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Clarification of the Regional Graziers Duties under the Federal Tort Claims Act

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The segregation states may be able to bring negro schools up to a substantial equality with white schools in point of physical facilities, but the "intangibles" will defeat them.

J. L. HETTINGER.

CLARIFICATION OF THE REGIONAL GRAZIERS DUTIES UNDER
THE FEDERAL TORT CLAIMS ACT

The plaintiff was the lessee of certain property which lies adjacent to government land which is part of a grazing area supervised under the Taylor Grazing Act. The owner or lessor of such adjoining property called "base property"¹ is entitled in the normal course of administration of the Taylor Grazing Act to a grazing permit upon the government land adjoining the leased or owned land. The base property in this case had previously been leased to another party who had been issued a grazing permit. Upon the leasing of the land by the plaintiff, the Federal Grazier refused to cancel the outstanding permit to the plaintiff's predecessor, thus allowing the predecessor to remain in possession of the government land under color of right. Action was brought under the Federal Tort Claims Act. It was alleged that the government employee wrongfully permitted, aided, and directed the plaintiff's predecessor to use the land, and that the government employee wrongfully refused to cancel the outstanding permit. As a result the plaintiff was forced to buy additional feed for his livestock and was damaged in the amount of \$109,000.00. District Court sustained the defendant's motion to dismiss, and the plaintiff appealed. *Held*, that the complaint stated a cause of action. The judgment of the District Court was reversed and remanded. *Oman v. United States*, 179 F. (2d) 738 (10th Cir. 1949).

In 1946 a further inroad upon the Federal Government's immunity to suit was brought about by the Federal Tort Claims Act.² This Act granted the United States District Courts exclusive jurisdiction of civil actions on claims against the United States for the negligent or wrongful acts of the Government's employees while acting within the scope of their office or employment, under circumstances where the United States, if a private person, would be liable.³ This broad waiver of immunity was limited by

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1. Base property is defined as "property used for support of livestock for which a grazing privilege is sought and on the basis of which the extent of a license or permit is computed." 43 C.F.R. 1612(e).
 2. 28 U.S.C.A. secs. 1346(b), 2671-2680; 43 U.S.C.A. secs. 314-315q.
 3. "Subject to the provisions of chapter 171 of this title the District Courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission

several exceptions,⁴ one of which is as follows: "The provisions of this chapter and section 1346 (b) shall not apply to: (a) any claim based upon an act or omission to act 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 be abused."⁵ The immunity here retained is consistent with principles of non-liability of municipalities for acts of their servants which involve the exercise of this discretion.⁶ The criteria for distinguishing a ministerial function from a discretionary function remain (as far as can be ascertained) those used in other contexts.⁷ A duty is ministerial when "it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion."⁸ The duties of Government employees engaged in administering the federal grazing lands here involved are determined by the Federal Range Code for Grazing Districts.⁹ The cause of action is based upon the Grazier's refusal to cancel an old permit after notification that the controlling base property had been transferred. The pertinent section of the Code reads as follows: "A transferee of base property whether by agreement or operation of law, or testamentary disposition will entitle the transferee, if otherwise properly qualified, to all or such part of a license or permit as is based on the property transferred, and the original license or permit will be terminated or decreased by such transfer."¹⁰ A further provision states that licenses or permits which confer grazing privileges in excess of those properly allowable "will be cancelled" if cause be not shown why they should not be cancelled.¹¹ Cancellation is clearly a ministerial function and does not fall within the exception to the Federal Tort Claims Act.¹²

The Regional Grazier's failure to act has allowed a situation to materialize which interfered with the rights of the preference holder to his damage. In order to determine what rights accrue to a preference holder

of any employee of the government while acting within the scope of his office or employment, under the 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." 28 U.S.C.A. sec. 1346-2 (b).

4. 28 U.S.C.A. sec. 2680.

5. 28 U.S.C.A. sec. 2860.

6. *Harris v. District of Columbia*, 256 U.S. 650, 41 S.Ct. 610, 65 L. Ed. 1146 (1921).

7. *Roberts v. United States*, 176 U.S. 221, 20 S.Ct. 376, 44 L. Ed. 443 (1900). *Federal Tort Claims Act*, 56 *Yale Law Journal* 534 (1947).

