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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Government's Petition to Intervene in Northeast Airlines Case Denied by C. A. B. New York - Florida Renewal Case (CAB Docket 12285). On August 15, 1963, the Civil Aeronautics Board confirmed in a formal opinion and order its tentative decision of July 26, denying (by a 3-2 vote) Northeast Airlines' certificate authority to engage in air transportation south of New York. The Board's decision was based on a finding that there was no present need for a third carrier in the New York - Florida market.

On September 12, petitions were filed by the Department of Justice for the United States, asking for leave to intervene, and for reconsideration of its decision. The petition for reconsideration alleged that the East Coast - Florida market, one of the richest in terms of profits and the largest in terms of passengers in the United States, should be serviced by at least three carriers. The petition further alleged that the CAB's decision was contrary to twenty years of decisions in favor of competition, and represented an unwarranted "solicitude for the well being of Eastern [Airlines]," one of the "Big Four." On September 16 the Board (again by a vote of 3-2) denied the Government's petitions to intervene and for reconsideration on the basis of the Board's Rules of Practice. These Rules require that petitions for intervention be filed before the prehearing conference (June 1961 in this case) unless good cause is shown for late filing.

On September 19, the Department filed a petition asking for reconsideration of the Board's order of September 16. This petition alleged that the Board's unveiling of important antitrust issues for the first time in its order of August 15, justified the late filing. It was also pointed out that if the Board's rules were strictly applied, the United States would be forced to intervene in virtually every case docketed with the Board. The petition indicated that the action of the Board restricting New York - Florida competition to two carriers represented de facto acceptance by the CAB of a policy of "duopoly markets," e.g., "the public is well served in this country if the majority of [air transportation] routes have two-carrier competition" (statement by the CAB chairman), proposed by a CAB planning group earlier this year. The petition also referred to (1) a public statement by the CAB chairman that the cut-back on competitive services does not hold out any over-all improvement of Florida service, and (2) to the fact cited by the minority in the August 15, 1963 opinion that one of the two carriers to whom customer choice would be limited by the CAB's action is the subject of more service complaints than any other United States air carrier.

Staff: Michael A. Duggan and Irwin E. Blum (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

FEDERAL HOUSING ADMINISTRATION

Housing Commissioner May Join in Suit for Restoration of Funds of FHA Insured Corporate Mortgagor Diverted in Violation of Corporate Charter; Diversity Unnecessary to Establish Federal Jurisdiction Where Commissioner Party to Suit. United States v. LeMay, et al., (C.A. 5, September 10, 1963). This action was brought by the Federal Housing Commissioner, the United States, and three corporations seeking the restoration to the corporations of certain funds. The complaint charged that some of the individual defendants had improperly caused to be withdrawn from the corporate plaintiffs certain monies which were paid to other defendants "in violation of express prohibitions of the corporate charter and being a conversion on the part of the mortgage security". The FHA had insured the mortgages of the corporate plaintiffs. On motion by the defendants, the district court concluded that neither the United States nor the Commissioner were necessary or proper parties to the action, and that, as diversity did not exist as between the remaining plaintiffs and any of the defendants, it lacked jurisdiction over the action.

The Court of Appeals reversed. Initially, the Court looked to the history of the National Housing Act since its enactment in 1934 and concluded that Congress had intended the Government to be an active participant in the Housing Program. More precisely it looked to 12 U.S.C. 1702 which authorized suits by and against the Housing Commissioner in any court of competent jurisdiction; to the very detailed regulatory scheme intended to ensure that the Commissioner was able to maintain adequate control over the program's participants; and, to the fact that the charter provision which had been violated was required to be included within the charter by those regulations, and concluded that the United States and the Commissioner were proper parties and that the jurisdiction of federal courts over the cause of action did not depend on diversity.

Staff: United States Attorney Woodrow Seals and Assistant United States Attorney William B. Butler (S.D. Tex.)

PRIORITY STATUTE

"Distributing agent" Appointed Pursuant to Bankruptcy Proceeding Is Subject to 31 U.S.C. 192 and Personally Liable to United States Where He Depletes Bankrupt's Assets by Paying Out Monies to Other Creditors With Knowledge of Existence of Government Claim. United States v. Elizabeth Simonson King, etc., (C.A. 3, September 13, 1963). The United States instituted this suit against the distributing agent of a bankrupt corporation and his surety for the unpaid portion of a debt owed the Government by the

bankrupt. The Government alleged that its claim was entitled to priority under 31 U.S.C. 191, and that as the distributing agent had depleted the bankrupt's assets by making payments to other creditors with knowledge of the Government's claim, he was personally liable for the unpaid portion of the obligation under 31 U.S.C. 192. The Government appealed from a dismissal of its complaint.

