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SUBROGATION, INDEMNITY, CONTRIBUTION AND ELECTION OF REMEDIES ASPECTS OF THE TORT CLAIMS ACT

FRED BLANTON*

Dramatically altering the concept of sovereign responsibility in the field of injuries to person and property, the Federal Tort Claims Act of 1946 in action has progressed steadily by application and interpretation to emerge as one of the most, if not the most, important pieces of domestic legislation enacted during the past decade. This ascendency has transpired primarily because the overwhelming majority of courts have boldly taken a dynamic approach to the inevitable problems occurring and recurring in a day-to-day consideration of the multitude of factual permutations and combinations presented to them for analysis and decision under the Act. Generally the private practitioner has consistently sought before the judicial forums provided under the Act, as contrasted with the legislative forum theretofore available, to obtain relief in a speedy and expeditious manner for the client who has in some manner suffered a loss, directly or indirectly, as a result of some activity of the Federal Government. But not only is the lawyer required to prosecute claims against the Government; he may also be retained to undertake the defense of a client who has been charged with being responsible along with a Government agent, servant or employee for an injury to the person or property of a third person. Furthermore, he may represent that very agent, servant or employee who has committed the act for which the Federal Government may be eventually adjudicated liable. More specifically, the practicing lawyer is vitally concerned with subrogation, indemnity, contribution and election of remedies as these concepts have been developed and applied within the framework of the Tort Claims Act. An examination of the principal cases affords an excellent opportunity to study and analyze the problems of the private lawyer in these fields and to state the avenues of approach open to him and their probability of success. Perhaps at the conclusion of such an examination, questions inherent in the title will in some small measure be answered.

SUBROGATION

The admittedly basic equitable doctrine of subrogation has seemingly been concerned more particularly in the jurisprudence of years past with those parties who are involved in certain aspects of mort-

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gages or suretyship, and with those who pay another's debt by agreement or for their own benefit.[1] However, the rationale underlying the principle, that there should be an ultimate discharge of an obligation by him who in good conscience ought to pay, is of foremost importance in this modern world wherein insurance against certain specified risks is commonplace and accepted. It would indeed be difficult in this age of automotive transport to encounter a person who is not familiar, through the requirements of financing companies, with that type of policy which by its terms binds the issuing insurance company "to pay for any direct and accidental loss or of damage to the automobile . . . caused by the collision of the automobile with another object or by upset of the automobile." Anyone with an equity in his home is well aware that mortgagees require protection in similar terms against fire damaging or destroying the security. With the universal enactment of workmen's compensation laws, owners of businesses have become cognizant of protection afforded against claims created by the application of such laws. Many times the loss to the automobile is caused by the careless driving of another motorist, the house is destroyed by a fire resulting from defective wiring installed by a repairman or the employee's injury comes about through the negligence of a third person. Nevertheless, and as it has agreed to do, the insurance company carrying the risk has paid to the insured or on his behalf all or part of this loss. Most assuredly, in equity and good conscience, the person causing such loss should not escape responding in damages for something for which he was at fault, and responding to the insurer who has paid the loss in order that orderly management of modern finance will not be impaired. This doctrine of subrogation enables the insurance company to be substituted in place of the insured, who, in the majority of such cases, had the primary right to institute proceedings against the person at fault. Furthermore, many policies specifically enunciate this in language similar to the following:

> "In the event of any payment under this policy, the company shall be subrogated to all rights of recovery therefor against any person or organization. The insured and other payees, if any, shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights, and shall do nothing after loss to prejudice such rights."

Notwithstanding such clauses, it must be emphasized that the equitable right of subrogation inures to the insurer upon payment without any formal assignment or any express stipulation to that effect in the policy.

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1. 4 POMEROY, EQUITY JURISPRUDENCE §§ 1212 *et seq.*, 1416 *et seq.* (5th ed. 1941).

