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NOTES AND COMMENTS

Administrative Law—Crop Insurance—Adequacy of Notice

In a recent United States Supreme Court case¹ the plaintiff, an Idaho farmer, sued the Federal Crop Insurance Corporation² to recover

¹ Federal Corp. Ins. Corporation v. Merrill,—U. S.—, 68 Sup. Ct. 1, 92 L. Ed. 51 (1947), *reversing* 174 P. 2d 834 (Idaho 1946).

² 52 STAT. 72 (1938), 7 U. S. C. §1503 (1940).

for the destruction of his spring wheat crop by drought. In applying for the insurance the plaintiff had informed the Corporation's local agent that he was reseeding 400 acres of his spring wheat on winter wheat acreage, and the agent had advised him that his entire crop was insurable. After the drought the Federal Crop Insurance Corporation refused to pay the loss because, prior to the plaintiff's application, the Corporation had promulgated its Wheat Crop Insurance Regulations which were duly published in the Federal Register.³ The regulations stated that spring wheat which had been reseeded on winter wheat was not insurable. The Court held in a five to four decision that the plaintiff could not recover.

The Federal Crop Insurance Corporation is expressly given the power to sue and be sued.⁴ If this had meant that the Corporation was to be held subject to the same rules of liability as private insurance companies, then it would have been liable in this case. Under the insurance law of Idaho⁵ and the majority of states⁶ the knowledge of the agent is the knowledge of the company and his representations in a situation like the present one would bind the company. However, the Court did not apply this rule because to have done so would have been to ignore the regulations promulgated by the Corporation and published in the Federal Register.

Prior to the Federal Register Act of 1935⁷ there was no uniform or systematic method of publicizing executive orders or administrative regulations. The great confusion that this led to was strikingly emphasized in the case of *Panama Refining Co. v. Ryan*⁸ where the case was argued through two lower courts upon the assumption that the Petroleum Code contained a paragraph which in fact had been eliminated by executive order. To correct this difficulty an act was passed requiring all executive orders and administrative regulations⁹ of general applica-

³ Wheat Crop Insurance Regulations 414-37(v), 10 FED. REG. 1591 (1945).

⁴ 52 STAT. 73 (1938), 7 U. S. C. §1506(d) (1940). This section provides that the Federal Crop Insurance Corp. shall not be subject to garnishment, attachment, or injunction.

⁵ *Maybee v. Continental Casualty Co.*, 37 Idaho 667, 219 Pac. 598 (1923); *Carroll v. Hartford Fire Ins. Co.*, 28 Idaho 466, 154 Pac. 985 (1916).

⁶ *E. g.*, *Triple Link Mutual Indemnity Ass'n v. Williams*, 121 Ala. 138, 26 So. 19 (1899); *Commercial Credit Co. v. Eisenhour*, 28 Ariz. 112, 236 Pac. 126 (1925); *Connecticut Fire Ins. Co. v. Moore*, 154 Ky. 18, 156 S. W. 867 (1913); *Crossman v. American Ins. Co. of Newark, N. J.*, 198 Mich. 304, 164 N. W. 428 (1917); *Cox v. Assurance Society*, 209 N. C. 778, 185 S. E. 12 (1936); *Steurnagel v. Supreme Council of Royal Arcanum*, 234 N. Y. 251, 137 N. E. 320 (1922).

⁷ 49 STAT. 500 (1935), 44 U. S. C. §§301-314 (1940).

⁸ 293 U. S. 388, 412 (1935).

⁹ Section 5 of the Federal Register Act requires specifically the publication of presidential proclamations and executive orders, such other documents as the president may determine, and such documents as Congress may determine. Under this section the president issues regulations requiring the rules of administrative agencies to be published. See Ronald, *Publication of Federal Administrative Legislation*, 7 GEO. W. L. REV. 51, 71 (1938). The Federal Administrative Procedure

bility and legal effect to be published in the Federal Register. According to the Act filing of the regulation with the Division of the National Archives Establishment is sufficient to give notice of its contents to the public.¹⁰ The cases¹¹ involving the point have held, with one exception,¹² that publication in the Federal Register does give notice to interested parties. Thus the Court in the principal case held that publication of the Corporation's regulations in the Federal Register gave legal notice of their contents, and they were binding on the plaintiff though neither he nor the Corporation's local agent had actual knowledge of them.