Two issues were critical to the Government's right of recovery: (1) whether the underlying obligation was entitled to priority under 31 U.S.C. 191, and, (2) whether a distributing agent appointed pursuant to a Chapter XI proceedings is an "executor, administrator, or assignee, or other person". 31 U.S.C. 192. There was no real dispute as to the former. Turning to the latter, the Court accepted the Government's contention that a distributing agent was properly included within the "or other person" phrase. Recognizing that sections 191 and 192 must be interpreted in pari materia, and mindful of the underlying Congressional intention to insulate priorities granted the United States from being frustrated by the acts of fiduciaries representing debtors of the Government, the Court concluded that the niceties differentiating between particular types of fiduciaries must be disregarded and the sanctions of 31 U.S.C. 192 imposed against any individual "who pays" to others monies that should satisfy debts due the United States under Section 191. In so concluding, the Court rejected the appellees' contention that, as the distributing agent disbursed funds only after court approval, he should be held harmless. It recognized that changes in distribution can be effected upon timely application to the bankruptcy court, and found that the agent's failure to do so constituted negligence.

Staff: Alan S. Rosenthal and Mark R. Joelson (Civil Division).

TORT CLAIMS ACT

Serviceman's Drunken Driving Held Beyond Scope of Employment; Government Not Liable for Damages Occasioned Thereby. Mider v. United States (C.A. 6, September 10, 1963). The Court of Appeals reversed the district court's holding that the United States was liable for damages occasioned by an automobile collision which had been caused by a Government vehicle which was being driven by an Air Force enlisted man while intoxicated. The district court's decision had been based on the findings of negligent dispatch of the vehicle by the soldier in charge of the motor pool -- a dispatch which was held to be within that soldier's scope of employment. The Court of Appeals, however, reasoned that the proximate cause of the collision was the drunken driving rather than the dispatch of the vehicle, and that this act was clearly beyond the scope of employment. Accordingly, and applying the applicable Ohio respondeat superior law, the Court exonerated the United States from any responsibility.

Staff: Assistant Attorney General John W. Douglas and Edward A. Groobert (Civil Division).

UNJUST CONVICTION STATUTE

Relief Unavailable Under Unjust Conviction Statute Where Court-Martial Conviction Is Set Aside on Ground That Military Was Without Jurisdiction to Try Offense. Floyd J. Osborn v. United States (C.A. 5, September 10, 1963). Plaintiff's general court-martial conviction for the offense of murder was set aside in a habeas corpus proceeding on the ground that the military authorities lacked jurisdiction to try him for that offense as it was committed within the geographical limits of the United States during peace-time (see 10 U.S.C. 1564). Thereafter, plaintiff brought this action to recover monetary damages under the Unjust Conviction Statute, 28 U.S.C. 1495 and 2513. The district court, noting that the order setting aside the conviction failed to indicate that it was set aside on the stated ground of innocence and unjust conviction and that plaintiff failed to show that he had not in fact committed the acts charged, dismissed the suit. On plaintiff's appeal, the Government urged that the Unjust Conviction Statute did not contemplate actions predicated upon unjust convictions by military tribunals. Alternatively, the Government showed plaintiff's inability to satisfy the several explicit statutory conditions precedent to recovery which demonstrated Congress' intent to limit the Act's availability only to those who were truly innocent of any criminal wrongdoing. The Court rejected the Government jurisdictional argument but in a detailed analysis agreed with its contention that each of the statutory conditions addressed to the proof of "innocence" must be, but had not been, meticulously satisfied.

Staff: Edward Berlin (Civil Division).

DISTRICT COURT DECISIONS

PROCEDURE

Acquiescing in Grant of Preliminary Relief Bars Subsequent Assertion of Personal Jurisdiction and Venue Defenses. Bank of Dearborn v. Saxon, Comptroller of Currency, and Manufacturers National Bank of Detroit. (E.D. Mich.) Complaint was filed on March 15, 1963, alleging that the Comptroller of the Currency's approval of a new branch office for a national bank was illegal. A motion for preliminary injunction was filed with the complaint seeking to enjoin the Comptroller from issuing his certificate of approval to the bank in question. A request for a temporary restraining order was denied upon the assurance of the Assistant United States Attorney that the Comptroller was not planning to issue the certificate in the immediate future. On April 1, 1963, at the hearing on the preliminary injunction motion, the Assistant United States Attorney once again advised the Court that the Comptroller was not planning to issue the certificate until the legal issue in the case was resolved; however, since there was no apparent harm in doing so, he signed a consent order granting the preliminary injunction.

