Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

December 27, 1963

United States

DEPARTMENT OF JUSTICE

Vol. 11 No. 25

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 11 December 27, 1963 No. 25

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

MEMOS AND ORDERS

The following Memoranda and Orders applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 22, Vol. 11 dated November 15, 1963:

MEMOS	DATED	DISTRIBUTION	SUBJECT
362	11-8-63	U.S. Attorneys	Public Law 87-748, 76 Stat. 744, Approved October 5, 1962
364	11-19-63	U.S. Attorneys	Use of Transcript on Appeals
280-S4	12-5-63	United States Marshals	Standard Form No. 2812 Revised July 1963 (Report of Withholdings & Contributions Health Benefits, Group Life Insurance, & Civil Service Retirement)

ORDERS	DATED	DISTRIBUTION	SUBJECT
307-63	11-8-63	U.S. Attorneys & Marshals	Title 28--Judicial Administration Chapter 1--Dept. of Justice Part 47--Reconsideration and Review of Adverse Actions in Dept. of Justice.
308-63	12-12-63	U.S. Attorneys & Marshals	Title 28--Judicial Admin. Chapter I--Dept. of Justice Part 0--Organization of Dept. of Justice--Subpart P--Fed. Bur. of Investigation - Adding Banking Institutions Insured by Fed. Savings & Loan Insurance Corp. to List of Banks Entitled to Receive Fingerprint Identification Services of FBI.

ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Court Rules For Government on Expense Motion. United States v. American Cyanamid Co., (S.D. N.Y.). On December 3, the Government noticed a deposition for December 16 under Rule 26, F.R.C.P., of a witness residing in Dickinson, Texas. The subpoena was issued and served returnable in Houston, Texas.

On December 6, Cyanamid moved in the Southern District of New York for a protective order under Rule 30(b) requesting relief of the nature defined in Local Civil Rule 5(a) of the Southern District, to wit, that the Government prepay counsel fees and expenses of Cyanamid for the taking of the deposition. Rule 5(a) reads as follows:

> Rule 5 - Counsel Fees on Taking Depositions in Certain Cases
>
> (a) When a proposed deposition upon oral examination, including a deposition before action, or pending appeal, is sought to be taken at a place more than 100 miles from the courthouse, the court may provide in the order therefor, or in any order entered under Rule of Civil Procedure 30(b), that prior to the examination the applicant pay the expense of the attendance at the place where the deposition is to be taken of one attorney for each adversary party, or expected party, including a reasonable counsel fee. The amounts so paid shall be a taxable cost in the event that the applicant recovers costs of the action or proceeding.

On December 13, argument was had. The Government took the position that it enjoyed a sovereign immunity from such costs, citing 18 U.S.C. 2412(a) and the case of United States v. Chemical Foundation, 272 U.S. 1 (1926). No judicial opinion was found with respect to the application of this local rule to the Government in a case where the United States was a party in its sovereign capacity. The Government also argued that merely compelling the defendant to take a deposition in Texas was not "good cause" under Rule 30(b) despite prior cases which did mechanically apply Rule 5(a). The defense cited North Atlantic, etc. v. United States, (C.A. 2 1954) 209 F. 2d 487, a case which did apply Rule 5(a) to the United States in a Federal Tort Claims Act.

Judge Levet at the argument stated that unless he lacked the power to grant the motion, he would grant it in the interest of fairness. He stayed the deposition and reserved decision.

By memorandum dated December 13, Judge Levet stated:

> By reason of 28 USC §2412 and by further reason of the decision, United States v. Chemical Foundation, 272 U.S. 1, 20-21 (1926), it is at least exceedingly doubtful if any allowance for such purposes may be imposed upon plaintiff.

However, Judge Levet refused to decide the point and ruled specifically that no cause had been shown under Rule 30(b). He denied the motion in his discretion:

> Accordingly, in my discretion, the motion is denied without prejudice to the defendant's right to submit its claim for expenses on this deposition for determination in the fixation of costs should it be ultimately determined at the conclusion of this action that defendant is entitled to costs.
>
> Settle order on notice specifying a date for the said deposition.

