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Assistant Attorney General Donald F. Turner

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United States v. Marshall & Ilsley Bank Stock Corporation, et al. (No. 1017 - O. T. 1966; May 22, 1967; D. J. File 60-0-37-333.)

In March, 1961, the United States brought suit under Section 7 of the Clayton Act challenging the acquisition by Bank Stock Corporation of Milwaukee, a bank holding company, of the second, fourth and tenth largest banks in the City of Milwaukee, Wisconsin. Trial on the merits was completed in 1963, but the district judge delayed decision until 1966, when he dismissed the case, sua sponte, on the ground that the Bank Holding Company Act of 1956, which requires Federal Reserve Board approval of bank holding company acquisitions, confers exclusive jurisdiction on the Board and pro tanto deprives the district courts of their jurisdiction under Section 15 of the Clayton Act to enforce Section 7 of the Act.

Shortly before the Government's notice of appeal was filed, Congress passed the Bank Holding Company Act Amendments of 1966, which are modeled after the Bank Merger Act of 1966 and which provide that a new test (whether an acquisition's adverse effects on competition are outweighed by the convenience and needs of the community) shall be applied both in Board and court proceedings. Section 11(e) provides that the new standard shall be applied by the district courts in all pending cases. Thereafter, the Government filed a motion in the district court requesting reconsideration in light of the subsequently enacted legislation. On November 17, the district court rejected the motion. The Government filed its jurisdictional statement in January, 1967, urging in substance that the existence of a procedure for administrative approval does not by implication repeal the antitrust jurisdiction of the district court. On April 11, 1967, the Supreme Court invited the Government to submit its views as to the bearing on the Marshall & Ilsley case of the Court's opinion in United States v. National Bank of Houston, Nos. 914, 972, O. T. 1966. A supplemental memorandum was filed in early May asserting that the Houston Bank decision clearly demonstrated the error of the district court.

On May 22, 1967, the Court issued a per curiam opinion, reversing the decision of the district court in light of Section 11(e) of the Bank Holding Company Act of 1966 and the Houston Bank decision.

Staff: Nathan Lewin (Solicitor General's Office); Howard E. Shapiro, Joel Davidow and Herbert G. Schoepke (Antitrust Division)

DISTRICT COURT

CLAYTON ACT

JUDGMENT ENTERED REQUIRING DIVESTITURE.

United States v. Kimberly-Clark Corporation. (N. D. Calif., Civ. 40529; May 11, 1967; DJ File 60--0-37-570).

On May 11, 1967, at San Francisco, Judge Zirpoli entered a final judgment directing that Kimberly-Clark dispose of Blake, Moffitt & Towne, which has current annual sales of $88 million. This case, which was filed in February 1962, had challenged Kimberly-Clark's acquisition of Blake, Moffitt & Towne, the largest independent paper merchant in the West. In an opinion handed down on February 17, 1967, Judge Zirpoli ruled that the acquisition violated Section 7 of the Clayton Act.

The judgment orders Kimberly-Clark to divest the Blake, Moffitt & Towne Division as a single going concern engaged in the wholesale distribution of paper and paper products, within 27 months. If divestiture is by sale, the purchaser must be approved by the plaintiff, and the terms and conditions of sale must be acceptable to the plaintiff or the court. The purchaser must state his intention to continue the operation of Blake, Moffitt & Towne as a paper merchant and must agree to be bound by the final judgment.

Other provisions in the judgment forbid Kimberly-Clark to vote any stock which it receives in exchange for Blake, Moffitt & Towne, and order that any such stock be disposed of within a reasonable time approved by plaintiff; enjoin interlocking officers, directors, or substantial shareholders between Kimberly-Clark and Blake, Moffitt & Towne, for a period of ten years beginning six months after divestiture; enjoin any financial transactions between the companies, except purchases and sales in the normal course of business, for ten years; forbid Kimberly-Clark to acquire any other paper merchant for ten years; and award all taxable costs to the plaintiff.

The parties agreed to the form of the judgment.

