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VA FORECLOSURES

Effective March 1 VA-held mortgages which go into default will be referred for foreclosure to the United States Attorneys. Cases in which the balance due is less than $5,000, exclusive of interest and costs, will be handled under direct reference procedures. All these foreclosures should be given expedited handling in accordance with the instructions contained in Title 3 of the United States Attorneys Manual, Par. 12 on Pages 15-16, whether they are referred through the Civil Division or directly. If the title search discloses that there are tax or other Federal liens against the property, it may be possible to secure the release of these liens. If this cannot be done, the interested Government agencies should not be named as parties defendant. Rather, the complaint should be amended to set forth the several liens of the United States and pray for their allowance in the proper order of priority. See Title 3 of the United States Attorneys Manual, Par. 2 on Page 28.4, for the proper order of priority. Prior approval of the Department is required before amending the foreclosure complaint to include a Federal tax claim. Problems in the handling of these cases should be brought to the attention of the General Claims Section.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Court Refuses to Reduce Fine and Vacate Suspended Jail Sentence. United States v. The Brookman Co., Inc., et al., (N.D. Calif.) D.J. File 60-191-9. On February 9, 1965, defendant Maurice Uglow's motion to reduce his fine of $10,000 and to vacate the suspended 30-day jail sentence was argued before Chief Judge George B. Harris, who denied the motion from the bench.

Mr. Uglow's counsel argued that (1) defendant would suffer great mental anguish if the suspended jail sentence was allowed to stand; (2) his resilient flooring business would suffer, since bidders for public projects are required to state whether they have ever been sentenced to prison or placed on probation; and (3) the payment of the fine would cause defendant great financial hardship. In the event the Court reduced the fine and vacated the jail sentence, defendant pledged himself to contribute the difference to the numerous charities with which he has been associated and supported for many years.

Government counsel opposed the motion, pointing out that the affidavits submitted by state and federal procurement officials flatly denied any requirement that bidders state whether they have been sentenced to prison, etc. As to defendant's pledge to contribute the amount of the reduction of the fine to charity, the Government suggested that "this, of course, would change what is intended to be a punishment into an opportunity for the defendant to become a public benefactor; in addition, under our tax laws the United States, instead of receiving the penal sum, would be contributing toward the charitable gift. . ."

The reaction of the local press to the extended and plaintive pleas of Uglow's counsel was prompt and pointed. The San Francisco News Call-Bulletin headlined its article, "Rug Man [Uglow] Lays it on Thick in U.S. Court," and reported that Judge Harris turned thumbs down on the motion to reduce the fine. "The fine", said the Judge, "was fair, equitable and just."

The San Francisco Chronicle reported the following morning that "Federal Judge George B. Harris was urged yesterday to cancel a $10,000 fine levied against a San Francisco businessman and to allow him to contribute an equal amount to charity." Furthermore, "He is prepared and willing to apply future earnings to charitable causes if the fine were removed." This the Judge refused to do and defendant's further plea for the expungement of the suspended 30-day jail sentence from the record was denied by the court.

Staff: Lyle L. Jones, Marquis L. Smith, William B. Richardson and Robert J. Staal (Antitrust Division)

Court Holds Manufacturer's Territorial Restrictions on Distributors to Be Per Se Violation of Section 1 Of Sherman Act, But Upholds Manufacturer's Right to Limit Distributors' Sales to Retailers Franchised by Manufacturer. United States v. Arnold, Schwinn & Co., et al., (N.D. Ill.) D.J. File 60-233-17. The Memorandum and Findings of Facts and Conclusions of Law, and the Final Judgment in this case were entered on January 25, 1965.

The Court found that defendant Arnold, Schwinn & Co. and defendant Schwinn Cycle Distributors Association, and several but not all of the distributors who are members of defendant Association were and are guilty of a conspiracy to divide certain territories among such distributors and to confine within such designated territories their respective sales of products which they purchase from Schwinn. The Court further found that such conspiracy constituted an unreasonable restraint of interstate trade and commerce and a per se violation of Section 1 of the Sherman Act.

The Court thereupon enjoined and restrained defendant Schwinn and defendant Association, as well as every member of the Association, from acting in concert, directly or indirectly, to restrict or limit the territory within which any such distributor may sell any Schwinn product which it has purchased; provided that Schwinn shall in no way be restricted from creating and maintaining or eliminating territories of primary responsibility for its said distributors and providing that Schwinn may exercise its right to choose and select its distributors, and to terminate the distributorships of those distributors who do not adequately represent Schwinn and promote the sale of Schwinn products in the territory designated by Schwinn as their territory of primary responsibility.

The Court found that during the 11-year period ending in 1962 an average of 54.5 per cent of all Schwinn bicycle sales were made by Schwinn directly to retailers or to consumers, without title ever being in any wholesaler or distributor. However, although the evidence indisputably shows that a substantial portion of Schwinn's annual sales are (1) outright sales to its distributors, and (2) sales with respect to which the distributors secure orders from their retailer customers, forward them to Schwinn, and then assume the credit risk of the retailer purchasers thereon, the Court made no finding as to what per cent of Schwinn's total sales such sales constitute. But the evidence shows that such sales averaged some eight million dollars annually.

Although the Court's finding is fuzzy with respect to the allegation that Schwinn conspired with defendant Schwinn Cycle Distributors Association, its members, other wholesale distributors, and Schwinn-franchised retailers to boycott non-Schwinn-franchised retailers, overwhelming documentary evidence shows that such combination was one aspect of the subject conspiracy.

In that connection the Court held that (p. 64):

> . . . when a distributor fills orders from warehouse stock that he has purchased. . .he is acting as owner and not as an agent or salesman for Schwinn. Where the ultimate risk and loss is borne

> by the distributor, as where he has purchased and taken title to the Schwinn products, he is truly an entrepreneur . . .

However, the Final Judgment reserves to Schwinn the right to choose and select its distributors and franchised retailers.

