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Record No. 6664

In the Supreme Court of Appeals of Virginia at Richmond

UNITED STATES OF AMERICA

v.

T. EUGENE SMITH, ET AL., TRUSTEES, ETC.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6664

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 28th day of February, 1967.

UNITED STATES OF AMERICA, Plaintiff in error,

against

T. EUGENE SMITH AND BURCH MILLSAP, TRUSTEES FOR JEFFERSON MANOR VENTURE, A PARTNERSHIP, Defendants in error.

From the Circuit Court of Fairfax County
Paul E. Brown, Judge

Upon the petition of the United States of America a writ of error is awarded it from a final order entered by the Circuit Court of Fairfax County on the 12th day of August, 1966, in a certain proceeding then therein depending, wherein T. Eugene Smith and another, Trustees, etc., were plaintiffs and the petitioner and another were defendants; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

* * * * *

RECORD

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* * * * *

PETITION

* * * * *

Come now your Petitioners, T. Eugene Smith and Burch Millsap, Trustees for Jefferson Manor Venture, a partnership, and respectfully represent unto this Honorable Court as follows:

1. That on or about June 28, 1957 Dixie Dime Stores, Incorporated, a Virginia corporation, entered into a written lease as tenant for a period of ten years covering certain store premises at 106 North King's Highway, Alexandria (Fairfax County), Virginia, at a rent of $600.00 per month. Petitioners are successors in interest to the landlord under that lease, having acquired the same on or about June 1, 1963.

page 2 } 2. That on December 16, 1963, your Petitioners, as landlords, filed a distress warrant, with affidavit attached thereto, in the County Court of Fairfax County, Virginia, Civil Docket No. 63-6992, against Dixie Dime Stores, Incorporated, their tenant, for $2,400.00 rent then due and owing, at $600.00 per month, for the months of September, October, November and December, 1963, for the rental due on the above store premises located at 106 North King's Highway, Jefferson Manor Shopping Center, Alexandria, Fairfax County, Virginia.

3. That on December 16, 1963, Deputy Sheriff Knupfer of Fairfax County, Virginia, pursuant to the issuance of the said distress warrant, proceeded to distrain certain fixtures and equipment owned by the said tenant, Dixie Dime Stores, Incorporated, and located on the said rental premises. A detailed listing of said fixtures and equipment is on file with the Clerk of the Circuit Court of Fairfax County, Virginia.

4. That on or about December 31, 1963, the Internal Revenue Service of the United States of America caused to be docketed among the judgment lien records of Fairfax County, Virginia, a tax lien against Dixie Dime Stores, Incorporated, in the amount of $4,438.70 for the non-payment of Federal

withholding taxes. The lien notice indicated that the assessment had been made on November 21, 1963.

5. That on January 6, 1964, James D. Swinson, Sheriff of Fairfax County, Virginia, was served a Notice of Levy in the amount of $4,473.50 by the Internal Revenue Service for taxes alleged to be then due, owing and unpaid to the United States of America from Dixie Dime Stores, Incorporated.

page 3 } 6. That on January 8, 1964, your Petitioners filed a second distress warrant with affidavit attached thereto, in the said County Court of Fairfax County, Civil Docket No. 64-116, against Dixie Dime Stores, Incorporated, for unpaid rent then due and owing in the amount of $600.00 for the month of January, 1964.

7. That on January 8, 1964, Deputy Sheriff Knupfer of Fairfax County, Virginia, pursuant to the issuance of the second distress warrant, distrained certain fixtures and equipment owned by Dixie Dime Stores, Incorporated, and located on the premises aforesaid. A detailed listing of said fixtures and equipment is on file with the Clerk of the Circuit Court of Fairfax County, Virginia.

8. That on January 9, 1964, the Clerk of the Circuit Court of Fairfax County, Virginia, issued a writ of *venditioni exponas,* directing the Sheriff of Fairfax County to expose to sale all those fixtures and equipment distrained under the first distress warrant of December 16, 1963.

9. That on January 20, 1964, the Internal Revenue Service sold the inventory of said Dixie Dime Stores, Incorporated, located on the premises at 106 North King's Highway, Alexandria, Virginia, at public auction for $2,565.00, thereby reducing the amount of its claim to $1,908.50.

10. That on January 22, 1964, Deputy Sheriff Knupfer, acting under the second distress warrant, distrained certain additional fixtures and equipment owned by Dixie Dime Stores, Incorporated, and located on the said premises. A detailed listing of said additional fixtures and equipment is on file with the Clerk of the Circuit Court of Fairfax County, Virginia.

11. That on January 28, 1964, pursuaunt to the aforesaid writ of *venditioni exponas* issued by the Clerk of the Circuit Court of Fairfax County on January 9, 1964,

page 4 } Deputy Sheriff Knupfer proceeded to sell on the said premises at public auction for $1,789.00 cash, the said fixtures and equipment upon which he had distrained under the first distress warrant filed December 16, 1963.

12. That on or about January 30, 1964, the Internal Reve-

nue Service of the United States of America caused to be docketed among the judgment lien records of Fairfax County, Virginia, a tax lien against Dixie Dime Stores, Incorporated, in the amount of $161.89 for the non-payment of FUTA taxes for the year 1962, and in the amount of $477.73 for the non-payment of Excise taxes for the period February, 1962 to February 1963, or a total of $639.62. The lien notice indicated that the assessment had been made on December 6, 1963.

13. That on January 30, 1964, the Clerk of the Circuit Court of Fairfax County issued a second writ of *venditioni exponas,* directing the Sheriff of Fairfax County to expose to sale those fixtures and equipment distrained on January 8, 1964, and January 22, 1964, under the said second distress warrant filed by your Petitioners on January 8, 1964.

14. That on February 24, 1964, the said additional fixtures and equipment distrained under the said second distress warrant and not previously sold at the said first sale were sold by Deputy Sheriff Knupfer at public auction for $1,677.00 cash.

15. That on February 24, 1964, Sheriff Swinson was served a second Notice of Levy in the amount of $2,971.12 by the Internal Revenue Service for taxes alleged to be then due, owing and unpaid to the United States of America from Dixie Dime Stores, Incorporated.

16. That on March 10, 1964, Sheriff Swinson was served with a Release of Levy by the Internal Revenue Service, in which the sum of $2,172.45 was released from the
page 5 } Levy of $4,473.50 served upon Sheriff Swinson on January 6, 1964.

17. That also on March 10, 1964, Sheriff Swinson was served with a Final Demand by the Internal Revenue Service for the payment of $2,971.12 to said Internal Revenue Service.

