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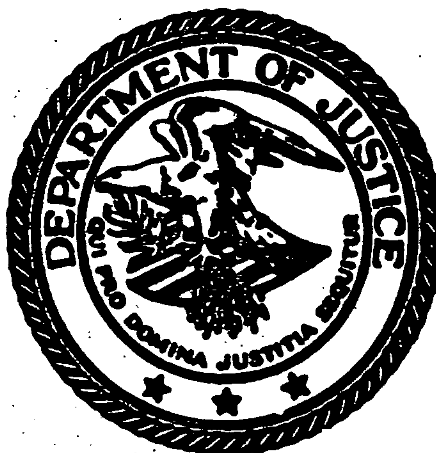

UNITED STATES ATTORNEYS
BULLETIN

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Vol. 10 November 30, 1962 No. 24

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Price Fixing - Steel Banding Devices; Indictment And Complaint Charging Violation of Section 1. United States v. Band-It Company, et al. (D. Colo.) On November 15, 1962, a Denver grand jury returned an indictment against Band-It Company and its president, Lodholm, for violating Section 1 of the Sherman Act. It was charged that the defendants and numerous distributor-co-conspirators throughout the United States have been engaged in a continuing price fixing combination and conspiracy. That combination and conspiracy allegedly has the following principal terms:

(a) Uniform prices, terms and conditions of resale from distributors to users are fixed by the manufacturer;
(b) The distributors will adhere to those resale prices, terms and conditions;
(c) Failure by any distributor to adhere to those resale prices, terms and conditions will prompt the cancellation of his distributorship; and
(d) The defendants and co-conspirators will police and enforce the maintenance of the resale prices, terms and conditions fixed as herein charged, by inducing, coercing and compelling distributors not to sell to any user at lower prices or at more favorable terms or conditions.

The products of Band-It Company include steel bands, clamps, buckles, other banding devices, and related products. Annual sales of Band-It products amount to approximately $2,700,000 at resale rates.

Simultaneously with the return of the indictment, the Government filed a companion civil complaint against the same two defendants. The relief sought includes an injunction against listing any prescribed or suggested resale prices by Band-It Company, and the requirement that Band-It Company inform all its distributors that they may sell at such prices and under such terms and conditions as they please.

Staff: George H. Schueller, and Marshall C. Gardner (Antitrust Division)

Disclosure of Grand Jury Material Denied Under Rule 6(e). In Re Grand Jury Proceedings. In two of the electrical prosecutions in Philadelphia, various corporate and individual defendants were convicted of conspiracies to fix prices and to submit non-competitive bids for the sale of turbine generator units and steam condensers. Since

1937, the corporate defendants (with one exception) have been subject to FTC orders directing them to cease and desist from fixing and maintaining uniform or identical prices in competitive bidding for the sale of turbine generators and steam condensers. As a result of the criminal proceedings in the Eastern District of Pennsylvania, the FTC entered into an investigation of whether its cease and desist orders had been violated. It requested the United States to petition the district court for an order granting it access to pertinent portions of the grand jury transcripts and documents relating to turbine generators and steam condensers for its confidential use in investigating compliance with the cease and desist orders. If the grand jury evidence disclosed violations, the Commission planned to certify the matter to the Department of Justice for collection of penalties or other appropriate action under 15 U.S.C. 49 or 56.

The District Court denied the petition and the Court of Appeals for the Third Circuit affirmed. The issue was whether disclosure should be granted under the second sentence of Rule 6(e) of the Federal Rules of Criminal Procedure, authorizing disclosure "when so directed by the court preliminarily to or in connection with a judicial proceeding". The Court of Appeals held that the disclosure sought here was in aid of the FTC's administrative proceeding; that no judicial proceeding is now pending and it is possible that none will result from the investigation; and therefore concluded that the disclosure was not preliminary to or in connection with a judicial proceeding as contemplated by Rule 6(e). The Court also rejected the Government's argument that a Government law enforcement agency should be granted access to grand jury material upon a showing that the evidence would be material and useful to the lawful function of such agency. Emphasizing the discretion of the trial judge in passing upon motions for access to grand jury materials, the Court held that this discretion "should be exercised favorably to disclosure only when it is persuasively shown that the ends of justice require it." Noting that the FTC has power to subpoena witnesses and documentary evidence relating to any matter under investigation, the Court concluded that no such persuasive showing was made here and that the District Court did not abuse its discretion in denying the petition.

