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Soverign Immunity - Suit for Specific Relief Against Federal Officers - United States Not a Necessary Part

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SOVEREIGN IMMUNITY — SUIT FOR SPECIFIC RELIEF AGAINST FEDERAL OFFICERS — UNITED STATES NOT A NECESSARY PARTY — Plaintiff, claiming right to possession, brought an ejection action in a Georgia court against both the government officer in possession of the land and the United States. Defendants removed the case to a United States district court[1] and moved for dismissal. The district court granted defendants' motion to dismiss, holding that the court had no jurisdiction over the claim because the suit in substance and effect was against the United States and the United States had neither consented to be sued nor waived its immunity from suit.[2] On appeal to the Court of Appeals for the Fifth Circuit, *held,* reversed, one judge dissenting. An action in ejectment against one who holds land to which plaintiff claims a possessory interest is not foreclosed because defendant possesses the land as agent of the United States and the United States has not waived its sovereign immunity. *Bowdoin v. Malone,* 284 F.2d 95 (5th Cir. 1960).

The doctrine of sovereign immunity in the United States, although judge-made, has been considered to be an implicit part of the United States Constitution.[3] Its early popularity[4] is evidenced by the great rapidity with which the eleventh amendment was added to the Constitution, thereby giving the states immunity from suits by citizens of other states.[5] The ex-

[1] A civil action commenced in a state court against an officer of the United States may be removed by him to the District Court of the United States for the district embracing the place wherein the action is pending. 28 U.S.C. § 1442 (1958).

[2] Doe v. Roe, 186 F. Supp. 407 (M.D. Ga. 1959).

[3] Monaco v. Mississippi, 292 U.S. 313, 321 (1934); see United States v. Lee, 106 U.S. 196, 207 (1882) (dictum). See generally Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine,* 59 HARV. L. REV. 1060 (1946).

[4] Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907); The Western Maid, 257 U.S. 419, 432 (1922). This theory has been criticized because the prevailing philosophy in this country is that the people and not the state are supreme. See Borchard, *Governmental Responsibility in Tort* (pts. 5 & 6), 36 YALE L.J. 757, 1039 (1927). A suggested alternative basis for the doctrine is its use as a device to prevent the courts from running the government. See Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages,* 40 CORNELL L.Q. 3 (1954); Briggs v. Light-Boat Upper Cedar Point, 93 Mass. 157 (1865).

[5] The eleventh amendment adopted in 1798 abrogated Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (state officers not immune from suit by a citizen of another state). See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821), which suggests as another reason for the popularity of the eleventh amendment the fear that creditors of the state would seek to enforce state obligations in federal courts.

tent to which this doctrine applies in suits against government officials, as opposed to he United States itself, has never been entirely clear. However, in at least three categories of cases it has been rather consistently held that the court has no jurisdiction unless the United States is joined and consents to be sued or waives its immunity from suit:[6] (1) cases in which, if specific relief were granted, the net effect would be to collect money from the public treasury;[7] (2) cases in which, if specific relief were granted, the net effect would be to compel specific performance by the United States of a contract to which it was a party;[8] and (3) cases in which plaintiff seeks to compel the sovereign to part with property admittedly owned by the sovereign.[9] Outside of these categories the cases turn on a precarious balance between protection of private interests and non-interference with functions of government officials; however, the conclusion is rarely explained in these terms. If the balance is weighted in favor of private protection, the result may be announced in terms that the official has acted beyond his statutory authority[10] or that he has acted to deprive plaintiff of his constitutional rights.[11]

A third rationale – that the official has committed a common-law tort – has doubtful status. In the leading case of *United States v. Lee*[12] the Supreme Court held that in an ejectment action against a government official the United States is not a necessary party and that the action may be maintained without waiver of sovereign immunity.[13] A host of decisions following *Lee,* including *Land v. Dollar*[14] decided in 1947, impliedly re-

[6] See generally Comment, 65 HARV. L. REV. 466, 469 (1952); Note, 40 GEO. L.J. 289, 298 (1952).

[7] *E.g.,* Mine Safety Co. v. Forrestal, 326 U.S. 371 (1945) (suit to enjoin Treasury officials from stopping payment under one contract because of excess profits made by plaintiff under an earlier contract, dismissed).

[8] *E.g.,* Wells v. Roper, 246 U.S. 335 (1918) (injunction to prevent Postmaster General from annulling a contract, dismissed); United States *ex rel.* Goldberg v. Daniels, 231 U.S. 218 (1913) (mandamus to order Secretary of Navy to deliver cruiser pursuant to contract, dismissed).