Staff: John J. Galgay, Joseph T. Maioriello and James J. Farrell (Antitrust Division)

Court Refuses Westinghouse's Motion For Acquittal. United States v. Engelhard-Hanovia, Inc., et al., (S.D. N.Y.). The indictment in this case which was returned on December 5, 1961, named five corporate and eight individual defendants. Defendants Engelhard-Hanovia, Inc. and Handy & Harman pleaded guilty and were fined $20,000 each. (The indictment as to Engelhard Industries was dismissed.) Six of the individuals pleaded nolo contendere to Count Two of the indictment (Section 14 of the Clayton Act) and were fined $1,000 - $2,000 each, following which Count One (Section 1 of the Sherman Act) was dismissed as to each of these defendants. After the Supreme Court had reversed Judge Cashin's dismissal of Count One of the indictment as against the two remaining individual defendants, they pleaded nolo contendere to Count One and were fined $500 each, and thereafter Count Two was dismissed as to them.

On November 14, 1963, defendant United Wire & Supply Corporation renewed its application to change its plea from not guilty to nolo contendere, which application was again denied by Judge Cashin on that date. On November 18, 1963, United Wire changed its plea from not guilty to guilty and Judge Cashin postponed the imposition of sentence until after the trial of the remaining defendant Westinghouse Electric Corporation. On November 21, 1963, defendant Westinghouse applied to change its plea of not guilty to nolo contendere, which application was denied after argument by Judge Cashin in a memorandum opinion citing United States v. Standard Ultramarine. On November 26, 1963, trial of Westinghouse, the sole remaining defendant, was begun. The Government completed its case on December 2, 1963, and rested following three days of trial. Westinghouse moved for a directed verdict of acquittal, decision as to which was reserved by Judge Cashin until the

defense had completed its case. Following oral argument on the motion for acquittal, Judge Cashin ruled that the case would go to the jury, which was done on December 5, 1963. After the jury had been out nine hours, and twice reported to Judge Cashin that it was unable to agree, a mistrial was declared in the early morning hours of December 6, 1963.

On December 11, 1963, the Government moved to restore the case to the Criminal Trial Calendar and on December 12, 1963, Westinghouse renewed its motion for a judgment of acquittal, pursuant to Rule 29(b), F.R. Crim. P. On December 18, 1963, after hearing argument on the cross motions, Judge Cashin denied defendant's motion to acquit and set a new trial date of March 9, 1964.

Staff: Bernard M. Hollander and John T. Sharpnack (Anitrust Division)

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections: Civil Rights Acts of 1957, 1960. United States v. State of Louisiana, et al. C.A. #2548 (E.D. La.). This suit instituted under the Civil Rights Act of 1957, as amended, was filed on December 28, 1961, against the State of Louisiana; Governor Jimmie H. Davis, Lieutenant Governor C.C. Aycock, and Speaker of the Louisiana House of Representatives J. Thomas Jewel - as members of the State Board of Registration; and Hugh E. Cutrer, Jr., Director of the Board.

The complaint challenged the constitutional validity of the provisions of the Louisiana Constitution and statutes which require voter applicants to interpret to the satisfaction of the registrar any section of either the state or federal constitution.

On November 27, 1963, a three-judge district court issued its opinion declaring that the Louisiana interpretation test is invalid as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution. The Court held that the purpose of its adoption and the effect of its enforcement was to disfranchise Negroes. Specifically, the Court found that the test had been applied in twenty-one parishes with the result that Negro applicants for voter registration had been discriminated against in these parishes.

In addition to enjoining the use of the interpretation test anywhere in the state, the Court enjoined the use of the state's new "citizenship" test in the twenty-one parishes where the interpretation test had been used to discriminate against Negro applicants. Under the Court's ruling the "citizenship" test may not be used in these parishes as to persons who were of voting age and met the residence requirements at the time the new test was adopted until there is a general reregistration of voters or until the Court is satisfied that the effects of prior discrimination have worn off.

One of the reasons cited by the Court to justify this relief is that it is "impossible to ascertain how many and which qualified Negroes were deterred from seeking registration, knowing that they had no chance of succeeding, since other qualified Negroes were kept off of the rolls by the practice of racial discrimination."