Lawyers commencing civil actions based on subrogation claims against the United States founded on the Tort Claims Act have been confronted in the past with two main arguments advanced on behalf of the Government. One concerned whether there was in fact a claim falling within the correct interpretation of Section 1346(b);[2] the other, whether there existed a direct prohibition by another, earlier and controlling statute invalidating the assignment which is inherent in subrogation. By Section 1346(b), the several United States District Courts are invested with exclusive jurisdiction "of civil actions on claims . . . for money damages . . . for injury or loss of property. . . ." Is there a "claim" within the context of this jurisdictional grant so that an insurance company which has reimbursed its insured, or paid money on his behalf, either in full or in part for the loss sustained, can maintain to a conclusion an action against the Federal Government? The Federal Anti-Assignment Act[3] forbids the assignment of claims against the United States. Is this subrogation assignment within the terms of this Act?

It is essential at this point to review the problem which faced the Congress in waiving sovereign immunity. A succinct statement, and one outlining the solution, is found in *State of Maryland, to Use of Burkhardt v. United States:*

> "Congress was creating a liability not theretofore existing on the part of the government. To have defined all of the tort rules under which liability could be established would have been an almost impossible undertaking; but standards of liability were necessary and Congress was compelled, as a practical matter, to adopt the principles of local law in defining them."[4]

Turning now to the earlier cases on subrogation in the courts of appeal, *Employers' Fire Ins. Co. v. United States,*[5] concerned itself with fire insurance companies which had paid a part of the loss caused by the crash of a United States airplane and the resultant fire. The owner of the property which was damaged had originated the action in the district court and the companies sought intervention, which was initially denied. However, the Court of Appeals for the Ninth Circuit stated in part:

> "We are persuaded that a proper interpretation of 28 U.S.C.A. Sec. 931 [now 1346(b)] permits the institution of an action against the United States and the right to intervene in a pending action by a subrogee.
> "Appellant subrogees are claimants whose claims exist 'on account of' damage to property."[6]

2. 28 U.S.C.A. § 1346(b) (1950).
3. REV. STAT. § 3477 (1875), as amended, 31 U.S.C.A. §§ 203 *et seq.* (1927).
4. 165 F.2d 869, 871 (4th Cir. 1947).
5. 167 F.2d 655 (9th Cir. 1948).
6. *Id.* at 656.

The importance of and dependence on local law in determining liability under the Tort Claims Act, and particularly the existence of the right of subrogation is well illustrated by *Old Colony Ins. Co. v. United States,*[7] and *National American Fire Ins. Co. of Omaha v.* United States.[8] In the former case the Court of Appeals for the Sixth Circuit held that the company which had reimbursed the owner of an automobile for a loss sustained when his property was damaged by an army truck was subrogated in accordance with Ohio law, which was said to be conclusive of the question. In the latter case, a house was damaged by an airplane of the United States and the insurance company paid the owner the loss sustained thereby, and the Court of Appeals for the Ninth Circuit stated the claim arose by operation of California law. The *Old Colony* case pointed out that the subrogation right was one enforced to achieve substantial justice, and the "claim" of the Tort Claims Act was not limited to that in favor of one who had actually suffered damage to his property. Further, there was a recognition that the right arises by operation of law and not as a result of an assignment within the ban of the Anti-Assignment Act. The *National American Fire Ins. Co.* case was more emphatic in declaring that an assignment of the claim was an idle act and had no legal significance, insofar as third parties were concerned. Of interest was the court's presenting, without deciding, the questions of whether several insurers should be joined and whether the possibility of setoff and counterclaim by the Government resulted in a disadvantage of inconvenience not in harmony with the purposes of the Act.

Augusta Broadcasting Co. v. United States,[9] considered a somewhat different aspect of the subrogation question. In that case, a radio tower of the plaintiff had been demolished by a Navy aircraft. National Union Insurance Company paid plaintiff $3,634.05, which was denominated as a loan, repayable only to the extent of the recovery which plaintiff could obtain from any third person. The Court of Appeals for the Fifth Circuit was not concerned and did not elaborate on the right of the subrogee to sue, holding merely that the giving of the loan receipt did not affect the right of the plaintiff to sue and that it was the real party in interest.

