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United States v. Plumbing Fixture Manufacturers Association, et al. (Cr. 66-296; December 18, 1967; D. J. 60-3-153)

On December 18, 1967 the Court of Appeals for the Third Circuit rendered an opinion reversing the decision of Judge Rosenberg of the Western District of Pennsylvania granting the corporate and individual defendants in the plumbing fixtures cases an injunction halting all discovery against them in the consolidated treble damage actions pending in the Eastern District of Pennsylvania. The defendant corporations, when confronted with extensive discovery requests under civil rules 33 and 34, had initially requested that Judge Lord of the Eastern District of Pennsylvania, who is assigned the treble damage cases, order a general stay of discovery pending the outcome of the criminal cases in the Western District. Judge Lord declined to grant any general stay of discovery, reasoning that a great deal of information (such as copies of all documents submitted to the grand jury and the taking of depositions of all immunized grand jury witnesses) could be obtained without any problem of self-incrimination and without indirectly supplying the Government with any new discovery against the defendants. Judge Lord made clear that he would give full consideration to all specific objections to interrogatories or to any other aspect of the proposed discovery. He declined to certify the questions presented to the Court of Appeals and defendants made no attempt to obtain appellate review of his decision by means of a mandamus action.

The corporate defendants, joined by individuals who were defendants in the criminal case but not in the treble damage actions, then sought from Judge Rosenberg, who had been assigned the criminal cases, an injunction halting civil discovery in the treble damage cases in the Eastern District. After the private plaintiffs appeared specially to contest Judge Rosenberg's jurisdiction over them and to deny adequate service, the individual defendants made an additional motion requesting that the Court enjoin the corporate defendants from complying with discovery in the treble damage cases

in Philadelphia. At the close of oral argument Judge Rosenberg granted a temporary but renewable injunction halting both sides from proceeding with discovery in the treble damage cases in the Eastern District. He concluded that he had power to take such action under the All-Writs Act and because of the general supervisory power of a federal judge in a criminal case to insure that no prejudice infects the proceeding.

The initial ground relied upon by the Court of Appeals in reversing Judge Rosenberg was that "if the injunctive relief sought in the sister court has been requested by the aggrieved parties and denied in the court whose proceedings are found to be restrained, the sister court should hold its hand. [Citations] The proper and ordinary procedure . . . is an appeal . . . of an application to the review court for peremptory writ, not resort to another coordinate tribunal." The Court of Appeals then considered the arguments peculiar to the individual defendants who were not parties to the treble damage actions and who claimed that their privilege against self-incrimination was threatened. The Court concluded that no serious threat of deprivation of constitutional rights was present, particularly since the discovery requested did not include taking the depositions of individual defendants. As to the possibility that the corporate defendants, in responding to discovery, might disclose material likely to incriminate individual defendants, the opinion stated that:

> We know of no rule or equitable principle that protects a defendant not a party in a criminal prosecution from the disclosure, by another person in a separate civil action, of evidence which may later become part of the prosecution's case against him.

The Court of Appeals was more sympathetic to the argument that disclosures elicited in the treble damage litigation might create prejudicial pre-trial publicity in regard to the criminal cases. The Court suggested, however, that such disclosures "need not be made available to the media of public information. Indeed, only the civil judge and civil plaintiffs' counsel need know what is disclosed, and counsel can be expressly enjoined from sharing the information with other persons pending the criminal trial." The opinion continues:

> Of course, the actual trial of the civil case can and should be postponed until after the criminal trial for it appears that the proof of the plaintiffs' case in open court may result in publicity hurtful to the criminal defendants.

The individual and corporate defendants have petitioned Mr. Justice Brennan for an order continuing in effect a stay of pre-trial discovery pending the filing of a writ of certiorari and determination thereof. The United States did not express an opinion on the merits of this matter either before Judge Rosenberg or in the Court of Appeals.

Staff: John C. Fricano, Rodney O. Thorson, Joel Davidow and S. Robert Mitchell (Antitrust Division)

SHERMAN ACT

COURT DENIES APPLICATION FOR MANDAMUS.