In emphasizing that view, the Court put the rhetorical question: "Who but the manufacturer should pass upon whether the /retail/ dealers are qualified to sell, service, repair and replace parts on Schwinn bicycles? The question answers itself. And how? Naturally by written authority, a franchise. Ergo, a franchise for retailers in such specialty fields as a bicycle is a business necessity." (pp.51-52).

In that connection, the Court found the evidence to be "abundantly clear that . . . /Schwinn followed the/ practice of eliminating . . . inactive and relatively inactive /retailer/ accounts . . . and adopting and adhering to a /retailer/ franchise program . . ." (p. 50).

In addition, the Court held that (p. 37):

> The retailer under the Schwinn franchising plan buys to sell to the public and not to resell to another retailer who may not have adequate service or may not otherwise meet the approval of Schwinn. When a retailer enters into such activities he forfeits his rights under his franchise . . .

The Court further held that "Even if retail dealers had lost their franchises for selling wholesale to unfranchised /retail/ dealers, it would have been a lawful cancellation." Still further, the Court held that "The Schwinn /retailer/ franchising system is reasonable, fair and good business procedure under all the circumstances existing in the bicycle industry."

Although the Government alleged that Schwinn conspired with defendant Schwinn Cycle Distributors Association and its members, other distributors, and Schwinn-franchised retailers to enforce Schwinn's fair trade prices by means of threatening to boycott and by boycotting those retailers who reportedly undercut such fair trade prices, the Court found that Schwinn "unilaterally took legal action to protect its fair trade program . . . /and that the/ evidence revealed no action whatsoever of the other defendants in aiding or cooperating with Schwinn in its efforts of fair trade price enforcement." (p. 17).

The Court further found that the Government introduced evidence of 44 instances of retailer franchise cancellations by Schwinn for undercutting Schwinn's fair trade prices. But in that connection the Court also found that not one of them was cancelled for that reason alone, but that in every such instance one or more good reasons appeared for cancellation of the dealer's franchise.

(Notwithstanding those findings, the evidence overwhelmingly supports the Government's allegations of a conspiracy to enforce and the enforcement of Schwinn's fair trade prices by means of a group boycott of reported price cutters.)

Over and above the Court's said findings, it held that Schwinn's cancellation of a Schwinn issued retailer franchise for violating a lawful fair trade agreement does not constitute a violation of Section 1 of the Sherman Act.

With respect to the free trade (as distinguished from the fair trade) States, the Court found that it disbelieved the Government's witnesses with respect to price fixing, and that it believed the defendants' witnesses. Accordingly, it ruled against the Government on that aspect of the conspiracy.

Staff: Joseph Prindaville, Raymond P. Hernacki and Kenneth H. Hanson (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

ADMINISTRATIVE PROCEDURE

District Court Has Jurisdiction to Review Agency's Choice of Procedure Prior to Entry of Final Order, Where Company Proceeded Against Alleges That Agency's Choice of Procedure Violates Regulation and Has Irreparably Injured Its Business and Reputation. The Elmo Division of Drive-X Company, Inc., et al. v. F.T.C. (C.A.D.C., No. 18559, February 11, 1965). D.J. File 145-119-15. A drug company was under a consent order entered by the FTC with respect to certain of its advertising practices. Pursuant to FTC regulation, the order provided for a reopening procedure whereby the order could be set aside by the Commission upon a finding of change in law or fact, or upon finding of public interest. Under the order and regulation, a new complaint could issue only after the outstanding order was set aside.

Here the Commission issued a new complaint against the drug company without setting aside the outstanding order. The company then sought an injunction in the district court against any proceedings under this complaint, alleging that the new complaint deals with substantially the same matters covered by the outstanding order and that the Commission's action caused substantial prejudice to its business and reputation. The Court of Appeals held that the district court had jurisdiction, and remanded for a trial of the question of whether the practices covered by the new complaint vary significantly from those governed by the outstanding order. The Court of Appeals argued that appellate review of any final order issuing from the new proceedings is not an adequate remedy for the asserted harm. Referring to Leedom v. Kyne, 358 U.S. 184, where the agency was enjoined from proceeding in violation of statutory authority, the Court of Appeals refused to pass on whether, under the alleged facts, the Commission had violated any statute, but argued that plaintiff had alleged a violation of the Commission's regulation and the terms of the consent order and that such violation was sufficient basis for an injunction. Under the allegations of the complaint, the Court felt that the Commission's duty to proceed only by way of reopening the consent order was "ministerial" rather than discretionary and was therefore reviewable by an injunctive proceeding where irreparable harm could be shown.

Judge Fahy dissented, on the ground that the statutory review of any order which might issue from proceedings pursuant to the new complaint is the exclusive method of reviewing procedural errors of the Commission.

Staff: United States Attorney David C. Acheson and Assistant United States Attorneys Frank Q. Nebeker, Sylvia Bacon and David Epstein (D.C.).

Where Administrative Procedure Act Does Not Require Hearing, and Judicial Review Is by Trial De Novo, Court May Not Set Aside Administrative Action on

Basis of Evidence Not Profferred to Agency. Joseph E. Seagram & Sons v. Dillon (C.A.D.C., No. 18465, January 21, 1965) D.J. File 235981-57. Seagram, requiring approval of its whiskey label under the Federal Alcohol Administration Act, 27 U.S.C. 201 et seq., submitted a proposed label to the Secretary of the Treasury without any explanatory statement. The label stated that neutral spirits in the blend had been aged more than four years. The Secretary's regulation barred statements as to the age of neutral spirits, on the theory that neutral spirits do not improve with age. Accordingly, the Secretary rejected Seagram's application, without a hearing (since no hearing was required by the Federal Alcohol Administration Act). In the district court, Seagram asserted that it had developed neutral spirits which do in fact improve with age, and that its proposed label was thus not misleading. Affidavits to this effect were rejected by the district court, which granted the Secretary's motion for summary judgment.

