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Eminent Domain - Proceedings to Assess Compensation - Use of Commissions in Federal Condemnation Actions

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COMMENT

EMINENT DOMAIN — PROCEEDINGS TO ASSESS COMPENSATION —USE OF COMMISSIONS IN FEDERAL CONDEMNATION ACTIONS.

In a condemnation action brought by the United States, a commission was appointed by the district court to determine the issue of just compensation pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure.[1] The report submitted by the commission to the court listed only a dollar figure of "Damages Assessed" for each tract of land involved. The United States objected that the report was inadequate, whereupon it was apparently informally returned to the commission. A supplemental report, which set out more fully the conclusions of the commission, was then filed. The district court adopted the reports over the objection of the United States.[2] On review the Supreme Court of the United States held the reports to be inadequate because they did not show the reasoning used by the commission in arriving at its conclusions; no sufficient basis existed upon which to decide whether the reports were "clearly erroneous" within the meaning of Rule 53(e) (2); and detailed instructions as to the commission's duties should have been given by the district court. *United States v. Merz*, 376 U.S. 192 (1964).

[1] Fed. R. Civ. P. 71A(h): "TRIAL. . . . [A]ny party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53 . . . ."

Fed. R. Civ. P. 53(c): "POWERS. . . . Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury."

Paragraphs (1) and (2) of subdivision (d) of Rule 53 deal with time and place of meetings and powers to subpoena witnesses and punish for contempt.

Fed. R. Civ. P. 53(e): "REPORT. . . . (2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous . . . . The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

[2] In affirming, the Court of Appeals for The Tenth Circuit held: (1) findings as to the amount of the award must be accepted on appeal if such are within the range of conflicting testimony and not "clearly erroneous";

Under the provisions of the general condemnation statute,[3] before the adoption of Rule 71A, it was the practice in federal condemnation suits to conform to the procedure of the state in which such actions were brought,[4] with two exceptions.[5] This practice continued after the adoption in 1938 of the Federal Rules of Civil Procedure, since no rule specifically governed condemnation.[6] However, experience showed the need for a uniform rule relating to federal proceedings in eminent domain.[7] The result of this need was the subsequent adoption of Rule 71A,[8] which became effective August 1, 1951.

The purpose of Rule 71A is to displace local conformity in favor of national uniformity by a single standard in federal con-

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(2) whether such a report is sufficiently comprehensive to provide a basis for review depends upon the nature of the matter involved; and (3) the commission's general findings were sufficient in view of the uncomplicated nature of the issues and evidence heard. United States v. Merz, 306 F.2d 39 (10th Cir. 1962), *rev'd*, 376 U.S. 192 (1964).

[3] Act of August 1, 1888, c. 728, § 2, 25 Stat. 357.

[4] *Ibid.*; United States v. City of New York, 165 F.2d 526 (2d Cir. 1948); Comparet v. United States, 164 F.2d 452 (10th Cir. 1947); United States v. A Certain Tract of Land, 72 F.2d 170 (3d Cir. 1934); 7 MOORE, FEDERAL PRACTICE 2709, 2716 (2d ed. 1955). *Cf.* California v. United States, 169 F.2d 914 (9th Cir. 1948); Nebraska v. United States, 164 F.2d 866 (8th Cir. 1947), *cert denied*, 334 U.S. 815 (1948) (prior to adoption of Fed. R. Civ. P. 71A(h), what constitutes property and what is just compensation in condemnation by United States not question of state law but of federal law); United States v. Kansas City, Kansas, 159 F.2d 125 (10th Cir. 1946) (appeal by the government from order in condemnation proceedings governed by federal law under former Rule 81(a)(7), prior to adoption of Rule 71A); Murphy v. United States, 145 F.2d 1018 (9th Cir. 1944), *cert. denied*, 352 U.S. 891 (1945); United States v. Miller, 317 U.S. 369 (1943).

[5] Condemnation proceedings under Tennessee Valley Authority Act, 48 Stat. 70 (1933), 16 U.S.C. § 831x (1958); and acquisition by the District of Columbia, D.C. CODE, §§ 16-619 to 16-144 (1961).