United States v. Honorable Ted Cabot, United States District Judge for Southern District of Florida. (Cr. 65-535; January 5, 1968; D. J. 60-139-149) (Case previously reported in Bulletin under Federal Rules of Criminal Procedure 16 on October 12, 1966)

By indictment dated December 13, 1965, ten dairy distributors, a public relations firm, and four individuals were charged with Sherman Act, Section 1 violations for a price fixing conspiracy and agreement not to compete in the southern Florida milk market. Defendants made a pre-trial discovery motion under Rules 16(a) and 6(e) of Federal Rules of Criminal Procedure to inspect and copy the grand jury testimony of all directors, officers, agents and/or employees of the corporate defendants. The district court judge on October 12, 1966, granted defendant's motion in part and required the United States to produce the transcripts of all officers, directors, agents and employees but not former employees of the corporate defendants. The district court rested its order on the inherent power of the court to manage a trial so as to achieve a fair and expeditious result, Rule 6(e) and 16(a)(3), Federal Rules of Criminal Procedure, and Dennis v. United States, 384 U.S. 855 (1966). On October 18, 1966, the United States filed a petition for mandamus in the Fifth Circuit Court of Appeals contending that the term "recorded testimony of the defendant" as used in Rule 16(a)(3), Federal Rules of Criminal Procedure does not include testimony of officers, agents or employees of corporate defendants and that "particularized need" had not been established to justify disclosure on any other ground.

On January 5, 1968, the Court of Appeals denied the Government's application for mandamus. The Court held that while the district judge took account of Rule 16(a)(3), he rested his decision on his discretionary powers, both inherent and under Rule 6(e), and made no clear-cut interpretation of Rule 16(a)(3). As the record did not "even remotely suggest an abuse of discretion," the Court of Appeals found mandamus inappropriate.

Staff: Howard E. Shapiro, Jerome A. Hochberg and Ronald B. Lewis (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

SUPREME COURT

INTERNATIONAL RELATIONS

STATE ESCHEAT STATUTE, CONDITIONING RIGHT OF NON-RESIDENT ALIENS TO INHERIT UPON EXISTENCE OF RECIPROCAL RIGHTS IN ALIEN HEIR'S COUNTRY, UNCONSTITUTIONALLY INTRUDES INTO FIELD OF FOREIGN AFFAIRS.

Oswald Zschernig, et al. v. William J. Miller, Administrator, et al. (No. 21, January 15, 1968; D.J. 9-21-2946)

A resident of Oregon died there intestate, leaving real and personal property. Her sole heirs were residents of East Germany. Under an Oregon escheat statute, "a non-resident alien's" right to inherit property depended upon (a) the existence of a reciprocal right of American citizens to inherit upon the same terms and conditions as citizens of the country of which the alien heir is an inhabitant or citizen, (b) the right of American citizens to receive payments within the United States from the estates of decedents dying within such foreign country, and (c) proof that the alien heirs of the American decedent will receive the benefit, use or control of their inheritance without confiscation. ORS 111.070.

An Oregon probate court held that the decedent's heirs were not entitled to inherit both the real and personal property on the ground that they failed to prove the existence of reciprocity of inheritance rights as required by the statute. The Supreme Court of Oregon reversed as to the realty on the basis of a 1923 treaty between the United States and Germany, but affirmed as to the personalty. The heirs appealed to the Supreme Court concerning the personalty.

In the Supreme Court, we urged as amicus curiae that the treaty also permitted German nationals to inherit personal property in this country regardless of the citizenship of the decedent. Contra: Clark v. Allen, 331 U.S. 503. In addition, we apprised the Court that the Government did not "contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations".

The Supreme Court, ruling in the heirs' favor, refused to consider our argument based on the treaty. Instead, the Court ruled that the history and operation of the Oregon statute made clear that it was an unconstitutional

"intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." In the Court's view, it seemed "inescapable that the type of probate law that Oregon enforces affects international relations in a presistent and subtle way".

Staff: Former Solicitor General Thurgood Marshall; Howard J. Kashner (Civil Division)

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

SUIT BY SECRETARY OF LABOR ATTACKING UNION ELECTION OF OFFICERS UNDER TITLE IV OF LMRDA NOT RENDERED MOOT BY UNION'S HOLDING OF ITS NEXT REGULARLY SCHEDULED ELECTION; SECRETATY MAY INCLUDE IN COMPLAINT ANY MATTER WHICH UNION HAD FAIR OPPORTUNITY TO CORRECT IN CONNECTION WITH INTERNAL COMPLAINT BY UNION MEMBER.

Wirtz v. Local 153, Glass Bottle Blowers Association etc.; Wirtz v. Local Union No. 125, Laborers' International Union of North America, AFL-CIO. (Nos. 57 and 58, January 15, 1968; D.J. 156-64-121 and 156-57-122)