The Court of Appeals held that the affidavits were properly rejected. The Court held that Seagram could not upset the administrative action on the basis of evidence which had not been profferred to the agency. The Court noted that, since the Act does not require a hearing on label applications, the provisions of the Administrative Procedure Act providing for action on the basis of the record made at an agency hearing are inapplicable. Accordingly, review in the district court is de novo. Nevertheless, the Court felt that the evidence which Seagram claimed would show that its neutral spirits were different should have been profferred to the Secretary. The Court stated that its affirmance of the district court was without prejudice to the right of Seagram to resubmit its proposed label to the Secretary with a proffer of evidence justifying approval of the label.

Staff: United States Attorney David C. Acheson and Assistant United States Attorneys Frank Q. Nebeker and Gil Zimmerman (D.C.)

On Remand for Taking of Additional Evidence, Agency Violated Section 8(a) of Administrative Procedure Act by Making Findings Without Recommended Decision From Hearing Officer; However, Harmless Error Rule Applied to Affirm Administrative Action. Kerner v. Celebrezze (C.A. 2 No. 28773, January 13, 1965). D.J. File 137-52-120. Kerner, whose application for disability benefits under the Social Security Act was denied, obtained a remand to the Secretary for the purpose of taking further evidence on two issues: "what can applicant do, and what employment opportunities are there for a man who can do only what applicant can do." Kerner v. Flemming, 283 F.2d 916, 921 (C.A. 2).

On remand, the Appeals Council directed an examiner to hold a hearing and, upon completion of the hearing, to return the record to the Council for the making of additional findings and conclusions. Kerner objected to this proceeding on the ground that it violated Section 8(a) of the Administrative Procedure Act, requiring that "Whenever the agency makes the initial decision without having presided at the reception of the evidence, [the hearing] officers shall first recommend a decision."

The Court of Appeals held that Section 8(a) was violated. It held that

the Section applies on remand whenever an evidentiary hearing is required by the remand, and that the term "initial decision" means the first decision after evidence is taken, not the first decision in the case. The Court conceded arguendo that exceptions might be read into Section 8(a) where the scope of the hearing on remand is "exceedingly restricted" or where the evidence at the hearing on remand is solely documentary or not in conflict. Such exceptions, however, were not deemed applicable to the present case.

The Court of Appeals nevertheless affirmed the administrative action, on the ground that the error was harmless. Conceding that the harmless error statute, 28 U.S.C. 2111, is not "in terms" applicable to administrative action, the Court stated that "we perceive no reason why the salutary principle embodied in it should not be so applied, even when the error consists of a procedural irregularity under the APA." Noting that the chief reason for Section 8(a) was to obtain a decision from a person who had a chance to evaluate the credibility of witnesses, the Court felt that credibility was not an important factor in the remand hearing in this case. In addition, the Court thought that it would be "fatuous" to suppose that a recommended decision in Kerner's favor would have changed the decision of the Appeals Council.

The Court's discussion of the substantive points in this case under the Social Security Act is summarized infra.

Staff: United States Attorney Joseph P. Hoey, and Assistant United States Attorney Carl Golden (E.D.N.Y.)

EXECUTION OF JUDGMENTS

State Law Governs Procedure For Execution of Judgments; Debtor Held to Have Waived Procedural Protections Provided by State Law in Connection With Execution Sale. Weir v. United States et al. (C.A. 8, No. 17,687, December 9, 1964). D.J. File 106-9-223. The United States, having obtained a judgment against a farmer for a marketing excess penalty under the Agricultural Adjustment Act, caused the farmer's farm to be sold in satisfaction of the judgment. The farmer's motion to set aside the sale was denied by the district court, and the Court of Appeals affirmed. The Court held that, under Rule 69(a), F.R.C.P., the execution sale was properly held under Arkansas law, and that the procedure set forth in 28 U.S.C. 2001-2 (which had not been followed) applied only to "judicial sales" -- sales made under order of the court and requiring confirmation by the court -- rather than "execution sales," which are reviewed by the court only upon complaint of either party. The Court also affirmed the district court's holding that the farmer had waived certain of his procedural rights under Arkansas law in connection with the execution sale, and that the sale price was not so grossly inadequate as to require that the sale be set aside.

Staff: United States Attorney Robert D. Smith, Jr. and Assistant United States Attorney James W. Gallman (E.D. Ark.)

GOVERNMENT CONTRACTS

Decision of Board of Contract Appeals Supported by Substantial Evidence;

Government Did Not Waive Contractor's Breach; Under Federal Law, Interest Runs Against Surety on Performance Bond From Date of Demand on Surety. United States v. Seaboard Surety Company et al. (C.A. 2, No. 27877, December 10, 1964). D.J. File 77-51-2548. A contract to supply rope to the Government provided that, if more than one sample was defective, the rope could be rejected. Seven samples proved to have excessive lubricant, resulting in excessive weight and price (the price being computed by weight). After these tests, the Government required further tests of breaking strength, at the contractor's expense. One sample proved defective. The rope was then rejected for excessive lubricant and failure to meet the required breaking strength. On appeal to the Armed Services Board of Contract Appeals, rejection of the contract was upheld solely on the ground of excessive lubricant, it being stated that failure of one sample to meet the breaking strength requirement was not sufficient for rejection.

In the Government's suit on the performance bond, the Court of Appeals affirmed the district court's holding that the Board's ruling was not arbitrary and was supported by substantial evidence, although the Court of Appeals noted that a price allowance for weight dilution might have been the more equitable solution. The Court also held that the Government did not waive the excessive lubricant breach by requiring further tests of breaking strength at the contractor's expense.

Although the contract was rejected in April 1956, demand was not made on the surety until December 1959. The district court held that interest should run from the date of demand on the surety. The Court of Appeals held that Federal law governs the running of interest, and that it runs from the date of demand on the contractor. Moreover, the Court held that the interest running from the date of demand on the surety should be computed on the full amount of principal plus interest which had accrued from the date of demand on the contractor.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorneys Arthur M. Handler, Andrew T. McEvoy and Stephen Charnas (S.D.N.Y.)