[6] The inherent power of the Federal Government to condemn and acquire property in its own right was firmly established by Kohl v. United States, 91 U.S. 367, 371 (1875). By the Condemnation Act, *supra* note 3, Congress gave the federal courts jurisdiction in federal condemnation cases and provided that the procedure in such cases conform as nearly as possible to state practices.

[7] Nealy, *Rule 71A(h) in Federal Condemnation Proceedings*, 23 FED. B.J. 45, 47, 48 (1963); 7 MOORE, *op. cit. supra* note 4 at 2717, 2744.

[8] *Supra* note 1.

demnation proceedings.[9] Since local conformity had been the practice in federal condemnation actions, there was necessarily an absence of uniform authority on the many procedural problems raised by the promulgation of Rule 71A.[10] There are few cases which bear upon the procedure to be followed by a commission during its hearings and, prior to *Merz*, apparently none dealing directly with the kind and extent of instructions to be given the commission by the court. Early cases suggested that the commission should not follow the exclusionary rules of evidence but should hear all evidence offered, preserve it in the record, indicate what use, if any, had been made of the evidence, and allow the court to rule later on such matters.[11] *Merz* clarifies commission procedure by enumerating certain minimum standards to be followed by the court in instructing a commission.[12] Instructions should be given on the method of conducting the hearing, including instructions on the kind of evidence that is admissible and the manner of ruling on it. The court should explain in detail the qualifications of expert witnesses, the weight to be given other opinion evidence, what is

[9] United States v. Merchants Matrix Cut Syndicate, 219 F.2d 90, 93 (7th Cir.), *cert. denied*, 349 U.S. 945 (1955); United States v. Wallace, 201 F.2d 65, 67 (10th Cir. 1952) (dissenting opinion).

[10] One of the problems encountered by district judges in applying the rule has been that of deciding when to appoint a commission. It was the apparent intention of the draftsmen of the rule that commissions should be used only in exceptional and extraordinary cases and where, because of peculiar circumstances, jury trial was inadvisable. 7 MOORE, *op. cit. supra* note 4, at 2711, 2790, 2797. But widespread, sometimes indiscriminate, use of commissions has been the practice in many areas. Nealy, *supra* note 7 at 46. For representative cases concerning reference to commissions, see United States v. Leavell & Ponder, Inc., 286 F.2d 398, 407, 409 (5th Cir.) *cert. denied*, 366 U.S. 944 (1961); United States v. Hall, 274 F.2d 856, 858 (9th Cir.), *cert. denied*, 362 U.S. 990 (1960); Cunningham v. United States, 270 F.2d 545 (4th Cir. 1959), *cert. denied*, 362 U.S. 989 (1960); United States v. Vater, 259 F.2d 667, 671 (2d Cir. 1958); United States v. Buhler, 254 F.2d 876, 879 (5th Cir. 1958); United States v. Bobinski, 244 F.2d 299 (2d Cir. 1957); United States v. Theimer, 199 F.2d 501 (10th Cir. 1952); United States v. Wallace, 201 F.2d 65 (10th Cir. 1952).

Some other problems encountered in the use of commissions are indicated in the following cases: Unwarranted use of masters is an "effective way of putting a case to sleep for an indefinite period." LaBuy v. Howes Leather Co., 352 U.S. 249, 253, n. 5 (1957). See United States v. Bobinski, *supra* at 301, saying, "Certainly the misadventures of this case . . . do not speak well for a course substantially repudiated in the state as well as federal procedure."

". . . [T]he appointment of the commission created far more problems than it solved, problems that ultimately required the court to perform a painful salvage operation in order to dispose of the case." United States v. Vater, *supra* at 671.

". . . [A]mong other things a reference to a commission tends unduly to prolong the proceedings, thereby causing vexation to all concerned and additional expense, in this instance to the government for accruing interest." United States v. Delaware, L. & W.R.R., 264 F.2d 112, 115 (3d Cir. 1959); see United States v. 44.00 Acres of Land, 234 F.2d 410 (2d Cir. 1956) (Interest does not accrue on that portion of the value of condemned property that is deposited with the court pursuant to the Declaration of Taking Act, 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1958).)