The question then arises as to whether a government corporation which engages in commercial activity should be held subject to the same rules of law as to its liability as a private corporation similarly situated. As a matter of public policy a strong argument can be made that it should not. Government corporations are not on the same basis as private ones in that their purpose is not to make profit but rather to procure benefits which inure to the public generally. In the principal case, for instance, it was pointed out that all-risk crop insurance had been too great a commercial hazard for private insurance companies, so the government entered the field to give the farmers much needed protection.¹³

However, the benefits which the government corporations are giving the public would seem to be somewhat illusory when these corporations are allowed to escape liability in situations where private corporations would be held. Such cases may tend to create distrust of government corporations. The courts have tended, in the absence of express con-

Act, 60 STAT. 238 (1946), 5 U. S. C. APP. §1002(a) (Supp. 1947), supplements this and requires all substantive rules and statements of policy of administrative agencies to be published in the Federal Register.

¹⁰ Publication in the Federal Register would seem to afford interested persons substantially the same opportunity to acquaint themselves with pertinent administrative regulation as they would have to acquaint themselves with pertinent statutes passed by Congress. However, to the effect that even lawyers seldom have access to or know how to use the Federal Register, see Wigmore, *The Federal Register and Code of Federal Regulations*, 29 A. B. A. JOUR. 10 (1943); 22 MICH. ST. B. JOUR. 23 (1943).

¹¹ *Flannagan v. United States*, 145 F. 2d 740 (C. C. A. 9th 1944); *Henderson v. Baldwin*, 54 F. Supp. 438 (D. C. Pa. 1942); *Henderson v. Nixon*, 66 Idaho 780, 168 P. 2d 594 (1946).

¹² *Hall v. Chaltis*, 31 A. 2d 699 (D. C. Mun. App. 1943). In this case it was held that a price regulation filed two days before and published on the day that defendant made the sale at a price above that required by the regulation did not give sufficient notice to defendant to render him liable to a \$50 penalty. A concurring opinion said of the Federal Register, "I think we can take judicial notice that the average shopkeeper does not see that publication and probably is unaware that such a publication exists."

¹³ See REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S COMMITTEE ON CROP INSURANCE, H. DOC. NO. 150, 75th Cong., 1st Sess. 2-4, 11-12; H. REP. NO. 1479, 75th Cong., 1st Sess. 2; 81 CONG. REC. 2866, 2867, 2887, 2891, 2893, 2895 (1937).

gressional intent to the contrary, to treat them as private corporations.¹⁴ This view was well stated in *United States v. Thomas*¹⁵ where the court said, "In commercial transactions the Government should require of no citizen adherence to a rule between men that it is unwilling to follow."

Examples of the courts denying government corporations¹⁶ the privileges and immunities usually afforded the Government itself are numerous. Thus government corporations may be sued without their consent¹⁷ even where Congress has not authorized suit against them.¹⁸ They are liable for interest¹⁹ and court costs.²⁰ Their actions have been held to be barred by statutes of limitations and laches.²¹ It has

¹⁴ Thurston, *Government Proprietary Corporations*, 21 VA. L. REV. 465, 503 (1935), where the author says "in the law of government proprietary corporations the public interest is best served by regarding them as private."

¹⁵ 27 F. Supp. 433 (N. D. Tex. 1939).

¹⁶ There are two principal types of government corporations, those which are incorporated directly by an act of Congress and those which are incorporated under the law of some state pursuant to an act of Congress. However, it is believed that the general principles applicable to one are applicable to the other. For an opinion that there is no distinction to be drawn between the two types see, Coffman, *Legal Status of Government Corporations*, 7 FED. B. J. 389 n.* (1936). The Government Corporations Control Act, 59 STAT. 597, 602 (1945), 31 U. S. C. APP. §869 (Supp. 1947) provides that government corporations must be created directly by act of Congress and any existing corporations chartered under state law must be reincorporated by act of Congress before June 30, 1948.

¹⁷ *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381 (1939); *Olson v. United States Spruce Production Corporation*, 267 U. S. 462 (1925); *Sloan Shipping Corp. v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549 (1922); *Federal Sugar Refining Co. v. United States Sugar Eq. Board*, 268 Fed. 575 (S. D. N. Y. 1920); *cf. Bank of the United States v. Planter's Bank of Georgia*, 9 Wheat. 904 (U. S. 1824).