Staff: Lionel Kestenbaum and George R. Kucik (Antitrust Division)

Supreme Court Affirms Findings of Violations of Sherman Act by Major Distributors of Feature Films For Television. United States v. Loew's, Inc., et al. In 1957, the United States brought six civil antitrust actions in the Southern District of New York against the major distributors of pre-1948 copyrighted motion picture feature films for television exhibition, alleging that each defendant had forced television station customers to accept inferior films as a condition of obtaining desirable pictures. The district judge, specifying particular contracts which he found illegal, concluded that these actions of defendants violated Section 1 of the Sherman Act. The Court entered separate final judgments

enjoining each defendant from conditioning or tying or attempting to condition or tie the purchase or license of the right to exhibit any feature film over any television station upon the purchase or license of any other film, and from using price differentials to effect such conditioning.

The Supreme Court affirmed the findings of violations. It held that a tie-in contract is illegal so long as the seller has sufficient economic power to appreciably restrain free competition in the market for the tied product, stating that such economic power may be inferred from the tied product's desirability to consumers or from its uniqueness, and that the requisite economic power is presumed when the tied product is patented or copyrighted. Despite differences between the movie and television industries, this case was covered by the holding in United States v. Paramount Pictures, Inc., 334 U.S. 131, 159, that "a refusal to license one or more copyrights unless another is accepted" is illegal. The Court also granted the Government substantially the additional relief it sought, holding that the decrees should: (1) require defendants to price the films individually and offer them on a picture-by-picture basis; (2) prohibit noncost-justified differentials in price between a film when sold individually and when sold as part of a package; (3) proscribe "temporary" refusals by a distributor to deal on less than a block basis while he is negotiating with a competing television station for a package sale.

The case was argued before the Supreme Court by Daniel M. Friedman (Ofc. of the Sol. Gen.).

Staff: Lionel Kestenbaum, Leonard Posner and George R. Kucik (Antitrust Division)

SHERMAN ACT - CLAYTON ACT

Complaint Under Section 1 of Sherman Act and Section 7 of Clayton Act. United States v. General Dynamics Corporation. (S.D. N.Y.) On November 8, 1962, a complaint was filed, alleging that agreements resulting from a "Special Sales Program" by General Dynamics Corporation which require its suppliers and subcontractors to purchase carbon dioxide and industrial gases from General's Liquid Carbonic Division are in violation of Section 1 of the Sherman Act. The complaint also alleged that General Dynamics' acquisition of the Liquid Carbonic Corporation on September 30, 1957, followed by the institution of the "Special Sales Program", has substantially lessened competition in carbon dioxide in violation of Section 7 of the Clayton Act. Defendant set up the "Special Sales Program" in 1958 to coerce suppliers to buy from it to the exclusion of independent carbon dioxide producers.

General Dynamics Corporation is the 13th largest industrial corporation in the United States with net sales in 1961 of $2,062,377,998 and is the nation's largest defense contractor with more than $1,900,000,000 in

prime defense contracts awarded in the fiscal year 1961. General Dynamics' annual purchases exceed $1,000,000,000 in goods from suppliers and, in addition, it controls the subcontracting of a substantial amount of defense business to other producers.

Before its acquisition in 1957, the Liquid Carbonic Corporation was the nation's largest producer and distributor of carbon dioxide with about 27% of the market and by 1959, as a division of General Dynamics, it had increased this to 29%.

Carbon dioxide is employed in processing of fuel for rockets and missiles, charging of fire extinguishers, carbonation of beverages, testing of aircraft, and many other uses. It is sold as dry ice in its solid state and also as a gas or liquid. In 1959, industry sales of carbon dioxide exceeded $65,000,000.

The relief requested includes injunctions against any attempts by General Dynamics to influence its suppliers to purchase products from any division of General Dynamics Corporation, and divestiture of its Liquid Carbonic Division.

Staff: Bernard M. Hollander, Alfred Karsted and Allen E. McAllester (Antitrust Division).

