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THE SCOPE OF LOADING AND UNLOADING CLAUSES IN AUTOMOBILE INSURANCE POLICIES

NOTES

THE SCOPE OF LOADING AND UNLOADING CLAUSES IN AUTOMOBILE INSURANCE POLICIES.—Policies of insurance covering those engaged in the transportation and delivery of merchandise generally contain clauses designed to meet the particular needs of the insured. One such clause often included in policies obtained by the owners of these commercial vehicles is the so-called "loading and unloading" clause. Undoubtedly, the purpose of this clause is to offer maximum protection to the insured, but the mere inclusion of this clause has not solved the problem. It fails in its purpose because the general terms "loading and unloading" do not specifically define the extent of the intended coverage.

A reading of the cases which have arisen as a result of the application of this clause discloses that there is no one interpretation accepted by the courts. The inherent problem in these cases, which have come before the courts throughout the country, is: at what point in the loading and unloading does the insurer's liability cease?

Currently, there are two schools of thought on the subject: the "complete operation" doctrine, which is the New York and majority view; and the "coming to rest" rule, which prevails in a minority of jurisdictions.

The "complete operation" doctrine permits a broader coverage to the insured. It extends the process of loading and unloading to include all operations involved in the handling of the goods, from the moment they are taken into possession by the insured until they are turned over to the party to whom delivery is to be made. Under this rule, " 'loading and unloading' must be construed as embracing not only the immediate transfer of the merchandise to or from the vehicle itself, but the entire act of delivering such merchandise between the vehicle and the place from or to which it is being transported."[1]

In contrast, the "coming to rest" rule construes this clause narrowly. Under this rule, "unloading" covers the time involved in taking or lifting the merchandise from the truck to the point where it is first set down, or where the movement which took it from the truck ends.[2] "Loading," by the same process of reasoning, would therefore cover only the act of putting the merchandise into the truck and its subsequent packing therein.[3] This rule does not extend "the liability of the insurer beyond what may be described as the natural territorial limits of an automobile and the process of loading and unloading it."[4]

Adherence to the "complete operation" doctrine by the New York courts seems to increase rather than resolve the problem surrounding the liability of insurance carriers during truck loading and unloading operations. This is pointed up rather sharply in the case of *Wagman* v. *American Fidelity & Casualty Co., Inc., et al.*[5]

In that case a truck owned and operated by a motor carrier, was to deliver clothing from a store in New York City to the store's warehouse in Rochester. The truck was parked at the curb and two of the store's employees brought the garments out on movable racks to the curb line. Wagman, a department manager of the store, supervised the pickup at the curb for inventory purposes, but did not actually push or carry

[1] Lowry, *et al.* v. R. H. Macy & Co., Inc., 119 N. Y. S. 2d 5, 10 (Sup. Ct., Trial T., Kings Co., Pt. VII, Dec. 12, 1952).

[2] Pacific Automobile Ins. Co. v. Commercial Casualty Ins. Co. of New York, 108 Utah 500, 161 P. 2d 423 (1945).

[3] *Id.* at 504, 161 P. 2d at 424.

[4] Stammer v. Kitzmiller, 226 Wis. 348, 276 N. W. 629, 631 (1937).

[5] 304 N. Y. 490, 109 N. E. 2d 592, aff'g 279 App. Div. 993, 112 N. Y. S. 2d 662 (1st Dept. 1952), aff'g 201 Misc. 325, 106 N. Y. S. 2d 854 (1952).

the garments. The truckmen did not leave the truck during the loading, nor did any of the store employees enter the truck. The driver of the truck reached down to the racks and lifted the garments into the truck. Wagman, on his way back from the curb to the store, collided with a pedestrian, causing her to fall to the sidewalk, whereby she sustained serious injuries. She brought suit against Wagman and the store. The store asserted a cross-claim against Wagman for judgment over against him as the party primarily liable. Wagman demanded that the motor carrier's insurer defend him against both claims, and when the insurer refused to do so Wagman brought this action for a declaratory judgment, alleging that he was entitled to protection from liability as an "insured" under the policy of insurance issued to the motor carrier.

