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Administrative Law -- Unreasonable Search and Seizure -- Compelled Production of Tax Records

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NOTES AND COMMENTS

Administrative Law—Unreasonable Search and Seizure—Compelled Production of Tax Records

Congress, as an incident[1] to the exercise of its power to "lay and collect taxes on income,"[2] has granted to the Commissioner of Internal Revenue authority to summon witnesses, examine and compel production of tax records. Upon failure of the taxpayer or witness to appear or to produce books, papers, records and memoranda, the district court may order an examination or issue a subpoena duces tecum compelling compliance[3] with the demands of the Commissioner.

There is the utmost need for such investigatory powers in order to avoid reducing the collection of income taxes to a voluntary basis. Yet, in the ordinary exercise of these important powers of inquiry into tax matters it is inevitable that the information elicited at times will assume a scope and nature which contravene the principles of the Fourth[4] and Fifth Amendments.[5] Although a subpoena duces tecum lacks many of the aggravating incidents of an actual search and seizure, it contains many of the same features and accomplishes substantially the same purpose. *Boyd v. United States*[6] held that compelling one to produce his private papers which incriminate him[7] was an unreasonable search and seizure. The rationale of the *Boyd* case was affirmed and extended

[1] U. S. CONST. Art. I § 8: "The Congress shall have power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."

[2] U. S. CONST. AMEND. XVI.

[3] The Constitutional validity of authorizing the courts to use their process in aid of inquiries before administrative agencies has been firmly established. Such a provision does not confer non-judicial powers on the courts but is a case or controversy to which the judicial power of the United States extends. Interstate Commerce Comm'n v. Brimson, 154 U. S. 447 (1894).

[4] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ."

[5] ". . . nor shall any person . . . be compelled in any criminal case to be a witness against himself. . . ."

[6] 116 U. S. 616,622,624 (1886): "A compulsory production of a man's papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure would be. . . ."

". . . and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such suit is compelling him to be a witness against himself within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of . . . an unreasonable search and seizure within the meaning of the Fourth Amendment."

[7] Use of the Fourth Amendment in aid of the Fifth has led to severe criticism of the *Boyd* case. *Eg.* see 8 WIGMORE, EVIDENCE §2264 p. 363 (3d ed. 1940).

in *Hale v. Henkel*,[8] which declared that a subpoena duces tecum may constitute an unreasonable search because of the broad sweep and indefiniteness of its demands. There can be little doubt that these objections will continue to be raised at least so long as tax books and records are construed by the courts as having the status of "private papers."

The question of whether tax books and records are to be considered private or public papers has been highlighted by *Shapiro v. United States*.[9] This decision, if extended by the courts, will have far reaching effect on the administration of internal revenue laws. Defendant, Shapiro, was tried on charges of having made tie-in sales in violation of the regulations under the Emergency Price Control Act. Having previously been compelled by subpoena duces tecum to produce his sales records and having raised timely objection, defendant made a plea in bar claiming immunity from prosecution based on Section 202(g) of the Act.[10]

The majority[11] held that the immunity provision was intended as a substitute or compensation for what would otherwise have been the constitutional privilege of the witness;[12] hence where no constitutional

[8] 201 U. S. 43 (1908).
[9] 335 U. S. 1 (1948).
[10] "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 . . . shall apply with respect to any individual who specifically claims such privilege."
The Compulsory Testimony Act of 1893 provides: "No person shall be excused from attending and testifying or from producing books, papers . . . before the Interstate Commerce Commission or in obedience to the subpoena of the Commission . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him. . . . But no person shall be prosecuted . . . for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission or in obedience to its subpoena. . . ."
[11] The decision was five to four with three dissenting opinions. The majority based its decision on Heike v. United States, 227 U. S. 131 (1913) and Wilson v. United States, 221 U. S. 361 (1911). The former held that the provisions of immunity statutes have no application to the production of documents where no constitutional privilege exists. The latter held that the constitutional privilege, which exists as to private papers may not be validly asserted as to corporate records required by law.
Since the *Wilson* case it can be said generally that corporate records are "public" and amenable to process if operations are carried on in areas appropriately subject to government regulation. This view however, does not cut down the scope of the Fifth Amendment because the constitutional privilege against self-incrimination is a personal one, applying only to natural persons. It cannot therefore be utilized by or on behalf of a corporation. United States v. White, 322 U. S. 694, 699 (1944).
[12] The Court quoted from Holmes, J. in the *Heike* case: ". . . the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the Act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned." 335 U. S. 1, 19 (1948). See also Councilman v. Hitchcock, 142 U. S. 547 (1891).

