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UNITED STATES DEPARTMENT OF JUSTICE

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TABLE OF CONTENTS

NEWS NOTES

NEW ASSOCIATE COMMISSIONER OF INS NAMED

August 28, 1968: James F. Greene, a veteran of 27 years with the Immigration and Naturalization Service, has been named Associate Commissioner of the Service by Attorney General Ramsey Clark. Mr. Greene, who began his career with INS as a border patrolman in 1941, was named Chief of the Border Patrol in 1957 and had been Deputy Associate Commissioner since 1961. As one of two Associate Commissioners under Commissioner Raymond F. Farrell, Mr. Greene will have jurisdiction over 4500 operations employees of the INS.

RECENT MEMOS

August 22, 1968: Memo No. 595 contains an analysis of Title III, Section 2514 of the "Omnibus Crime Control and Safe Streets Act of 1968" dealing with wire interception and the procedures for the requesting of immunity for witnesses, which greatly expands the number of Federal crimes the investigation or prosecution of which may now be aided by grants of witness immunity.

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POINTS TO REMEMBER

MAIL FRAUD; ADVERTISING SOLICITATION SCHEMES

An old scheme has been reactivated and is on the increase. Business firms and individuals are being solicited to buy advertisements in trade publications, primarily labor union publications but including those of other associations and organizations, to show good will or to stave off possible or threatened difficulties with the groups.

The publications may or may not be printed. If printed, only enough copies to mail to the advertisers may be run off. The copies often imitate the format of official trade papers or magazines. Solicitations usually are "boiler room" operations, with employees using a battery of telephones, calling top executives, and using names similar to those of well known labor representatives. There are only a few, if any, personal contacts and, when a territory is exhausted, the operators move on.

The Postal Inspection Service is giving special attention to the investigation of this type of scheme, and the Fraud Section is very much interested in the prosecution of these cases. Any inquiries in connection therewith should be addressed to that section.

IMMUNITY STATUTES

Attention is called to the decision in United States v. Klehman (digested at p. 708). The conviction there was reversed because the individual defendant had acquired automatic immunity when he testified before the F. T. C. under a subpoena issued pursuant to 15 U. S. C. 49. In making prosecutive determinations in future cases where prior proceedings have been had before administrative agencies, the background of each case should be carefully reviewed to ascertain whether immunity has in fact been acquired.

15 U. S. C. 49 is typical of a number of automatic immunity statutes. It provides that the witness does not have to raise the privilege against self-incrimination; immunity attaches automatically when the witness testifies under subpoena. No information the witness divulges may be used in a later prosecution even if obtained from an independent source if it is substantially related to the subject matter of the granting provision and to the subject matter of the criminal proceedings. The immunity applies only to natural persons; in the instant case Klehman could not be prosecuted but the Wilmington Chemical Corporation could be. Other immunity "bath" statutes are:

15 U. S. C. 32 (antitrust proceedings); 15 U. S. C. 155 (China Trade Act); 18 U. S. C. 835 (Explosives and Other Dangerous Articles); 26 U. S. C. 4874

(Taxes on Cotton Futures); 46 U. S. C. 827 (testimony before the Federal Maritime Commission); 49 U. S. C. 9, 43 and 46-48 (Interstate Commerce Act); and 50 App. U. S. C. 1896 (rent ceilings).

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ANTITRUST DIVISION

Assistant Attorney General Edwin M. Zimmerman

DISTRICT COURT

SHERMAN ACT

DISTRICT COURT OPINION FOR GOVERNMENT IN SERTA ASSOCIATES, INC.

United States v. Serta Associates, Inc. (Civ. 60 C 843; August 9, 1968; D. J. 60-89-14)

On August 9, 1968 Judge Bernard M. Decker rendered an opinion finding for the Government. This is the last of a series of six cases resulting from an investigation of the bedding industry by grand juries in Chicago in 1957 and 1958. Two were settled by consent decrees: United States v. Restonic Corporation, Civ. 60 C 828 (N. D. Ill., 1960) and United States v. The Spring-Air Company, Civ. 60 C 845 (N. D. Ill., 1960); two by pleas of nolo contendere: United States v. Firestone Tire and Rubber Company, Cr. 8842 CR (W. D. Tenn., 1959) and United States v. United States Rubber Company, Cr. 16044 (D. Colo., 1959); and the fifth by trial: United States v. Sealy, Inc., 388 U.S. 350 (1967).

