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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

CLAYTON ACT

Supreme Court Rules For Government in Section 7 Case. United States v. El Paso Natural Gas Company (Sup. Ct. No. 94), File No. 60-0-37-158. On April 6, 1964, the Supreme Court reversed the decision of the District Court for the District of Utah and held that the acquisition of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company violated Section 7 of the Clayton Act. The Court held that the acquisition may tend to substantially lessen competition in the sale of natural gas to California. Mr. Justice Douglas, writing for seven members of the Court (Mr. Justice White did not participate in the case and Mr. Justice Harlan filed a separate opinion concurring in part and dissenting in part) traced the history of Pacific Northwest, its early efforts to sell natural gas to the California market and its premerger contractual relationships with El Paso which had the effect of allocating the California market to El Paso. The Court stated that "Pacific Northwest, though it had no pipeline to California, is shown by this record to have been a substantial factor in the California market at the time it was acquired by El Paso." Noting that the natural gas industry presented peculiar problems of competitive analysis, the Court held that Pacific Northwest's proximity to the California market, its access to large untapped gas reserves, and Pacific Northwest's eagerness to serve the expanding California market were all indicative of the competitive struggle it was waging with El Paso prior to the merger. The Court further held that three findings made by the District Court relating to the probability of success of Pacific Northwest's efforts to enter the California market were irrelevant to the disposition of the case, thereby stressing that it is the competitive process itself and not the probability of ultimate success of a competitor which is protected by Section 7.

The Court also commented adversely on District Judge Ritter's adoption in toto of proposed findings submitted by the defendants and stated that, even though such findings will not be rejected out of hand by an appellate court, they are less helpful than findings "drawn with the insight of a disinterested mind." The Court not only reversed the judgment but directed the District Court to order divestiture.

Mr. Justice Harlan in a separate opinion agreed that a violation of Section 7 had been established. He also objected to the unsatisfactory findings entered by the District Court and urged that district courts write opinions in complex antitrust cases in order to set forth the reasoning underlying their decisions and to connect subsidiary findings with the ultimate determination of legality or illegality. His opinion also calls for a re-examination

by Congress of the relationship of the regulatory agencies to antitrust enforcement and notes that the El Paso decision and the Lexington Bank decision have the effect of putting the Department of Justice "in the driver's seat" in economic regulation of these industries. Mr. Justice Harlan dissented from the Court's order of divestiture and stated that he would have left determination of the proper relief to the district court.

Staff: Robert B. Hummel and Michael I. Miller (Antitrust Division)

Section 7 Case Filed. United States v. Crown Textile Manufacturing Company, Inc., and York-Dixie Company. (E.D. Pa.) File 60-148-70. On March 31, 1964, a complaint was filed in Philadelphia, Pennsylvania, against Crown Textile Manufacturing Company, Inc. and York-Dixie Company, alleging that Crown Textile's acquisition of the inventory and use of name of Puritan Looms, Inc. and Arel-Dillon Mfg. Co., Inc. and York-Dixie's acquisition of the hair canvas manufacturing plant of Arel-Dillon, violated Section 7 of the Clayton Act.

Crown Textile, whose headquarters is in Philadelphia, is the largest producer of hair canvas in the United States, with 1961 sales in excess of 58 per cent of the total domestic hair canvas sales. York-Dixie is an affiliated company and concurrently, upon acquiring the hair canvas plant from Arel-Dillon, leased it to Crown Textile.

Puritan Looms, Inc., together with Arel-Dillon, an affiliated company was a major manufacturer of hair canvas. In 1960, the year prior to its acquisition, Puritan's sales accounted for approximately 16 per cent of the total hair canvas sales in the United States. In the same year, Crown Textile's sales amounted to approximately 45 per cent. Today, there are only four domestic manufacturers of hair canvas.

Hair canvas is the basic material from which coat fronts are made. Coat fronts are required in the production of men's and women's suits and other similar apparel to help maintain the shape of the garment. The hair canvas used therein is woven from goat or other animal hair combined with varying proportions of cotton, wool, or synthetic substitutes. Total sales of hair canvas in the United States in 1962 were approximately $17 million.

The complaint alleges that these acquisitions may substantially lessen competition or tend to create a monopoly in the manufacture and sale of hair canvas as industry concentration has been substantially increased to the detriment of actual and potential competition which has been substantially lessened. The complaint requests that the defendants be required to divest themselves of all assets acquired from Puritan Looms, Inc. and Arel-Dillon Mfg. Co., Inc. and the defendants be enjoined from acquiring assets of any person engaged in the manufacture, distribution, or sale of hair canvas.

Staff: Walter L. Devany (Antitrust Division)

SHERMAN ACT

Producer of Lawn Care Products Charged With Violating Section 1 of Sherman Act. United States v. The O.M. Scott & Sons Company. (D.C.) File No. 60-44-19. On March 30, 1964, a complaint was filed against O.M. Scott & Sons Company, the largest producer of lawn care products, charging that Scott had combined with its dealers in non-fair trade states to maintain resale prices of lawn care products manufactured by Scott. The complaint charges a combination beginning in 1959 and continuing to date whereby Scott and its dealers had maintained the prices of lawn care products defined by the complaint as grass seeds, fertilizers, chemical controls and mechanical equipment utilized in their application for the care of lawns. Scott sells directly to dealers and does not utilize wholesalers or other distributors.

The complaint requests that the Court prohibit Scott perpetually from carrying out any combination to restrain the sale of its lawn care products and that the defendants be required to take such affirmative action as will dissipate the combination.