The policy contained an omnibus provision defining the term "insured" as including not only the named insured, but also "any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured." The policy also provided that "use of the automobile for the purposes stated includes the loading and unloading thereof."

The lower courts awarded judgment for Wagman, maintaining that the accident occurred while he was engaged in an operation directly related to the loading of the vehicle. The Court of Appeals, in affirming the judgment, held that the broad purpose of the policy was to cover the complete operation of making a pickup; that the process of placing the goods on the vehicle cannot be dissociated from the process of taking the goods from the store to the curb line, regardless of the fact that one operation was performed by the truckmen and the other operation by the store employees; and that both operations together constituted the act of "loading." The court further stated that the fact that Wagman was on his way back to the store when the accident occurred did not suspend the coverage under the policy and that although Wagman was not an employee of the insured, he came within the policy's omnibus provision defining the term "insured" as embracing any person using the vehicle with the permission of the named insured.

There was a dissenting opinion, however, which took the position that assuming New York is inclined "toward the 'complete operation' theory in determining what constitutes the loading of a vehicle, these words are not a formula that embraces everything that may have been done prior to the immediate effort of loading."[6] It laid stress on the fact that it was due to a special agreement between Wagman's employer and the motor carrier that the truckmen followed the unusual procedure of not leaving their trucks. It concluded that since the store employees would ordinarily have taken the inventory inside the store, the risk created to the pedestrian by virtue of taking the inventory on the sidewalk was not one which accompanied the loading, and therefore was not within the contemplation of the insurer and the motor carrier in entering into the insuring agreement.

In *Stammer* v. *Kitzmiller*,[7] often cited as the leading case on the "coming to rest" doctrine, a truck driver, who was an employee of a brewery company, opened a hatchway in the sidewalk leading to the basement of a tavern, removed a barrel of beer from the truck and delivered it through the hatchway. Leaving the hatchway open and unguarded, the driver entered the tavern to have the sales slip signed. While he was in the tavern, a pedestrian fell into the hatchway.

The court, in holding that the accident was not within the loading and unloading

[6] *Id.* at 498, 109 N. E. 2d 596.
[7] 226 Wis. 348, 276 N. W. 629 (1937).

provision of the policy, stated that "when the goods have been taken off the automobile and have actually come to rest, when the automobile itself is no longer connected with the process of unloading, and when the material which has been unloaded from the automobile has plainly started on its course to be delivered by other power and forces independent of the automobile and the actual method of unloading, the automobile then may be said to be no longer in use."[8] The court pointed out that in some cases it may be difficult to ascertain the precise line at which unloading ends and a further phase of commerce, such as the completion of delivery, begins. It noted, however, that in this case the merchandise had been removed from the vehicle and considerable time had elapsed after anything had been done which was reasonably connected with the "actual unloading,"[9] and that therefore, it found no difficulty in limiting the responsibility of the insurer who covered loading and unloading operations.

In some cases where the "coming to rest" theory has been applied, the courts have held that the unloading ceases when the merchandise has been set on the sidewalk.[10] This is the narrowest interpretation of the doctrine, encompassing merely the process of removing the goods from the vehicle and setting them down, and eliminating from coverage any further acts such as picking them up from the sidewalk and setting them to rest within the customer's premises.[11]

The largest area of difference between the doctrines is found in the fact that those courts which apply the "coming to rest" doctrine tend to draw a distinction between unloading and subsequent delivery,[12] while in the application of the "complete operation" doctrine there is a tendency to consider delivery within the scope of unloading.[13] It may be noted, however, that there are certain fundamental concepts, to which the courts have on occasion alluded, which seem to transcend the bounds of either doctrine. For example, in a few instances the courts have inquired into the question of causal relationship, and have pointed out that a causal relationship must exist between the loading or unloading and the damages sustained.[14] That this is not more frequently discussed in the cases would seem more reasonably attributable to the court's belief that the requirement has been met in the particular case in which it is not discussed, rather than to a rejection of the requirement. In fact, serious reflection leads almost inevitably to the conclusion that once the court determines what the extent of the loading or unloading operation is in a given case, the answer to the question of whether there is a causal connection between the loading or unloading operation and the damage sustained would be apparent.

