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Article 7

# The Plea of Nolo Contendere in the Federal Courts

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report to any participant or beneficiary. In addition, the administrator must file with the Secretary of Labor two copies of the description and annual report.[45]

SEC. 9. *Enforcement.*—This section imposes a criminal liability for any willful violation with respect to disclosure, reporting or publication. Also, a civil liability arises against the administrator and in favor of a participant or beneficiary who has been refused or has failed to receive, upon request, publication of a description or annual report within thirty days after such request. In the court's discretion, the administrator may be liable up to fifty dollars a day from the date of failure or refusal.

### CONCLUSION

The Act calls for some duplication of information already required of administrators under the Internal Revenue Code and the Taft-Hartley Act. However, the Welfare and Pension Plans Disclosure Act covers a substantially wider area. In addition it places the information in the hands of a governmental agency, the Department of Labor, which can, under the Act, regulate and enforce proper administration and impose penalties where needed.

Notwithstanding its advantages, the new Act will not be a panacea for the problems which prompted it. The closer watch afforded the federal government and the employee-beneficiary will not completely discourage the unscrupulous. But the fact that man is inclined to misbehave is no valid argument against a regulatory statute or criminal law. In short, the new Act seems to be a proper step in the direction of curtailing abuse and mismanagement in the administration of employee benefit plans.

[45] Under this section, the Secretary of Labor is required to make copies of the description and annual reports available for inspection in the public document room of the Department of Labor.

## THE PLEA OF NOLO CONTENDERE IN THE FEDERAL COURTS

### INTRODUCTION

In the early case of *United States v. Hartwell*[1] there was an attempt made to set up a distinction between a plea of nolo contendere and a plea of guilty. The court, however, said that this suggestion should not be given any weight, as it is well settled that the legal effect of the former is that of the latter as it regards all the proceedings on the indictment.

However, though the defendant concedes his guilt by using the plea, it is still a valuable piece of procedural machinery in a criminal proceeding;

[1] Fed. Case No. 15,318 (1869).

it is a confession only for the purposes of the criminal case and evidence of a plea of nolo contendere is not admissible either as an admission or as proof of guilt in a subsequent case against the defendant.[2]

### EFFECTS OF A PLEA OF NOLO CONTENDERE

The plea of nolo contendere is in effect a plea of guilty to every essential element of the offense.[3] It admits all of the facts well pleaded in the indictment,[4] and leaves open for review the sufficiency of the indictment only.[5]

The defendants, in *United States v. Cosentino*,[6] after withdrawing pleas of not guilty, pleaded nolo contendere, and were sentenced two months later. They urged that it was error to sentence them without hearing any evidence bearing on the question of their guilt. It was held that by entering such pleas the defendants confessed the truth of the charges and that, therefore, the court was under no obligation to receive any evidence. In *United States v. Norris*,[7] the defendant in a criminal case, after a plea of nolo contendere filed a stipulation of facts which he wanted the court to take into consideration in determining his case. The Supreme Court said:

> After the plea, nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record.[8]

The stipulation was too late, for the nolo plea upon the question of guilt was as conclusive as if a plea of guilty had been entered.

By pleading nolo contendere the defendant will waive his demand for a bill of particulars.[9]

Nor is a defendant entitled to a trial after a plea of nolo contendere.[10] "It is [for the purpose of the case only] the equivalent of a plea of guilty, and leaves nothing for a jury to try."[11]

[2] Piassick v. United States, 253 F.2d 658 (C.A. 5th, 1958); Mickler v. Fahs, 243 F.2d 515 (C.A. 5th, 1957).

[3] E.g., United States v. Lair, 195 Fed. 47 (C.A. 8th, 1912), cert. denied 229 U.S. 609 (1913).

[4] United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945); Harris v. United States, 190 F.2d 503 (C.A. 10th, 1951).