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C I V I L   D I V I S I O N

Acting Assistant Attorney General Joseph D. Guilfoyle

COURTS OF APPEALS

ADMIRALTY

Section 709(a) of Merchant Marine Act of 1936, 42 U.S.C. 1199(a), Does Not Require Annual Computation and Payment of Additional Charter Hire, But Permits Carrying Forward and Offsetting of Profits in Subsequent Loss Years. United States v. Moore-McCormack Lines, Inc. (C.A. 4, September 29, 1962). The United States brought suit against a charterer of its vessels to recover "additional charter hire", authorized by Section 709(a), 46 U.S.C. 1199(a), with respect to the years 1951 and 1952. The charterer resisted payment on the ground that the above-cited section allowed the carrying forward of these profits into the remaining five unprofitable years of the charter. The district court upheld the Government's contention that such carrying forward was not permitted by the Act. 199 F. Supp. 522. The Court of Appeals reversed, holding that the Act permitted the computation and payment of additional charter hire over the life of the charter agreement.

Staff: Lawrence F. Ledebur (Civil Division)

INVENTION SECRECY ACT

Invention Secrecy Act Limited to Claims for Compensation for Unauthorized Governmental Use Prior to Issuance of Patent and Resulting From Disclosure Envisioned in Section 181 of Act. Farrand Optical Co., Inc. v. United States (C.A. 2, October 19, 1962). Plaintiff brought this suit to recover compensation for the Government's use of its invention pursuant to the Invention Secrecy Act of 1951, 35 U.S.C. 181. The district court ruled that the Government's use of plaintiff's invention was based upon an implied contract to pay reasonable royalties, and awarded plaintiff $657,622. The court rejected the Government's argument that, since there had been no unauthorized use or tortious taking, plaintiff's claim was not cognizable under the Act. It held that, inasmuch as the statute spoke only of use by the United States and not specifically of unauthorized use, it should be interpreted broadly enough to cover cases like the instant one where compensation is sought for Government use pursuant to an express or implied license.

The Court of Appeals reversed. The Court noted that under the statute a secrecy order may issue withholding the grant of a patent for as long a period of time as the national interest requires, that during that period defense agencies of the United States to whom, pursuant to the statute, the invention had been disclosed by the Commissioner of Patents may use the invention secure from the threat of an infringement suit, and that the statute gives an applicant whose patent is so withheld the right to "compensation for damages caused by the order of secrecy and/or for the use of

of the employer but he refused, whereupon payment was made by the United States pursuant to its guarantee. The United States then brought suit against the employer for recovery under his indemnity agreement. The district court granted summary judgment for the employer without opinion.

On appeal by the United States, the Court of Appeals held that the record fully supported the Government's contention that the payments in question could not legally be considered as advances against wages in light of the clear prohibition against the participation of outside agencies. The Court held that the terms of the Agreement supersede any effort by the migrants themselves to contract away any rights afforded them by the Agreement or to acquiesce in any conduct in violation of the Agreement.

With respect to the employer's contention that his obligation as an indemnitor was discharged because a certain official of the Department of Labor had consented to the practice involved, the Court held that the United States could not be estopped by the conduct of its officials.

Staff: John W. Boult (Civil Division)

SOCIAL SECURITY ACT

Administrative Determination of Lack of Covered Self-Employment Income and Wages Supported by Substantial Evidence. Brunenkant v. Celebrezze (C.A. 7, October 31, 1962). Plaintiff was a futures trader on the Chicago Board of Trade. He admitted that most of his futures trading was speculative, and thus resulted in capital gain which is expressly excluded from coverage by Section 211(a)(3)(A) of the Act, 42 U.S.C. 411(a)(3)(A). However, he claimed coverage from earnings from other, assertedly non-speculative futures trading which resulted from his activities as an "odd-lot specialist" in wheat futures on the Board of Trade. The Court of Appeals agreed with the Government that the two types of trading were indistinguishable in nature, and varied only in the degree of risk-taking involved. After upholding the Secretary's factual determination that plaintiff's odd-lot trading was speculative, the Court held: "The limited degree of his speculation does not, for the purposes here concerned, either change the nature of his trading activities or qualify his profits therefrom as self-employment income rather than capital gains."