On May 13, 1963, within the original 60 days in which to answer or move against the complaint, the Government filed a motion to dismiss on the grounds that the Court lacked jurisdiction over the person of the Comptroller and venue

did not lie in the Eastern District of Michigan. By order dated September 3, 1963, the Court denied the motion on the ground that the Government waived its defenses by acquiescing in the issuance of the preliminary injunction without raising them. This ruling suggests that it is never safe to agree to preliminary relief requested by an opposing party unless it is certain that no waivable defenses can be asserted. Furthermore, it would appear to be necessary to raise personal jurisdiction and venue defenses, if they are to be raised at all, when opposing a request for preliminary relief.

Staff: United States Attorney Lawrence Gubow and Assistant United States Attorney John H. Shepherd (E.D. Mich).

TORT CLAIMS ACT

Discretionary Function Exception Applied to Psychiatric Diagnosis and Ward Assignment Based Thereon. Annie Mae Moore v. United States, (E.D. Mo., September 5, 1963.) Plaintiff sued the Government under the Federal Tort Claims Act for the alleged wrongful death of her husband resulting from his falling or jumping from a third floor bathroom window while he was a patient in Jefferson Barracks Veterans' Administration Hospital. At no time prior to the incident did the decedent manifest suicidal tendencies. The Court held that the decision of the Government doctors as to the decedent's psychiatric diagnosis and ward assignment based thereon fell within the ambit of discretion which is made non-actionable by virtue of 28 U.S.C. 2680(A) (discretionary function), citing Fahey v. United States, 153 F. Supp. 878.

Staff: United States Attorney Richard D. FitzGibbon, Jr., Assistant United States Attorney Donald L. Schmidt, (E.D. Mo.) and Vincent H. Cohen (Civil Division).

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections; Deprivation of Rights Under Color of Law and Conspiracy; 18 U.S.C. 242 and 371. United States v. James Ramey, Jr. and Louise Ramey (S.D. West Va.).

On September 18, 1963, a grand jury in Bluefield, West Virginia, returned a two-count indictment against a Wayne County constable and his wife, a justice of the peace. Investigation of the arrest of a Wayne County Republican election official in the early hours of the morning of the 1962 General Election disclosed that the constable arrested and incarcerated the election official on a fictitious complaint and warrant for rape issued by the constable's wife.

Count one of the indictment charges the constable with wilfully depriving the election official of his right not to be deprived of his liberty without due process of law and of his right to be immune from illegal arrest and incarceration by and at the instance of a person acting under color of law.

Count two charges that the constable and his wife, acting under the laws of the State of West Virginia wilfully conspired to violate the provisions of Section 242 of Title 18, United States Code.

Staff: United States Attorney Harry G. Camper, Jr. (S.D. West Va.); Henry Putzel, Jr., Edgar N. Brown (Civil Rights Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES (18 U.S.C. 3500)

Failure of Government to Produce All Statements of Witness Re Subject Matter of Direct Examination Basis for Granting Motion for Mistrial Even Though Government Did Not Know of Existence of Such Statements. United States v. David Clifton Stephens (August 13, 1963, S.D. Texas). The defendant, a former County Office Manager of the Agricultural Stabilization and Conservation Service, United States Department of Agriculture, was indicted under a twenty-four count indictment charging him with the offer and acceptance of bribes in violation of 18 U.S.C., 201 and 202, conspiracy to defraud the United States in violation of 18 U.S.C. 371 and the making of a false statement in violation of 18 U.S.C. 1001.

During the trial and prior to commencing cross-examination of a Government witness, counsel for defendant requested pursuant to 18 U.S.C. 3500 all statements made by the witness relating to the subject matter testified to on direct examination. Statements given by the witness to the Federal Bureau of Investigation were produced.

During cross-examination, the witness without explanation produced from his pocket other statements he had made to investigators of the Department of Agriculture and to the Internal Revenue Service. The Government disclaimed any prior knowledge of the existence of the Department of Agriculture and Internal Revenue statements, as well as the existence of any similar reports relating to other witnesses who had already testified.

A motion for a mistrial was made by defendant at the close of the Government's case on the grounds that the Government had not produced all statements of witnesses in the possession of the United States relating to the subject matter of the testimony of the witness. The Court took the motion under advisement. At the close of defendant's evidence the motion for a mistrial was renewed by defendant and granted by the Court.