Section 402 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. 482, authorizes the Secretary of Labor, upon complaint by a union member who has exhausted his internal union remedies, to file a suit seeking to set aside any union election the outcome of which may have been affected by a violation of the standards for conducting elections prescribed by Section 401 of the Act, 29 U.S.C. 481, and to obtain an order directing the conduct of a new election under the Secretary's supervision. In Local 153, the Secretary's suit was premised on the union's application at its 1963 election of a rule requiring all candidates for office to have attended 75% of the union meetings in the two years preceding the election; this rule disqualified over 97% of the membership from running for office. In Local 125, the alleged violation occurred at the union's 1963 election and consisted of the practice of the union's Secretary-Treasurer in making per capita tax payments to the International with respect to some union members who were in arrears on their dues: the result of this practice was that these members' eligibility to vote was subsidized by the union treasury. In Local 153 the district court denied relief on the ground that the violation could not have affected the outcome of the election. While the Secretary's appeal was pending, the union held its next regularly scheduled election, and the Third Circuit Court of Appeals held that this rendered the Secretary's suit moot. In Local 125, the district court permitted the Secretary to hold a supervised election as to one union office, but denied relief as to the other offices. While the Secretary's appeal from this order was pending, the union held its next regularly scheduled election. The Sixth Circuit Court of Appeals held that this rendered the case moot. Both decisions followed the decision of the

Second Circuit Court of Appeals in Wirtz v. Local 410 et al., IUOE, 366 F. 2d 438.

The Supreme Court reversed, holding that the cases were not moot. The Court reasoned that in LMRDA Congress intended to make the Secretary's intervention in union elections effective, once the statutory prerequisites to such intervention are fulfilled. The Court noted that Congress deliberately gave enforcement authority to the Secretary, rather than to private union members. Once the Secretary's authority is properly brought to bear, and it is shown that a violation may have affected the outcome of a union election, the Act requires the holding of a new election supervised by the Secretary. "We cannot agree that this statutory scheme is satisfied by the happenstance intervention of an unsupervised election. The notion that the unlawfulness infecting the challenged election should be considered as washed away by the following election disregards Congress' evident conclusion that only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act would not by some means perpetuate their unlawful control in the succeeding election. That conclusion was reached in light of the abuses surfaced by the extensive congressional inquiry showing how incumbents' use of their inherent advantage over potential rank and file challengers established and perpetuated dynastic control of some unions." It had been argued that it would serve no practical purpose to void the old election once the terms of office conferred thereby had terminated. The Supreme Court stated that this argument "fails to consider the incumbents' possible influence on the new election". In addition, "it seems to view the Act as designed merely to protect the right of a union member to run for a particular office in a particular election. But the Act is not so limited, for Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member."

The Supreme Court remanded Local 153 to the Court of Appeals for consideration of the merits of the Secretary's appeal. However, in Local 125 the Supreme Court proceeded to reach the merits of the appeal, in view of the importance of the issue involved and the divergent views of the lower courts. In Local 125, the losing candidate for Business Representative in a run-off election attacked the result of that election in his internal complaint and his complaint to the Secretary, on the basis of a violation which had occurred both at that election and at the election of the other union officers in the general election out of which the run-off arose. The district court had held that the Secretary's suit must be confined to the election for Business Representative, since that was the election to which the internal complaint of the union member was addressed. The Supreme Court, however, concluded that "it would be anomalous to limit the reach of the Secretary's cause of action by the specifics of the union member's complaint".

Acknowledging that the purpose of the internal self-exhaustion requirement was to foster union self-government by giving the union a chance to correct election abuses before the courts step in, the Court concluded that responsible union self-government had not occurred here, since the union had failed to act in the face of "the almost overwhelming probability" that the misconduct affecting the run-off election had also affected the general election. In short, the Court ruled that the Secretary's suit could include any misconduct "which the union had a fair opportunity to consider and redress in connection with a member's initial complaint." In view of its ruling that the union had "fair notice" of the alleged violation at its general election, the Court stated that it intimated no view on the Secretary's argument "that a member's protest triggers a §402 enforcement action in which the Secretary would be permitted to file suit challenging any violation of §401 discovered in his investigation of the member's complaint".

Staff: Louis F. Claiborne (Solicitor General's Office); Robert V. Zener (Civil Division)

STANDING; FEDERAL ELECTRIC POWER PROGRAMS

UTILITY COMPANY HELD TO HAVE STANDING TO CHALLENGE ACTION OF TVA IN PROVIDING ELECTRIC POWER TO CERTAIN VILLAGES, SINCE PARTICULAR STATUTORY PROVISION INVOKED REFLECTED LEGISLATIVE PURPOSE TO PROTECT COMPETITIVE INTEREST; HOWEVER, TVA'S ACTION HELD JUSTIFIED ON MERITS.

Hardin v. Kentucky Utilities Co. (Nos. 40, 50 and 51, January 16, 1968; D.J. 115-70-18)

The TVA Act of 1959 barred the TVA from expanding its sales outside "the area for which the Corporation [TVA] or its distributors were the primary source of power supply on July 5, 1957". The TVA sought to extend its services to two villages in Claiborne County, Tennessee. The competing private power company, Kentucky Utilities, then brought this action, asserting that the two villages were not within TVA's primary service "area". The district court, while finding that Kentucky Utilities had standing to bring the action, dismissed the case on the merits. The Court of Appeals reversed on the merits. The Supreme Court, agreeing with the district court, reversed the decision of the Court of Appeals on the merits after holding that Kentucky Utilities had standing.

