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TABLE OF CONTENTS

NEWS NOTES

Consent Judgment Filed in Wilson Antitrust Suit

September 27, 1968: A proposed consent judgment was filed in a federal antitrust case in United States District Court in Chicago to prevent the nation's largest producer and seller of sporting goods from acquiring the country's leading manufacturer of gymnastic equipment.

The judgment would conclude a case, filed last March 27, in which the Department sought to enjoin the Wilson Sporting Goods Company from acquiring the Nissen Corporation. On July 8, the Department won a preliminary injunction.

The civil complaint had charged that the proposed acquisition would eliminate actual and potential competition between Wilson and Nissen in the manufacture and sales of sporting goods, and would eliminate Wilson as a potential entrant into the gymnastic equipment field, in violation of the Celler-Kefauver Section of the Clayton Act.

Newspaper Antitrust Action Settled in Cincinnati

September 27, 1968: A proposed consent judgment in a federal antitrust case has been filed in United States District Court in Cincinnati, requiring the E. W. Scripps Company, which controls Cincinnati's two daily newspapers, to sell its majority interest in one of them.

It requires Scripps to sell its stock in The Cincinnati Enquirer. Scripps owns the city's only other daily newspaper, the Cincinnati Post and Times-Star.

The judgment concludes a 1964 civil suit that charged Scripps with violating the restraint of trade and anti-monopoly sections of the Sherman Act and the Celler-Kefauver anti-merger section of the Clayton Act.

The suit had said three separately-owned dailies were published in Cincinnati before Scripps began a series of purchases that gave it a monopoly in the city's newspaper field.

Starting in 1956, the complaint said, Scripps bought more than 50 percent of the stock in The Cincinnati Enquirer, Inc., and gained control over the newspaper. In 1958, Scripps purchased the Times-Star and it ceased publication after being merged with the Scripps-owned Post.

The suit had asked that Scripps be ordered to sell its Enquirer interest and be forbidden to buy any newspaper in the Cincinnati area.

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EDWIN WEISL, JR.
Assistant Attorney General
Civil Division

Ed Weisl was born in New York City on October 17, 1929. He graduated from Yale with a degree in political science and philosophy in 1951. For the next two years he served as a Lieutenant junior grade in the Navy, first on destroyer duty in Korea and later at the Pentagon. After his discharge he attended Columbia Law School where he participated in the Harlan Fiske Stone Moot Court Honor Argument. Upon graduation he joined the New York firm of Simpson, Thacher and Bartlett, of which he was a member until his appointment as Assistant Attorney General in charge of the Land and Natural Resources Division in March 1965. He served as Assistant Special Counsel to the Preparedness Subcommittee of the Senate Armed Services Committe when it investigated the Nation's missle, satelite, space and defense programs in 1957 and 1958. In 1964 he was the campaign director for the Democratic Party throughout the State of New York. He is a Vice-President of the Columbia Law School Alumni Association and President of the Washington, D.C. Chapter. In October 1967, Mr. Weisl was named by President Johnson as Assistant Attorney General for the Civil Division of the Department of Justice.

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GILBERT S. MERRITT, JR.
United States Attorney
Tennessee, Middle

Mr. Merritt was born January 17, 1936 in Nashville, Tennessee. He received his A.B. degree from Yale University (1957), his LL.B. degree from Vanderbilt University (1960), and his LL.M. degree from Harvard University Law School in 1962. From 1960 to 1963 he was in private practice in Nashville. During this period he was also Assistant Professor of Law, and later a part-time Lecturer in Law at Vanderbilt University. From 1963 until his appointment as United States Attorney, Mr. Merritt was Associate Metropolitan Attorney for the Nashville Department of Law. Since he has been United States Attorney his office has given special emphasis to the litigation of civil rights cases involving equal employment, school desegregation, and open housing.

ANTITRUST DIVISION

Assistant Attorney General Edwin M. Zimmerman

DISTRICT COURT

SHERMAN ACT

FURRIERS INDICTED FOR VIOLATION OF SECTION 1 OF ACT.