Yorkshire Ins. Co. v. United States,[10] developed other facets of the subrogation problem. There two insurance companies each paid part of the loss and separate actions were brought. The Government contended that there existed a serious inconvenience to it if partial subrogees could sue. The court answered by pointing out that such inconvenience could be avoided by a timely objection (which could be

7. 168 F.2d 931 (6th Cir. 1948).
8. 171 F.2d 206 (9th Cir. 1948).
9. 170 F.2d 199 (5th Cir. 1948).
10. 171 F.2d 374 (3d Cir. 1948).

waived). Furthermore, Rule 17(a),[11] clearly allows suits by the real party in interest. Quoting from Williston, the court supported its position:

"At an early day an assignee of a chose in action was permitted to sue in the assignor's name and later was permitted to sue in his own name under real party in interest statutes. But when there were several partial assignees the rule forbidding splitting causes of action prevented them from suing individually. All could join or be joined in an action as parties plaintiff, or the partial assignee could separately intervene in an action by an assignor."[12]

One court of appeals held, with a vigorous dissent, in *United States v. Hill*,[13] that the Federal Anti-Assignment Act was applicable and denied a claim instituted by a subrogated insurance company.

In *United States v. South Carolina State Highway Department*,[14] where several insurance companies paid for a loss to a bridge, the court left open one question and resolved another previously mentioned:

"Some question might arise in a proper case as to the right of an insurer who had paid only a part of the loss to maintain an independent action for the recovery of the amount paid; for this would involve the splitting of a cause of action."[15]

"So far as the right of setoff and counterclaim is concerned, the right of the subrogee to recover cannot rise above those to whose rights he has been subrogated."[16]

Furthermore, the court stated it was no hardship for the Government to sue in another suit where its counterclaim exceeded the amount of the claim.

The partial subrogee question was also posed and answered in *State Farm Mutual Liability Insurance Co. v. United States*, in the First Circuit:

"We think that a partial subrogee is a real party in interest, under Rule 17(a), and as such has standing to sue in his own name, subject only to the right of the defendant, by making timely objection, to insist upon the joinder of the other parties in interest in order to avoid a split-up of the cause of action."[17]

11. "(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest: but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States." FED. R. CIV. P. 17(a).
12. Yorkshire Ins. Co. v. United States, *supra* note 10, at 375.
13. 171 F.2d 404 (5th Cir. 1948).
14. 171 F.2d 893 (4th Cir. 1948).
15. *Id.* at 897.
16. *Id.* at 898.
17. 172 F.2d 737, 739 (1st Cir. 1949).

The workmen's compensation situation developed in *Aetna Casualty & Surety Co. v. United States.*[18] An employee of the Federal Reserve Bank was injured through the negligence of the Post Office Department. The insurance carrier paid on behalf of the employer the claim for workmen's compensation. The injured employee failed to bring an action against the responsible agency within one year of the injury and, under New York law, this operated as an assignment of the claim to the carrier, which thereupon instituted an action. The Court of Appeals for the First Circuit held that the Anti-Assignment Act did not apply. It further stated that plaintiff's claim was founded on, limited by and substituted for the injured employee's claim. Thus, counterclaims arising from the same transaction could be interposed, and that unrelated counterclaims could be the subject of a new and different action. A main point of interest concerned venue, wherein the assignment could result in venue in a district other than that in which the original claimant could properly have brought the action.[19]

These cases, and particularly the last one, culminated in certiorari to the Supreme Court of the United States. The writ granted, the main issues of subrogation were presented in argument and resolved. In clear language, the Court held in the *Aetna Casualty* case (1) the insurer carrying the workmen's compensation risk had a right to sue, (2) that a judgment could properly be rendered against the United States in favor of an insurance company on a subrogated claim and in favor of an individual on a personal injury claim, and (3) that two insurance companies who had each paid part of a loss could sue.[20] The Court clarified its ruling by adding that where an insurance company had paid all the loss, it must sue in its own name, following Rule 17(a). Further, where each had made partial payments both were real parties in interest and could sue, subject to the right of the United States to compel joinder under Rule 19(b),[21] since both were necessary parties. The main issues resolved: (1) a subrogee has a claim, and (2) the Federal Anti-Assignment Act has an implicit ex-

18. 170 F.2d 469 (2d Cir. 1948), *aff'd*, 338 U.S. 366, 70 Sup. Ct. 207, 94 L. Ed. 171 (1949).

