officers and employees is on the increase. Such attempts pose a threat to the orderly conduct of official business and to the morale of the agency's personnel. When such interference amounts to an assault, the offender should be swiftly prosecuted under 18 U.S.C. 111 or 26 U.S.C. 7212(a) and appropriately punished.

The General Crimes Section, Criminal Division, has supervisory responsibility for cases prosecuted under the aforesaid sections. It should be noted, however, that it is unnecessary to obtain prior authorization from either the Department or the Internal Revenue Service before initiating prosecutions. (D.J. File 125-03)

SELECTIVE SERVICE

MILITARY SELECTIVE SERVICE ACT OF 1967 - PROCEDURE FOR INDUCTION OF MEN CHARGED WITH VIOLATION OF ACT; SUBSEQUENT DISMISSAL OF CRIMINAL CHARGES.

In some instances a registrant charged with violating the provisions of the Act indicates, prior to trial, a desire to be given an opportunity to be inducted. The previous policy of the Department of the Army, in those cases where the Government was willing to release the defendant on the condition that he be inducted, was to authorize a waiver permitting induction but to condition the grant of the waiver on the registrant's complete release from the criminal charge prior to induction. That policy has now been changed by the addition of the following to paragraph 23d of Army Regulation 601-270:

> Men who have filed and pending against them a criminal charge alleging violation of the Military Selective Service Act of 1967 may be processed for induction, and inducted, if otherwise acceptable, upon receipt by the Armed Forces Examining and Entrance Station of a letter (furnished directly to the Armed Forces Examining and Entrance Station or through the local Selective Service board) from the U.S. Attorney concerned with the prosecution reflecting:
>
> (1) Neither he nor the judge of the U.S. District Court concerned has any objection to the man's induction prior to judicial disposition of the charge.

(2) Upon notification that the man has been inducted, appropriate action will be taken to accomplish the man's release from the charge.

This change in the policy of the Department of the Army does not, of course, eliminate the necessity of obtaining prior authorization from the Criminal Division to dismiss the indictment. (D. J. File 25-012)

COURT OF APPEALS

COUNSEL - RIGHTS OF CODEFENDANTS TO SEPARATE COUNSEL

SINGLE REPRESENTATION FOR TWO OR MORE DEFENDANTS HELD PRE-JUDICIAL ERROR.

United States v. George T. Lollar (C. A. D. C. March 20, 1967, 376 F. 2d 243; D. J. 95-16-1909); United States v. Ford (C. A. D. C. May 9, 1967; D. J. 95-16-1966)

Lollar and Ford, codefendants charged with robbery and assault with a dangerous weapon, were jointly represented by a single court-appointed counsel. They were convicted and appealed separately. Based on the record's failure to disclose that the trial court considered the risks of joint representation, explained such risks to the codefendants, and advised them of their right under the Criminal Justice Act to have separate counsel if their interests were so conflicting that they could not be represented by the same counsel, the Court of Appeals found that defendants had been deprived of their constitutional right to effective assistance of counsel and were entitled to a new trial, each with his own assigned counsel.

In reaching its decision the Court relied on Glasser v. United States, 315 U. S. 60 (1942), to the extent that where a defendant has been prejudiced as a result of having to share his attorney with another defendant and has not waived his objections thereto, he must be granted a new trial.

Previous District of Columbia cases in which the issue of joint representation was raised, while requiring some prejudice for reversal of conviction, formulated no standards for determining when prejudice may be said to exist. (Lebron v. United States, 229 F. 2d 16 (1955); Wynn v. United States, 275 F. 2d 648 (1960).) However, the Court in Campbell v. United States, 352 F. 2d 359 (C. A. D. C. 1965), expressly pointed out that "a trial judge has a responsibility to assure that codefendants' decision to proceed with one attorney is an informed decision."

In Lollar and Ford the Court laid down for the first time the test that where the record does not indicate an informed decision was made, the

Government must sustain the burden of establishing beyond a reasonable doubt that prejudice does not result from the joint representation.

The Court arrived at this rule on the basis of Chapman v. California, 386 U.S. 18 (February, 1967), wherein the Supreme Court held that where a constitutional violation has been shown, the Government must sustain the burden of establishing beyond a reasonable doubt that the error is harmless.

Applying this criterion to the cases before it the Court arrived at an "informed speculation" that the joint trial of Lollar and Ford had resulted in their prejudice (i.e., the Court decided that the Government had not proven lack of prejudice beyond a reasonable doubt).

