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UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

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Civil Division

DATE: October 7, 1966

JWD:DJAnderson:sz

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SUBJECT: Agreement with President Kennedy's Executors

The views of the Civil Division have been asked as to the enforceability of conditions in an agreement by which the executors of President Kennedy will donate to the United States for deposit in the National Archives certain personal items of the late President. These conditions relate to limitations of the use of the material to certain categories of persons, and limitations on the public display of the items during the lifetimes of certain named parties.

We conclude that, as written, there is considerable doubt as to whether the executors can enforce the agreement either against the United States or against its officials. This would be so regardless of the presence of the suit provision in paragraph (3).

The reason for this doubt is the general rule that only an Act of Congress can waive the sovereign immunity of the United States. The suit provision in the agreement reads as follows:

> (3) In the event of a wilful violation of this agreement by any official acting or purporting to act on behalf of the United States, it is understood that the undersigned executors or any of the persons named in paragraph (2) may sue in the district court of the United States for the District of Columbia, for the purpose of enforcing the provisions of this agreement.

No individual officer of the Government, such as the archivist or the Administrator of the General Services

Administration, can accomplish such a waiver. See Minnesota v. United States, 305 U.S. 382. The "suit" provision in question, being an attempt by the archivist to do this, would not be effective.

Nor would the instrument be enforceable aside from the clause under other doctrines dealing with suits against the United States and its officials. The statute under which the gift is to be made authorizes acceptance of conditional gifts, but does not specifically waive sovereign immunity.

> The Administrator (of General Services Administration) is authorized, whenever he deems it to be in the public interest, to accept for deposit--
>
> (1) The papers and other historic materials of any President or former President of the United States . . . subject to restrictions agreeable to the Administrator as to their use.
>
> [44 U.S.C. 397(e).]

It cannot be argued that this grant of power to accept gifts conditionally impliedly grants consent to enforce such conditions against the United States or its officers. In a case before the District of Columbia Circuit dealing with a related point, that Court stated:

> It will be seen that in some instances Congress has been content to provide that the accepting and administering officials shall observe the terms and conditions of the gift. In others, it has gone farther, and provided means whereby the donor can through court action compel the administering official or agency to observe the terms and conditions of the accepted gift. (See, 2 U.S.C. 159 allowing suits against the Board of the Library of Congress to enforce the provisions of trusts which they have accepted.) [Story v. Snyder, 184 F.2d 454, 456 (D.C. Cir., 1950).]

The distinction is clear, and in the former case, where enforcement is not provided for, there is no waiver of immunity. This is in line with the general rule that waivers of sovereign immunity are to be strictly construed. Sherwood v. United States, 312 U.S. 584.

If title to the property vests unconditionally in the United States and it will not revert to the executors in the case of a violation, enforcement based on cases such as Land v. Dollar, 330 U.S. 731, and Etheridge v. United States, 218 F. Supp. 809 (E.D. N.C., 1963), is precluded. In the Land case, above, plaintiff was seeking the return of shares of stock which it allegedly had pledged to members of the Maritime Board as security for a loan which had been repaid. The Board claimed that the transaction had been an outright sale of the shares to the Government. The Court held that if the transaction was in fact an outright sale, the suit, being one for the return of property owned by the United States, would be, in effect, against the United States and could not be maintained in the absence of consent to sue. If, however, plaintiff could prove its assertion that the stock was merely pledged, then the holding of the shares would have been in excess of defendant's statutory authority, and the suit would be one against the individual members of the Board for property which they wrongfully held as individuals. Recovery could be based "on their right under general law to recover possession of specific property wrongfully withheld." 330 U.S. at 736. The fact that they were officials of the United States would not shield them in such a case.

There is no clause in this instrument which would automatically cause the property in question to revert to the executors upon failure of one of the conditions. Therefore, even in the case of a violation of one of the conditions, the title will remain in the United States. In that way, the case also differs from Etheridge cited above. In that case the testator bequeathed land to the United States to be used for a specific purpose. Some years later, the Government ceased to use it for such a purpose and began using it for something else. The Court held that the gift was of a determinable fee. As such, there was an automatic reverter when the use of the property changed. From that point on, title was divested from the United States, and

it became liable for the fair rental value of the land. Had there been no reverter, it would seem that the suit would have been an unconsented one under the doctrine of Land, supra, and Larson v. Domestic and Foreign Corporation, 337 U.S. 731. The Larson case would appear to undercut the Land decision by holding that the actual title to the personalty is not decisive. However, the Larson opinion makes clear that in a case where the holding of property would be in excess of statutory authority, an action may be maintained against the individual officials who hold the property, though not against the United States.

Thus, in the instant agreement if there were a clause by which the property would revert to the executors upon breach of one of the conditions, upon such a breach the title would by operation of law return to the executors. At this point, and upon a demand for return of the property, the officials holding the property would be doing so unlawfully. Since the property is definitely unique, money damages would not be an adequate remedy at law and a possessory action in the nature of replevin would be appropriate. In this way the case could be distinguished from Larson and would fall within the Land doctrine.

Thus it is concluded that only by the inclusion of a reverter clause would an action be maintainable, and then only against the officials who, by violating the terms of the agreement, would be acting in excess of their authority. Such a suit would not "expend itself on the public treasury," Land, 330 U.S. at 731, since the property returned would belong to the executors and not the United States Government.

It should also be noted that if the instrument is considered a contract with the United States, the United States is only liable for money damages for breaches of its contracts. It cannot be compelled to specifically perform its contracts nor will mandamus lie to compel an official to perform them. See White v. General Services Administration, 343 F.2d 444 (C.A. 9, 1963). Thus the conditions could not be enforced under this theory.

The enforceability problem would be alleviated if the gift were made to the Board of the Library of Congress, instead of to the United States for deposit in the National Archives. The statute concerning gifts to that Board, 2 U.S.C. 159, states "The Board may be sued in the United States District Court for the District of Columbia, which is given jurisdiction of such suits, for the purpose of enforcing the provisions of any trust accepted by it." Story v. Snyder, cited above,

is the only case decided under that statute. It held that a suit for a commission on a sale of property for the Board was not a suit to enforce a trust accepted by the Board, and was thus outside the waiver of immunity granted by the Act and constituted an unconsented suit against the United States. However, it is clear that the waiver of immunity contained in that Act would make conditions like the ones in the present instrument enforceable against the members of such a Board regardless of the presence of a "suit" provision in the instrument.