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SUING UNCLE SAM IN TORT
*A Review of the Federal Tort Claims Act and Reported Decisions to Date.*

HERBERT R. BAER**.

Although the founding of the United States was the result of a firm conviction on the part of the fathers of this country that the King, not only could, but had done wrong, the concept of sovereign immunity was adopted as a part of our philosophy of government. The individual who was the victim of a tort or a breach of contract on the part of the United States was without a remedy as a matter of right. Such an aggrieved person, prior to 1855, had only one hope of recompense. He might, if he were fortunate and knew the right people, succeed in having a private bill introduced in Congress which bill if enacted would provide for payment to him of such amount as Congress saw fit to award under the circumstances. All compensation was a matter of grace coupled with political good fortune.

As was to be expected, the preparation, introduction and passage of private bills placed an undue burden on Congress which should more appropriately concern itself with public affairs. The first step taken to alleviate this situation was the establishment of the Court of Claims in 1855. As originally created, it was not really a court but merely an advisory body which heard claims of a limited sort and then prepared such bill awarding compensation as appeared to it just. The bill would then be turned over to Congress which body might, or might not, enact the same into law. The said Court was required to hear claims founded on any law of Congress or regulation of an executive department, or

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* December 1, 1947.
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1 United States v. Clarke, 8 Pet. 436 (U. S. 1834); The Siren, 7 Wall. 152 (U. S. 1868); Eastern Transport Co. v. United States, 272 U. S. 675, 472 (1927).

2 In this connection the discussion in the House of Representatives on a Federal Torts Claim Act in 1940 which failed to become law is of interest. Speaking in support of the then bill, H. R. 7236, Mr. Celler said, "The average number of private claims brought into the House during the last two Congresses has been about 2,300 per Congress and involve over $100,000,000 each Congress. In the Seventieth Congress, for example, in the House of Representatives 1,364 claim bills were presented; in the Senate, 904; all involving $106,685,748.67. Three hundred and thirty-six of these bills were enacted, 230 House bills and 106 Senate bills." Mr. Luce also speaking in support of the then bill said, "If we make no further progress, then, sir, we accept continuance of a burden that is serious, we accept a procedure that is outrageous, we accept a result that does no credit either to Congress or to the Nation." 86 Cong. Rec. 12018 (1940). On July 25, 1946, during the discussion of the present Federal Tort Claims Act, Mr. Celler announced that "Over 2,000 claim bills were filed in this very session of Congress." 92 Cong. Rec. 10067 (1946).

3 10 Stat. 612 (1855).
upon any contract, express or implied, with the government of the United States. It had no jurisdiction over tort claims.

In 1863 the power of the Court of Claims was enlarged to the extent that instead of preparing bills for Congress it could now render a final judgment. This judgment, however, was subject to an estimate by the Secretary of the Treasury of the amount required to pay each claimant. The Supreme Court held that the estimate provision was inconsistent with the finality essential to judicial decisions and thereupon Congress repealed that provision in 1866. Thus by 1866 the United States had discarded the shield of sovereign immunity in a limited field. The Supreme Court cautiously approached the doctrine of non-immunity and zealously protected such sovereign immunity which still remained. And there remained much, for the entire field of tort claims was still untouched. The language of Mr. Justice Miller written in 1868 is illustrative of the attitude of the then Supreme Court. Speaking of the Court of Claims, he said:

"The creation by Act of Congress of a court in which the United States may be sued, presents a novel feature in our jurisprudence, though the act limits such suits to claims founded on contracts, express or implied, with certain unimportant exceptions. But in the exercise of this unaccustomed jurisdiction, the courts are embarrassed by the necessary absence of precedent and settled principles by which the liability of the government may be determined. The language of the statutes excludes by the strongest implication demands against the government founded on torts. The general principle 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."

The policy which Mr. Justice Miller found was "imposed by necessity" and which prevented an action in tort against a sovereign state was made the subject of minor exceptions by various Acts of Congress from time to time. But it was not until August 2, 1946 that the policy

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5 12 Stat. 820 (1863).
6 Gordon v. United States, 2 Wall. 561 (U. S. 1864). See the appendix in 117 U. S. 697 for the full report of this case.
7 14 Stat. 9 (1866). This statute not only eliminated the objectionable estimate provision but also expressly authorized appeals to the Supreme Court.
8 Gibbons v. United States, 8 Wall. 269, 274 (U. S. 1868), italics added.
9 12 Stat. 820 (1863) authorized owners of property seized by Union troops to sue in the Court of Claims under certain conditions; 26 Stat. 851 (1891) Court of Claims given power to entertain suits in behalf of those property owners whose property had been destroyed by Indians in amity with the United States; 36 Stat. 851 (1910) patent infringement suits against the government; 41 Stat. 525 (1920) admiralty suits against the United States extended to include public vessels by 43 Stat. 1112 (1925); 49 Stat. 1028, 1049 (1935) suits for damages to oyster beds as the result of Harbor Improvements. In the creation of so-called "government
of governmental non-liability for tort was really doomed when on that
date Congress enacted the Federal Tort Claims Act. This statute,
more than any other since the establishment of the Court of Claims in
1855, has torn away the cloak of sovereign immunity from the United
States. Today, not only may the government be sued in Contract but
it may also be sued in Tort.