Bazelon, J. dissenting in both cases stated that, were Lollar and Ford cases of first impression, he would consider reversing without any showing of prejudice in favor of an absolute rule requiring separate counsel for each defendant. However, he decided that since the present rule in the District of Columbia Circuit requires a finding of prejudice in order to reverse, and since he could not find prejudice in the record, he would affirm the conviction. He went on to point out that Chapman v. California, supra, relied on by the majority, was inapposite because that case:

> dealt with whether an admitted constitutional violation was harmful. Here, the question is whether there was a constitutional violation. (Lollar v. United States.)

In the separate opinion of Ford v. United States, the Court went beyond its decision in Lollar and, recognizing the uncertainty of a case-by-case determination of prejudice in joint representation, laid down a rule to be followed by the lower courts in assigning counsel under the Criminal Justice Act. That rule was articulated as follows:

> . . . [H]ereafter separate counsel for each co-defendant should be appointed initially in every case, with an instruction that if counsel conclude, after fully investigating the case and consulting with their clients, that the interests of justice and of the clients will best be served by joint representation, this conclusion with supporting reasons shall be communicated to the court for such on-the-record disposition as the court deems appropriate in the circumstances. Slip opinion, p. 5.

Staff: United States Attorney David G. Bress; Assistant United States Attorneys Frank Q. Nebeker and Nicholas S. Nunzio (Dist. of Col.)

DISTRICT COURT

FEDERAL FOOD, DRUG AND COSMETIC ACT

NEW DRUG INTENDED FOR EXPORT ONLY IS NONETHELESS SUBJECT TO NEW-DRUG APPROVAL PROCEDURES.

United States v. An Article of Drug . . . Ethionamide-INH (E.D. N.Y., 67 C 288; August 19, 1967, D.J. 22A-52-25)

The Government seized for forfeiture a large quantity of Ethionamide-INH tablets, being held at Brooklyn, New York, for export to South Vietnam under A. I. D. financing and approval for sale in the professional treatment of tuberculosis. Seizure was made on the grounds that Ethionamide-INH is a new drug for which there has been no approval of a new drug application (21 U. S. C. 355). Claimant, moving for summary judgment, argued that new drugs intended for export are exempt from new-drug approval procedures under 21 U. S. C. 381(d). The Government pointed out on cross-motion for summary judgment that 21 U. S. C. 381(d) applies by its terms to "adulterated or misbranded" drugs only and that "new drugs" is an entirely separate statutory concept. Claimant contended that Congress meant for the exemption to apply more broadly than the terms indicated, tracing the legislative history in detail, suggesting Congressional oversight, and relying upon a statement in an F. D. A. publication in 1949. Judge Dooling decided that claimant's argument had to yield to the language of the statute and found that the plain meaning was supported by provisions of 21 U. S. C. 334(d)(1) and administrative interpretation evident in 21 CFR 130. 3. The Court granted the Government's motion for summary judgment: a new drug intended for export only is nonetheless subject to new drug approval procedures. The Court also held that the res constituted a "new drug" that had been in commerce (having been shipped from New Jersey to Brooklyn), even if no labeling could be said to have accompanied the drug to give it a particular therapeutic character, where the evidence clearly established its intended use as a "new drug."

Staff: United States Attorney Joseph P. Hoey and Former Assistant United States Attorney Quentin H. Vaughan (E. D. N. Y.); Axel Kleiboemer (HEW)

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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

ASSISTANTS APPOINTED

California, Northern - F. STEELE LANGFORD, ESQ.; University of Maryland, LL. B., and formerly an attorney with the Justice Department and in private practice.

California, Northern - JOHN G. MILANO, ESQ.; Harvard LL. B., and formerly an attorney with the Justice Department and in private practice.

District of Columbia - JOEL M. FINKELSTEIN, ESQ.; Cornell, LL. B., and formerly an attorney with the Justice Department.

Maryland - ALAN I. BARON, ESQ.; Harvard, LL. B., and formerly law clerk U. S. District Court and in private practice.

Ohio, Northern - CLARENCE D. ROGERS, ESQ.; Howard University, LL. B., and formerly attorney, Cleveland Lawyers Project and in private practice.

Texas, Southern - JOEL P. KAY, ESQ.; University of Texas, LL. B., and formerly an attorney with the Department of Justice.

Washington, Western - JOHN M. DARRAH, ESQ.; Yale, LL. B., and formerly in private practice.

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURT OF APPEALS

INDIANS

NECESSITY OF DEPARTMENT OF INTERIOR APPROVAL OF CONTRACTS CONCERNING TRUST PATENT INDIAN LAND; DISCRETIONARY EXCEPTION TO FEDERAL TORT CLAIMS ACT.