Staff: James J. Coyle, Mary P. Clark, L. David Cole, James E. Figenshaw, Julius Tolton and Lewis Rubin (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Carl Eardley

SPECIAL NOTICE

FORECLOSURE ACTIONS

In connection with foreclosure cases, your attention is called to the recent decision in Madison Properties, Inc. v. United States (C.A. 9, No. 20,806, April 4, 1967; D.J. File 130-82-1341), and to the reference therein by the Court of Appeals to the district court's recognition of the custom of the Marshal in his district to follow Washington law, allowing redemption within one year after sale. As you know, it is the Department's position that federal law governs the question of redemption rights and that no right of redemption exists under federal law. United States v. Heasley, 283 F. 2d 422 (C.A. 8); United States v. West Willow Apartments, 245 Supp. 755, 758 (E.D. Mich.). Accordingly, it is suggested that, in all foreclosure actions instituted on behalf of Government agencies, care should be taken that the foreclosure decree, the order of sale and the advertisement of sale not only contain no language indicating that there is a statutory right of redemption, but also that such documents specifically provide that there is no right of redemption from the sale. The Marshals, of course, should also be instructed that, in conducting the sale and reporting thereon, they should not indicate that any right of redemption exists.

COURTS OF APPEALS

DISCOVERY--EXECUTIVE PRIVILEGE

INTRA-GOVERNMENTAL DOCUMENTS RELATING TO DECISION-MAKING PROCESSES HELD NOT SUBJECT TO DISCOVERY UPON CLAIM OF EXECUTIVE PRIVILEGE.

V.E.B. Carl Zeiss, Jena, Steelmasters, Inc. and Ercona Corporation v. Ramsey Clark (C.A. D.C., No. 20351; May 8, 1967; D.J. File 233279-86).

Plaintiffs, an East German manufacturer of optical instruments and scientific devices and its American representatives, are defendants in an action pending in the Southern District of New York to determine the ownership of certain trademarks in which the Attorney General as successor to the Alien Property Custodian previously had claimed an interest. See Rogers v. Ercona Camera Corporation, 277 F. 2d 94 (C.A. D.C.). The United States is not involved in that litigation. Plaintiffs commenced these proceedings by causing the District Court to issue a foreign subpoena directed to the Attorney General, commanding the production of documents from Department of

Justice files for use in connection with the Southern District proceedings. The Government, after making available some 4500 documents, moved to modify the subpoena (1) by eliminating from its requirement 49 documents as to which it asserted a claim of executive privilege, and (2) by not requiring the Attorney General to submit those documents to the Court for its in camera inspection. The 49 documents were Department of Justice memoranda and intra-governmental communications "containing opinions, recommendations and deliberations pertaining to" Department decisions. An affidavit made by the Attorney General recited his conclusion, following personal examination, that their production would be contrary to the public interest.

The District Court held that the claim of executive privilege should be honored, stating: "as documents integral to an appropriate exercise of the executive's decisional and policy-making functions, they are immune from the disclosure the claimants seek." In addition, the Court refused to inspect the documents in camera on the ground that 'claimants' showing of necessity is far too negligible to require or justify more." Accordingly, it granted the Government's motion to modify. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318. The Court of Appeals affirmed "for the reasons stated in" the District Court's opinion.

Staff: John C. Eldridge (Civil Division)

FEDERAL TORT CLAIMS ACT

EMPLOYER OF INDEPENDENT CONTRACTOR OWES NO DUTY TO CONTRACTOR'S EMPLOYEES TO PROTECT THEM AGAINST RISKS INHERENT IN WORK.

Barbara Ellen Eutsler v. United States (C.A. 10, No. 8854; April 12, 1967; D.J. File 157-77-113).

Plaintiff brought this Tort Claims Act suit for damages for the death of Charles Eutsler in an explosion in October 1962 on the premises of Hercules Powder Company. At the time of his death, Eustler, an employee of Hercules, was performing work on a solid fuel rocket propellant pursuant to a contract between Hercules and the Air Force. The theory of plaintiff's case was that the Government, as contractee, owed the employees of its independent contractor a common law duty to provide adequate safety regulations or to see that the contractor followed such regulations when it directed the contractor to deal with inherently dangerous substances. The district court granted summary judgment for the United States on the authority of United States v. Page (C.A. 10), certiorari denied, 382 U.S. 979. The Court of Appeals affirmed.