Plaintiff also claimed creditable wages for salary purportedly received from a family corporation which the Secretary held to be a sham, intended only to circumvent the exclusion from coverage of his earnings from odd-lot trading. Plaintiff first argued that the validity of the corporation was established by state law, and thus beyond the Secretary's inquiry. The Court, however, adopted the Government's argument that regularity of incorporation constitutes no such barrier: "The regularity and validity of its organization does not serve to overcome the fact that its 'corporate shell' was diverted to the purpose of serving as a channel through which plaintiff's membership on the exchange might serve to produce 'wages' creditable to him for social security purposes." The Court then

went on to find that the Secretary's "sham" determination was supported by substantial evidence.

Finally, the Court rejected plaintiff's claim that a portion of the claimed wages was alternatively creditable as self-employment earnings for legal services to the corporation. The Court upheld the Secretary's determination that this claim was wholly inconsistent with the record evidence.

Staff: Stephen B. Swartz (Civil Division)

Disability Freeze; "Kerner Rule" Inapplicable Where Substantial Evidence Supports Administrative Determination That Claimant Has No Medically Determinable Impairment. Joe Ward v. Ribicoff (C.A. 6, October 29, 1962). This action sought review of a denial by the Secretary of Health, Education and Welfare of appellant's application for disability benefits and a disability freeze. Appellant claimed he was suffering from heart disease and black-out spells. There was a conflict in the medical evidence as to whether or not appellant actually had heart disease. Additionally, the medical evidence tended to show that his black-out spells were caused not by heart disease, but by rapid breathing, a problem apparently within his control. The district court held the Secretary's determination that appellant was not disabled was supported by substantial evidence. On appeal, the Sixth Circuit affirmed. The Court agreed that there was substantial evidence supporting the Secretary's finding of the non-existence of a disabling impairment. Appellant relied upon the Sixth Circuit's "Kerner" type rule (Hall v. Flemming, 289 F. 2d 290), urging that the Secretary's failure to show what appellant could do, and what employment opportunities there were, required reversal. This rule has been a substantial impediment to the successful defense of these actions. In refusing to apply it here, making its first inroad on that rule, the Court held that the Secretary's finding of the non-existence of a medically determinable impairment expected to be of long continued duration or result in death "precludes the necessity of an administrative showing of gainful work which the appellant was capable of doing and the availability of any such work," relying on Bradey v. Ribicoff, 298 F. 2d 855 (C.A. 4), certiorari denied, 370 U.S. 951.

Staff: Stanley M. Kolber (Civil Division)

TORT CLAIMS ACT

District Court's Findings Ample to Support Damage Awards; Interest Payable Only from Date of Filing Transcript of Judgment With G.A.O. Until Date of Mandate of Affirmance. United States v. George B. Jacobs (C.A. 5, October 23, 1962). Plaintiff brought this action for damages when a Post Office truck collided with the rear of a vehicle being towed by plaintiff. The trial court found that plaintiff sustained a back injury as a result of the accident. It also awarded plaintiff interest on the judgment from the date of judgment. On appeal, the Government argued that the court's findings were not specially stated as required by Rule 52(a),

the invention by the Government resulting from his disclosure." The Court reasoned that Congress had obviously intended to grant relief only as broad as the harm suffered by a patent applicant through imposition of the secrecy order and for which no other provision of the patent law provided relief. Accordingly, it held that the compensation provisions of the Act applied only to unauthorized governmental use during the pendency of secrecy orders resulting from the disclosure envisioned in the statute -- and not from contractual negotiations conducted long prior thereto -- since any other interpretation of the statute would render it "a jurisdictional grant of indefinite boundaries." Since the judgment demanded was in excess of the district court's Tucker Act jurisdiction, the Court of Appeals remanded the case with instructions that it be transferred to the Court of Claims.

Judge Clark dissented since he believed the "case appear[ed] to fall precisely within the terms of [the statute]."

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorneys David R. Hyde, David Klingsberg and Robert E. Kushner (S.D. N.Y.)