Inasmuch as a large percentage of every trial attorney's work is made
up of negligence cases it reasonably follows that the average trial attorney
is very apt, sooner or later, to be confronted with a negligence case
against the United States government. The use by the government of
automobiles in the transportation of mail and in other governmental
activities is alone bound to result in a substantial number of accidents
from which litigation will spring. It is the purpose of this article to
both review the provisions of the Federal Tort Claims Act and to give
a blanket coverage of all cases reported to date construing the Act.

Two Methods of Handling Tort Claims

The Federal Tort Claims Act provides for two methods of handling
an individual's tort claim against the government, (1) by administra-
tive adjustment where the claim is $1,000 or less, and (2) by suit irre-
spective of the amount of the claim. We will first consider the
administrative adjustment provisions found in Section 403(a) of the Act.

Administrative Adjustment of Tort Claims

Section 403(a) confers authority on the head of each Federal
Agency, or his designee for the purpose, subject to certain limitations
set forth in subsequent sections, to settle any money claim against the
United States accruing on and after January 1, 1945 for property dam-
corations" as the Federal Home Loan Bank 47 Stat. 725 (1932); Home
Owners' Loan Corporation 48 Stat. 128 (1933); Tennessee Valley Authority 48
Stat. 58 (1933) and others Congress has subjected said corporations to suit and
removed the immunity inherent in the government itself. See for a discussion of
this Congressional action and an enumeration of the government corporations that
were declared subject to suit Keifer v. Keifer, 306 U. S. 381, 390; note, 59 Sup.
Ct. 516 (1938).


(1927), the District Courts were given concurrent jurisdiction with the Court of
Claims in all contract actions against the United States where the demand did not
exceed $10,000. If the claimant sought to recover more than $10,000 his proper
remedy was in the Court of Claims.

Not all types of torts are made the subject of suit by the Federal Tort
Claims Act. Section 421 of the Act which is stated in full later in the body of
this article enumerates certain torts which are expressly excluded from the coverage
of the statute. See p. 135 infra.

The manuscript of this article was completed December 1, 1947.

No attempt is made herein to review the legislative history of the Act. This
has been the subject of treatment elsewhere. See Comment, The Federal Tort
Claims Act, 56 Yale L. J. 534 (1947) and Gottlieb, The Federal Tort Claims Act—
A Statutory Interpretation, 35 Geo. L. J. 1 (1946).

age, personal injury or death, where the total claim does not exceed $1,000 and the damage or injury was caused by the negligent or wrongful act or omission of any employee\textsuperscript{14} of the United States government while acting within the scope of his office or employment, under circumstances where the United States if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Aside from the specific limitations contained in other sections of the Act, the scope of the administrative adjustment section will depend on the construction to be placed on certain of the words and phrases used in that section. The authority to adjust is conferred on the head of each "Federal Agency." The term "Federal Agency"\textsuperscript{15} is one that calls for definition and Congress undertook to specifically define that term in Section 402(a) of the Act as follows:

"'Federal Agency' includes the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: Provided, That this shall not be construed to include any contractor with the United States."

The above definition, itself, contains terms which may well lead to controversy. Thus the phrase "corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States" will lead to the inquiries, (1) what was the primary function of the corporation in question, and (2) if its primary function was to act as an instrumentality or agency of the United States was it so acting at the time of the wrong alleged? It is important to note the use of the conjunctive "and." The corporation in question must not only have as its primary function acting as an instrumentality or agency of the United States but it must also be acting as such instrumentality or agency when the tort is committed. Consequently, before the practitioner invokes the Federal Tort Claims Act when a colloquially called "government corporation" is involved he must fully satisfy himself as to the two aforementioned requirements.

Another phrase found in the administrative adjustment section,

\textsuperscript{14}Section 402(b) of the Federal Tort Claims Act defines employee as follows: "Employee of the Government" includes officers or employees of any Federal Agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal Agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."

\textsuperscript{15}The Library of Congress was held to be a Federal Agency within the meaning of the Federal Tort Claims Act in Decision No. B-55754 rendered by the Comptroller General on May 22, 1947. See note on this decision in 33 A. B. A. J. 937 (1947).
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403(a), is "caused by the negligent or wrongful act or omission of any employee." With the word "negligent" there should be no difficulty of interpretation, but the words "wrongful act or omission" do present a problem of interpretation not answered by any definition in the Act. What is meant by the word "wrongful"? Does the word cover situations where as between individuals liability is imposed without fault? Take the familiar doctrine of Rylands v. Fletcher under which the owner of a reservoir was held liable to neighboring property owners damaged by escaping waters even though the escape and ultimate damage were without any negligent or intentional act or omission of the owner. Or consider the blasting-cases where in certain jurisdictions a person blasting is held absolutely liable for damage done even though he has not been guilty of negligence. Let us suppose that the United States should have in its possession wild animals, *ferae naturae*, and that without fault of the government one of those animals escapes and injures an individual. In all of these cases many jurisdictions would impose liability on the private person as owner regardless of fault. Is the United States in such cases to be held liable as would a private individual or is the injury complained of not the result of a "wrongful act or omission" within the meaning of the Federal Tort Claims Act?