On appeal, plaintiff had urged the Court to distinguish United States v. Page on the ground that Page involved considerations of a non-delegable duty and imputed negligence arising out of contract, "while here the premise of simple negligence based upon the duty to exercise reasonable care is advanced." The Court refused to so distinguish Page. On the contrary, it ruled that Section 413 of the Restatement of Torts, which requires an employer of an independent contractor to take safety precautions to avoid peculiar unreasonable risks "to others" during work likely to create such dangers, did not create a duty to the independent contractor's employees. In addition, the Court also rejected "the theory, implicit in appellants' argument, that a contractor, having undertaken to impose certain safety precautions in some areas, is in violation of a legal duty by not imposing similar precautions in all areas."

Staff: Martin Jacobs (Civil Division)

GOVERNMENT CONTRACTS

REGULATIONS REQUIRING DEPOSITS TO ACCOMPANY BIDS FOR SURPLUS GOVERNMENT PROPERTY HELD NOT TO CONFER RIGHTS ON BIDDER.

George Epcar Company v. United States (C.A. 10, Nos. 9150 and 9151; May 8, 1967; D.J. Files 78-77-20 and 21).

The Defense Supply Agency put up for auction as surplus property a number of Army trucks. Applicable regulations, also incorporated expressly in the invitation for bids on the trucks, required all bidders to accompany their offers with a deposit of 20% of "the total amount bid." 41 C.F.R. 101-45.304-10(a). The invitation also reserved the Government's right to accept any one item in a bid. The Epcar Company submitted four "alternate" bids for the vehicles, but accompanied its offer with a bid deposit which amounted to 20% of only one of its bids. Although all of Epcar's bids were high, the contracting officer accepted only the one covered by a sufficient bid deposit. Epcar refused to pay, claiming that because its bid deposit did not equal 20% of the total of all four of its bids, none of those bids could be accepted. The contracting officer rejected Epcar's contentions, declared the contract breached, and retained Epcar's bid deposit as partial liquidated damages. Epcar sued in the district court to recover its deposit, and the United States counterclaimed for an additional sum in liquidated damages. The district court awarded a money judgment to the Government.

The Tenth Circuit affirmed. The Court of Appeals accepted our position that the bid deposit regulations were for the Government's protection only and conferred no rights on the bidders. Additionally, it held that the Defense Supply Agency had reserved the right in the invitation to accept less than all

the bids, and that the contracting officer did not, therefore, violate the terms of the invitation by accepting only one of Epcar's bids.

Staff: Richard S. Salzman (Civil Division)

STATUTES OF LIMITATIONS

STATE STATUTE WHICH EXTINGUISHES STATE COURT JUDGMENTS AFTER SIX YEARS, APPLIES TO UNITED STATES.

United States v. Tacoma Gravel and Supply Co. (C.A. 9, No. 20,218; January 25, 1967, rehearing denied, April 3, 1967; D.J. File 105-82-32).

In 1953, the Reconstruction Finance Corporation obtained a deficiency judgment in a Washington state court against Tacoma Gravel. Ten years thereafter, the Government brought this action in a federal district court to renew that judgment. The district court dismissed the action on the basis of a Washington statute (R.C.W. 4.56.210) providing that a judgment is not renewable and ceases to be a lien or charge against the estate or person of the judgment debtor after six years from the date of entry.

The Court of appeals affirmed. It ruled R.C.W. 4.56.210 was not a statute of limitations, but one of "extinguishment," and that the United States' judgment was subject to its terms since the Government had elected to bring suit in the state court. The Court found this case "readily distinguishable from United States v. Summerlin, 310 U.S. 414 (1941)" on the following ground:

> Here we are concerned only with a judgment of the State of Washington. We do not decide whether R.C.W. 4.56.210 also operates to cut off the claim underlying that judgment.