The Supreme Court rejected the Government's contention that Kentucky Utilities had no standing because there had to be an intent in the statute to give Kentucky Utilities a judicially enforceable right. The Court instead ruled "that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor

has standing to require compliance with that provision". The Court then pointed out that one of the primary purposes of the area limitations in the Act was to protect private utilities from TVA competition. Accordingly, the Court held that Kentucky Utilities came within the class the Act was designed to protect, and thus "no explicit statutory provision is necessary to confer standing".

On the merits, however, the Court ruled in the Government's favor. The Court observed that while the TVA, as of the date set by the statute, was not the primary source of power in the village concerned, it was the primary source for Claiborne County as a whole, and TVA was free to conclude under the statute that the county constituted its service "area".

Staff: Robert H. Marquis, TVA

COURT OF APPEALS

MEDICAL CARE RECOVERY ACT

UNITED STATES MAY ENFORCE ITS RIGHT UNDER ACT WITHOUT BECOMING PARTY TO ACTION BROUGHT BY INJURED PERSON WITHIN 6 MONTHS AFTER IT FURNISHES MEDICAL CARE.

United States v. Merrigan (C. A. 3, No. 16,657, January 16, 1968; D.J. 77-48-1733)

The Medical Care Recovery Act gives the United States a right to recover from a third person the reasonable value of the medical care it furnishes to a person injured under circumstances creating a tort liability upon the third person. 42 U.S.C. 2651(a). The Act additionally provides in 42 U.S.C. 2651(b):

> The United States may, to enforce such right, (1) intervene or join in any action . . . brought by the injured. . . person . . . or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished by the United States in connection with the injury or disease involved, institute and prosecute legal proceedings against the third person in a State or Federal court. . .

In this case, the United States sued in a federal district court to recover for medical care furnished a veteran. The veteran had earlier brought

his own action against the tortfeasor within six months after medical care was first furnished, and his action had already gone to trial and judgment. The district court dismissed the Government's action on the ground that, in view of the earlier suit filed within the six-month period, the Government's only remedy was intervention or joinder in the private action.

On appeal, the Government contended that the language of 42 U. S. C. 2651(b) was permissive and that the United States did not lose the independent right of recovery created by the Act merely because it failed to intervene. We further argued that the statute did no more than require the Government to wait for six months to afford the injured person an opportunity to bring his action first. The Court of Appeals agreed and reversed. Judge Hastie dissented.

Staff: Morton Hollander and Howard J. Kashner
(Civil Division)

DISTRICT COURT

FALSE CLAIMS ACT

GOVERNMENT ENTITLED TO SUMMARY JUDGMENT AS TO LIABILITY IN CIVIL FALSE CLAIMS ACT SUIT BASED ON PRIOR CRIMINAL CONVICTION; SETOFF OF CIVIL SERVICE RETIREMENT ANNUITY ALLOWABLE BEFORE JUDGMENT.

United States v. John A. Wylie (M. D. Pa., December 27, 1967; D.J. 46-16-784)

Defendant, former Director of Budget and Finance, Office of the Secretary of Defense, was convicted on June 18, 1965, of violating 18 U. S. C. 287 for presenting a false claim. Thereafter, a civil complaint was filed under the False Claims Act, 31 U. S. C. 231, seeking recovery of double damages and forfeitures. The civil complaint was predicated in part upon the same false claim for which defendant had been convicted. Defendant denied liability. He counterclaimed for recovery of his Civil Service retirement annuity which admittedly was being withheld as a setoff against the Government's instant claim.

The United States moved for summary judgment, on an estoppel by judgment theory, as to the count in the complaint based upon the false claim for which defendant had been convicted. Defendant moved for summary judgment on his counterclaim for recovery of his annuity. The Government's motion was granted as to liability. The Court ruled that the jury in the criminal case had found, of necessity, that defendant had fraudulently obtained a specific sum of money in the false claims, and that therefore,

defendant was foreclosed from disputing liability for fraudulently obtaining that sum of money in the present action. However, the Court reserved the determination of damages for trial, holding that defendant's claim of a debt owed him by the Government created an issue of fact as to the amount of damages.

Defendant's motion for summary judgment concerning his annuity was denied, the Court holding that the United States was entitled to set off the retirement annuity even though its claim had not been reduced to judgment, citing Shay v. Agricultural Stabilization and Conservation State Committee for Arizona, 299 F. 2d 516, 524 (C. A. 9, 1962).