The complaint was filed on May 31, 1960 alleging that Serta Associates, Inc., the sole defendant, a corporation organized by a group of mattress manufacturing licensees located throughout the country, had conspired with its member licensees to allocate exclusive marketing territories and to induce their retail store customers to adhere to the suggested retail prices fixed by defendant.

After the case was set for trial in 1964, the trial was stayed pending the appeal to the Supreme Court of the judgment of the trial court in an essentially similar case, United States v. Sealy, Inc., 388 U.S. 350 (1967), where the resale price maintenance issue had been adjudicated in favor of and the territorial issue adverse to the Government. After the reversal and favorable decision by the Supreme Court on the territorial issue in the Sealy case, this case proceeded to trial on January 8 and continued through January 23 of this year.

On the Government's representation that the proof in this cause would be substantially similar to that in the Sealy case, the court entered an order that this case would go forward initially on the price maintenance issue. It was agreed that if the Government prevailed on that issue, then the doctrine of the Sealy case would apply and an appropriate judgment and decree would be entered on both resale price maintenance and allocation of territory.

At the trial, the Government relied primarily on documentary evidence from the files of defendant and its licensees, consisting of Serta's rules and regulations, its corporate minutes, and the franchise provisions to prove by direct evidence the agreement on prices and territory. Selected correspondence of Serta with its licensees, and certain correspondence of licensees with retailers was introduced showing how Serta's rules were interpreted. Trial subpoenas were successfully used to bring the evidence up to date. The oral testimony introduced was primarily that of a few retailers who had been cut off from access to Serta products.

The defendant called numerous licensees and dealers who testified that Serta products were in fact sold in many markets at other than the Serta suggested prices. The Government objected to this evidence on the ground that it did not rebut the express evidence of the agreement on authority of United States v. General Motors Corp., 121 F. 2d 376 (C. A. 7, 1941), but the court received all of this evidence. The court's opinion holds that this proof did not disprove the Government's case and was negative evidence showing only that the conspiracy was less than 100 per cent effective.

The court found that the by-laws, rules, regulations, and license agreement evidenced an agreement to fix prices; and that this included the following: requesting retailers to maintain minimum resale prices and advertised prices, limiting comparative price advertising and receiving assurances of cooperative and enforcing compliance. The court noted that other means were utilized by Serta and its licensees to induce retailers to maintain the suggested retail price such as "preticketing" Serta products and distributing retail price lists and by the promotion by Serta of a cooperative advertising program which was made available by the licensees only to those retailers who used the Serta suggested retail prices in all their advertisements.

The court held specifically that the advertising restriction, i. e., regulating the prices at which Serta mattresses could be advertised was a form of price tampering and a per se violation, citing Socony-Vacuum and Parke-Davis.

On the territorial issue, the court held in conformity with United States v. Sealy, Inc., that since an "aggregation of trade restraints" had been found to exist the territorial allocation in conjunction with the price fixing constituted a per se violation of Section 1 of the Sherman Act.

The Government is to submit an appropriate decree within 20 days.

Staff: Bertram M. Long, Harry H. Faris and Harold E. Bailey (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEALS

JUDICIAL REVIEW OF AGENCY ACTION

CONCLUSIONS OF ATOMIC ENERGY COMMISSION HAD A RATIONAL BASIS, AND THEREFORE MAY NOT BE OVERTURNED BY A REVIEWING COURT.

