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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Price Fixing-Copper and Brass Tube and Pipe; Complaint Under Section I. United States v. Anaconda American Brass Company, et al. (D. Conn.) On December 4, 1962 a civil action was filed charging 11 corporate defendants with engaging in an unlawful combination and conspiracy, beginning at least as early as 1956 and continuing thereafter up to and including the date or the filing of the complaint, to fix and stabilize prices in the sale of copper and brass tube and pipe throughout the United States and to submit non-competitive sealed bids to TVA, all in violation of Section 1 of the Sherman Act.

The defendant corporations Anaconda American Brass Co.; Phelps Dodge Copper Products Corp.; Chase Brass & Copper Co. Inc.; Revere Copper & Brass Inc.; Cerro Corp.; National Distillers & Chemical Corp.; Scoville Mfg. Co.; Calumet & Hecla, Inc.; Mueller Brass Co.; Triangle Conduit & Cable Co. Inc. and Progress Mfg. Co., Inc. were charged with engaging in the said conspiracy among themselves and among certain co-conspirators, and various firms and persons including the Lewin-Mathes Co., Reading Tube Corp. and Bridgeport Brass Co. The combined sales of the defendants and the co-conspirators averaged $360,000,000 annually during the period 1956 through 1960 and constituted approximately 90% of all brass mill tube and pipe sales by domestic manufacturers throughout the United States during the said period.

This complaint is essentially a companion case to a criminal indictment returned on September 12, 1962 against 11 corporate defendants and seven individuals for artificially fixing prices at non-competitive levels and of having deprived the TVA, municipalities and public utilities of the benefits of free and open competition. In this complaint the Court was asked to adjudge defendant's conduct to be in violation of Section I of the Sherman Act; to enjoin them from continuing their conspiracy or from entering into a new and similar conspiracy in the future; to order each of them to withdraw their presently effective price lists; to review their terms and conditions of sale on the basis of individual cost figures and profit judgments; to adopt new prices, terms and conditions of sale on the basis of such independent review; to require defendants, for a period of five years, to certify that any price changes were independently arrived at and not a result of any agreement or understanding with a competitor; and, with regard to all sealed bids or quotations on brass mill products submitted to TVA, public utilities, agencies of federal, state or municipal governments, to require a written certification by each of the defendants that said bid or quotation was not the result of any agreement or understanding between the defendants and any of its competitors.

Finally, the Court was asked to have defendants maintain a record of all meetings attended by any of its officers, directors or employees having managerial or supervisory authority in connection with the sale or pricing of brass mill products and similar representatives of any two or more of its competitors and that said records include the dates and places of meetings, the names of all persons in attendance and a list of all the topics discussed.

Staff: John J. Galgay, Donald Ferguson, Edwin Weiss, Ralph S. Goodman, Ronald E. Sommer, and Bernard Mindich (Antitrust Division)

Court Rules for Government on Question of Primary Jurisdiction. United States v. North American Van Lines, Inc., et al. (S. D. Ind.) On December 5, 1962 the Court entered an order overruling defendants' motion to dismiss the indictment on the grounds of primary jurisdiction. Oral argument was had on October 18, 1962 at which time defendants contended that the matters charged in the indictment should be heard primarily by the Interstate Commerce Commission and the Federal Maritime Board in order that those bodies could determine whether or not any or all of the matters charged were within their jurisdiction rather than the Court's. The defendants made reference to each separate means as separate matters to substantiate their position.

The Government contended, first, that the charge in the indictment was a conspiracy to suppress competition composed of a number of means and such a conspiracy should not be dismembered or attention focused on single episodes to the exclusion of the overall conspiracy; secondly, that even if the Commission or Board could immunize from antitrust prosecution any or all of the means, it is fundamental that legal means may be utilized to accomplish the unlawful objective of conspiracy; and thirdly, tended that neither agency had jurisdiction over a criminal conspiracy as charged in the indictment.

Staff: Willard R. Memler and James F. Buckley (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

COURT OF APPEALS

BANKING

Comptroller of the Currency Order Approving Establishment of Branch Bank Upheld. Community National Bank of Pontiac v. Saxon (C.A. 6, November 26, 1962). On May 12,1959 defendant-appellee, Manufacturers National Bank of Detroit, applied to the Comptroller of the Currency of the United States for permission to establish a branch office in an unincorporated area in Bloomfield Township, Oakland County, Michigan, about 1.18 square miles in size, with about 292 homes, 990 residents, 16 business establishments, a railroad station, and an office building with 60 tenants. After conducting the usual investigation concerning the legality and necessity of the branch, the Comptroller approved the application and the branch bank was opened. The Community National Bank of Pontiac, Michigan, with a branch office in the city of Bloomfield Hills at a location approximately two miles from the newly approved branch of the Manufacturers Bank, filed suit against the Manufacturers Bank and the Comptroller, alleging that the Comptroller's approval and the establishment and operation of the new branch bank were in violation of the National Bank Act and praying for mandatory and injunctive relief.