[5] United States v. Cosentino, 191 F.2d 574 (C.A. 7th, 1951). Accord: United States v. Norris, 281 U.S. 619 (1930); Roitman v. United States, 41 F.2d 519 (C.A. 7th, 1930).

[6] 191 F.2d 574 (C.A. 7th, 1951).

[7] 281 U.S. 619 (1930).

[8] Ibid., at 623.

[9] Kramer v. United States, 166 F.2d 515 (C.A. 9th, 1948).

[10] Lloyd v. Patterson, 242 F.2d 742 (C.A. 5th, 1957).

[11] Farnsworth v. Zerbst, 97 F.2d 255, 256 (C.A. 5th, 1938).

*Hocking Valley Ry. Co. v. United States*[12] applied the rule that the plea will not admit the insufficiency of the indictment; the case held that the defendant was right in his assertion that the plea of nolo contendere would not be taken as a final admission of the offense charged, if as in the case, no offense was charged, it could not be guilty of a crime, because no crime had been committed.

Though the general rule is that this plea leaves open for review only the sufficiency of the indictment, and waives all defenses other than that the indictment charges no offense,[13] an exception to this rule is found in the case of *United Brotherhood of Carpenters and Joiners of America v. United States*.[14] There a group of manufacturers were indicted for conspiring to violate § 1 of the Sherman Act. The power of the trial court on that issue was limited by § 6 of the Norris-La Guardia Act, but the trial court refused to instruct the jury on this point. Several of the manufacturers were found guilty, but the defendants combated the indictment by demurrer on the ground that their action did not state a crime under the Sherman Act. The demurrers being overruled, the defendants entered pleas of nolo contendere and were sentenced. The Supreme Court granted certiorari and held that each of these defendants, if they had stood trial, would have been entitled to the same instructions under § 6 as the other groups found guilty should have received, and that in view of the nolo plea entered by the defendants, they should be given an opportunity to now stand trial. The Court realized that ordinarily a plea of nolo contendere leaves only the sufficiency of the indictment open for review, but in view of the application of § 6 the defendants in this "exceptional situation" should have an opportunity to defend the indictment.[15]

A problem very often arises in situations where the defendant, under the law, will receive a more severe punishment, if he has twice been convicted of a particular crime or crimes. In these cases, the defendant may claim that a conviction based on a nolo plea is not such a conviction as contemplated by the legislature in adopting the law. In *Bruno v. Reimer*,[16] the deportation statute of the United States provided for deportation if the alien shall have been twice convicted in this country of a crime involving moral turpitude. The court stated that even though the defendant had

[12] 210 Fed. 735 (C.A. 6th, 1914).

[13] Crolich v. United States, 196 F.2d 879 (C.A. 5th, 1952), cert. denied 344 U.S. 830 (1952).

[14] 330 U.S. 395 (1947).

[15] The court also gave as one of its reasons for allowing the defendants this opportunity to defend the action, the fact that there was uncertainty at the time of the trial as to liability for contracts between groups of employees and groups of employers that restrained interstate commerce.

[16] 98 F.2d 92 (C.A. 2d, 1938).