In that connection we may look forward to litigation in which it is sought to hold the United States liable for injuries to persons and damages to property by reason of the operation of its aeroplanes. Several states have enacted the Uniform Aeronautics Act which imposes absolute liability upon the owner of aircraft for damages occasioned by the flight or descent of aircraft or the dropping of articles therefrom irrespective of whether or not the owner has been negligent. Does the fact that the state statute or state decisional law gives the injured party a legal cause of action against a private person engaged in such activities mean

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16 L. R. 3 H. L. 330, 37 L. J. Ex. 161, 19 L. T. 220 (1868). For a discussion of this famous case see *Prosser, Torts*, pp. 449-456 (1941); Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. Pa. L. Rev. 298 (1911). While the case has been accepted as law in England the doctrine of absolute liability without fault enunciated therein has been both accepted and rejected by state courts in this country. Cases will be found collected in *Prosser, Torts*, *supra*.


18 For the law relating to the liability of an owner of a wild or dangerous animal see *Harper, Torts* §171 (1941); *Prosser, Torts* §57 (1941); Buckle v. Homes, 2 K. B. 125, 42 T. L. R. 147 (1926) and the excellent collection of cases giving the conflicting views in 69 A. L. R. 500-517 (1930).


that there has been such a legal wrong as is within the scope of the "wrongful act or omission" language of the Federal Tort Claims Act? If it was the intention of Congress to give the injured person a remedy against the government when he would have a remedy against a private person it may well be argued that recovery should be allowed under the Act especially since such cases are not specifically mentioned in Section 421 which excepts certain torts and will be discussed later herein. 21 If this class of cases is not covered by the Federal Tort Claims Act the remedy by private bill still remains. 22

The negligent or wrongful act or omission of the employee of the government must have occurred while the employee was "acting within the scope of his office or employment." This phrase is of course subject to interpretation according to the ordinary principles of agency law. However, Section 402(c) specifically defines the phrase in so far as it is applicable to military or naval forces as follows:

"'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in line of duty."

The phrase "in line of duty" 23 in the military sense is subject to broader interpretation than "scope of employment" as generally construed and was apparently inserted for the purpose of including acts which while "in line of duty" in the military sense may not be said to have been within the common law interpretation of "scope of employment." 22a

Finality of Award or Settlement.

By Section 403(b) all awards or determinations made under the Administrative Adjustment provision are made final and conclusive on all officers of the Government unless obtained by fraud. Similarly Sec-

21 See infra p. 135.
22 Section 131 of the Legislative Reorganization Act of 1946, 60 Stat. 812 at 831 expressly forbids the introduction of private bills in cases covered by the Federal Tort Claims Act. Cases not within the scope of the Act are still the proper subject of a private bill.
23 For an excellent paper which discusses in detail the difficulties involved in construing the phrase "in line of duty" see the opinion of Attorney General A. Mitchell Palmer, 32 Ops. Atty. Gen. 12 (1919). A more recent treatment of the subject is found in Doke v. United States, 131 P. 2d (Wash.) 436 (1942), affirmed on rehearing, 135 P. 2d 71 (1943).
22a After the manuscript of this article had been placed in the printer's hands the case of Rutherford v. United States 73 F. Supp. 867 (E.D. Tenn. N.D. June 19, 1947) was reported. A naval recruiting officer had given a radio broadcast in the performance of his duties. While driving home from the broadcasting station in his private car he met with an accident as a result of which the plaintiff was injured. Judge Taylor held that at the time of the accident the recruiting officer was not "acting in line of duty" and hence was not "acting within the scope of his office or employment" within the meaning of the Federal Tort Claims Act.
tion 403(c) provides that the acceptance of any settlement, award or compromise by a claimant shall be final and conclusive on him and shall constitute a complete release not only as to the United States but also as to the employee whose act or omission gave rise to the claim. This latter provision is in accord with the well settled common law rule that a release of a principle for a tort committed by his agent operates as a release of the agent as well.\textsuperscript{24}

\textit{Appropriations and Reports.}

All payments of awards are to be made by the head of the Federal Agency in question out of appropriations for that purpose which are expressly authorized by Section 403(c). The head of each Federal Agency is required by Section 404 to make an annual report to Congress of all claims settled in which he shall state the name of the claimant, the amount of the settlement and the nature of the claim.