Under the provisions of the National Bank Act (12 U.S.C. 36), a national banking association may, with the approval of the Comptroller, establish and operate branches only at such places within the state in which the bank is located as are expressly authorized for state banks by the law of the State in question. The law of Michigan (17 M.S.A. 23.762) limits establishment of a branch bank to a location within a village or city. Appellant contended that the site of the newly approved branch was not within a "village" as the term is used in the Michigan statute.

After an extensive trial, including testimony on whether the area was a "village" under Michigan law and whether the Comptroller had acted in accordance with law, the district court dismissed the action. The court of appeals affirmed. It held that the Comptroller's finding that the area in question is a village was essentially a finding of fact; that it was reasonable, based on substantial grounds and not arbitrary, capricious or otherwise unlawful; and that the district court's finding that the Comptroller's decision was in accordance with law was amply supported by the evidence and could not be overturned, under the limited scope of review afforded by the Administrative Procedure Act.

Staff: Pauline B. Heller (Civil Division)

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56, Summary Judgment Not Appropriate When Conflicting Inferences May Be Drawn from Undisputed Facts. Empire Electronics v. United States

(C.A. 2, November 23, 1962). This action against the United States was brought by the manufacturer of material alleged to have been converted. Affidavits were submitted by the parties and both moved for summary judgment, stipulating that there was no genuine dispute as to any material fact. Summary judgment was then granted the Government. The court of appeals reversed, holding that the case was inappropriate for summary judgment.

Although the actual facts in the litigation were not in dispute, the court found that conflicting inferences on the crucial question of intention to pass title were permissible; in such posture, the issue must be submitted to the trier of fact. The court, therefore, reversed, ruling that in such circumstances judgment pursuant to Rule 56(c) was impermissible.

Staff: Assistant United States Attorney Peter H. Ruvulo (E.D. N.Y.)

JUDICIAL CODE

Wrongful Death Action Not Transferable to Federal District Court Located in State Requiring Ancillary Appointment of Personal Representative, Since Transfer Would Not Be to Forum Wherein the Action "Might Have Been Brought" Within the Meaning of 28 U.S.C. 1404(a). Barrack v. Van Dusen (C.A. 3, October 2, 1962). Petitioners commenced these wrongful death and personal injury actions, arising out of the crash of an Eastern Air Lines Electra airplane into Boston Harbor, in the District Court for the Eastern District of Pennsylvania. Upon motion of the defendants (Eastern Air Lines, General Motors, Lockheed Aircraft Corporation, and the United States) under 28 U.S.C. 1404(a), the cases were ordered transferred to the District of Massachusetts, where the majority of the cases arising out of the same crash were pending. On petitions for writs of mandamus or prohibition, the Third Circuit, relying on Hoffman v. Blaski, 363 U.S. 335, vacated the transfer orders. The court held that since Massachusetts required the ancillary appointment of the Pennsylvania personal representatives as a condition to the maintenance of suit, plaintiffs in the wrongful death actions could not have brought an action in Massachusetts as a matter of right, and that, therefore, the transferee forum was not one wherein these actions "might have been brought," within the meaning of 28 U.S.C. 1404(a).

Staff: Morton Hollander (Civil Division)

JURISDICTION

Federal Court Without Jurisdiction Over Suit Challenging Proposed Urban Renewal Program. Harrison-Halsted Community Group, Inc. v. Housing and Home Finance Agency (C.A. 7, November 28, 1962). Plaintiffs, a non-profit community organization and individuals, brought this suit seeking declaratory and injunctive relief to prevent the defendants, the HHFA, the University of Illinois, and city and state agencies from proceeding with an urban renewal plan in the City of Chicago. Plaintiffs alleged that this plan was a change from an earlier plan on which they, as

property owners in and around the area in question had relied. This change, it was alleged, would cause economic injury. The district court's dismissal of the suit was affirmed.

The court of appeals held that (1) the plaintiffs had no standing to sue, for the allegations of economic injury did not create standing and a legislature and not a court is the correct forum for a discussion of the relative merits of the programs here involved; (2) there was no right to review of these programs under the Federal Housing Act of 1949, and (3) the Administrative Procedure Act was not, because of the absence of a "legal wrong," a sufficient basis for jurisdiction and (4) in so far as the HHFA was concerned, this was an unconsented suit against the United States.

Staff: United States Attorney James P. O'Brien (N.D. Ill.)