Staff: Charles R. Esherick, and Richard T. Colman
(Antitrust Division)

Steel Companies Indicted. United States v. United States Steel Corporation, et al., (S.D. N.Y.) File No. 60-138-145. On April 7, 1964, a grand jury sitting in New York, New York, returned an indictment charging eight major steel companies and two steel company officials with eliminating price competition in carbon steel sheets in violation of Section 1 of the Sherman Act. The defendants are United States Steel Corporation, and James P. Barton, formerly Manager of Sheet and Steel Products and now Assistant General Manager of Administrative Services of that company; Bethlehem Steel Company, and W. J. Stephens, formerly its Assistant Vice President of Sales; National Steel Corporation; Great Lakes Steel Corporation; Jones & Laughlin Steel Corporation, Armco Steel Corporation; Republic Steel Corporation; and Wheeling Steel Corporation. The following steel companies were named by the grand jury as co-conspirators but not made defendants: The Youngstown Sheet and Tube Company; Pittsburgh Steel Company, and Granite City Steel Company.

The indictment charges that the conspiracy began at least as early as 1955 and continued to at least 1961. According to the indictment, the defendants and co-conspirators held meetings, at which no minutes were kept, at the Biltmore and Sheraton East Hotels in New York City, among other places. The grand jury charged that the defendants and co-conspirators agreed from time to time on charges for extras (those component parts of the price of steel which, when added to the base price, constitute the total price of the various qualities and sizes of the sheet products) and, further, that they agreed from time to time on uniform standards and charges for steel sheet products being produced, and for new steel sheet products to be introduced into the market by defendants.

Carbon steel sheet are basic steel products used in the manufacture of automobile bodies, refrigerators, washing machines and many other appliances and products.

Shipments by the industry of carbon steel sheets amount to $3.6 billion a year and account for about one-third of the total shipments of all finished steel products in the United States. The defendants, the indictment states, account for most of such shipments.

Staff: Samuel Karp, John H. Earle, Marshall C. Gardner, Augustus A. Marchetti, William E. Swope, Philip F. Cody, and S. Robert Mitchell (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

LONGSHOREMEN'S AND HARBOR WORKERS' ACT

Death Occurring on Dismantled Ship Aground in Navigable Waters Held Covered by Harbor Workers' Act. Boston Metals Company v. O'Hearne (C.A. 4, March 9, 1964). Decedent was killed while working on a decommissioned cruiser which had been sold for scrap and which, under the scrap contract, was not to be used again as a vessel. The motors had long been disconnected and the ship was lying aground in the Patapsco River. The Court of Appeals affirmed the deputy commissioner's award on the authority of Calbeck v. Travelers Insurance Co., 370 U.S. 114, holding that, if the injury or death occurs on navigable waters, the Longshoremen's and Harbor Workers' Act will apply, regardless of the dismantled or early stage of construction of a ship, and regardless of the availability of state remedies.

Staff: Leavenworth Colby and Allan J. Weiss (Civil Division)

Fifth Circuit Adheres to Position in Gondeck Case That Not All Recreational Activity at Defense Bases Is Within Scope of Employment. Smith, Hinchman & Grylls Assoc., Inc. v. O'Keefe (C.A. 5, February 27, 1964). The district court (222 F. Supp. 4) sustained an award of death benefits for a death by drowning which occurred when decedent, an employee stationed in Korea and covered by the Defense Bases Compensation Act, was off duty, though on call. Decedent was then boating on a lake which was under the supervision of the Korean Government. The Court of Appeals reversed, citing Gondeck v. Pan American World Airways, 299 F. 2d 74, which was reaffirmed by the Court. The Court held that injury which occurs while the employee is engaged in recreational activities at a permanent overseas base may not be compensable as arising out of or in the course of employment unless the employer sponsors the recreational activities or in some way has supervisory authority over the recreational facilities.

Staff: Leavenworth Colby and Allan J. Weiss (Civil Division)

"Surviving Wife" Determined on Basis of State Law of Domestic Relations. Albina Engine & Machine Works v. O'Leary, (C.A. 9, February 28, 1964). The Court of Appeals sustained the deputy commissioner's award to the surviving wife of a common-law marriage contracted in Idaho although Oregon did not permit common-law marriages to be contracted within its boundaries. The Court stated that under federal law the determination of what is a surviving wife is based on applicable state law. The law of Oregon, the state of domicile and employment, specifically provided under its compensation law that a proper common-law wife could be compensated for her husband's death. Moreover, the Court held, even if the Oregon compensation law set up a different standard of

common-law marriage than its domestic relations law, Oregon law recognized a common-law marriage validly contracted in another state. Since the parties had commenced their common-law marriage in Idaho, where such a marriage is valid, on all grounds the common-law wife was a "surviving wife" within the meaning of the Longshoremen's and Harbor Workers' Act.

Staff: Acting United States Attorney Sidney I. Lezak, Assistant United States Attorney William B. Borgeson (D. Oregon)

PRACTICE BEFORE FEDERAL COURTS - SOVEREIGN IMMUNITY

Suit Against United States to Compel Consideration of Attorney's Application to Be Admitted to Practice Fails to State Claim Upon Which Relief Can Be Granted. C. C. Divine v. United States (C.A. 5, February 27, 1964) File No. 78-74-60. The Court of Appeals affirmed the district court's dismissal, for failure to state a claim upon which relief can be granted, of this suit brought to obtain an order accepting or denying plaintiff's application to practice in the federal district courts in the Southern District of Texas. Plaintiff alleged that his application to practice had been pending for 4 years without any action whatsoever. The Court agreed, without explanation, with the district court that the suit was an unconsented suit against the sovereign since neither 28 U.S.C. 1343(4) nor 28 U.S.C. 1346(b) relied upon by plaintiff gave consent of the United States to be sued. 28 U.S.C. 1343(4) confers jurisdiction upon district courts to entertain suits for damages or equitable relief under any Act of Congress providing for the protection of civil rights. 28 U.S.C. 1346(b) is the Tort Claims Act. In addition, the Court agreed with the district court that the complaint failed to state a claim upon which relief can be granted.

