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Statutes - Torts - Applicability of Anti-Assignment Act to Suits under F.T.C.A.

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Whether the use of such a device in North Dakota, in situations of the *Hermes v. Markham* type, would be successful, is a question furnishing ground for interesting speculation.

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STATUTES — TORTS — APPLICABILITY OF ANTI-ASSIGNMENT ACT TO SUITS UNDER F. T.C.A. — Plaintiffs brought an action under the Federal Tort Claims Act [1] for damages to realty bought by the plaintiffs after the damages had occurred. The assignor had leased part of the tract to the United States Government and the unleased portion had been damaged by the government's agents. Plaintiffs took title as a result of a tripartite contract to which the government was a party and which reserved to the plaintiffs the claim against the government. Plaintiffs joined the assignor as party defendant. The government contended that the assignment was void under the Anti-Assignment Act.[2] The district court allowed recovery which the circuit court affirmed [3] on the ground that the assignment was a "mutual mistake of law" and equity would grant relief from the hardship that would otherwise ensue. The Supreme Court granted certiorari and *held* that the Anti-Assignment Act made the voluntary assignment void. The court rejected the equity theory and found that the claim did not fall within any of the exceptions contemplated by the statute. The dissent felt that the Anti-Assignment Act should not be a bar since all the parties were before the court and payment of a just claim would be binding upon all parties so as to foreclose the possibility that any of the purposes of the Anti-Assignment Act would be violated. *United States v. Shannon*, 72 Sup. Ct. 281 (U.S. 1952).

During the ninety-nine year history of the Anti-Assignment Act,[4] the courts have recognized involuntary assignments as exceptions to the broad sweep of the statute (aside from voluntary assignments made in accordance with the provisions of the statute [5] or waiver of the statute by the United States by payment to the assignee [6]). Assignments by operation of law include assignment in bankruptcy,[7] by will or by death,[8] and by subrogation.[9] The early cases held that the statute applied to equitable and legal claims alike,[10] and also that the assignment was void and unenforceable as be-

1. 60 Stat. 842, 28 U.S.C. (1946) §§921-946, as amended, 28 U.S.C. (1946 Supp. III) §§1291, 1346(b), 1402(b), 1504, 2110, 2401(b), 2402, 2411, 2412, 2671-2680.
2. 54 Stat. 1029 (1940), 31 U.S.C. §203 (1946).
3. 186 F.2d 430 (4th Cir. 1951).
4. 10 Stat. 170 (1853) R.S. §3477 (1875), as amended, 54 Stat. 1029 (1940) 31 U.S.C. §203 (1946). The Act provides that "All transfers and assignments made of any claim upon the United States . . . shall be absolutely null and void, unless . . . made . . . after the allowance of such a claim and ascertainment of the amount due and the issuing of a warrant in payment thereof."
5. See note 4 *supra*.
6. Freedman's Savings Co. v. Shepherd, 127 U.S. 494 (1888); Bailey v. United States, 109 U.S. 432 (1883); Goodman v. Niblack, 102 U.S. 556 (1880); McKnight v. United States, 98 U.S. 179 (1878); Thayer v. Presser, 175 Mass. 225, 56 N.E. 5 (1900).
7. National Bank of Commerce v. Downie, 218 U.S. 345 (1910); Erwin v. United States, 97 U.S. 392 (1878).
8. *See* note 7 *supra*.
9. United States v. Aetna Surety Co., 338 U.S. 366 (1949).
10. Spofford v. Kirk, 97 U.S. 484 (1878); United States v. Gillis, 95 U.S. 407 (1877).

tween the parties.[11] The modern trend is to the effect that the statute is purely and simply for the protection of the Government and therefore the assignment will be enforceable as between the parties to it.[12] The courts have enforced the Anti-Assignment statute with equal vigor to cases involving contract claims and those involving tort claims since the Anti-Assignment Act uses the unequivocal words "All transfers and assignments made of *any claim* upon the United States." [13]

In the instant case, the Supreme Court has enumerated the basic principles which underlie the Anti-Assignment Act but it is difficult to see how those principles apply to the facts in this case. The first purpose was to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon the officers of the government.[14] Here the claims were included as an incident or the purchase of the land.[15] The second purpose was to prevent the possible multiple payment of claims and to make unnecessary investigation of alleged assignments.[16] The danger of this is obviated where all possible parties are before the court in a single suit [17] wherein all rights between them can be finally adjudicated.[18] The third purpose was to enable the government to deal only with the original claimant. In this case any damages proved could be paid to the vendor and impressed with a resulting trust or subjected to an equitable lien in favor of the assignee [19] since the assignment, though not valid against the United States [20] is valid between the parties.[21] The last purpose, of recent origin, was to save to the United States any defenses which it has against an assignor by way of set-off, counterclaim, etc., which might not be applicable to an assignee.[22] The Government made no allegations of counterclaim or set-off in the instant case.