Alexander T. Deutsch v. United States Atomic Energy Comm'n., et al. (C. A. D. C., No. 21,098; decided August 26, 1968; D. J. No. 27-7130)

Petitioner sought review of a decision of the Atomic Energy Commission rejecting his claim (under 42 U. S. C. 2187 (b)(3)) for an award for a claimed discovery which led to the utilization of atomic energy to preserve and sterilize food. The arguments of both parties to the appeal included extended discussions of scientific principles relating to radio-activity. The Court of Appeals commented on the "ever-recurring question of the scope and extent of our authority to set aside the ruling of an administrative agency":

> Despite our daily diet of challenges to administrative agency action and our resulting repeated efforts to articulate the limits of judicial review of such actions we nevertheless are continually called upon to substitute our judgment on factual issues for that of the agency charged by Congress with the initial responsibility of making, evaluating, and acting upon those facts. It is well settled that the fact-finding function is within the exclusive province of the administrative agency. We appear unable to establish a substantial recognition at the Bar that "[t]he judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." Rochester Telephone Corp. v. United States, 307 U. S. 125 at 146 (1939).

The Court stated that considerable deference must be given to the expertise of the agency in this field. It then affirmed the agency's decision,

concluding that it was grounded in logic and reason and was supported by generally accepted scientific principles.

Staff: Michael C. Farrar (Civil Division)

TORT CLAIMS ACT - SCOPE OF EMPLOYMENT

SERVICEMAN DRIVING OWN CAR BETWEEN ARMY STATIONS UNDER TRAVEL ORDERS WAS WITHIN SCOPE OF EMPLOYMENT UNDER IOWA LAW.

United States v. Betty Fuller Farmer (C. A. 8, No. 19, 116; decided August 14, 1968; D. J. 145-4-1515)

Plaintiff was injured when the automobile in which she was riding was struck by the private car of an Army National Guardsman. The Guardsman had completed a tour of duty at Fort Leonard Wood, Missouri, and was ordered to return to his home station in Iowa and deliver all items of clothing issued at Fort Leonard Wood. He had been given a cash travel allowance; he had twenty-four hours to reach the Iowa station; and he was permitted to use his own automobile. The accident occurred in Iowa.

The Court of Appeals held that the Guardsman was acting within the scope of his employment under the Act, applying Iowa law; it therefore affirmed the district court's award of damages against the Government. The Court distinguished Bissell v. McElligott, 369 F. 2d 115 (C. A. 8), in which the Government prevailed in a similar case under Missouri law. The Court said that in Missouri, respondeat superior liability depends upon the employer's right "to control the physical acts or movements of the employee at the very moment of the occurrence," while in Iowa only general control of the employee's conduct is necessary to hold the employer.

It should be noted that, in this case, the Eighth Circuit did not invoke its practice of considering district judges' interpretations of state law "binding". See e. g., United States v. Fahrenkamp, 312 F. 2d 627, 631.

Staff: William Kanter (Civil Division)

DISTRICT COURT

JUDICIAL REVIEW UNDER NATIONAL SERVICE LIFE INSURANCE ACT OF 1940

ABSENT CONTRACT OF INSURANCE, DISTRICT COURTS HAVE NO JURISDICTION TO REVIEW DETERMINATION OF THE VETERANS ADMINISTRATION UNDER 38 U. S. C. 785.

Margie M. McKay v. United States (S. D. Tex., Civil No. 66-H-349; decided July 23, 1968; D. J. 146-55-3863)

The Veterans Administration determined in 1961 that plaintiff's deceased husband could not be issued a veteran's insurance policy, since he had forfeited all rights to veteran's benefits by submitting false information to the VA. After his death, plaintiff brought this action in the district court, seeking a ruling that the VA's determination was erroneous. The Government moved to dismiss for lack of subject-matter jurisdiction, asserting that such a determination was unreviewable.

38 U. S. C. 785 provides for the finality of VA determinations "except in the event of suit as provided in section 784 of this title, or other appropriate court proceedings." Section 784 provides that in a dispute over a contract of insurance, the district court may review the VA determination. Since there was no contract issued in this case, plaintiff relied on the second exception for jurisdiction.

The district court refused to follow the decisions allowing review in these circumstances, including a dictum in the Fifth Circuit in Salyer v. United States, 326 F. 2d 623. It relied instead upon the majority of district court decisions, especially Mitchell v. United States, 111 F. Supp. 104 (D. N. J.), and upheld the Government's contention that Congress intended this determination to be final and conclusive.