Thus, it purported to leave unimpaired the well-settled doctrine that the United States is not bound by state statutes of limitation in enforcing its rights.

Staff: Alan S. Rosenthal and Florence Wagman Roisman (Civil Division)

DISTRICT COURTS

CONTRACTS

SURETY HELD LIABLE TO UNITED STATES FOR WAREHOUSEMAN'S BREACH OF UNIFORM GRAIN STORAGE AGREEMENT.

United States v. Ohio Casualty Ins. Co. (S.D. Ohio, Civil No. 3212; May 4, 1967; D.J. File 120-58-119).

In 1962, the United States brought suit against a warehouseman and his surety for failure to redeliver grain meeting the requirements of a Uniform Grain Storage Agreement between the warehouseman and Commodity Credit Corporation. In 1963, a default judgment was entered against the warehouseman. The surety was thereafter dismissed as a party defendant. In 1965, the United States instituted this action against the surety under a warehouseman's bond in which the surety agreed to be bound to CCC for any breach of the Uniform Grain Storage Agreement by the warehouseman. The District Court awarded judgment against the surety for the full penal sum of its bond plus interest at 6% from the date the default judgment was entered against the principal.

The surety had contended that CCC had knowledge of various defaults by the warehouseman prior to and during the effective dates of the bond and that it, therefore, was discharged from all liability under the bond. The Court found that CCC was not aware of any defaults by the principal prior to the effective date of the bond. The Court further held that even if CCC had been aware of any defaults occurring after the bond became effective, "where the bond contained no provision that plaintiff give notice to the surety of the principal's default, failure to give such notice does not discharge the surety."

Staff: Harold J. Heltzer (Civil Division); United States Attorney Robert M. Draper and Assistant United States Attorney Roger J. Makley (S.D. Ohio)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURT OF APPEALS

BANK ROBBERY

OBTAINING MONEY THROUGH FALSE REPRESENTATION OF IDENTITY HELD NOT VIOLATION OF 18 U.S.C. 2113(b).

Edward S. LeMasters, Sr., v. United States (C.A. 9, No. 20, 376; Apr. 21, 1967; D.J. File 29-11-1728).

LeMasters persuaded a teller at the Watsonville, California, branch of the Bank of America that he was Eugene A. Tournour and that he had lost his passbook for his account in that bank. After he was issued a passbook in Tournour's name, he withdrew $6,700 from the account within the next week. Tournour did not know LeMasters and had not authorized him to withdraw funds from the account. Defendant was convicted of theft from a federally-insured bank.

On appeal, the Court of Appeals reversed, holding that defendant's conduct, in obtaining the money through a misrepresentation, did not violate 2113(b), which was intended to proscribe only common-law larceny.

Ninth Circuit declined to follow the reasoning of the Fifth Circuit in Thaggard v. United States, 354 F. 2d 735 (C.A. 5, 1965), cert. denied, 383 U.S. 958 (1966), which was commented on in the U.S. Attorney's Bulletin Vol. 14, no. 2 p. 28. The Thaggard opinion affirmed a conviction of larceny from a bank, based on the fraudulent taking by a depositor of funds erroneously credited to his account. The Fifth Circuit interpreted the bank larceny statute (18 U.S.C. 2113(b)) to cover any unlawful taking, not just common-law larceny.

Concluding that the opinion in LeMasters presents the more tenable position regarding the interpretation and scope of 2113(b), the Solicitor General has declined to seek review of the LeMasters decision.

Staff: United States Attorney Cecil F. Poole and
Assistant United States Attorney Jerrold M. Ladar (N.D. Calif.)

SUPREME COURT

EXPATRIATION

SUPREME COURT HOLDS CONGRESS LACKS POWER TO EXPATRIATE UNITED STATES CITIZENS.

Afroyim v. Rusk (No. 456 - O. T. 1966; May 29, 1967; D. J. File 38-51-4454).