United States v. Intercontinental Fur Corp., et al. (S.D. N.Y., 68 CR 764; September 18, 1968; D.J. 60-198-15)

On September 18, 1968, a grand jury for the Southern District of New York returned an indictment against twenty New York City firms, eighteen of which were corporations and two of which were partnerships, on a charge of conspiring to eliminate competition in the purchase of Alaska sealskins in violation of Section 1 of the Sherman Act. The indictment alleges that during the period April 1962 to April 1966 the defendant firms, which include six sealskin dealers and fourteen fur manufacturers, agreed not to compete with one another in the bidding at the semi-annual sealskin auctions held by the Fouke Fur Company on behalf of the United States and Japanese Governments. The manufacturers agreed not to bid for the skins in competition with the dealers. The dealers allocated among themselves the lots of skins for which each would bid and, pursuant to their agreement with the manufacturers, turned the skins over to the manufacturers. The manufacturers took turns in selecting the lots which had been turned over to them; the order of choice was determined in a lottery held earlier by the manufacturers. Only after the lottery and the purchase of skins from the conspiring dealers could the manufacturers purchase from other dealers.

Harvested on the Pribilof Islands off the coast of Alaska pursuant to an international treaty, the Alaska sealskins are packed in barrels, shipped to a warehouse in Seattle, Washington, and then transported to Greenville, South Carolina, where, under contracts with the United States and Japanese Governments, the Fouke Fur Company processes, dyes and sells the pelts at auctions held in the spring and fall of every year. By the terms of its contracts with the two governments, the Fouke Fur Company, after deducting its processing and selling charges, remits pre-determined shares of the auction proceeds to the United States and Japan. The United States Government in turn remits 70 percent of its share of the proceeds to the State of Alaska pursuant to the Alaska Statehood Act of 1958.

The defendant and unnamed co-conspirator manufacturers accounted

for substantially more than half of the Alaska sealskin garments manufactured in the United States during the period of the charged conspiracy. At the nine auctions held between April 1962 and April 1966, the purchases of Alaska sealskins by the defendant dealers pursuant to the conspiracy totaled approximately $7.9 million representing 50% of the Alaska sealskins sold at auction during this period.

The defendants are:

Intercontinental Fur Corp.	Durable Fur Co., Inc.
Essenfeld & Sons, Inc.	H B A Fur Corp.
F.G.K. Fur Corp.	Jack Kasindorf, Inc.
North American Fur Co., Inc.	Nat Lustgarten, Inc.
Charles Sonenblum, Inc.	Rappoport & Sternberg, Inc.
Lester Taffer, Inc.	Schwartz & Kreinig, Inc.
Berman & Fox, Inc.	Tikalsky & Glassman, Inc.
Brooks & Senter Fur Corp.	Valerie Furs Corp.
Ceranka Furs, Inc.	Verona & Smith
Chambers Sherwin, Inc.	Dunn & Landau

Arraignment has been set for October 3, 1968.

Staff: Norman H. Seidler, Samuel London, Edward F. Corcoran and Richard J. Favretto (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEALS

ADMINISTRATIVE LAW -- "FREEDOM OF INFORMATION" ACT

PUBLIC INFORMATION SECTION OF ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. 552, DOES NOT REQUIRE DISCLOSURE OF REPORTS OF PRESENTENCE INVESTIGATIONS.

Don B. Cook v. Warden J. T. Willingham, et al. (C.A. 10, No. 10,012; September 23, 1968; D. J. 145-12-1153)

Plaintiff, while serving a prison sentence in a federal penitentiary, sought to obtain the non-confidential portions of the report of his presentence investigation. The report had been prepared for the use of the sentencing judge by a probation officer, an employee of the Administrative Office of United States Courts. The sentencing court had made the report available to the Bureau of Prisons. Plaintiff had requested a copy of the report from the Bureau, but ignored its advice that he should direct his request to the sentencing court. He then brought this action against the prison officials based upon the Public Information Section of the Administrative Procedure Act (known as the "Freedom of Information" Act), 5 U.S.C. 552.

The Act governs the availability of agency records; in defining "agency," it excludes the "courts of the United States." 5 U.S.C. 551(1)(B). The prison officials moved to dismiss the complaint on the ground that the report belonged to the sentencing court, not to the Bureau of Prisons, and was thus exempted from disclosure. The district court dismissed the complaint, and plaintiff appealed.

The Tenth Circuit granted the defendants' motion to affirm the judgment below. In doing so it agreed with the district court that the presentence report, which was prepared for the use of the sentencing court, "remains in the exclusive control of that court despite any joint utility it may eventually serve," and is thus not an "agency" report which would be available under 5 U.S.C. 552.

Staff: John C. Eldridge and Michael C. Farrar (Civil Division)

OFFICIAL IMMUNITY

BARR v. MATTEO, 360 U.S. 564, BARS SLANDER ACTION AGAINST SECRET SERVICE AGENT.