[11] United States v. Cunningham, 246 F.2d 330 (4th Cir. 1957); see United States v. Southerly Portion of Bodie Island, 19 F.R.D. 313 (E.D.N.C. 1956) (within discretion of commission whether to rule on admissibility of evidence unless instructed otherwise by court).

[12] United States v. Merz, 376 U.S. 192, 198 (1964).

competent evidence of value, and the best evidence of value. Examples illustrating severance damages should be given, and the right to view the property and the limited purpose of viewing should be explained.[13] Rules 71A(h) and 53(e)(2) provide that the commission shall make a report to the district court, which will review the commission's findings of fact in accordance with the "clearly erroneous" standard.[14] To what extent the report, as a basis for the court's review, should state specific subsidiary findings of fact has been in conflict. Decisions in several circuits recognized the need for specific findings but did not set forth any uniform standard to be used.[15] In two Fifth Circuit cases commission reports were rejected as inadequate for review because they neither showed how the commission resolved conflicts in testimony nor made any findings as to particular benefits.[16] But other decisions established a lesser standard for report comprehensiveness.[17] *Merz* indicates

[13] *Ibid.*

[14] United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); See note 1 *supra.*

[15] Louis Gill & Sons v. United States, 313 F.2d 416 (9th Cir. 1962); United States v. Lewis, 307 F.2d 453, 455, 458 (9th Cir. 1962); United States v. 2872.88 Acres in Clay and Quitman Counties, 310 F.2d 775 (5th Cir. 1962), *cert. granted*, 372 U.S. 975 (1963) (decided with the principal case); United States v. Carroll, 304 F.2d 300, 304 (4th Cir. 1962); United States v. Leavell & Ponder, Inc., 286 F.2d 398, 406 (5th Cir.), *cert denied*, 366 U.S. 944 (1961); United States v. 2477.79 Acres in Bell County, 259 F.2d 23, 29 (5th Cir. 1958); United States v. Cunningham, 246 F.2d 330, 333 (4th Cir. 1957); United States v. Bobinski, 244 F.2d 299 (2d Cir. 1957); United States v. 44.00 Acres of Land, 234 F.2d 410, 411, 414, 416 (2d Cir. 1956); United States v. Certain Parcels of Land in Philadelphia, 215 F.2d 140, 142, 144 (3d Cir. 1954).

[16] United States v. 2872.88 Acres in Clay and Quitman Counties, *supra* note 15; United States v. 2477.79 Acres in Bell County, *supra* note 15. (Report inadequate for review which showed no basis for resolving conflicts in testimony before commissioners).

[17] United States v. Lewis, 307 F.2d 453 (9th Cir. 1962); United States v. Cunningham, 246 F.2d 330 (4th Cir. 1957) (report sufficient though it did not show the "path" taken through the evidence); United States v. 3065.94 Acres of Land, 187 F.Supp. 728 (S.D. Cal. 1960) (commission report not required to tell what use was made of testimony or what facts were considered by commission); United States v. Southerly Portion of Bodie Island, 19 F.R.D. 313 (E.D.N.C. 1956) (since commission chairman was a lawyer, court assumed its instructions had been followed though no such showing made in report); United States v. Certain Parcels of Land in Warren County, 90 F. Supp. 27 (W.D. Va. 1949) (report not to be interfered with unless prejudice, corruption, or clear mistake of law or fact appears).

that commissioners should be instructed on the kind of report to be filed and what kind of findings should be included.[18] Though the findings do not have to be as detailed as would those made by a judge trying a case without a jury, they must reveal at a minimum the reasoning used in deciding on the award, the standards followed, the testimony believed, and the measure of severance damages used.[19]