Staff: United States Attorney Louis C. LaCour; John Doar, David Norman, Frank M. Dunbaugh, (Civil Rights Division)

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

MAIL FRAUD

Scheme to Harass by Use of United States Mails Does Not Constitute Violation of Mail Fraud Statute; Indictment Dismissed. United States v. Edwin R. Bauer (N.D. Indiana). On November 26, 1963, the District Court dismissed a mail fraud indictment which charged a scheme to defraud various mail order houses. Defendant had been arrested twice by an Indiana state trooper for traffic violations. To seek revenge against the trooper, defendant ordered numerous articles of merchandise to be sent to the trooper, using fictitious numbers on Diner's Club coupons. Defendant had no knowledge whose Diner's Club number he was using. The state trooper rejected all the merchandise and it was returned to the respective mail order houses. The postage or shipping charges were paid by the mail order houses.

In holding that the facts of this case did not constitute a violation of 18 U.S.C. 1341, the Court stated that the underlying motive of the scheme devised by defendant was not to defraud, but rather to harass the state trooper, or a sort of "mail order vendetta," and that the fact that someone might suffer some slight loss in the transaction, or that the trooper might receive and keep, if he chose to do so, goods which he had not ordered, was not "the significant intent" of defendant.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

Judicial Review of Deportation Order Under 8 U.S.C. 1105a; Jurisdiction of Court of Appeals; What Is "Final Order of Deportation". Foti v. INS, S. Ct., No. 28, December 16, 1963, ____ U.S. ____, 32 LW 4049. On January 7, 1963, the Supreme Court granted a petition for certiorari to review the September 21, 1962 decision of the Court of Appeals for the Second Circuit [308 F. 2d 779] in which that Court, sitting en banc and by a five-to-four vote, held that it had no original jurisdiction under 8 U.S.C. 1105a to review the denial of an application for suspension of deportation [8 U.S.C. 1254(a)(5)] since, in this case, deportability had been conceded and the denial of the application was a discretionary order and not a final order of deportation (C.A. 2 decision digested at Vol. 10, No. 21, p. 595).

Certiorari was granted because of a conflict among circuits regarding the interpretation of the jurisdictional language in §1105a, and was limited to the question whether courts of appeals have jurisdiction under that section to review final administrative orders with respect to discretionary relief sought during deportation proceedings [371 U.S. 947].

The question the Supreme Court had to decide was a rather narrow one of statutory construction - whether a refusal by the Attorney General to grant suspension of deportation is one of those "final orders of deportation" of which direct review by courts of appeals is authorized under §1105a. Both Foti and the Government contended that it is and the Supreme Court concluded that the Court below erred in holding that it was not.

The Court carefully reviewed the historical background of the Immigration and Nationality Act and the manifest purpose of Congress in enacting §1105a and held that, in addition to having original and exclusive jurisdiction under that section to review denials of suspension of deportation, courts of appeals have like jurisdiction to review.

> "all determinations made during and incident to the administrative (deportation) proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure pursuant to §244(e) [8 U.S.C. 1254(e)] and orders denying the withholding of deportation under §243(h) [8 U.S.C. 1253(h)]. . ."

The Court declined to pass at this time on whether §1105a extends the exclusive jurisdiction to courts of appeals to include review of orders denying motions to reopen deportation proceedings, a question of somewhat different to the one in Foti since such an administrative determination

is not made during the same proceeding where deportability is determined and discretionary relief is denied. (This question appeals in a petition for certiorari pending in the Supreme Court since January 5, 1963 in Giova v. Rosenberg, 308 F. 2d 347 S. Ct. No. 15 Misc.).

Reversed and remanded.

Staff: Philip R. Monahan, Attorney, Department of Justice

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Public Lands; Mineral Leasing Act; Small Tract Regulation, 640 Acre Rule, Does Not Bar Lease of Isolated Tract Even Though Non-Isolated Tract Is Included in Same Offer. Southwestern Petroleum Corporation v. Udall (C.A. D.C., Nov. 14, 1963). Southwestern's was the last of three offers to lease land in the same New Mexico township. All three included a 120-acre tract in section 10 and a separate 160-acre tract in section 11, but only Southwestern's included a section 14 tract contiguous to the section 11 tract. The fact that all three offers were for less than 640 acres brought into play 43 C.F.R. § 192.42(d), which reads: "Each offer * * * may not be for less than 640 acres except * * * where the land is surrounded by lands not available for leasing under the act * * *." The present suit by Southwestern challenged the Secretary's issuance of a lease on the section 10 land to the first applicant.