In a broad and sweeping five-to-four decision, the Supreme Court in this case not only struck down the very expatriation-by-voting provision which it had sustained only nine years ago, but in doing so declared that Congress lacks power to expatriate any United States citizen against his will. This ground for decision casts serious doubt on the validity of all the other statutory grounds for expatriation short of actual and voluntary renunciation.

Petitioner, a naturalized American citizen, voted in 1951 in a political election in Israel. When he applied for renewal of his United States passport in 1960, the State Department declined to grant his application on the ground that he had lost his American citizenship under Section 401(e) of the Nationality Act of 1940 (54 Stat. 1137, as amended, 58 Stat. 746) which provided that a United States citizen shall lose his citizenship if he votes in a political election in a foreign state. Petitioner unsuccessfully challenged this ruling of the State Department in the district court and the court of appeals. Each challenge was rejected because of the 1958 ruling of the Supreme Court in Perez v. Brownell, 356 U.S. 44, which upheld the constitutionality of Section 401(e) upon the basis of the implied power of Congress to regulate foreign affairs.

Justice Black, writing for the majority of the Court in Afroyim, reasoned that any doubt as to whether prior to the passage of the Fourteenth Amendment Congress had the power to deprive a person against his will of citizenship was removed by the unequivocal terms of the Amendment, which provides that "all persons born or naturalized in the United States . . . are citizens of the United States . . ." He found in these words a definition of citizenship which a citizen keeps unless he voluntarily relinquishes it. Justice Black concluded by stating that the holding of the Court did no more than to give to a citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship. Perez v. Brownell was overruled, as was the judgment of the court of appeals.

Justices Clark, Steward and White joined in a dissent by Justice Harlan who found no legal basis for overruling Perez v. Brownell.

Staff: Solicitor General Thurgood Marshall, Assistant Attorney General Fred M. Vinson, Jr., Beatrice Rosenberg and Jerome M. Feit (Criminal Division); General Counsel Charles Gordon (Immigration and Naturalization Service).

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern, III

UNITED STATES ATTORNEYS

The nominations of the following appointees as United States Attorneys have been submitted to the Senate for confirmation:

Maryland -- Stephen H. Sachs

Missouri, Eastern -- Veryl L. Riddle

The nomination of United States Attorney Robert M. Morgenthau, Southern District of New York, to a new four-year term has been confirmed by the Senate.

The nomination of the following new appointee as United States Attorney has been confirmed by the Senate.

Oklahoma, Northern -- Lawrence A. McSoud

Mr. McSoud was born Mary 11, 1933 at Bristow, Oklahoma, and is unmarried. He attended Oklahoma State University, Stillwater, Oklahoma from 1951 to 1955, when he received a B.S. degree, and Tulsa University Law School, Tulsa, Oklahoma from 1955 to 1959, when he received his LL. B. degree. He was admitted to the Bar of the State of Oklahoma in 1959. Mr. McSoud was Creek County Attorney at Sapulpa, Oklahoma from 1959 to 1963. He served as an Assistant United States Attorney for the Northern District of Oklahoma from 1964 to 1967, and as Court-appointed United States Attorney from February, 1967 up to the time of his Presidential appointment.

UNITED STATES ATTORNEYS MANUAL

In Instruction Sheet No. 97, which accompanied the June 1 correction sheets, there should be added to the list of new pages to be inserted, Page VII of Title 2.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

SUPREME COURT

DEPORTATION

ALIEN HOMOSEXUAL HELD DEPORTABLE AS BEING AFFLICTED WITH PSYCOPATHIC PERSONALITY.

Clive Michael Boutilier v. INS (Supreme Court No. 440; May 22, 1967; DJ File 39-51-2691).

Petitioner, a Canadian national, was admitted to the United States in 1955 at the age of 21. In 1963 when he applied for naturalization an investigation developed that he had been a homosexual for several years prior to his entry in 1955 and continued to have homosexual relations thereafter during his residence in the United States. After a hearing he was found deportable as having been subject to exclusion at time of entry as a person afflicted with psychopathic personality. His petition for review of the deportation order was denied by the Second Circuit with one judge dissenting. 363 F.2d 488. The Supreme Court granted certiorari. 385 U.S. 927.

