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Abstracts of Recent Cases

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of the proceeding was established. When a plaintiff's attorney left practice to become a judge and the attorney that succeeded him had no knowledge that an order to list the matter for the trial had not been complied with, the court held that under such circumstances there was good cause for delay. *Marquette Appliances, Inc. v. Wexler,* 27 F.R.D. 484 (E.D. Pa. 1960). However, where either the plaintiff, *Jameson v. Du Comb,* 275 F.2d 293 (7th Cir. 1960), or his attoney, the situation in the principal case, fail to appear at a court proceeding because of business elsewhere at that time, such an excuse will be insufficient.

In conclusion it is to be remembered that, while the federal decisions concerning the rules are not binding upon the courts of West Virginia, they are valuable guides until the West Virginia Supreme Court of Appeals has established a more definite and authoritative course to follow.

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ABSTRACTS

Procedure—Importance of Including All Grounds in Motion for New Trial Under Federal Rules of Civil Procedure

Following a verdict for *P* in a personal injury suit, a judgment was entered on April 20. On April 25, *D* filed a timely motion for a new trial assigning various grounds, but did not include excessive verdict. Motion was denied on September 20. On October 18, *D* filed a petition for "reargument and reconsideration" of his motion for a new trial and on the same day, without notice to *P* or any hearing, the court entered an order granting a new trial unless *P* remit a part of the sum awarded. *Held,* reversed. The district court was without power to enter an order granting a new trial on the issue of damages where such order was not made within ten days after entry of judgment and where excessiveness of verdict was not stated as ground in *D's* motion for a new trial. *Demeretz v. Daniels Motor Freight, Inc.,* 307 F.2d 469 (3rd Cir. 1962).

The issue in the principal case concerned Fed. R. Civ. P. 59 (d) which has been incorporated into the new West Virginia rules.

> Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any

> reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor. W. Va. R. C. P. 59(d).

On the federal level the law appears to be settled that even though a motion for a new trial is made within ten days after a judgment has been entered, granting of a new trial on grounds not mentioned in the motion is inferred to be action taken by the court on its own initative. *National Farmers Union Auto. & Cas. Co. v. Wood,* 207 F.2d 659 (10th Cir. 1953). Furthermore, whether the court acts directly on its own initiative or whether this initiative is inferred, the action must take place within the ten day period following the judgment. *Tsai v. Rosenthal,* 207 F.2d 614 (8th Cir. 1961).

Prior to the new rules in West Virginia, the court had the power, on its own initiative to order a new trial where sufficient grounds existed, but this power was infrequently used. Rule 59(d) merely places a time limitation on when this discretionary power may be exercised. LUGAR & SILVERSTEIN, WEST VIRGINIA RULES 454 (1960).

However, if the West Virginia court follows the settled federal law, the practicing attorney must exercise a greater degree of care in drafting his motion for a new trial being certain to include all possible grounds. Then, if the court grants the motion eleven days following the judgment, based on grounds mentioned within the motion, Rule 59(d) will have no application. Otherwise, if the court grants the motion anytime aften ten days following judgment, on grounds not mentioned in the motion, the court would be acting on its own initiative and such granting would be void.

Property—Sale of an Undivided Interest in Realty for Federal Tax Lien

Proceeding by the United States to enforce tax liens against the one-sixth undivided interest owned by the taxpayer and located in Alabama. The United States District Court for the Middle District of Alabama rendered a judgment decreeing public sale of all the jointly owned property. *Held,* reversed and remanded. The statute providing for action to enforce federal tax lien or subject property to

payment of tax relates to individual property of the delinquent taxpayer and does not authorize the government to force a public sale on property of other joint owners. *Folsom v. United States,* 306 F.2d 361 (5th Cir. 1962).

The Internal Revenue Code of 1954 allows the government to enforce any tax lien under the Code by subjecting to a sale any property of the delinquent taxpayer, or in which he has any right, title, or interest. 26 U.S.C. § 7403 (1959). The principal case has placed a limitation on this broad, sweeping language to the effect that a federal court must respect the rules of property ownership in the particular state of the situs of the property sought to be subjected to sale for the tax deficiency.

In West Virginia the applicable rules are comparable to those in the jurisdiction of the principal case. By statute an owner of an undivided interest in land, may have this interest separately assessed on the land books of the county in which the property is located. Furthermore, in any tax sale only the tract, lot, estate, interest, or undivided interest proceeded against in that particular instance shall pass to the purchaser, so that any other estate, interest, or undivided interest in the same land shall not be affected by the sale. At such a sale, if the interests have been assessed separately, the owner of one such interest may purchase the interest of another. W. VA. CODE ch. 11, art. 4, § 9 (Michie 1961). Also by statute tenants in common or joint tenants are entitled to either voluntary or forced partition. W. VA. CODE ch. 37, art. 4, § 1 (Michie 1961); 50 W. Va. L. Q. 158 (1947).

Where there is a judgment lien involved the controlling principle appears to be that the lien of a judgment attaches to the interest of the judgment debtor, nothing more and nothing less. *Brown v. Hodgman,* 124 W. Va. 136, 91 S. E. 2d 910 (1942).