Southwestern contended that, in allowing acceptance of part of an offer to lease while rejecting another part, the Secretary's interpretation of the regulation was erroneous, arguing that the regulation requires all of the land covered by an offer to be isolated, and that inclusion of non-isolated land should necessitate rejection of the entire offer. The Court of Appeals, affirming the District Court's dismissal of the suit, said that the question was whether the Secretary's interpretation of his regulation was reasonable.

> It was for the Secretary, the promulgator of the rule, to determine which of the two possible interpretations was better in accord with the over-all leasing policy of which the regulation is a part, We cannot say that the Secretary's choice of interpretation was unreasonable and, absent such a finding, we cannot disturb his decision.

The Court again explicitly declined to rule on the Government's contention that the lessee was an indispensable party to the suit, citing two other cases in which it had refused to rule on the point.

Staff: Hugh Nugent (Lands Division).

Condemnation: Federal Law Controls Construction of Complaint Under Maxim Ejusdem Generis; Reservation of "Oil, Gas, and Other Minerals" to Owner of Subsurface Estate Does Not Allow Extraction of Gravel. Bumpus v. United States (C.A. 10, Nov. 20, 1963; D.J. File No. 33-17-197-216). A condemnation complaint for the Toronto Dam and Reservoir in southeastern Kansas contained the following reservation: "* * * to the owner or owners of the subsurface estate, * * * all oil, gas and other minerals in and under said land, with full rights of ingress and egress for the purpose of exploration, development, production and removal of oil, gas and other minerals which may be produced from said land * * *." Two and a half years after entry of judgment for just compensation, the former landowner began

to remove gravel from the tract, claiming a right to do so under the above reservation. The United States moved for and was granted a writ of assistance to bar further removal of gravel, and the landowner appealed.

The Court of Appeals noted that federal law controlled because the condemnation was under federal law, but had to turn to the applicable principles of general law because of the lack of federal decisions in point. The Court thought the case "peculiarly one for the application of the maxim ejusdem generis." "Since gravel is not of the same kind or species as oil and gas, the general word 'mineral' following that enumeration of specific minerals would not, under the rule of ejusdem generis, be construed to include gravel." Moreover, the gravel was found at the surface, which the Government had wanted for reservoir purposes, and the reservation was to the owners of the subsurface estate.

Chief Judge Murrah, concurring specially, would have affirmed on the simple premise that only the subsurface estate was reserved. Since the trial court had found that the gravel was not part of the subsurface estate, he saw no need to determine whether, as a part of the subsurface, the gravel would be classified as a mineral.

Staff: Hugh Nugent (Lands Division).

Indians, Tax Exemption of Allotted Land of Five Civilized Tribes, Section 6(b) of Act of August 4, 1947, 61 Stat. 731, Interpreted for First Time. United States v. Wewoka Creek Water and Soil Conservancy District No. 2, of State of Oklahoma. (E.D. Okla., September 27, 1963.) Suit was brought to cancel certain taxes assessed by defendant on restricted Indian land for which tax exemption certificates had been filed under the provisions of the Act of May 10, 1928, 45 Stat. 495. Defendant contended that the lands were no longer tax exempt since additional exemption certificates had not been filed within two years from the date of the enactment of the Act of August 4, 1947. (61 Stat. 731.) Section 6(b) of that Act provides:

> All tax exempt lands owned by an Indian of the Five Civilized Tribes on the date of this Act shall continue to be tax exempt in the hands of such Indian during the restricted period; Provided, that any right to tax exemption which accrued prior to the date of this Act under the provisions of the Acts of May 10, 1928 (45 Stat. 495), and January 27, 1933 (47 Stat. 777), shall terminate unless a certificate of tax exemption has been filed of record in the County where the land is located within two years from the date of this Act.