18. That the proceeds of the Sheriff's Sales of January 20, 1964, in the amount of $1,789.00, and of February 24, 1964, in the amount of $1,677.00, a total of $3,466.00, are in the hands of James D. Swinson, Sheriff of Fairfax County.

19. That the Internal Revenue Service of the United States of America claims said proceeds from the sale of the property distrained under both the said warrants of distress, and Sheriff James D. Swinson has refused to disburse the proceeds either in whole or in part to your Petitioners or to the Internal Revenue Service until so directed by the order of this Court.

WHEREFORE, your Petitioners pray:

1. That the United States be made a party hereto, either

pursuant to the provisions of Section 2410 of the Judicial Code (28 U.S.C. 2410), or by petition in intervention; or be forever barred from asserting any claim hereunder;

2. That the defendant James D. Swinson, Sheriff, be required to pay the sale proceeds remaining in his hands into the registry of this Court, less his expenses of sale;

3. That all parties be required to appear before this Court and to state and litigate their claims; that the rights of the parties in the said fund be ascertained, and that an order be entered that Petitioners are entitled to priority to the extent of their claim of $3,000.00, together with their costs and a reasonable attorney's fee.

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T. EUGENE SMITH and
BURCH MILLSAP
Trustees for Jefferson Manor
Venture
By Counsel

BAUKNIGHT, PRICHARD, McCANDLISH
& WILLIAMS
By: CARRINGTON WILLIAMS
106 North Payne Street
Fairfax, Virginia
Attorneys for Petitioners

Filed in Circuit Court Clerk's Office May 8, 1964.

THOMAS P. CHAPMAN, JR.

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ANSWER

COMES NOW, James D. Swinson, Sheriff of Fairfax County Virginia, by counsel, in for answer to the petition filed in the above styled cause states as follows:

1. That the Defendant neither admits nor denys the allegations of the petition and asks for strict proof thereof.

AND, by way of further affirmative defense to the allegations of the petition the Defendant states as follows:

1. That the Defendant, James D. Swinson, has in his possession the sum of $3,466.00; which sum is claimed by the Internal Revenue Service of the United States and by the Petitioners in this cause; that the said James D. Swinson has no claims against sum of money *accept* such cost and fees which are allowed him by statute.

WHEREFORE, the said Defendant prays that he be allowed to pay in to the Clerk of this Court the said sum of money less his proper cost and fees; that he not be required to make any further defense or present further evidence in testimony in this cause; that the Petitioner and the Defendant, United States of America or any other party which may claim an interest in said fund may than proceed against this cause; that the said Defendant, James D. page 11 } Swinson, be relieved and released upon payment into the Clerk's Office of the said fund for any further claim or liability which may be made between Petitioners or any other party.

JAMES D. SWINSON
Sheriff of Fairfax County Virginia

RALPH G. LOUK
Commonwealth Attorney
Counsel for Defendant
By: RICHARD E. DIXON
Assistant Commonwealth Attorney
Counsel for Defendant

Filed June 1, 1964.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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MOTION TO DISMISS AND FOR LEAVE TO INTERVENE

Comes now the United States of America by its attorneys, MacDougal Rice, Assistant United States Attorney and Clar-

ence J. Grogan, Attorney, Tax Division, Department of Justice, and moves that the United States be dismissed as a party to this cause on the ground that the Court lacks jurisdiction over the United States of America for the reasons that the United States cannot be sued without its consent, and the United States has not consented to be sued in this type of action.

The United States respectfully moves this Court for leave to intervene in this suit for the reason that the United States has interests in the fund involved; these interests will be adversely affected unless the United States is a party to this proceeding, and it is necessary that the United States be a party to this proceeding in order that a judgment affecting the said fund be valid against the interests of the United States in this fund.

UNITED STATES OF AMERICA
By: MACDOUGAL RICE
Assistant United States Attorney

CLARENCE J. GROGAN
Trial Attorney
Department of Justice

Filed July 2, 1964.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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COMPLAINT IN INTERVENTION

To the Honorable Judges of the Circuit Court of Fairfax County:

The plaintiff in intervention, the United States of America, by its attorneys, MacDougal Rice, Assistant United States Attorney, and Clarence J. Grogan, Attorney, Department of Justice, after leave had and obtained, complains and alleges that:

I

The United States is intervening in this cause to enforce its federal tax liens against the sum of $3,466.00, the property of Dixie Dime Stores, Inc., now in the possession of the defendant James D. Swinson, Sheriff of Fairfax County.

II

The Commissioner of Internal Revenue, a delegate of the Secretary of the Treasury of the United States, has authorized and requested this action, and the Attorney General of the United States has directed that this action be commenced.

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III

On November 21, 1963, the District Director of Internal Revenue, a delegate of the Secretary of the Treasury, made an assessment for withholding taxes for the four quarters of 1962. On November 22, 1963, the District Director gave Dixie Dime Stores, Inc., notice of this assessment and made a demand for its payment. The taxpayer has refused and continues to refuse to pay the balance outstanding on this assessment, and there is still due and owing to the United States by virtue of this assessment the sum of $2,266.25 plus interest thereon and lien fees. Interest and lien fees computed to February 24, 1964, total $57.50. On December 31, 1963, the District Director filed a Notice of Federal Tax Lien covering this assessment with the Clerk of the Circuit Court, Fairfax, Virginia.

IV

On December 6, 1963, the District Director of Internal Revenue, a delegate of the Secretary of the Treasury, made assessments against Dixie Dime Stores, Inc., for excise taxes for the period from February of 1962 through February of 1963 and for Federal Unemployment Tax Act taxes for the year 1962 in the respective amounts of $477.73 and $161.89. On the same day the District Director of Internal Revenue gave Dixie Dime Stores, Inc., notice of these assessments and made demands for their payment. Dixie Dime Stores, Inc., has refused and continues to refuse to pay the outstanding balances due on these assessments, and there is still due and owing to the United States by virtue of these assessments the respective sums of $477.73 and $161.89, plus statutory

interest thereon and lien fees. Interest computed to February 24, 1964, and lien fees amount to $6.25 on the assessment for excise taxes and the sum of $2.25 by virtue of page 17 } the assessment for Federal Unemployment Tax Act taxes. On January 24, 1964, the District Director of Internal Revenue filed a Notice of Federal Tax Lien covering these assessments with the Clerk of the Circuit Court, Fairfax County, Fairfax, Virginia.