Although it is clear that in the instant situation the Government had no prior knowledge of the statements made to Government agencies other than the FBI, the Court by granting defendant's motion has construed the phrase in paragraph (b) of 18 U.S.C. 3500, "in the possession of the United States," to mean that any statement of any Department or agency shall be within the constructive possession of the United States Attorney for purposes of production under the Jencks Act.

While this at first may appear an inordinate burden on the United States Attorney to seek out all statements given to any agency or department of the United States, careful pretrial preparation and interviewing of possible Government witnesses on this subject should serve to alert the Government as to their existence.

Staff: United States Attorney Woodrow Seals;
Assistant United States Attorneys William Jackson and W. Scott Cook (S.D. Texas):
Robert M. Talcott (Criminal Division)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

NATURALIZATION

False Testimony Concealing Immoral Relations No Bar to Naturalization. Petition of Sotos, (W.D. Pa., Sept. 13, 1963.)

The question before the Court was whether petitioner had been during the five year period prior to filing his petition for naturalization a person of good moral character. The Immigration and Naturalization Service contended that he was disqualified under Section 101(f) (6) of the Immigration and Nationality Act, 8 U.S.C. 1105 (f) (6), in that he had given false testimony for the purpose of obtaining his naturalization and therefore could not meet the character qualification.

In his application for naturalization and in his testimony in the naturalization proceedings, petitioner, a single person, concealed his correct address to hide the fact that he had had immoral sexual relations with his landlord's wife while residing at such address. After concluding that petitioner's immoral sexual relations constituted, under Pennsylvania law, fornication and not adultery, the Court held that neither petitioner's fornication nor his false testimony precluded him from establishing good moral character.

The Court construed Chaunt v. United States, 364 U.S. 350, as holding that perjury, to be a barrier to naturalization, must have been material in that the facts concealed rendered the alien ineligible to naturalization or might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship. The Court reasoned that if petitioner had given his correct address an investigation would only have revealed that he had committed furnication, and that since furnication is not a barrier to naturalization petitioner's false testimony must be deemed immaterial under the ruling in Chaunt. The Court found petitioner to have been a person of good moral character for the past five years and admitted him to citizenship.

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation: Invalidity of Award by Rule 71A(h) Commission; Importance of Recent Market Transactions; Recent Leases of Portions of Property Practically Control Rental Value; Effect of Government Taking on Supply of Space Available Cannot Enhance Rental Value; Leases of Space Indicate Capitalized Value of Fee; Non-comparable Sales Not Substantial Evidence to Support Award; Government Lien Deducted From Award Before Interest Computed; Interest to Ousted Lessees Begins From Date Possession Delivered. United States v. Michoud Industrial Facilities, et al. (C.A. 5, August 22, 1963). The property here involved, the former Higgins Shipbuilding Plant, represents 1,000 acres of land on which are located buildings described by the Court of Appeals as of "truly gargantuan size." When it became surplus at the end of World War II it was sold after extensive effort, without cash payment, to the Board of Commissioners of the Port of New Orleans (the Dock Board), the United States retaining a non-interest-bearing lien for some $9,500,000 purchase price. The Board attempted to rent portions of the property, but by May 1951 there were only 32 lessees, while some 1,767,000 square feet of floor space was vacant. The leases had been made and the vacant portions were being offered at a rate of about 20 cents per square foot. The United States condemned temporary use commencing May 1, 1951, and amended to condemn fee title in December 1952. Extended proceedings before a Rule 71A(h) commission and the district court resulted in judgment in October 1960 awarding a total of some $17,390,000, from which the $9,500,000 lien was deducted.

The Court of Appeals, over a strong dissent of Judge Brown, reversed all awards. The basic ground for reversal was the refusal of the condemnees' appraisers and the commissioners to give almost controlling effect to the lease rentals and then to ignore the vast amount of vacant space unleased. The Court first held that the fact that the Government's taking removed that space from the market must be ignored in determining market value, relying on United States v. Cors, 337 U.S. 325, which extended the rule of United States v. Miller, 317 U.S. 369. The dissent disagrees with this ruling in terms only as to the lessees' interests where Judge Brown asserts that the lessees' losses do not come from increased costs by virtue of the Government's condemnation.