Staff: United States Attorney Morton L. Susman and Assistant United States Attorney C. Leland Hamel (S. D. Tex.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Stephen J. Pollak

DISTRICT COURTS

DISCRIMINATION IN HOUSING

RACIAL DISCRIMINATION IN SALE OF HOMES PROHIBITED BY TITLE VIII OF CIVIL RIGHTS ACT OF 1968

United States v. Knippers and Day Real Estate, Inc. (E. D. La., Civil No. 17-033-65A; D. J. 175-32-2)

The Attorney General filed suit on July 22, 1968, in the United States District Court for the Eastern District of Louisiana under Title VIII of the Civil Rights Act of 1968 (82 Stat. 81), Public Law 90-284, to enjoin the practice of racial discrimination by the defendants, real-estate builders and dealers, in the sale of homes located in Baton Rouge, Louisiana. The dwellings involved are covered by Sections 803(a) (1), (B) and (C) of Title VIII of the aforementioned Act.

A substantial number of these dwellings have been inspected and approved by the Veterans Administration and some are located on sites which have been surveyed and approved by the Federal Housing Administration for the development of single family dwellings. In addition, many of these dwellings have been sold with loans insured or guaranteed by the credit of the Federal Government. These dwellings, located in an exclusively white area of Baton Rouge have thus far not been sold to Negroes. The United States alleges that defendants have engaged in a pattern or practice of racial discrimination in the sale of these dwellings, by refusing to sell to Negroes because of their race; representing that no homes were available for sale when in fact there were; or having made available to white persons terms and conditions not made available to Negroes with comparable financial positions.

It is further alleged that these policies constitute a pattern or practice of resistance to the law which has deprived Negroes of their right to obtain housing without discrimination based on race. The United States asks in this action that the defendants be enjoined from practicing the specific acts of discrimination mentioned above and to grant any other relief which the interests of justice may require.

Staff: Grady Norris, Hugh Fleischer, Ed Christenberry and Frank Hill (Civil Rights Div.)

SCHOOL DESEGREGATION

STATE OFFICIALS ARE CONSTITUTIONALLY OBLIGED TO TAKE AFFIRMATIVE STEPS, BEYOND INSTITUTING AN OPEN ADMISSION POLICY, TO DESEGREGATE PUBLIC INSTITUTIONS OF HIGHER LEARNING WHICH HAD PREVIOUSLY BEEN SEGREGATED UNDER LOCAL LAW.

Rita Sanders, et al. and United States v. Buford Ellington, et al. (M.D. Tenn., Civil No. 5077; D.J. 169-71-6)

The State of Tennessee operates seven institutions of higher learning. One of them, the Tennessee Agricultural and Industrial State University located in Nashville, Tennessee, has been, from its inception, a college for Negroes. The school was limited to Negroes by law (Tenn. Code Ann. 49-3701 et seq.) until 1957, when Federal Court decisions declared these statutes unconstitutional. In 1961 the State of Tennessee instituted an open-admission policy with respect to its public colleges, allowing students to be admitted regardless of race.

Private plaintiffs instituted an action to enjoin the construction of an extension center at the University of Tennessee at Nashville, which it was alleged would duplicate facilities presently in existence at the Tennessee A & I State University in Nashville. The United States intervened in the suit under section 902 of the Civil Rights Act of 1964 (42 U.S.C. §200h-2) and Rule 24, F.R.C.P. The Government alleged that the State of Tennessee had failed to take the steps necessary to disestablish its racially segregated schools and that the educational opportunities and facilities at former Negro schools were inferior to those at previously all-white schools.

The Government asked the court to order the defendants to formulate and submit a plan to end the dual system of higher education in the State of Tennessee and for an injunction barring the defendants from construction of the proposed extension facility of the University of Tennessee at Nashville until submission of the plan to end the dual system of education.

At the conclusion of an evidentiary hearing, the court found that despite "some good faith efforts to bring about desegregation of their institutions" the defendants had failed to carry out their "affirmative duty . . . to dismantle the dual system of higher education which presently exists in Tennessee." The court said that the open-admissions policy "alone does not discharge the affirmative duty imposed upon the State by the constitution where, under the policy, there is no genuine progress toward desegregation and no genuine prospect of progress."