LIMITATIONS

Suit by United States To Recover Overpayment Not Barred by Laches; 31 U.S.C. 122, 129 Not Applicable. Thompson v. United States (C.A. 10, October 21, 1962). This suit was brought by the United States to recover overpayments made to defendant when the United States neglected to deduct the amount of an allotment from his pay. The allotment was found to have been paid by the United States to defendant's mother without making appropriate deductions from his pay. The judgment of the district court in favor of the United States was affirmed. The court of appeals held that (1) the limitations periods provided by 31 U.S.C. 122, 129 did not apply to this action; (2) laches was not available as a defense against the United States in these circumstances, and (3) defendant's motion for summary judgment was properly denied, notwithstanding the Government's failure precisely to allege payment to the mother, since the district court, in considering whether there are issues of fact which preclude summary judgment, is not limited in its inquiry to the precise allegations of the pleadings.

Staff: United States Attorney Newell A. George and Assistant United States Attorney Elmer Hoge (D. Kan.)

DISTRICT COURT

BANKING

Plaintiffs Permitted To Take Oral Deposition of Comptroller of the Currency. The Union Savings Bank of Patchogue, New York v. James J. Saxon (D. D.C., November 27, 1962). The plaintiff banks seek declaratory and injunctive relief against the Comptroller of the Currency, resulting from his permission to a national bank (12 U.S.C. 36) to establish a branch office near the village in which plaintiffs do business. Such permission is alleged to have been based on "ex parte representations" and on a "personal relationship" between the applicant bank's president and the Comptroller. The Comptroller's action is further alleged to have been illegal and in violation of his own regulations. When plaintiffs

sought to take the oral deposition of the Comptroller, the Government moved for a protective order under Rule 30(b), F.R.C.P. In denying this motion, the court by memorandum opinion indicated that it "does not encourage the procedure of taking the oral deposition of the head of an agency of the United States Government, and under normal circumstances would not allow such procedure," but in the present case "actions personal to the Defendant and in violation of the United States Code" are alleged. Accordingly, the deposition was permitted, "limited to the procedural action taken by the Defendant as to the subject matter of this case, and not the workings of his (Saxon's) mind." On the Government's subsequent motion for rehearing and redetermination, the court adhered to its original ruling without further opinion.

Staff: Paul J. Grumbly and David V. Seaman (Civil Division)

State Statute Purporting To Forbid Opening of New National Bank Upheld. Bank of New Orleans and Trust Co. v. James J. Saxon (D. D.C., December 5, 1962). Plaintiff State banks sued to prevent the Comptroller of the Currency from chartering a new national bank for a location near the City of New Orleans. The management of an existing New Orleans national bank had created and controlled the new bank through a bank holding company, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841), and plaintiffs contended that this control made the new bank in effect a "branch," illegal under 12 U.S.C. 36. After commencement of the suit, the Louisiana legislature passed a law purporting to forbid the opening for business of any bank subsidiary of a holding company. On cross motions for summary judgment, Judge McLaughlin ruled for plaintiffs and enjoined chartering of the new bank, holding that the Louisiana statute (a) directly prevented the bank from opening, (b) was constitutional as so interpreted, and (c) was contemplated and permitted by the Bank Holding Company Act of 1956. He found it unnecessary to decide whether the new bank constituted a "branch."

Staff: Paul J. Grumbly and David V. Seaman (Civil Division)

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

In Suit by Secretary of Labor To Set Aside Union Elections Defendant Not Entitled to Jury Trial. Wirtz v. District Council No. 21, Brotherhood of Painters, Decorators and Paperhangers of America (E.D. Pa., November 27, 1962). The Secretary of Labor brought suit under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 to set aside an election conducted by defendant union. Defendant, relying on the Seventh Amendment and Rule 38 of the Federal Rules of Civil Procedure, made a demand for a jury trial. The Government's motion to strike this demand was granted.

The court held that the basic relief prayed for in this action (i.e., an order setting aside an election, enjoining defendant's officers from transferring or disposing of the union's assets, and ordering a new election under the supervision of the plaintiff) was injunctive in nature. Moreover, since neither at common law nor at present was the action of

quo warranto available to challenge an election of officers in an unincorporated association, the court reasoned that relief in such cases, if there was to be any, must be supported by an equitable claim. Hence, since, under either view, an equitable remedy is involved, the Seventh Amendment does not grant a jury trial. Since Rule 38 is merely a reaffirmation of the Seventh Amendment right it, too, was held to be inapplicable. Finally, it was held that the LMRDA itself granted no jury right.

Staff: United States Attorney Drew J. T. O'Keefe and Assistant United States Attorney Edward F. Kane; Chalres Donnenfeld (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections; Civil Rights Act of 1957. United States v. Neely B. Mayton, et al. (S.D. Ala.). This action filed on August 27, 1962, charged the defendants with racially discriminatory acts and practices in conducting registration for voting in Perry County, Alabama.