GOVERNMENT EMPLOYEES' LIFE INSURANCE

Civil Service Commission Has No Duty to Locate Possible Claimants to Proceeds of Government Employee's Group Life Insurance Policy. Kimble v. United States (C.A.D.C., No. 18,311, January 21, 1965) D.J. File 162-16-15. A Government employee died in October 1959, having named no beneficiary of his group life insurance policy. The Civil Service Commission made an unsuccessful effort to locate his widow, from whom he had been separated since 1939. It then submitted its file to the insurer, together with the claim filed by a woman who had been the employee's common-law wife. This claim was paid. Two years later, in 1963, the widow turned up and filed a claim with the Civil Service Commission, which was rejected. The widow then sued on the theory that the Civil Service Commission was negligent in failing to locate her and advise her of her right to file a claim.

Under the governing statute, 5 U.S.C. 2093, the widow's claim under the

policy was untimely. The Court of Appeals held that the Civil Service Commission had no duty to search for possible claimants and thus would not be liable even for negligence in making the search. The intent of the governing statute, in the Court's view, was to place the Civil Service Commission in the position of an employer holding a group life insurance policy. In this situation, the Court found no precedent for holding the employer liable for failure to find claimants.

Staff: United States Attorney David C. Acheson and Assistant United States Attorneys Frank Q. Nebeker, Patricia Frohman and Daniel McTague (D.C.)

MILITARY DISCHARGE

Undesirable Discharge Enjoined Pending Administrative and Judicial Review, Where Soldier Shows Likelihood of Success on Merits Upon Judicial Review; Probability That Board of Officers Exceeded Its Authority by Recommending Undesirable Discharge on Basis of Acts Occurring During Prior Period of Enlistment Terminating in Honorable Discharge. Schwartz v. Covington (C.A. 9, No. 19444, February 10, 1965). D.J. File 145-4-1341. A board of officers, after a hearing, recommended that plaintiff, a Sergeant in the Army, be given an undesirable discharge. The basis of the recommendation was testimony of a psychiatrist that plaintiff was a homosexual, coupled with evidence as to five homosexual acts. Under the regulation, an undesirable discharge could be issued only if homosexual acts had occurred during the soldier's service. Four of these five acts had occurred during a prior period of enlistment and had come to the attention of the Army, but no action had been taken. The prior enlistment had ended with an honorable discharge. After plaintiff's re-enlistment and involvement in another homosexual act, these proceedings were commenced. The district court enjoined issuance of the discharge, pending administrative and judicial review. The Court of Appeals affirmed. The Court held that there was a likelihood that plaintiff would prevail on the merits in the district court, if administrative review proved unavailing. The Court felt that by considering acts occurring during the prior period of enlistment, the board of officers probably acted in excess of its authority. The Court referred to Army Regulation 615-375, providing that the purpose of a discharge certificate is to "specify the character of service rendered during the period covered by the discharge." The Court added that, without the acts occurring during the prior period of enlistment, the evidence supporting the board's findings "is not very substantial."

The Court also held that irreparable damage would result from issuance of the discharge despite the Army's assurance of reinstatement should plaintiff prevail upon review. Finally, the Court held that there was no showing of harm to the Government or the public by issuance of a stay.

Staff: Robert V. Zener (Civil Division).

NATIONAL SERVICE LIFE INSURANCE

Insured's Intention to Change Beneficiary Ineffective Where No Written

Statement Changing Beneficiary Is Executed. Cooper v. United States et al. (C.A. 6, No. 15778, February 5, 1965). The insured had three National Service life insurance policies. He executed change of beneficiary forms with respect to two of these policies shortly before his death, naming plaintiff as the new beneficiary. On each form was stated, in boldface type, the requirement that a separate form be executed for each separate policy. On each of the two forms, the insured inserted the word "all" in the space provided for indicating the amount each beneficiary was to receive if more than one were named (the insured having named only one -- the plaintiff). Without challenging the district court's finding that the insured did intend to make plaintiff the beneficiary of all three policies, the Court of Appeals held that plaintiff had not been made the beneficiary of the third policy. The word "all" was construed as referring only to all of the insurance under the particular policy covered by the form. Accordingly, the insured's intention to change the beneficiary remained unexecuted as to the third policy.

Staff: United States Attorney J. H. Reddy and Assistant United States Attorney B. B. Guthrie (E.D. Tenn.)

SOCIAL SECURITY ACT

In Disability Case, Evidence of Applicant's Physical Condition at Time of Hearing Is Relevant Only to Establishing His Condition at Time Application For Benefits Was Filed. Kerner v. Celebrezze (C.A. 2, No. 28773, January 13, 1965). D.J. File 137-52-120. The facts of this case, together with the Court's discussion of points decided under the Administrative Procedure Act, are set forth supra. On remand, the Appeals Council considered medical evidence as to the applicant's physical condition in August 1961 (the application having been filed in May 1957). The Court of Appeals pointed out that the issue in the case was whether applicant was under a disability on the date of the application, and that the medical evidence considered on remand was only relevant to the question of the applicant's physical condition on the date of the application. However, the Court concluded that, while some remarks in the administrative decision were "troubling," the Appeals Council "appreciated the true issue" and considered the medical evidence only for its proper relevance. Accordingly, the decision was affirmed.

Staff: United States Attorney Joseph P. Hoey, and Assistant United States Attorney Carl Golden (E.D.N.Y.).

Substantial Evidence Supports Denial of Benefits; Secretary's Resolution of Conflicts in Evidence Is Conclusive; Private Insurer's Determination of Disability Does Not Bind Secretary; Disability Must Exist on Date of Application For Benefits; Secretary May Take Official Notice of Occupational Studies. Charlie J. Moon v. Celebrezze (C.A. 7, No. 14682, January 29, 1965). D.J. File 137-25-43. In this Social Security disability action, claimant sought review of the Secretary of Health, Education and Welfare's denial of a period of disability and disability benefits. The district court reversed the Secretary's decision on the ground that there was no substantial evidence in the record to support the finding that claimant, who asserted disability from bone and joint

disease and a mental-emotional condition, was capable of engaging in substantial, gainful activity. The court criticized the Secretary's reliance on certain governmental vocational publications in making his findings.