The Bureau of Indian Affairs had taken the position that this section does not require the filing of another tax exemption certificate where a certificate has already been filed under either the 1928 or the 1933 Acts. After reviewing the legislative history of the 1947 Act and its relation to previous Acts dealing with the tax exemption of Indian land, the Court held that the lands involved, being restricted and a tax exemption certificate having been filed pursuant to the provisions of the 1928 Act, retain their

tax exempt status and a renewed filing is not called for nor necessary under the provisions of Section 6(b) of the Act of August 4, 1947.

Staff: United States Attorney Edwin Langley; Assistant United States Attorney E. C. Nelson (E.D. Okla.)

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS

Special Notice

The following item which appeared in Volume 5, No. 10 of the Bulletin on May 10, 1957, is reprinted for the information and guidance of United States Attorneys and their staffs.

Notification to Internal Revenue Service When Suit is Commenced. Immediately upon receipt of service of a complaint in a tax refund suit, notice of that fact should be given directly to the nearest district office of the Internal Revenue Service. In preparing a defense of such suits, the Tax Division utilizes information furnished by the Service, most of which originates from the District Director's office which processed the returns involved. In order to speed preparation by the Division, the appropriate District Director should immediately be alerted to the pendency of the suit and requested to forward the necessary data to the Chief Counsel in Washington.

Appellate Decisions

Injunction Suit: Fifth Circuit Holds That Order of District Court Which (1) Denies Government's Motion to Dismiss and (2) Continues in Force Consent Restraining Order, Is Non-appealable Order - Ross v. Evans (C.A., November 13, 1963). In this case taxpayer filed suit for an injunction on December 5, 1962, and the district court issued a temporary restraining order on the same day. With the consent of the parties, and by an order dated December 14, 1962, the temporary restraining order was continued in full force and effect until further order of the court. On January 21, 1963, the Government filed a motion to dismiss the complaint. Without a hearing, the court denied the motion and stated in its order dated February 8, 1963, that the consent restraining order should remain in effect. The Government appealed on the theory that the denial of our motion to dismiss and the continuance of the consent restraining order was the same thing as issuing a preliminary injunction. The Fifth Circuit dismissed the Government's appeal and after pointing out that an order denying a motion to dismiss is not appealable, stated the following:

> Where, as here, the temporary restraining order has been entered by consent until further order of the court, and no application has been made to dissolve the restraining order, and no orders have been made with respect to the restraining order except to continue it in force, it will not have lost its character as a non-appealable temporary restraining order and become converted into an appealable preliminary injunction.

Staff: Lee A. Jackson, Meyer Rothwacks, Ralph A. Muoio (Tax Division)

Constitutionality of State Recording Statute Upheld; Federal Tax Lien Has Priority Against Unrecorded Assignment of Accounts Receivable. Security State Bank of Pharr, Texas v. Uhlhorn, d/b/a Uhlhorn Construction Co., et al. (C.A. 5, November 27, 1963). Taxpayer, a subcontractor on a housing development, obtained interim financing from the Security State Bank, the appellant. Taxpayer has assigned to the appellant its rights to future accounts receivable from the contractor, as security for its indebtedness. The assignee then loaned funds to taxpayer in reliance on the assignment and at the time the Government's lien arose against the taxpayer-assignor the amounts owed to the assignee by taxpayer exceeded the receivables owed taxpayer. The contractor instituted an interpleader action in the state court, and the United States and the appellant contested the right to the interpleaded funds after the Government removed the case to the federal district court and filed its appearance as intervenor.

A Texas recording statute, as amended in 1957, required that an assignment of accounts receivable arising under a construction contract be recorded in the county in which the work is performed and that it contain a description of the property being improved. Appellant failed to comply with these statutory requirements. The district court held that appellant's assignment was therefore inchoate and unperfected and thus did not give appellant the necessary stature as a "mortgagee" or "pledgee" under Section 6323 of the 1954 Internal Revenue Code as to pre-empt the tax lien.

On appeal, appellant Bank attacked the constitutionality of the recording statute, claiming that the amendatory act passed by the Texas legislature in 1957 which for the first time gave rise to the aforesaid recording requirements failed to give notice in its caption of the procedural requirements set out in the body of the act. Alternatively, arguing under Crest Finance Co. v. United States, 368 U.S. 347 (1961), appellant contended that its lien was sufficiently perfected to take priority over the federal lien even though it was not properly recorded.