The *Merz* decision, while recognizing that commissions may be utilized advantageously,[20] should curtail the "free-wheeling" tendency of commissioners to use their own expertise instead of acting merely as a "deliberative body applying constitutional standards.[21] Left largely unsettled are the problems created by the provision in Rule 53(e)(2) allowing courts to adopt, modify, or reject reports in whole or in part, or to receive further evidence, or to recommit them to the commission in whole or in part with instructions. Obviously the court has wide discretion in deciding which of these courses of action to follow and may tailor its decision to the facts of the case. The admonition that the court "shall accept the master's findings of fact unless clearly erroneous" is open to several possible interpretations. Courts in non-condemnation cases have sometimes treated a master's findings as advisory only and have not felt bound by a master's conclusions of law.[22] This treatment has carried over somewhat into condemnation cases. As one court viewed the matter:

> It was the purpose of the rule, where there is a trial without a jury, to place ultimate responsibility for the findings of fact upon the judge. Where there has been a reference to a master, the master's findings are entitled to special weight because he has seen and heard the witnesses but they are not given the effect of a verdict by a jury. The language of the rule is that the court shall accept the master's findings unless clearly erroneous. This is manifestly a guide to be followed in the exercise of the discretion vested in the District Judge, not a limitation upon his power . . . .[23]

The Supreme Court has said "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[24] Here the Court was talking about an appellate court's review of a lower court decision under Rule 52(a). In condemnation proceedings some courts have applied the rule in a somewhat narrower fashion. Thus it has been stated that the district court should determine whether the commission has followed the instructions of the court as to admissibility and

[18] 376 U.S. at 198.
[19] *Id.* at 198.
[20] *Id.* at 197.
[21] *Id.* at 198.
[22] D.M.W. Contracting Co. v. Stolz, 158 F.2d 405, 407 (D.C. Cir. 1946), *cert. denied*, 330 U.S. 839 (1947); *cf.* United States v. Waymire, 202 F.2d 550, 553 (10th Cir. 1953).
[23] United States v. Twin City Power Co., 248 F.2d 108, 112 (4th Cir. 1957), *cert. denied*, 356 U.S. 918 (1958).
[24] United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

consideration of testimony offered and decide whether it has overstepped its guidelines and prerogatives in this respect.[25] But as stated by the Court of Appeals for the Tenth Circuit, the report should be adopted unless it is "clearly erroneous" in whole or in part based on substantial error in the proceedings;[26] or, based upon a misapplication of controlling law;[27] or, because it is not supported by substantial evidence;[28] or, because it is contrary to the clear weight of the evidence.[29] It has also been stated that a district court may not reject a commission report merely because it disagrees with the result reached or would have personally decided differently on the evidence presented.[30]

Once a report or a portion thereof has been rejected as "clearly erroneous," the court is faced with the problem of deciding what course of action will bring the case to a fair and rapid conclusion. Much confusion has resulted from the interpretation of Rule 53(e)(2) to provide the court with power to modify the master's findings. The United States has consistently contended that modification by the court without further proceedings may be exercised, if at all, only to a very limited degree. It points out the difference between the findings of the commission and its report. Findings are made on the basis of testimony given before the commission by witnesses whose credibility it was able to judge first-hand. The United States' contention is that the commission *report*, and the re-

[25] United States v. 10064.97 Acres of Land, 12 F.R.D. 393 (D. Wyo. 1952).

[26] United States v. Waymire, 202 F.2d 550, 553 (10th Cir. 1953). See United States v. 15.3 Acres of Land, 154 F. Supp. 770, 775 (M.D. Pa. 1957); *cf.* I-XL Eastern Furniture Co. v. Holly Hill Lumber Co., 134 F. Supp. 343 (E.D.S.C. 1955).

[27] United States v. Waymire, *supra* note 26 at 553.