V

James D. Swinson, Sheriff of Fairfax County, has in his possession the sum of $3,466.00, which is the property of Dixie Dime Stores, Inc. The petitioners claim that their interest in this fund is senior and prior to the claim of the federal tax lien against this fund.

VI

Under Sections 6321 and 6322, Internal Revenue Code of 1954, a lien upon all the property and rights to property, whether real or personal, belonging to Dixie Dime Stores, Inc., arose on the dates the aforesaid taxes were assessed, and these liens secure the outstanding balances, plus statutory interest thereon, due on the aforementioned assessments. These tax liens are senior in priority to all other claims to the fund involved.

WHEREFORE, the plaintiff in intervention prays:

I

That this Court adjudge and decree that there is due and owing to the United States by Dixie Dime Stores, Inc., by virtue of the above-described assessments the sum of $2,905.-87, plus statutory interest thereon and lien fees.

II

That this Court adjudge and decree that the plaintiff in intervention has valid and prior liens against the property of Dixie Dime Stores, Inc., including the fund in the sum of $3,466.00 held by James D. Swinson, Sheriff of Fairfax County.

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III

That this Court decree that the liens of the plaintiff in intervention be foreclosed against the sum of $3,466.00 held by James D. Swinson, Sheriff of Fairfax County, and that the Sheriff of Fairfax County be ordered to pay from this fund the sum of $2,905.87, plus statutory interest thereon and lien fees, in satisfaction of the tax claim of the United States prior to the payment of any other claims against the said fund.

IV

That the plaintiff in intervention be granted such other and further relief, including its costs, as this Court deems proper.

THE UNITED STATES OF AMERICA
By: MACDOUGAL RICE
Assistant United States Attorney

CLARENCE J. GROGAN
Trial Attorney
Department of Justice

Filed Jul 27 1964.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court
of Fairfax County, Va.

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ORDER

This day came the United States of America by its attorneys MacDougal Rice, Assistant United States Attorney, and Clarence J. Grogan, Attorney, Tax Division, Department of Justice, and moved this Court to dismiss the United States as a party defendant on the ground of lack of jurisdiction and for leave to intervene in this suit on the ground that it has an interest in the fund which is the subject of this action

that will be adversely affected unless the United States is a party to this proceeding and because the United States is a necessary party to the rendition by this Court of a final judgment affecting its interests in the said fund.

It is ORDERED that the United States of America be dismissed as a defendant in this proceeding and that the motion for leave to intervene be granted and that the United States be allowed to file its Complaint in Intervention in this Court, and that it serve copies of this Order with copies of its Complaint in Intervention attached thereto on the other parties to this action within fifteen (15) days after the date of entry of this Order.

ENTER this 3rd day of August, 1964.

BARNARD F. JENNINGS
Judge

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PETITIONERS' REQUEST FOR ADMISSIONS TO INTERVENOR, UNITED STATES OF AMERICA

Pursuant to Section 8-111.1 of the Code of Virginia of 1950, as amended, Petitioners request that Intervenor admit the truth of the following, or deem the same as admitted, unless denied within twenty (20) days after service of this Request:

1. That the officer of Dixie Dime Stores, Inc. who was responsible for the collection and payment to the United States Internal Revenue Service of the taxes the United States claims herein was Karl M. Dollak, whose office address is 910 17th Street, N.W., Washington, D. C., and whose residence address is 4106 Rosemary, Chevy Chase, Maryland.

2. That the United States Internal Revenue Service has made no penalty assessment against Dollak as the
page 23 } officer responsive for collecting and paying over such taxes, pursuant to Section 6671-6672 et seq. of the Internal Revenue Code of 1954, nor made any other attempt to hold Dollak personally liable for such taxes.

T. EUGENE SMITH and BURCH MILLSAP,
Trustees for Jefferson Manor Venture,
a partnership
T. EUGENE SMITH and
BURCH MILLSAP, Trustees
By Counsel

BAUKNIGHT, PRICHARD, McCANDLISH & WILLIAMS
By CARRINGTON WILLIAMS
CARRINGTON WILLIAMS
106 North Payne Street
Fairfax, Virginia

Filed Aug 21 1964.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court
of Fairfax County, Va.

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GROUNDS OF DEFENSE OF PETITIONERS TO COMPLAINT IN INTERVENTION OF THE UNITED STATES

Now come the Petitioners and in answer to the Complaint in Intervention filed by the United States of America say as follows:

1. They neither admit nor deny the allegations of paragraph I of the Complaint in Intervention, since the same speak for themselves.

2. Neither admit nor deny the allegations of paragraph II since they are without knowledge of the truth thereof.

3. Deny, for lack of knowledge sufficient to form a belief as to the truth thereof, the allegations as to the balance owing the United States, plus interest and lien fees, but admit the rest of paragraph III.

page 25 } 4. Deny, for lack of knowledge and information sufficient to form a belief as to the truth thereof, the allegations of paragraph IV of the Complaint in Intervention, except that it is admitted that on January 24, 1964 the District Director filed a notice of tax lien with the

Clerk of the Circuit Court of Fairfax County, Virginia.

5. Deny the allegations of paragraph V, except it is admitted that James D. Swinson, Sheriff of Fairfax County, has in his possession the sum of $3466.

6. Deny the allegations of paragraph VI.

Affirmative Defense

As and for an affirmative defense to the Complaint in Intervention filed herein by the United States of America, Petitioners allege that the United States has an adequate remedy for collection of the taxes for which it claims priority over Petitioners, by making an assessment for and collecting such taxes from the officer or officers of Dixie Dime Stores, Inc. who were individually responsible for the collection and payment of such withholding and social security taxes to the United States and who wrongfully failed so to do, pursuant to Sections 6671-6672 of the Internal Revenue Code of 1954 (26 U.S.C.A. 6671-6672); that Petitioners have requested the United States to effect such assessment and collection as a matter of basic equity but that it has refused so to do; that Petitioners have no remedy for collection of their claim for rent other than from the distraint proceeds of $3466 held by Sheriff Swinson; and that the United States should not be permitted to assert any priority herein, as a competing creditor or otherwise, to the detriment of
page 26 } Petitioners until it has exhausted the remedies accorded it by the Internal Revenue Code against the responsible officer or officers of Dixie Dime Stores, Inc.