entered a plea of nolo contendere to one such offense, it was as conclusive of guilt as a guilty plea, and was, therefore, a proper sentence and conviction within the deportation statute. A conviction and sentence under a nolo plea are sufficient, also, to establish a defendant as a "second offender" under the Fair Labor Standards Act,[17] and as a basis for conviction and sentence under Habitual Criminal Statutes.[18] Also illustrative of the situation is the case of *Tseung Chu v. Cornell*,[19] wherein a law of the United States provided that any alien seeking to procure a visa by misrepresentation would be excluded from admission into the United States. In defendant's application for a visa (which visa required disclosure by the applicant of a prior conviction) he failed to disclose the fact of a prior conviction of income tax evasion and, therefore, was accused of misrepresentation. The defendant's contention was that a plea of nolo contendere is not such a conviction that need be disclosed in the visa. The court's holding was that the plea of nolo contendere is the equivalent of a plea of guilty and a defendant sentenced on such a plea is to be deemed convicted of the offense for which he was indicted. To indicate further that for the purposes of the case in which the "plea" is used, there is little or no difference between a plea of guilty and one of nolo contendere, the case of *Fisher v. Schilder*,[20] should be illustrated. There the defendant entered a plea of nolo contendere. The court clerk erroneously entered in his minutes that the defendant entered a plea of guilty. The judge convicted and sentenced the defendant on the plea of guilty as shown in the minutes. The defendant claims that the judgment and sentence are void because of his having been adjudged guilty on the guilty plea, when he really pleaded nolo contendere. It was determined by the court that the nolo plea, having all the effects of a guilty plea, there is no substantial difference between a plea of nolo contendere and one of guilty. Therefore, the court continued, there was no error in adjudging the defendant guilty and sentencing him, but only in saying that the judgment of conviction was on a plea of guilty; this in itself is not reversible error.

Though the plea of nolo contendere is indicative of defendant's guilt, it is different from a plea of guilty, in that the former cannot be used against him in a subsequent case. Evidence of the "plea" is not admissible either as an admission or proof of guilt in a subsequent suit,[21] where the subsequent suit is based on the same set of facts as the case wherein the

[17] United States v. Claudy, 106 F. Supp. 367 (W.D. Pa., 1952), rev'd on other grounds 204 F.2d 624 (C.A. 3d, 1953); United States v. Dasher, 51 F. Supp. 805 (E.D. Pa., 1943).

[18] United States v. Skeen, 126 F. Supp. 24 (N.D. W.Va., 1954).

[19] 247 F.2d 929 (C.A. 9th, 1957), cert. denied 355 U.S. 892 (1957).

[20] 131 F.2d 522 (C.A. 10th, 1942).

[21] Authority cited note 2, supra.

plea was used,[22] or if the subsequent case is based on different facts.[23] Nor does it make any difference if the subsequent case is a civil[24] or criminal one;[25] the plea of nolo contendere still cannot be introduced in any subsequent proceeding.

### CASES TO WHICH THE PLEA IS APPLICABLE AND THE PUNISHMENT THAT CAN BE GIVEN BY VIRTUE OF THE PLEA

The plea of nolo contendere will not, in the absence of a statute, be accepted in capital cases,[26] but it will be allowed in a case where the punishment may be by fine or imprisonment or both.[27] That the plea will not be accepted where imprisonment is mandatory (with or without a fine) was set forth in *Tucker v. United States*.[28] Messrs. Lenvin and Meyers, in an article entitled "Nolo Contendere; Its Nature and Implications"[29] feel that the *Tucker* case was overruled on this point by *Hudson v. United States*,[30] since in this case it was stated that the "use of the plea . . . and the propriety of imposing a prison sentence upon it are recognized by the Probation Act[31] . . . [which] provides 'for the suspension of sentence and the release of the prisoner on probation . . . after a plea of . . . nolo contendere for any crime or offense not punishable by death or life imprisonment.' "[32] In any event where the plea may be accepted it may only be pleaded with the court's consent.[33]

After the court accepts the "plea" in a case punishable by fine, imprisonment, or both, it is not restricted, as originally set down in the *Tucker* case, to simply fining the defendant, but it may prescribe as punishment, both a fine and imprisonment, or imprisonment or fine alone "without limitation (except that of the statute) upon the size of the penalty."[34] A

[22] Mickler v. Fahs, 243 F.2d 515 (C.A. 5th, 1957).

[23] Piassick v. United States, 253 F.2d 658 (C.A. 5th, 1958).

[24] Authority cited note 22, supra.

[25] Authority cited note 23, supra.

[26] Hudson v. United States, 9 F.2d 825 (C.A. 3d, 1925), aff'd 272 U.S. 451 (1926); Tucker v. United States, 196 Fed. 261 (C.A. 7th, 1912).