Justice Clark delivered the opinion of the Court and affirmed the decision of the Second Circuit. The issues before the Supreme Court were whether Congress in using the term "psychopathic personality" meant to include homosexuals and whether the deportation statute was void for vagueness. As to the first issue Justice Clark concluded that the legislative history of the statute indicated beyond a shadow of doubt that Congress intended the phrase "psychopathic personality" to include homosexuals such as the petitioner. As to the second issue Justice Clark held that the void for vagueness doctrine had no application here where petitioner was not being deported for post-entry conduct but for characteristics he possessed at time of entry. Justices Brennan, Douglas and Fortas dissented.

Staff: Solicitor General Thurgood Marshall and Assistant to Solicitor General Nathan Lewin; Assistant Attorney General Fred M. Vinson, Jr. and Philip R. Monahan (Criminal Division)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

DISTRICT COURT

INDIANS

TRIBAL LANDS OF THE FIVE CIVILIZED TRIBES REMAIN NONTAXABLE UNTIL ALLOTTED; SECTION 2 OF ACT OF APRIL 12, 1926, 44 STAT. 239, LIMITED APPLICATION OF OKLAHOMA STATUTES OF LIMITATION TO RESTRICTED INDIANS.

United States v. Hugh Russell, et al. (Civil No. 5839, E.D. Okla; January 16, 1967; DJ File 90-2-11-6799).

Suit was brought on behalf of the Coctaw-Chickasaw Tribes of Indians to quiet title to certain tribal land in Pittsburg County, Oklahoma. The County had assessed taxes against the land and, upon nonpayment, had obtained a resale tax deed covering the property. Later, the County conveyed to another defendant, who not only claimed title under the deed from the County, but also by adverse possession. By the Act of April 12, 1926, 44 Stat. 239, relied upon by the defendants, Congress consented and provided that the Oklahoma Statutes of Limitations (12 O.S. sec. 93) should apply to restricted Indians of the Five Civilized Tribes. The Government took the position and the Court held that this Act is applicable only to individual restricted Indians' lands and does not apply to tribal lands held by the United States as trustee, i.e., the statute does not apply to the United States nor to the Indian Tribes. The Court also held that, so long as the tribal lands are unallotted, they remain nontaxable.

Staff: United States Attorney Bruce Green and Assistant United States Attorney Cecil E. Robertson (E.D. Okla.).

NAVIGABLE WATERS

ACTION FOR DECLARATORY JUDGMENT THAT HIGH VOLTAGE AERIAL TRANSMISSION LINE WOULD CONSTITUTE UNREASONABLE INTERFERENCE WITH NAVIGATION AND CREATE PUBLIC NUISANCE, AND FOR JUDGMENT IN NATURE OF MANDAMUS COMPELLING SECRETARY OF ARMY TO REVOKE AND CANCEL PERMIT ISSUED FOR CONSTRUCTION OF LINE; DISMISSED ON GROUND THAT LINE WOULD PROVIDE ADEQUATE CLEARANCE FOR NAVIGATION PURPOSES THOUGH OBSTRUCTING PASSAGE OF PLAINTIFF'S OIL-DRILLING RIGS.

Levingston Shipbuilding Company v. The Hon. Stanley R. Resor, Secretary of the Army (Civil No. 5105, E.D. Tex., Beaumont Div.; April 4, 1967; DJ File 90-1-3-1390).

This action was brought to obtain a declaratory judgment that a proposed high voltage aerial transmission line with a vertical clearance of 164 feet across the Sabine River, approximately four miles south of Orange, Texas, would be an unreasonable and unlawful interference with navigation and a public nuisance, and for an order in the nature of mandamus against the Secretary of the Army compelling him to revoke a permit issued to the Gulf States Utilities Company for the construction of the transmission line.

