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UNITED STATES - GOVERNMENT CORPORATIONS - HOME OWNERS' LOAN CORPORATION NOT SUABLE IN TORT

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UNITED STATES — GOVERNMENT CORPORATIONS — HOME OWNERS' LOAN CORPORATION NOT SUABLE IN TORT — An action was brought in tort for damages sustained in a fall on ice on the sidewalk in front of premises which were in the possession and control of the Home Owners' Loan corporation. The defendant corporation was created under the Home Owners' Loan Act passed by Congress in 1933 which provides that it "shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State."[1] The corporation moved to dismiss the action, claiming that as an instrumentality of the United States it could not be sued without the consent of Congress and that consent had not been given to an action sounding in tort. *Held*, that the Home Owners' Loan Corporation was not subject to a tort action and that the suit should be dismissed. *Prato v. Home Owners' Loan Corporation*, (D. C. Mass. 1938) 24 F. Supp. 844.

In so far as the opinion of the court in this case states that Congress, by failing expressly to subject the Home Owners' Loan Corporation to actions in tort, has indicated an intent that it should not be amenable to such suits,[2] it would seem to be overruled by the recent decision of the Supreme Court of the United States in *Keifer & Keifer v. Reconstruction Finance Corporation*.[3] In that case it

[1] 48 Stat. L. 129, § 4 (a), 12 U. S. C. (1934), § 1463 (a).

[2] Federal Land Bank v. Priddy, 295 U. S. 229 at 231, 55 S. Ct. 705 (1935): "Whether Federal agencies are subjected to suit . . . is thus a question of the congressional intent."

[3] (U. S. 1939) 59 S. Ct. 516, noted 37 MICH. L. REV. 1166 (1939).

was declared that a Regional Credit Corporation is subject to suit in tort, though the statute authorizing it failed to give it the power to "sue and be sued." The Court declared that its legal position is the same as if this clause had been expressed, and since Congress did not restrict its consent to suits sounding in contract only, it intended to include tort actions. In the principal case the court takes another approach and declares that the HOLC is performing a governmental function and as such was not intended to be amenable to actions in tort. This approach is similar to that taken by courts with regard to municipal corporations. A municipal corporation is held liable for torts committed in the exercise of a proprietary function, but is not held liable when engaged in a governmental function.[4] This would appear to be an acceptable approach to the problem. The court feels that the corporation's duties are governmental and that subjecting it to tort action would be an undue interference with its activities. This conclusion, however, differs from that reached by a majority of the courts which have considered similar questions.[5] For example, a federal district court in *Pennell v. HOLC*[6] reached the conclusion that subjecting the HOLC to actions in tort would constitute no great interference with its activities and no

[4] Harris v. District of Columbia, 256 U. S. 650, 41 S. Ct. 610 (1921); Bilderback v. City of Klamath Falls, (D. C. Ore. 1924) 6 F. (2d) 642; City of Winona v. Botzet, 94 C. C. A. (8th) 563, 169 F. 321 (1909); Naumburg v. City of Milwaukee, 77 C. C. A. (7th) 67, 146 F. 641 (1906); Martin v. Asbury Park, 111 N. J. L. 364, 168 A. 612 (1933); DILLON, MUNICIPAL CORPORATIONS, 5th ed., §§ 1626, 1631, 1665 (1911).

[5] Pennell v. H. O. L. C., (D. C. Me. 1937) 21 F. Supp. 497; Herman v. H. O. L C., 120 N. J. L. 437, 200 A. 742 (1938), noted in 4 UNIV. NEWARK L. REV. 103 (1938). These cases involve almost exactly the same situation as the principal case, but arrive at conclusions diametrically opposed to it. They declare that the HOLC, while an agency of the government, is engaged in a commercial activity, and is suable in tort. See also Gill v. Reese, 53 Ohio App. 134, 4 N. E. (2d) 273 (1936); H. & P. Paint Supply Co. Inc. v. Ortloff, 159 Misc. 886, 289 N. Y. S. 367 (1936); Central Market Inc. v. King (HOLC Garnishees), 132 Neb. 380, 272 N. W. 244 (1937), cert. den. Home Owners' Loan Corp. v. Central Market, 302 U. S. 687, 58 S. Ct. 17 (1937), which on much the same reasoning held that the HOLC was subject to service of garnishment. Contra, Home Owners' Loan Corp. v. Hardie & Caudle, 171 Tenn. 43, 100 S. W. (2d) 238, 108 A. L. R. 702 at 705 (1937).

[6] Pennell v. H. O. L. C., (D. C. Me. 1937) 21 F. Supp. 497 at 499. In the case of Graves v. People of the State of New York ex rel. O'Keefe, (U. S. 1939) 59 S. Ct. 595 at 597, commented on 37 MICH. L. REV. 1079 (1939), Justice Stone declares with regard to the HOLC: "And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments." This would seem to indicate that a government corporation could not engage in other than a governmental function. However, in attempting to discover whether Congress intended that one of its corporations should be liable in a tort action, the fact that it is exercising powers usually exercised by private corporations is important. In regard to this statement, the words of the same Justice in Federal Land Bank v. Priddy, 295 U. S. 229 at 235, 55 S. Ct. 705 (1935), should be noticed. "Immunity of corporate government agencies from suit and judicial process, and their incidents, is less readily implied than immunity from taxation."

government function would be hampered, since the corporation is engaged in a commercial undertaking. When the government by means of a corporate agency engages in a commercial activity, that agency does not share the governmental immunity from suit.[7] As yet there has been no United States Supreme Court decision upon the question of the liability of the HOLC to suit in tort actions. However, it is submitted that in view of the cases holding that the corporation is not performing governmental duties [8] and the increasing tendency to hold governmental corporate agencies amenable to suits in tort as indicated by the *Keifer* case, a decision contrary to the one announced by the court in the principal case is to be anticipated.

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[7] Bank of United States v. Planters' Bank of Georgia, 9 Wheat. (22 U. S.) 904 (1824); United States v. Lee, 106 U. S. 196, 1 S. Ct. 240 (1882); The Lake Monroe, 250 U. S. 246, 39 S. Ct. 460 (1919); Sloan Shipyards Corp. v. United States Shipping Board Emercency Fleet Corp., 258 U. S. 549, 42 S. Ct. 386 (1922); Olson v. United States Spruce Products Corp., 267 U. S. 462, 45 S. Ct. 357 (1925); United States Shipping Board Emergency Fleet Corp. v. Greenwald, (C. C. A. 2d, 1927) 16 F. (2d) 948; Howarth v. United States Shipping Board Emergency Fleet Corp., (C. C. A. 2d, 1928) 24 F. (2d) 374; United States Shipping Board Emergency Fleet Corp. v. Harwood, 281 U. S. 519, 50 S. Ct. 372 (1930); Lindgren v. United States Shipping Board Emergency Fleet Corp., (C. C. A. 4th, 1932) 55 F. (2d) 117.

[8] See cases cited note 4, supra.