[27] Hudson v. United States, 9 F.2d 825 (C.A. 3d, 1925), aff'd 272 U.S. 451 (1926). This case overthrew the view in the Tucker case where it was held that in a case where the penalty may be either fine or imprisonment, the court must only fine the defendant.

[28] 196 Fed. 261 (C.A. 7th, 1912).

[29] 51 Yale L. J. 1255 (1942).

[30] 272 U.S. 451 (1926).

[31] 18 U.S.C.A. § 3651 (1951).

[32] Hudson v. United States, 272 U.S. 451, 452, 453 (1926).

[33] Fed. Rules Crim. Proc. 11.

[34] Hudson v. United States, 9 F.2d 825, 826 (C.A. 3d, 1925), aff'd 272 U.S. 451 (1926).

plea of nolo contendere warrants the maximum punishment that the law provides.[35]

### ACCEPTANCE OF THE PLEA IN ANTITRUST CASES

As noted above, the plea of nolo contendere can be entered only with the court's consent.[36] Though apparently the plea of nolo contendere has been accepted by the courts more often than not, recent decisions having to do with violations of antitrust legislation have disagreed as to whether or not to allow the plea.

Part of § 5 of the Clayton Act[37] provides as follows:

> A final judgment or decree . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . , as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. . . .

A judgment based on a plea of nolo contendere entered by a defendant before any testimony is taken is a consent judgment within § 5.[38] Because it is such a consent judgment as provided for by § 5 and, therefore, cannot be used against a defendant in a subsequent suit, courts have differed as to whether or not to allow the plea.

The first of three very recent decisions dealing with the problem was *United States v. Cigarette Merchandisers Ass'n.*[39] The defendants in the case were charged with the violation of certain antitrust laws. Government counsel objected to acceptance of a plea of nolo contendere entered by the defendants on two grounds—the oppressive manner in which the defendants enforced their restraints upon their victims, and the necessity of preserving to those victims in private suits the benefit of the government's prosecution if it succeeds. (Though no mention was made of § 5, the second reason given by the government indicates its awareness of the prohibition imposed by the section.) At the time the criminal indictment was filed against the defendant in this case the government had also filed a companion civil suit against the defendants on the same facts. The plea was allowed, the court's reasons being that as to the first objection, it is a

[35] United States v. Food and Grocery Bureau of Southern Calif., 43 F. Supp. 974 (S.D. Cal., 1942), aff'd 139 F.2d 973 (C.A. 9th, 1943).

[36] Authority cited note 33, supra.

[37] 15 U.S.C.A. § 16 (1951), as amended 15 U.S.C.A. § 16 (Supp. 1957).

[38] Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (N.D. Minn., 1939), cert. denied 314 U.S. 644 (1941).

[39] 136 F. Supp. 212 (S.D.N.Y., 1955).

sufficient answer that the sentencing court, on a nolo plea, may impose as severe a fine as upon a guilty plea or a finding of guilt after trial; as to the second objection, giving benefits to private suits may be accomplished by the simple process of the Attorney General going forward in the trial of the civil suit.

In *United States v. Standard Ultramarine and Color Co.*,[40] the defendants were charged with violating the Sherman Anti-Trust Act.[41] The indictment, to which the defendants entered pleas of nolo contendere, charged, among other things, price fixing, and control of 37½% of the business in their field for nine years. No civil suit, as in the previous case, was filed by the government.