After a hearing on the government's motion for a preliminary injunction on October 26, 1962, the Court on November 15, 1962, issued a temporary injunction enjoining the defendants from engaging in any act or practice which involves or results in racial distinctions in the registration of voters in Perry County, Alabama. The Court ordered the defendants to register all applicants who met the specific qualifications set forth in the Order and required the Board of Registrars to process all applications within a reasonable time, notify the applicants of the action taken by the Board on their applications and permit rejected applicants to reapply after a 60 day waiting period.

Staff: United States Attorney Vernol R. Jansen, Jr.;
David L. Norman, Arvid A. Sather, (Civil Rights Division)

Voting and Elections; Civil Rights Act of 1957. United States v. George Penton, et al. (M.D. Ala.). The complaint, filed on August 3, 1961, alleged that the defendant Board members and their predecessors have engaged in racially discriminatory acts and practices in conducting registration for voting in Montgomery County, Alabama.

The case was tried before Judge Frank M. Johnson, Jr. in Montgomery, Alabama in January, 1962. The Court further enjoined the defendants from using different and more stringent qualification requirements in the future than had been applied to white registrants since January 1, 1956, and also required the defendants to submit periodic reports in writing to the Court, setting forth the names and races of the persons applying for registration, the action taken by the Board of Registrars on the applications, and if rejected, the specific reason for such rejection. The Court found that Negro applicants in Montgomery County, Alabama have been denied registration because of the racially discriminatory conduct of the registrars and that the deprivations were pursuant to a pattern and practice of racial discrimination. The injunction, issued by the Court on November 20, 1962, restrains the defendants from engaging in any act or practice which involves or results in distinction based on race in the registration for voting and voting processes.

Staff: United States Attorney Ben Hardeman; John Doar,
David L. Norman, Arvid A. Sather, Gerald Stern,
(Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

COINS AND CURRENCY

Fraudulent Alteration (18 U.S.C. 331). The question has recently arisen as to whether the alteration of the mint mark or date on a genuine United States coin, with intent to defraud coin collectors, constitutes a violation of 18 U.S.C. 331. The General Counsel of the Treasury Department rendered an opinion in 1956 that such alteration is not within the ambit of the statute, and instructions to Secret Service agents in the field based thereon are still in effect. This Department has recently reviewed the Treasury opinion, and concurs in its conclusions.

It is our conclusion, based on the legislative history, that Congress intended the statute to protect only against fraudulent alterations of coins that affect their intrinsic value as mediums of exchange, and thus their integrity as money. There is no indication that Congress intended to protect against fraudulent alteration of a coin's extrinsic and entirely incidental value as a collector's item that has no effect on its money function. The latter fraud is one against which protection must be sought from the police powers of the various states, and not from the more limited delegated powers of the Federal Government. It is suggested, therefore, that if cases arise involving the alteration of coins to defraud collectors, the matter be referred to the appropriate state or local officials for possible state action.

APPEAL

In Forma Pauperis Appeal; Entitlement to Transcript at Government Expense. Julius Ingram v. United States (C.A. D.C., December 6, 1962, Misc. No. 1797). Petitioner filed a petition for leave to prosecute an appeal in forma pauperis complaining in an inartful way of his conviction. Counsel were then appointed. Rather than adopting the claims of error advanced by their client, counsel argued that they were unable to allege error inasmuch as they had not been provided with a complete transcript; that such a transcript was necessary to conduct a search for error and that they were entitled to it as a matter of due process.

The Court turned to the decision in Coppedge v. United States, 369 U.S. 438 (1962), in which the Supreme Court said: "If . . . the claims made or the issues sought to be raised by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application, the Court of Appeals must provide the would-be appellant with both the assistance of counsel and a record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate of lack of 'good faith' is in error and that leave to proceed with the appeal in forma pauperis should be allowed. . ."

The Court of Appeals held that Coppedge does not mean that a complete transcript must be prepared in every case. On the contrary, in order to obtain even a partial transcript some showing of error, if only vague and conclusory, must be made.

The Court devised the following implementing procedure under Coppedge: When a pro se petition is filed, upon direct appeal from a judgment of conviction, and the claims of error are so conclusory in nature that "their substance cannot adequately be ascertained," counsel will be appointed and simultaneously, the portion of the transcript of proceedings which relates to the conclusory allegations will be ordered so that appointed counsel may determine their merit.

The Court also held that under the due process clause, a superficial showing of some investigation, unaccompanied by even a hint that some error had been discovered, is insufficient to warrant preparation of a complete transcript at Government expense. The Court thus denied appellant's motion, but without prejudice since the views expressed in the opinion relating to Coppedge were stated for the first time. The dissent objected on the ground that since appellant alleged error in his pro se petition, he was entitled to the portion of the transcript relating to those claims of error. Although appellant filed his petition prior to Coppedge, the dissent did not think this should alter his right to a transcript.

Staff: United States Attorney David C. Acheson; Assistamt United States Attorneys Nathan J. Paulson and Anthony G. Amsterdam (Dist. Col.).