Another fundamental factor which the courts have discussed and which transcends the bounds of either doctrine is the question of interpretation of the loading and unloading clause in the light of intention. It has been stated, with reference to the coverage of the clause, that "an insurance contract like any other contract must be interpreted

[8] *Id.* at 552, 276 N. W. at 631.

[9] *Id.* at 553, 276 N. W. at 631.

[10] St. Paul Mercury Indemnity Co. v. Standard Accident Ins. Co., 216 Minn. 103, 11 N. W. 2d 794 (1943).

[11] *Ibid.*

[12] American Casualty Co. v. Fisher, 195 Ga. 136, 23 S. E. 2d 395 (1942).

[13] Wheeler, *et al.* v. London Guarantee & Acc. Co., Ltd. of London, England, 292 Pa. 156, 140 A. 855 (1928).

[14] See Handley v. Oakley, 10 Wash. 2d 396, 116 P. 2d 833 (1941); Pacific Automobile Ins. Co. v. Commercial Casualty Ins. Co. of New York, 108 Utah 500, 161 P. 2d 423 (1945); Zurich General Accident & Liability Ins. Co., Ltd. v. American Mut. Liability Ins. Co. of Boston, 118 N. J. L. 317, 192 A. 397 (1937); Ferry, *et al.* v. Protective Indemnity Co. of New York, 155 Pa. Super. 266, 38 A. 2d 493 (1944).

in the light of the intention of the parties."[15] Although the courts have infrequently looked to the factor of intention as a criterion for determining whether coverage exists under the loading and unloading clause, it is apparent that if the inquiry into the intention of the parties becomes more exhaustive, the limits of either the "complete operation" doctrine or the "coming to rest" doctrine, as ordinarily defined, will become of less importance.

THE NILES-BEMENT-POND CASE AS A SETBACK TO THE GOVERNMENT APPLYING THE DEBENTURE STAMP TAX TO PROMISSORY NOTES.—The Federal Documentary Stamp Tax[1] is imposed "on all bonds, debentures, or certificates of indebtedness issued by any corporation and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities."

The case of *Niles-Bement-Pond* v. *Fitzpatrick*,[2] decided by the United States Court of Appeals for the Second Circuit, is a clear warning to the Bureau of Internal Revenue that the foregoing statute cannot be the basis of taxing all corporate borrowing. On the other hand, it is not in conflict with the many previous decisions that the mere use of a promissory note as a form of corporate borrowing cannot avoid the Federal Documentary Stamp Tax where the borrowing transaction has many of the characteristics of a debenture.

The question of whether the statute was to be strictly construed to apply to financing in the form of bonds, debentures or certificates of indebtedness or whether it would be applied to the financing transaction regardless of form, was first decided in the Second Circuit Court of Appeals in 1947 in the *General Motors Acceptance Corp.* v. *Higgins* case.[3] The court held that the substance of the loan transaction, not the form, would govern the imposition of the tax.[4]

It is now clear from the *Niles* case that the controlling factor used by the courts to determine the substance of the transaction has been the source of the loan,[5] and therefore financing through investment sources, i.e., insurance companies rather than from the commercial loan department of banks will result in the loan's being taxable.

In the *General Motors Acceptance Corporation*[6] case and some of the subsequent cases,[7] the argument has been made that a documentary stamp tax had previously been imposed by a separate section covering promissory notes as distinguished from the present and entirely different section on debentures and certificates of indebtedness.