Staff: United States Attorney Bernard J. Brown (M. D. Pa.); N. David Palmeter (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURTS OF APPEAL

INTERSTATE COMMERCE ACT (MOTOR CARRIERS)

VIOLATION OF INTERSTATE COMMERCE REGULATIONS PERTAINING TO MOTOR CARRIERS MALUM PROHIBITUM OFFENSE IN WHICH SPECIFIC CRIMINAL INTENT NOT AN ELEMENT.

United States v. John Henricks, Inc. (C. A. 7, No. 16315, January 8, 1968; D. J. 59-30-10241)

The Court of Appeals for the Seventh Circuit affirmed the conviction under 49 U.S.C. 322(a) of defendant, a private motor carrier engaged in interstate transportation of hay, for failing to require its drivers to keep a daily log in compliance with Regulations, even though evidence showed that defendant had a standing program instructing its drivers concerning the necessity of keeping such log.

The Court rejected defendant's contention that the statute making it unlawful "knowingly and willfully" to violate a Regulation includes criminal intent as an element of the offense. It held that, since the offense is malum prohibitum, no such element is required. The Court concluded that evidence of defendant's acknowledgment of its failure to comply with requirements on occasion of Government inspections made in 1961, 1964, and 1965 was sufficient to show that defendant's continuing failure to require its drivers to comply with the Regulations was with knowledge of the requirements of such Regulations.

The Court also rejected defendant's contention that the term "require" as used in the logging regulations (49 C.F.R. 195.8) was synonymous with the word "request", and that a carrier complies with the Regulations by requesting its drivers to keep logs. The Court held that the word "require" suggests a duty to impose sanctions for noncompliance (so as to assure compliance); and that to hold otherwise would frustrate the regulatory requirements.

Staff: United States Attorney Edward V. Hanrahan; Assistant United States Attorneys John Peter Lulinski, Richard S. Jalovec and Gerald M. Werksman (N.D. Ill.)

NARCOTICS

CRIMINAL RESPONSIBILITY -- ADDICTION TO NARCOTICS DOES NOT

OF ITSELF CONSTITUTE THAT KIND OF INSANITY WHICH WILL NEGATIVE CRIMINAL RESPONSIBILITY.

La Verl Bailey & Charles R. Smith v. United States (No. 24158, C.A. 5, December 1, 1967; D.J. 54-74-1490)

The appellants appealed from a conviction for violating the federal prohibitions against concealing and transporting illegally imported narcotics and purchasing narcotics not from the original stamped packages, 21 U.S.C. 174; 26 U.S.C. 4704.

One of the specifications of error was the trial court's failure to honor their request for a jury charge on the issue of criminal responsibility or "insanity".

Appellants' theory was that addiction is a defect or disease which creates a compulsion to procure and use narcotics, and that one acting under such a compulsion should not be criminally responsible. They relied on Robinson v. California, 370 U.S. 660 (1962), urging that punishment imposed upon addicts for narcotics crimes is cruel and unusual in violation of the Eighth Amendment.

The Court of Appeals stated that the holding in the Robinson case was limited to the criminality of the status of drug addiction. From the mere fact that drug addiction was not itself a crime, one could not conclude that drug addiction constituted insanity or some evidence of mental disease so as to raise the issue of criminal responsibility. The Court said that it was unwilling to undertake such an extension of Robinson beyond the line expressly drawn by the Supreme Court.

The Court observed that the record contained no evidence probative of the contention that addiction eliminated the criminal intent of the appellants and further indicated that it would assume "that an element of reasoned choice yet exists where an addict knowingly violates the law in acquiring and using drugs", and that, therefore, at least until an appropriate evidentiary basis was laid in the record of a trial court, the law would not excuse crimes simply because an individual had to satisfy his drug craving "very, very badly".

Staff: United States Attorney Morton L. Susman; Assistant United States Attorneys Ronald J. Blask, James R. Gough, and former Assistant United States Attorney Thomas C. McClellan (S.D. Texas)

* * *

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

COURT OF APPEALS

PUBLIC LANDS

DEFERENCE DUE SECRETARY OF INTERIOR'S INTERPRETATION OF PUBLIC LAND ORDER; INTERIOR DEPARTMENT NOT ESTOPPED FROM REFUSING TO ISSUE HOMESTEAD PATENT.

Stewart L. Udall, et al. v. Richard L. Oelschlaeger (C. A. D. C. No. 21, 127, Jan. 23, 1968, D. J. 90-1-1-1850)

Appellee entered unsurveyed land near Turnagain Arm, an extension of Cook Inlet south of Anchorage, Alaska, in 1954 with a view toward obtaining a homestead patent.* Subsequent to the official survey of the area, his final application was denied by the Interior Department on the basis that the subject land was not open to homestead by virtue of Public Land Order 576 which withdrew from the public domain an 11-mile strip of land "parallel to and one mile distant from the line of mean high tide of Turnagain Arm."