[9] *E.g.,* Louisiana v. Garfield, 211 U.S. 70 (1908) (injunction proceedings against Secretary of Interior to prevent disposition of certain government-owned lands, dismissed); Oregon v. Hitchcock, 202 U.S. 60 (1906) (suit to prevent Government from patenting public land to Indians because land belonged to Oregon via congressional acts, dismissed).

[10] *E.g.,* Land v. Dollar, 330 U.S. 731 (1947); Santa Fe Pac. R.R. v. Fall, 259 U.S. 197 (1922); Waite v. Macy, 246 U.S. 606 (1918); Carlson v. Washington *ex rel.* Curtiss, 234 U.S. 103 (1912); Scully v. Bird, 209 U.S. 481 (1908); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 109 (1902); Scranton v. Wheeler, 179 U.S. 141, 152 (1900).

[11] *E.g.,* Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304-06 (1952); Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936); *Ex parte* Young, 209 U.S. 123, 155-60 (1908); Smyth v. Ames, 169 U.S. 466, 518-19 (1898); Poindexter v. Greenhow, 114 U.S. 270, 286, 292 (1885); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 868-70 (1824).

[12] 106 U.S. 196 (1882).

[13] *Id.* at 220.

[14] 330 U.S. 731, 737-39 (1947). In an action to restrain the chairman of the United States Maritime Commission and others from selling stock which they allegedly were illegally withholding from the plaintiff and to compel the return of the stock to the plaintiff, the Court held the district court had jurisdiction over the case because if defendants wrongfully held the stock they would be acting beyond their statutory authority

affirmed the position that sovereign immunity does not extend to government officials who have committed a tort on the basis that an agent of the Government committing a tort acts as an individual and not on behalf of the Government.[15] But in 1949 *Larson v. Domestic & Foreign Commerce Corp.*[16] assailed this exception to the sovereign immunity rule.[17] The Court purported to "hold" that "if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are actions of the sovereign, whether or not they are tortious under general law. . . ."[18] The Court explained *Lee* as a case involving an unconstitutional taking of plaintiff's land and therefore within the first exception to the sovereign immunity doctrine, and distinguished *Dollar* as a case where the government official acted beyond his statutory authority[19] and thus within the other exception to the doctrine. This broad language in *Larson* suggests therefore that if specific relief is sought against a government official who has committed a tortious act the United States will be considered an essential party to the suit unless the official has acted beyond his statutory authority or in an unconstitutional manner.[20]

or would be guilty of committing a tort and either violation would be sufficient to remove the case from the shield of sovereign immunity.

[15] *E.g.*, Land v. Dollar, 330 U.S. 731 (1947); Ickes v. Fox, 300 U.S. 82 (1937) (threatened deprivation of vested property rights in water); Goltra v. Weeks, 271 U.S. 536 (1926) (trespass to property); Sloan Shipyards Corp. v. United States Fleet Corp., 258 U.S. 549 (1922) (conversion of property); Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911) (interference with access to navigable water); Tindal v. Wesley, 167 U.S. 204 (1897) (wrongful withholding of land); Noble v. Union River Logging R.R., 147 U.S. 165 (1893) (attempt to withdraw grant of right-of-way which had become vested property right of the railroad). The vast amount of authority accepting the view of *Lee* lends strength to the position that sovereign immunity should not be extended to a government officer who has committed a tortious act.

The statement that when a government official acts either tortiously, unconstitutionally, or beyond his statutory authority he is acting as an individual and not as an agent of the Government is a mere fiction used by the Court to justify its decision that the Court has jurisdiction even though the United States has not been joined or consented to be sued. This statement begs the question whether sovereign immunity should be extended to all acts of government officials or whether the courts in each case must weigh the advantages to be derived from application of the doctrine against the private injury incurred. See Davis, *supra* note 4, at 9.

[16] 337 U.S. 682 (1949).

[17] *But see, id.* at 705-32 (dissenting opinion).

[18] Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 695 (1949). Despite the strong language in terms of "holding," the decision actually turned on other grounds. See text accompanying note 24 *infra*.

[19] The language of the Court in *Lee* suggests that its holding was based primarily on defendant's wrongful trespass to the plaintiff's property and not their taking of plaintiff's property without just compensation. 106 U.S. at 220-21. The Court's distinction of *Dollar* can be criticized in that the *Dollar* Court indicated it would reach the same decision if the official had merely committed a tort and had not acted beyond his statutory authority. 330 U.S. at 737.