Lawrence v. United States and Cruz (C. A. 9, No. 21,210, Aug. 17, 1967, D. J. 90-2-1-2425)

Appellants sought specific performance and damages arising from an alleged unapproved oral contract to enter into a long-term lease of allotted Indian land near Palm Springs, California. Damages were also sought against the United States under the Federal Tort Claims Act because of the alleged negligent refusal of employees of the Bureau of Indian Affairs to issue to appellants permits of occupancy to a portion of this land. The district court dismissed the case without explanation.

Absent approval from the Secretary of the Interior, every contract touching land allotted to Indians is null and void (25 U. S. C. 348). However, before the Ninth Circuit, appellants contended that, since the contract alleged was one merely to enter into a lease that would then be subject to Secretarial approval, the Indians here could not be over-reached and they should be forced to submit a lease for approval. In affirming, the Court answered this by noting that the words "any contract" in 25 U. S. C. 348 embraced any contract to enter into a lease.

The Court further held that the United States has not consented to be sued for the failure to issue permits of occupancy to Indian lands. The decision whether or not to issue a permit being founded upon judgment and discretion, the exception to the Federal Tort Claims Act applies (28 U. S. C. 2680).

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

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

COURTS OF APPEALS -- CRIMINAL CASES

EVIDENCE

REVENUE AGENT MAY PROPERLY INTERVIEW TAXPAYER WITHOUT ADVISING OF RIGHT TO COUNSEL.

Frohman v. United States (C. A. 8, No. 18576; July 27, 1967; D. J. 5-26S-1048)

This is another case of precustody questioning of a taxpayer by Internal Revenue agents in which the court was asked to apply the Escobedo and Miranda requirement that the individual being questioned be informed of his right to counsel. The Eighth Circuit held that it need not decide that question since the record showed that the taxpayer had an attorney at his side during the interview. The case is valuable, however, for its citation of all the cases which discuss the application of Miranda-Escobedo to Internal Revenue investigations, and for its statement that "the majority authorities comprise an impressive list and we would be loathe to oppose them."

Staff: Former United States Attorney Richard D. FitzGibbon, Jr., and Assistant United States Attorney John A. Newton (E. D. Mo.)

United States v. Mansfield (C. A. 7, No. 15802, July 26, 1967; D. J. 5-23-4284)

United States v. Turzynski (N. D. Ill., 66 Cr. 151; June 2, 1967; D. J. 2-23-5066)

Both of these cases involve the application of Miranda-Escobedo to precustody questioning of a taxpayer by Internal Revenue agents.

In a lengthy opinion in Turzynski, Judge Will held that the agents must advise a taxpayer of his right to counsel before beginning their questioning. He refused to follow the Seventh Circuit's decision in United States v. Spomar, 339 F. 2d 941, certiorari denied, 380 U. S. 975, on the ground that the Seventh Circuit had not considered Escobedo in that case. (Actually, the briefs in Spomar reveal that the appellant placed his chief reliance on Escobedo.)

At the argument of the Mansfield case, which took place shortly after the Turzynski opinion was published, the effect of Turzynski was discussed by both counsel. In deciding the case, the Seventh Circuit held that advice as to the right of counsel was unnecessary. It relied upon Spomar and upon its earlier decision in United States v. Achilli, 234 F. 2d 797, 805-806, affirmed, 353 U. S. 373.

It should be noted that Judge Will appears to have been misled by an inaccurate note on Internal Revenue procedure which appeared in Commerce Clearing House Tax Service. (See 67 CCH par. 8505.)

Staff: Mansfield--United States Attorney Edward V. Hanrahan; Assistant United States Attorneys John P. Lulinski, Gerald M. Werksman and Richard G. Schultz (N. D. Ill.)

Turzynski--United States Attorney Edward V. Hanrahan; Assistant United States Attorneys Jack Schmetterer and George Faber (N. D. Ill.)

DISTRICT COURT

LIENS

FORECLOSURE OF FEDERAL TAX LIENS AGAINST TAXPAYER'S EQUITABLE INTEREST IN MORTGAGE; JUDGMENT CREDITOR'S LIEN HELD INFERIOR TO TAX LIEN.