Motion

Now come the Petitioners and respectfully move the Court to bar the United States, Intervenor, from further prosecuting and proving any claim whatever in this proceeding until it shall first make reasonable effort to collect its claim by making an assessment and attempting to effect collection thereunder against the responsible officer or officers of Dixie Dime Stores, Inc. for the taxes claimed herein, pursuant to Sections 6671-6672 of the Internal Revenue Code of 1954 (26 U.S.C.A. 6671-6672);

WHEREFORE, having fully answered, Petitioners pray that the prayers of the Complaint in Intervention be denied, and reiterate their earlier prayer that the claims of the Petitioners herein be deemed prior to all the claims herein, and that the Defendant, James B. Swinson, be ordered to pay the

same to Petitioners as prayed in the original petition filed herein.

T. EUGENE SMITH and BURCH MILLSAP,
Trustees for Jefferson Manor Venture,
a partnership
By Counsel

BAUKNIGHT, PRICHARD, McCANDLISH
& WILLIAMS
By CARRINGTON WILLIAMS
106 North Payne Street
Fairfax, Virginia

Filed August 21, 1964.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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ORDER

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THIS CAUSE, this day came on to be heard on the pleadings formerly filed and upon hearing of the Defendant, James D. Swinson, that he be allowed to pay the fund in controversy into the Clerk's Office, and upon argument of counsel; and

IT APPEARING TO THE COURT, that all parties of record, by their counsel, have agreed that the Defendant, James D. Swinson, be allowed to pay in to the Clerk of the Circuit Court of Fairfax County the fund which is in controversy in this cause, in the amount of $1,789.00 from the sale conducted by the said James D. Swinson as Sheriff of Fairfax County, Virginia on the 28th day of January, 1964 and in the amount of $1,677.00 from the sale conducted on the 24th day of February, 1964, less his proper fees as are provided by statute.

WHEREFORE IT IS ADJUDGED, ORDERED AND DECREED, that the Defendant, James D. Swinson, be and

hereby is granted leave to pay to Thomas P. Chapman, Jr., Clerk of the Circuit Court of Fairfax County the sum of $1,789.00, less statutory cost and fees of $57.28 and the sum of $1,677.00, less statutory cost and fees of $55.04 for a total of $3,353.68; and upon paying said sum and receiving a receipt therefore the Defendant, James D. Swinson, sheriff, shall be dismissed as a party to this cause and relieved of any further claim or liability to the parties in this
page 29 } cause; and upon receiving said sum the Clerk shall hold the same subject to the order of this Court.

ENTERED this 22nd day of September, 1964.

ALBERT V. BRYAN, JR., Judge

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INTERVENOR'S REPLY TO PETITIONERS' REQUEST FOR ADMISSIONS

Pursuant to Section 8-111.1 of the Code of Virginia (1950), as amended, the Intervenor, the United States of America makes sworn replies to Petitioners' Request for Admissions as follows:

1. The United States admits that Karl M. Dollak has an office address at 910 17th Street, N.W., Washington, D.C., and resides at 4106 Rosemary, Chevy Chase, Maryland. The United States admits that Karl M. Dollak was the President of Dixie Dime Stores, Inc., at the time that the taxes claimed herein became due and payable to the United States, but the United States neither knows nor admits that Karl M. Dollak was responsible for the collection and payment of the said taxes to the Internal Revenue Service, nor does the United States know or admit that Karl M. Dollak was a person who willfully failed to collect, truthfully account for, and pay over the taxes claimed herein because that is a fact to be determined ultimately by a Court of Law in an action to which the said Karl M. Dollak is a party. The Internal Revenue Service has made no determination that Karl M. Dollak was such a responsible officer.

page 32 } 2. The Internal Revenue Service has made no penalty assessment against the said Karl M. Dollak

pursuant to Sections 6671 and 6672, Internal Revenue Code of 1954, nor has any other attempt been made to hold the said Dollak personally liable for the taxes claimed herein by virtue of assessments made against the taxpayer, Dixie Dime Stores, Inc.

MACDOUGAL RICE
Assistant United States Attorney

Filed Oct. 5, 1964.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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NOTICE

Please take notice that on Friday, February 12, 1965, at 10:00 A.M. or as soon thereafter as counsel may be heard, the undersigned will bring on for hearing before the Circuit Court of Fairfax County, Virginia, the Motion previously filed herein by Plaintiffs on August 21, 1964, praying the Court that the United States of America, Plaintiff in Intervention, be barred from prosecuting and proving any claim for taxes whatever in this proceeding until it makes a reasonable effort to collect the taxes it claims by assessment and collection from a responsible officer of Dixie Dime Stores, Incorporated, pursuant to Section 6671-6672 of the Internal Revenue Code of 1954.

T. EUGENE SMITH and
BURCH MILLSAP, Trustees for
Jefferson Manor Venture, a joint
venture
T. EUGENE SMITH &
BURCH MILLSAP,
Trustees [SEAL]
By Counsel

BAUKNIGHT, PRICHARD, McCANDLISH
& WILLIAMS
By CARRINGTON WILLIAMS
106 North Payne Street
Fairfax, Virginia
Counsel for Plaintiffs

Filed Feb. 5, 1965.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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ORDER

This day came the parties hereto, by counsel, and argued the Plaintiffs' Motion to bar the Defendant and Complainant in Intervention, the United States of America, from prosecuting and proving any claim for taxes in this proceeding until it makes a reasonable effort to collect the same by assessment and collection from a responsible officer of Dixie Dime Stores, Inc., pursuant to Sections 6671-6672 of the Internal Revenue Code of 1954.

Upon consideration whereof, and it appearing to the Court that the same should be granted, it is hereby

ADJUDGED, ORDERED and DECREED, that the Defendant and Complainant in Intervention, the United States of America, be and it is hereby barred from prosecuting and proving any claim for taxes in this proceeding until it demonstrates to the satisfaction of the Court that it has
page 36 } made a reasonable effort to collect the taxes it claims by assessment and collection from a responsible officers of Dixie Dime Stores, Inc., pursuant to Sections 6671-6672 of the Internal Revenue Code of 1954, to which ruling of the Court the Defendant, United States of America, excepts.

PAUL E. BROWN, Judge

March 12th, 1965.

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AFFIDAVIT

My name is Charles J. Clowser, 626 Alta Vista Drive, Fairfax, Virginia. I am employed by Potomac Management Company, 7253 Maple Street, Annandale, Virginia, and have been so employed from June of 1963 up until the present time. The President of Potomac Management Company is T. Eugene Smith, one of the Plaintiffs in this suit.