[20] See, *e.g.*, Fay v. Miller, 183 F.2d 986 (D.C. Cir. 1950).

The problem which faced the court in the principal case was whether the language in *Larson,* in effect, overruled *Lee.*[21] The court concluded that *Lee* had not been so limited as to preclude an action seeking to oust the government's agents from wrongful possession of land growing out of their tortious or illegal acts.[22] The result could have been brought within the exception to sovereign immunity recognized in *Larson* — that the action of the government agent in the principal case amounted to an unconstitutional taking of plaintiff's land.[23] Alternatively, the court could have avoided *Larson* entirely by limiting it to its facts and ignoring its sweeping language. *Larson* involved a contract for the sale of government goods and the action would have resulted, in effect, in a decree of specific performance of a government contract, an area in which it has been consistently held that the suit is in reality one against the United States which cannot be maintained without its consent.[24] The court's disparagement of the tortious conduct theory in *Larson* was thus unnecessary, but lower courts, understandably, have not felt free to disregard it and indeed most have followed the literal wording of *Larson* without deviation.[25]

The resulting confusion calls for a reappraisal of the entire doctrine of sovereign immunity. The apparent reason for the doctrine in modern law is to permit the Government to function unimpaired by a multitude of private suits against officials;[26] but weighed against this must be the proposition that private individuals have rights of property and contract which

21 One court has taken the position that *Lee* has been almost completely overruled: "[I]n my opinion, United States v. Lee has been severely limited by Larson, and with the possibility of the landowner recovering compensation for the wrongful taking, there may be no cases at all in which United States v. Lee will permit suit today." Jones v. United States, 127 F. Supp. 31, 33 (E.D.N.C. 1954).

22 Principal case at 105.

23 The Court in *Larson* did not question the proposition that an action could be maintained against a government official if his action violated plaintiff's constitutional rights. 337 U.S. at 689.

24 There is a valid reason for denying a suit for specific relief against a government official for his tortious interference with a contract since plaintiff may sue the United States for damages in the Court of Claims. However, in the property cases specific relief to gain return of the wrongfully held property is the only adequate measure of relief, and that form of relief cannot be awarded by the Court of Claims. See generally Comment, 65 HARV. L. REV. 466, 471 (1952).

25 See, *e.g.,* United States *ex rel.* Nez Perce Tribe of Indians v. Seaton, 257 F.2d 206 (D.C. Cir. 1958); United States v. 706.98 Acres of Land, 158 F. Supp. 272 (W.D. Ark. 1958); Andrews v. White, 221 F.2d 790 (6th Cir. 1955), *affirming* 121 F. Supp. 570 (E.D. Tenn. 1954); Hudspeth County Conservation & Reclamation Dist. v. Robbins, 213 F.2d 425 (5th Cir.), *cert. denied,* 348 U.S. 833 (1954); Arizona *ex rel.* Arizona State Bd. of Pub. Welfare v. Hobby, 221 F.2d 498 (D.C. Cir. 1954); Stack v. Strang, 94 F. Supp. 54 (S.D.N.Y. 1950), *rev'd on other grounds,* 191 F.2d 106 (2d Cir. 1951); American Dredging Co. v. Cochrane, 190 F.2d 106 (D.C. Cir. 1951). *But see* Archbold v. McLaughlin, 181 F. Supp. 175 (D.D.C. 1960); Laycock v. Kenney, 270 F.2d 580 (9th Cir. 1959); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955); Farrell v. Moomau, 85 F. Supp. 125 (N.D. Cal. 1949). See generally Comment, 8 STAN. L. REV. 683, 692 (1956).

26 See Block, *supra* note 3, at 1080.

should be protected against impairment by government agents as well as private citizens.[27] The decisions prior to *Larson,* either consciously or unconsciously, interposed the doctrine of sovereign immunity in those cases in which suit would have resulted in an undue restraint on the operation of the Government. *Larson* itself was not inconsistent with this pattern, but its sweeping language which cast doubt upon a basic rationale for avoiding sovereign immunity as developed in *Lee* and related cases, has posed the threat of extending sovereign immunity to the point where the rights of the individual may be unduly suppressed. It is reassuring that the court in the principal case has concluded that the principle of *Lee* is still available for protection of private rights in appropriate cases, notwithstanding what was said in *Larson.* But the apparent inconsistencies between the theory of *Lee* and the language of *Larson* will doubtless continue to plague the lower courts until the Supreme Court clarifies the latter or reappraises the entire doctrine of sovereign immunity.

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[27] See Note, 23 So. CAL L. REV. 258, 260 (1950).