\textbf{Suits on Tort Claims Against the United States}

It is by Section 410(a) of the Act that the government surrenders its sovereign immunity and authorizes action in tort against it. Exclusive jurisdiction is conferred upon the federal district court where the plaintiff is a resident or where the act of omission occurred, sitting without a jury, to hear and determine and render judgment on any claim against the United States for money only, which accrued on or after January 1, 1945 by reason of property damage, personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States government while acting within the scope of his office or employment under circumstances where the United States if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred. The section authorizes the recovery of costs but provides that attorney's fees shall not be included in costs and that the United States shall not be liable for interest prior to judgment nor for punitive damages.

\textit{Jurisdictional Amount.}

It is to be noted that there is no jurisdictional limit and as the Act now stands the plaintiff may sue for any amount he wishes. His claim need not exceed $3,000 as it must in diversity cases and it may exceed the $10,000 limit set for contract suits under the Tucker Act.\textsuperscript{25}

\textit{Venue.}

The venue provision contained in this section of the statute should be carefully observed. The suit must be \textit{either} in the district where the


\textsuperscript{25} See note 9 \textit{supra}. 
plaintiff resides or where the act or omission complained of occurred. There conceivably will be cases where the act or omission occurred in District A, the injury in District B and the residence of the plaintiff was in District C. Under such a set of facts District C would always be proper for venue purposes whereas there may be a question raised as to whether the district where the injury was sustained was in fact the district where the act or omission took place. Safe practice would indicate the action be laid in District C, the residence of the plaintiff.

No Jury Trial.

Since the trial is to be without a jury it is quite apparent that some difficulty in administration will be caused where the United States is alleged to be a joint tort-feasor with a third party. Whether in such a case there may be joinder of the parties will be discussed later herein.

Judgment as a Bar to Further Action.

Section 410(b) provides that the judgment recovered against the United States shall be a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim. Such a provision is, of course, in accord with the common law rule that a claimant can have but one satisfaction for one wrong. Presumably the claimant will have been made whole by virtue of the judgment he obtained against the government and hence should have no claim against the employee. An interesting situation may be envisaged, however, which eventually will require solution. Let us suppose that the claimant has recovered against the United States for injuries suffered as a result of the negligent operation of an automobile by an employee of the United States. Let us then suppose further that the claimant institutes an action against the employee in which he sets up the same injury, the same accident, but alleges that the employee was driving in a grossly negligent manner and willfully and maliciously ran into the claimant wherefore the claimant seeks to recover both actual and punitive damages. His claim for actual damages will be barred having been already satisfied in his action against the government. What will happen to his claim for punitive damages? It will be recalled that the government is not to be liable for punitive damages. If the claimant chooses to sue the government on

26 See infra p. 129.
28 In Horton v. Coach Co., 216 N. C. 567, 5 S. E. 2d 828 (1939) the court said, "If the tort is the result of simple negligence, damages will be restricted to such as are compensatory, but if it was willful, or committed with such circumstances as to show gross negligence, punitive damages may be given." (Italics our own.) See also in this connection Jackson v. Scheiber, 209 N. C. 441, 184 S. E. 17 (1936) where the defendant master was held not liable to the plaintiff who alleged that the servant had intentionally driven the master's car into him.
29 Sec. 410(a), 60 Stat. 842, 844, "... the United States shall not be liable for... punitive damages."
a theory of simple negligence will he thereby be barred from suing the employee on a theory of such gross negligence and recklessness as to warrant the finding of malice upon which punitive damages are predicated? This question, along with others, will have to await judicial decision for its answer.

Suit Following an Attempted Administrative Adjustment.

In the event the claimant has presented a claim to the Federal Agency alleged to be responsible under Section 403 of the Act he may not institute suit against the government under Section 410 unless either, (1) the Federal Agency has made a final disposition of the claim, or (2) the claimant shall have given 15 days notice in writing to the Federal Agency that he is withdrawing his claim. If the claimant should decide to sue after his claim has been presented, rejected, or withdrawn, he cannot sue for more than the amount of the claim he presented to the Federal Agency unless the increased amount sought is based upon "newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal Agency or upon evidence of intervening facts relating to the amount of the claim." Any disposition of a claim made by the Federal Agency under Section 403 may not be used as evidence of liability or the amount of damages in the event suit is brought under Section 410.

Procedure.

Section 411 provides that all writs, pleadings, motions and practice and procedure shall be in accordance with the Federal Rules of Civil Procedure and that the provisions of the Tucker Act shall apply to counterclaims, set-offs and the payment of the judgment and interest thereon. Although the procedure is to be in line with the Federal Rules the substantive law to be applied is that of the place where the negligent or wrongful act took place.