Anthony J. Scherer v. Kenneth Morrow (C. A. 7, No. 16,661, September 25, 1968; D. J. 145-3-860)

The defendant, a Special Agent of the Secret Service, delivered a lecture on the responsibilities and activities of the Service to a class of trainees of the Chicago Police Department. In response to a question at the close of the lecture, the agent allegedly referred to plaintiff as a "nut," and stated that the Secret Service "went to his [plaintiff's] home and deactivated a cannon that he had pointed at O'Hare Field, the day President Johnson came to Chicago." Cf. Scherer v. Brennan, 379 F. 2d 609 (C. A. 7), involving that incident.

Scherer then brought this slander action against the agent, who moved for summary judgment on the basis of affidavits which established that, in giving the lecture, he was carrying out the duties of his office. The district court granted defendant's motion and the plaintiff appealed.

The Seventh Circuit affirmed on the ground that "a federal official cannot be held personally liable for acts committed within the outer perimeter of the official's line of duty," citing Barr v. Matteo, 360 U. S. 564. The Court noted that the allegedly slanderous statements were made only for the purpose of using a pertinent local incident to demonstrate the functions of the Secret Service. Consequently, these statements were absolutely privileged under the Barr doctrine.

Staff: Michael C. Farrar (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURTS OF APPEALS

INTERSTATE COMMERCE ACT (MOTOR CARRIERS)

MIRANDA DOCTRINE DOES NOT EXTEND TO NONCUSTODIAL TYPE OF INTERROGATION BY INTERSTATE COMMERCE COMMISSION INVESTIGATOR NOR RECORDS REQUIRED TO BE KEPT UNDER ICC REGULATION. VALIDITY OF TRUCK LEASING ARRANGEMENT NOT GERMANE TO OFFENSE UNDER 49 U. S. C. 303(c). EXPECTATION OF PAYMENT SUFFICIENT WITH RESPECT TO ELEMENT OF "FOR HIRE".

United States v. William H. Webb (C. A. 4, No. 11,591, July 16, 1968; D. J. 59-30-10568)

The Court of Appeals for the Fourth Circuit affirmed the conviction of defendant, an ICC-regulated motor carrier, for aiding and abetting another trucker, Dunn, to engage in unauthorized hauling for hire in violation of 49 U. S. C. 303(c). The Court refused to extend the doctrine of Miranda v. Arizona, 384 U. S. 456, to a noncustodial type of interrogation of defendant by an ICC investigator to whom defendant voluntarily surrendered business records kept pursuant to ICC regulations and made oral and written incriminating admissions.

The evidence established that, in the course of ICC's investigation of a truck-leasing arrangement between defendant and Dunn (whose application for an ICC permit had been denied), defendant, at his place of business, voluntarily released to the investigator, at the latter's request, relevant invoices, freight bills, driver's logs and equipment leases which he was required to keep under ICC regulations, and he made oral statements in response to the investigator's interrogation. Subsequently, on the basis of the information gleaned from the interviews and documents furnished by defendant, the investigator prepared a written statement to the effect that the leasing agreement was merely an accommodation for Dunn to allow him to continue hauling for a customer who was about to expand from local to interstate shipments. The statement also admitted that, contrary to the ostensible agreement, defendant had no participation in the business of hauling for Dunn's customer, had not handled any orders or exercised any control whatever over the trucks used by Dunn. Defendant signed the statement in his own office at the request of the investigator, who told him that he did not have to sign it, but had not advised him of his constitutional right to counsel and to remain silent, and that the statement might be used against him in

criminal proceedings. Defendant's conviction is based on the investigator's testimony concerning defendant's oral statements during the interview, the statement defendant signed, and defendant's shipping documents.

The Court concluded that the documents, as well as defendant's oral and written statements, were properly admitted in evidence, because defendant was not the subject of a "custodial interrogation" at any time during the investigation to require the safeguards of the constitutional warnings enunciated in the Miranda case. The Court further concluded that the shipping records kept in obedience to a legitimate regulation are deemed to be public "non-privileged" documents and therefore outside the Fifth Amendment protection against self-incrimination of the custodian of such records under the holding in Shapiro v. United States, 335 U. S. 1; and consequently not affected by the recent pronouncements in Marchetti v. United States, 390 U. S. 39; Grosso v. United States, 390 U. S. 62; and Haynes v. United States, 390 U.S. 85.