Staff: United States Attorney Woodrow Seals and Assistant United States Attorney James R. Gough (S.D. Texas)

GOVERNMENT CONTRACTS

Illinois Scaffolding Act Imposes No Liability Upon United States to Employee of Contractor When United States Not In Charge of Work; Standard Army Contract Terms Alone Do Not Place Government in Charge. Frank Cannon v. United States (C.A. 7, March 3, 1964) File No. 157-25-40. Plaintiff, employee of a painting contractor who was painting the buildings at an Army depot, was injured in a fall from a defective scaffold. The Illinois Scaffolding Act renders liable both the employer and "the owner, or any other person having charge of the work." The Illinois Supreme Court has held recently that the owner must actually be in charge of the work to be liable. The facts showed that the painting company had full charge of the work and had supplied all the scaffolds. The district court held for the United States.

The Court of Appeals affirmed, rejecting plaintiff's attempt to show that the United States had charge of the work through the standard clauses in the painting contract permitting the United States to require dismissal of incompetent employees and to inspect the work and setting forth various safety measures

which the contractor is required to follow. In fact, as the Court of Appeals noted, the Government did not control hiring or firing or the manner of carrying on the work, and only sporadic inspections by the safety inspector were made.

This case should be a useful precedent in other states as well as Illinois, since the standard under the Scaffolding Act, as construed by the Illinois courts, is similar to general concepts of tort liability of an owner--that control of the work (where the cause of injury is some piece of work equipment) is the basis of liability.

Staff: United States Attorney Edward R. Phelps, Assistant United States Attorney Leon Scroggins (S.D. Illinois)

RAILWAY LABOR ACT

Injunction, Restraining National Mediation Board From Conducting Representation Election Where No Place On Ballot Furnished For Vote Against Representation Affirmed. National Mediation Board v. Association For Benefit of Non-contract Employees (C.A. D.C., March 12, 1964) File Nos. 145-135-6 and 145-135-7. This litigation arose out of a representation dispute involving an unrepresented class of ground employees of United Airlines. The Brotherhood of Railway and Steamship Clerks petitioned the Board for an election. After determining that the class of employees was unrepresented, the Board decided that all the employees were in one craft for election purposes. United attempted to intervene and request a redetermination of the craft. The Association attempted to intervene in order to speak for a portion of the employees, as a separate craft, who wished to vote against representation. The Board Ballot did not provide for a vote against any representation. The Board denied both petitions for intervention. United and the Association instituted actions to enjoin the election. The District Court dismissed United's complaint on the ground that a carrier has no standing to intervene in an election proceeding. The District Court granted an injunction restraining the Board from holding an election unless the ballot provided a place to vote against representation, and remanded the question of the appropriate craft for reconsideration in light of the Court's holding that employees had a right to vote against representation.

The Court of Appeals affirmed in each case in a brief per curiam opinion. We argued that the district court had no jurisdiction to review any of these matters since the appropriate craft and the form of the ballot were committed to the discretion of the Board, and that, if the Court had any jurisdiction, it certainly did not obtain until after certification was completed. In addition we argued that the Board's interpretation of the Act as prohibiting a "no representation" vote was valid.

Wright, J., dissented on the grounds that, under Supreme Court decisions and previous decisions of the Court of Appeals, the determination of the proper craft is not subject to judicial review, that the particular ballot had been used since 1921 and approved by the Court of Appeals, that the District Court had no jurisdiction to enjoin an election, and that the above grounds were applicable to the instant cases, there being no question of the Board acting

contrary to an express statutory duty--the sole exception to the non-reviewability of representation disputes. He also stated that there was no equity in the action, since a majority of employees could defeat representation by avoiding their ballots.

As Judge Wright pointed out, this case appears to be a departure from well-settled doctrines of judicial review in this area. The terse majority opinion adopts as its own the District Court's opinion which defended its jurisdiction on the existence of a serious question of statutory interpretation--whether or not employees could vote against any representation.

Staff: Howard E. Shapiro (Civil Division)

SOCIAL SECURITY ACT

Complaint Amended To Name Secretary as Defendant More than 60 Days After Secretary's Decision, Dismissed For Lack of Indispensable Party and Untimely Commencement of Suit; Secretary's Discretionary Extension of Time Approved. Vance Simmons v. United States Department of Health, Education and Welfare. (C.A. 3, February 24, 1964) File No. 137-48-191. Plaintiff, pro se, brought an action to review the Secretary's denial of benefits. The named defendant was "The United States Department of Health, Education and Welfare." The United States Attorney moved to dismiss for failure to name an indispensable party. The motion was granted on the grounds that the Secretary is the only proper defendant under Section 205(g) and that the amendment of the complaint to substitute the Secretary was made more than 60 days after the Secretary's decision was entered. On appeal, the United States Attorney agreed at oral argument that this would be an appropriate case for the Secretary to grant an extension of time, and the extension was subsequently granted. In view of this development the Court of Appeals remanded the case to the district court for further consideration.

Staff: United States Attorney David M. Satz, Jr. and Assistant United States Attorney Edward J. Turnback (D. N.J.)

DISTRICT COURT

CIVIL SERVICE DISMISSAL

Failure to Exhaust Administrative Remedies Bars Suit For Review; Charge of Bribery Good Cause For Dismissal Despite Acquittal in Subsequent Criminal Case. Arnold Finfer v. Mortimer M. Caplin, Commissioner of Internal Revenue (E.D. N.Y., February 24, 1964). Plaintiff, a veteran, discharged from the Internal Revenue Service, brought action against the Commissioner of Internal Revenue on grounds that he had been improperly removed (5 U.S.C.A. 863) and was entitled to reinstatement (5 U.S.C.A. 652(b)(2)). Plaintiff's removal was based on the charge of bribery and was made for the good of the Service. After removal, plaintiff was indicted and tried twice upon the charge of bribery. The first trial resulted in a mistrial when the jury could not agree on a verdict. Upon the second trial he was acquitted.

Plaintiff appeared by counsel during the administrative proceedings and refused to testify personally on the grounds that this might prejudice his rights in the pending criminal proceedings. After his acquittal, he sought to exercise rights of appeal which had long since been foreclosed by applicable limitation provisions in Civil Service and Internal Revenue appeal procedures.