[15] Pacific Automobile Ins. Co. v. Commercial Casualty Ins. Co. of New York, 108 Utah 500, 507, 161 P. 2d 423, 426 (1945).

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[1] Int. Rev. Code § 1810.

[2] 213 F. 2d 305 (2d Cir., 1954), reversing 112 F. Supp. 113 (Conn., 1953).

[3] 161 F. 2d 593 (2d Cir., 1947), reversing 60 F. Supp. 979 (S. D. N. Y. 1945), cert. denied, 332 U. S. 810 (1947).

[4] This view was followed in every case except Allen v. Metallic Casket Co., 99 F. Supp. 104, 106 (N. D. Ga., 1951), aff'd 197 F. 2d 460 (5th Cir., 1952), and possibly in Leslie Salt Co. v. United States, 110 F. Supp. 680 (N. D. Calif., 1953), both as later explained in this Note.

[5] *Ibid.*

[6] 161 F. 2d 595 (2d Cir., 1947).

[7] Commercial Credit Co. v. Hofferbert, 93 F. Supp. 562, 564 (D. Md., 1950), aff'd per curiam, 188 F. 2d 574 (4th Cir., 1951), Niles-Bement-Pond Co. v. Fitzpatrick, 112 F. Supp. 113 (Conn., 1953), Gamble-Skogmo, Inc. v. Kelm, 112 F. Supp. 872 (Minn., 1953).

With the repeal of the former section on promissory notes, it was argued by the taxpayer that Congress no longer intended to subject any promissory notes to this tax.

The government has contended that the tax repealed was that which covered only notes used customarily in day-to-day commercial transactions of a short term character.[8] No court has accepted the taxpayer's argument that the history of the legislation made promissory notes tax free.

On the other hand, the courts have not accepted the government's argument that only *short* term commercial loans are exempt from the tax.[9]

The refusal of the courts to limit the exception to short term commercial loans was seen previous to the *Niles* case in *Belden Mfg. Co.* v. *Jarecki*[10] and *United States* v. *Ely Walker Dry Goods Co.*,[11] where the notes were for five years and fifteen years respectively and yet were held to be nontaxable. In other respects, however, these two cases and now the *Niles* case, follow the government argument that the loan be made for commercial rather than investment purposes. In the *Ely Walker* case, the borrower was an old customer of the two banks involved, and in the habit of borrowing from their commercial loan departments. In addition, the two notes were classified promissory notes by the National Bank Examiners and the corporate charter prohibited the corporation from selling any bonds without the approval of 90% of the preferred stockholders. In the *Belden* case, despite the fact that the borrower received a substantial amount of capital for a long period of time,[12] the court pointed out that the note had not been sold to the highest bidder, and was not purchased as an investment; the lender was a bank accommodating an old customer, and was an institution not solely engaged in the investment business.

In the *Niles*[13] case the notes were twenty-nine in number, covering a seven-year period for an aggregate of $3½ million. The borrower was an old customer of the bank and was borrowing for current purposes.

The government has, however, prevailed in cases in which the lender can be said to be an investor rather than a commercial lender. In two such cases, taxable loans were made by insurance companies,[14] in another by trustees under pension and annuity trusts,[15] and another by lenders who specifically stated the loan was for investment purposes.[16] In no case was the lender a commercial bank except in one case now on appeal.[17]

[8] *Ibid.*

[9] The courts likewise have rejected the argument that Congress intended to tax only transactions involving "interest coupons," or "in registered form" or "known generally as corporate securities." General Motors Acceptance Corp. v. Higgins, 161 F. 2d 593, 595 (2d Cir., 1947). Commercial Credit Co. v. Hofferbert, 93 F. Supp. 562, 565 (D. Md., 1950), Stuyvesant Town Corp. v. United States, 111 F. Supp. 243, 246 (Ct. Cl., 1953), Treasury Reg. 71 (1941), § 113.50.

