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Federal Procedure: Ability to Bring an Original Suit or Counterclaim for Tort Against the United States

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of self-defense in its charge to the jury. *Green* v. *State,* 7 Ga. App. 803, 68 S.E. 318 (1910).

Although a New York court has gone along with weight of authority on this question, it would seem that they have qualified the general rule somewhat. In a case where the defendant was convicted of murder in the first degree, the defendant offered in his behalf the allegation that he acted in self-defense and also that the homicide was the result of accident. The state objected on the ground that these defenses were inconsistent. The conviction was affirmed in the higher court, and on the question of these inconsistent defenses, the court held that the defendant clearly had the right to rely on inconsistent defenses. This, however, was qualified by the statement, "but it is significant that only one (of the defenses) could rest on truth." *People* v. *Gaiman,* 176 N.Y. 84, 68 N.E. 112 (1903).

Apparently, Louisiana is the only jurisdiction which does not adhere to the general rule that a defendant may rely, in a criminal prosecution, upon inconsistent defenses. This is evidenced by a case in which the defendant was charged and convicted of having been an accessory before the fact to a murder. At the trial the defendant denied that he had any connection whatever with the crime, but he also attempted to show that on the day of the murder he told one of the murderers that he did not wish the deceased harmed. In other words he offered as defenses a denial of the procurement, and also that he had repented and countermanded the procurement. The conviction was reversed for other reasons, but on the question of admissibility of inconsistent defenses the court held, "a defendant cannot be allowed to occupy the inconsistent position, as the defendant in this case attempts to do, of denying the procurement and at the same time contending that he repented and countermanded it." *State* v. *Kinchen,* 126 La. 39, 52 So. 185 (1910).

ROBERT T. MCGRAW.

Federal Procedure—Ability to Bring an Original Suit or Counter-Claim for Tort against the United States.—The United States brought suit against defendants for property damages alleged to have been caused by a collision between a government mail truck and a truck owned by defendants. Defendants filed a counter-claim for damages to their truck, and the United States filed a motion to dismiss the counter-claim on the grounds that the court lacked jurisdiction to entertain a claim of this nature against the United States, a sovereign nation. This motion was denied, but on reargument it was granted, the court *holding* that a suit against the United States on a tort claim cannot be maintained whether it be in the form of an original suit or a counter-claim, unless there is specific Congressional authority. *United States* v. *Dugan Bros.,* 36 F. Supp. 109 (E.D. N.Y. 1941).

The reason for immunity of the United States from suit is well stated by Justice Fields as follows: "It is a familiar doctrine of the common law, that a sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen and, consequently, controlled in the use and disposition of the means required for the proper administration of the Government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme

authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some Act of Congress." *The Siren* v. *United States,* 7 Wall. 152, 19 L.ed. 129 (1868); *United States* v. *Clarke,* 8 Pet. 436, 8 L.ed. 436 (1834).

Recognizing the need for congressional authority to sue, Congress passed the "Tucker Act" *U.S.C.A. Tit.* 28, *Sec.* 250, and also the "Claim for Credit Act" *U.S.C.A. Tit.* 28 *Sec.* 774. The "Tucker Act" allows suits to be brought against the United States 1) on claims founded upon the constitution of the United States or any law of Congress, 2) on any regulation of an executive department 3) upon any contract express or implied, with the government of the United States, and 4) for damages, liquidated or unliquidated, in cases not sounding in tort. A careful examination of the "Tucker Act" makes it clear that tort actions are expressly forbidden against the United States. The "Claim for Credit Act" states as follows the conditions upon which claims for credit will be allowed in suits brought by the United States: 1) claims must be presented to the accounting officer of the treasury and 2) must be disallowed in whole or in part, unless it is proved that the vouchers were not in the defendant's power to procure and that defendant was prevented from presenting them because of absence from the United States by some unavoidable accident.