Because of vast level mud flats and a 30-foot rise and fall of the tide in this area, the line employed as the seaward limit of the reserve was determinative of whether the withdrawal included the land sought by the appellee. The appellee prevailed in the district court, arguing that the term "line of mean high tide" meant the true average of the high tides as defined by the Supreme Court in Borax, Ltd. v. Los Angeles, 296 U. S. 10 (1935), and that the Government was estopped from refusing to issue a patent on the ground that adjacent landowners had previously been issued homestead patents in this allegedly withdrawn area. In remanding the case to the Interior Department, the district court rejected the Government's argument that the order intended the surveyor's meander line as the seaward boundary of the withdrawn area.

On appeal, the case was reversed and remanded with orders to enter judgment in favor of the Secretary. Citing Udall v. Tallman 380 U. S. 1 (1965), the District of Columbia Circuit noted its "duty to defer to the Secretary's interpretation of his own regulations, so long as that interpretation is not plainly beyond the bounds of reason or authority * * * ". The Court found a requisite basis for the Secretary's meander line-interpretation in the wording of Public Land Order 576 which had the disputed seaward line coinciding with a "meander corner."

The Borax decision was found not to govern the issue, since it determined "the vastly different matter" of boundaries between tideland and upland

owners. Likewise, the Court held that apart from the general rule that the Government is not estopped by the mistakes of its agents, the record did not show that appellee relied upon the issuance of the neighboring patents which were given prior to the official survey of the area.

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

CONDEMNATION

MINES AND MINERALS; PRETRIAL SETTLEMENTS; SCOPE OF FUNCTION OF COMMISSION UNDER RULE 71A(h); LEGAL QUESTION AS TO COMPENSABLE INTEREST NOT REFERABLE TO COMMISSION; RIGHT TO EXTRACT COAL HELD LEASE UNDER VIRGINIA LAW WARRANTING COMPENSATION; UNIT RULE WHEN MINERALS INVOLVED.

United States v. Atomic Fuel Co. 383 F. 2d 1 (C. A. 4, 1967, D. J. 33-48-675-65)

The United States condemned varying interests in three small parcels of land in Dickinson County, Virginia, for use in the construction of the John W. Flannagan Dam and Reservoir Project. Steinman Development Company was the owner of all the coal in place in a 581. 88-acre area which included the three small parcels condemned by the Government. Before the Government's taking, Steinman entered into a contract with Pound River Coal Company which in material part gave it the right "to mine the seam or seams of coal" lying within the 581. 88-acre area. Pound River assigned the contract to Atomic Fuel Coal Company, appellant herein.

The Government, before any interests of Atomic were determined by the court, and in the light of Atomic's claim to compensation, entered into a settlement agreement with Steinman for its interest in all the coal in place in regard to the three parcels condemned. Atomic claimed compensation in the amount of $250, 000 and the issue of just compensation was tried before a commission. The district court referred the legal question of the character of Atomic's claim, as to whether it was a lease or a mere license, to the commission for determination. The district court then adopted the findings of the commission and held that Atomic's contract was, according to Virginia law, a mere license to extract coal rather than a lease of the coal in place and denied Atomic compensation (254 F. Supp. 209).

Atomic appealed and the Government contended that Atomic's contract was a "working arrangement" to mine coal which, under Virginia law, does not grant an interest or estate in the land or coal in place but was a revocable license in which no rights are created until the coal was actually mined and separated from the land. Cf. Church v. Goshen Iron Co., 112 Va. 694, 72

S. E. 685 (1911); Bostic v. Bostic, 199 Va. 348, 99 S. E. 2d 591 (1957).

The Fourth Circuit reversed, holding that Atomic's contract was, under Virginia law, a mineral lease entitling Atomic to compensation. The Court said (p. 3):

> Time, money and litigation could have been saved the United States and the other parties if the customary procedure had been followed in this case. With notice of the claim of Atomic, its interest as well as that of all other claimants should have been determined by the Court before directing the ascertainment of just compensation. Certainly the legal question of the character of Atomic's claim ought not to have been left to the commission.
>
> The validity of the claims once declared, all of the recognized claimants had the right to be heard by the commission upon the amount due for the whole of the take. This amount would then be put into the registry of the Court. Thereafter claimants would be heard by the Court upon the distribution of it among them. By this method the Government would be relieved of the problems of distribution, for its only obligation is to pay as a whole for what it expropriates. Messer v. United States, 157 F. 2d 793, 795 fn. 5 (5 Cir. 1946).

This illustrates the dangers that can develop when the Government enters into partial settlements excluding minerals and other interests before the rights of all interested claimants are determined by the court. As a result, the Government will end up paying twice for property taken.