19. *Id.* at 472.

20. 338 U.S. 366, 70 Sup. Ct. 207, 94 L. Ed. 171 (1949).

21. "(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons." FED R. CIV. P. 19(b).

ception recognized through the years in favor of an assignment by operation of law.

The practical operation of this decision is illustrated by *United States v. State Road Department of Florida*,[22] where an insurance company which had paid part of the damages to a bridge was compelled to join in the action.

One unresolved problem in subrogation—that of inability to compel joinder for lack of proper venue[23]—would appear to offer no insurmountable legal or practical problems. As mentioned in the *Aetna Casualty* case, the subrogee may have a residence in a district other than that of the primary claimant. Certainly no greater handicap exists against the Government in this situation than in one where the suing claimant resides elsewhere than where the tort occurred. Furthermore, the Government has its rights under Section 1404(a):

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[24]

CONTRIBUTION AND INDEMNITY

Taking the considered risk of oversimplification, working definitions of contribution and indemnity for use in connection with the Tort Claims Act must be presented. The quasi-contractual right of indemnity arises when a person who, without fault on his part, has been compelled to pay damages occasioned by the primary negligence of another, whether or not contractual relations exist between them. On the other hand, there is a common-law inhibition against enforcement in the courts of contribution among parties whose common burden arises from participation in a tort. To the extent that this has been modified by statute or otherwise, such modification is based upon those concepts of equity and natural justice which require that those who have a common burden should bear it in equal proportions and one party should not bear more than his just share to the advantage of the others. No attempt is made here to survey the law of each state to determine whether such rights exist. The lawyer is cautioned that the rules of his own jurisdiction control. For instance, the right of contribution does not exist under New York law in the absence of a joint judgment against the tortfeasors,[25] while in Pennsylvania such

22. 189 F.2d 591 (5th Cir. 1951).

23. Tort claims "may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C.A. § 1402(b) (1950).

24. 28 U.S.C.A. § 1404(a) (1950).

25. Wasserman v. Perugini, 173 F.2d 305 (2d Cir. 1949).

a judgment is not required.[26] Whatever mention is made of local law serves only to illustrate the workings of the Tort Claims Act.

A comparison of two cases will develop the difference between subrogation and indemnity. In the *Aetna Casualty* case, the insurance carrier paid on behalf of the insured compensation to an injured employee and was subrogated, by operation of law, to the primary claim of such injured employee. In *United States v. Chicago, R. I. & P. Ry.*,[27] a railway employee was injured and made a claim against his employer under the Federal Employers' Liability Act[28] for compensation, which claim the employer settled. Although the court said that either as a subrogee or indemnitee the railroad could maintain an action against the responsible third party, it seems clear that this is the right of indemnity as defined.

St. Louis-San Francisco Ry. v. United States,[29] points out the difference between indemnity and contribution. There the plaintiff railroad paid certain claims of employees for damages caused by inhalation and contact with gas from poisonous gas bombs shipped by the United States and carried by plaintiff over its lines. The plaintiff averred specially that it was without fault. Applying Mississippi law, the Court of Appeals for the Fifth Circuit said that a right of indemnity, as distinguished from a right of contribution, arises in favor of one not actively at fault as against an active wrongdoer.

The Supreme Court in *United States v. Yellow Cab Co.*,[30] resolved all doubts as to the liability of the United States on claims for contribution, and presumably for indemnity, where the local law so provides. Notwithstanding such a clear exposition and interpretation of the Tort Claims Act, the impact of jurisdictional and procedural limitations in the federal courts has caused some dilemmas, which have been complicated further by varying rules of local law.