The Court granted the Government's motion dismissing plaintiff's action on the merits. The basis for the decision was that plaintiff had not shown that his removal had been effected in bad faith nor through arbitrary and capricious action, that he had failed to make timely appeal, and that the charge of bribery alone warranted removal for the "good of the Service."

The Court rejected plaintiff's contention that, since he is a veteran, entitled to appeal both through the Internal Revenue Service and the United States Civil Service Commission, he may therefore avoid appealing to either and still be extended a right of review in the District Court. The decision holds that the requirement of exhaustion of administrative remedies is applicable in this case.

The Court made it clear that acquittal of the charge of bribery did not imply error in the removal and that there is no parity in the standards of proof applicable to a criminal trial and administrative removal for cause. In addition, the Court rejected plaintiff's contention that he was denied the right to require the production of witnesses and conduct cross-examination.

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

TORT CLAIMS ACT

False Imprisonment Exception Governs Involuntary Psychiatric Hospitalization; Discretionary Function Exception Applied to Doctor's Decision to Give Psychiatric Treatment; Suit Against VA Psychiatrist Barred by Governmental Immunity. Blitz v. Boog, Blitz v. United States (C.A. 2, February 26, 1964). These suits against the United States, and against a VA doctor arose out of the doctor's action in (1) referring plaintiff to a private hospital for psychiatric care, where plaintiff was hospitalized for eight days, and (2) in prescribing psychiatric care on a second occasion when plaintiff sought treatment for a "fever." The suit against the United States claimed damages for assault and battery by the attendants at the private hospital to which plaintiff was removed, for failure to treat plaintiff for a "fever" and for false imprisonment in that employees of the VA, on the doctor's orders, forcibly transported plaintiff to the private hospital. The suit against the doctor brought in a state court sought similar damages. The state suit was removed and the cases were consolidated for argument. Both cases were dismissed for failure to state a claim upon which relief could be granted, and came to the Court of Appeals on the pleadings.

Insofar as the complaint against the United States was for false imprisonment, the Court of Appeals held it barred by 28 U.S.C. 2680(h). The claim for damages based on mistreatment at the private hospital was held defective in

failing to allege that the VA employees had any reason to expect that plaintiff would be mistreated at that hospital. The claim based on the failure of the VA hospital to treat plaintiff for a "fever" and the decision instead to apply psychiatric treatment was held excluded by the "discretionary function" exception in the Tort Claims Act. Finally, the state court suit against the VA doctor was held properly removed, and properly dismissed on the ground that the doctor had been acting pursuant to official duties and was entitled to the governmental immunity set forth in Gregoire v. Biddle, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949.

Staff: Assistant United States Attorney Anthony J. D'Auria and Assistant United States Attorney Philip H. Schaeffer (S.D. N.Y.)

$5,000 Award Not Insufficient For Aggravation of Pre-existing Back Condition; District Court's Failure to Specify Elements of Award Not Reversible Error When Not Challenged and in Light of Facts. Henderson v. United States (C.A. 5, February 27, 1964) File No. 157-257. Plaintiff was injured by an Army truck in June 1961. On September 12, 1961, when getting up from a sitting position on the floor, he felt severe pain. Thereafter he underwent surgery for a ruptured disc. The Court of Appeals affirmed as not clearly erroneous the findings that (1) plaintiff had suffered from osteo-arthritis prior to either incident, and (2) the second incident was unrelated to and not the consequence of the truck accident. The district court found that the two incidents had caused a 20 per cent back disability and that the negligence of the United States was the proximate cause of the first incident. No effort to attribute portions of the disability to either incident was made, and the award was $5,000. The Court of Appeals sustained the award against plaintiff's charge of insufficiency, on the ground that the district court had had to weigh the evidence that the first incident had caused little pain, and that the severe pain and operation had not occurred until after the second unconnected incident. Since there was no challenge to the failure to specify the elements of the award, the Court found a remand for that purpose unnecessary.

Staff: United States Attorney Ben Hardeman and Assistant United States Attorney Rodney R. Steele (M.D. Ala.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections; Civil Rights Act of 1957, 1960. United States v. Henry Earl Palmer, et al., (E.D. La.). This suit instituted under the Civil Rights Act of 1957 as amended was filed on March 26, 1963, against the registrar of East Feliciana Parish, Louisiana and against the State of Louisiana. The complaint alleges that defendants have engaged in racially discriminatory acts and practices in the registration process in East Feliciana Parish which have deprived Negro citizens of the right to register to vote without distinction of race or color. In East Feliciana Parish there are approximately 3,200 potential white voters and approximately 3,700 potential Negro voters. As of January 31, 1964, there were 2,749 white persons and 126 Negroes registered to vote in East Feliciana Parish. The complaint further alleges that in 1958 the Registrar of Voters pursuant to affidavits of challenge filed with him discriminatorily purged the voter registration rolls of approximately 55% of the Negro voters and about 3% of the white voters. The Government seeks an injunction forbidding discriminatory acts and practices and a finding of a pattern and practice of discrimination and the reinstatement to the voter rolls of all persons purged from the voter rolls in 1958.

Also on March 26 application was made for a temporary restraining order on the basis of the pleadings and affidavits submitted therewith. These affidavits contain testimony to the effect that the Registrar of Voters of East Feliciana Parish has refused to receive and process applications of Negro applicants since November 6, 1963. The application for a temporary restraining order was denied and the Government's motion for a preliminary injunction on the issue of the reopening of the books was set for April 27, 1964.

Staff: United States Attorney Louis LaCour (E.D. La.); Frank Dunbaugh (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FRAUD

Use of Discovery Devices in Related Civil and Criminal Cases. United States v. Steffes and Securities and Exchange Commission v. Great Plains Acceptance Corp. (D. Montana, March 14, 1964). Dept. File 113-44-11. A civil case was brought by the SEC against five defendants to enjoin violations of the securities laws. Thereafter, an indictment was returned against two of the individuals, charging them with fraud in the sale of securities, the same conduct involved in the civil action.

