6-1-1952

Procedure -- Suits Against the Government -- Ancillary Litigation

PROCEDURE — SUITS AGAINST THE GOVERNMENT — ANCILLARY LITIGATION

In a suit against the government for the proceeds of a National Service Life Insurance policy,[1] the defendant brought in a party to whom several payments had been made. Judgment was rendered for the plaintiff against the government for the undisbursed proceeds[2] and against the third party for the payments made. *Held*, that the court has jurisdiction to compel restitution from the party brought in by the government. *De Motts v. United States*, 101 F. Supp. 770 (D. Kan. 1952).

From the basic rule that the government is not amenable to suit without its consent,[3] it has been held that such consent defines the jurisdiction of the court hearing a permitted suit.[4] Generally, a waiver of sovereign immunity is to be strictly construed.[5] On these grounds, courts have usually refused to expand suits against the government to entertain claims against a third party not involving the government.[6] The consent sued under in the most important limiting decision[7] impliedly involved an analogy to the jurisdiction of the Court of Claims,[8] where only the liability of the govern-

1. See the National Service Life Insurance Act of 1940, 54 STAT. 1008, as amended, 38 U.S.C. § 801 *et seq.* (Supp. 1950). Such policies have now been generally replaced during periods of active service for free protection. 65 STAT. 33 (1951), 38 U.S.C.A. § 851 *et seq.* (Supp. 1951) (Servicemen's Indemnity Act).

2. "Any payments of insurance made to a person represented by the insured to be within the permitted class of beneficiaries shall be deemed to have been properly made and to satisfy fully the obligation of the United States under such insurance policy to the extent of such payments." 54 STAT. 1009 (1940), 38 U.S.C. § 802(1) (1946).

The third party, the insured's acknowledged mother, was within the permitted class of beneficiaries.

3. McMahon v. United States, 342 U.S. 25 (1951); Maricopa County v. Valley Nat. Bank, 318 U.S. 357 (1943); United States v. Sherwood, 312 U.S. 584 (1941); United States v. Shaw, 309 U.S. 495 (1940).

4. United States v. Sherwood, 312 U.S. 584 (1941); Herren v. Farm Security Administration, 60 F. Supp. 694 (W.D. Ark. 1945) *rev'd on other grounds*, 153 F.2d 76 (8th Cir. 1946); North Side Canal Co. v. Twin Falls Canal Co., 12 F.2d 311 (D. Idaho 1926).

5. McMahon v. United States, 342 U.S. 25 (1951); United States v. Sherwood, 312 U.S. 584 (1941); United States v. Michel, 282 U.S. 656 (1931); Pass v. McGrath, 192 F.2d 415 (D.C. Cir. 1951), *cert. denied*, 72 Sup. Ct. 302 (1952). *But see* United States v. Shaw, 309 U.S. 495, 501 (1940); *cf.* Canadian Aviator, Ltd. v. United States, 324 U.S. 215 (1945); Federal Housing Administration v. Burr, 309 U.S. 242 (1940).

6. United States v. Sherwood, 312 U.S. 584 (1941); Pack v. United States, 176 F.2d 770 (9th Cir. 1949); Wasserman v. Perugini, 173 F.2d 305 (2d Cir. 1949); Moreno v. United States, 120 F.2d 128 (1st Cir. 1941), *affirming* 35 F. Supp. 657 (D. Mass. 1940); Lowe v. United States, 37 F. Supp. 817 (D.N.J. 1941).

On whether jurisdiction over suits against the government can be invoked when the real issue is between the plaintiff and a private co-defendant, *compare* Calhoun v. Ussery, 46 F.2d 495 (W.D. La. 1930) *with* New Amsterdam Casualty Co. v. United States, 71 F. Supp. 155 (W.D. Pa. 1947). See Cramp Shipbuilding Co. v. United States, 20 U.S.L. WEEK 2486 (3d Cir. April 7, 1952) (suit against the government failed, but diversity of citizenship existed between the plaintiff and the co-defendant).