Pennsylvania R.R. v. United States,[31] represents an attempt which failed to solve a perennial problem. The case arose out of the South Amboy explosion. In these disaster cases, some corporation or corporations are likely to be subjected to many damage suits. As a practical matter, there exists no forum in today's jurisprudence wherein the question of liability can be decided. Plaintiff sought a declaratory judgment to determine whether plaintiff, seven primary defendants, the United States or others were guilty of the negligence which caused the explosion. More specifically, plaintiff sought a judgment declaring

26. Howey v. Yellow Cab Co., 181 F.2d 967 (3d Cir. 1950), *aff'd sub nom.*, United States v. Yellow Cab Co., 340 U.S. 543, 71 Sup. Ct. 399, 95 L. Ed. 523 (1951).
27. 171 F.2d 377 (10th Cir. 1948).
28. 35 STAT. 65 (1908), as amended, 45 U.S.C.A. §§ 51 *et seq.* (1939).
29. 187 F.2d 925 (5th Cir. 1951).
30. 340 U.S. 543, 71 Sup. Ct. 399, 95 L. Ed. 523 (1951).
31. 111 F. Supp. 80 (D.N.J. 1953).

whether plaintiff, any of the claimants or defendants were entitled to judgments, contribution or indemnity from the United States or any other defendant.

Significantly, the court said a declaratory judgment action could be instituted against the United States to determine liability under the Tort Claims Act, despite strenuous objection by the Government that only actions for money damages are allowable. However, all was to no avail, since the district court dismissed the action because all the parties were not in the suit and could not be brought in due to the geographical limits of service of process and therefore the matter could not be concluded. Even if Congress extended the limits of service of process in these disaster cases, jurisdictional limitations might defeat the cause because of a lack of diversity.

Ryan Stevedoring Co., Inc. v. United States,[32] and *Terminal R.R. Ass'n of St. Louis v. United States*,[33] concerned claims for indemnity under the Tort Claims Act and involved the statute of limitations which was formerly one year, but is now two years.[34] The problem is when does the indemnity claim arise. Moore states:

> "If the defendant has a claim over against a third-party defendant — such as a claim for indemnity, contribution, etc. — the statute usually will not commence to run against the defendant (third-party plaintiff) and in favor of the third-party defendant until judgment has been entered against the defendant, or the defendant has paid the judgment."[35]

In the *Terminal* case, plaintiff was compelled to pay on April 2, 1948, a claim for an accident which happened on June 10, 1943, prior to the time stated in the Act, January 1, 1945, when claims first came under the Act. The civil action for indemnity against the United States was filed on February 16, 1949. The court held that in 1943 the United States had no obligation to the injured employee whom the Terminal Company discharged. In the *Ryan* case, the plaintiff sought indemnity against the United States for damage which occurred on August 11, 1944. The Court of Appeals of the Second Circuit reached the same result as that reached by the court in the *Terminal* case, but for a different reason. The court said a later accruing claim for indemnity because of an earlier tort would seem not freed from the bar of the statute of limitations, even though it apparently recognized that normally a claim for indemnity does not arise until payment by the person secondarily liable. The conclusion reached seems reasonable.

32. 175 F.2d 490 (2d Cir. 1949).
33. 182 F.2d 149 (8th Cir. 1950).
34. "(b) A tort claim against the United States shall be forever barred unless action is begun thereon within two years after such claim accrues, or within one year after the date of enactment of this amendatory sentence, whichever is later. . . ." 28 U.S.C.A. § 2401(b) (1950).
35. 3 MOORE, FEDERAL PRACTICE § 14.09 (2d ed. 1948).

Derivative rights allowed under the Tort Claims Act should not rise higher than the primary ones. Otherwise, the government may be seriously inconvenienced.

A person entitled to indemnity or contribution against the United States may find himself blocked if sued in the state courts, and no other grounds for removal exist. In *McCracken v. Brown & Root, Inc.*,[36] defendant was sued in the state court for dynamite blast damages and sought to remove to the district court on the ground that the United States was liable under the Tort Claims Act. Since jurisdiction is exclusive in the federal courts, the United States could not have been sued in the state courts. Since there could have been no jurisdiction in the state court, no right of removal existed.

