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PARTIES - LACK OF CONTROVERSY WHERE PARTIES REPRESENT SAME INTERESTS

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PARTIES — LACK OF CONTROVERSY WHERE PARTIES REPRESENT SAME INTERESTS — The United States on July 19, 1941, filed libels to forfeit Italian vessels for willful damage done to such vessels contrary to statute.[1] On September 9, 1941, the United States Maritime Commission requisitioned the use of said vessels. The act authorizing such requisitioning [2] provided for the determination of just compensation for the use of the ships or damage for injuries thereto during use by the government. Pursuant to proper authority [3] the Alien Property Custodian on July 22, 1942, declared vested in himself all right, title and interest, if any, of the claimants in the vessels in the interest, and for the benefit, of the United States, and filed petitions praying to be substituted for the prior owners of the ships who were the claimants in the admiralty proceedings for forfeiture instituted by the United States. *Held*, substitution denied because it would leave no adverse interests before the court and would infringe the statutory power of enemy owners to defend against forfeiture.[4] *The Pietro Campanella*, (D.C. Md. 1942) 47 F. Supp. 374.

The general test of justiciability, which is the necessary requisite for judicial

[1] 50 U.S.C. (1940), § 193.

[2] Under authority of the Act of Congress of June 6, 1941, 55 Stat. L. 242, 46 U.S.C.A. (Supp. 1941), note preceding § 1101.

[3] Trading with the Enemy Act of Oct. 6, 1917, as amended, §§ 5(b), 7(c), 50 U.S.C. (1940 and Supp. 1941), Appendix, §§ 5(b), 7(c); and Executive Order No. 9095 of March 11, 1942, as amended, 50 U.S.C.A. (Supp. 1942), Appendix, § 6, note; 7 FED. REG. 1971, 5205 (1942).

[4] Although substitution was denied to the Alien Property Custodian, the court indicated that he should be made a party with right to receive any interest which claimants are determined to have had at time of order vesting their interests in the Alien Property Custodian.

relief as found in the Constitution of the United States,[5] has been interpreted by the courts to include the existence of adverse parties.[6] In the leading case in this country on the subject of the adverse character of the parties, the United States Supreme Court dismissed a writ of error because it found that "the interest [of the parties] in the question brought here for decision is one and the same, and not adverse." [7] Also, where the interests of the parties were originally adverse, but by reason of the acquisition by one of the parties of the interest of the other party pending appeal from the lower court's decision, the Supreme Court refused to entertain the appeals.[8] In recent years most of the cases which have come before the courts involving problems of the adverse character of parties have arisen under declaratory judgment acts. In 1933 the United States Supreme Court passed upon a case arising under the Tennessee act, and found that the parties were adverse and that it was a proper case for adjudication;[9] and in 1936 the Supreme Court upheld the constitutionality of the Federal Declaratory Judgment Act,[10] which by its terms limited its operation to "cases of actual controversy." Where the "controversy" brought before the court by the parties to the suit represents mere differences of opinion, and their interests are essentially identical, the courts refuse to pass upon such questions.[11] Most cases brought for the express purpose of testing the validity of legislation will not be entertained.[12]

[5] U.S. Constitution, art. 3, § 2.

[6] "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication." In re Pacific Railway Commission, (C.C. Cal. 1887) 32 F. 241 at 255.

[7] Lord v. Veazie, 8 How. (49 U.S.) 251 at 254 (1850).

[8] Cleveland v. Chamberlain, 66 U.S. 419 (1861): Wood-Paper Co. v. Heft, 8 Wall. (75 U.S.) 333 (1869); South Spring Hill Gold Min. Co. v. Amador Medea Gold Min. Co., 145 U.S. 300, 12 S. Ct. 921 (1891).

[9] Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249, 53 S. Ct. 345 (1933).

[10] Act of June 14, 1934, 48 Stat. L. 955, 28 U.S.C. (1940), § 400. This act was held constitutional in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S. Ct. 461 (1936). The Court said, 300 U.S. at 240-241: "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests."

For a discussion of the nature and scope of the "actual controversy" as required by federal and state declaratory judgments acts, see Schroth, "The 'Actual Controversy' in Declaratory Actions," 20 CORN. L. Q. 1 (1934).

[11] Cummings v. Shipp, 156 Tenn. 595, 3 S.W. (2d) 1062 (1928); Jefferson County v. Jefferson County Fiscal Ct., 259 Ky. 661, 83 S.W. (2d) 16 (1935); Reese v. Adamson, 297 Pa. 13, 146 A. 262 (1929); Moore v. Caldwell County, 207 N.C. 311, 176 S.E. 580 (1934); Wright v. McGee, 206 N.C. 52, 173 S.E. 31 (1934).

[12] Chicago & G. T. Ry. v. Wellman, 143 U.S. 339 at 345, 12 S. Ct. 400 (1891). In referring to suits involving the validity of statutes, the Court said: "It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the

But a difference of opinion between administrative officers as to their rights and duties may present an actual controversy rather than a mere occasion for an advisory opinion;[13] and the fact that both parties want the same judgment does not necessarily indicate that the parties are not adversaries.[14] However, to allow a substitution of the Alien Property Custodian as *dominus litus* in the principal case would remove the adverse interests in the suit,[15] even to the extent of allowing the custodian to consent to a decree of forfeiture without contest. In such a situation the plaintiff would be the United States and the defendant claimant would be an officer of the United States acting in the interest of the United States, and an adjudication under those circumstances would be a nullity.

constitutionality of the legislative act." Cf. also Purity Oats Co. v. State, 125 Kan. 558, 264 P. 740 (1928).

[13] Langer v. State, 69 N.D. 129, 284 N.W. 238 (1939); Ex parte County Board of Education of Montgomery County, 260 Ky. 246, 84 S.W. (2d) 59 (1935).

[14] State ex rel. Miller v. State Board of Education, 56 Idaho 210, 52 P. (2d) 141 (1935). Professor Borchard has stated: "The made case or test case is a familiar institution in American jurisprudence; it may or may not involve a legitimate controversy and both parties may possibly want the same judgment. But if the court wishes to render judgment it will close its eyes to the realities and perceive only the ostensible conflict of interests." BORCHARD, DECLARATORY JUDGMENTS, 2d ed., 32-33 (1941).

[15] Principal case, 47 F. Supp. at 378: "The Alien Property Custodian is an officer of the United States acting in the national interests. His authority stems from the constitutional grant of power in Art. I, § 8, Clause 11. . . . It is under this power that Congress has authorized the President . . . to appoint the Alien Property Custodian, and to confer upon him the power to act, and in this respect he represents the President of the United States."