As to the temporary taking from the Dock Board, the Court held that the 20 cents per square foot rental was the best proof of the going market value as of the time the last leases were made. The commissioners had found an average rental of 60 cents per square foot. The Court stated that the 20 cents rate was not controlling as a matter of law but that the commissioners erred in not considering it to be one of the most important elements of the value. The Court answered the condemnees' argument, that its witnesses said the 20 cents was ridiculously low and was a bargain rate, by saying:

> When it became apparent that such large quantities of the property would not move at that sub-standard price, then that price obviously was the most that could be obtained for it at the time.

The Court emphasized the fact that a unit consisting of all the non-leased property was being valued. As to vacant land, the commission had used a backwards process of discounting 10% from December 1952 fee value to reach May 1951 value, had assumed that such property should return 8% yearly, and thereby reached its rental value figure for the temporary taking. Here the Court held that, absent any substantial evidence to the contrary, the actual rentals should be used. Moreover, the Court held that the process used assumed that, absent the Government taking, the land would have been fully utilized, and stated that it "would be a wild assumption indeed that the Dock Board actually lost rental" between 1951 and 1952 equal to that amount and that under the facts it is apparent that no owner could have fully utilized all of the vacant land for all of that period.

Reversal of the award as to the permanent taking rested on essentially the same ground. The commissioners had arrived at value by capitalizing income and had used 60 cents per square foot rental value for building space.

As to vacant land, the witness whose value the commission adopted had relied on sales of small tracts (one to five acres) located in a heavily built-up industrial area some 15 miles from the property taken. The Court said:

> While we have recognized the general proposition that this court would not substitute its judgment for that of the trial court in determining whether a particular sale was too remote in point of time or was not comparable in size, this principal related merely to the admissibility of the evidence to be considered by the trial court. See International Paper Co. v. United States, 5th Cir., 227 F. 2d 201. It falls far short of constituting a rule that the appellate courts may not reverse a finding of value which it finds to have been based on a comparison of the condemned property with other tracts which neither by location nor quantity of land involved or other characteristics bear any resemblance to each other in the market.

The Court especially emphasized that what was being valued was 1,000 acres, which included 707 acres of open land.

The awards as to the lessees, which were likewise based on a 60 cents per square foot rental value, were reversed for the same reasons, the Court saying that special characteristics of particular space should be considered and that:

> As to all other tenants, and as to all space which was susceptible of being duplicated in unleased space in the buildings,

we conclude that the Commissioners and the trial court erred in not accepting the terms of the particular leases or the going rate as of January, 1951, whichever is higher, as the fair market value of the space as of May 1st of that year.

The Dock Board had cross-appealed, arguing that because the Government's vendor's lien bore no interest and, under Louisiana law, was not an interest in property but merely a contract right, interest representing compensation for delay in payment should be computed prior to set-off of the lien amount. The Court held to the contrary, stating that it is immaterial what the Dock Board's title may be called under Louisiana law.

Laclede Steel Company had claimed interest from May 1, 1951, when the United States sought possession, even though the Court permitted it to remain in possession until November 1. This claim was likewise rejected.

This case is an outstanding example of the fact that merely because qualified experts assert a value, such testimony is not substantial evidence when, on the facts, it is a plain refusal to recognize actual market value.

Staff: Harold S. Harrison (Lands Division).

Condemnation: Extent of Judicial Review of Administrative Decision; Right to Condemn Land Not to Be Physically Occupied by Public; Claimed Use For Recreational Purposes Adjoining Reservoir Does Not Preclude Condemnation. United States (Plaintiff-Appellee) v. Arison Agee, et al. (Defendants-Appellants) (C.A. 6, August 30, 1963). The United States condemned a 57-acre tract of farmland for use in connection with a dam and reservoir project in Tennessee. 24 acres, including the access road to the remainder, were below the high water line. It was determined by the Corps of Engineers that the cost of providing new access would exceed the value of the remaining 33 acres. The taking of the 33 acres was contested. It was contended that Agee was deprived of his property without due process of law because the privilege of retaining unflooded lands was accorded other property owners electing to waive severance damages, but was denied him because he was non compos mentis and incapable of entering into a binding agreement. It was also contended that the decision to take the 33 acres was arbitrary, capricious and in bad faith. The Government contended that the determination to condemn the land above the high water mark is final and not subject to judicial review. The district court held that, while the scope of judicial review of administrative decisions as to what lands are to be acquired in condemnation proceedings is extremely narrow, there is no controlling authority foreclosing the power of the court to set aside a taking where the designated officials responsible for the taking have acted in bad faith. On the merits, the district court found that the Government officials had not acted in bad faith in taking the contested acreage. The landowners appealed, and the judgment was affirmed.