Staff: Robert M. Perry (Land and Natural Resources Division)

RIGHT OF ACCESS; NECESSITY OF OBJECTION TO REFUSAL TO GIVE REQUESTED INSTRUCTIONS; PROPOSED JURY INSTRUCTION BASED ON STATE STATUTE THAT PRESCRIBED MEASURE OF DAMAGES FOR LOSS OF ACCESS NOT APPLICABLE IN FEDERAL CONDEMNATION PROCEEDINGS.

Bock v. United States (375 F 2d 479, C. A. 9, 1967, D. J. 33-49-847)

Appellant's property fronted State Highway 11A and vegetables were sold on the premises to highway travelers. The Government, in conjunction with the construction of U. S. Highway 82, a part of the national system of interstate and defense highways, changed State Highway 11A into a limited access highway, denying appellant direct access thereto. Appellant assigned error to the court's failure to give three of its proposed instructions to the jury. The record disclosed that, at the trial, appellant objected to the court's refusal

as to only one of its proposed intructions. The Ninth Circuit rejected all but one of appellant's assignments of error, saying (p. 480):

> Rule 51 provides that a party may not complain of the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating distinctly the matter to which he objects and the grounds of his objection. Here the record discloses that Bock was duly afforded an opportunity in the trial court to make his objections but expressed none at all, save as to one instruction. He is therefore not entitled to have all of them reviewed as a matter or right; and it is firmly established in this circuit that "the 'plain error' rule may not be utilized in civil appeals to obtain a review of instructions given or refused". Bertrand v. Southern Pacific Co., 282 F. 2d 569 (9th Cir. 1960), cert. denied, 365 U. S. 816, 81 S. Ct. 697, 5 L. Ed. 2d 694 (1961); Hargrave v. Wellman, 276 F. 2d 948 (9th Cir. 1960).

As to appellant's contention that the trial court erred in not submitting its proposed instruction based on the State of Washington statute (R. C. W. 47. 52. 080), which entitled an owner of business property abutting a highway to compensation for loss of adequate ingress and egress where a highway is altered, the Court of Appeals held that the state statute could not be used to declare a measure of damages in federal condemnation proceedings and the instruction given by the court adequately covered the matter.

Staff: Robert M. Perry (Land and Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

COURTS OF APPEALS-CIVIL CASES

ATTORNEY'S LIEN--SET-OFF

ATTORNEY'S FEE AWARDED BY DISTRICT COURT AS PART OF JUDGMENT IN FEDERAL TORT CLAIM ACTION IS SUBJECT TO RIGHT OF UNITED STATES TO SET-OFF AGAINST ENTIRE JUDGMENT ANY DEBTS JUDGMENT-CREDITOR OWES UNITED STATES

United States v. Meyer Harris Cohen (C. A. 5, No. 23,941, Dec. 27, 1967, D. J. 5-12-4805) (1968-1 U. S. T. C. ¶9138)

In 1951 and 1952 the Commissioner of Internal Revenue made jeopardy assessments for income tax deficiencies, fraud penalties, and accrued interest against the taxpayer, Mickey Cohen, totalling $227,641. These assessments were eventually reduced to judgments for a total of $393,469 in April 1965.

Meanwhile the taxpayer had been convicted of income tax evasion and sent to jail (see Cohen v. United States, 297 F. 2d 760 (C. A. 9, 1962)). In jail he was assaulted and seriously injured by a fellow prisoner. He sued the United States under the Federal Tort Claims Act (28 U. S. C. 2671 et seq.) alleging that the Government had negligently failed to prevent the assault on him. After trial, the district court rendered judgment for Cohen in the total amount of $110,000 and under Section 2678 of 28 U. S. C. awarded $15,000 of the judgment to Cohen's attorneys for their services. See Cohen v. United States, 252 F. 2d 679 (N. D. Ga., 1966). In its judgment the court provided that the attorneys' fees were "a first priority lien upon said judgment *** free and clear of any and all claims which the * * * United States might assert against * * * the plaintiff".

The Government appealed solely on the ground that the discretion given to a district court under Section 2678 of 28 U. S. C. to award a fee to the attorney of a successful claimant in a Federal Tort Claim action does not permit it to make the award free and clear of the Government's right to set-off against the judgment any claims it has against the successful claimant. The Fifth Circuit agreed.

The Court of Appeals held that the purpose of Section 2678 of 28 U. S. C. was to give the district court discretion in awarding an attorney's fee in order to limit the amount which an attorney could receive in a Federal Tort

Claim action. It was not intended to create an independent right in an attorney. Consequently, an attorney has only a derivative right to a portion of the client's judgment. In such circumstances, the United States had the right to set-off any debts owed it by the judgment creditor against the entire judgment, even though third parties may have derivative rights to part of the judgment. United States v. Munsey Trust Co., 332 U.S. 234.