This last mentioned provision relating to the substantive law applicable was before the court in Spell v. United States. The plaintiff's decedent had been killed by reason of the negligence of the driver of a Navy bus operated by the United States in Florida. The defence given in behalf of the government was that the bus driver had been blinded by the headlights of an approaching automobile. Under the decisional

31 Ibid.
32 Section 10 of the Tucker Act, 24 Stat. 505, 507 (1887), 28 U. S. C. A. §765 (1928) provides that final judgments shall carry interest at the rate of 4 percent per annum.
33 Sec. 410(a), 60 Stat. 842, 844 states that liability shall be, "in accordance with the law of the place where the act or omission occurred."
law of Florida a motorist who is blinded by the lights of an approaching vehicle is under a duty to stop his car until he can once again see ahead and his failure to do so is negligence. Judge De Vane, speaking for the United States District Court, held that by virtue of the provisions of the Federal Tort Claims Act the District Court was bound to follow the law of Florida where the negligence had been committed. The problem in the Spell case was relatively simple. But, because the "line between procedural and substantive law is hazy" and the courts have not been uniform in their decisions as to just what constitutes substance and what is procedure it is quite evident that some difficulties will be encountered. For example: suppose the tort was committed in state B and the federal court in which the action is brought happens to be sitting in state A, the plaintiff's residence. Suppose that in state A the plaintiff must prove himself free from contributory negligence on his own case while in state B the burden of proving contributory negligence is on the defendant. Suppose further that the state court in state A has construed its rule as one of substance and that in state B the rule is declared to be one of procedure only. Can the plaintiff prevail in state A without proving himself free from negligence? Again, invert the positions of the states and assume that state B requires the plaintiff to prove himself free from contributory negligence and holds that such a provision is a matter of substance. State A holds that the burden of proving contributory negligence is on the defendant and is a matter of procedure. Can the plaintiff prevail in the federal court in state A without proving himself free from negligence on his own case?

In diversity of citizenship cases the Supreme Court has held that a federal court sitting in state A must apply the law of that state as to the burden of proof, the conflict of laws and contributory negligence. It has been suggested that the rule applied in diversity cases has no application to suits under the Federal Tort Claims Act but that in suits under that statute the federal courts should adopt a general rule and determine according to their own views whether a particular matter is one of substance or procedure. By so doing, it is claimed, all federal

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38 See in this connection Central-Vt. Ry. v. White, 238 U. S. 507, 511 (1915) where Mr. Justice Lamar said, "But matters of substance and procedure must not be confounded because they happen to have the same name . . . it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is part of the very substance of his case."
See also Goodrich, Conflict of Laws 199 (1938).
courts, wherever they may sit, would be governed by the same rules in determining whether the burden of proof or the question of contributory negligence shall be considered as a matter of substance and hence controlled by the law of the place where the act or omission occurred or as a matter of procedure and therefore controlled by federal law.

Take another instance. Is res ipsa loquitur a rule of substantive or procedural law? Shall the federal court sitting in state A apply the rule of res ipsa loquitur of the state courts in state A or shall it apply the rule of res ipsa loquitur as interpreted by the courts of state B where the negligent act or omission took place? In a recent diversity of citizenship case the Circuit Court of Appeals of the Fourth Circuit had occasion to consider this question in detail and came to the conclusion that res ipsa loquitur was a rule of substantive law. Accordingly, in an action pending in a federal court sitting in Virginia and which arose out of an accident occurring in Maryland the court held that the law of Maryland controlled as to the effect of the res ipsa loquitur doctrine.

Joinder of Parties Defendant.

To date three reported cases have raised the problem of whether or not a plaintiff may join in the same action the United States Government and a private individual charging them both with being joint tortfeasors. The typical case is one in which two automobiles collide, one operated by the United States and one by an individual and the plaintiff, as the innocent third party, is injured.

As already stated, the Act provides that practice and procedure shall be in accordance with the Federal Rules of Civil Procedure. Rule 20(a) of those rules expressly authorizes the joinder of parties defendant, "... All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

The difficulty with joining the United States and an individual in the same action is that under the Federal Tort Claims Act the trial is held by the Court without a jury whereas the individual has the right

43 Lachman v. Pennsylvania Greyhound Lines, 160 F. 2d 496 (C. C. A. 4th 1947). Compare Harke v. Haase, 75 S. W. 2d (Mo.) 1001 (1934) in which res ipsa loquitur is referred to as a rule of evidence. See also the scholarly article by Prosser, The Procedural Effect of Res Ipsa Loquitur, 20 MINN. L. REV. 241 (1936) especially at p. 257 where he states, "In the first place, it should be clear that what we are dealing with is nothing more than a matter of circumstantial evidence."
to a jury trial. For these reasons it has been contended that no joinder is permissible under the Act. Court decisions to date have upheld joinder notwithstanding the difficulties that might arise in the court passing upon the case against the United States and the jury passing upon the case in so far as it relates to the private individual.