privilege existed, no immunity could be granted.[13] Prosecution and conviction of defendant was upheld because he had no constitutional privilege against self-incrimination in the sales records since they were "required by law to be kept"[14] and had "public aspects."[15]

That the required records doctrine, if extended, will have applicability to tax matters[16] is evidenced by the Code[17] and Regulations[18] which require records to be kept.[19] Although the *Shapiro* case was concerned mainly with the Fifth Amendment (self-incrimination), to which the scope of this writing extends only incidentally,[20] it is obvious that if records required by law to be kept are construed as being so "public" in nature that the constitutional privilege against self-incrimination is inapplicable,[21] then such construction would eliminate unreasonable

[13] Shapiro v. United States, 335 U. S. 1, 20 (1948).

[14] §14 of Maximum Price Regulation 426, 8 FED. REG. 9546, 9548-49 (1943) provides: "Records. (a) Every person subject to this regulation shall . . . preserve for examination by the Office of Price Administration all his records . . . or other written evidences of sale or delivery which relate to the prices charged pursuant to the provisions of this regulation . . . shall keep and make available for examination . . . records of the same kind which he customarily kept, relating to prices. . . ."

[15] ". . . it cannot be doubted that the sales record which petitioner was required to keep as a licensee under the Price Control Act has 'public aspects.'" Shapiro v. United States, 335 U. S. 1, 34 (1948).

[16] Mr. Justice Frankfurter raises this possibility in his dissenting opinion. 335 U. S. 1, 54 (1948).

[17] INT. REV. CODE §54(a).

[18] U. S. Treas. Reg. 111 §29.54-1 (as amended by T. D. 5381, 1944 CUM. BULL. 188). "Every person subject to the tax . . . shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits and other matters required to be shown in any return.... The books or records required by this section shall be kept at all times available for inspection by internal revenue officers and shall be retained so long as the contents thereof may become material in the administration of any internal revenue law." *Cf.* §14 of Maximum Price Regulation 426 quoted in part in note 14 *supra* which is the basis of the decision in the *Shapiro* case.

[19] See 27 TAXES 639 (1949).

[20] Generally on quasi-public records and self-incrimination, see Note, 47 COL. L. REV. 838 (1947). Also Note, 24 Ind. L. J. 567 (1949), 8 WIGMORE, EVIDENCE §2259c (3d ed. 1940) (See list of cases cited in 1949 Pocket Supplement in particular).

[21] Whether the privilege against self-incrimination actually exists as to the production of an individual's tax records has not been authoritatively decided. Indeed, there is a striking scarcity of cases squarely on the point. See Internal Revenue Agent v. Sullivan, 287 Fed. 138 D.C. N.Y. (1923). Also United States v. Murdock, 284 U. S. 141 (1931). As a practical matter, if such privilege exists, it would seem wise that Congress enact an immunity provision similar to that accompanying virtually all the major regulatory statutes. For a list of enactments containing such immunity clause, see Shapiro v. United States, 335 U. S. 1, 6 (1948). The Bureau is primarily in the business of collecting taxes, not of punishing criminals and its task at best is a most difficult one without the added complication of a constitutional privilege to hinder its enforcement of the revenue laws. An immunity provision gets evidence to aid tax collection and amnesty is granted for offenses which in many instances are not provable anyway.

search and seizure[22] as a defense to a subpoena duces tecum compelling production of those records. Especially is this true since a demand of records so public would clearly be a reasonable search. If taxpayers' records are by judicial interpretation made "public" it may be that government officials charged with administering the revenue laws will have an inherent power to examine those records whether relevant to any matter under investigation or not. Until such characterization is made, however, the cry of "fishing expedition" will continue to be raised and extensive analysis of the statutes will be necessary to ascertain the scope of the inquisitorial powers granted.

Are the present Code provisions susceptible of an interpretation which permits an unreasonable search and seizure? The Commissioner, after refusal of a taxpayer or third party to comply with his demands, may petition[23] the district court[24] to order an examination or compel production of books of account. The investigation must be for the purpose of "ascertaining the correctness of a return" or "making a return where none has been made."[25] Further, the petition must identify

[22] Mr. Justice Frankfurter poses the question of whether the majority holding does not in fact make a man's home a "public library." In pointing out the extreme consequences to which the decision may lead, he says: "Moreover, the Government should be able to enter a man's home to examine or seize such public records, with or without a search warrant, at any time." Shapiro v. United States, 335 U. S. 1, 54, 55 (1948). It may be urged that such conclusion does not necessarily follow. Even though the word "papers," as used in the Fourth Amendment (see note 4 *supra*) means "private papers" there is still the "right of the people to be secure in their houses." The sanctity of a man's home would require the use of appropriate and orderly process to get access to those records. A subpoena duces tecum is one such appropriate process. But see Davis v. United States. 328 U. S. 582 (1946).