The court ordered the defendants to formulate and submit not later than April 1, 1969 a plan to dismantle "the dual system now existing" in public

higher education in Tennessee. The court denied, however, the request that the construction of the extension center in downtown Nashville be enjoined. The court observed "there is nothing in the record to indicate that the University of Tennessee has any intention to make the Nashville Center a degree-granting day institution," and concluded that the proposed construction will "not necessarily perpetuate a dual system of higher education."

Staff: Assistant United States Attorney Carlton Petway (M. D. Tenn.); Nathan Lewin, Patrick Hardin, Thomas Hutchison and Kermit Lipez (Civil Rights Div.)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURT OF APPEALS

IMMUNITY -- FEDERAL HAZARDOUS SUBSTANCES ACT

DEFENDANT'S PRIOR TESTIMONY BEFORE FEDERAL TRADE COMMISSION HELD TO CONFER IMMUNITY FROM PROSECUTION UNDER FEDERAL HAZARDOUS SUBSTANCES ACT.

United States v. Klehman (C.A. 7, No. 16281, 16282, July 3, 1968; D.J. 104-23-26)

The Wilmington Chemical Corporation and its president, Joseph S. Klehman, were charged with ten counts of shipping X-33, a flammable, misbranded water-repellent, in interstate commerce in violation of the Federal Hazardous Substances Act (15 U.S.C. 1261, et seq.). Klehman claimed immunity from prosecution by virtue of testimony he had given under subpoena before the Federal Trade Commission. The district court denied Klehman's motions to dismiss on the ground that the testimony before the F.T.C. did not have a substantial relationship to the criminal prosecution as required by Heike v. United States, 227 U.S. 131 (1913). The corporation then entered a plea of guilty and Klehman pleaded nolo contendere on the condition that he be allowed to appeal the immunity issue. The court accepted the plea and imposed sentence.

The Seventh Circuit reversed, holding that the F.T.C. testimony had a substantial relationship to the criminal prosecution. One of the operative issues of Klehman's criminal prosecution was that he had had a responsible share in the shipment of X-33. Klehman had testified before the F.T.C. that he was president and sole stockholder of the corporation, that he and his personal secretary were the only directors, that he had actual control of the company, that he formulated corporate policy, and that the employees did only as they were told. He knew at the time he testified that there was a good chance that he would be prosecuted under the Hazardous Substances Act and his testimony was incriminating. 15 U.S.C. 49 provides that no person shall be excused from testifying before the F.T.C. on the ground of self-incrimination, but that "no natural person shall be prosecuted ... for or on account of any transaction, matter, or thing which he may testify ... before the commission in obedience to a subpoena issued by it..."

Staff: United States Attorney Thomas A. Foran; Assistant United States Attorneys John Peter Lulinski, Gerald M. Werksman and Roger J. Balla (N.D. Ill.)

DISTRICT COURTS

CONSTITUTIONAL RIGHTS OF ACCUSED - RIGHT OF CONFRONTATION

RIGHT OF CONFRONTATION NOT DENIED WHERE TRANSCRIPT OF TESTIMONY OF WITNESS AT PRELIMINARY HEARING ADMITTED IN EVIDENCE ON TRIAL AFTER WITNESS INVOKED PRIVILEGE UNDER FIFTH AMENDMENT.

United States v. A. J. Allen (D. Colorado, July 8, 1968; D.J. 31-13-101)

The Government called as its witnesses two women alleged, in a White Slave Traffic Act Indictment, to have been transported by the defendant. Both women, claiming their privilege against self-incrimination, refused to testify. The court then received into evidence the transcript of testimony given by each at the preliminary hearing. In each instance the testimony at the preliminary hearing was given under oath and the defendant, through the same counsel who represented him at trial, cross-examined the witnesses.

The defendant, contending that the court erred in admitting into evidence the testimony given at the preliminary hearing, moved for a new trial.

In denying the motion, the court held not only that the invocation of the privilege against self-incrimination was sufficient to render the witnesses "unavailable" within the terms of Barber v. Page, No 703, October Term, 1967 (April 23, 1968), but also that the defendant, by being allowed to cross-examine the witnesses at the preliminary hearing, had not been denied his right to confrontation.