The Court of Appeals reversed, holding that substantial evidence supported the Secretary. The Court pointed out that: (1) the evidence of disability must be considered as of the date on which the claimant files his application; (2) it is proper for the Secretary's Appeals Council to take official notice of governmental vocational studies pursuant to the provisions of Section 7(d) of the Administrative Procedure Act; (3) it is for the Secretary and not the district court or the Court of Appeals to resolve conflicts in the evidence; and (4) a private insurance company's decision to pay on a disability insurance policy, though of some weight, is not conclusive.

Staff: Harvey L. Zuckman (Civil Division).

THREE-JUDGE DISTRICT COURT

Requirement That Complaint to Enjoin Federal Statute Must Raise Substantial Constitutional Question Met. Harvey Aluminum Inc., et al v. Fred F. Ragsdale, et al. (C.A. 9, No. 19473, February 3, 1965). D.J. File 156-12-168. Appellants sought to have a three-judge district court convened to consider the merits of their complaint to enjoin enforcement of the management reporting provisions of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 433(a), 439 and 440) on the ground that they violated the due process and self-incrimination clauses of the Fifth Amendment. The district court denied the application. In a one-line order, the Court of Appeals reversed and remanded with instructions that a three-judge district court be convened. The Court said only that the complaint did not present a plainly insubstantial question as to the constitutionality of the statute in question.

Staff: Harvey L. Zuckman (Civil Division).

UNCLAIMED FUNDS

Proceeds of Judgment For Overpayment of Rent Which Remain Unclaimed by Tenants May Not Be Returned to Landlord. Hansen v. United States (C.A. 8, No. 17,801, January 20, 1965). D.J. File 146-18-223-2194. In 1952, the United States obtained a consent judgment against defendant Hansen under the Housing and Rent Act for overpayment of rent. The proceeds of the judgment which were not distributed to the tenants were deposited in the United States Treasury, in a trust account held under 31 U.S.C. 725p and entitled "Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown." In this proceeding, Hansen moved under Rule 60(b)(6), F.R.C.P., to reopen the judgment to provide for the return of the unclaimed proceeds. The Court of Appeals affirmed the district court's denial of the motion. The Court of Appeals assumed that, if defendant could prove that he was entitled to the money, he could proceed under Rule 60(b)(6). However, the Court held that defendant had not shown that he was entitled to the unclaimed proceeds.

Staff: United States Attorney Miles W. Lord and
Assistant United States Attorney Stanley H. Green
(D. Minn.).

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

APPEAL

Mail Fraud; Right of Government to Appeal After Suppression of Evidence and Dismissal of Indictment. United States v. Kanan et al. (C.A. 9, Feb. 4, 1965). D.J. File 122-8-22. Defendants were indicted for violations of the mail fraud and fraud by wire statutes (18 U.S.C. 1341, 1343) for their alleged diversion of funds of the Arizona Savings & Loan Association and misrepresentations made to investors, shareholders and depositors. The trial court granted defendants' motion to suppress all of the information obtained from the Association's documents and records on the ground that defendants' rights under the Fourth Amendment had been violated. On the trial date counsel for the Government informed the court that he was not prepared to proceed because all of the evidence upon which the indictment was based and which was presented to the Grand Jury had been suppressed, and he urged the court to enter an order sua sponte, dismissing the indictment, in order to preserve the Government's right to appeal. The court dismissed the indictment on the ground that it had been obtained by evidence improperly taken before the Grand Jury.

On appeal, it was held that 18 U.S.C. 3731 does not confer jurisdiction on a court of appeals to review a dismissal of an indictment when the dismissal was secured at the insistence of the Government, where the Government felt unable to proceed to trial because of an insufficiency of evidence, and where the Government admittedly sought through an indictment dismissal to obtain review of a district court suppression order.

Staff: Beatrice Rosenberg (Criminal Division)

BILLS OF LADING ACT

Fraudulent Uttering of Forged Bills of Lading; Fraudulent Transfer of Bill of Lading Known to Contain False Statement; Proof. United States v. Harry Robbins (C.A. 2, Jan. 12, 1965). D.J. File 49-51-930. Acorn Industries, Inc., which did not appeal, and Robbins, its President, were convicted by a jury on three counts of fraudulently aiding in the uttering of forged bills of lading and on one count of fraudulently transferring for value a bill of lading known to contain a false statement, all in violation of the Bills of Lading Act, 39 Stat. 544, 49 U.S.C. 121.

Robbins arranged with Harris Factors Corporation for advances on Acorn's accounts receivable. Harris would issue checks to Acorn on the basis of invoices and bills of lading which Robbins would present to Harris weekly, but Harris later discovered that several bills purportedly represented interstate and foreign shipments which had never been ordered, or shipments which actually contained far less merchandise than had been ordered, or shipments which had been ordered but which were never sent.

In affirming Robbins' conviction, the Second Circuit held the district court correctly allowed the Government to introduce evidence of four similar offenses for the purpose of showing the absence of negligence or mistake, that is, to show that defendant knew the bills were false and designed to defraud Harris. "It is well established that fraudulent intent may be proven by similar, contemporaneous false representations." The Court noted the trial judge had carefully instructed the jury on the "very limited purpose" for which the evidence of similar acts had been admitted. Compare United States v. Schultz, 235 F. 2d 684, 685 (C.A. 7, 1956), where the Seventh Circuit held that in a prosecution under 49 U.S.C. 121 for fraudulently transferring for value a bill of lading known to contain a false statement, the defendant's evidence of similar transactions should have been admitted for the purpose of showing his lack of fraudulent intent.

Robbins also argued that the Government's evidence did not establish his guilt beyond a reasonable doubt. The Court, however, pointed to "strong circumstantial evidence" from which the jury could have inferred fraudulent intent and knowledge of the bills' falsity. Since the Vice President of Acorn was absent from the city on the day defendant left the room supposedly to obtain his signature on the factoring agreement with Harris, the jury could reasonably have believed that Robbins either forged or procured the forgery of the Vice President's signature.