INDICTMENT

Some Incompetent Evidence before Grand Jury Does Not Vitiate Indictment if Sufficient Competent Evidence Available. Mark Coppedge, Jr. v. United States (C.A. Dist. Col., November 15, 1962). The Court of Appeals held, inter alia, that the perjurious testimony of a witness before a grand jury does not vitiate an indictment, if there is sufficient competent evidence which supports the indictment. The Court relied on Lawn v. United States, 355 U.S. 339, 349 (1958), in which the Supreme Court stated that "/A/n indictment returned by a legally constituted non-biased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment."

The Court concluded that it is enough if there is some competent evidence to sustain the charge issued by the grand jury even though other evidence before it is incompetent or irrelevant in an evidentiary sense or even false. (Court's emphasis.) The Court observed that the sound basis of this doctrine is vividly illustrated in this case by the fact that in two trials, with the higher standards of proof called for in a criminal case, and where witnesses were subject to cross-examination and confrontation, juries believed appellant's guilt beyond reasonable doubt without hearing testimony from Thompkins, the alleged prejurer. (Court's emphasis.)

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Arnold T. Aikens and Nathan J. Paulson (Dist. Col.).

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Unauthorized Refills of Prescriptions; Affirmance of conviction of Pharmacist for Illegal Dispensing of Drugs. Walter T. Marks v. United States (C.A. 5). The Court of Appeals on November 23, 1962 affirmed the conviction of Walter T. Marks, the owner of a drug store, for violations of the Act resulting from refilling prescriptions without the authorization of the prescribing physicians as required by 21 U.S.C. 353(b)(1), which resulted in the misbranding of the drugs. Defendant was sentenced to serve two years' imprisonment. In affirming the conviction, the Court concluded that the drugs in question were either "new drugs" or dangerous drugs, respectively, as charged; that the evidence was sufficient to justify the conviction; and that the tracing, identification, and connection of the drugs to the defendant was satisfactorily established by the Government. The Court noted that while the Government could have, and possibly should have, read into the record the numbers and identifying marks on the several exhibits (the drugs purchased from defendant by the FDA inspectors), it was not necessary and there was no error in the failure to do so. The exhibits constituting the drugs that formed the bases of the several counts were properly and sufficiently identified, traced from the manufacturer in Pennsylvania, and connected to the defendant in Atlanta, Georgia by FDA chemists' analyses and testimony. It may be noted that the drugs involved in the matter were amphetamine sulphate and meprobomate tablets (Equanil or Miltown).

Staff: United States Attorney Charles L. Goodson; Assistant United States Attorney Bobby C. Milam (N.D. Ga.).

RAILWAY SAFETY APPLIANCE ACT

Distinction between Train Movements and Switching Operations; Visual Inspection of Brakes. Carbon County Railway Co. v. United States (C.A. 10). The Court of Appeals for the Tenth Circuit recently affirmed the judgment for the Government based on a complaint charging that defendant had operated railroad trains in violation of 45 U.S.C. 1-10, specifically the Power or Train Brakes Safety Appliance Act of 1958 (amending 45 U.S.C. 9), and a regulation of the ICC, in that the trains were operated when the power-brakes on each car had not been inspected and tested as required by the statute and regulations. The District Court (Utah) held that the Court of Appeals agreed that the movements in question were train operations even though the railroad is only eleven miles in length, crosses practically uninhabited desert country, crosses but one public highway, and has no appreciable grades or curves. Also, the defendant operates only one train at a particular time and no foreign carrier operates over the tracks. Defendant assembles and moves cars loaded with coal from mines to an interchange yard where they are received by another railroad for further transfer; defendant also receives and delivers back to the mines empty coal cars and miscellaneous loads. The Court held that the applicable regulation requires that the brake system be set up and then visually inspected to determine that the brakes are applied on each car before the train is moved and that a failure to actually inspect is a violation, notwithstanding defendant's safety record or other extrinsic considerations.

Staff: United States Attorney William T. Thurman (D. Utah).

NATIONAL STOLEN PROPERTY ACT

Checkwriter as a Thing Used in Forging and Falsely Making Securities. United States v. Ashba, et al. (E.D. Wis., October 17, 1962). Money orders and other securities are often stolen in blank and filled in with the use of a checkwriter or a check-protector, which frequently is also stolen and is carried interstate by those using it to prepare bogus securities. The Department has been asked several times recently by U.S. Attorneys whether such a checkwriter may be considered a "thing" used in forging such securities, interstate transportation of which may come within the purview of paragraph four of 18 U.S.C. 2314.

Although in this case the defendant (convicted by a jury on a conspiracy count) was acquitted on a count charging interstate transportation of a checkwriter, the District Court's charge to the jury on this aspect is worthy of note: "I instruct you that if you believe that the checkwriter was transported from Chicago to Milwaukee, such transportation would constitute transportation in interstate commerce. I further instruct you that, while a checkwriter is a normal instrument of business, it is, when used in the preparation of forged or falsely made securities, a thing used in forging and falsely making securities within the meaning of Section 2314."