[10] 192 F. 2d 211 (7th Cir., 1951).

[11] 201 F. 2d 584 (8th Cir., 1953). See also, Shamrock Oil & Gas Co. v. Ellis Campbell, 107 F. Supp. 764 (N. D. Texas, 1952).

[12] See M. T. 38, 194-2 Cum. Bull. 128.

[13] See note 2 *supra.*

[14] Commercial Credit Co. v. Hofferbert, 93 F. Supp. 562 (D. Md., 1950), Gamble-Skogmo v. Kelm, 112 F. Supp. 872 (D. Minn., 1953).

[15] United States of America v. General Shoe Corp., CCH Fed. Tax Serv., Supp. Vol. 49019 (M.D., Tenn., 1953).

[16] General Motors Acceptance Corp. v. Higgins, 161 F. 2d 593 (2d Cir., 1947), see note 14 *supra.*

[17] Leslie Salt Co. v. United States, 110 F. Supp. 680 (N. D. Calif., 1953).

An apparent exception was a loan made to the *Atlantic Metallic Casket Company*.[18] This loan, made by an insurance company, was held to be not taxable. However, it is submitted that the size of the loan ($600,000) suggests a commercial loan rather than an investment.

Only one court has tried to distinguish between financing for so-called capital purposes for which debentures are appropriate and financing for current business purposes which presumptively might be exempt from the tax.[19]

In addition to the express statement of one or both parties that the loan represented an investment,[20] the courts have recognized that where there is a conversion right expressed in the note or the loan agreement to obtain debentures or promissory notes in smaller denominations, or where the lender is provided with a number of identical notes,[21] it is indicative of an investment transaction rather than an ordinary commercial loan. Such split-up of the investment paper suggests resale to other investors.

Where the loan imposes restrictions on the borrower similar to those contained in a debenture, the court is inclined to view this as an investment in the nature of a debenture.[22] The use of such terms as "purchase and sale," or "redemption" rather than "prepayment" are words more closely associated with debenture financing.[23] Where the borrower obtains a large amount of capital for a substantial period of time, this is likewise considered indicative of an investment transaction.[24] Where the formality of the note is similar to the form of debentures or other corporate securities, the court will find the note taxable.[25] The sale of the instrument to the highest bidder and other factors similar to debenture financing will be viewed as being an investment situation.[26]

It would seem that the point seized by the courts in several of the decisions that the lender was an insurance company rather than a commercial bank is a fair distinction. Insurance company loans have perhaps of necessity been characterized by unliquid investment comparable to the classic bond or debenture. Commercial banks on the other hand have continued to seek more liquid loans. Although the distinction should not be conclusive, it is a distinction which has merit as one of the important factors to be considered.

The *Niles* case[27] has clarified the picture by the reversal of the District Court and

[18] 99 F. Supp. 104 (N.D. Ga., 1951).

[19] Niles-Bement-Pond v. Fitzpatrick, 213 F. 2d 308 (2d Cir., 1954), cf. p. 312.

[20] Reason for investment clause is to avoid SEC registration fees, and statements; Commercial Credit Co. v. Hofferbert, 93 F. Supp. 562, 566 (D. Md., 1950), see note 16 *supra*.

[21] General Motors Acceptance Corp. v. Higgins, 161 F. 2d 593 (2d Cir., 1947), Commercial Credit Co. v. Hofferbert, 93 F. Supp. 562 (D. Md., 1950), Gamble-Skogmo v. Kelm, 112 F. Supp. 872 (D. Minn., 1953), United States of America v. General Shoe Corp., CCH Fed. Tax Serv., Supp. Vol. 49019 (M. D. Tenn., 1953).

[22] Niles-Bement-Pond Co. v. Fitzpatrick, 112 F. Supp. 133 (Conn. 1953), cf. United States v. Ely & Walker Dry Goods Co., 201 F. 2d 584 (8th Cir., 1953).