In the Court of Appeals, appellants made the same contentions as in the district court. The Government made no attempt to reverse the decision, but contended that the district court took a mistaken view of its scope of review, in that the courts are foreclosed absolutely from reviewing the decision of the condemning authority. The Court of Appeals refused to follow the decisions of the Supreme Court and other circuits relied upon by the Government for this contention, but held that the scope of judicial review of administrative determinations in eminent domain proceedings is extremely narrow. It approved the district court's review of the administrative determination to the extent of determining whether the decision was made in bad faith, without citation of authority to support this proposition. However, it affirmed the judgment on the merits, stating: "It is well established that the federal government, in eminent domain proceedings, is not limited to precisely the amount of property which will be physically occupied by the public." And the circumstance that, after taking, the land had been leased to the Girl Scouts, does not prove the land was not taken for public use. The Court rejected the argument that the landowner was deprived of his property without due process of law, stating that "where the taking is for a public purpose the rights of the property owner are satisfied when he receives that just compensation which the Fifth Amendment requires as the price of the taking." Citing Berman v. Parker, 348 U.S. 26. Appellants have filed a petition for rehearing. There is thus added one more case containing dictum as to authority for judicial review which cannot find support in any Supreme Court decisions.

Staff: Elizabeth Dudley (Lands Division).

Public Lands: Mineral Leasing Act; Color of Title; Lack of Jurisdiction of District Court Over Secretary of Interior. Charles L. Ward v. Humble Oil & Refining Co., et al. (C.A. 5, August 15, 1963). Appellant, claiming to be the owner of surface rights and an undivided one-half mineral estate in certain lands in the State of Mississippi, filed a complaint in the District Court for the Southern District of Mississippi, seeking the cancellation, as a cloud upon his title, of an oil and gas lease which had been issued by the Department of the Interior. The Secretary of the Interior was personally served with a copy of the summons and complaint.

The District Court dismissed the cause without prejudice as to the Secretary of the Interior, being of the opinion that the suit was essentially against the United States, which had not consented to be sued. The District Court then granted a motion for summary judgment as to the nonofficial defendants, lessees of the United States, on the grounds that the Secretary of the Interior was an indispensable party who was not subject to the Court's jurisdiction.

The Court of Appeals held that the District Court was correct in its order dismissing the complaint as to the Secretary of the Interior,

for the reason that the Secretary was not suable in the District Court in Mississippi. The Court went on to hold that the case raised questions of law and fact upon which the United States would have to be heard and which cannot be tried behind its back. This holding, which was participated in by Judge Cameron, is contrary to the partial dissenting opinion which he wrote in the case of Stewart v. United States, 242 F. 2d 49, 52 (C.A. 5. 1957), where he stated that, in his opinion, an action may be maintained against a party before the court even though it may involve deciding on a land title in which others (the United States) not before the Court are interested.

Staff: George R. Hyde (Lands Division).

Public Property: United States Entitled to Trial on Issue of Damages in Ejectment Action Where Its Ownership Is Established; Court Has No Discretion to Refuse to Decide Issue Properly Before It. United States v. Langendorf (C.A. 9, August 22, 1963). The United States sought recovery of possession of public land bordering on the Lower Colorado River and damages for past use and occupancy and amounts paid under the Acreage Reserve Program for not growing crops on the land. The suit stemmed from old and continuing trespasses on public land in this area by a larger number of persons. Striking defendants' pleas of adverse possession, estoppel, laches, and failure to exhaust administrative remedies, the district court ruled for the United States on the issue of ownership, but summarily dismissed the claim for damages.

The Court of Appeals reversed the dismissal, stating: "The district court had jurisdiction over the parties and the subject matter and we can see no reason why it should not have determined these issues on the merits." Defendants' cross-appeal was dismissed for lack of prosecution.

Staff: Raymond N. Zagone (Lands Division)

Public Lands; Public Sales; Authority of Secretary of Interior to Set Aside Sale of Public Lands to High Bidder at Auction. Robert V. Ferry, et al. v. Stewart L. Udall, et al. (D. Ariz., September 3, 1963). Plaintiff Ferry was declared the high bidder at a public sale of public land held under 43 U.S.C. 1171. He paid the amount bid to the Bureau of Land Management but did not receive either a cash certificate or a patent. Thereafter, one Stanley C. Soho requested that the sale be set aside on the grounds that there had been collusive bidding. The Manager rejected the request and Soho appealed to the Director of BLM, who affirmed the action of the Manager. Soho then appealed to the Secretary and, in a decision by the Assistant Secretary, it was determined that the sale should be vacated.