In *Englehardt v. United States* the plaintiff, a citizen of Maryland, was injured as the result of a collision between a motor vehicle owned and operated by the United States and a car being driven by the individual defendant, Quillen, who was a citizen of Delaware. Quillen moved for a dismissal on the theory that he could not be joined in the action with the United States. Judge Chesnutt denied the motion stating that he could find no evidence of any intent on the part of Congress to prohibit the joinder of the actions. He declared that decisions under the Tucker Act prohibiting joinder were inapplicable because the jurisdiction of the District Courts under the Tucker Act was concurrent with that of the Court of Claims and that the Court of Claims never did have jurisdiction to entertain suits against private individuals. As to the difficulty presented by the fact that the individual defendant is entitled to a jury trial the court declared that, (1) as a matter of fact the individual may never demand the jury trial, and (2) if he does demand it there is nothing to prevent the case being tried at one and the same time with the judge giving the judgment in so far as the United States is concerned and the jury rendering a verdict as to the individual defendant. Indeed, if the court should prefer not to engage in such a procedure it may always order separate trials as a matter of convenience under Rule 42(b).

It is, of course, apparent that there may be conflicting decisions made by the court and jury. Perhaps the astute trial judge, if he determines to try the case against both defendants at one and the same time, will await the jury's verdict before handing down his own judgment as to the claim against the United States. Conceivably, if the jury departs too far from the views of the trial judge he may find himself obliged to set the verdict aside as against the weight of the evidence.


The court referred to United States v. Sherwood, 312 U. S. 584 (1941) in which the Supreme Court held that a suit could not be maintained under the Tucker Act (supra, note 9) against the United States and another defendant jointly.

The rule reads, "*Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or any separate issue of or of any number of claims, cross claims, counterclaims, third party claims or issues."
In *Dickens v. Jackson and United States* it appeared that the individual defendant joined with the United States was a citizen of the same state as the plaintiff. Motion was made by the United States to have the case dismissed as against the individual because of lack of diversity. Judge Byers granted the motion on that ground but expressly refused to pass upon the question of whether or not there could be joinder had there been the proper diversity between the plaintiff and the individual defendant.

However, in *Bullock v. United States* the same situation was present. There was no diversity as between the plaintiff and the private individual who had been joined as a co-defendant with the United States. In this case the Government moved for a dismissal on the ground that it could not be joined with an individual defendant under the Federal Tort Claims Act. Judge Smith denied the motion to dismiss as to the United States, held that there could be a joinder and cited the *Englehardt* case as his authority but then concluded that, on his own motion, he would be compelled to dismiss the case as to the individual defendant because of the lack of diversity of citizenship between him and the plaintiff.

That is the state of affairs at the date of this writing. It remains to be seen if the Circuit Court of Appeals and ultimately the United States Supreme Court will sustain the joinder of an individual defendant with the United States in an action brought under the Federal Tort Claims Act.

**Limitation of Actions.**

As has been previously stated the torts covered by the Federal Tort Claims Act are only those which accrued on or after January 1, 1945. That date marks the beginning of the general tort liability of the United States. The statute not only fixed a starting date but also provided a definite time limit within which claims might be presented for administrative adjustment or made the subject matter of a suit. Section 420 of the Act provides that any claim cognizable under the Act shall be forever barred unless the claim is presented in writing to the Federal Agency out of whose activities the claim arose (where claimant does not seek more than $1,000) or unless suit is brought against the United States irrespective of the amount of the claim within 1 year after the accrual of the claim or within 1 year after the enactment of the statute (August 2, 1946) whichever is later.

Although the limitations provision of the statute would seem to be very clear that section has already been the subject matter of construc-

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tion by several United States District Court judges. In *State of Maryland, to the Use of Burkhardt v. United States* an action for wrongful death was brought under the Federal Torts Claims Act. It appeared that the deceased was killed September 2, 1945 as a result of the alleged negligence of the operator of a United States army truck. The suit against the government was instituted December 5, 1946. The Maryland Wrongful Death Statute on which the action was predicated provides that "every such action shall be commenced within 12 calendar months after the death of the deceased person."

A motion was made to dismiss the complaint which was granted by Judge Chesnut. The court stressed the language in the act which provides that the United States shall be liable to suit as would a private individual. Under the facts of this case a private person could not have been sued on December 5, 1946 which was more than 12 months from the date of death. The provision in the Federal Tort Claims Act allowing suit within 1 year after August 2, 1946, the date of enactment of the statute, was held not to enlarge the time provided for a wrongful death action by state law. State law tolled the period during which the action could be brought and that was, in this case, 12 months after September 2, 1945. Actually, had the plaintiff been aware of the Federal Tort Claims Act his case would not have been lost for he did have the period from August 2, 1946 the date of enactment to September 2, 1946 the date of the tolling of the 12-month period provided for in the Maryland Wrongful Death Statute within which to bring his action. Judge Chesnut pointed out that the 12-month period provided for by the Maryland statute was not to be regarded as a "period of limitation but as an essential feature of the cause of action itself."

In *Sweet v. United States* the plaintiff brought an action against the government under the Federal Tort Claims Act within one year after August 2, 1946, the enactment date. While the opinion does not state, it would appear that the tort had been committed some time after January 1, 1945 but more than a year before the institution of suit. It so happened that the state of California where this action was pending had a one year limitation for tort actions and that consequently under the state law the action would be barred. A motion to dismiss was made by the United States on the theory that since, at the time the suit was instituted a private individual could successfully plead the statute of limitations the government should not be suable. The motion was denied. Judge Yankwich held that the limitation period fixed by Congress rather than the limitation period fixed by state law controlled.