[23] "Petition" is in form a complaint and is governed by Rule 8(a) of the Federal Rules of Civil Procedure. See Martin v. Chandis Securities Co., 128 F. 2d 731 (9th Cir. 1942).

[24] INT. REV. CODE §3633(a): "If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

INT. REV. CODE §3615(e): "Whenever any person summoned under this section neglects or refuses to obey such summons, or to give testimony or to answer interrogatories as required, the collector may apply to the judge of the district court . . . for an attachment against him as for contempt."

See *In re* Wolrich, 84 F. Supp. 481 (D.C. N.Y. 1949).

[25] INT. REV. CODE §3614(a): "The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer . . . designated by him for that purpose, to examine any books, papers, records or memoranda *bearing* upon the matters required to be included in the return, and may require the attendance of the person rendering the return . . . or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return. . . ." Martin v. Chandis Securities Co., 33 F. Supp. 478 (S.D. Cal. 1940) *aff'd.* 128 F. 2d 731 (9th Cir. 1942), McDonough v. Lambert, 94 F. 2d 838 (5th Cir. 1938). See 8 MERTEN, LAW OF FEDERAL INCOME TAXATION §47.44 *et seq.* (ed. 1943).

the books, papers, and records with reasonable particularity[26] as having a "bearing upon matters required to be included in the return"[27] or as "respecting any objects or income liable to tax or the returns thereof."[28] Since the statute clearly limits the investigatory power to matters bearing on the income tax liability of a taxpayer and the provisions are so defined and limited to this legitimate purpose, there can be no basis for an interpretation so broad as to permit an unreasonable search and seizure. If the records demanded are not reasonably identified as bearing on the tax liability of the person whose return is being investigated, the statute is not complied with and the subpoena is unenforceable, not because it imports an unreasonable search but because it is beyond the pale of the statutory grant.[29] The provisions of the quoted statutes are the measure of the Commissioner's power and an investigatory proceeding which does not comply with the requirements therein, is a wholly unauthorized assumption of inquisitorial powers.[30] Hence, to hold that a subpoena duces tecum or an examination is a "fishing expedition"[31] and thus an unreasonable search and seizure prohibited by the Fourth Amendment is to violate one of the cardinal rules of constitutional decision.[32]

A much more difficult question arises in ascertaining what is a "reasonable" time during which books of account may be examined or their production compelled. After the passage of a reasonable time it may be argued with force that any search would constitute an unreasonable search within the meaning of the Fourth Amendment. There is no express statutory time limitation on examination and production of

[26] First Nat'l Bank v. United States, 160 F.2d 532, 535 (5th Cir. 1947). See also United States v. Union Trust Co., 13 F. Supp. 286 (W.D. Pa. 1936).

[27] INT. REV. CODE §3614(a), quoted *supra* note 25.

[28] INT. REV. CODE §3615(a).

[29] Under this view a corporation is entitled to protection by the courts against a broad search, quite apart from the question of whether a corporation may be protected by the Fourth Amendment itself. There are cases which indicate that the prohibition against unreasonable search and seizure applies to corporations as well as individuals. *E.g.* see Hale v. Henkel, 281 U. S. 43, 76(1906).

A measure which gave the Commissioner powers wide enough to investigate records for any purpose was deleted by Congress. See 26 U.S.C.A. §1544 and note (1935); also Rasquin v. Muccini, 72 F.2d 688 (2d Cir. 1934).

[30] See Mays v. Davis, 7 F. Supp. 596(W.D. Pa. 1934), First Nat'l Bank v. United States, 160 F.2d 532(5th Cir. 1947), *In re* International Corporation Co., 5 F. Supp. 608(S.D. N.Y. 1934).

[31] Federal Trade Comm'n v. Am. Tobacco Co., 264 U. S. 298 (1924), Ellis v. Interstate Commerce Comm'n, 237 U. S. 434 (1915). See note 44 *infra*.