Plaintiffs, after petitioning for reconsideration, then brought this action against the Secretary and others to obtain judicial review of the decisions which cancelled and vacated the sale. Plaintiffs also sought judgment declaring that they were entitled to the issuance of a cash certificate and a fee patent to the land.

In a decision entered September 3, 1963, the Court granted defendants' motion for summary judgment, following the decision in Wilcoxson v. United States, 313 F. 2d 884 (C.A. D.C.). The Court concluded that, no cash certificate having issued to plaintiffs, no contractual rights arose between plaintiffs and the United States, no equitable title to the land vested in plaintiffs and no rights to the land were ever vested. Accordingly, when the Secretary of the Interior determined, in the exercise of his discretion, that the fair market value of the tract involved on the date it was offered for sale exceeded the sum paid by plaintiff, the Secretary had the power to decide not to sell the tract. Furthermore, his action in so deciding is not reviewable.

Staff: Assistant United States Attorney Arthur E. Ross (D. Ariz.).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS

Complaint: Statute of Limitations Tolling Provision. United States v. Hyman Greenberg (C.A. 9) _____ F. 2d _____, decided July 5, 1963, rehearing denied August 19, 1963, reported P-H, para 63-5083, United States v. Mario Sanseverino (C.A. 10) _____ F. 2d _____, decided August 22, 1963, rehearing denied September 10, 1963. In these two criminal tax cases, attacks on the validity of criminal complaints based on the Tax Division's standard complaint form for use in tolling the statute of limitations reached opposite results.

In the Greenberg case in the Southern District of California the complaint was held to be insufficient. The United States appealed and the Court of Appeals for the Ninth Circuit concluded that the complaint was based on conclusions only and did not support the issuance of a warrant. Within a month the Court of Appeals for the Tenth Circuit in the Sanseverino case upheld the validity of a substantially identical complaint in a tax evasion case appealed by the defendant following his conviction in the Northern District of Oklahoma. The Solicitor General has concluded against certiorari in the Greenberg case, and Sanseverino is not seeking review in the Supreme Court.

The Tax Division is considering revision of the complaint form set forth at p. 137-8 of the Manual on Trial of Criminal Income Tax Cases. In the meantime, United States Attorneys, particularly in the Ninth Circuit, are urged to supplement the complaint form by a further statement of the results of the various kinds of examination conducted by the special agent or revenue agent signing the complaint. For example, when the facts permit, the stock clause regarding the nature of the investigation conducted by the agent "by examination and audit of said taxpayer's business and financial books and records" could be followed with a statement that the agent discovered a double set of books, one of which reflected more income than was reported on the returns. Or, when the clause about the examination of the taxpayer's books and records is appropriately followed by the clause "by identifying and interviewing third parties with whom the said taxpayer did business," the further statement could be added that a comparison of the receipts reflected on the taxpayer's books and records and the testimony and records of third parties reflected that sales (or commissions, or wages) were not recorded or reported for income tax purposes. Again, in appropriate cases, the agent can swear that the various enumerated avenues of investigation provided him with information reflecting the receipt of unreported income based on the excess of annual net worth increases over reported income. A similar statement could be made with respect to an analysis of bank deposits.

CIVIL TAX MATTERS
District Court Decisions

Bankruptcy; Tax Refunds Resulting From Bankrupt Taxpayer's Net Operating Loss Carryback Were Assigned to Trustee by Filing of Petition in Bankruptcy. In the Matter of Gerald Segal, etc. (N.D. Tex., August 26, 1963.) (CCH 63-2 USTC ¶9692). A dispute arose between the taxpayer bankrupt and the trustee in bankruptcy as to which party was entitled to net operating loss carrybacks provided by Section 172, Internal Revenue Code of 1954. The bankrupt claimed these carrybacks by virtue of the decision in In the Matter of Sussman, 289 F. 2d 76 (C.A. 3), which held that the bankrupt was entitled to the refund resulting from the application of such carrybacks due to the fact that such a right was not perfected at the time the petition in bankruptcy was filed and thus not property in the estate of the bankrupt at that time by virtue of the operation of Section 172(c), Internal Revenue Code of 1954, which precludes the existence of a carryback claim until the end of the taxable year. Also in accordance with the Court's reasoning in Sussman, the bankrupt further asserted that the Assignment of Claims Act, 31 U.S.C. 203, prohibits the assignment of a claim against the United States, except when the claim has been allowed.