United States v. Max B. Cohen, et al. (S. D. Fla.; July 13, 1967; 67-2 U. S. T. C. par. 9602)

The United States moved for a partial summary judgment on the issue of priority of its tax liens and the judgment lien of the defendant, Fontainebleau Hotel Corporation. The taxpayer's judgment creditor asserted that its judgment lien was prior to the tax lien as to the taxpayer's interest in a mortgage indebtedness on the ground that the Government's lien was not filed properly because it was not recorded in the county where the trustee of the mortgage indebtedness resided; the Government was prevented by collateral estoppel from foreclosing its lien in this proceeding because its petition to intervene in a previous state court foreclosure action brought by the judgment creditor was denied; the Government had released its lien; and the defendant was entitled to invoke the doctrine of marshaling assets which would require the United States to satisfy its tax liens out of other property belonging to the taxpayer.

The Court rejected the various contentions made by the judgment creditor. The Court, relying upon the decisions of Campbell v. Bagley, 276 F. 2d 28 (C. A. 5); Grand Prairie State Bank v. United States, 206 F. 2d 217 (C. A. 5); and United States v. Goldberg, 362 F. 2d 575 (C. A. 3), ruled that the mortgage indebtedness was intangible personal property requiring that the notice of federal tax lien be filed where the taxpayer was domiciled. The affidavit filed by the taxpayer which showed that at the time the federal tax liens were filed he was residing in the counties where they were filed was not contested by the judgment creditor. The Court rejected the contention by the Fontainebleau that the Government was estopped to bring this action by virtue of a denial of its petition to intervene in the state court suit. The Court reasoned that there could have been no adjudication of the Government's tax liens, since it was not made a party to that proceeding, and the Court cited the judgment creditors attorney's argument to the state court opposing the Government's petition to intervene to the effect that this action would not result in an adjudication of the Government's rights if it was not made a party. The creditor's counterclaim against the United States seeking to invoke the doctrine of marshaling assets was rejected by the Court on the ground that the Fontainebleau could not show that it was prevented from satisfying its judgment lien out of the very assets it demanded that the United States be forced to look to for recovery.

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

SEIZURE AND SALE OF TAXPAYER'S PROPERTY

FAILURE TO GIVE SENIOR MORTGAGEE NOTICE OF SALE OF TAXPAYER'S PROPERTY OR NAME AND ADDRESS OF PURCHASER AT SALE HELD NOT TO AFFORD ACTION AGAINST DISTRICT DIRECTOR OR UNITED STATES.

Harry Pargament v. Edward J. Fitzgerald, Jr., as District Director, Internal Revenue Service, and United States of America (S. D. N. Y., No. 67-315; June 20, 1967; D. J. 5-57-10436)

The plaintiff in this action held a first mortgage on the taxpayer's plant and equipment, which were seized, advertised for sale and sold at public auction to collect various federal tax liabilities which had accrued subsequent to the plaintiff's mortgage. Plaintiff sought to recover damages in the approximate amount of the outstanding balance on his mortgage on the grounds that he never received a notice of the federal tax sale and that the District Director's "carelessness, neglect and refusal and failure to keep proper records and timely disclose the name and address of the purchaser" prevented plaintiff from enforcing his prior right to the property. Plaintiff also claimed that the District Director conspired with the purchaser to prevent the enforcement of plaintiff's chattel mortgage and complained that the sale of the property for a small amount violated a legal right of the plaintiff, arising from the alleged fact that the taxpayer had an offer to purchase the plant and machinery for a much higher amount.

The Court granted the Government's motion to dismiss and denied the plaintiff's cross-motion for summary judgment on the grounds that the United States, as a sovereign, is immune from an action of this kind and that the plaintiff stated no claim against the District Director for which relief could be granted.

In dismissing the claim against the District Director, the Court held that plaintiff was not entitled to any notice other than the required notice by publication, inasmuch as he was neither the owner nor possessor of the property levied upon. The Court further held that there is no requirement that the District Director keep a record of the names and addresses of purchasers of personal property at federal tax sales, so that the failure to inform plaintiff was not the breach of any legal duty. The Court noted that the only requirement relating to the maintenance of records of the names and addresses of the purchasers at tax sales is limited to sales of real property. (See Section 6340 of the Internal Revenue Code of 1954.)

The Court also concluded that there was no merit in plaintiff's complaint that the property was sold for a small amount ($500) at a time when plaintiff's senior mortgage claim was substantial (approximately $10, 000) and when an alleged offer had been made to the taxpayer which was considerably higher. The Court noted that the only interest that can be seized and sold by virtue of a federal tax levy is the interest of the taxpayer and that, accordingly, prior encumbrances such as that of the plaintiff are not disturbed by the tax sale; the purchaser simply takes whatever interest the taxpayer owned, subject to all other claims.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Grant B. Hering (S. D. N. Y.); Robert E. Ferguson (Tax Division)

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