[32] "The court will not pass upon a Constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. The rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction . . . the court will decide only the latter." J. Brandeis concurring in Ashwander v. T. V. A., 297 U. S. 288, 347 (1936).

books and records. However, there would seem little need for any examination beyond the ordinary limitation period on assessment.[33] There are exceptions, of course, where no return has been filed or where fraud is involved in the return[34] or where as much as twenty-five percent of the tax due has been omitted.[35] In these cases the ordinary limitation on assessment is not applicable, and there may arise a need for examination and production of records in order to determine a tax deficiency. In view of the Congressional mandate against unnecessary[36] examinations and the utter futility of examining records to "ascertain the correctness of a return" at a time when there can be no further assessment, the Commissioner should set forth in his complaint sufficient allegations[37] to toll the ordinary statute of limitations on assessment. The allegation of reasonable suspicion of fraud[38] has been held

[33] INT. REV. CODE §275(a): "The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

[34] INT. REV. CODE §276(a): "In the case of a false or fraudulent return with intent to evade tax or of failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time."

[35] INT. REV. CODE §275(c): "If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time within 5 years after the return was filed."

[36] INT. REV. CODE §3631: "No taxpayer shall be subjected to unnecessary examinations or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Commissioner, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

This section has been construed as a limit on the power of the Commissioner. Martin v. Chandis Securities Co., 128 F.2d 731 (9th Cir. 1942), First Nat'l Bank v. United States, 160 F.2d 532 (5th Cir. 1947). See also Pacific Mills v. Kenefick, 99 F.2d 188 (1st Cir. 1938): "The first provision amounts to a Congressional safeguard of the taxpayer's right not to be harrassed by unnecessary examinations. This right is stated in absolute terms. The other part of the section is more explicit and limits the number of examinations to one per year unless the Commissioner certifies that more are necessary,—a safeguard against oppressive action by subordinate officials. Every presumption is to be made in support of the Commissioner's action. But he clearly has no right to impose additional examinations in disregard of the statute, i.e. unnecessary in the performance of his duty as Commissioner. A second examination ordered by the Commissioner without any necessity therefor is an arbitrary abuse of power." *But cf.* Bolich v. Rubel, 67 F.2d 894 (2d Cir. 1933).

A deficiency assessment is not illegal because facts forming the basis of assessment were obtained through alleged illegal second examination. Phillip Magone Co. v. United States, 54 F.2d 168, 172 (Ct. Clms. 1931), Glassell v. Comm'r, 42 F.2d 653 (5th Cir. 1930).

[37] Martin v. Chandis Securities Co., 128 F. 2d 731 (9th Cir. 1942).

[38] *In re* Andrews, 18 F. Supp. 804, 806, 807 (D. Md. 1937), Martin v. Chandis Securities Co., 128 F.2d 731 (9th Cir 1942). Some showing of fraud is necessary to justify examination; *In re* Brooklyn Pawnbrokers, Inc., 39 F. Supp. 304 (E. D. N.Y. 1941); Zimmerman v. Wilson, 81 F.2d 874 (3d Cir. 1936). *But see* United States v. United Distillers Prod. Corp., 156 F.2d 872 (2d Cir. 1946).

sufficient to warrant further examination, thus, not relegating the Commissioner to actual proof of fraud. The theory here is that examination is allowed in order to ascertain whether fraud exists so that further assessment can be made.

Where, however, there is no allegation of fraud or reasonable suspicion thereof, and the statutory period of assessment has run, courts have held that a subpoena duces tecum compelling production of books and records is an unreasonable search and seizure in violation of the Fourth Amendment.[39] It may well be argued that this is not a necessary result.[40] If indeed, on the facts the courts feel constrained to disallow further examination and production of records, the result can be reached on statutory grounds. A fair interpretation of §3614(a)[41] construed in conjunction with §3631[42] leads to the conclusion that Congress intended to authorize examination and production of books only when necessary and relevant to "income liable to tax." The assessment period having passed, there exists neither the liability nor the necessity, absent a tolling of the statute. Thus the courts' decisions under such circumstances can rest on lack of power under the statutes rather than on unreasonable search and seizure.

As a practical matter it would seem that where a taxpayer has duly made his return and paid the tax, and the statutory time limit for further assessment has passed, there should be no further required examination by the Commissioner unless there is prima facie some good reason therefor.[43] While the courts should not unduly circumscribe the investigatory powers permitted the Commissioner in the performance of his highly important duties, such powers are not thus unduly restricted. If "necessity" exists there can be no hardship in requiring a showing thereof to the court.

As to the manner of asserting the defense, a taxpayer whose books are demanded may refuse to comply with a blanket subpoena or "fishing excursion"[44] and when resort is had to the courts for enforcement,

See also *In re* Upham's Estate, 18 F. Supp. 737 (S.D. N.Y. 1937); *In re* Keegan, 18 F. Supp. 746 (S.D. N.Y. 1937); *In re* Paramount Jewelry Co., 80 F. Supp. 375 (S.D. N.Y. 1948).