In view of the statutes and case law which appear to make each interest in land separate and distinct, in West Virginia, the same result should be reached as in the principal case. A federal tax lien against one of the joint property owners should not subject the interest of the other owner or owners to a public sale without at least allowing the non-delinquent holders to obtain partition and if this be impossible, allow them to purchase the interest of the delinquent owner.

Torts—Compensation under Fifth Amendment for Airplane Noise

Ps built their homes adjacent to a military air base. Jet airplane operations from the base caused windows and dishes to rattle, smoke to blow into the homes during the summer months, and noise which interrupted ordinary home activities and interfered with the use and enjoyment of the private homes. Although the aircraft did not fly directly over *Ps'* land, they sought to recover under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1959), and the Fifth Amendment for private property taken for public use. The United States District Court for the District of Kansas held for D. *Held,* affirmed. Governmental activities which do not directly encroach on private property are not a taking within the meaning of the Fifth Amendment even though the consequences of such acts may impair the use of the property. *Batten v. United States,* 306 F.2d 580 (10th Cir. 1962).

The United States Supreme Court considered the problem of excessive aviation noise for the first time in *United States v. Causby,* 328 U.S. 256 (1946). The Court held that continued low-altitude flights by military aircraft could constitute a "taking" of private property for which the Fifth Amendment required compensation. Note, *Airplane Noise: Problem in Tort Law and Federalism,* 74 HARV. L. REV. 1581 (1961).

Recently the Court had an opportunity to review its decision in the *Causby* case. In *Griggs v. County* of *Allegheny,* 369 U.S. 84 (1962), *P's* property was in direct line with the landing approach to the airport. Although the take-offs and landings were within the navigable air space approved by the F.A.A., the Court allowed recovery under the Fifth Amendment, apparently on the ground that the approach and departure slopes are a part of the navigable airspace. 30 FORDHAM L. REV. 803 (1962).

The *Causby* case appears to have been based on the theory of trespass because the aircraft wandered from the navigable airspace and thereby directly invaded the plaintiff's property. However, in the *Griggs* case there was no direct invasion of the plaintiff's airspace, but rather a constructive taking of the property because the property was rendered virtually uninhabitable.

On the other hand, the *Ps* in the principal case were unable to show either a trespass or a taking. Their property was made less enjoyable and no doubt depreciated in value, but it was, neverthe-

less, still inhabitable. The *Ps* were put to an unpleasant inconvenience, but such inconvenience did not result in a taking of their property necessary for them to recover under the Fifth Amendment.

Torts—Malpractice—Statute of Limitations under Federal Tort Claims Act

P, a veteran, was wounded in Korea and suffered some brain damage. In 1957 he was examined in a Veterans Administration Hospital and the injury was diagnosed as psychosomatic. In 1959 he was admitted to a state hospital and it was discovered that *P* had an organic injury to his brain of traumatic origin. *P's* condition was treated and he was released. This action against the United States under the Federal Tort Claims Act was brought in 1960 charging malpractice by the physicians in the Veterans Hospital. The United States District Court for the Northern District of California dismissed the action on grounds that the two year statute of limitations had run. *Held,* reversed and remanded. A claim accrued for the purpose of the statute of limitations when the claimant discovered, or in exercise of reasonable diligence should have discovered, acts constituting the alleged malpractice. *Hungerford v. United States,* 307 F.2d 99 (1962).

The Federal Tort Claims Act was intended to place liability on the United States in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C. § 2674 (1959). Actions under the Act are subject to a two year statute of limitations. Because the various states are in conflict as to the time a claim accrues, a serious problem is presented the attorney in determining when the claim of his client may have been barred by the statute of limitations. Annot., 80 A.L.R.2d 369 (1961).

The principal case held that it was not the law of the state where the injury occurred that determined when the claim accrued, but rather federal law. This view has not been accepted by all federal courts. In *Quinton v. United States,* 304 F.2d 234 (5th Cir. 1962), the court stated that the state law determines when a cause of action comes into existence, but the federal law governs the time for the commencement of the statute of limitations. However, the law of the state was held to determine when the statute of limitations began to run in *Tessier v. United States,* 269 F.2d 305 (1st Cir. 1959).

If the principal case had been determined under West Virginia law, a contrary result would have been reached. In the most recent West Virginia case, an operation was performed in 1946 and an action for malpractice was brought in 1955 for injury sustained at the time of the operation. The circuit court set aside a verdict for the plaintiff and granted a new trial. The appellate court affirmed stating that the cause of action for malpractice accrued at the time of the operation, when the injury was sustained. *Gray v. Wright,* 142 W. Va. 490, 96 S.E.2d 671 (1957).

The present problem does not appear to have been considered by the Fourth Circuit. However, the Fourth Circuit did decide one of the first cases concerning the Federal Tort Claims Act. While not actually faced with the determination of when the statute of limitations began to run, the court set a path followed by the other circuits in determining that the law of the state must be considered for defining the actionable wrong, but the Federal Tort Claims Act fixes the limitation of time. *Burkhardt v. United States,* 165 F.2d 869 (4th Cir. 1947).

Assuming that the federal courts serving West Virginia would accept the rule in the principal case, an action for malpractice under the Federal Tort Claims Act would be barred by the statute of limitations two years after the injured party discovered or with reasonable diligence should have discovered the injury, rather than two years following the actual injury as under West Virginia law.

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