The Fifth Circuit, affirming the lower court, per curiam, paid its respects only to the constitutional argument. It apparently seemed clear to the Court, as it does from the existing state of the law, that Crest Finance was not helpful to appellant since it concerned an assignment not required under state law to be recorded. In fact, recent Texas Supreme Court decisions had held that an assignee-creditor who fails to comply with the state recording requirements is unprotected against subsequent lien creditors of the assignor, including the Federal Government. Similarly, existing federal decisions make it clear that where a state statute renders a security interest ineffective for want of recordation, that interest cannot pre-empt a later federal tax lien.

Staff: Joseph Kovner, Robert J. Golten, Ralph A. Muoio (Tax Division)

District Court Decisions

Priority of Liens: Insurance Proceeds: Federal Tax Liens Subordinated to Assignment Executed Prior to Date of Tax Liens But Entitled to Priority Over Subsequently Arising Equitable Lien and Lien of Judgment Creditor on Personal Property. Farmers Reliance Insurance Company of New Jersey, et al. v. Miami Rug Company, et al. (S.D. Fla., November 12, 1963.) Plaintiff insurance companies paid into court the sum of $12,485.06 representing the proceeds of insurance policies taken out by taxpayer on certain premises and the contents thereof which were destroyed by fire on March 18, 1962. The United States claimed an interest in the proceeds by virtue of federal tax assessments made on April 27, 1962. Notices of federal tax liens were filed on April 30, 1962. A large portion of the personal property insured under the policies was owned by the Estate of Russell B. Wilson and leased to taxpayer, which lease was recorded on October 5, 1961, and contained a covenant to insure. The personalty leased was encumbered by a mortgage in favor of Rath Provision Company, recorded on June 7, 1961. On April 23, 1962, taxpayer executed two unrecorded assignments in favor of Wilson and Rath of that portion of the proceeds payable under the insurance policies for the damage or injury to the personal property burned, not to exceed the unpaid balance due said parties under the lease and chattel mortgage. Allen B. Cramer, Inc. claimed an equitable lien against the proceeds for services in repair of the damaged property commencing May 1, 1962. Miami Rug Company asserted a lien by virtue of a judgment against taxpayer on September 10, 1962.

In awarding a first priority to Wilson and Rath, the Court ruled that the assignment of the insurance proceeds was not an assignment securing a contingent obligation, but was a completed transfer of interest for valid consideration prior to the perfection of the Government's tax liens. However, the Court held that the federal tax liens were entitled to priority over the equitable lien of Cramer for services rendered subsequent to the date the tax liens were recorded, and over the claim of the judgment creditor, whose lien did not arise until after the tax liens were recorded. The Court noted that under Florida law the lien of a judgment creditor on personal property does not arise until the execution is placed in the hands of the sheriff for levy. Since the federal tax liens were recorded prior to the date execution was effected by the judgment creditor, the United States was entitled to priority.

Staff: United States Attorney William A. Meadows, Jr.; Assistant United States Attorney Edward Kaufman (S.D. Fla.).

Injunction - Suit to Restrain Sale of Mortgaged Property by Chattel Mortgagee. Rosenthal & Rosenthal, Inc. v. United States and Scanlon. (E.D. N.Y. October 3, 1963.) (CCH 63-2 USTC ¶9819). On November 15, 1962, taxpayer executed and delivered a chattel mortgage to plaintiff. On August 20, 1963, the Government filed tax liens against the taxpayer-mortgagor, and threatened to seize and sell the taxpayer-mortgagor's interest in the chattels which were subject to the mortgage. At the

time of the seizure by the Government, the mortgage was in default, but the taxpayer-mortgagor was still in possession of the property. The plaintiff-mortgagee filed the present suit on September 10, 1963 seeking a declaration of rights in the property, a delivery of the property and an injunction pendente lite to prevent the sale of the property.

The Court concluded that an injunction pendente lite was warranted under these facts and prevented the sale of the property by the Internal Revenue Service, stating that the rights of a chattel-mortgagee are fixed under New York law, and cited Matter of Ideal Mercantile Corporation, 143 F. Supp. 810.