Because the courts, for jurisdictional purposes, treat a counter-claim, set-off, or cross-claim the same as an original suit, there must be consent of Congress for a claim against the United States whether it is asserted in an original suit against the United States, or whether it is asserted as a counter-claim or in some other manner in a suit brought by the United States. *United States* v. *Shaw,* 309 U.S. 495, 60 Sup. Ct. 659, 84 L.ed. 88 (1939).

In granting this consent Congress has an absolute discretion to specify the cases and contingencies in which the liabilities of the government may be submitted to the courts for judicial determination. The courts may not go beyond the letter of such consent no matter how beneficial they may deem, or in fact might be, the exercising of a larger jurisdiction over the liabilities of the government. *Schillinger* v. *United States,* 155 U.S. 163, 15 Sup. Ct. 85, 39 L.ed. 108 (1894).

The court, in the above case, dealing directly with an action in tort, quoted with approval from *Gibbons* v. *U. S.,* 8 Wall. 269, 19 L.ed. 453 (1869), as follows: "The language of the statutes which confer jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the government founded on tort. The general principal which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties." *Schillinger* v. *United States, supra.*

It is important to note that in the revision of the "Tucker Act" *U.S.C.A. Tit.* 28, *Sec.* 250, in 1887, Congress did not deem it necessary to allow claim against the United States sounding in tort. If Congress had intended to furnish a remedy for such cases there is no evidence of it. Congress has reserved the matter for its own determination. *Bigby* v. *United States,* 188 U.S. 400, 23 Sup. Ct. 468, 47 L.ed. 519 (1902).

Generally in any suit by the United States a defendant can set off an amount equal to the government claim, if there is Congressional authority for the court to take jurisdiction of defendant's claim. *United States* v. *Shaw, supra.* The only limitations are that the claim must arise out of the particular transaction for

which the defendant is being sued or out of a distinct and independent transaction which would of itself constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States. *United States* v. *Wilkins,* 6 Wheat. 135, 5 L.ed. 225 (1821); *United States* v. *Fillebroun,* 7 Pet. 28, 8 L.ed. 596 (1833).

The courts have expressly denied an affirmative judgment against the United States upon a counter-claim, set-off, or cross-claim even though the counter-claim was of such a nature that it would have properly formed the basis of an original action against the United States. *United States* v. *Shaw, supra.* The courts hold that when a proper claim for credit (one allowed by the Tucker Act) is set up by the defendant in conformity with the *U.S.C.A. Tit. 28, Sec. 774,* there is no jurisdiction conferred upon the court to determine that the United States is indebted to the defendant for any balance, or to render judgment in the defendant's favor for the excess of the set-off over defendant's indebtedness as proved during the trial. *United States* v. *Eckford,* 6 Wall. 484, 18 L.ed. 920 (1867); *United States* v. *Shaw, supra; Schaumburg* v. *United States,* 103 U.S. 667, 26 L.ed. 599 (1880). But actually, the doctrine of immunity should apply only where there is no congressional authority for the claim. Therefore the question arises as to why the courts will not allow a judgment in excess of the government claim when the claim is one which is allowed to be brought against the United States by the "Tucker Act" *U.S.C.A. Tit. 28, Sec. 250.*

It is the writer's opinion that an affirmative judgment over the amount for which the government sues should be allowed on a counter-claim if it is a cause of action upon which an original suit could have been brought against the United States under the "Tucker Act," *supra.* By thus allowing an affirmative judgment over the amount for which the government sues, multiplicity of suits would be prevented; also it would be an adherence to the principle set down as the reason for immunity from suit in *The Siren* v. *United States, supra.* It is difficult to understand why the courts refuse to allow an affirmative judgment in such cases.