A problem seemingly destined for ultimate decision by the Supreme Court of the United States involves the right of indemnity in favor of the United States as contrasted with the right against the Government. In the master-servant relationship it is axiomatic that a master who has had to respond in damages through application of the doctrine of respondeat superior is entitled to be indemnified by the servant. The Court of Appeals for the Ninth Circuit in *Gilman v. United States*,[37] has resolved the matter in favor of the erring employee. *Burks v. United States*,[37a] held otherwise.

In the *Gilman* case the employee urged that Section 2676 of the Judicial Code[38] revealed the intention of Congress to give the government employee certain benefits and such expressed intention negated any indemnity in such circumstances in favor of the United States. The quasi-contractual nature of indemnity, that the payment by the employer confers a benefit upon the employee which should be paid since otherwise he would be unjustly enriched, afforded the basis for the holding. The court stated that by virtue of Section 2676, when judgment was entered against the United States the employee was no longer primarily liable; in fact, his liability was completely extinguished. A payment then by the Government actually conferred no benefit on the employee to result in unjust enrichment. *United States v. Standard Oil Co.*,[39] which made it clear that the government-employee relationship was one controlled by federal rather than state law, and that there was no action in existence whereby the Government could seek reimbursement on account of injuries suffered by

36. 101 F. Supp. 180 (W.D. Ark. 1951).
37. 206 F.2d 846 (9th Cir. 1953), 7 VAND. L. REV. 286 (1954).
37a. 116 F. Supp. 337 (S.D. Tex. 1953).
38. "The judgment in an action under section 1346(b) of this title shall constitute 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." 28 U.S.C.A. § 2676 (1950).
39. 332 U.S. 301, 67 Sup. Ct. 1604, 91 L. Ed. 2067 (1947).

a soldier at the hands of a third person, was not felt to be controlling in view of the rationale adopted.

The dissent noted that insurance carriers may escape liability because many employees are derelict in the course of their employment while driving privately owned vehicles fully covered by liability insurance.

The decision in the *Burks* case was predicated on the theory that Section 2676 does not concern the Government's right to indemnity in such circumstances. The court pointed out that the Tort Claims Act does not require that an action be maintained against the Government alone and that a claimant may pursue the employee. Moore states:

> "We believe that the right of the United States to indemnity from its negligent employee is a proper case. The common law has long recognized the right of the master to be indemnified by the servant and it is no novelty to recognize that right when the United States is claiming against its employee."[40]

It is believed that the decision of the *Gilman* case is eminently correct. Prior to the Tort Claims Act the Congress enacted legislation for the relief of individuals injured through the negligence of Government employees. Throughout the history of this country no case has been found wherein the United States sought to recover the amount so expended from its employees! It must be concluded that there has never existed a right of indemnity in favor of the United States against its employees. The *Standard Oil* case makes it clear that federal law must govern this master-servant relationship. The Tort Claims Act does not create such a course of action and the courts should not do so in the absence of specific legislation.

ELECTION OF REMEDIES

The doctrine of election of remedies is applicable only where inconsistent remedies are pursued to enforce the same cause. On the contrary, where there are in existence two or more concurrent and consistent remedies, one or all may be prosecuted until full satisfaction is obtained.

Consideration of a common situation under the Tort Claims Act involving election of remedies starts with Sections 2672 and 2675, quoted here in part:

> "§ 2672. Administrative adjustment of claims of $1,000 or less
>
> "The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the

40. 3 MOORE, FEDERAL PRACTICE § 14.29 at 514 (2d ed. 1948).

United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the 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.

"Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award or determination shall be final and conclusive on all officers of the government, except when procured by means of fraud."

"§ 2675. Disposition by federal agency as prerequisite; evidence

"(a) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.

"(b) The claimant, however, may, upon fifteen days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

"(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages."[41]

In *Carson v. United States*,[42] claimant fell in a post office and filed a claim for administrative determination for $2,500. Since a claim for this amount could not be entertained by the agency, claimant reduced to $1,000, stating such action to be without prejudice. After the claim was rejected, a civil action was filed for $20,000. The court limited recovery to $1,000, the amount of the claim, and considered the reservation in the reduced claim to be of no effect.