Here, then, is one instance where an action could be successfully maintained against the government when it would have failed against a private individual.

The two cases just discussed are readily reconcilable and illustrate the recognized distinction between a statute which limits the time within which a common law action may be brought and a statute which creates for a limited period a cause of action unknown at common law.

The tragedy that occurred when a United States bomber crashed into the Empire State Building in New York City has given rise to actions under the Federal Tort Claims Act and incidentally raised an interesting question of limitations of actions by reason of the New York Workmen's Compensation law. In Commissioners of the State Insurance Fund v. United States and Scannell and Oliver v. United States actions were brought to recover damages for the personal injuries sustained by the individual plaintiffs who had been employed in the Empire State Building and were injured as a result of the crash. The disaster occurred on July 28, 1945 which was prior to the passage of the Federal Tort Claims Act but after the date set (January 1, 1945) for the accrual of claims.

Both the individual plaintiffs had in due course filed claims for Workmen's Compensation benefits under the New York statute. The said statute at that time provided that if the injured employee wished to institute an action against the third party tort-feasor he was obliged to start his action within 6 months after the date of the compensation award and in any event within 1 year after the cause of action accrued. If the employee did not commence his third party suit within that time the action passed to the Workmen's Compensation insurance carrier, here the Commissioners of the State Insurance Fund. The theory of the statute is that a failure to start suit within the prescribed time operates as an assignment of the claim to the insurance carrier who then may bring suit and retain out of the recovery not only the amount paid in compensation benefits but also one third of the excess, the remaining two thirds going to the injured employee.

On January 29, 1947 and on March 13, 1947 the New York Workmen's Compensation law was amended so as to permit an action by the injured employee against a third party tort-feasor to be commenced "not later than 9 months after the enactment of a law creating, establishing, or affording a new or additional remedy." The purpose of the amendment was to enable injured employees to take advantage of the Federal Tort Claims Act. Within 9 months after August 2, 1946

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55 Consolidated Laws of New York, c. 67, §29.
56 Laws of 1947, State of New York, c. 9 and c. 144.
the individual plaintiffs had instituted suit against the United States under the Federal Tort Claims Act and the Commissioner of the State Insurance Fund had done likewise. Each claimed to be the proper party plaintiff, the Commissioner by virtue of an assignment by operation of law since the actions had not been brought by the individuals within 1 year after July 28, 1945, the date of the accident, and the individuals on the theory that their right to sue the government only accrued August 2, 1946 and that their actions were brought within 9 months of that date.

The government, in order to protect itself, contended that in each case the plaintiff was not the proper party to bring the action. Judge Holtzoff ruled in favor of the individual claimants and against the commissioner. He held that the individuals had had no cause of action against the government on the date of the injury, July 28, 1945, but only acquired an action on August 2, 1946 when the Act was passed. Therefore, he found the time period for bringing suit by the individuals against the government as a tort-feasor began to run only from the latter date. The court declared the 1947 amendments to the New York Workmen's Compensation law were retroactive in effect since it was the purpose of those amendments to give time to the individuals injured by reason of the crash of the bomber to sue the government under the Federal Tort Claims Act.

Limitation Period Following Attempt at Administrative Adjustment.

It is very likely that if a claim is presented to a Federal Agency for adjustment under Section 403 of the Act there may be considerable delay and ultimately no settlement reached. To take care of this situation Section 420 provides that if a claim for not more than $1,000 has been presented to the Federal Agency involved within the time specified, the time for the institution of suit on that claim in the event of no settlement is extended for 6 months from the date of mailing of a notice to the claimant by such Federal Agency as to the final disposition of the claim or for 6 months from the date of the withdrawal of the claim from the agency by the claimant if the period of limitations would expire sooner.57

Compromise of Litigated Claims.

The attorney general is authorized to arbitrate, compromise or settle any claim for which a suit is pending under the Federal Tort Claims Act if the court wherein the action is pending approves.58

Appeals.

Appeals from final judgments of the district courts acting under Section 410 of the Act may be taken to either the circuit court of

appeals as in other district court appeals or to the court of claims. Appeals to the court of claims, however, may only be taken if the notice of appeal filed pursuant to Rule 73 of the Federal Rules of Civil Procedure shall have affixed thereto the consent of the appellees that the appeal be taken to that court. From both the circuit court of appeals and the court of claims appellate review is had in the Supreme Court pursuant to Sections 239 and 240 of the Judicial Code.58

Claims Excepted from the Federal Tort Claims Act.