The defendants contended that the plea of nolo contendere should be allowed because: (1) The plea is in the public interest since it is tantamount to a plea of guilty for purposes of the case and permits the imposition of the same fine as would be imposed if they were found guilty; (2) An expensive trial would have to follow if the plea was not allowed, for the defendants would defend the case rather than plead guilty. The court, in rejecting the plea, said that pleas of nolo contendere would be advantageous to the defendants for it would eliminate the impact of § 5 of the Clayton Act, which would follow if defendants were convicted. Therefore, it would be against the public interest to allow the plea—it would deny to private persons the benefit of the prima facie case under § 5 if defendants were found guilty. The court set down various factors it felt were important in determining whether or not the plea should be accepted: "[T]he nature of the claimed violations; how long persisted in; the size and power of the defendants in the particular industry; the impact of the condemned conduct upon the economy; whether a greater deterrent effect will result from conviction rather than from acceptance of the plea, . . ." and "the view of the Attorney General."[42] By considering these factors the court felt that a nine year violation by the defendants, whereby they were able to gain 37½% of the industry's profits, along with the charge of price fixing (deemed by the court to be the most serious charge), necessitated it to refuse to accept the plea; by accepting it the court felt it would add to the already heavy burden of private persons seeking redress. The court also held that the legislative background and debate in antitrust legislation indicated that the legislature wanted private citizens to have an "easy time" in suing an offender. The defendants relied upon the *Cigarette* case, where as already indicated, the motion to plead nolo contendere was granted. The court distinguished the two cases by

[40] 137 F. Supp. 167 (S.D.N.Y., 1955).

[41] 15 U.S.C.A. §§ 1–7 (1951).

[42] 137 F. Supp. 167, 172 (S.D.N.Y., 1955).

saying that in the *Cigarette* case, the government, simultaneously with the filing of the criminal indictment, commenced a companion civil suit, based on the same facts and, in the event of the government's success, the decree will be available to private parties. In the instant case, no such civil suit was instituted.

The most recent case discussing the acceptance of a nolo contendere plea in anti-trust litigation is *United States v. Safeway Stores.*[43] The defendants were charged with violation of the Sherman Anti-Trust Act in that they were engaged in price wars for the purpose of destroying competition and to accomplish this purpose operated stores below the cost of doing business. The government had also filed a companion civil suit along with the criminal indictment.

The defendants wanted to withdraw their pleas of not guilty and enter pleas of nolo contendere. This was objected to by the government for the following reasons: (1) That Safeway is a multiple offender and has been convicted or pleaded nolo contendere in five other cases, and this the government contends, shows a great disrespect for the law; (2) Acceptance of the nolo plea would deprive private litigants of the benefits to be derived from a verdict of guilty under § 5 of the Clayton Act; (3) That the *Ultramarine* case supports its position.

The pleas were allowed. It was held that the prior convictions of Safeway have more bearing upon the sentence of punishment to be assessed than upon the issue pertaining to the acceptance or rejection of the plea. Also, that the primary responsibility of a court is to consider the public interest and not to use a criminal prosecution as a means of giving an advantage to a private citizen in a private suit.[44] The court did not believe, as was so stated in the *Ultramarine* case, that Congress intended pleas of nolo contendere were to be refused for the purpose of aiding private parties under § 5. That if it had so intended, Congress would have deleted from § 5 the phrase "or decrees entered before any testimony has been taken"; that by so doing, private litigants would have secured the benefit of criminal convictions (for, as the court points out, Congress must have been aware that a great many pleas of nolo contendere result in judgments before any testimony is given). Finally, the court said, that though the crowded condition of the court's docket would not of itself be sufficient reason for accepting nolo pleas, the fact was that if it didn't accept them, all other litigation in the district would be delayed. The court said the government was not right in relying on the *Ultramarine* case for in that case no companion suit was filed by the government, while here such a suit was filed.

[43] 20 F.R.D. 451 (N.D. Tex., 1957).

[44] Authority cited note 40, supra.

In two of the three cases discussed, a companion civil suit was filed by the government and in these two the plea of nolo contendere was allowed. The determining factor, therefore, seems to be the filing of the companion suit; if one is filed, the courts seem to say that since the companion suit, if successful, will aid the private litigants, § 5 should not. However, judging from the later two cases it does not appear they would have been decided differently if in the *Ultramarine* case a companion civil suit had been filed, or, if the *Safeway* case, no such suit was filed. The deciding factor seems to be whether the purpose of a criminal prosecution for an anti-trust violation, and in view of § 5, is to aid private litigation or not.