The criminal action was set for trial but prior thereto one defendant gave notice of the taking of depositions for the civil action under Rule 26, F.R. Civ. P. The persons designated to give depositions were the victims named in the indictment. The Government moved to stay the civil case pending disposition of the criminal case, and to quash the subpoenas to take depositions.

In its argument, the Government did not dispute defendant's right to interview prospective witnesses for the prosecution, but stressed that there is a vast difference between the right to interview and the right to depose prospective witnesses. It was contended that the Government's motions should be granted to promote the orderly administration of justice.

The Court held that the depositions could not be taken under Rule 15 of the Criminal Rules, and Rule 26 of the Civil Rules could not be used as a device to take depositions for use in a criminal case. Although depositions may be taken under Rule 26 as a right, in the absence of a showing of good cause for a denial thereof, here good cause for the stay was shown. The Government's motions were granted.

Staff: United States Attorney Moody Brickett; Assistant United States Attorney Richmond F. Allan (D. Mont.)

MAIL FRAUD

Representations as to Refund. Morris G. Kaplan v. United States (C.A. 9, March 13, 1964). Dept. File 36-12-305. Defendant conducted a scheme to defraud, selling shoes through the mails with the representation that refunds would be made in all cases if the purchasers were dissatisfied. In fact, defendant instructed his employees to make refunds only in response to complaints made through the Post Office Department, the Better Business Bureau or through attorneys.

At the trial, defendant showed that he had made refunds in the amount of $17,000. The Court of Appeals stated that the question is not whether he made a refund in a percentage of instances, but whether he represented that he would refund in all cases, upon request, and then refused to do so and this was done as part of a scheme to defraud.

The Court of Appeals reviewed the facts, noting the instructions to employees, destruction of the requests for refunds, a threat to a former employee, and defendant's continued solicitations with the offer of refunds or exchanges even after he was interviewed by a postal inspector. The Court concluded that the facts "clearly constitute evidence sufficient to support the trial court's finding based on a logical inference, that appellant specifically intended to and did devise a scheme to defraud, and that he did make false representations concerning refunds, and used the mails to further his scheme".

The Court of Appeals rejected the argument that, in order to convict, inferences that may be drawn from circumstantial evidence must be inconsistent with every reasonable hypothesis of innocence, and the evidence must be such as to exclude every reasonable hypothesis but that of guilt. The Court stated that the current correct test is whether "reasonable minds could find that the evidence excludes every hypothesis but that of guilt".

Staff: United States Attorney Francis C. Whelan (S.D. Calif.).

ANTI-SLOT MACHINE AND GAMBLING DEVICES ACTS

Attempt to Enjoin Enforcement of Gambling Devices Act of 1962 Prior to Institution of Enforcement Proceedings Dismissed for Lack of Case of Controversy. Lion Mfg. Corp. v. Kennedy (C.A.D.C., March 5, 1964). The Court of Appeals affirmed the dismissal for lack of case or controversy of this action to enjoin enforcement of the Anti-Slot Machine Act as amended, by the Gambling Devices Act of 1962, 15 U.S.C. 1171-78, and for a declaratory judgment that the act did not apply to plaintiffs, a manufacturer and a distributor of certain coin-operated amusement machines. The case is more fully described on p. 162, Vol. 12, No. 7, of the United States Attorneys' Bulletin.

SECRECY OF GRAND JURY PROCEEDINGS

Refusal by Trial Court to Examine Grand Jury Testimony of Key Prosecution Witness Held no Abuse of Discretion Absent Defense Showing of Particularized Need. United States v. Herman Myron Feldman (C.A. 3, No. 14,442, March 26, 1964). Defendant was convicted for conspiring to utter and deal in counterfeit $20 Federal Reserve notes in violation of 18 U.S.C. 371. The only direct testimony against him came from a paid informer or undercover agent employed by the Secret Service. In cross-examining this witness, the defense used a statement that the witness had given orally to the Secret Service, but no significant inconsistencies between that statement and the trial testimony were developed. The defense then asked leave to examine the witness' grand jury testimony in order to determine whether that testimony was inconsistent with the witness' testimony at trial. When this request was denied, the defense asked the judge to examine the grand jury transcript. The judge refused. His refusal was one of the bases on which defendant appealed.

The Third Circuit commented that "the law on the right of the defense in a criminal proceeding to examine Grand Jury testimony or to have the trial judge do so is somewhat unclear". It noted, however, that the most recent Supreme Court case in point, Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959), expressly held that the Jencks rationale is not to be applied to grand jury testimony and that the burden rests on the defense to show a "particularized need" for such testimony. In that case, the Supreme Court expressly left open the question whether, if requested to do so, the trial judge is required to examine the grand jury transcript for apparent inconsistencies.

The Court of Appeals held that a trial judge is not required to examine grand jury testimony until the defense has borne its burden of establishing a "particularized need". In reaching this decision, the Third Circuit rejected the contrary rule adopted by the Second Circuit in United States v. Giampa, 290 F. 2d 83 (1961) and aligned itself with the District of Columbia, the Fourth, Eighth, and Tenth Circuits. Gordon v. United States, 299 F. 2d 117 (C.A. D.C., 1962); Pittsburgh Plate Glass Co. v. United States, 260 F. 2d 397 (C.A. 4, 1958); Hance v. United States, 299 F. 2d 389 (C.A. 8, 1962); Bary v. United States, 292 F. 2d 53 (C.A. 10, 1961). The Third Circuit considered that to require the trial judge to examine grand jury testimony without a showing of particularized need is essentially to apply the Jencks rationale to grand jury testimony, contrary to the Supreme Court's holding in the Pittsburgh Plate Glass case.