A similar situation arose in *Corkle v. United States*,[43] wherein claimant's property was injured by a Post Office Department vehicle. A claim was filed with the department for $1,300, later reduced to $1,000. After administrative rejection of the claim, the court in an action stated plaintiff could not recover over $1,000.

In *Reardon v. United States*,[44] claim was filed with the Post Office Department for $450.00, and after refusal, suit was instituted for

41. 28 U.S.C.A. §§ 2672, 2675 (1950).
42. 88 F. Supp. 337 (N.D. Ill. 1949).
43. 94 F. Supp. 908 (E.D.S.C. 1951).
44. 87 F. Supp. 35 (D. Mass. 1949).

$750.00. The plaintiff was allowed to amend to seek only the amount of the original claim.

These cases should make clear that a claimant may choose to elect the administrative remedy provided under the Act to his prejudice. Since lawyers are forbidden to solicit business, a layman should be informed and made cognizant of the fact that any damage to property or injury to person at the hands of the Government should be discussed with a lawyer in order that he may be fully advised as to his rights under the Tort Claims Act. Otherwise, the filing of a claim and subsequent refusal may seriously limit the amount of recovery.

Furthermore, the mere existence of administrative rights given by another statute and not acted upon, would not constitute an election. In *United States v. Gaidys,* where the Military Claims Act[45] was involved, the court said:

> "And there is no sustainable basis for the argument that the Act should be narrowed through the process of interpretation by excluding from its reach claims of the kind presented here merely because the plaintiffs might have submitted their claims to administrative consideration and action pursuant to the Military Claims Act. To narrow the Tort Claims Act in that manner would not be in harmony with the Congressional purpose in enacting it."[46]

Where federal employees, military and civilian, have been injured by activities of the Federal Government, there has been much discussion in the cases of election of remedies, or, in reality, whether the federal employee was actually covered by the Act.

In *Feres v. United States,*[47] an injury to a military person suffered in line of duty was held not to be contemplated by the Tort Claims Act because of the system of benefits otherwise provided for compensation. However, in *Parr v. United States,*[48] the court said that a civilian employee of the War Department was covered by both the Tort Claims Act and Federal Employees' Compensation Act.[49] In contrast with the person in the military, where no right existed under the Tort Claims Act, the presentation of a monthly claim under the Compensation Act and the acceptance of payments was held to be an election of remedies and suit was precluded under the Tort Claims Act.

Wham v. United States,[50] concerned a plaintiff, a member of the Metropolitan Police Force of the District of Columbia, who was injured by a Treasury Department vehicle. There was in existence a

45. 42 Stat. 725 (1922), as amended, 31 U.S.C.A. §§ 223 *et seq.* (1927).
46. 194 F.2d 762, 764 (10th Cir. 1952).
47. 340 U.S. 135, 71 Sup. Ct. 153, 95 L. Ed. 152 (1950).
48. 172 F.2d 462 (10th Cir. 1949).
49. 39 Stat. 742 (1916), 5 U.S.C.A. §§ 751 *et seq.* (1949).
50. 180 F.2d 38 (D.C. Cir. 1950).

Police and Fireman's Relief Fund, supported by the United States. Against the contention that plaintiff must elect the court found that there were no inconsistent remedies to force an election.

Lewis v. United States,[51] involved a U. S. Park Police member who was allegedly shot by another member who was engaged with him in the course of duty in pursuing two fugitives. The court pointed out that employees covered by the Federal Employees' Compensation Act are expressly forbidden to sue the government for injuries received in the course of their duties.[52]

Although the question of coverage was not decided, the court pointed out the availability of the same fund as existed in the *Wham* case.

Sasse v. United States,[53] held that the amendatory act above precluded a civilian employee of the War Assets Administration from bringing an action under the Tort Claims Act.