[23] Niles-Bement-Pond v. Fitzpatrick, 213 F. 2d 308 (2d Cir., 1954).

[24] See note 13 *supra*.

[25] General Motors Acceptance Corp. v. Higgins, 161 F. 2d 593 (2d Cir., 1947), General Motors Acceptance Corp. v. Higgins, CCH Fed. Tax Serv., Supp. Vol. 49014 (S. D. N. Y., 1953).

[26] *Ibid.*

[27] See note 2, *supra*.

the position of the government. It continues a line of decisions which holds that financing through commercial departments of banks regardless of whether the term is short or long is probably not the type of investment instrument taxable under the present documentary stamp tax. The distinction between the loan from a commercial loan department of a bank and the negotiated financing from an insurance company may be clarified in the near future by the Court of Appeals of the Ninth Circuit where the *Leslie Salt* case[28] is now pending. In that case, the District Court held the loan not taxable, although negotiated with two insurance companies for the aggregate amount of $4,000,000. The government has appealed, and if the Court of Appeals for the Ninth Circuit fails to reverse, the apparent conflict may support certiorari to the Supreme Court of the United States.

Judge Clark's dissent in the *Niles* case expressing the fear that there will be one law for the banks and one for insurance companies will have many sympathetic proponents. But functional differences between the two institutions have supported differences in law before and there is no reason to believe that the majority in the *Niles* case were making an arbitrary distinction.

JURISDICTION—UNIFORM CODE OF MILITARY JUSTICE—PROVISION PERMITTING COURT-MARTIAL OF CIVILIAN FOR IN-SERVICE OFFENSE.—On March 25, 1954, the United States Court of Appeals for the District of Columbia upheld the right of the Armed Forces to apprehend a civilian citizen of the United States and transport him to a foreign country for trial by courts-martial for major crimes committed while that civilian was in the service.[1] This is an unprecedented extension of jurisdiction by the military over those civilian ex-servicemen who have been on active duty since May 31, 1951, the effective date of the new Uniform Code of Military Justice. Now, any person in this category against whom a "charge" has been filed by the military for an offense committed during service since May 31, 1951, may be plucked from civilian status without benefit of hearing or indictment by grand jury and transported from his home to the farthest point in the world to be held for trial by courts-martial.

The facts which gave rise to this decision are that Robert W. Toth had been honorably discharged from the United States Air Force on December 8, 1952, following service in Korea. On April 8, 1953, he was formally charged by the United States Air Force, with having committed premeditated murder in Korea on or about September 27, 1952, at a time when he was still in the service. After discharge, on May 13, 1953, he was apprehended by military personnel at his place of employment in Pittsburgh, Pennsylvania. Shortly thereafter, he was flown by military authorities to Korea, where he was confined, pending investigation and trial. Two qualified military counsel were assigned to represent him, and a civilian lawyer from Pittsburgh retained by his family, to assist in the defense, flew to Korea with the assistance of the Air Force.

Audrey Toth, a sister of the accused, petitioned the United States District Court for the District of Columbia for a writ of habeas corpus. The subsequent hearing resulted in Toth's release. The Secretary of the Air Force then appealed and a reversal was obtained in the Court of Appeals. The argument of the Government was based on an interpretation of Article 3(a) of the Uniform Code of Military Justice,

[28] See note 17, *supra*.

[1] Talbott v. Toth, — U. S. App. D. C. —, 215 F. 2d 742 (1954), cert. granted, 348 U. S. 809, 75 S. Ct. 39, 99 L. ed. 24 (Oct. 14, 1954).

which provided that "Subject to the provisions of Article 43 (statute of limitations, which is not here in dispute) any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, *shall not be relieved of amenability to trial by courts-martial by reason of termination of that status.*"[2] (Emphasis added.)