In addition, the Court held that the question of the validity of the lease agreement was not in issue, the theory of the Government's case being that the parties did not abide by the lease, which the evidence established was a mere subterfuge whereby Dunn illegally engaged in interstate hauling, the latter being the gravamen of the offense. It also held that since both parties expected payment to be made for the hauls, it was sufficient to establish that the hauls were "for hire," even if defendant had proved that he did not pay Dunn for any of the hauls.

Finally, the Court found that it was a proper exercise of discretion for the trial court, sitting without a jury, to reopen the case, sua sponte, in order to allow the Government to introduce in evidence a letter from ICC reprimanding defendant for entering into a prior similar lease arrangement, where, after the trial court denied the Government's offer to introduce such letter in evidence in the case in chief (because intent or scienter are not elements of the crime), defendant argued in his summation that the Government failed to show that he entered into the lease agreement with knowledge of its illegality.

Staff: United States Attorney Claude V. Spratley, Jr. and Assistant United States Attorney Samuel W. Phillips (E. D. Va.)

NARCOTICS - ENTRAPMENT

NINTH CIRCUIT HOLDS MARIHUANA PEDDLERS CAN'T TRUST THEIR FRIENDS.

United States v. Quevedo (C. A. 9, No. 22,263, September 10, 1968; D. J. 12-12-2675)

Don Shutz and Lonnie Van De Ford were Government informants. They had known appellant for several years. Don used to call appellant on the phone, and visit his room in a boarding house. Lonnie, on the other hand, used to meet appellant at the apartment of Bunny and Bones -- a male and female -- some mutual friends.

Don and Lonnie asked appellant to sell them and an undercover agent some marihuana. Appellant obliged on the evening of April 14, 1966.

The defense at trial and on appeal was entrapment. Appellant felt that a conviction cultivated from a friendship was no conviction at all. The Ninth Circuit disagreed. It felt a friendship cultivated for a conviction was no friendship at all.

The Court held, per curiam, that it "may not be a nice thing to [send a friend to jail], but it falls short of entrapment as a matter of law."

Staff: United States Attorney William Matthew Byrne, Jr. (C. D. Calif.)

SECURITIES ACT

FRAUD IN THE SALE OF SECURITIES: SUFFICIENCY OF EVIDENCE TO SHOW PARTICIPATION IN OFFENSE.

Galbraith v. United States (C. A. 10, 1968, 387 F. 2d 617, D. J. 113-13-36)

The appellant was convicted for fraud in the sale of securities. On appeal, one of his claims of error was that the evidence was insufficient, in that one of his victims was unable to identify him in the courtroom. This witness, 84 years of age, testified that she had purchased a security from two men, one of whom was introduced to her as Galbraith (appellant). She delivered her check to the men and later received a certificate signed by the appellant as president of the company.

The Court of Appeals held that the evidence of the appellant's continuing participation in the sale of securities, his endorsement of the check and his execution and delivery of the corporate certificate constituted sufficient evidence of circumstance to permit the jury to find that the appellant participated in the defrauding of this witness.

Other allegations of error were also found to be without merit, and the conviction was affirmed. The appellant had received a sentence of three and a half years in prison, to be followed by five years on probation.

Staff: United States Attorney Lawrence M. Henry and Assistant United States Attorney Milton C. Branch (D. Colorado)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

COURTS OF APPEALS

CONDEMNATION

SEVERANCE DAMAGES; EXCLUSION OF VALUE CREATED BY GOVERNMENT'S PROJECT; EXCLUSION FROM AWARD FOR SEVERANCE DAMAGES OF RIGHTS AND VALUES RIPARIAN IN NATURE DERIVING FROM ACCESS TO NAVIGABLE BODY OF WATER; SUBSTANTIAL EVIDENCE TO SUPPORT AWARD.

United States v. Leila Brown Birnbach, et al. (C. A. 8, No. 18, 846, September 16, 1968, D. J. 33-4-262-197)

The Government appealed from an award of $5, 950 as severance damages resulting from the taking of 21 acres of a 156-acre farm, for use in connection with the Arkansas River Project. The Government claimed that there was no substantial evidence to support the award of severance damages and that the court below did not state the factual basis for that award. The landowners cross-appealed, claiming that the court should have awarded $80, 000 for the land taken because the court wrongly excluded any value created by the Project.