The plaintiff's business is located on the Sabine River at Orange, Texas, upstream from the location of the proposed transmission line. It is engaged in the construction and repair of mobile drilling rigs and platforms used in drilling for oil and gas in the Gulf of Mexico, and elsewhere.

A motion to dismiss for lack of jurisdiction was filed on behalf of the Secretary of the Army, which was taken under advisement by the Court pending a hearing on the merits. A trial on the merits was held, briefs submitted and oral argument had. On April 4, 1967, the Court granted the defendant's motion to dismiss and denied plaintiff's request for declaratory judgement, writ of mandamus, and other relief.

In its findings of fact, the Court found that the permit to Gulf States Utilities Company for the construction of the proposed transmission line was legally and properly issued by the Secretary of the Army and that the transmission line would not constitute an unlawful structure, would not be a public nuisance and would not constitute a taking of plaintiff's property without compensation and that it would provide and allow adequate vertical clearance for purposes of navigation.

The Court further found that, pursuant to an earlier and somewhat related case entitled Levingston Shipbuilding Company v. The Hon. Stephen Ailes, Secretary of the Army, et al., 239 F. Supp. 775 (E.D. Tex. 1965), aff'd 358 F.2d 944 (C.A. 5, 1966), the waterway in question was going to be obstructed by a 138-foot fixed-span bridge and for that reason the proposed aerial transmission crossing to be constructed at a height of 164 feet would not unreasonably obstruct public rights of navigation on the Sabine River.

Staff: Assistant United States Attorney Charles K. Ruth (E.D. Tex.).

PUBLIC PROPERTY

STATUTORY REQUIREMENT THAT OPERATORS OF "TRANSPORTATION" SERVICES IN DISTRICT OF COLUMBIA OBTAIN CERTIFICATE OF CONVENIENCE AND NECESSITY FROM METROPOLITAN AREA TRANSIT COMMISSION DOES NOT APPLY TO TRANSPORTATION SERVICE ON MALL PROVIDED BY CONTRACTOR WITH NATIONAL PARK SERVICE.

Washington Metropolitan Area Transit Commission, et al. v. Universal Interpretive Shuttle Corporation (D. C.; May 1, 1967; DJ File 90-1-4-155).

The compact approving creation of the Washington Metropolitan Area Transit Commission to assume most of the former functions of public utility commissions in the District of Columbia and in nearby Maryland and Virginia counties provides that "transportation" activities in the District of Columbia shall be subject to the jurisdiction of that Commission. During the summer of 1966, the National Park Service operated an experimental "minibus" service in the Mall area, whereby tourists were transported on park lands from the base of the Capitol past various points of interest, including the Smithsonian Institution and the Lincoln and Jefferson Memorials. When this experiment established the popularity of the proposed service, the National Park Service called for proposals from interested bidders and ultimately awarded a contract to the Universal Interpretive Shuttle Corporation, a California corporation. The contract provides that all details of the service, including charges and routing are to be determined by the National Park Service. The concessionnaire, with the concurrence of the Park Service, did not apply for a certificate of convenience and necessity and, on March 31, 1967, the Washington Metropolitan Area Transit Commission instituted injunction proceedings to enjoin its proposed operations. The United States, although not intervening as a party, was authorized to file a representation of interest, present evidence and file briefs. See Calhoun County, Florida v. Roberts, 137 F. 2d 130, 131 (C. A. 5, 1943). D. C. Transit System, Inc., and other local sightseeing companies intervened on behalf of the plaintiff.

On May 1, 1967, the Court dismissed the proceeding. It held that (a) the legislation approving the compact did not purport to grant the Commission jurisdiction over the type of transportation covered by the contract, (b) the projected service was essentially a Government activity within the meaning of an exclusion in the compact legislation and (c) the franchise rights of D. C. Transit System, Inc. (70 Stat. 598), did not apply to the type of transportation activities covered by the contract.

Both the Commission and the intervenors have filed appeals. It is believed that an expedited procedure will permit early disposition of the case by the appellate court.

Staff: Thos. L. McKevitt and Rebecca J. Lennahan
(Land and Natural Resources Division).

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