The decision of the Fifth Circuit places attorney's fees awarded under Section 2678 of 28 U.S.C. in the same status as a lien an attorney might have under state law on a judgment against the United States in a non-tort action. In such circumstances, if a lien exists, it is inferior to the Government's right of set-off. See Malman v. United States, 202 F. 2d 483 (C.A. 2, 1953); Madden v. United States, 371 F. 2d 469, 178 Ct. Cl. 121 (1967); Brozan v. United States, 128 F. Supp. 895 (S.D. N.Y.,1954); Kleiger v. McMahon, 128 F. Supp. 741 (S.D. N.Y., 1954); Morgan v. United States 131 F. Supp. 783 (S.D. N.Y., 1955).

The same general principle is embodied in the Tax Lien Act of 1966 (26 U.S.C. 6321 et seq.) which is not directly applicable to attorney's fees awarded under the Federal Tort Claims Act. Section 6323 of 26 U.S.C. provides in substance that attorney's liens under local law shall take priority over tax liens except when the claim or judgment is against the United States and the United States has the right of set-off.

Staff: Joseph Kovner and Albert J. Beveridge, III (Tax Division)

TAX LIENS--TEXAS COMMUNITY PROPERTY

TEXAS MARITAL COMMUNITY IS NOT THIRD PARTY ENTITLED TO JOIN UNITED STATES AS DEFENDANT IN QUIET TITLE ACTION PURSUANT TO 28 U.S.C. 2410, WHERE SOLE PURPOSE OF ACTION IS TO CONTEST MERITS OF HUSBAND'S SEPARATE LIABILITY FOR UNDERLYING ASSESSMENT GIVING RISE TO TAX LIEN WHICH HAS AFFIXED TO COMMUNITY PROPERTY

Daniel J. Mulcahy and Lessie Mulcahy v. United States, et al. (C.A. 5, No. 24,052, Jan. 12, 1968, D.J. 5-74-1134)

This was the second attempt by the taxpayer and his wife, who resided in Texas, and who owned community property, to seek the aid of a court for the purpose of attempting to enjoin the collection of Section 6672 penalties which had been assessed solely against the husband. The Court of Appeals affirmed the dismissal by the District Court of the action because the claims for equitable relief raised by the taxpayer and his wife were identical to the claims raised in the former action, and the decision of the former action

barred further maintenance of the present action. However, in the instant case, the plaintiffs raised one new claim. They sought to litigate the validity of the assessment on the theory that the tax liens securing payment of the husband's separate liability had affixed to community property, and, therefore, the marital community constituted a third party and had standing to challenge the validity of the tax liens pursuant to 28 U.S.C. 2410 under the guise of a quiet title action.

Staff: Crombie J. D. Garrett and Willy Nordwind, Jr. (Tax Division)

DISTRICT COURT-CIVIL CASES

INJUNCTION

COURT BARS ACTION TO ENJOIN DISTRICT DIRECTOR OF INTERNAL REVENUE FROM EXAMINING BOOKS OF TAXPAYER BEFORE SUMMONS HAD BEEN ISSUED.

M. Ashley Dickerson v. Lewis J. Conrad, District Director of Internal Revenue, and Charles A. Pohland, Internal Revenue Agent (D. Alaska, October 26, 1967, D. J. 5-6-218) (68-1 U.S.T.C. par. 9158)

This is an action in which the plaintiff sought to enjoin the defendants from "harassing" her by conducting an investigation of her tax returns. It appears that one of the defendants notified the plaintiff pursuant to Section 7602 of the Internal Revenue Code that he wished to discuss the returns with her. Plaintiff refused the interview and further sought to enjoin the defendants from conducting their investigation on the grounds that her constitutional rights under the Fourth and Fifth Amendments, as well as the attorney-client privilege, were being violated.

Section 7421(a) prohibits suits to restrain the assessment or collection of federal taxes. The defendants argued that the District Court lacked jurisdiction to entertain plaintiff's suit under Section 7421 because a preassessment investigation by the Internal Revenue Service was part of the assessment process and could not be enjoined. Campbell v. Guetersloh, 287 F. 2d 878 (C. A. 5, 1961). The defendants also contended that the plaintiff's action was premature, since a summons had not been served on her by the District Director.

The Court, granting the defendants' motion to dismiss, pointed out that an injunction was not the plaintiff's proper remedy, since she was not required to respond to the defendants' requests until a summons had been issued. She must wait to challenge the investigation until such time that the summons is sought to be enforced.

Staff: United States Attorney Richard L. McVeigh; Assistant United States Attorney Marvin S. Frankel (D. Alaska); and Stanley B. Kay (Tax Division)

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