The management of the Jefferson Manor Shopping Center was turned over to Potomac Management Company at the time it was acquired by Messrs. Smith and Millsap as Trustees for the present joint venture in June of 1963. We took over the management and collection of the rents from Monroe Development Corporation, by whom a part of the shopping center had previously been owned. In attempting to collect the rent from Dixie Dime Stores, Incorporated, which was located in the Jefferson Manor Shopping Center, the only person with whom we dealt was Mr. Karl M. Dollak, 910 17th Street, N.W., Washington, D. C. It is my recollection that only one months' rent was paid
page 38 } from the time we took over the shopping center, and thereafter the rent was in default. I repeatedly called Mr. Dollak's office in Washington to ask for the rent, and was told it would be forthcoming. There was never any indication that anybody else was the responsible officer in the corporation for paying rent or other bills.

Finally, Mr. Smith and I made an appointment to go into Washington and meet with Mr. Dollak to discuss the situation, and we did do this, meeting him and having lunch at the Lawyers' Club. Mr. Dollak admitted that he was behind on the rent but stated that Christmas was his big season and that he would bring it up to date then. We told him we either wanted the rent, or the building.

After the rent was further in default, and we were trying to get possession of the building, I saw Mr. Dollak again and he never claimed that anybody else was the responsible officer in the corporation for handling the rent besides himself.

CHARLES P. CLOWSER [SEAL]

Filed March 12, 1965.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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MOTION FOR VACATION OF JUDGMENT WITH OR WITHOUT REHEARING

Comes now the United States of America by its attorney, MacDougal Rice, Assistant United States Attorney for the Eastern District of Virginia, and respectfully moves this Court pursuant to Rule 3:21 of the Rules of the Supreme Court of Appeals of Virginia, for reconsideration and vacation of its judgment in the above action entered March 12, 1965, with or without a rehearing of the matters presented to the Court on said date.

In support of said motion the United States of America sets forth the following:

1. There is authority to support the position of the United States that the remedy of distraint need not be pursued or exhausted before the remedy of foreclosure of federal tax liens may be invoked. Distraint is not a judicial prerequisite. *United States* v. *Curry*, 201 Fed. 371 (D. Md. 1912). The remedies of distraint and judicial foreclosure are cumulative and complementary, and either one may be availed of, as the Government deems appropriate in the collection of taxes due it. *Blacklock* v. *United States*, 208 U.S. 75 (1908); *Mansfield* v. *Excelsior Refining Co.*, 135 U.S. 326 (1890).

2. Petitioners herein have shown no special equities entitling them to marshalling, to the prejudice of the superior right of the United States to collect its revenues.

page 41 } The federal tax liens here are entitled to payment in the priority at which they bound the property on the respective dates of sale, January 28, 1964, and February 24, 1964, and this priority cannot, without the consent of Congress, be impaired or superseded by state law in favor of subsequent liens imposed by authority of any law or judicial decision of the state. *Littlestown National Bank* v. *Penn Tile Works Co.*, 352 Pa. 238, 42 A. 2d 606 (1945). The equities in favor of the federal tax collector are overriding.

Thus, in *United States* v. *Duncan,* 25 Fed. Cas. 927 (No. 15,-003) (C.C. Ill. 1850), an intermediate creditor's request for marshalling was refused, with the following (25 Fed. Cas. at p. 936):

> The United States are entitled to all their legal rights; and, in the case supposed, of an application to a court of equity, to say to the judgment creditors: We will enforce our lien of older date than yours, made specific by levy before you applied to the court; we will retain our lien under the decree of 1846 upon the lands out of Morgan County; *we are not to be regarded as ordinary individual creditors of the estate; your rights must yield to ours.* (Emphasis supplied.)

The senior federal tax lien on the fund held by the sheriff in this case cannot be displaced and the United States remitted to the satisfaction of its lien in some other manner requiring extensive litigation. Equity will not compel the abandonment of claims to a fund in court in return for a law suit.

3. Petitioners have failed to establish their entitlement to marshalling. The marshalling doctrine may be stated as follows: when one creditor has a claim against two funds as security and another creditor has a claim against only one of these funds, the claim of the former must be first satisfied out of that fund which is security for his loan only. *United States* v. *Behrens,* 230 F. 2d 504 (C.A. 2d 1956), *certiorari* denied, 351 U.S. 919 (1956). First and most important, no second "fund"—which in this instance would be the secondary liability of responsible officers, as sureties, for the page 42 } indebtedness of the taxpayer-corporation, as principal debtor—is before the Court or even in existence. It is impossible, then, for petitioners to show that the rights of their co-creditor, the United States, will be neither endangered nor injuriously delayed, and that there is no reasonable doubt of the availability of another fund to satisfy the co-creditor's demand. 35 Am. Jur., Marshaling, §7; *American National Insurance Co.* v. *Vine-Wood Realty Co.,* 414 Pa. 263 (1964), 64-1 U.S.T.C. ¶9434; *Blakemore* v. *Wise,* 95 Va. 269, 28 S.E. 332 (1897).

Further, to invoke the doctrine of marshalling both funds must be in the hands of the common debtor of both creditors. *Savings and Loan Corp.* v. *Bear,* 155 Va. 312, 154 S.E. 587 (1930); *National Valley Bank of Staunton* v. *Kanawha Banking and Trust Co.,* 151 Va. 446, 145 S.E. 432 (1928); *Pollard & Bagby* v. *Richmond,* 181 Va. 181, 24 S.E. 2d 564 (1945).

Here, not only is there no second "fund", as we have seen, but there is also no "common debtor" of both creditors, for petitioners have no claim whatsoever against the responsible officers of the taxpayer-corporation, absent evidence that any such responsible officers were personally liable on the lease negotiated with petitioners' predecessor in interest. The right to marshal must exist at the time the common fund is available for distribution, which in this case would be the respective sale dates. That right demonstrably did not then exist, does not now exist and, on the facts of this case, can never exist.

4. The responsible officers of the taxpayer-corporation, whoever it may eventuate that they are, are only secondarily liable as sureties for the taxpayer-corporation's indebtedness to the United States and can maintain a claim for reimbursement against the corporation as principal debtor. 50 Am. Jur., Suretyship, §221. The surety's contingent obligation and right of reimbursement preclude the very existence of the "fund" which is prerequisite to application of the doctrine of marshalling. Therefore, a junior lien creditor page 43 } of the principal debtor cannot compel the senior lien creditor to satisfy his debt from the surety of his debtor before resorting to a fund on which he has a lien. *Union Bank* v. *Laird,* 2 Wheat (U.S.) 390 (1817). Where one of the "funds" is the property of a surety, the principal of marshalling will not apply. *Miller Lumber & Coal Co.* v. *Berkheimer,* 342 Pa. 329, 20 A. 2d 772 (1941).