MIGRANT LABOR PROGRAM

Payment by American Employer to Mexican Migrant Workers, or to Others on Their Behalf, of Fee to Facilitate Employment of Particular Workers, Was Not Deductible "Advance Against Wages," But Was Instead an Illegal Payment in Violation of Article 36 of Migrant Labor Agreement Excluding Participation of Private Intermediaries in Contracting of Mexican Workers. United States v. Bill D. Ward (C.A. 5, November 7, 1962.) Pursuant to the Migrant Labor Agreement of 1951 between the United States and Mexico, an American employer entered into work contracts with twenty-six Mexican nationals whereby the employer agreed to pay all wages due under the contracts, and promised to make no deductions other than those authorized by the Agreement. Under Article 32 of the Agreement the United States agreed to guarantee the performance by the employer of his obligations under the contracts. The employer also executed an indemnity agreement wherein he agreed to indemnify the United States for any loss as a result of its guarantee.

Subsequent investigation of the employer's payroll practices revealed that he made deductions from the wages of the workers which deductions were attributable to a precontract payment of a fee to facilitate the contracting of predesignated Mexicans, a fee commonly referred to as "mordida." Pursuant to Article 30 of the Agreement, representatives of the United States and Mexico executed a regional joint determination that the employer had made illegal deductions and was indebted to the workers in the sum of $449.50. The employer appealed this finding asserting that the individual workers had consented to the advances and the subsequent wage deduction, and that an official of the United States had consented to the procedure. These contentions were rejected and the original determination was upheld by a final joint determination. The United States made demand for payment

F.R.C.P., in that the court made no findings with respect to plaintiff's other physical conditions and the effect that they had on his pain and suffering and ability to earn wages. The Government also argued that, under 31 U.S.C. 724(a), a court does not have jurisdiction to award interest against the Government from the date of judgment. The Court of Appeals ruled that the trial court's findings were ample to support its damage awards. It held, however, that interest can only be awarded in one limited situation -- where the Government appeals, and, only then from the date the plaintiff files a transcript of the district court judgment with the GAO until the date of the mandate of affirmance.

Staff: Edward A. Groobert (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

LABOR

Use of Immunity Under Labor-Management Reporting and Disclosure Act (29 U.S.C. 521(b)) in Aid of Grand Jury Investigation; Procedure to Be Followed. It is to be noted that the Labor-Management Reporting and Disclosure Act (LMRDA) contains an immunity provision, which has been found to be quite useful in aid of certain grand jury investigations. The statute makes applicable to investigations conducted by the Secretary of Labor or his delegates the provisions of 15 U.S.C. 49, 50, which, in effect, confer immunity upon any person subpoenaed to testify during the course of such an investigation.

In grand jury investigations involving possible violations of LMRDA or of the Labor-Management Relations Act or the Hobbs Act, which may also involve LMRDA violations, this immunity provision has been found to be useful in compelling the testimony of reluctant witnesses. The procedure to be used is as follows:

Where the witness has refused to testify in reliance on his Fifth Amendment privilege the Regional Attorney of the Department of Labor should be requested to authorize the issuance of a subpoena through the Bureau of Labor-Management Reports, returnable before a cooperating Bureau of Labor-Management Reports official or before the United States Attorney or the Assistant in charge of the matter.

The person conducting the proceeding, acting on behalf of the Secretary of Labor, will propound significant questions covering the subject matter and periods of time pertinent to the grand jury inquiry. Having so testified the immunity of the witness is complete as to the subject matter and periods covered and the witness may thereafter be compelled to testify before the grand jury.

In the event the witness nevertheless invokes the privilege against self-incrimination, it is then appropriate to seek the aid of the court to compel testimony, and finally to seek a contempt citation should the witness fail to comply with the order of the court.

Should the witness invoke the privilege on the initial interrogation under the BLMR subpoena, the assistance of the court should be obtained at that time. (See Goldberg v. Battles, 196 F. Supp. 749, aff'd 299 F. 2d 937, cert. den.________U.S.__________, October 8, 1962.)

INTERNAL REVENUE

Arrest and Seizure Powers; Intelligence Division and Internal Security Division Investigators. The Medical Deductions Act, Public Law 87-863, was recently signed into law by the President. Among its

other provisions, the Act extends the arrest and seizure powers possessed by Alcohol and Tobacco Tax Division employees to investigators of the Intelligence Division and the Internal Security Division of the Internal Revenue Service.