The trial court had ruled that no "particularized need" had been shown but defendant sought only "the opportunity to see if there might be inconsistencies in Wood's testimony". The Third Circuit pointed out that searching cross-examination by several counsel, based partly on the statement the witness gave the Secret Service, had failed to impair the witness' credibility, and that his version of the critical events was supported by circumstantial evidence. Noting that Rule 6(e), F.R. Crim. P., vests the power of inspection in the district court and that the trial judge had had the opportunity to observe the witness as well as the entire trial, the Court of Appeals could not say that the judge had abused his discretion in failing to make the requested inspection.

Staff: United States Attorney Drew J. T. O'Keefe;
Assistant United States Attorney Lawrence Prattis
(E.D. Pa.)

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Creation of Record of Lawful Entry Denied Because Deportation Terminated Residence. Ivan Mrvica v. Esperdy (Supreme Court No. 353; March 30, 1964.) This case involved construction of the provisions of Section 249 of the Immigration and Nationality Act, 8 U.S.C. 1259, which in certain circumstances permits an alien illegally in this country to apply for a record of lawful admission in the United States for permanent residence.

Petitioner, a Yugoslav national, entered the United States in 1940 as a crewman. He was ordered deported in September 1942 for overstaying his temporary admission, and in October 1942 departed as a crewman on a Yugoslav vessel which called at several ports in Chile and returned to the United States in December 1942. Petitioner was detained on board the vessel by the immigration authorities but was then allowed to go ashore for medical treatment. He has since remained in this country.

After again being ordered deported he applied under Section 249 for creation of a record of lawful permanent residence, which Section has as a requirement that an alien reside continuously in the United States from June 28, 1940. His application was denied by the Immigration and Naturalization Service on the ground that when he departed in 1942 he executed the order for his deportation and that his deportation terminated his residence in the United States. He brought a declaratory judgment action in the District Court for the Southern District of New York, challenging the denial of his application. This action was dismissed by the District Court and the dismissal upheld by the Second Circuit.

By a 5-3 decision the Supreme Court held that the deportation of petitioner did terminate his residence in the United States and disqualified him for adjustment of status under Section 249. Justice Harlan, writing for the majority, thought it beyond dispute that one who has been deported does not continue to have his residence here and that it would be quite impossible to consider that a deported alien, whose reentry into the United States within the year of deportation could be a felony, nevertheless continues to reside in this country.

Justice Goldberg, in a dissenting opinion, joined in by Justices Black and Douglas, refused to attribute to Congress the purpose to deport an alien of good moral character who has been a long-time resident of this country and who is otherwise eligible for the relief afforded by Section 249, by the fiction that he deported himself by shipping, with Government encouragement, as a seaman on a two and a half month round trip voyage to South America during the war.

Staff: Solicitor General Archibald Cox; Assistant Attorney General Herbert J. Miller, Jr.,; Assistant to the Solicitor General Louis F. Claiborne; Beatrice Rosenberg and Richard W. Schmude (Criminal Division)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Restrictions on Travel to or in Cuba. MacEwan v. Secretary of State (E.D. Pa.) (D.J. #146-1-8-210). On March 30, 1964, the District Court for the Eastern District of Pennsylvania, Freedman, Judge, upheld the authority of the Secretary of State to refuse to validate a passport for pleasure travel to Cuba.

In a twenty-three page opinion, the Court recognized that the Secretary derives his authority to regulate such travel not only from the inherent power of the Executive to conduct the nation's foreign affairs, but also from Section 215 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185 and Section 1 of the Passport Act of 1926, 22 U.S.C. 211a.

Staff: Benjamin C. Flannagan (Internal Security Division)

Jencks Act, 18 U.S.C. 3500; Instructions Concerning Communist Party Membership in Prosecution For False Statement in Violation of 18 U.S.C. 1001. Billie Maurice Ogden v. United States (Supreme Court, 764, Misc. S. D. Calif.) (D. J. 146-1-60-37). Petitioner had been convicted of making false statements to the Air Force on a "certificate of non-affiliation with certain organizations" in violation of 18 U.S.C. 1001. The alleged false statements stemmed from his failure to relate his membership in the Communist Party when such information was requested. On appeal to the Court of Appeals for the 9th Circuit, petitioner raised among other issues contentions concerning the District Court's instructions "on membership", and alleged errors in the district court's application of the Jencks Act. Petitioner's contentions concerning the trial court's charge was based on the argument that it was error for the court not to require the jury to find that petitioner had complied with the formal requirements imposed by the Party for membership and that the Party had an unlawful objective. The Court of Appeals rejected this contention and, though it overruled several of petitioner's contentions under the Jencks Act, with regard to the statements of certain witnesses, it remanded the case to the trial court for a hearing on whether notes made by an F.B.I. agent during interviews constituted a "statement" within the meaning of the Act. The Court of Appeals further instructed the District Court that if it was determined that a Jencks Act statement once existed that the court may nonetheless conclude that the rights of defendant were not affected by non-production if the same information was available to defendant in a signed statement of the witness presented on the basis of the agent's notes, or if the statement was destroyed in accordance with ordinary practice before prosecution was contemplated and in good faith and with no intent to suppress evidence. The Court's judgment and order is reported, 303 F. 2nd 724, at 737-738. At the subsequent hearing, the trial court found that the notes in question had been destroyed after the agent had dictated a two page statement which was subsequently signed by the witness, that the destruction was in accordance with the then existing practice and that no prosecution was contemplated until long after the notes had been destroyed. The trial court concluded that petitioner's rights under the Act had not been violated. Petitioner again appealed to the Court of Appeals and his conviction was affirmed in a decision which has not

yet been reported. Petitioner sought a writ of certiorari in the Supreme Court on the questions of (1) Whether the trial court's instructions concerning membership in the Communist Party was proper; (2) Whether non-production of an F.B.I. agent's notes of an interview with a Government witness constitutes reversible error under the Jencks Act, 18 U.S.C. 3500, where the notes were destroyed under established procedure after the information of the notes was included in a report which was available to the defense at trial and, (3) Whether the hearing held pursuant to the remand to the Court of Appeals concerning the applicability of 18 U.S.C. 3500 violated petitioner's rights in that the questions of fact presented were not submitted to a jury but were resolved by the district judge. The Supreme Court denied certiorari on April 6, 1964.