7. United States v. Sherwood, 312 U.S. 584 (1941).

8. The district courts have concurrent jurisdiction not exceeding $10,000.00 with the Court of Claims in certain suits against the United States, including those on "express or implied contracts" and those "for liquidated or unliquidated damages in cases not sounding in tort." 36 STAT. 1093 (1911), 28 U.S.C. §§ 1346(a)(2), 2401, 2402 (Supp. 1950).

ment is held adjudicable.[9] Under certain other statutory waivers of immunity, Court of Claims procedure has been held inapplicable.[10]

The National Service Life Insurance Act[11] expressly renders the government susceptible to suit on policies issued under the Act[12] and authorizes "all parties having or claiming to have an interest in the insurance" to be brought in.[13] Although it has been held that the latter provision is intended to prevent multiplicity of suits,[14] and despite the possible inapplicability of Court of Claims procedural limitations,[15] the courts have invoked the general rule restricting litigation.[16] In suits under the Act, jurisdiction was refused

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9. United States v. Sherwood, 312 U.S. 584 (1941); Leather v. United States, 61 Ct. Cl. 388, *cert. denied*, 271 U.S. 660 (1926); Jackson v. United States, 27 Ct. Cl. 74 (1891) (court cannot make private party a defendant, ". . . and if he should come in voluntarily on notice the court would have no jurisdiction to make a decree to which it could compel him to submit"); Waite v. United States, 57 Ct. Cl. 546 (1922) (government contractor not permitted to intervene as defendant in patent infringement suit although he was bound to save the government harmless from such suits); *see* United States for Use of Mutual Metal Mfg. Co. v. Biggs, 46 F. Supp. 8, 11 (E.D. Ill. 1942). *But cf.* the Contract Settlement Act. 58 STAT. 633 (1944), 41 U.S.C. § 114(b), 114(c) (1946), Central Nat. Bank of Richmond v. United States, 84 F. Supp. 654 (Ct. Cl. 1949), 91 F. Supp. 738 (Ct. Cl. 1950).

10. United States v. Pfitsch, 256 U.S. 547 (1921) (district court, given special jurisdiction over claims against the government, not sitting as the Court of Claims); Cook v. United States, 115 F.2d 463 (5th Cir. 1940) (general procedure must give way to special provision for refunds of collections made by the Agricultural Adjustment Administration); Westbrook v. Director General of Railroads, 263 Fed. 211 (N.D. Ga. 1920); see note 15 *infra*; *cf.* Revenue Oil Co. v. United States, 75 Ct. Cl. 692 (1932), *cert. denied*, 289 U.S. 728 (1933) (Secretary of the Interior's jurisdiction over land claims excluded the Court of Claims).

11. See note 1 *supra*.

12. 43 STAT. 612 (1924), as amended, 38 U.S.C. § 445 (Supp. 1950), made applicable to the National Service Life Insurance Act by 54 STAT. 1014 (1940), as amended, 38 U.S.C. § 817 (1946). By § 817 as amended, § 445 seems applicable to the Servicemen's Indemnity Act, 65 STAT. 33 (1951), 38 U.S.C.A. § 851 *et seq.* (Supp. 1951).

13. *Ibid.*

14. Blanton v. United States, 17 F. Supp. 327, 329 (S.D. Ala. 1936); *cf.* Heinemann v. Heinemann, 50 F.2d 696 (6th Cir. 1931) (the purpose of the provision is to effect a consolidation of claims under the policy).

15. Law v. United States, 266 U.S. 494 (1925) (district court erroneously denied jury trial under the general procedure when jury trial was available under the applicable service insurance act); Prouty v. United States, 94 F. Supp. 320 (D.N.H. 1950) (issue of jury trial); *cf.* Mara v. United States, 54 F.2d 397 (S.D.N.Y. 1931) (general consent to be sued does not apply to service insurance actions); Holliday v. United States, 87 F. Supp. 367 (Ct. Cl. 1949) (Court of Claims cannot entertain suit for service insurance).

16. See notes 17, 18 *infra*.

Jurisdictional problems regarding venue and process are not discussed in the text, since the objections of that class raised in the *De Motts* case were termed unseasonable. The opinions limiting litigation, *infra* notes 17, 18, seem to consider these problems important if not determinative. One writer suggests that the jurisdictional questions are secondary to the larger issue of limiting litigation against the government. Chafee, *Broadening the Second Stage of Federal Interpleader*, 56 HARV. L. REV. 929, 941-942 (1943). It seems doubtful that this theory obtains when the decision is to expand the suit. Both the court in the *De Motts* case and the dissenting judge in the *Pack* case, *infra* note 18, apparently found it necessary to avoid the difficulties by holding the objections to venue to have been raised unseasonably.