In the opinion of the District Court which granted the writ, Holtzoff, J., pointed out that under this section which authorizes such extension of jurisdiction, there was no provision governing arrest, preliminary hearings, or method of removing a person taken into custody for trial, and "in the absence of machinery to transfer the accused for trial by courts-martial, the Court should not try to supply the machinery which Congress has omitted to furnish."[3] On a return writ, he added that where the code does not provide for jurisdiction over a civilian, it expressly iterates "that a civilian subject to trial by a courts-martial may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject."[4] This refers to civilians on military posts in the employ of the Government. The accused in this case is not subject to any such authority. The Court of Appeals, Prettyman, J., opinionating, took a negative view of the same point, saying in effect, that since there is no provision prohibiting the taking of a civilian into custody without a definite provision requiring due process, that no rights are violated.[5] More specifically, this court bases its reasoning on a statute in existence, with minor modifications, from 1863 until the enactment of the Uniform Code of Military Justice in 1950. This statute provided "that a person accused of committing fraud against the Government while in military service was amenable to trial by court-martial after his discharge from the service."[6] Although this statute has, since its enactment, been upheld repeatedly in lower Federal Courts, it has been discussed in the Supreme Court only once.[7] However, the Supreme Court in this case did not discuss or pass upon the constitutionality of these statutes. The Court of Appeals reasons from this that these statutes were constitutional. Then assuming the validity of such statutes, they decide that the provision of Article 3(a) of the Uniform Code is likewise valid.[8]

Though Judge Holtzoff refused to comment on the constitutionality of the Article in question until the court-martial actually exercised jurisdiction,[9] the Court of Appeals goes directly to that point as covered in the language of the Fifth Amendment of the Constitution which provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . ." nor shall any person ". . . be deprived of life, liberty or property without due process of law. . . ."[10] The Court here looks to the Code's alleged counterpart for hearing and investigation by a Grand Jury. It

[2] Art. 3(a) U. C. M. J.; MCM (1951); 50 U. S. C. A. 8553(a).
[3] Toth v. Talbott, 113 F. Supp. 330 (June 25, 1953).
[4] Toth v. Talbott, 114 F. Supp. 468 (Sept. 3, 1953).
[5] Talbott v. Toth, *supra,* note 1.
[6] *In re* Bogart, 3 Fed. Cas. 796 (1873); Kronberg v. Hale, 180 F. 2d 128 (1950); AW 94, 41 Stat. 805, 10 U. S. C. (Supp. IV) 1566; 62 Stat. 64, 10 U. S. C. (Supp. IV) 1566.
[7] 336 U. S. 210, 69 S. Ct. 530, 93 L. ed. 621 (1949); 34 U. S. C. § 1200, Art. 8.
[8] Talbott v. Toth, *supra,* note 1.
[9] Toth v. Talbott, *supra,* note 3.
[10] U. S. CONST., amend. V.

is contained in Article 32 of the Code which prohibits the referral to a general court-martial of any charges or specifications "until a thorough and impartial investigation of all the matters set forth therein has been made."[11] This investigation can be made by any commissioned officer, with or without legal training, though the Manual for Courts-Martial advises using "mature" officers, whose rank is in the vicinity of major or commander.[12] If, after the investigation, the officer decides to forward the charges, he does so to the "convening authority," who reviews them, secures the advice of his legal officer, and decides whether to refer the charge for trial.[13] On this procedure, the Court commented that "These provisions of the Uniform Code seem to afford an accused as great protections by way of preliminary inquiry into probable cause as do requirements for grand jury and indictment. The record indicates, and indeed we must assume in the absence of a showing to the contrary, that Toth will be afforded the full protection provided by the Uniform Code."[14]