NATIONAL STOLEN PROPERTY ACT

Motion for Judgment of Acquittal Denied With Respect to Interstate Transportation of Forged and Counterfeited Stock Certificate Pledged as Collateral for Loan. United States v. Leonard Strauss (S.D. Fla., Oct. 19, 1962). Strauss was convicted of interstate transportation of a forged and counterfeited security, purporting to be a stock certificate of a New York corporation, representing 8,000 shares of common stock at $26 per share, or about $208,000. He had pledged the bogus certificate to a Florida bank as collateral for a $100,000 loan, $35,000 of which was advanced by the bank. Thereafter, the bank suspected illegality and contacted the corporate transfer agent in New York, who advised on the basis of the certificate number etc., that the certificate was counterfeit. In order to be certain of the nature of the certificate, the Florida bank sent it to the New York transfer agent for examination, and this transportation was the basis of the indictment under 18 U.S.C. 2314.

Defendant filed a motion for judgment of acquittal in which he contended that he did not cause the interstate transportation because he merely pledged the certificate to a bank and could not have reasonably foreseen that it would be sent in interstate commerce, and because interstate transportation of the certificate was not necessary to the loan and was not even necessary to determine that the certificate was spurious.

The Court denied defendant's motion on the authority of Cunningham v. United States (C.A. 4, 1959), 272 F. 2d 791, 794, which supports the proposition that defendant caused the interstate transportation and that the chain of causation was not broken by intervening independent acts of others.

Staff: Former United States Attorney Edward F. Boardman; Assistant United States Attorney Alfred E. Sapp (S.D. Fla.).

FEDERAL AID HIGHWAY PROGRAM

In the United States Attorneys Bulletin dated August 24, 1962 (Vol. 10, No. 17, p. 502) we reported at length on several prosecutions for conspiracy to defraud the United States sustained by the First Circuit involving irregularities in land acquisition for the Federal Aid Highway Program. On November 19, 1962 the Supreme Court denied a petition for certiorari in the case of Francis L. Harney et al. v. United States, 306 F. 2d 523 (C.A. 1, 1962).

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950; Registration of Communist Party members. Attorney General v. William Albertson and other cases. On May 31, 1962 the Attorney General filed ten separate petitions with the Subversive Activities Control Board at Washington, D. C. pursuant to Section 8(a) and (c) of the Subversive Activities Control Act to obtain orders requiring the registration of respondents as members of the Communist Party. (See United States Attorneys Bulletin, Vol. 10, No. 13, June 29, 1962). During September 1962, hearings were held in Washington, D. C. before the Board in the matters against William Albertson and Miriam Friedlander and on October 29, 1962 and November 2, 1962 respectively, the Board issued orders against these respondents requiring them to register as members of the Communist Party, USA. On the petition filed against Arnold Samuel Johnson a hearing was held in New York City before Board Member Thomas J. Donegan. On November 7, 1962, Mr. Donegan issued his recommended decision to the Board that the respondent Johnson register under the Act.

On the petition filed against Betty Gannett Tormey, hearings were concluded in New York on October 16, 1962. On November 20, 1962, Board Member Edward C. Sweeney issued his recommended decision to the Board that the respondent Tormey register under the Act.

Staff: Oran H. Waterman, James A. Cronin, Jr.,
Robert A. Crandall and Earl Kaplan
(Internal Security Division).

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IMMIGRATION AND NATURALIZATION SERVICE

Raymond F. Farrell, Commissioner

DEPORTATION

Conflict in Circuits on Construction of Sec. 106(a) of Immigration and Nationality Act, 8 U.S.C. 1105(a). Gallegos, et al. v. Rosenberg, (C.A. 9, November 2, 1962); Arreche-Barcelona v. INS, C.A.9, November 2, 1962; Peter Holz v. INS, (C.A. 9, November 1, 1962.) The Ninth Circuit in the above cases reaffirms the position taken in Giova v. Rosenberg reported in United States Attorneys Bulletin of July 13, 1962 that only final orders of deportation are reviewable under Sec. 106 of the Immigration and Nationality Act as amended (8 U.S.C. 1105(a)). It declined to entertain the petition of Gallegos to review a denial of a motion to reopen deportation proceedings, the petition of Arreche-Barcelona to review a denial of an application to create a record of permanent residence and the petition of Holz to review a denial of an application for stay of deportation.