The statutory provision for bringing in third parties, although it transcends ordinary limits of venue and process, does not conflict with federal civil procedure. FED. R. CIV. P. 4(f), 82. Unseasonable objections to venue may be ineffective. 62 STAT. 937 (1948), 63 STAT. 101 (1949), 28 U.S.C. § 1406 (Supp. 1950).

over ancillary actions for alienation of affections[17] and for enforcement of community property rights.[18]

Pointing out that the cross-action in the instant case arose from the same contract of insurance as the principal action, the court distinguished the prior holdings.[19] Federal third-party practice was considered,[20] but the third party's pleadings were held to have joined the issues as in an interpleader.[21] It was apparently assumed that in an interpleader the court would have the disputed jurisdiction.

The general restriction on litigation against the government was not reasoned away, nor is it likely that the asserted jurisdiction can be founded on an analogy to interpleader.[22] Rather, it is submitted, construction of the

17. Moreno v. United States, 120 F.2d 128 (1st Cir. 1941), *affirming* 35 F. Supp. 657 (D. Mass. 1940). See Chafee, *Broadening the Second Stage of Federal Interpleader*, 56 HARV. L. REV. 929, 939-942, 957-958.

18. Pack v. United States, 176 F.2d 770 (9th Cir. 1949). This case seems to achieve the unfortunate effect of denying relief to a woman whose husband used their community property without her consent to create an insurance estate payable to a third party. Whereas the *Pack* case dealt with procedure, it has since been held that a widow is without substantive rights in such a situation. Wissner v. Wissner, 338 U.S. 655 (1950), *reversing* 89 Cal. App. 2d 759, 201 P.2d 837 (1949) (the deceased's wishes regarding the service life insurance proceeds override the community property rights of his wife in the insurance estate).

19. De Motts v. United States, 101 F. Supp. 770, 772-773 (D. Kan. 1952).

20. Federal third-party practice, FED. R. CIV. P. 14(a), is probably inapplicable. Moreno v. United States, 120 F.2d 128 (1st Cir. 1941), *affirming* 35 F. Supp. 657 (D. Mass. 1940); Chafee, *Broadening the Second Stage of Federal Interpleader*, 56 HARV. L. REV. 929, 957-958 (1943). Furthermore, Rule 14(a) has been modified since the *Moreno* case and Chafee's article to exclude parties brought in on account of possible liability to the plaintiff. *Compare* 329 U.S. 843, 852 *with* 308 U.S. 645, 681-682.

Rule 13(g) is discussed in note 22 *infra*.

21. The third party entered a cross-complaint for all the proceeds. With her reply, the plaintiff filed a cross-complaint against the third party for the payments made.

22. Federal interpleader proceedings are generally limited to claims against the res. Pack v. United States, 176 F.2d 770 (9th Cir. 1949); Moreno v. United States, 120 F.2d 128 (1st Cir. 1941); Prudential Ins. Co. v. Tomes, 45 F. Supp. 353 (D. Neb. 1942); Lawyers Trust Co. v. W. G. Maguire & Co., 2 F.R.D. 310 (D. Del. 1942); Stitzel-Weller Distillery, Inc. v. Norman, 39 F. Supp. 182 (W.D. Ky. 1941); Massachusetts Bonding & Ins. Co. v. Daniels, 35 F. Supp. 653 (E.D. Ill. 1941); *accord*, Great Lakes Auto Ins. Group v. Shepherd, 95 F. Supp. 1 (W.D. Ark. 1951) (cross-claim not allowed against a defendant who made no claim); *cf.* Hagan v. Central Avenue Dairy, Inc., 180 F.2d 502 (9th Cir. 1950) (cross-claim not allowed against an absentee defendant); West Coast Life Ins. Co. v. Twogood, 83 F. Supp. 710 (S.D. Cal. 1949). *Contra*: Coastal Air Lines, Inc. v. Dockery, 180 F.2d 874 (8th Cir 1950); Bank of Neosho v. Colcord, 8 F.R.D. 621 (W.D. Mo. 1949); Chafee, *Broadening the Second Stage of Federal Interpleader*, 56 HARV. L. REV. 929 (1943); *cf.* Globe Indemnity Co. v. Puget Sound Co., 154 F.2d 249 (2d Cir. 1946) (restitution possible in same suit for amount paid out under incorrect decision of lower court); Century Ins. Co. v. First Nat. Bank, 102 F.2d 726 (5th Cir.), *cert. denied*, 308 U.S. 570 (1939) (decree granting entire fire insurance proceeds to trustee of bankrupt warehouseman as against holders of warehouse receipts reduced to amount of lien for storage); Roberts v. Metropolitan Life Ins. Co., 94 F.2d 277 (7th Cir.), *cert. denied*, 303 U.S. 660 (1938) (court may determine if there was fraud in assignment to assignee-claimant).