The practical import then is that even though there might have been an election in the past, there is none now so far as both civilian and military personnel of the government are concerned when injured in the line of duty. This has been extended to the defendant parents of a U. S. Military Academy cadet who sued for damage for the death of the cadet sustained in course of military duty in *Archer v. United States*;[54] and to those seeking damages for the death of a federal prisoner in *Sigmon v. United States*.[55]

Canon v. United States,[56] distinguished the preceding cases, which followed the doctrine of *Johansen v. United States*,[57] and declared that a civilian employee at an army hospital who was negligently operated on for varicose veins was not required to resort to the Federal Employees' Compensation Act rather than the Tort Claims Act. To the same effect is *Dishman v. United States*,[58] involving a Veterans' Administration employee not injured in his employment. However,

51. 190 F.2d 22 (D.C. Cir. 1951).
52. "(b) The liability of the United States or any of its instrumentalities under sections 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel." 63 STAT. 854, 5 U.S.C.A. § 757(b) (Cum. Supp. 1950).
53. 201 F.2d 871 (7th Cir. 1953).
54. 112 F. Supp. 651 (S.D. Cal. 1953).
55. 110 F. Supp. 906 (W.D. Va. 1953).
56. 111 F. Supp. 162 (N.D. Cal. 1953).
57. 343 U.S. 427, 72 Sup. Ct. 849, 95 L. Ed. 1051 (1952).
58. 93 F. Supp. 567 (D. Md. 1950).

Pettis v. United States,[59] held that an army nurse with a service connected injury and entitled to veteran's benefits, who was later injured through the negligence of a veterans' hospital was precluded from suing under the Tort Claims Act. Similarly where there is a remedy available under the Suits in Admiralty Act, as was the case in *Abbattisa v. United States*,[60] an action under the Tort Claims Act was held to be precluded.

Fidelity-Phenix Fire Ins. Co. of N.Y. v. United States,[61] can well be the climax of this article. There property belonging to Air Force personnel was damaged by the crash of an Air Force bomber, such property then being on the base at a trailer camp maintained for military personnel. The insurance companies involved brought subrogated claims against the United States. The court said:

> "Suits against the Government by insurers to recover for the service-connected property losses of military personnel, are not authorized under the present statutory scheme."[62]

The plaintiffs were left without a remedy, and were advised that their recourse was to the Congress. Thus, the *compulsory* election of remedies enforced by the congressional scheme of compensation under the Military Personnel Claims Act of 1945,[63] resulted in the Government escaping a liability which it should justly bear.

Apparently, only in the field of election of administrative action or a suit under the Tort Claims Act does an election of remedies doctrine have some significance, and then only when a private individual is involved.

CONCLUSION

Most of the conclusions to be derived from this exposition have been presented as the cases were pertinent. Some few comments, however, may not be amiss as to their broad effect on administration of the Act.

Subrogation, indemnity and contribution have all been demonstrated to be workable concepts within the structure of the Act. However, the end result has been and will continue to be that all citizens of the United States do not receive identical treatment in tort cases against the Government. Thus, a right of contribution may exist in one state and not in another. On the rule of local law will depend whether or not a joint tortfeasor can pursue the United States. Although the Act was conceived with admirable purpose, this and like inequities which

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59. 108 F. Supp. 500 (N.D. Cal. 1952).
60. 95 F. Supp. 679 (D.N.J. 1951).
61. 111 F. Supp. 899 (N.D. Cal. 1953).
62. *Id.* at 906.
63. 59 STAT. 225 (1945), as amended, 31 U.S.C.A. §§ 222c, 222d, 223b (Supp. 1953).

tend to defeat that purpose should be removed by legislation. Admittedly this would be a difficult task, but one which should appeal to fair-minded people everywhere. To exclude the benefits of subrogation, indemnity or contribution to all would not be a suggested solution. However, a clause in the Act setting out in essence the rights and thereby allowing a federal body of law to emerge might be acceptable. This could be extended to the definition of the tort, since there exist differences in local law which might result in similar inequities in direct actions against the Government by the one injured.

Practically, as we have seen, where compensation is provided for the injured employee by the United States under another Act, there has resulted a compulsory election of remedies, with the result, in one case at least, that the Government has escaped full responsibility for its negligence. An examination anew of the multitude of acts covering compensation to Government employees could well be undertaken by the Congress to resolve such difficulties.