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## **COSTS - ASSESSMENT OF COURT COSTS AGAINST AN AGENCY OF THE FEDERAL GOVERNMENT**

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**COSTS — ASSESSMENT OF COURT COSTS AGAINST AN AGENCY OF THE FEDERAL GOVERNMENT** — A complaint against defendant, filed in equity by the Reconstruction Finance Corporation, was dismissed without costs,<sup>1</sup> the lower federal court being of opinion that it had no power to impose costs upon a governmental agency. The rule of court which bears on this point says, "costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law."<sup>2</sup> *Held*, on appeal to the circuit court of appeals, the district court did have power to assess costs against the Reconstruction Finance Corporation. *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, (C. C. A. 2d, 1940) 111 F. (2d) 940, certiorari granted (U. S. 1940) 61 S. Ct. 26.

As a general rule, costs cannot be taxed against the United States in any suit to which it is a party,<sup>3</sup> in the absence of an act of Congress specifically authorizing the allowance of costs in such a case.<sup>4</sup> Although cases regarding the amenability of a governmental agency to various forms of suit and process are relatively numerous, the principal case is one of the very few in which the specific question here involved has been squarely presented for decision.<sup>5</sup> The word-

<sup>1</sup> *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, (D. C. N. Y. 1939) 29 F. Supp. 853.

<sup>2</sup> Rule 54(d) of the Rules of Civil Procedure.

<sup>3</sup> *United States v. Verdier*, 164 U. S. 213, 17 S. Ct. 42 (1896); *Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754 (1895); *United States v. Thompson*, 98 U. S. 486 (1878); *United States v. Boyd*, 5 How. (46 U. S.) 29 (1847); *United States v. Hooe*, 3 Cranch (7 U. S.) 73 (1805).

<sup>4</sup> *United States v. Worley*, 281 U. S. 339, 50 S. Ct. 291 (1929); *United States v. Chemical Foundation*, 272 U. S. 1, 47 S. Ct. 1 (1926); *James Shewan & Sons v. United States*, 267 U. S. 86, 45 S. Ct. 238 (1924).

<sup>5</sup> In *General Electric Co. v. Federal Radio Comm.*, (App. D. C. 1929) 31 F. (2d) 630, cert. denied in *Federal Radio Comm. v. General Electric Co.*, 281 U. S. 464, 50 S. Ct. 389 (1930), costs were assessed against the commission, but the point was neither raised nor argued. In *De Bary v. Carter*, (C. C. A. 5th, 1900) 102 F. 130, costs were awarded against the collector of internal revenue in an action for the recovery of taxes. In *National Home for Disabled Volunteer Soldiers v. Wood*, (C. C. A. 7th, 1936) 81 F. (2d) 963, *affd.* 299 U. S. 211, 57 S. Ct. 137 (1936), costs were not adjudged against the home, a governmental agency. This decision seems to conflict directly with the principal case, but the majority opinion reconciled it by means of a statute in the "Home" case. In *Federal Deposit Ins. Corp. v. Casady*, (C. C. A. 10th, 1939) 106 F. (2d) 784, the court held costs should be awarded neither in favor of nor against the federal deposit corporation, since it is a governmental agency.

ing of the rule quoted above <sup>6</sup> is sufficiently flexible to allow the court to find somewhere an implied permission to make governmental agencies pay costs when they are not on the successful side of a suit, in the absence of an express authorization. Thus, in the principal case, the court seized upon the act creating the Reconstruction Finance Corporation, which let it "sue and be sued . . . in any court of competent jurisdiction. . . ." <sup>7</sup> Logically, there is some merit in the majority reasoning, that since Congress conferred the power to sue and be sued, it intended to subject the Reconstruction Finance Corporation to the ordinary incidents of suit, one of which is the imposition of costs against an unsuccessful litigant. Furthermore, in the case of the Securities Exchange Commission, Congress specifically provided that no costs were to be levied for or against it. <sup>8</sup> If Congress intended the Reconstruction Finance Corporation and other governmental agencies to be free from such a burden, it might not be amiss to ask why a like provision was not incorporated in the acts creating these other agencies. <sup>9</sup> The statute being flexible, and the logic on neither side being insurmountable, the question really becomes nothing more than one of policy, to be determined by the courts, as to whether governmental agencies should bear the burden of costs when they are the losing party at suit. By imposing such burden, no great hardship is thereby placed upon the agency, for, as the court in the principal case noted, "If the rendition of a judgment against the Reconstruction Finance Corporation, implicit in permitting it to be sued, is not an interference with its governmental activities, we can see no reason for supposing that immunity was granted with respect to the small additional sum that would normally be added to the judgment as costs." <sup>10</sup> Further, since the Reconstruction Finance

<sup>6</sup> Rule 54 (d) of the Rules of Civil Procedure.

<sup>7</sup> 47 Stat. L. 6, § 4 (1932), 15 U. S. C. (1934), § 604.

<sup>8</sup> 48 Stat. L. 903, § 27 (1934), 15 U. S. C. (1934), § 77v.

<sup>9</sup> Most of the acts creating governmental agencies are silent on the question of costs in suit. The act creating the Securities Exchange Commission is the only definite exception that the writer was able to find. However, in the Federal Communications Commission Act, Congress managed to say just enough to be ambiguous: "The court may, in its discretion, enter judgment for costs in favor of or against an appellant . . . but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof." 48 Stat. L. 1094, § 402 (f) (1934), 47 U. S. C. (1934), § 402 (f). The above quotation might be construed to mean that the court may in its discretion tax the commission with costs. If so, it would be another exception to the Congressional habit of silence on this point. Another act, the one creating the Interstate Commerce Commission, mentions "costs," but not in the same connection with which we here deal with it: "the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States." 24 Stat. L. 385 (1887). In that context, court costs are probably not referred to. This section has been frequently amended. For its history, see 49 U. S. C. (1934), § 16 (10), (11).

<sup>10</sup> Principal case, 111 F. (2d) 940 at 942. In *First Trust Joint Stock Land Bank of Chicago v. Lehman*, 225 Iowa 1309 at 1313-1314, 283 N. W. 96 (1938), the court pointed out that "Immunity of corporate government agencies from suit and judicial process, and their incidents, is less readily implied than immunity from taxation," quoting from *Federal Land Bank of St. Louis v. Priddy*, 295 U. S. 229 at 235, 55 S. Ct. 705 (1935).

Corporation is, technically at least, distinct from the United States, the result here reached does not infringe upon the admitted doctrine which excepts the United States from an adverse award of costs in the absence of an express statutory authorization to that effect. Viewed from a practical angle, the decision in the principal case will certainly tend to place governmental corporations and commissions<sup>11</sup> on an equal plane with private litigants until such time as Congress may decide to be more explicit on the subject.

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<sup>11</sup> Whether the respective arm of the United States is a commission or a corporation, in a particular case, does not seem to matter, in so far as the question of assessing costs against it is concerned. If it can sue and be sued, it matters not what it is called. The question is the same.