[39] *In re* Andrews, 18 F. Supp. 804 (D. Md. 1937) (involved oral testimony concerning books and papers); Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936). A valid basis for decision in these cases is set out in, Martin v. Chandis Securities Co., 128 F.2d 731 (9th Cir. 1942).

[40] See note 32 *supra*. [41] See note 25 *supra*. [42] See note 36 *supra*.

[43] Martin v. Chandis Securities Co., 33 F. Supp. 478, 480 (S.D. Cal. 1940) cited with approval in First Nat'l Bank v. United States, 160 F.2d 532 (5th Cir. 1947).

[44] ". . . as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds." McMann v. Securities & Exchange Comm'n, 87 F.2d 377 (2d Cir. 1937).

See also United States v. Union Trust Co., 13 F. Supp. 286 (W.D. Pa. 1936).

he may then set up his objections. Similarly a third person so summoned may insist upon unreasonableness and lack of statutory power as grounds for a court's refusal to enforce the Commissioner's order; but neither may test the validity of an order by securing an injunction to restrain its enforcement against himself.[45] The courts have little difficulty with the issues thus raised regardless of the theory on which the decision is based.

Considerable difficulty is experienced, however, when a taxpayer attempts to restrain, or prevent by injunction[46] or otherwise,[47] an allegedly wrongful examination of a third party's books. In this instance the taxpayer should not be afforded a remedy on any theory. He has no proprietary interest in the records and therefore, there can be no search and seizure which will be an invasion of his property rights.[48] Further, there is no beyond-the-statute ground to give him relief. If the demands made by the Commissioner are unlawful, and therefore unenforceable, but the third party who might object has not done so, this is no more open to objection by the taxpayer than a voluntary furnishing of information by any third party would be.

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[45] Caplis V. Helvering, 4 F. Supp. 181 (E.D. N.Y. 1933); Zimmerman v. Wilson, 105 F.2d 583 (3d Cir. 1939); *In re* Keegan, 18 F. Supp. 737 (S.D. N.Y. 1937); *In re* Upham's Estate, 18 F. Supp. 746 (S.D. N.Y. 1937); Cooley v. Bergen, 27 F.2d 930 (D.C. Mass. 1928). See 9 MERTEN, LAW OF FEDERAL INCOME TAXATION §49.171 n. 71 (ed. 1943).

[46] Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936) is an example of the dilemma in which a court may find itself as a result of being too ready to decide a constitutional question. Held: The taxpayers for whom the limitation period on assessment had run, not the brokers whose records were being demanded, were the real and aggrieved parties and that they might therefore enjoin what the court called an unreasonable search protected by the Fourth Amendment. The court, feeling that further examination would be an unreasonable search, bumped squarely into the well established principle that only the owner of property may object. (See note 48 *infra*.) It based its decision however, on the idea that the taxpayers had some sort of property right in the information contained in the broker's records. See Notes, 45 YALE L. J. 1523 (1936), 84 U. OF PA. L. REV. 789 (1936), 84 U. OF PA. L. REV. 904 (1936). The court, bothered by lack of an allegation of fraud to toll the limitation on assessment, and feeling that further examination should not be allowed, could have avoided the "property concept" hurdle by a decision on statutory grounds. However, the embarrassment of the decision was relieved somewhat when on remand, evidence was taken which showed reasonable grounds to suspect fraud and the bill was dismissed. See 25 F. Supp. 75 (E.D. Pa. 1938). This time on appeal the court retreated to the sound position that only the owner of property may object. "Agents may not under official pretext but in fact officiously, extend their powers beyond those provided by law. If they attempt to examine unrelated transactions, or to engage in an irrelevant "fishing expedition" . . . they may be restrained by the court to whom application is made to enforce compliance." 105 F.2d 583 (3d Cir. 1939). See Note, 28 GEO. L. J. 120 (1939).

[47] *In re* Keegan, 18 F. Supp. 737 (S.D. N.Y. 1937), *In re* Upham's Estate, 18 F. Supp. 746 (S.D. N.Y. 1937).

[48] The principle is well established that only the owner of the books and papers has a standing to object to a search as being an unreasonable search. Esgee Co. v. United States, 262 U. S. 151, 158 (1923), Hale v. Henkel, 201 U. S. 43, 69 (1906), Simmons v. United States, 18 F.2d 85 (8th Cir. 1927), Graham v. United States, 15 F.2d 740 (8th Cir. 1926).