According to the computations of the movant, the final date of the twenty-one day period following entry of the final order is April 2, 1965.

Respectfully submitted,
MacDOUGAL RICE
Assistant United States Attorney

Filed March 26, 1965.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

* * * * *

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ORDER

* * * * *

Upon consideration of the motion of the United States of America for vacation of the judgment entered herein on March 12, 1965, and upon consideration of the argument of counsel on said motion presented before the court on April 16, 1965;

It is the order of the Court that said motion for vacation of judgment be, and it hereby is denied.

PAUL E. BROWN, Judge

Date: April 27, 1965.

Seen:
CARRINGTON WILLIAMS
Attorney for Petitioners

Seen and exception respectfully noted
to the aforesaid ruling of the Court:
MacDOUGAL RICE
Assistant United States Attorney

* * * * *

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

TO THE HONORABLE PAUL BROWN:

Take notice that the United States of America, by its attorney, notes an appeal from the final judgment of the Court entered herein on April 27, 1965, and sets forth its assignment of error as follows:

The Court erred in granting petitioners' motion to bar the United States from prosecuting and proving any claim for taxes in this action until the United States first demonstrates to the satisfaction of the Court that it has made a reasonable

effort to collect such taxes by assessment and collection from a responsible officer of Dixie Dime Stores, Inc., pursuant to Sections 6671-6672 of the Internal Revenue Code of 1954, which judgment was entered on March 12, 1965, and became final on April 27, 1965, with entry of the Court's order denying the motion of the United States for vacation of the Court's judgment of March 12, 1965.

UNITED STATES OF AMERICA
By: MAC DOUGAL RICE
Assistant United States Attorney

Filed June 24, 1965.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

* * * * *

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* * * * *

STATEMENT OF FACTS AND PROCEEDINGS RELATING TO FINAL ORDER ENTERED HEREIN

Comes now the United States of America by its attorney, MacDougal Rice, Assistant United States Attorney for the Eastern District of Virginia, and respectfully submits, pursuant to Rule 5:1(e), (f), of the Supreme Court of Appeals of Virginia, for signature by the Court and by counsel for the parties to this action the following statement of facts and proceedings relating to the final order entered herein by this Court on April 27, 1965, to which the United States excepted and from which it appeals:

1. This action was instituted by petitioners, T. Eugene Smith and Burch Millsap, Trustees for Jefferson Manor Venture, a partnership, against the United States of America and James D. Swinson, Sheriff of Fairfax County, on May 8, 1964. Petitioners prayed that the United States be made a party hereto, pursuant to 28 U.S.C. 2410 or by petition in intervention, or be barred from asserting any claim; that James D. Swinson, Sheriff, be required to pay the net proceeds of sale of certain fixtures and equipment which he had distrained into the Registry of this Court; that the rights of the

parties in this fund be ascertained, and that an order be entered according petitioners priority to the extent of their claim of $3,000, plus costs and attorney's fees.

2. Petitioners are successors in interest to the landlord under a written lease, dated June 28, 1957, with
page 47 } Dixie Dime Stores, Inc., wherein the latter, as tenant, agreed to pay a rental of $600 per month for ten years covering certain store premises at 106 North King's Highway, Alexandria (Fairfax County), Virginia. Petitioners acquired their successor interest on or about June 1, 1963.

3. On November 21, 1963, the District Director of Internal Revenue assessed withheld income tax liabilities for the four quarters of 1962 against Dixie Dime Stores, Inc., in the amount of $4,438.70, and on November 22, 1963, the District Director gave notice of this assessment to Dixie Dime Stores, Inc., and made demand for payment thereof. There is presently due and owing to the United States with respect to this assessment the sum of $2,266.25, plus accrued interest and lien fees.

4. On December 6, 1963, the District Director of Internal Revenue assessed excise tax liabilities for the period from February, 1962, through February, 1963, inclusive, and Federal Unemployment Tax Act liabilities for the year 1962 against Dixie Dime Stores, Inc., in the respective amounts of $477.73 and $161.89. On that date the District Director gave notice of these assessments to Dixie Dime Stores, Inc., and made demand for payment thereof. There is presently due and owing to the United States with respect to these assessments the respective sums of $477.73 and $161.89, plus accrued interest and lien fees.

5. On December 16, 1963, petitioners, as landlords, filed a distress warrant, with affidavit attached thereto, in the County Court of Fairfax County, Virginia, Civil Docket No. 63-6992, against Dixie Dime Stores, Inc., their tenant, for $2,400 rent then due and owing, at the rate of $600 per month, for the months of September, October, November, and December, 1963, for rental due on the store premises at 106 North King's Highway, Alexandria (Fairfax County), Virginia.

6. On December 16, 1963, Deputy Sheriff Knupfer of Fairfax County, Virginia, pursuant to issuance of the aforesaid distress warrant, distrained certain fixtures and equipment owned by the said tenant, Dixie Dime Stores, Inc., and located on the aforesaid rental premises.

page 48 } 7. On December 31, 1963, the District Director

of Internal Revenue filed notice of federal tax lien with the Clerk of the Circuit Court, Fairfax County, Virginia, with respect to the liabilities assessed on November 21, 1963, against Dixie Dime Stores, Inc.

8. On January 6, 1964, the District Director of Internal Revenue served a Notice of Levy on James D. Swinson, Sheriff of Fairfax County, Virginia, in the amount of $4,-473.50, for taxes due, owing and unpaid to the United States from Dixie Dime Stores, Inc.

9. On January 8, 1964, petitioners filed a second distress warrant, with affidavit attached thereto, in the County Court of Fairfax County, Civil Docket No. 64-116, against Dixie Dime Stores, Inc., for unpaid rent then due and owing in the amount of $600 for the month of January, 1964.

10. On January 8, 1964, Deputy Sheriff Knupfer of Fairfax County, Virginia, pursuant to issuance of this second distress warrant, distrained certain fixtures and equipment owned by Dixie Dime Stores, Inc., and located on the aforesaid rental premises.

11. On January 9, 1964, the Clerk of the Circuit Court of Fairfax County, Virginia, issued a writ of *venditioni exponas,* directing the Sheriff of Fairfax County to expose to sale all those fixtures and equipment distrained under the first distress warrant, issued on December 16, 1963.

12. On January 20, 1964, the District Director of Internal Revenue sold the merchandise inventory of Dixie Dime Stores, Inc., located on the aforesaid rental premises, at public auction for $2,565, which amount was applied to reduction of the federal tax liabilities assessed on November 21, 1963, which are outstanding unpaid in the amount of $2,266.25, plus accrued interest and lien fees.