The Court also rejected attacks based on the prosecutor's allegedly inflammatory questioning of defendant and other witnesses and on defendant's inability to cross-examine a Government witness who was present at the time defendant made an admission.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Pierre N. Leval and Charles A. Stillman (S.D. N.Y.)

NATIONAL STOLEN PROPERTY ACT

Interstate Transportation of Stolen United States Postage Stamps. United States v. Daniel Bozza, et al. (E.D. N.Y.). D.J. File 122-52-32. After a trial of six weeks, a jury convicted all eleven defendants of various violations, including the interstate transportation of approximately $67,129 in United States postage stamps with knowledge the stamps had been obtained in burglaries of five Post Offices in New Jersey. The Government secured the convictions under the first paragraph of 18 U.S.C. 2314, which prescribes maximum penalties of $10,000 and ten years' imprisonment for the transportation in interstate or foreign commerce of "any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud."

Judge Mishler of the Eastern District of New York has imposed heavy sentences on nine of the defendants. He will sentence the other two at a later date.

These are the first convictions under Section 2314 which involve the transportation of stamps. Cf. United States v. Seagraves, 265 F. 2d 876 (C.A. 3,

1959) (geophysical maps); United States v. Taylor, 178 F. Supp. 352 (E.D. Wisc., 1959) (Shetland pony).

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Martin R. Pollner (E.D. N.Y.)

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Discovery Under Rule 33, F.R. Civ. P.; Claimant in Drug Seizure Case Ordered to Give Broad Details of Drug Promotion; Relevancy Under Misbranding Charge Not Limited Solely to Promotional Statements About Drug Items Seized; Claimant Also Required To Reveal Chemical Composition of Drug, but Government Ordered Not to Divulge Information Without Leave of Court. United States v. An Article . . . Sudden Change by Lanolin Plus (E.D. N.Y.). D.J. File 22A-18-51. This is a libel action instituted at Miami, Florida (and removed to the Eastern District of New York), in which the Government seeks to have condemed, as a misbranded drug, a quantity of a purported face-lifting or anti-wrinkle cream. By interrogatories propounded under Rule 33, F.R. Civ. P., and as bearing upon the misbranding charge, the Government asked claimant for detailed information about its promotion of the product generally--information about advertisements, releases, etc., wherever used, even if not related specifically to the articles seized at Miami. Claimant objected on a point of relevancy. The Honorable Judge John R. Bartels held that the matter sought to be elicited was, within the terms of Rule 26(b), "relevant to the subject matter involved in the pending action." The Court noticed that the suit was not in rem in the traditional and admiralty sense, but that seizure was a "convenient device" for starting an action capable of resulting in final determinations affecting the product whenever and wherever it is introduced into interstate commerce. The Court also ordered claimant to reveal the chemical make-up of its product--which claimant emphasized is a trade secret--but forbade the Government from divulging any such information without express permission of the Court.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Carl Golden (E.D. N.Y.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950; Registration of Communist-action Organizations. United States v. Communist Party, United States of America (D. D.C.) D.J. File 146-7-51-566. On February 25, 1965 a grand jury in the District of Columbia returned a 12-count indictment against the Communist Party, charging that it failed to register with the Attorney General as a "Communist-action" organization in accordance with an order of the Subversive Activities Control Board and in violation of 50 U.S.C. 786 and 794. The first count charges that the party failed to register on February 13, 1965 and the next ten counts charge failure to register on each of ten days from that date. The last count charges failure to file the registration statement which the Act requires. The indictment specifically alleges that at all times subsequent to February 12, 1965 the Party defendant had knowledge of the identity and availability of someone willing to sign the registration form and statement for and on behalf of the Party.

As a result of decisions by the Supreme Court on June 5, 1961 and October 9, 1961, the Communist Party was required to register by November 20, 1961. When the Party failed to register on the appointed date, it became subject to prosecution and it was subsequently indicted (December 1, 1961) and convicted (December 17, 1962) for failing to register on each of the eleven days following the November 20th deadline and for not filing the necessary registration statement during this eleven-day period. On December 17, 1963 the Court of Appeals for the District of Columbia Circuit reversed the conviction holding that the Government had the burden of proving that a volunteer was available to register the Party. "Because the issues are novel", the appellate court instructed the District Court to grant a new trial if the Government should request it. The Department has moved for a retrial of the original case and it will be assigned for trial on March 16, 1965.

Staff: United States Attorney David C. Acheson and Assistant United States Attorney Joseph Lowther (D. D.C.); Oran H. Waterman and James A. Cronin, Jr. (Internal Security Division)

Unlawful Use of Passports (18 U.S.C. 1544). United States v. Paul Carl Meyer (N.D. Ill.) On February 2, 1965, a grand jury in Chicago, Illinois, returned a four-count indictment against Paul Carl Meyer, charging him with unlawful use of passports. The first count charged that in February 1963 Meyer delivered fifteen United States passports to a representative of the Soviet Union in East Berlin, Germany. The other three counts charged that Meyer had used a passport issued to another person as identification in registering at a hotel and buying travelers checks in Madrid, Spain, and in cashing travelers checks in Berlin, Germany.

Meyer was arrested on a bench warrant, and bail was set at $2,500. He was arraigned on February 3, 1965, and entered a plea of guilty to all four

counts. On February 26, 1965, Meyer received concurrent sentences of two years imprisonment on the first count and one year imprisonment on each of the other three counts.

Staff: United States Attorney Edward V. Hanrahan; Assistant United States Attorney D. Arthur Connelly (N.D. Ill.); John F. Doherty, John H. Davitt and James P. Morris (Internal Security Division).