The Department's position consistently has been that a checkwriter like the instant one which merely imprints the amount of a check, and is not equipped with a signature plate, is analogous to a typewriter or pen and may not logically be construed as a "tool" in the light of prior construction given the words "tool, implement, or thing" in Section 2314, unless some word, symbol or sign evidencing authenticity is also imprinted on the check by the machine. The Department has felt that such a machine equipped with a signature plate which prints on a security both the amount and the payor's signature would be analogous to a charge plate used to imprint information on a sales slip, in line with the rationale of United States v. Fordyce (D.C., 1961), 192 F. Supp. 93.) Thus, the Court's instruction goes beyond the position the Department has previously taken.

Therefore, while the Court's instant charge to the jury may be an aid to the Government in similar prosecutions, the Department would caution against relying entirely upon it as regards "thing" used in forging securities.

Staff: United States Attorney James B. Brennan; Assistant United States Attorneys Louis W. Staudenmaier, Jr., and William J. Mulligan (E.D. Wis.).

FORFEITURES

Motion for Summary Judgment on Ground of Prior Acquittal in Criminal Action Denied in Forfeiture Action. United States v. One 1961 Ford Galaxie 2-Door, 8 Cylinder Automobile (N.D. Ga., November 15, 1962). The claimant in the forfeiture proceeding had been previously indicted for wilfully and knowingly passing, uttering and publishing two counterfeit Twenty Dollar

Federal Reserve Notes, and had been acquitted on said charge. Relying on Coffey v. United States, 116 U.S. 436 (1886), claimant contended that the verdict of not guilty in the criminal action estopped the Government from proceeding on the libel on the ground that it was based on the same acts as those which the Government attempted to prove in the criminal action. In the Coffey case, supra at 443, the Supreme Court stated that "where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit in rem by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit in rem."

The Court, in denying the claimant's motion for summary judgment in the instant case, relied on United States v. Burch, 294 F. 2d 1 (C.A. 5, 1961), which held that the acquittal of the charge of conspiring to violate the Internal Revenue laws by manufacturing, possessing, and selling illicit whiskey for lack of evidence did not bar a subsequent action for forfeiture of sugar allegedly possessed by defendant for use in the manufacture of illicit whiskey. The Court in Burch stated that the Coffey case may be assumed to have continued vitality as a precedent, but that since the disposition of the forfeiture action would not require the relitigation of specific fact issues which had already been judicially determined in the criminal action, the forfeiture action was not barred.

The criminal indictment brought against the claimant in the instant case alleged that he had wilfully and knowingly passed, uttered and published two counterfeit Twenty Dollar Federal Reserve Notes. The libel of information stated that the automobile involved was used by the claimant to transport, carry, convey, and possess, and to facilitate the transportation, carriage, possession and passing of a counterfeit Twenty Dollar Federal Reserve Note. The Court stated that uttering or publishing a check consists in presenting it for payment, and that a considerable difference exists between transporting, carrying, conveying and possessing a counterfeit note on the one hand, and the uttering and publishing of it on the other. Since it had not been previously determined whether or not the automobile was used to convey the counterfeit note, the Government was not collaterally estopped from proceeding with the forfeiture action.

Staff: United States Attorney Charles L. Goodson; Assistant United States Attorney Burton Brown (N.D. Ga.).

IMMUNITY

Use of FCC Immunity. Marcus v. United States (C.A. 3, November 28, 1962). As a result of the decision of the Court of Appeals for the Third Circuit upholding the contempt conviction of Arthur Marcus for refusal to give compelled testimony, it is suggested that consideration be given to the procedures used in establishing a "record" for presentation to the court when requesting that a witness be immunized under 47 U.S.C. 409(1).

In the Marcus matter the appellant attacked the grant of immunity by contending that the Grand Jury proceeding was not a "proceeding" within the meaning of 409(1). The pertinent language is:

> . . .in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter. . .

Appellant urged that the grand jury investigation was primarily one involving 18 U.S.C. 1084, not the FCC Act, stating "no indication appears in the record concerning their (the questions asked) relevance and relationship to a particular federal law."

The record presented to the court for its consideration as to whether this was a proceeding within the purview of the FCC Act consisted solely of the questions asked of the witness and his invocation of the Fifth Amendment, Government counsel's letter of Grand Jury Authority specifically stating "the Federal Communications Act" and the verbal statement to the court as to the scope of the Grand Jury's investigation.