As a general rule it can be said that a counter-claim for damages arising from tort will not be allowed against the United States. *United States* v. *Various Ariticles of Personal Property seized at Premises of Charles T. Noble,* 11 F. Supp. 193 (W.D. N.Y. 1935). The language of the "Claims for Credit Statute," *supra,* which confers jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the government founded on tort. *Gibbons* v. *United States,* 8 Wall. 269, 19 L.ed. 453 (1869). Some evidence of contractual liability must be at the foundation of every action. *Schillinger* v. *United States, supra.* It seems that the settled distinction between contract and tort cannot be evaded by framing the tort claim as upon an implied contract. *Bigby* v. *United States, supra; Langford* v. *United States,* 101 U.S. 341, 25 L.ed. 1010 (1879).

Actions ex delicto are to be distinguished from those in which private property was taken or used by the officers of the government with the consent of the owner or under circumstances showing that the title or right of the owner was recognized or admitted. The law in these cases implies a meeting of the minds of the parties, and an implied agreement to pay for that which is used. In these cases there is no dispute existing as to the title to the property used. The important fact in each case is that the officers who appropriated and used the property of others were authorized to do so, and hence the existence of the implied contract that the government would pay for the use. *United*

States v. *Russell*, 13 Wall. 623, 20 L.ed. 474 (1871); *United States* v. *Great Falls Manufacturing Co.*, 112 U.S. 645, 5 Sup. Ct. 624, 28 L.ed. 846 (1884); *United States* v. *Palmer*, 128 U.S. 262, 9 Sup. Ct. 104, 32 L.ed. 442 (1888); *Bigby* v. *United States, supra.*

HENRY G. PETERSEN, JR.

Pleading— Limitation on Right to Amend Defective Pleading.—In an action against four defendants, three of them demurred to a third amended complaint on ground that as to them the complaint stated no cause of action. In sustaining the demurrers part of the trial court's order was as follows: "It appearing from said third amended complaint and the three complaints previously served and filed herein, the decision of the Supreme Court of Wisconsin with respect to the last of said previous complaints and the entire record herein that the facts reiterated in all said complaints without change and obviously undisputed negative the existence in plaintiff of any actual and just cause of action against said demurring defendants and that the following order should be made herein in the interests of justice.

"It Is Further Ordered that leave to further amend be withheld unless and until the plaintiff makes due application for such leave accompanied by the tender of pleading sufficient to withstand demurrer and a showing sufficient in law to satisfy the court that plaintiff is justly entitled to such leave to amend." From a judgment on the merits, upon motion of defendants, and a dismissal of the complaint, plaintiff appealed.

Held; judgment of trial court affirmed. Since pleading over is a matter within the sound discretion of the trial court, plaintiff is not entitled to amend his complaint indefinitely. The plaintiff having failed to apply to the trial court for leave to amend in accordance with the order, he elected thereby to stand or fall upon the third amended complaint. Since an earlier complaint had been passed on by this court he knew in what respects it had been held defective, he knew whether there were facts which if alleged and set out in the complaint would cure the defect. Because of this and the three unsuccessful attempts to state a cause of action it was not an abuse of discretion to withhold leave to amend the complaint a fourth time except on proper showing. *Angers* v. *Sabatinelli et al.*, 1 N.W. (2d) 765 (Wis. 1942).

The number of times a party to a civil action may amend his pleading or plead over is, at common law and under the majority of state codes, a matter largely within the discretion of the trial court, and an order granting or denying leave to amend will not be overruled unless there is a manifest abuse of discretion. Typically, in agreement with the principal case, where a plaintiff had three opportunities in a California court to make a good complaint and failed, the appellate court said, "Three failures to make a good complaint fairly indicate that a fourth attempt would also be unavailing. The proposed amendment, or proposed amended pleading, was not tendered to the court for inspection, and we see nothing erroneous in the action of the trial court in refusing to allow further amendments. The failure to make good pleading probably arises in lack of facts, rather than in the fault of the pleader." *Dukes* v. *Kellog*, 127 Cal. 563, 60 Pac. 44 (1900).

Similarly, it was held not an abuse of discretion to deny a third amendment to a complaint held insufficient on a general demurrer, because "we must assume that the questions presented were fully discussed and argued before the court below and the plaintiff thus made thoroughly familiar with the particular