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LANDS DIVISION

Acting Assistant Attorney General J. Edward Williams

Condemnation: Enhancement Due to Project; Scope of Project; Committment to Project Language of United States v. Miller, 317 U.S. 369, Does Not Mean Entire Project Is Controlled by Plans Existing on Particular Date; Estoppel; Special Benefits. United States v. Arlo C. Crance, et al. (C.A. 8, No. 17,514; February 11, 1965; D.J. No. 33-26-385-254), reversing United States v. 35 Acres, 214 F. Supp. 792 (W.D. Mo. 1962). The Eighth Circuit's opinion in this case is a landmark in federal condemnation law. In 1961, the United States condemned 35 acres of a 127.5-acre tract for use as a public access and recreation area abutting the reservoir of the Pomme De Terre Dam and Reservoir. The United States had purchased 5 acres in fee and a flowage easement of 2.07 acres from the same tract, for the same project, years earlier in 1958.

Under the first design memorandum prepared by the Corps of Engineers, the 35 acres in question were scheduled for fee acquisition under the Corps' policy at that time of blocking out a reservoir in 40-acre tracts and acquiring in fee any 40-acre tract partially or wholly within the full flood pool reservoir line. A new acquisition policy by the Corps in 1953, which provided for fee takings up to the 5-year flood line and flowage easements above that line, reduced the amount to be taken from Crance, first to 6.25 acres in fee and 7 acres of flowage easement, then, as a result of more accurate engineering data, to the 5 acres in fee and 2.07 acres of flowage easement that was purchased. This property was obtained for use as part of the reservoir.

In 1960, as the project neared completion, the Corps developed tentative plans for public use areas around the reservoir which did not include the land in question, and held a public meeting in the neighborhood of the project to announce the location of the proposed use areas, giving the public an opportunity to comment on the selections. As a result of suggestions and petitions from a number of persons at the meeting, the Corps decided to construct an additional use area and the 35 acres here in question were finally selected for that purpose in 1961. Thus, the property in question had been included in the early plans for the project, eliminated during the intermediate planning and included again as final plans were developed.

The trial court ruled, 214 F. Supp. 792, that the 35-acre tract must be valued as enhanced by the project because 28.22 acres were not within the scope of the project from the time the Government was committed to it within meaning of the Miller rule, United States v. Miller, 317 U.S. 369 (1943), according to the tentative plans existing on the date of appropriation for the project, and that the Government was estopped from asserting that the remaining 6.18 acres (eliminated from the first taking by more accurate engineering data) were within the scope of the project.

The Court of Appeals reversed, holding that all enhancement due to the project must be eliminated in valuing the 35-acre tract. The Court, agreeing in all major respects with the argument advanced by the United States, reviewed in

detail the method by which a project of this type is constructed. Emphasizing the fact that public uses areas were an integral part of the project from the beginning, the Court refused to fix the scope of the project according to any particular set of preliminary plans, as had the district court.

The Court stated:

> The significant factor here is that this project contemplated recreational areas from its very inception and certain property lying beyond a perimeter of the reservoir would probably be incorporated for recreational purposes if the land acquired for the reservoir alone was not also sufficient for recreational utilization. Since the Crance property abutted the reservoir line, it was within the sphere of probable acquisition for recreational use.

Therefore, the Court concluded, the rule in Shoemaker v. United States, 147 U.S. 282 (1893), precludes the increment in value in computing just compensation, because "The property condemned was taken during construction from an area of probable acquisition for fulfillment of a recreational purpose which was within the scope of the project from its inception." The primary importance of this holding is that it rejects the idea, derived from a misreading of the Miller opinion, that the scope of a project is fixed at some particular date by some action of Congress entirely unrelated to the development of the project, such as the appropriation of funds for the project. Rejecting such a mechanical approach, the Court directs attention to the purpose of the project and its practical development in order to determine its scope. Thus, the Court said:

> To hold, in effect, on a project of this type that simply because this particular tract of land was not delineated on a map at the time of appropriation of funds for the project by Congress, it had been excluded, would be giving undue weight to the proposed diagram of the reservoir plan.

The decision will be extremely helpful in eliminating inflated enhancement claims in future litigation.

The Court also rejected the lower court's ruling on estoppel because there was no evidence that Crance relied upon any representations by the Government, at the time of the sale of the first 5 acres in fee and 2.07 acres of flowage easement, that the tract in question would not be condemned later; also, there was no evidence that the Government agent had authority to bind the Government.

Finally, the Court held that the trial court erred in instructing the jury that special benefits could not exist if other lands in the area were similarly benefited.

Staff: Roger P. Marquis and Richard N. Countiss (Lands Division)

Mining Law: Jurisdiction of Bureau of Land Management; Requirement of Exhaustion of Administrative Remedies. Lundberg v. United States, et al. (N.D. Cal., December 23, 1964; D.J. File 90-1-18-625). Section 5 of the Act of July 23, 1955, 69 Stat. 367; 30 U.S.C. 613, provides for proceedings in the Department of the Interior to determine the surface rights of mining claimants in

lands of the United States. In the course of this type of proceeding it is determined whether there are any claims to surface rights in conflict with Section 4 of the Act of July 23, 1955, which prohibits the use of any unpatented mining claim for purposes other than prospecting, mining, or processing operations and uses reasonably incident thereto.

The Bureau of Land Management alleged that a Mr. James H. Scott had made no discovery (as required by 30 U.S.C. 23) within the limits of certain lands and that this precluded him from gaining any rights by location under 30 U.S.C. 26. In 1963, Mr. Fred E. Lundberg, as executor of the estate of Mr. Scott, filed suit against the United States, the Secretary of the Interior and officials of the Bureau of Land Management, in a federal district court for a declaratory judgment to the effect that the Bureau of Land Management had no authority to adjudge plaintiff's rights to either the mining claims or the surface rights. Plaintiff also demanded that the Bureau be enjoined from proceeding further or holding a hearing.

Defendants moved to dismiss on several grounds; however, the Court, in its memorandum and order on the motion, considered and based its ruling solely on the ground that plaintiff must first exhaust his administrative remedies before seeking relief in the federal court. Plaintiff alleged that the Department of the Interior's procedure of holding a hearing and then permitting appeals within the Department was too time-consuming and that it would unreasonably hinder the sale of this part of the estate.