[28] *Ibid.*

[29] *Ibid.*

[30] United States v. Rainwater, 325 F.2d 62, 66 (8th Cir. 1963); United States v. 15.3 Acres of Land, 154 F. Supp. 770, 775 (M.D. Pa. 1957). See United States v. Twin City Power Co., 253 F.2d 197, 203 (5th Cir. 1958), wherein the court states: "[The clearly erroneous] . . . burden is especially strong when the commission has viewed and inspected the properties, or when credibility is questioned and the commission has had the opportunity to see and hear the witnesses, and is lighter when inferences for and deductions from opinion evidence may be drawn as well by the district court as by the commission, and still lighter when the appellate court in turn reviews the inferences drawn by the district court from the written transcript of evidence, though the 'clearly erroneous' rule is still applicable. (Citation omitted.)"

port only, should be modified; and such modification may extend only to the correction of an error of law.[31] If the court seeks to make contrary findings there must be further proceedings either before the court or before the commission.[32] The commission is seen by the United States as an independent entity whose findings ought to have at least the effect of those of a jury and should not be overturned by a reviewing body.[33] This position has heretofore received little support from the courts. Most courts have preferred to allow more or less wide discretion in modification. The Court of Appeals for the Fifth Circuit adopted the following position:

> Although the Commission's findings of fact must be accepted by the district court unless they are clearly erroneous . . . . the district court is authorized by the Rule to modify or reject the Commission's findings in whole or in part. We do not think the power to modify is to be narrowly construed or applied . . . . The district court could have rejected the Commission's findings had they been clearly erroneous. Had this been done, the district court could have substituted its own findings based upon the evidence before the Commission . . . . We think the district court could properly accept and approve the Commission's findings and modify and supplement them by making further findings from the evidence.[34]

The same court found that witness credibility could be judged as well by a district judge from the record as by members of a commission.[35] The principle that "one who decides must hear" renders the wisdom of this pronouncement questionable.[36] A seemingly middle-of-the-road approach is taken by the Court of Appeals for the Fourth Circuit in a recent case wherein the court retreats from the broad position previously adopted.[37] In *United States v. Carroll*,[38] that court states:

> . . . [I]f there is evidence in the record before . . . [the district judge] from which a correct ultimate decision can be made and which does not involve a determination upon conflicting testimony of questions of fact [Footnote omitted.] (as distinguished from a determination of an issue the resolution of which depends on informed opinion and judgment evidence), [the district judge may] make the necessary determinations himself and enter final judgment

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[31] Brief for Appellant, pp. 13-17, United States v. Carroll, 304 F.2d 300 (4th Cir. 1962); Reply brief for Appellant, pp. 4-7, United States v. Rainwater, 325 F.2d 62 (8th Cir. 1963); Brief for Petitioner, pp. 26-30, United States v. Merz, 376 U.S. 192 (1964).

[32] Brief for Appellant, p. 40, United States v. Certain Lands in the City of Statesboro, Docket No. 21039, 5th Cir., case presently pending.

[33] Briefs cited note 31 *supra*.

[34] United States v. Tampa Bay Garden Apartments, 294 F.2d 598, 603 (5th Cir. 1961).

[35] United States v. Twin City Power Co., 253 F.2d 197, 204 (5th Cir. 1958).

[36] See Morgan v. United States, 298 U.S. 468, 480 (1935).

[37] See United States v. Twin City Power Co., 248 F.2d 108, 112 (4th Cir. 1957), *cert. denied*, 356 U.S. 918 (1958), wherein the former position of this circuit is stated.

[38] 304 F.2d 300, 303 (4th Cir. 1962).

rather than remand the case for further proceedings before the commission.

The Court of Appeals for the Eighth Circuit, in *United States v. Rainwater*,[39] held that a judge was not permitted to substitute his judgment for that of a commission and thereby increase the award on the ground that it was inadequate. The case was remanded with direction to enter judgment in the amount awarded by the commission. This seems to suggest that modification of the award by the court is not proper. However, since the Court of Appeals felt that the district court was wrong in finding the report clearly erroneous, the case is questionable authority for the proposition that a court may not modify. The majority opinion suggests and the dissent states that a judge might hear additional evidence and then modify the award in light of the record made before the commission and the additional evidence.[40] It should be kept in mind that the views stated in all the above cases were those of courts considering commission reports prior to *Merz*, reports that may have often been inadequate. *Merz*, however, does not seem to support the United States' contention that the court should remand with instructions to the commission, take additional evidence, or begin anew rather than resort to modification. The Court authorizes modification and mentions several cases in which modification of reports has been approved.[41] *Merz* qualified its

[39] 325 F.2d 62, 66 (8th Cir. 1963).