Staff: United States Attorney Lawrence M. Henry; Assistant United States Attorney Thomas C. Seawell (D. Colorado); and Justin Williams (Criminal Division)

UNIVERSAL MILITARY TRAINING AND SERVICE ACT

FIRST AMENDMENT NOT DEFENSE TO AIDING AND ABETTING REFUSAL AND EVASION OF SERVICE.

United States v. Coffin, et al. (D. Mass.; D.J. 25-16-578)

After a three-week trial a jury at Boston, Massachusetts, returned a verdict of guilty against Reverend William Sloane Coffin, Jr., Yale University Chaplain, Michael Ferber, Harvard graduate student, Mitchell Goodman, author and part-time professor, and Dr. Benjamin Spock, noted author and pediatrician, under an indictment charging them and one Marcus Raskin, a former White House disarmament aide and co-director of the Institute for

Policy Studies in Washington, D. C., who was acquitted, with conspiring to counsel, aid and abet Selective Service registrants to refuse and evade service in the armed forces, to neglect to have in their possession at all times their registration certificates and their notices of classification, and to hinder and interfere with the administration of the Act.

On July 10, 1968, Judge Francis J. W. Ford imposed sentences of two years and a $5,000 fine on Coffin, Goodman, and Spock and two years and a $1,000 fine on Ferber. The defendants have noted an appeal to the First Circuit.

The basic issues were: the extent to which the First Amendment protects opposition to the war in Vietnam and to the draft; the Government's extension of the conspiracy concept in criminal law to apply to expressions on controversial public issues at public meetings, in churches, in petitions and in meetings with representatives of the Government; and the question whether the Vietnam war is being conducted in violation of the United Nations Charter, treaties of the United States, international law, American Constitutional law and whether the conscription law itself is constitutional as written and applied.

Staff: United States Attorney Paul F. Markham; Assistant United States Attorney John Wall (D. Mass.); and Joseph J. Cella, Jr. (Criminal Division)

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Acting Director John K. Van de Kamp

APPOINTMENTS

Arkansas, Eastern - THOMAS C. HUEY; University of Arkansas, LL. B., and formerly with the Arkansas Workmen's Compensation Commission and in private practice.

Hawaii - JOSEPH M. GEDAN; DePaul University College of Law, LL. B., and formerly in private practice, Deputy Attorney General of the State of Hawaii, Assistant U. S. Attorney for the District of Hawaii, and with the Legislative Research Bureau of the State of Illinois.

New York, Southern - HENRY T. COGHILL; University of Illinois Law School, LL. B., and formerly in private practice.

New York, Southern - DAVID L. KATSKY; Brown University Law School, LL. B., and formerly a law clerk to the chief judge of the U. S. District Court.

New York, Southern - DANIEL J. SULLIVAN; Columbia University Law School, LL. B., and formerly in private practice.

Wisconsin, Eastern - RICHARD E. REILLY; Catholic University Law School, LL. B., and formerly with the Criminal Division of the Department of Justice.

RESIGNATIONS

Alaska - GERALD J. VAN HOOMISSEN, to join the Alaska State Department of Law.

District of Columbia - WILLIAM L. DAVIS, to join the Neighborhood Legal Services Program.

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

COURT OF APPEALS

PUBLIC LANDS

MINING CLAIMS; SCOPE OF COLEMAN DECISION; VALUABLE MINERAL DEPOSITS; PRUDENT MAN TEST OF DISCOVERY; MARKETABILITY TEST; SURFACE RESOURCES ACT OF 1955; JURISDICTION; SUBSTANTIAL EVIDENCE.

Converse v. Udall (C. A. 9, No. 21, 697 August 19, 1968, D. J. 90-1-18-731)

The Ninth Circuit, in affirming a decision of the Secretary of the Interior, in a case arising under the Surface Resources Act of 1955, 69 Stat. 367, has broadly applied the Supreme Court's recent decision in United States v. Coleman, 390 U. S. 599 (1968). The decision by the Ninth Circuit in Converse will be extremely valuable in resisting attempts which are already being made to limit the effect of the Coleman decision to situations involving building stone or common variety materials. (Rehearing En Banc on this issue has been ordered by the Tenth Circuit in Udall v. Snyder, No. 9671.)