The Court of Appeals first dealt with the landowners' cross-appeal, holding that the landowners did not present sufficient evidence to prove "that the land taken here was not within the scope of the Arkansas River Project from the time the government was committed to it" and therefore "the land was not entitled to a valuation based upon or including the benefit of enhancement created by the Arkansas River Project." With respect to the Government's appeal, the Court stated that the evidence submitted by both the landowners and the Government on the issue of severance damages was "meager" and that the award was not clearly erroneous. The Court also held that the court below had sufficiently indicated the factual basis for its conclusion; the Government witness having admitted a small amount of severance damage for some unstated reason.

However, the Court reversed on the basis of an issue not raised in the Government's brief, although discussed tangentially at oral argument following questioning by the Court. The Court stated:

> * * * when a government project results in taking a part of a landowner's tract and the project enhances the value of the remaining tract, the government is entitled to have the value of such

> enhancement set off against the value of the land taken in determining the damages the government must pay. When the converse is true, so that the taking of a portion does not enhance but lowers the value of the remainder because of the loss of the riparian location * * *.

Under United States v. Rands, 389 U.S. 121 (1967), "* * * value 'flowing' from a riparian location may not be recognized when the riparian character of the land is destroyed." The Court noted that the trial judge considered, in his determination of severance damage, "factors having to do with riparian location ('irrigation, boating, fishing and hunting')." Since he "improperly took into consideration, in his fixing of severance damages, rights and values riparian in nature which may not be used as a basis for damage against the superior rights of the government," the judgment was vacated and the case was remanded "for reconsideration of the severance damage issue to determine, on a proper basis, the amount to which the appellees are entitled."

Staff: Frank B. Friedman (Land and Natural Resources Division)

CONDEMNATION

OMISSION OF VALUE OF PART OF PROPERTY TAKEN; ERROR NOT WAIVED BY FAILURE SPECIFICALLY TO OBJECT TO COMMISSION'S REPORT OR THE DISTRICT COURT'S ORDER.

Prechter v. United States (C.A. 5, No. 24394, August 20, 1968; D.J. 33-25-315-144)

By declaration of taking an easement was acquired across 80 acres of appellants' land. At oral argument it was pointed out for the first time by the appellate court that the condemnation commission erred in computing just compensation (here measured by the difference between the fair market value of appellant's tract before and after the taking). The error was that the commission calculated the before value on the basis of 73 acres, instead of 80 acres. The Court of Appeals reversed and remanded the case holding:

> During oral argument, the government conceded that the seven acres were completely absent from the commission's report, but argued that any objection to such omission was waived by appellant's failure to raise the point before the district court. We are not concerned here with an evidentiary question which we have frequently held must be raised in the district court before it will be considered on appeal. * * * Rather, the objection

> here is to the complete failure of the commission to place any value whatsoever on seven acres of Prechter's land. Such an error can and must be noticed on appeal, even if raised for the first time. Here appellant did object to the award as inadequate, arbitrary, and not based upon any of the testimony. In the circumstances of this case, such allegations are sufficient to allow a review by the complete omission of these seven acres from the commission's pre-taking calculation of value.

The opinion itself is helpful to the Government by indicating that had the commission's report been thorough and complete as required by United States v. Merz, 376 U.S. 192 (1964), such a miscalculation would never have occurred and, if it did, it would have been uncovered sometime before oral argument in the Court of Appeals. Due to the disposition of the case, points specifically presented by the appellant were not considered by the Court.

Staff: William M. Cohen (Land and Natural Resources Division)

DISTRICT COURT

TAX IMMUNITY OF FEDERAL PROPERTY

United States v. Philip Craig, as Tax Collector for the Town of Ashland, Maine, et al. (D. Maine, N. Div., Civ. No. 1706; D. J. 90-1-5-978)

An action was brought for a declaratory judgment seeking to establish the invalidity of certain tax assessments for taxable year 1965, upon parcels of land in Ashland, Maine, held by the Small Business Administration as a mortgagee in possession. The court held that the supplemental tax assessment made by the Town of Ashland, Maine, for the taxable year beginning April 1, 1965, on real property formerly owned by the Maine Grafton Lumber Corporation, and then in the possession of the Small Business Administration, United States Government, was null and void.

As owner of the real property, the Small Business Administration, an agency of the United States Government, was not subject to local taxation thereon, citing Small Business Administration v. McClellan, 364 U.S. 446 (1960).

Staff: United States Attorney Lloyd P. LaFountain (D. Maine) and Felthan Watson (Land and Natural Resources Division)

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