13. On January 22, 1964, Deputy Sheriff Knupfer of Fairfax County, Virginia, pursuant to issuance of the second distress warrant, filed on January 8, 1964, distrained certain additional fixtures and equipment owned by Dixie Dime Stores and located on the aforesaid rental premises.

page 49 } 14. On January 24, 1964, the District Director of Internal Revenue filed notice of federal tax lien with the Clerk of the Circuit Court, Fairfax County, Virginia, with respect to the liabilities assessed on December 6, 1963, against Dixie Dime Stores, Inc.

15. On January 28, 1964, pursuant to the writ of *venditioni exponas* issued by the Clerk of the Circuit Court of Fairfax County on January 9, 1964, Deputy Sheriff Knupfer sold at public auction for $1,789 the fixtures and equipment of

Dixie Dime Stores, Inc., upon which he had distrained under the first distress warrant, filed December 16, 1963.

16. On January 30, 1964, the Clerk of the Circuit Court of Fairfax County, Virginia, issued a second writ of *venditioni exponas,* directing the Sheriff of Fairfax County to expose to sale those fixtures and equipment distrained on January 8, 1964, and January 22, 1964, under the second distress warrant, filed January 8, 1964.

17. On February 24, 1964, the additional fixtures and equipment distrained under the second distress warrant and not previously sold at the first sale were sold by Deputy Sheriff Knupfer at public auction for $1,677.

18. On February 24, 1964, the District Director of Internal Revenue served a second Notice of Levy on James D. Swinson, Sheriff of Fairfax County, Virginia, in the amount of $2,-971.12 for taxes due, owing and unpaid to the United States from Dixie Dime Stores, Inc.

19. On March 10, 1964, the District Director of Internal Revenue served a Release of Levy on Sheriff Swinson, in which the sum of $2,172.45 was released from the Levy of $4,473.50 served on him on January 6, 1964.

20. On March 10, 1964, the District Director of Internal Revenue served a Final Demand for payment of $2,971.12 on Sheriff Swinson.

21. The proceeds of the Sheriff's sales of January 28, 1964, in the amount of $1,789, and of February 24, 1964, in the amount of $1,677, a total of $3,466, were in the possession of James D. Swinson, Sheriff of Fairfax County.

page 50 } 22. In his answer, filed on or about June 3, 1964, to the petition herein, Sheriff Swinson admitted that he had in his possession the sum of $3,466, stated that he had no claim against said sum of money and prayed that he be allowed to pay the same in to the Clerk of this Court, less his proper costs and fees.

23. On August 3, 1964, this Court entered an order granting the motion of the United States for dismissal as a party defendant on the ground of lack of jurisdiction and for leave to intervene herein on the ground that the United States has an interest in the fund which is the subject of this action, is a necessary party to any determination of interests in this fund and will be adversely affected by any disposition of the fund to which it is not a party.

24. The complaint in intervention of the United States was filed with this Court on July 27, 1964, and intervention in this action was authorized and requested by the Commissioner of Internal Revenue and directed by the Attorney General of the United States.

25. In their answer, filed on or about August 21, 1964, to the complaint in intervention, petitioners admitted the making of federal tax assessments against Dixie Dime Stores, Inc., the refusal of the latter to pay these assessments, and the filing of notices of federal tax liens with respect to these assessments as hereinabove detailed. For an affirmative defense, petitioners alleged that the United States has an adequate remedy for collection of these taxes by way of assessment and collection thereof from the officer(s) of Dixie Dime Stores, Inc., who were individually responsible for the payment of withholding and social security taxes to the United States and who wilfully failed to make such payment, pursuant to Sections 6671-6672 of the Internal Revenue Code of 1954, and that the United States should not be permitted to assert any priority with respect to the distraint proceeds of $3,466 before exhausting this remedy. Petitioners moved in their answer to bar the United States from further prosecuting and proving any claim until first making a

page 51 reasonable effort to collect same by making an assessment and attempting to effect collection thereunder against the responsible officers of Dixie Dime Stores, Inc., pursuant to Sections 6671-6672 of the Internal Revenue Code of 1954.

26. On August 21, 1964, petitioners served on the United States a request for admissions that the officer of Dixie Dime Stores, Inc., responsible for collection and payment to the United States of the subject withholding and social security taxes, was Karl M. Dollak and that the District Director of Internal Revenue has made no assessment against him under Sections 6671-6672 of the Internal Revenue Code of 1954 or any attempt to hold him personally liable for such taxes. In its reply to petitioners' request, the United States admitted that Karl M. Dollak has an office address at 910 17th Street, Northwest, Washington, D. C., and resides at 4106 Rosemary, Chevy Chase, Maryland, and was president of Dixie Dime Stores, Inc., when the subject taxes became due and payable, but stated that it neither knows nor admits that Karl M. Dollak was responsible for collection and payment thereof, nor that he was a person who wilfully failed to collect, truthfully account for and pay over such taxes, because that is a fact to be determined ultimately by a court of law in an action to which he is a party. The United States admitted that the Internal Revenue Service has made no penalty assessment against Karl M. Dollak under Sections 6671-6672 of the Internal Revenue Code of 1954 or other-

wise attempted to hold him personally liable for the subject taxes.

27. On September 22, 1964, this Court entered an order granting leave to James D. Swinson, Sheriff of Fairfax County, to pay to Thomas P. Chapman, Jr., Clerk of the Circuit Court of Fairfax County, the sums in his possession of $1,789, less statutory cost and fees of $57.28, and $1,677, less statutory cost and fees of $55.04, for a total of $3,353.68 and upon such payment to be dismissed as a party to this action and relieved of any further claim or liability herein, and directing the Clerk to hold such fund subject to the order of this Court.

page 52 } 28. On March 12, 1965, following oral argument by the parties, this Court entered an order granting petitioners' motion to bar the United States from prosecuting and proving any claim for taxes herein until it demonstrates to the satisfaction of the Court that it has made a reasonable effort to collect such taxes by assessment and collection from a responsible officer of Dixie Dime Stores, Inc., pursuant to Sections 6671-6672 of the Internal Revenue Code of 1954, to which order the United States took exception.