[40] *Id.* at 67.

[41] 376 U.S. at 200, nn. 5 & 6, referring to United States v. 44 Acres of Land, 234 F.2d 410, 414 (2d Cir. 1956); United States v. Carroll, 304 F.2d 300, 303 (4th Cir. 1962); United States v. Certain Interests in Property 296 F.2d 264, 268 (4th Cir. 1961); United States v. Twin City Power Co., 248 F.2d 108, 112 (4th Cir. 1957), *cert. denied*, 356 U.S. 918 (1958). In United States v. 44 Acres of Land, the Court of Appeals for the 2d Circuit says at page 414: "Rule 71A(h), together with Rule 53(e)(2) gave the judge authority to reject, in part, a finding of the Commissioners if 'clearly erroneous' and to modify their award accordingly. He was not obliged to, although he had discretion to, remand their report to the Commissioners for a revised finding." See also United States v. Twin City Power Co., 253 F.2d 197, 204 (5th Cir. 1958) (remand not necessary; protracted litigation may be concluded by the court).

approval of modification based on the existing record with the language "in light of the exigencies of the particular case,"[42] indicating that normal procedure should be to resubmit to the commission except in cases, such as those in which there has already been extremely protracted litigation and one or more appeals, when justice will be better accomplished by ending the case expeditiously.

Another question upon which *Merz* sheds some light is whether the court of appeals reviews the report of the commission or the judgment of the district court. Prior to *Merz* most courts held it was the judgment of the district court and not the commission report that was reviewed.[43] The Department of Justice now argues that *Merz* rejects this position and holds that courts of appeal review the findings of the commission just as the district court does.[44] The Supreme Court, after setting down its requirements for adequate commission reports, stated:

> If those procedures are followed and the District Court adopts the report, as it may under Rule 53(e)(2), the Court of Appeals will have some guide lines to help it determine whether *the report* is "clearly erroneous" within the meaning of Rule 53(e)(2). (Emphasis supplied.)[45]

That courts of appeal must review the commission report seems manifest from a practical standpoint. While, technically, it is the judgment entered by the district court from which an appeal is taken,[46] it would be difficult, if not impossible, for an appellate tribunal to tell whether the district court's disposition of a commission report was correct unless it considered that report contemporaneously with the district court judgment.

Merz established certain minimum standards to which commissions must adhere, particularly with respect to the commission's report to the court. But the opinion only suggests possible solutions or alternatives to the problems of scope of review by district courts and courts of appeal, and procedures for remedial action when a district court finds a commission report inadequate. It is still the district court which has the ultimate responsibility for determining the issue of just compensation, though it may choose a commission as the means for making this determination. *Merz* emphasizes that the court must exercise such supervision over a commission so as to insure that its responsibility is not relinquished.

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[42] 376 U.S. at 200.

[43] United States v. Twin City Power Co., 248 F.2d 108, 112 (4th Cir. 1957), *cert. denied*, 356 U.S. 918 (1958); Parks v. United States, 293 F.2d 482, 485 (5th Cir. 1961); see United States v. Benning, 330 F.2d 527, 530 (9th Cir. 1964), wherein the court adhered to the stated rule but nevertheless reviewed the commission report instead of remanding to the district court in order to dispose of the case without prolonging the already lengthy litigation. *But cf.* O'Rieley v. Endicott-Johnson Corp., 297 F.2d 1, 5 (8th Cir. 1961), saying that the clearly erroneous standard was to be applied on appeal to a referee's findings and not to those of the district court.

[44] Brief for Appellant, pp. 35-38, United States v. Certain Lands in the City of Statesboro, Docket No. 21439, 5th Cir., case presently pending.

[45] 376 U.S. at 199.

[46] See Fed. R. Civ. P. 73(a).