Staff: United States Attorney Joseph P. Hoey (E.D. N.Y.).

Decision of Tax Court of United States Is Res Judicata Even Though That Decision Was Entered Pursuant to Stipulation of Parties and Did Not Reach Merits of Tax Liability. United States v. George and Ida Smith (D. N.J., June 27, 1963.) (CCH 63-2 USTC ¶9753). This was an action to reduce the outstanding tax liabilities of taxpayers, who were husband and wife, to judgment. Defendants filed an answer which amounted to a general denial. Thereafter, at a pretrial conference, Mr. Smith indicated that he would not contest the liability insofar as it applied to him but that he would resist entry of judgment based on a transferee liability against Mrs. Smith. The Government filed a motion for summary judgment based on Mr. Smith's intention not to contest the liability asserted against him and based upon a decision of the Tax Court of the United States which held that Mrs. Smith was indebted to the Government as a transferee. Mrs. Smith defended on the grounds that the Tax Court decision was based on a stipulated settlement entered into by her counsel and the Commissioner of Internal Revenue, allegedly without her knowledge and consent. The District Court held that it is settled law that a decision of the Tax Court is res judicata as to the same tax liabilities before the Court. United States v. International Building Co., 345 U.S. 502. The court further held that the fact that the stipulation on which the Tax Court decision was based did not reach the merits of the tax liability would not change the above result. Erickson v. United States, 309 F. 2d 760 (Ct. of Claims, 1962.)

Staff: United States Attorney David M. Satz, Jr. (D. N.J.); and John G. Penn (Tax Division).

* * *

I N D E X

Subject	Case	Vol.	Page
A			
ANTITRUST MATTERS Court Refuses Westinghouse's Motion for Acquittal	U.S. v. Engelhard-Hanovia, Inc., et al.	11	623
Court Rules For Government on Expense Motion	U.S. v. American Cyanamid Co.	11	622
C			
CIVIL RIGHTS MATTERS Voting and Elections; Civil Rights Acts of 1957, 1960	U.S. v. State of La., et al.	11	625
D			
DEPORTATION Judicial Review under 8 U.S.C. 1105a	Foti v. INS.	11	627
L			
LANDS MATTERS Condemnation: Federal Law Controls Construction of Complaint Under Maxim Ejusdem Generis; Reservation of "Oil, Gas, and Other Minerals" to Owner of Subsurface Estate Does Not Allow Extraction of Gravel	Bumpus v. U.S.	11	629
Indians, Tax Exemption of Allotted Land of Five Civilized Tribes, Section 6(b) of Act of August 4, 1947, 61 Stat. 731, Interpreted for First Time	U.S. v. Wewoka Creek Water and Soil Conservancy Dist. No. 2, of State of Oklahoma	11	630
Public Lands; Mineral Leasing Act; Small Tract Regulation, 640 Acre Tule, Does Not Bar Lease of Isolated Tract Even Though Non-Isolated Tract is Included in Same Offer	Southwestern Petroleum Corp. v. Udall	11	629

Subject	Case	Vol.	Page
M			
MAIL FRAUD Scheme to Harass by Use of United States Mails Does Not Constitute Violation of Mail Fraud Statute; Indictment Dismissed	U.S. v. Bauer	11	626
MEMOS & ORDERS Applicable to U.S. Attorneys		11	621
T			
TAX MATTERS Decision of Tax Court of U.S. Is Res Judicata, etc.	U.S. v. George and Ida Smith	11	635
Constitutionality of State Recording Statute Upheld; etc.	Security State Bank of Pharr, Texas v. Uhlhorn, d/b/a Uhlhorn Const. Co., et al.	11	633
Injunction - Suit to Restrain Sale, etc.	Rosenthal & Rosenthal, Inc. v. U.S. and Scanlon	11	634
Injunction Suit: Fifth Circuit Holds That Order of Dist. Ct. Which (1) Denies Govt's. Motion ...Is Nonappealable Order	Ross v. Evans	11	632
Priority of Liens: Insurance Proceeds: Etc.	Farmers Reliance Ins. Co. of New Jersey, et al. v. Miami Rug Co., et al.	11	634