Staff on the Government's brief in the Supreme Court
Kevin T. Maroney, Robert L. Keuch, Carol M. Burke,
(Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation: Rule 71A(h) Commission Procedure as Outlined by Supreme Court. United States v. Merz (and United States v. 2,872.88 Acres in Clay and Quitman Counties, Georgia), 376 U.S. 192 (1964) (D.J. File 33-37-259-19, and 33-11-400-160 and 33-11-400-162). The facts are stated in the reports of the conflicting Tenth and Fifth Circuit opinions in 10 U.S. Atty. Bul. 445 (1962), 306 F.2d 39; and 11 U.S. Atty. Bul. 44 (1963), 310 F.2d 775, respectively. The main issue was whether condemnation commission reports must contain subsidiary findings and legal reasoning with sufficient particularity so as to permit meaningful court review. The judgment of the Tenth Circuit was reversed and that of the Fifth Circuit modified. Rehearing was denied in Clay and Quitman Counties on April 6, 1964.

Seizing the opportunity of the first cases to be heard concerning the procedure to be followed where commissioners determine just compensation in condemnation cases under Rule 71A(h), F.R.Civ.P., the Supreme Court broadly outlined the skeleton of the whole procedure. It made the following points:

1. Although ease of viewing and likelihood of uniformity of awards justify use of commissions, the court must supervise them closely. They may not become "free-wheeling," using their own expertise, but must "act as a deliberative body applying constitutional standards."

2. The district court must select "responsible commissioners."

3. The parties must be heard on instructions to the commission, i.e., there must be a hearing thereon.

4. The district court should instruct the commission "on the law." It said:

> But the instructions should explain with some particularity the qualifications of expert witnesses, the weight to be given other opinion evidence, competent evidence of value, the best evidence of value, illustrative examples of severance damages, and the like. The commissioners should be instructed as to the manner of the hearing and the method of conducting it, of the right to view the property, and of the limited purpose of viewing. They should be instructed on the kind of evidence that is inadmissible and the manner of ruling on it.

5. "The commissioners should also be instructed as to the kind of report to be filed."

a. Conclusory findings are unacceptable since they preclude effective court review "even when the district court reads the record, for it will have no way of knowing what path the commissioners took through the maze of conflicting evidence."

b. While every contested issue raised on the record need not be resolved by a separate finding of fact, the "path followed by the commissioners in reaching the amount of the award can, however, be distinctly marked" and they "can be instructed to reveal the reasoning they use in deciding on a particular award, what standard they try to follow, what line of testimony they adopt, what measure of severance damages they use, and so on."

6. Objections to instructions and the report must be timely and specific.

7. Review of the report by the district court is under the "clearly erroneous" standard, which permits the district court to "'modify' the report on the basis of the record made before the commissioners, or it 'may reject it in whole or in part or may receive further evidence or may recommit it with instructions' -- all as provided in Rule 53(e) (2)." The court of appeals examines the commission's report, not the district judge's action on the report, to determine whether the report is "clearly erroneous."

A more detailed analysis of the opinion is made in a Lands Division memorandum which is in the course of distribution to all United States Attorneys.

Staff: Roger P. Marquis, Harold S. Harrison, Hugh Nugent and Raymond N. Zagone (Lands Division).

Condemnation: Stipulation as to Compensation Where Parties Do Not Agree on Estate Taken Held Not to Protect Either Party Sufficiently; Court Having Jurisdiction Must Decide in Present Condemnation Proceeding Whether Public or Private Roadway Easement Was Taken; Condemnation Court Cannot Leave Cloud on Title Condemned. United States v. City of Tacoma, Wash. (C.A. 9, March 25, 1964), D.J. File No. 33-49-687-27. The United States condemned a roadway easement across lands in the City of Tacoma's watershed. The parties stipulated that just compensation for the taking was $5,531.17. However, they disagreed whether the estate set out a "public" roadway easement or a "private" easement. In the final judgment based on the stipulated compensation, the district court ordered that "nothing set forth in this judgment shall be construed as deciding the contention raised" as to the nature of the roadway easement. The United States objected to the court leaving this issue unresolved. On appeal, the Ninth Circuit reversed.

The Court of Appeals held that the City's contention that the United States had acquired only a private roadway easement "is patently without merit." Nor did the Court agree with the appellee that the form of the judgment was sufficiently protective of the interests of both parties. "In our view it is not sufficiently protective of the interests of either," said the Court. The Government could never be sure what use it could make of the road without precipitating further litigation. On the other hand, the City had agreed to the amount of compensation without knowing what it had sold.

But apart from whether either party could "live" with the judgment, the Court held that a federal court may not decline to exercise its jurisdiction

in the circumstances of the present case. The case was remanded for the court to determine whether a public road easement has been taken. If so, the City of Tacoma would be relieved of its stipulation entered into under a misunderstanding of the nature of the estate taken.

Staff: A Donald Mileur (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Decision

Wilfully Attempted Evasion of Income Tax; Admissibility of Evidence of Criminal Acts Committed in Subsequent Years. United States v. Northern (C.A. 6, March 27, 1964). Appellant was indicted for the wilfully attempted evasion of his 1954-1956 income taxes and was convicted on the third count, relating to 1956. The Government proved its case by the net worth-expenditures method, which showed some $21,000 of unreported income in 1956, arising from appellant's business of maintaining coin-operated music and pinball machines in restaurants and other locations in Nashville, Tennessee. The evidence also showed that in 1956 appellant entered into an agreement with a location owner named Estes under which collection tickets were falsified to show only one-half of the true collections; that late in 1956 Estes discontinued the use of appellant's machines; and that in 1957, when Estes resumed the use of appellant's machines, appellant personally made the collections and--without any further discussion of the subject with Estes--reestablished the practice of recording only one-half the true collections on the tickets. Appellant urged that the evidence of 1957 transactions was irrelevant but the trial court admitted it solely as tending to show his knowledge of the practice in 1956. The Court of Appeals affirmed the conviction stating:

> The voluntary resumption by [appellant] in 1957 of the practice during the indictment years without any new agreement or understanding with the location owner tended to prove knowledge and authorization by [appellant] of the concealments which took place in the tax years in question. We think this testimony was admissible. Grant v. United States, 255 F. 2d 341 (C.A. 6), cert. denied 358 U.S. 828; Gordon v. United States, 164 F. 2d 855 (C.A. 6), cert. denied 333 U.S. 862.