29. On March 26, 1965, the United States moved this Court, pursuant to Rule 3:21 of the Rules of the Supreme Court of Appeals of Virginia, for reconsideration and vacation of its order entered on March 12, 1965, with or without rehearing, on the following grounds: (1) the United States may not be compelled to elect remedies in the collection of taxes due it; (2) petitioners have shown no special equities entitling them to marshalling, to the prejudice of the superior right of the United States to collect its revenues; (3) petitioners have failed to establish their entitlement to marshalling, and (4) a junior lien creditor of the principal debtor cannot compel the senior lien creditor to satisfy his debt from the surety (here an alleged "responsible officer") before resorting to a fund on which he has a lien.

30. On April 27, 1965, following reargument to the Court on April 16, 1965, this Court entered an order denying the motion of the United States for vacation of the Court's order of March 12, 1965, to which final order the United States took exception.

Dated: .....

.....

Judge

I ask for this:
MAC DOUGAL RICE
Assistant United States Attorney

Filed June 24, 1965.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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The "Statement of Facts and Proceedings" attached hereto was delivered to me on June 28, 1965, by Edward E. Young, Deputy Clerk of the Circuit Court of Fairfax County, Virginia, together with the carbon copy of a letter dated June 22, 1965, addressed to Thomas P. Chapman, Jr., Clerk of this Court. It will be noticed that the Statement of Facts and Proceedings is not signed by Carrington Williams, Attorney for the Petitioners, nor does it appear that he was given any written notice of the time and place of tendering such statement to me.

Given under my hand this 30th day of June, 1965.

PAUL E. BROWN
Judge of the Circuit Court of
Fairfax County, Virginia.

Received this 30 day of June.
EDWARD E. YOUNG, Deputy Clerk

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NOTICE OF WITHDRAWAL OF NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

TO THE HONORABLE PAUL BROWN:

Take notice that the United States of America, by its attorney, hereby withdraws the Notice of Appeal and Assign-

ment of Error filed in this action on June 24, 1965, for the reason that the order of the court entered herein on April 27, 1965, was interlocutory and not a final, appealable judgment within the purview of Rule 1:9 of the Virginia Rules of Court.

UNITED STATES OF AMERICA
By: MAC DOUGAL RICE
Assistant United States Attorney

Filed Aug. 23, 1965.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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ORDER OF DISTRIBUTION

* * * * *

This day came the parties hereto, by counsel;

And it appearing to the Court that by order entered herein on April 27, 1965, this Court did order that the United States of America, Defendant and Plaintiff in Intervention, be forever barred from prosecuting its claim for taxes in this proceeding until it should make reasonable effort to make an assessment against and collect from the responsible officer of Dixie Dime Stores, Inc., the taxes it claims herein, pursuant to the provisions of Section 6671-6672 of the Internal Revenue Code of 1954, as amended; but that the United States of America has made no effort to and declines to make an assessment against the responsible officer of Dixie Dime Stores, Inc., pursuant to the aforesaid or other provisions of the Internal Revenue Code;

It is, therefore, ADJUDGED, ORDERED AND DECREED that Thomas P. Chapman, Jr., Clerk of this Court, shall distribute to the Plaintiffs the balance remaining in his hands of the proceeds of the Sheriff's Sale paid to
page 60 } him by James D. Swinson, Sheriff of Fairfax County, in the amount of $3,353.68.

THIS ORDER IS FINAL.

ENTER this 12th day of August, 1966.

PAUL E. BROWN, Judge

WE ASK FOR THIS:
CARRINGTON WILLIAMS
Bauknight, Prichard, McCandlish & Williams
3976 Chain Bridge Road
Fairfax, Virginia
Counsel for Plaintiffs

SEEN AND OBJECTED TO:
STEFAN C. LONG
Assistant United States Attorney
Post Office Building
Alexandria, Virginia
Counsel for United States of America

* * * * *

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

TO THE HONORABLE PAUL BROWN:

Take notice that the United States of America, by its attorney, notes an appeal from the final order of the Court entered herein on August 12, 1966, and sets forth its assignment of error as follows:

The Court erred in ordering distribution to the plaintiffs of the fund ($3,353.68) in the possession of the Clerk of this Court resulting from the proceeds of a sheriff's sale. The Court based its order on a finding that the United States had refused to proceed with collection activity against a responsible officer of the taxpayer, Dixie Dime Stores, Inc., pursuant to a previous interlocutory order of this Court which barred the United States from prosecuting and proving any claim for taxes in this action until the United States first demonstrated to the satisfaction of the Court that it had made a reasonable effort to collect such taxes from a re-

sponsible officer of the taxpayer in accordance with Sections 6671 and 6672 of the Internal Revenue Code of 1954.

UNITED STATES OF AMERICA
By: STEFAN C. LONG
Assistant United States Attorney

Filed Sep. 1, 1966.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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MOTION TO DISMISS APPEAL

* * * * *

Now come the petitioners, T. Eugene Smith and Burch Millsap, Trustees for Jefferson Manor Venture, a partnership, and respectfully move this Honorable Court that, pursuant to Sections 8-462 and 8-463, Code of Virginia of 1950, as amended, and Rule 5:1, §4, the Notice of Appeal and Assignment of Error filed herein by the Appellant, United States of America, and other steps now or hereafter taken to perfect the appeal, be dismissed as not having been filed within sixty (60) days from entry of final judgment herein. In support of this Motion petitioners would show to the Court that a final order herein was entered by the Circuit Court of Fairfax County on March 12, 1965; that Appellant filed a Notice of Appeal and Assignment of Error therefrom on June 24, 1965, and thereafter withdrew the same on August 23, 1965; that Appellant in its Statement of Facts and Proceedings relating to Final Order entered herein, filed June 24, 1965 (Record, page 46), and in the Notice of Appellant's Designation of Contents of Record on Appeal filed August 2, 1965, Appellant treated the Order of the lower court filed March 12, 1965 as a final and appealable

page 68 } Order; and the same was treated by the Clerk of the lower Court as a final Order.

WHEREFORE, Appellees pray that the Notice of Appeal and Assignment of Error, the Notice of Appellant's Designa-

tion of Contents of Record on Appeal, and any other steps now or hereafter taken to perfect the appeal be dismissed, pursuant to Sections 8-462 and 8-463 of the Virginia Code of 1950, as amended, and Rule 5:1 of the Supreme Court of Appeals of Virginia.

T. EUGENE SMITH and
BURCH MILLSAP, TRUSTEES
for Jefferson Manor Venture, a
partnership
By Counsel

BAUKNIGHT, PRICHARD, McCANDLISH
& WILLIAMS
By CARRINGTON WILLIAMS
3976 Chain Bridge Road
Fairfax, Virginia

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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