The District Court upheld the Referee's decision that the trustee was entitled to the carryback notwithstanding the Sussman case and 31 U.S.C. 203. In regard to the prohibition contained in 31 U.S.C. 203, the Court cited Martin v. National Surety Co., et al., 300 U.S. 588, which held that such provision's purpose was to protect the Government, and not to determine equities growing out of an irregular assignment. Also, the ruling of the Referee that under Texas decisional law a contingent claim is transferrable was tacitly approved by the Court.

In overcoming the Sussman decision, the Court with the aid of a lengthy quotation from the Journal of the National Association of Referees in Bankruptcy, issue of October 1962, at page 116, attacking the ruling in Sussman, felt that the purpose of the Bankruptcy Act had been defeated in that decision. The line of reasoning which particularly impressed the Court was that if the bankrupt had died solvent, the carryback, although unperfected and inchoate at the time, was nevertheless a property right which would then at the instant of death pass to his estate. (See Fournier v. Rosenblum, decided 6/12/63 (11 AFTR (2) 1668) wherein the Court of Appeals for the First Circuit followed the Sussman case.).

Partition Suit; Federal Tax Share of Proceeds of Partition Suit Brought by Divorced Spouse Against Former Husband, Taxpayer, Is Subject to Payment of Pro Rata Share of Plaintiff's Counsel Fees, Payments Under Prior Mortgage and Payment of Real Estate Taxes Arising After Federal Tax Lien. Anna Smith v. Alfred John Smith. (Superior Court, N.J. - Chancery Div., January 11, 1963.) (CCH 63-2 USTC ¶9619). The taxpayer and the plaintiff, as husband and wife, were tenants by the entirety of

certain property subject to a mortgage in the amount of $2,600. Plaintiff secured a judgment nisi of divorce on grounds of desertion on January 13, 1961 and a final judgment on April 14, 1961. Plaintiff made payments on the mortgage during the years 1958 to 1961 in the total amount of $1,610.47. Federal tax liens totaling $2,021.55 were filed against taxpayer in March and September, 1958, and November, 1959. Plaintiff sued to quiet title and for partition, joining the United States under 28 U.S.C. 2410. On dismissal of the partition action the United States intervened. Following entry of a consent judgment for partition sale, plaintiff bid on the property for $4,000. The distributable net after costs totaled $3,675, of which the gross federal share was one-half, or $1,837. The Court held that the federal share was subject to payment of one-half of the wife's pre-divorce (i.e., pre-final divorce judgment) mortgage payments, since the mortgage itself was senior to the federal tax liens and plaintiff had "intended" to recoup these payments from taxpayer by subrogation or contribution and not to make a gift. The Court also held the federal share subject to payment of one-half of plaintiff's pre-divorce real estate taxes, as well as one-half of plaintiff's counsel fees. However, the Court declined to hold the federal share subject to payment of one-half of plaintiff's pre-divorce expenditures for repairs to the property, deeming such repairs discretionary and not fixed as to necessary amount. Further, the Court sustained the Government's contention that a federal tax lien is entitled to priority over the assignee of a state court judgment obtained by taxpayer, which was docketed prior to filing of the tax lien, but which was not perfected by levy and execution.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Robert D. Carroll (D. N.J.); Charlotte P. Faircloth (Tax Division).

Statutory Period for Collection Under Sections 275 and 276 of the Revenue Code of 1939 May Be Computed by Using Base of Five Years and Three Hundred and Sixty-Five Days Where Intervening Offer in Compromise Interrupted Six Year Period for Collection. United States v. Harry J. Tyrrell. (S.D. Ill., June 21, 1963.) (CCH 63-2 USTC ¶9595). The United States instituted this suit to obtain a judgment for income taxes in the amount of $115,281.31 plus interest. The sole issue was whether the Government's suit was timely. Sections 275 and 276, Internal Revenue Code of 1939, barred any action brought after six years from the assessment but in this case taxpayer had suspended the statute of limitations by executing a waiver in connection with an offer in compromise. The argument turned on whether in computing the limitations period the Government should base its computation on a breakdown of the period into years, months and days or base it, as the taxpayer contended, on a breakdown into only years and days. This argument became important because if taxpayer's contention was correct the suit was untimely by two days whereas if the Government was correct the suit had been filed on one day prior to the last day for filing the suit.

The Court adopted taxpayer's method of computation stating that the use of "months" in the computation failed to accurately reflect the limitation period because a month could contain 28, 29, 30 or 31 days.

Staff: United States Attorney Edward R. Phelps (S.D. Ill.); James N. McCune (Tax Division).

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