This case arose as a dispute between the Forest Service and a mining claimant over who was to manage the surface resources of unpatented mining claims within a National Forest prior to patents being applied for or issued. Some $90,000 of timber was actually involved. The Court of Appeals outlined the general purposes of the 1955 Act and adopted the facts as contained in the Secretary's and district court's decisions.

The Court of Appeals on the issue of jurisdiction held that the district court had jurisdiction to review the Secretary's decision under 28 U. S. C. 1331, relating to federal questions, and the Administrative Procedure Act. The Court refused to decide whether a limited jurisdiction existed under 28 U. S. C. 1361 which we conceded. This Division does not agree with the Court's decision on this issue. This question of the district court's limited jurisdiction is still being vigorously contested in the Ninth Circuit by this Division and we hope will be resolved in the near future.

The Court generally reviewed the mining statutes and the requirement that for the purpose of obtaining a patent, there must be a discovery of a valuable mineral deposit within the limits of the claims located. The "prudent man test," which is the historic standard used to determine if a valuable

discovery had been made, was likened to the "reasonable man test" used in negligence cases to guide the factfinders. The Court stated that the finding of some mineral or a vein or lode is not enough to constitute a discovery--their extent and value are also to be considered. The standard to be applied in determining the validity of a discovery was held to vary, depending on who was involved in the controversy. A stricter standard for proof of a discovery was held to be required in cases where there was a public interest and to a lesser degree if the controversy was between competing miners or interests. This sliding measure, the Court found, explained some of the statements in some early cases which indicated that, if a locator has found any mineral in place, he has made a discovery. This, the Court reasoned, would not be an effective discovery against the Government but could be as against a competing mineral locator. The Court also has clearly defined the distinctions between "exploration," "discovery" and "development" in adopting the Secretary's definition of these terms.

More important is the Court's adoption of the Supreme Court's decision in Coleman concerning the "marketability test" which the Ninth Circuit found to be significantly tightened from the standard stated in Chrisman v. Miller, 197 U.S. 313 (1905). This Court has squarely held that a showing that mineral can be extracted, removed and marketed at a profit--the so-called "marketability test"--was proper to be applied to all mining claims. The argument that this "marketability test" did not apply where the discovery was of precious metals was expressly rejected in a detailed analysis of the rationale and cases supporting the "prudent man test" and "marketability test." In view of the apparent general effort by mining interests to limit narrowly the application of the Coleman decision, this decision should effectively end many of these attempts.

Staff: George R. Hyde (Land and Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

STATE SUPREME COURT

LIENS

UNITED STATES NOT REQUIRED TO PROCEED AGAINST RESPONSIBLE OFFICER BEFORE FORECLOSING AGAINST CORPORATE ASSETS.

United States v. T. Eugene Smith, etc., et al. (Virginia Supreme Court of Appeals, June 10, 1968; D. J. 5-79-1165)

In this proceeding, the United States was competing with a landlord for a fund realized when the assets of the taxpayer-corporation were sold at a sheriff's sale. There was no dispute as to the priority of the Government's liens for withholding taxes over the landlord's lien for rent. The landlord argued, however, that he had only one source for collecting the rent (the subject fund), whereas the Government had two sources: it could proceed against responsible officers of the corporation for most of the tax liability as well as enforce its lien against the fund in question. The lower court adopted the view that equity required the United States to make a reasonable effort to collect from the persons responsible under Sections 6671 and 6672 of the Internal Revenue Code.

The United States appealed and the Virginia Supreme Court of Appeals reversed the decision and remanded the case with instructions that the lower court distribute the fund to the United States. After discussing the constitutional authority for collecting taxes, the Court observed that such authority represented the supreme law of the land and that a federal tax lien cannot be displaced by subsequent liens imposed by authority of state law or judicial decision, citing State of Michigan v. United States, 317 U. S. 338, 340. The Court held that the action of the lower court was in violation of this principle.

The Appellate Court also recognized that the remedies available to the Government in collection of revenues are cumulative and not mutually exclusive and that the United States should not be compelled to resort to any particular source for collection.

Staff: Assistant United States Attorney Stefan C. Long (E. D. Va.); Stephen H. Paley and Augustus A. Simpson (Tax Div.)

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