### MEMO FROM THE ATTORNEY GENERAL OBJECTING TO THE USE OF THE PLEA

A letter, sent by the Attorney General of the United States gave the following information and instructions to all United States Attorneys concerning the plea of nolo contedere:

> One of the factors which has tended to breed contempt for federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license of sentencing as a multiple offender.
>
> Uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are no deterrent to crime. As a practical matter it accomplishes little that is useful even where the Government has civil litigation pending. Moreover, a person permitted to plead nolo contendere admits guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in his denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco.
>
> In many jurisdictions the Court will ordinarily not accept a plea of nolo contendere unless consented to by the prosecuting attorney. And in others, a refusal to consent to the plea will have the effect of placing full responsibility on the judge where it belongs.
>
> Accordingly, in an effort to discourage the widespread use of the plea of nolo concendere, you are instructed not to consent to it except in the unusual circumstances and then after your recommendation for doing so has been reviewed and approved by the Assistant Attorney General responsible or by my Office. . . .—HERBERT BROWNELL, JR., *Attorney General.*[45]

Being rather subjective, whether or not the above letter has affected the courts' thinking as to the acceptance of the plea, little is known. In *United States v. Jones,*[46] the defendant entered a plea of nolo contendere which

[45] Cf. United States v. Jones, 119 F. Supp. 288 (S.D. Cal., 1954).

[46] Ibid.

was objected to by the government solely on the grounds of the above mentioned memo. The court, in its decision, said that while the memo may tell counsel to do certain things, it is not at all binding upon the court.

Though the court, clearly, is completely independent of any mandate contained in the letter, its contents must, undoubtedly, have some influence and effect on the court.

### WITHDRAWAL OF THE PLEA BY MOTION OF THE DEFENDANT

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> A motion to withdraw a plea of . . . nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

### WITHDRAWAL BEFORE SENTENCE

A defendant, in a criminal case, is not entitled, as a matter of right, to withdraw a plea of nolo contendere, but it lies within the discretion of the court.[47] However, if defendant is allowed to withdraw the plea of nolo contendere, and pleads not guilty, the nolo plea is not admissible against the defendant on the trial arising on the substituted plea of not guilty.[48]

### WITHDRAWAL AFTER SENTENCE

When a party attempts to withdraw the plea after sentence, it is often necessary for the courts to determine if a "manifest injustice" would be done if he was not allowed to withdraw it.

In one case where a defendant entered a plea of nolo contendere and then admitted his guilt to the court, the judge, on appeal said that in view of his admission of guilt there could have been no manifest injustice.[49]

In *United States v. Vidaver*[50] the indictment charged Mr. X with using the mails to defraud. X then claimed that a subsequent case, after his sentence, showed that what he had done was not an offense against the government. The court held that the defendant, by the nolo plea, admitted that he used the mail to defraud, but that the defendant, in the case relied upon by X denied using the mails for fraudulent purposes. Therefore, the court said that in view of the admisison of fraud by X (by reason of the

[47] Mosley v. United States, 207 F.2d 908 (C.A. 5th, 1953), cert. denied 347 U.S. 933 (1954); Farnsworth v. Zerbst, 97 F.2d 255 (C.A. 5th, 1938), cert. denied 307 U.S. 642 (1938); United States v. Anthracite Brewing Co., 11 F. Supp. 1018 (E.D. Pa., 1934).

[48] Pharr v. United States, 48 F.2d 767 (C.A. 6th, 1931).

[49] Klingstein v. United States, 217 F.2d 711 (C.A. 4th, 1954).

[50] 73 F. Supp. 382 (E.D. Va., 1947).

nolo plea) no manifest injustice was done in not re-examining the situation in the light of the subsequent case.