Certain types of claims are expressly excluded from the coverage of the Federal Tort Claims Act and as to such claims the individual claimant can neither seek administrative adjustment nor bring suit under the Act. The exceptions are set forth in Section 421 as follows:

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.60

(c) Any claim arising in respect of the assessment or collection or any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C. title 46, secs. 741-752, inclusive), or the Act of March 3, 1925 (U. S. C. title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

60 This section will exclude claims for damages to postal matter but will it bar the person who is injured by the negligent operation of a mail truck? On that point the discussion had on an identical exception in H. R. 7236 (1940) supra, note 1a, is of interest:

"MR. EBERHARTER. (After quoting the exception) It seems to me that this exemption might embrace a situation where a mail truck would cause damage to some individual or to his property, because the negligent transmission of the postal matter might occur while it was being transported by a mail truck.

MR. CELLER. We did consider that point, but the members of the committee, upon the suggestion of representatives of the Post Office Department and the Attorney General's Office, thought that we should go a little slowly on the situation. For that reason that clause was inserted. It was inserted primarily because of the insistent suggestion of the Post Office Department. I do not believe that if somebody is run down by a mail truck, for example, due to the negligence of the driver, that section would preclude any action against the Government.

MR. EBERHARTER. I am glad to have the gentleman's explanation of that, because I do not see any reason for making that exception." 86 Cong. Rec. 12019 (1940).
(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.”

While the enumerated exceptions may deprive an individual of the right to sue the United States for a claim falling within one of them it must be born in mind that the claimant is not without a remedy. If the Federal Tort Claims Act does not cover the case of the individual claimant and if no other statute affords him relief he may still pursue the old method of having a private bill introduced in Congress.61

In Skeels v. United States62 the court had occasion to construe exception (j) relating to claims arising out of the combatant activities of the military forces during time of war. On July 24, 1945 the plaintiff’s decedent was in fishing boat 6 miles offshore from Freeport, Texas. High overhead the United States Army was engaged in target practice the target being towed by a plane and the marksmen being located in other planes. A piece of pipe, 14 inches in length, fell from either one of the planes or the target and hit and killed the plaintiff’s decedent. An action was brought in due time against the government. The plaintiff contended that the doctrine of res ipsa loquitur applied and that the death of the deceased was due to the negligence of the United States. The government moved to dismiss the complaint on two theories, (1) that whatever injury occurred resulted from combat activities of the armed forces during time of war, and (2) the plaintiff had failed to show any negligence.

Judge Dawkins refused to dismiss the complaint and held that prac-

61 See note 22 supra.
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Practice or training activities, even in time of war, were not "combatant activities" within the meaning of the exception in the Federal Tort Claims Act. He also held that in view of allegations in the complaint to the effect that no notice or warning had been given to the public and no area restricted because of the target practice he was not prepared to say as a matter of law that the complaint failed to allege negligence. Although he mentioned the *res ipsa loquitur* argument of the plaintiff he did not discuss the merits of it.\(^6\)

**Exclusiveness of Remedy and Repealer.**

By Section 423\(^6^4\) it is provided that after the enactment of the statute, August 2, 1946, the mere fact that a Federal Agency may sue or be sued in its own name shall not be construed to authorize suits against such agency for claims cognizable under the Federal Tort Claims Act for the remedy provided by the Act, when it exists, is exclusive. All provisions of law which authorize any Federal Agency to settle claims cognizable under the Act are repealed by Section 424.\(^6^5\) Any power existing in Federal Agencies to settle claims not covered by the Federal Tort Claims Act is not disturbed but expressly reserved.

**Attorneys' Fees.**

The amount to be collected by attorneys for services rendered clients under the Federal Tort Claims Act is specifically limited by Section 422.\(^6^6\) If a settlement is reached under the Administrative Adjustment section, then the head of the Federal Agency involved may, as a part of the settlement, determine and allow a reasonable counsel fee. This fee may not exceed 10% of the settlement if the amount recovered is $500 or more. It is to be paid out of the settlement award but not in addition thereto.

If the matter has been litigated, then either the court as a part of its judgment or the attorney general as a part of the settlement, should the litigation be settled, may determine and allow a reasonable counsel fee which shall not exceed 20% of the judgment or settlement if the same is $500 or more.\(^6^7\) Said fee, as in the case of an administrative adjustment, shall be paid out of the judgment or settlement and not in addition thereto.


\(^6^7\) Under this provision a 20 per cent fee was allowed in a death action wherein the judgment was $15,000. See Spell v. United States, 72 F. Supp. 731 (S. D. Fla. July 23, 1947).
An attorney who demands or receives fees in excess of those allowed by the Act is guilty of a misdemeanor and subject to a fine of not over $2,000 or imprisonment for not more than one year or both.

**Conclusion**

We have in the foregoing paper reviewed the provisions of the Federal Tort Claims Act together with the decisions reported to date construing the statute. A year is far too short a time for the development of a well rounded body of interpretative law on a statute such as we have had under consideration. However, if this survey will prove of some assistance to the practising attorney who finds himself with a possible tort claim against the United States it will have served its purpose.

68 See note 11, supra.