The Government's approach was that if the witness involved was the first witness called to testify, this would be the total record. Appellant moved to gain a copy of the previous Grand Jury minutes, but the court denied the motion. A series of questions were asked of the witness concerning his use of wire communication facilities for personal or business needs, names and locations of persons contacted, locations of phones called, and the purpose for the calls made. The questions were designed to cover the broad scope of the inquiry into gambling and the use of wire communication facilities in furtherance of gambling enterprises, and also covered the subject of the witness' sources of income as stated in the tax returns. The Court of Appeals considered the questions asked as dispositive of the scope of the inquiry into possible FCC violations as well as possible violations of other pertinent statutes.

The use of FCC immunity in racketeering probes can be of significant value when used in carefully selected situations, particularly those involving 1084 and 1952 allegations. It is suggested that all situations involving conspiracies to commit Federal offenses would be subject to the use of the FCC immunity provision, where telephones are the means of communication.

EVIDENCE

Evidence of Extrajudicial Statements of Accomplice Incompetent to Stand Trial Held Admissible. Robinson v. United States (C.A. D.C. decided August 30, 1962). The grand jury returned a three-count indictment against the appellant and one Berlene Waters charging robbery, felony murder and murder respectively. Berlene Waters was found incompetent to stand trial during a pretrial psychiatric examination. At the close of the Government's case, counts charging robbery and felony murder were dismissed by the trial court. Appellant was then found guilty of second degree murder by the jury.

Appellant was arrested during the early morning hours two days after the crime in question. Later, at 10:15 a.m., he was presented before the United

States Commissioner who fully advised the appellant of the charges and of his constitutional rights. Later that same day, about 1:00 p.m., the police appeared with Berlene Waters, appellant's accomplice, at the Marshal's cellblock, and in the presence of the appellant, Waters related her version of the killing, and accused the appellant of the crime. During her narrative, appellant several times interrupted stating she was trying to put all the blame on him and that she was as guilty as he. Appellant then related his version of the killing, asserting that Waters urged him to rob the victim and that the pistol accidentally fired. This colloquy between the appellant and Waters took place in the presence of the Deputy Marshal. Subsequently, the appellant signed a statement of his version of the crime.

At the trial appellant, testifying on his own behalf, insisted he never had owned a gun, denied the shooting, and repudiated the confession, asserting it was not his. The trial court admitted into evidence his confession as well as the testimony of the Deputy Marshal relative to the colloquy between appellant and Waters. Also received into evidence was the testimony of one Mitchell, who, being in the vicinity of the crime, was told by Waters shortly after the shooting that "Freddie (appellant) shot a man."

Appellant asserted on appeal that since Berlene Waters was found incompetent to stand trial, the court could not, on that account, receive evidence of what she said either to Mitchell at the time of the crime or to the appellant in the cellblock. The Court of Appeals refuted this contention stating: "Indeed, insane people have been held to be competent witnesses at trial." (Slip opinion, p. 10, n. 12.)

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Daniel A. Rezneck and Victor W. Caputy (Dist. Col.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

Deportation Order for Frank Costello Upheld; Frank Costello v. INS (C.A. 2, December 4, 1962.) This case involves the notorious Frank Costello, a native of Italy, who entered the United States in 1895 and became a naturalized citizen in 1925. He was convicted in 1954 on two counts of an indictment charging income tax evasion for the years 1948 and 1949. Because he fraudulently concealed his bootlegging operations from the naturalization court in 1925, Costello's naturalization was cancelled through litigation finally determined by the Supreme Court on December 12, 1960.

Deportation proceedings were instituted in 1961 against Costello and he was administratively ordered deported on the ground that his two income tax convictions involved moral turpitude and did not arise from a single scheme of criminal misconduct. Costello by this action, under section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a, challenged the validity of the deportation on the grounds: (1) that the deportation statute was not intended to apply to a person of naturalized status at the time of conviction; (2) that the Government failed to establish that the crimes did not arise out of a single scheme of criminal misconduct; (3) that the crimes did not involve moral turpitude; and (4) that prejudicial error resulted when the deportation hearing officer refused to issue a subpoena to the lawyer who represented Costello at the criminal trial for tax evasion, and who allegedly would have testified that the convictions did arise out of a single scheme of criminal misconduct.

The Second Circuit found no merit in Costello's action. As to his contention that his citizenship status at the time of conviction precluded his deportation, the Court found that Congress could not have intended to provide for the deportation of an alien, convicted of two crimes involving moral turpitude, who had never been naturalized, but to prohibit the deportation of an alien who had not only been convicted of two crimes involving moral turpitude, but had in addition fraudulently secured a certificate of citizenship.

With respect to Costello's argument that the crimes arose from a single scheme of criminal misconduct, the Court concluded that it was unreasonable to suppose that the Congress intended to grant immunity from deportation to those who over a period of time pursued a course of criminal conduct involving numerous, successive, separate crimes, consummated at different times but in the same manner, or with

the same associates or even by the use of the same fraudulent devices, disguises, tools or weapons.