Coastal Air Lines, Inc. v. Dockery, *supra*, and Bank of Neosho v. Colcord, *supra*, in admitting ancillary litigation, invoked Rule 13(g) of the Federal Rules of Civil Procedure, which rule applies to a cross-claim against a *co-party*. A party brought in to assert his interest in service life insurance would not seem to be a "co-party" in regard to the plaintiff in a suit against the government.

Interpleader proceedings initiated by the government in service life insurance cases should not be expanded. Chafee, *supra*, at 939-942.

procedural provisions of the service insurance act, as well as of the substantive provisions, should be guided by the deceased's intent.[23] That intent has been held powerful enough to controvert rights established by state law;[24] and, as mentioned before, special procedure may obtain under particular waivers of governmental immunity.[25] Actually, the prior cases as well as the instant case entertain those matters essential in carrying out the serviceman's intent, but nowhere do the opinions acknowledge that intent to be controlling.

TAXATION — MOVABLE TANGIBLES — TAXING SITUS

Plaintiff's interstate barges were registered in Ohio, but stopped there only for fuel and repairs. Ohio levied an ad valorem personal property tax on the full value of the vessels. On appeal to the Supreme Court of the United States, *held*, that the possibility of subjection to a second tax by the states in which the barges have acquired taxing sitii through physical presence[1] precludes collection by the domiciliary state of more than its proportionate share. *Standard Oil Co. v. Peck*, 72 Sup. Ct. 309 (1952).

Since the establishment of federal supremacy over navigable waters,[2] in order to protect shipping against multiple taxation[3] the courts have had to decide what constitutes a tax situs for vessels.[4] A state may tax tangible personal property found within its borders,[5] even against a domiciliary of another state.[6] However, a distinguishable situation arises where the prop-

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23. See Thomas v. United States, 189 F.2d 494 (6th Cir.), *cert. denied*, 342 U.S. 850 (1951); Johnson v. United States, 87 F.2d 940 (8th Cir. 1937); Golden v. United States, 91 F. Supp. 950 (M.D. Ala. 1950), *aff'd*, 192 F.2d 81 (5th Cir. 1951); Jadin v. United States, 74 F. Supp. 589 (D. Wis. 1947); Baldwin v. United States, 68 F. Supp. 657 (W.D. Mo. 1946).

24. Wissner v. Wissner, 338 U.S. 655 (1950), *reversing* 89 Cal. App. 2d 759, 201 P.2d 837 (1949).

25. See notes 10, 15 *supra*.

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1. Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949).

2. United States v. Appalachian Power Co., 311 U.S. 377 (1940); Gibbons v. Ogden, 9 Wheat, I (U.S. 1824).

3. U.S. CONST. AMEND. XIV, § 1; Frick v. Pennsylvania, 268 U.S. 473 (1925); Delaware, L. & W. R.R. v. Pennsylvania, 198 U.S. 341 (1905); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905).

4. Texas v. Florida, 306 U.S. 398 (1939); Frick v. Pennsylvania, 268 U.S. 473 (1925) (not applicable to intangibles, although in Texas v. Florida the Supreme Court took it upon itself to determine a domicile from the evidence in the record).

5. Pullman's Palace-Car Co. v. Pennsylvania, 141 U.S. 18 (1891); Walworth v. Harris, 129 U.S. 355 (1888).

6. Old Dominion S.S. Co. v. Virginia, 198 U.S. 299 (1905); Pullman's Palace-Car Co. v. Pennsylvania, 141 U.S. 18 (1891); Coe v. Errol, 116 U.S. 517 (1886); Brown v. Houston, 114 U.S. 622 (1884); The State Railroad Tax Cases, 92 U.S. 575 (1875); Tappan v. Merchant's Bank, 19 Wall. 490 (U.S. 1873); Railroad Co. v. Pennsylvania, 15 Wall. 300 (U.S. 1868).