The Federal Tort Claims Act [23] declared the Government's liability for the negligent acts of its employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with

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11. National Bank of Commerce v. Downie, 218 U.S. 345 (1910); Spofford v. Kirk, 97 U.S. 484 (1878); Porter v. Title Guaranty and Surety Co., 21 Ida. 312, 121 Pac. 548 (1912).

12. McKenzie v. Irving Trust Co., 323 U.S. 365 (1944); Martin v. National Surety Co., 300 U.S. 588 (1936) (equitable lien was imposed on money collected from the government by second assignee who took with notice of prior assignment); Bank of California v. Commissioner of Internal Revenue, 133 F.2d 428 (9th Cir. 1943) (estate tax case); *In re* Webber Motor Co., 52 F. Supp. 742 (D. N.J. 1943); People of State of New York v. Hanley Milling Co., 41 F. Supp. 844 (N.D. Ohio 1940); *aff'd*, 123 F.2d 819 (6th Cir. 1940) (equitable assignment); York v. Conde, 147 N.Y. 486, 42 N.E. 193 (1895), *dismissed*, 168 U.S. 642 (1897).

13. 54 Stat. 1029 (1940), 331 U.S.C. §203 (1946).

14. Goodman v. Niblack, 102 U.S. 556 (1880).

15. Admittedly, the land *could* be bought as an incident to the assignment.

16. See note 14 *supra*.

17. 1 Ala. L. Rev. 308 (1948). Fed. R. Civ. P. 15, 18-21.

18. This is, in effect, the doctrine of res judicata. See Cumberland Pipe Line Co. v. Spears, 208 Ky. 492, 271 S.W. 581 (1925); Good Health Dairy Products Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 756 (1937); Silber v. First Catholic Slovak Union, 23 Ohio App. 198, 154 N.E. 350 (1926).

19. Martin v. National Surety Co. 300 U.S. 588 (1936).

20. McKenzie v. Irving Trust Co., 323 U.S. 365 (1944); Martin v. National Surety Co., 300 U.S. 588 (1936); *In re* Webber Motor Co., 52 F. Supp. 742 (D. N.J. 1943).

21. See note 11 *supra*.

22. United States v. Aetna Surety Co., 338 U.S. 366, 371 (1949).

23. See note 1 *supra*.

the law of the place where the act or omission occurred." [24] The act also provided that the Federal Rules of Civil Procedure should control the practice and procedure of the suit under the Act.[25] These rules require the suit be brought by the real party in interest,[26] and permit necessary [27] and permissive [28] joinder of parties. Under modern statutes, valid tort claims are transferable by assignment if they pass the test of survival [29] and the assignee may sue in his own name as the real party in interest.[30] The fact that the assignor was joined as party defendant raises the constitutional right to a jury trial by the assignee.[31] But the Federal Rules of Civil Procedure are sufficiently elastic to try government issues to the court and private issues to the jury.[32] Yet the possibility that the Federal Tort Claims Act may be an exception to the Anti-Assignment Act by implication was not considered by the Supreme Court in the instant case.

Although the reasons for enforcing the Anti-Assignment Act are absent from the instant case, the majority felt that recognizing the assignment as valid when all parties are before the court would in effect, repeal the statute by mere judicial construction in plain disregard of the unequivocal language of the act.

JOHN G. MUTCHLER.

TRUSTS — BREACH OF CONTRACT OF AGENCY OR EMPLOYMENT — IMPOSITION OF CONSTRUCTIVE TRUSTS WHERE STATUTES MAKE ORAL CONTRACTS OF AGENCY VOID. — The plaintiff orally employed defendant, a real estate agent, to purchase certain land for him, but advanced no money. Defendant purchased the property but took title to the land in his own name. Plaintiff sued to impose a constructive trust on the property, contending that defendant had taken title to the property in fraudulent breach of their purchase agreement. Defendant's motion to dismiss was granted on the basis of a specific statute covering oral contracts with real estate brokers to purchase property and making such contracts void unless in writing.[1] Upon appeal, it was *held*, that the agreement created a relationship of trust and confidence between the parties to which the statute did not apply and that

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24. 28 U.S.C. §1346 (b).
25. 60 Stat. 844 (1946).
26. Fed. R. Civ. P. 17 (a).
27. Fed. R. Civ. P. 19 (a).
28. Fed. R. Civ. P. 20 (a).
29. Clark, Code Pleading p. 164 (2d ed. 1947).
30. Clark, *op. cit. supra* at 165.
31. See 59 Yale L.J. 1515 (1950).
32. See note 30 *supra*.

1. N.M. Ann. Stat. §75-143 (Supp. 1951): "§1. Any agreement entered into subsequent to the first day of July, 1949, authorizing or employing an agent or broker to purchase or sell lands, tenements, or hereditaments or any interest in or concerning them, for a commission or other compensation, shall be void unless the agreement, or some memorandum thereof shall be in writing and signed by the person to be charged therewith, or some other person thereunto by him lawfully authorized. No such agreement or employment shall be considered exclusive unless specifically so stated therein." Also see N.D. Rev. Code §9-0604 (1943): "The following contracts are invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by his agent . . . 4. An agreement . . . for the sale of real property, or of an interest therein . . ."