Upon the basis of the decision of the Supreme Court in Jordan v. DeGeorge, 341 U.S. 223, the Court rejected Costello's contention that the crime of income tax evasion does not involve moral turpitude. On this point the Court commented:

> An alien who is permitted to enter this country and to enjoy the blessings of freedom under the Constitution and laws of the United States, and who wilfully evades or attempts to evade the payment of his fair share of the taxes needed to support our Government is surely engaged in conduct involving moral turpitude.

The Court found no difficulty in answering Costello's final argument that the hearing officer erred in refusing to subpoena the attorney who represented Costello in his criminal trials for income tax evasion. The Court found that the testimony the attorney allegedly would give concerning whether the offenses arose from a single scheme would have been completely devoid of probative force.

Staff: United States Attorney Vincent L. Broderick; Special Assistant United States Attorney Roy Babitt (S.D.N.Y.)

Interpretation of Sheepherders Act of 1954. Pietro Giammario v. L. W. Hurney (C.A. 3, December 6, 1962.) The Third Circuit passed on a novel issue in this action which was brought to test the validity of a deportation order. Petitioner, prior to entry, had been convicted in Australia for larceny of sixty pounds and was administratively found deportable on the basis of such conviction. Petitioner contended that notwithstanding his conviction he was not deportable because the Sheepherders Act (8 U.S.C. 1182(a) (1958 Ed)) permitted the entry of an alien who was excludable for conviction of a misdemeanor classifiable as a petty offense under the provisions of 18 U.S.C. 1 (3) by reason of the punishment actually imposed.

The question presented was whether the Attorney General, in determining that the Australian offense was not a misdemeanor within the meaning of the Sheepherders Act, correctly applied the law of the United States and not that of Australia.

The Court approved the Attorney General's determination, observing that divergent and anomalous results would follow from an application of varying systens of foreign laws.

Staff: United States Attorney Drew J. T. O'Keefe; Assistant United States Attorney Joseph Ritchie, Jr. (E.D. Pa.) Don R. Bennett (Criminal Division)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950; Registration of Communist-action Organizations. United States v. Communist Party, United States of America (District of Columbia). A twelve count indictment against the Communist Party charging that it failed to register and file a registration statement in violation of 50 U.S.C. 786 and 794 was returned on December 1, 1961 (United States Attorneys Bulletin, Volume 9, No. 25, p. 731). On December 17, 1962, the jury returned a verdict of guilty on all counts and the Court fined the Communist Party, USA the sum of $120,000.

Staff: F. Kirk Maddrix and Robert L. Keuch. (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation; Declaration of Taking; Time for Filing Answer; Discovery Not Warranted of Appraisal Reports. United States v. 4.724 Acres of Land in Plaquemines Parish (E.D. La.) Approximately 2½ years after the instant condemnation action had been filed, a defendant landowner filed an answer alleging that the Government had not complied with the Declaration of Taking Act in that it had failed in good faith to estimate just compensation. The Government filed a motion to strike the answer on the ground that it was filed too late under Rule 71A(e). Defendant also filed a motion for an order requiring the Government to produce appraisal reports, etc. The Government filed an opposition to this motion on the ground that such data is not subject to discovery.

In an opinion issued October 30, 1962, Judge Robert A. Ainsworth, Jr. granted the Government's motion to strike the defendant's answer and denied defendant's motion for the production of appraisal reports. With respect to the former, the Court held "* * * Rule 71A(e) is controlling here and the court is not allowed to grant enlargement of time for answering." The Court went on to note that

> Of course, the defendant may ". . . present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award," even though he failed to answer. Rule 71A(e), Fed. R. Civ. P.

In denying defendant's motion for production of appraisal reports, the Court noted that "The general rule is that discovery of opinionative material will not be granted unless special circumstances require it" citing United States v. Certain Parcels of Land in the City and County of San Francisco, State of California, N.D. Cal., S.D., 1959, 25 F.R.D. 192; 4 Moore, Federal Practice, § 26.24, at 1152 and specifically footnote 5 for case citations, and Supp. 1961, p. 81. The Court went on to hold that no special circumstances requiring discovery had been shown in the instant case, stating in this connection:

> The sole issue in a condemnation proceeding is the determination of "just compensation" of the property apportioned to a public use. U.S. v. 900.57 Acres of Land, W. D. Ark., 1962, 30 F.R.D. 512; 518;5 therefore, "good cause" is not shown upon the contention that the production of the appraisal reports "will narrow the issues at the trial."

Footnote 5 states:

> This case also is authority for the holding that condemnees are not entitled to obtain in advance of the trial the opinion of condemnor's expert appraisers

as to value of the land nor are the condemnees allowed to see and copy the appraisal reports when the only issue is "just compensation."

It is understood that Judge Ainsworth will designate this opinion to be published by the West Publishing Company.

Staff: Norton L. Wisdom, Special Assistant to the United States Attorney (New Orleans, Louisiana).

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