The defendant, in *United States v. Shapiro*,[51] motioned to dismiss an appeal by the government from a judgment entered in a district court whereby the judgment set aside a judgment of defendant's conviction and allowed him to withdraw his plea of nolo contendere. He had been in prison for one year when he made the motion. The defendant, at the trial court, withdrew his original plea of not guilty, and entered a plea of nolo contendere. He claimed that he did this firmly believing that he was a United States citizen, not knowing that the United States was planning to deport him; that had he known he was not a citizen and that the United States planned to deport him he would have maintained his plea of not guilty. This was held at the trial court, on the motion, to be sufficient injustice obtaining to the defendant. The defendant contended in his motion to dismiss the govenment's appeal, that 18 U.S.C.A. § 3731[52] furnished the only authority for a government appeal, and that this section furnished no authority for an appeal from an order of the district court granting a motion to set aside a judgment of conviction under Rule 32(d). The court agreed and against the government's contention that the action of the district court was final, held that the order of the disrict court setting judgment aside and permitting defendant to withdraw a plea of nolo contendere was not a final appealable judgment; since after judgment was set aside and defendant permitted to withdraw he was again faced with the indictment to which he could and at first did plead not guilty.

### COURT'S RIGHT TO SET ASIDE THE PLEA WITHOUT A MOTION

In giving to the court the right to set aside the defendant's plea of nolo contendere (without motion to that effect by the defendant), it was held that pleas of nolo contendere are not exceptions to the rule that courts have the jurisdiction and authority during the term at which their orders, judgments and decrees are made, to set them aside and substitute others for them, or even amend or modify them until and unless they have been executed in whole or in part.[53]

In summary, therefore, it is seen that before sentence, on motion by the defendant, it is within the discretion of the court as to the right of the

[51] 222 F.2d 836 (C.A. 7th, 1955).

[52] The section reads in part: ". . . An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases in the following instances: From a decision or judgment setting aside or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section. From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section. . . ."

[53] Stewart v. United States, 300 Fed. 769 (C.A. 5th, 1924).

defendant to withdraw the nolo plea. After sentence, it is the presence of manifest injustice which will give the defendant the right to withdraw (whether the injustice is present is also determined by the court). Also, the court of its own volition, may, if it so pleases, set aside the plea of nolo contendere.

## THE CONSUMER-MANUFACTURER RELATIONSHIP IN PRODUCTS LIABILITY CASES

### THE PROBLEM

Due to the great strides made in merchandising processes and methods of product distribution, there has developed almost indomitable impetus toward protection of the ultimate consumer rather than toward restriction of the manufacturer's liability as had been the tendency in the past. No doubt the buying public relies quite heavily on the representations made by suppliers of chattels in the various advertising media, and that warranties and guaranties of merchantability serve as forceful motivations for the consumer's purchasing habits. It is evident too, that under present marketing practices, most products or articles used by the public are purchased from retailers; hence, today, the manufacturer and consumer have no direct contractual relationship in most buying and selling transactions. In view of these facts, the extent of the manufacturer's responsibility to ultimate vendees who, not dealing directly with the producer, have relied on representations and suffered injury due to imperfections in the products, has been constantly changing. The past and present relationship between the producer and buyer is the scope of this comment.

### THE RULE AND ITS HISTORY

Initially, the common law remedy for misrepresentation was an action on the case in the nature of deceit which was used almost entirely in direct transactions between buyer and seller.[1] However, in the early case of *Pasley v. Freeman*[2] the action of deceit was held valid for a false affirmation made by the manufacturer even though the buyer had no direct dealings with the seller. Consequently, deceit had become an established cause of action regardless of contractual privity and it had become acceptable for consumers who had been misled as to merchantability of products to seek redress in an action of trespass on the case for breach of duty which sounded in tort. In *Stuart v. Wilkins*[3] the cause of action for misrepresentation was taken out of tort and brought in assumpsit for breach of the

[1] Smith and Prosser, Torts, c. 18 (1952).

[2] 3 Term. Rep. 51 (1789).

[3] 1 Dougl. 19 (1778).