¹⁸ In creating corporations Congress has almost uniformly included "sue and be sued" clauses. *E.g., Farmer's Home Corporation*, 50 STAT. 527 (1937), 7 U. S. C. §1014 (1940); *Federal Savings and Loan Insurance Corporation*, 48 STAT. 1246, 1256 (1934), 12 U. S. C. § 1725 (1940); *Home Owner's Loan Corporation*, 48 STAT. 128, 129 (1933), 12 U. S. C. §1463 (1940); *Tennessee Valley Authority*, 48 STAT. 58, 60 (1933), 16 U. S. C. §831 (1940); *Reconstruction Finance Corporation*, 47 STAT. 5, 6 (1932), 15 U. S. C. §604 (1940); *Inland Waterways Corporation*, 43 STAT. 360, 362 (1924), 49 U. S. C. §155 (1940); *National Agricultural Credit Corporation*, 42 STAT. 1454, 1462 (1923), 12 U. S. C. §1171 (1940); *Foreign Banking Corporations*, 41 STAT. 378 (1919), 12 U. S. C. §614 (1940).

¹⁹ *United States v. The Thekla*, 266 U. S. 328 (1924); *National Home For Disabled Volunteer Soldiers v. Parrish*, 229 U. S. 494 (1913); *accord, Standard Oil Company v. United States*, 267 U. S. 76 (1925) (interest allowed against United States on a policy of war risk insurance, though not administered by a government corporation. The court, per Holmes, said, "When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business.").

²⁰ *Reconstruction Finance Corporation v. J. G. Menihan Corp.*, 312 U. S. 81 (1941); *see Walling v. Norfolk Southern Ry.*, 162 F. 2d 95, 97 (C. C. A. 4th 1947).

²¹ *Lindgren v. United States Shipping Board Merchant Fleet Corp.*, 55 F. 2d 117 (C. C. A. 4th 1932); *The No. 34*, 11 F. 2d 287 (C. C. A. 2d 1925); *Bank of the United States v. McKenzie*, 2 Fed. Cas. 718, No. 927 (C. C. Va. 1829); *see United States v. Morse*, 26 F. Supp. 341, 342 (S. D. Me. 1939). *But cf. Davis v. Corona Coal Co.*, 265 U. S. 219 (1924).

been held that government corporations can be estopped.²² They are liable for their torts.²³ Some courts have held that they are subject to garnishment and attachment.²⁴

In holding government corporations liable in situations where the Government itself would be immune, many courts merely say that the corporation is a separate and distinct entity²⁵ or that the Government in becoming a corporation and descending to the level of the business world divests itself of its sovereignty.²⁶ The more recent view on liability is that it is a matter of congressional intent.²⁷ Congress may clothe the corporation with the Government's immunity.²⁸ Whether or not it has done so must be determined by considering the statute creating the corporation and the nature and purposes of the corporation created.²⁹

Thus the question in the principal case would be: did Congress intend the law of private insurance companies to be bodily applicable to the Federal Crop Insurance Corporation? That Congress authorized the Government to enter into a commercial field, that it chose a corporate form to administer the insurance,³⁰ and that it gave it power to sue

²² *Providence Engineering Corporation v. Downey Shipbuilding Corporation*, 294 Fed. 641 (C. C. A. 2d 1923); *see The Falcon*, 19 F. 2d 1009, 1014 (D. C. Md. 1927); *cf. Cushman v. United States*, 43 F. Supp. 810 (S. D. Cal. 1942).

²³ *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381 (1939); *Panama Railroad Co. v. Johnson*, 264 U. S. 375 (1924); *Sloan Shipyard Corp. v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549 (1922); *Federal Sugar Refining Co. v. United States Sugar Equalization Board*, 268 Fed. 575 (S. D. N. Y. 1920).