8. *Rehmann v. Des Moines*, 204 Iowa 798, 215 N.W. 957, 55 A.L.R. 430 (1927).

9. The Federal Range Code for Grazing Districts 43 C.F.R. 161.

10. 43 C.F.R. 161.7 (a).

11. In case of failure . . . to show cause . . . the license or permit will be cancelled to the extent indicated in the notice." 43 C.F.R. 161.9(d).

12. It should be noticed that the issuance of permits by the Grazier is called discretionary. 43 C.F.R. 161.9(c). It would fall within the exception of the Federal Tort Claims Act previously mentioned. For an abuse of this discretionary power the permit seeker is offered procedural protection by the same section.

the legal history of preferences must be reviewed.

Early in the history of this country large areas of unappropriated government lands were freely used by stockmen. The Government condoned this practice and in fact recognized such use as creating an implied license.¹³ Although some rights were recognized between individuals, the licenses could be revoked at any time by the Government.¹⁴ These licenses are the historical forerunners of the permits now issued under the Taylor Grazing Act. The rights appurtenant to these permits are still being determined. In *Osborne v. United States*¹⁵ the court recognized that the terms of a permit are binding as between the Government and the permit holder and other permit seekers. In *Red Canyon Sheep Company v. Ickes*¹⁶ the United States Court of Appeals for the District of Columbia recognized that the preferences upon which permits are granted are the proper subjects of equitable protection. These preferences, it was said, did not fall within the classification of conventional grazing or vested rights, but as they had as their source an act of Congress and are of definite value to the persons possessing them, the court felt that they should be protected.¹⁷ To determine whether a cause of action is stated it is still necessary to decide whether or not the Grazier acted within the scope of his employment.

The phrase, scope of employment, has been called a "highly indefinite phrase" and "no more than a bare formula to cover the uncommanded acts of the servant for which it is found to be expedient to charge the master with liability."¹⁸ A more definite test states that if the acts of the agent may fairly and reasonably be incidental to the purposes of the employment or the natural, direct, or logical result of the purposes for which the agent was employed, the agent may then be within the scope of employment.¹⁹ The fact that the act was expressly forbidden does not preclude the liability of the principal though it may be an important fact in determining the liability.²⁰ The scope of the employment is a question of fact and, as the Court of Appeals pointed out, should be decided after a full hearing of the facts.

The avowed purpose of the Federal Range Code for Grazing Districts to define the stockgrowers' rights, to protect those rights by regulation

13. *Buford v. Houtz*, 133 U.S. 320, 10 S.Ct. 305, 33 L. Ed. 618 (1890); *Light v. United States*, 220 U.S. 523, 535; 31 S.Ct. 485, 487; 55 L. Ed. 570 (1911); *Steele v. United States* 113 U.S. 128, 130; 5 S.Ct. 396, 28 L.Ed. 952 (1865); *Omaechevarria v. Idaho* 246 U.S. 343, 352; 38 S.Ct. 323, 327; 62 L. Ed 763 (1918).

14. *Buford v. Houtz*, 133 U.S. 320, 10 S.Ct. 305, 33 L.Ed. 618 (1890).

15. 145 F.(2d) 892 (9th Cir. 1944).

16. 98 F.(2d) 308 (D.C. Cir. 1938).

17. "We rule that the valuable nature of the privilege to graze which arises in a licensee whose license will in the ordinary course of administration . . . ripen into a permit, makes the privilege a proper subject of equitable protection against an illegal act." *Red Canyon Sheep Co. v. Ickes*, 98 F.(2d) 308, 316 (D.C. Cir. 1938).

18. *Prosser, Torts*, 476 (1941).

19. *Mechem Outlines Agency*, 3d ed. sec. 531.

20. *Mechem on Agency*, 2d ed. Vol. II, sec. 1879. *Restatement of Agency*, Vol. I, sec. 22.8.

against interference,²¹ and to promote the most advantageous use of the property.²² The recognition by the courts of grazing preferences as property rights, different from conventional rights, but rights which nevertheless may be protected not only by injunction but by legal actions is an important step toward the fulfillment of the purpose of the Act.

RICHARD S. DUMBRILL.

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21. United States v. Achabal, 34 F. Supp. 1 (D. Nev. 1940). Reversed on other grounds 122 F. (2d) 791 (9th Cir. 1941).
22. 43 C.F.R. 161.1 (a).