The Ninth Circuit thus continues to align itself with the Second Circuit which took a similar position in Foti v. INS reported in the United States Attorneys Bulletin of October 19, 1962. In conflict with the view of the Second and Ninth Circuits are the decisions of the Seventh Circuit in Blagaic v. Flagg, 304 F. 2d 623 and Roumeliotis v. INS, 304 F. 2d 453. The Seventh Circuit liberally construes Sec. 106 to encompass review of denials of applications for relief from deportation, considering these matters as being ancillary to the final deportation order.

Petitions for certiorari have been filed by Foti and Roumeliotis which if granted should resolve the conflict in the circuits on the construction of Sec. 106.

Staff: United States Attorney Francis C. Whelan and Assistant United States Attorney James R. Dooley (S.D. Calif.)

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T A X D I V I S I O N

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS

District Court Decisions

Liens: Federal Tax Lien Prior to Lien of Purchaser on Execution Where Claim of Taxpayer's Creditor Was Reduced to Judgment After Filing of Notice of Lien. Miklos M. Goldberger v. United States (D. Puerto Rico, October 19, 1962). In this case notice of federal tax lien was filed on June 29, 1961. Subsequently, on September 25, 1961, Judgment was entered in an action against taxpayer in favor of one of his creditors. The creditor moved for sale of the property attached in the action in satisfaction of the judgment rendered in her favor, and on March 9, 1962, pursuant to court order, the property was sold at public auction. Plaintiff was the purchaser. Notice of Seizure, pursuant to Section 6331 of the Internal Revenue Code of 1954, and Notice of Public Auction Sale, pursuant to Section 6335, were then served on the purchaser. He brought an action for declaratory judgment, to be declared owner of the property free and clear of all liens, to extinguish the federal tax lien, and to enjoin the United States from satisfying its lien by levy seizure, and sale of the property.

In denying plaintiff's motion to confirm entry of injunction pendente lite, the Court found that taxpayer's creditor, plaintiff's predecessor in interest, had only an inchoate lien at the time of assessment of the federal tax liability and could not, therefore, qualify as a "judgment creditor" within the definition of Section 301.6323 of the Treasury Regulations and the application of Section 6323 of the Internal Revenue Code of 1954. Since the property was sold originally on motion of this creditor, whose judgment was rendered subsequent to notice of filing of federal tax lien, it did not matter that judgment had been entered in favor of other creditors in the same action prior to notice of filing of the federal tax lien.

Staff: United States Attorney Francisco A. Gil, Jr. (Puerto Rico) and Michael J. Foley (Tax Division).

Priority Given to Trust Deeds Recorded Prior to Filing of Notice of Federal Tax Lien and to Local Tax Liens on Which Tax Rate Was Fixed Prior to Filing of Notice of Federal Tax Liens; Priority Established by State Law Gives Local Tax Lien Priority Over Trust Deeds, Resulting in Circular Priority. United States v. E. Fred Johnson, d/b/a Johnson Pressed Metal Products, et al. (S.D. Calif.) Taxpayer E. Fred Johnson and his wife are record titleholders of certain real property having a fair market value of approximately $36,000. A loan from the Small Business Administration in the amount of $60,000 was secured by a trust deed of this real property and it was recorded on August 23, 1957. Further security was a chattel mortgage on certain personal property, which has been foreclosed

and payment made by way of a stipulated judgment. A second deed of trust was given to Charles Lewis, d/b/a Aero Factors, as security for a loan of approximately $9,600 and it was recorded on August 6, 1958. Priority was given the United States on the two assessments made prior to August 6, 1958. The Small Business Administration's trust deed was given priority over the federal tax lien and the trust deed of Aero Factors had priority over all federal tax liens resulting from assessments made after August 6, 1958.

The local tax liens were given priority against the federal tax liens from the date the county tax rate is fixed, thus giving priority to two of the six local tax liens in which the rates were fixed prior to the assessment of any federal taxes. Since the remaining local tax liens have priority over the trust deeds under state law, they were allowed to be fully satisfied out of the money allocated for satisfaction of the trust deeds. This resolves in accordance with the Supreme Court decision in the United States v. New Britain, 347 U.S. 81, a circular priority in which the trust deeds have priority over the federal tax lien, the federal tax lien has priority over subsequent local tax liens, but the local tax lien has priority over the trust deeds.

Staff: United States Attorney Francis C. Whelan (S.D. Calif.) and Robert C. Bruce (Tax Division).

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