The Court said that if the contemplated action is clearly beyond the jurisdiction of the administrative body, the court could enjoin the proposed action; however, in this case the gist of plaintiff's complaint is that his mining claims are those of a locator, that they are obviously valid under 30 U.S.C. 26, and that the Bureau is therefore without jurisdiction to determine otherwise under 30 U.S.C. 611 et seq. which would subject him to the processes of administrative review within the Department of Interior. The Court, in granting the motion to dismiss, indicated that the administrative procedure was proper, since both the district court and the Bureau would first have to determine the validity of plaintiff's claims and this type of decision is particularly within the field of knowledge of the Bureau.

Staff: Assistant United States Attorney J. Harold Weise (N.D. Cal.)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Internal Revenue Summons; Taxpayer Not Allowed to Intervene in Action to Compel a Bank to Produce Certain of Its Records to Assert Rights Against Self-Incrimination and Against Unreasonable Search and Seizure. M. Jay Perkal v. Arthur T. Rayunec. (N.D. Ill., December 9, 1964). (CCH 65-1 U.S.T.C. ¶9209). After the filing of a petition to enforce a bank to comply with the requirements of an Internal Revenue summons by producing certain of its records, the taxpayer sought to intervene to dismiss the petition and to quash the summons. In support of his position the taxpayer argued that he was the real party in interest and that the bank was merely acting as his agent to carry on his banking affairs and that, therefore, if compliance with the summons were ordered, he would be denied his constitutional privileges against self-incrimination and unreasonable search and seizure.

In denying the taxpayer's motion, the Court concluded that the taxpayer had no standing to object to the production of third-party records. The Court noted that the Supreme Court in Reisman v. Caplin, 375 U.S. 440, stated by way of dicta that parties affected by a disclosure may appear and assert their claim, but there was no reference in that opinion to the situation in which the taxpayer seeks to quash a summons directed to an independent bank for the production of its own records.

The District Court also noted that the objections as to privilege, probable cause and oppressiveness sought to be raised by the taxpayer were objections properly to be made by the bank itself and the bank had not raised them. Therefore, compliance with the summons was ordered.

Staff: United States Attorney Edward V. Hanrahan; Assistant United States Attorney Thomas Curoe (N.D. Ill.); and Robert A. Maloney (Tax Div.).

Summons Enforcement; Managing Partner Required to Produce Books and Records of General Partnership Despite Invocation of Privilege Against Self-Incrimination Under the Fifth Amendment. In the Matter of United States of America v. Harry G. Silverstein. (S.D. N.Y., January 14, 1965). An Internal Revenue summons directed the respondent to produce the books and records of nine real estate syndicates in which he was a participant. The Court had previously ordered the respondent, over the invocation of the privilege against self-incrimination under the Fifth Amendment, to produce the books and records of five syndicates which were cast in the form of limited partnerships and in each of which he was one of the three general partners who managed the partnership business. United States v. Silverstein, 210 F. Supp. 401 (S.D. N.Y.), affirmed, 314 F. 2d 789 (C.A. 2d), certiorari denied 374 U.S. 807. The respondent refused to produce books and records of syndicates which

were cast in the form of general partnerships and in which he was one of the managing partners, again raising the privilege against self-incrimination, and this action to enforce compliance ensued.

In ordering the respondent to produce the books and records sought, the Court applied the standard set out in United States v. White, 322 U.S. 694, 701, to the effect that there is no privilege when, under all the circumstances, the organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents but rather to embody their common or group interests only. The Court analyzed in detail the evidence submitted and concluded that under the factual situation it could fairly be said that the general partnerships were of an impersonal character in the scope of their membership and activities and that they did not represent purely private or personal interests of their constituents, and, therefore, the Court ordered the production of the books and records of the general partnerships.

Staff: United States Attorney Robert M. Morgenthau; and Assistant United States Attorney Stephen Charnas (S.D. N.Y.).

Supplemental Proceedings; Upon Refusal of Taxpayer Judgment-Debtor to Deliver Corporate Certificates Owned by Him to the Court in Obedience to an Order Entered in Supplemental Proceedings in Aid of Collection of Judgment, District Court Enters Decree Divesting Taxpayer of Ownership of the Securities and Directs that They be Sold to Satisfy Tax Judgment. United States v. William Lusk. (N.D. Ill., November 12, 1964). (CCH 65-1 U.S.T.C. ¶9156). After the Tax Court had determined the tax liability of the taxpayer and the Seventh Circuit Court of Appeals had affirmed, the United States instituted suit to reduce the ensuing assessment to judgment and a judgment in the amount of $78,877.49 was obtained. Supplemental proceedings in aid to collection of the judgment disclosed that the taxpayer was the record owner of corporate securities worth in excess of $100,000.00.

The Government, pursuant to Rule 69 of the Federal Rules of Civil Procedure, obtained an order requiring the taxpayer to deliver the securities to the Court. When the taxpayer refused, he was incarcerated for civil contempt. Even after spending six months in confinement, the taxpayer continued to refuse to obey the Court's order. Thereupon, utilizing the provisions of Rule 70 of the Federal Rules of Civil Procedure, the United States moved for the entry of an order divesting the taxpayer of ownership in the securities involved. Rule 70 specifically provides that where a judgment directs a party to deliver deeds or other documents or to perform a specific act and the party fails to comply within the time specified, the Court may direct the act to be done at the cost of the disobedient party or by some other person appointed by the Court and the act when so done has like effect as if done by the party. The rule further provides that, if the property is located within the district, the Court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and that such a judgment has the effect of a conveyance executed in due form of law. The motion

of the Government was granted and the taxpayer was released from confinement. The remedy here is concededly harsh; but, under the circumstances of the case, it was considered to be the appropriate vehicle both to protect the revenue and to provide for release of the taxpayer from confinement.

Staff: United States Attorney Edward V. Hanrahan; Assistant United States Attorney Thomas Curoe (N.D. Ill.); and Robert A. Maloney (Tax Div.).

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