In the Grant case, the Sixth Circuit had held, inter alia, that evidence of other criminal acts is admissible, if it tends logically to prove any element of the offense charged. The instant case is believed to be the first criminal tax case in which proof of criminal acts relating to tax liability for a year subsequent to the indictment years has been held to be admissible.

Staff: United States Attorney Kenneth Harwell; Assistant United States Attorney Carrol D. Kilgore (M.D. Tenn.)

CIVIL TAX MATTERS
District Court Decisions

Proceeding in Court for Collection of Taxes: Government Held Barred From Collecting Decedent's Income Taxes in Estate Proceedings Six Years After Assessment Even Though Claim For Such Taxes Had Been Timely Filed In Proceedings Within Federal Period of Limitations. In re Feinberg. (Surrogate's Court, Kings County, N.Y., November 18, 1963). CCH 64-1 USTC Par. 9141). Taxpayer died in 1947. Surrogate's Court proceedings for the administration of his estate were commenced in 1947, and in 1948 his administratrix duly filed a return

covering his 1947 income taxes. After an extended audit of the return under agreed extensions of the period of limitations on assessment, a deficiency assessment of 1947 taxes was made on May 13, 1954, in the amount of $32,440.09. A formal claim for these taxes was served upon the administratrix and filed in the proceedings on August 12, 1954. The administratrix neither paid the claim nor formally rejected it. The Government in 1958 petitioned the Surrogate's Court to compel the administratrix to render her accounting with respect to the tax claim, but she could not be personally served due to her unknown whereabouts. After she was discovered in Colorado, the Government renewed its petition in 1962; and the administratrix was then personally served and answered the petition through her attorneys.

Upon stipulated submission of the matter, the Surrogate ruled that the filing of the Government's proof of claim in the proceedings did not constitute the commencement of "a proceeding in court" under the federal statute of limitations (Sec. 276(c), Internal Revenue Code of 1939) and that, since the Government had taken no other administrative or judicial action to collect the taxes within six years of the 1954 assessment date, its claim in the proceedings was time barred by the federal statute which had not been tolled and it could not compel the administratrix to pay through an accounting. The Surrogate's reasoning appears to equate New York authority, which holds that the United States cannot be compelled to submit to the jurisdiction of the Surrogate's Court for the adjudication of its tax claims to the exclusion of its federally defined remedies (Matter of Smathers, 249 App. Div. 523), with a rule that the United States may never voluntarily submit to such jurisdiction by filing its proof of claim in such proceedings.

In short, the ruling holds that, insofar as the United States is concerned, its claim and petition for payment in Surrogate's Court proceedings are to be deemed not to constitute "a proceeding in court" for collection even though it is clear under New York law that any other type of claimant submits to the Court's jurisdiction for a judicial determination of his claim by such action. It is interesting to note that the revised New York Surrogate's Court Act, which became effective March 1, 1964, now explicitly provides (Sec. 211(a)) that, with respect to any period of limitation or an action for the collection of a claim, the filing of a proof of claim in Surrogate's Court proceedings "shall be deemed the institution of a special proceeding for the collection of such claim."

This matter has been reheard by the Court, and a decision upon the rehearing is presently awaited.

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

Summons: Enforcement of; Examination of Books and Records of Massachusetts Realty Trust. Patrick J. Mullins, IRS v. Gennaro J. Angiulo (D. Mass., March 27, 1964). An administrative summons was served upon the trustee of a Massachusetts realty trust by an Internal Revenue Agent, directing the trustee to produce designated books and records of the trust pertaining to its income tax returns for the years 1957 through 1962. The Government filed a petition to enforce the summons and the trustee countered with a motion to dismiss. The trustee argued to dismiss on the grounds that: (a) the trust was not distinct

from its individual constituents and the books and records, therefore, were protected by the trustee's invocation of his Fifth Amendment privilege; and (b) that the years 1957, 1958 and 1959 were "closed" by the three-year statute of limitations and consequently, the records for that period need not have been produced.

The Court entered judgment in favor of the Goverment directing compliance with the summons. The Court based its ruling on its finding that the trust possessed a quasi-corporate identity which divorces the books and records of the trust from the individual personal ownership of the trustee; and since he holds the records in his representative capacity, he cannot protect them through the utilization of his personal privilege under the Fifth Amendment.

The Court found, regarding the "closed" years of 1957, 1958 and 1959, that the trust had failed to file an income tax return for the year 1958, and the records for that year were producible. In addition, the Court found that the books and records for 1957 and 1959 were reasonably necessary in the making of the 1958 return and were also producible.

Staff: United States Attorney W. Arthur Garrity, Jr., and Assistant United States Attorney Murray H. Falk (D. Mass.)

District Court Has No Jurisdiction to Enjoin Tax Sale by District Director. Leonzal, et al. v. Lethert, et al. (D. Minn., January 14, 1964). (CCH 64-1 USTC Par. 9278). This suit was brought to enjoin the District Director of Internal Revenue from administratively selling certain real property. The realty had previously been acquired by a purchaser at a mortgage foreclosure sale, but the District Director (exercising rights accorded a lien creditor under state law) redeemed the property. Thus, the United States had a fee interest in the property at the time this action was commenced. The Court found that no possible jurisdiction existed to restrain the sale and granted the Government's motion to dismiss.

Staff: United States Attorney Miles W. Lord, Assistant United States Attorney Sidney P. Abramson (D. Minn.), and Robert A. Maloney (Tax Division)

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