The Court's excision of the real issue seems to come from its discussion of the Fifth Amendment, "which excepts from the requirement of indictment or presentment (of a Grand Jury) cases arising in the land or naval forces." Appellee says a case arises when a charge is made; hence the case against Toth did not arise until April 8, 1953, the date the charges were filed, which was after his discharge; hence the case did not arise in the land or naval forces; hence he cannot be held to answer unless upon indictment. The Government contends that a case "arises when the crime is committed; hence the Constitution itself excepts the present case from requirement for indictment. It seems to us that, although a crime does not become a case, i.e., a legal proceeding, until a charge is made, a case *arises* when the crime is committed."[15] Since the question of, whether Congress has the right to deprive a person of due process expressly set out in the Fifth Amendment, is neglected and assumed to be answered in the affirmative, the Court saw no obstacle in reversing the holding of the District Court.

In summing up, we see the language of the Fifth Amendment as opposed to that of Article 3(a) of the Uniform Code. If the meanings are found to be compatible, the case of the Government should prevail. If not, Mr. Toth should not stand trial for murder. If the crime with which Toth is charged falls into the exception of "cases arising in the land or naval forces," . . . "when in actual service in time of War or public danger,"[16] then it is clear that Congress, by enacting Article 3(a), is merely exercising the powers given by the Amendment over those who are or have been in the military service. If the crime does not fall within the named exception, then an application of Article 3(a) in this case is contrary to the express provisions of the Fifth Amendment. The answer then, to the question, "When does a case 'arise' within the meaning of the Fifth Amendment?" should remove all doubt as to the disposition of the case. An exploration of the consequences of the two alternative answers should lead to the correct conclusion. If a case "arises" when the crime, such as is contemplated by Article 3(a) is committed, and that crime is thoroughly investigated pursuant to the provisions of Article 32 of the Code, then any present civilian, who has served with the military since the Code took effect, may be apprehended and taken to the scene of the crime, wherever in the world it might be, upon sole recommendation of the investigating officer in the case. There are some thirty-four crimes listed

[11] Art. 32 U. C. M. J., MC (1951).
[12] MCM (1951) p. 45.
[13] MCM (1951) p. 47.
[14] Talbott v. Toth, *supra,* note 1.
[15] *Ibid.*
[16] *Supra,* note 3.

in the Manual for Courts-Martial 1951, for which this may be done.[17] In many of the crimes involving violence, such as murder, there is no statute of limitations. Yet, a person may be taken into custody without knowing the charges against him, and without benefit of indictment, and transferred any distance before being able to meet his accuser and defend himself. It seems unlikely that the framers of the Fifth Amendment, or even the formulators of Article 3(a), intended such extensive results. However, if a case is held to "arise" when the charges are made, and not before, a civilian in the position of Mr. Toth, or in similar circumstances, could conceivably "get away with murder," because an "honorable discharge once effective, cannot be revoked, except for fraud, or manifest error."[18] And Article 3(a) makes no pretense of affording the protection of due process to the dischargee-civilian.

The fact then stands that there has been an omission by Congress which would have given to Article 3(a) the due process provision it sorely needs. A suggestion along such lines was presented to Congress on March 4, 1950, two months before the enactment of the Uniform Code of Military Justice, when a bill was introduced in the United States Senate,—"To amend the Uniform Code of Military Justice, and for other purposes." The amendment proposed reads as follows: "d. All persons arrested by the Armed Forces pursuant to this article within the continental limits of the United States or its Territories or possessions, shall be taken without delay before the nearest United States district court for a hearing on the charges brought against such person. The district court shall have authority to admit such person to bond in the same manner, and in its discretion, under the same circumstances, as if the person had been charged with a criminal offense by the civil authorities of the United States."[19] Congress did not deem it necessary to so amend, apparently feeling that the construction of Article 3(a) as it was and is, provided the due process intended in the Fifth Amendment. The present case, however, illustrates the need for such a change.

[17] MCM (1951) p. 219.
[18] CSJ AGA 1949, § 3685 (Aug. 26, 1949).
[19] S. 3188, 81st Cong., 1st Sess. (1950).