²⁴ *Federal Land Bank v. Priddy*, 295 U. S. 229 (1935); *Commonwealth Finance Corporation v. Landis*, 261 Fed. 440 (E. D. Pa. 1919); *Central Market v. King*, 132 Neb. 380, 272 N. W. 244 (1937); *Gill v. Reese*, 53 Ohio App. 134, 4 N. E. 2d 273 (1936); *Haines v. Lone Star Shipbuilding Co.*, 268 Pa. 92, 110 Atl. 788 (1920); *cf. Federal Housing Administration v. Burr*, 309 U. S. 242 (1939). *Contra: McCarthy v. United States Shipping Board Merchant Fleet Corporation*, 53 F. 2d 923 (App. D. C. 1931); *Home Owners' Loan Corporation v. Hardie & Caudle*, 171 Tenn. 43, 100 S. W. 2d 238 (1936).

²⁵ *See, e.g., Olson v. United States Spruce Production Corporation*, 267 U. S. 462, 467 (1924); *National Home For Disabled Volunteer Soldiers v. Parrish*, 229 U. S. 494, 496 (1913); *Bank of the United States v. Planter's Bank of Georgia*, 9 Wheat. 904, 907 (U. S. 1824); *Lindgren v. United States Shipping Board Merchant Fleet Corporation*, 55 F. 2d 117, 120 (C. C. A. 4th 1932).

²⁶ *Bank of the United States v. Planter's Bank of Georgia*, 9 Wheat. 904, 907 (U. S. 1824).

²⁷ *Reconstruction Finance Corporation v. J. G. Menihan Corp.*, 312 U. S. 81 (1941); *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381 (1939); *Federal Land Bank v. Priddy*, 295 U. S. 229 (1935); *Sloan Shipyard Corporation v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549 (1922); *cf. Federal Housing Administration v. Burr*, 309 U. S. 242 (1939).

²⁸ *See Reconstruction Finance Corporation v. J. G. Menihan Corp.*, 312 U. S. 81, 84 (1941); *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 389 (1939); *Federal Land Bank v. Priddy*, 295 U. S. 229, 231 (1935).

²⁹ *See note 27 supra.*

³⁰ Not all government insurance is handled by government corporations. National Service Life Insurance is administered by the Administrator of Veterans' Affairs and payment is made from a fund in the Treasury. 54 STAT. 1003, 1012

and be sued would seem to indicate that it intended the Corporation to be subject to the same rules of law as private insurance companies. The Supreme Court could have avoided the effect of the Corporation's Wheat Crop Insurance Regulations in the same manner as did the Idaho Supreme Court.³¹ That court said that Congress did not intend such regulations to be binding law but merely rules for the Corporation's own guidance and for the guidance of its agents. However, the Court did not find that Congress intended the law of private insurance companies to be applicable to the Corporation.

In the future, if government corporations which are engaging in commercial activities are to be held amenable to the same rules of law as private corporations Congress must clearly manifest that intention in the statutes creating them.

WILLIAM T. JOYNER, JR.

Adoption—Invalidation for Want of Consent

In *Allen v. Morgan*,¹ the Court of Appeals of Georgia upheld the action of the trial court in denying plaintiff's petition for adoption of defendants' child, and vacating the interlocutory order of adoption granted eight months prior to entry of the judgment.

The defendants were married after conception but before birth of the child. On learning of this the husband's step-mother began to apply pressure to have the child adopted. The defendants testified that the step-mother "suggested" that the mother go to a waiting home and put the child out for adoption, in order that the step-mother could hold up both "her head" and "her social standing." One month after its birth they took the child to Saluda, North Carolina and left it in the care of a doctor, until the defendants "could get situated." Three days later the defendants signed the consent, "because of the constant pressure being put on us day and night." The plaintiffs were residents of Georgia and were qualified in every way to become adoptive parents. Neither they nor their attorney had knowledge of any coercion that might have been practiced on the defendants.

The court, in construing the statute² requiring consent of the natural parents, held that both the letter and spirit of the statute gives the court, "full and unrestricted power to examine into the nature and kind of consent by parents to an adoption, not only because it is absolutely

(1940), 38 U. S. C. §§801, 805 (1940). The War Risk Insurance of the First World War was administered by the Bureau of War Risk Insurance in the Treasury Department. 40 STAT. 398 (1917).

³¹ *Merrill v. Federal Crop Ins. Corporation*, 174 P. 2d 834 (Idaho 1946).

¹ 44 S. E. 2d 500 (Ga. 1947).

² GA. CODE ANN. (Harrison, 1937) §74-403 (Supp. 1945) ". . . no adoption shall be permitted except with the written consent of the living parents of the child. . . ."