

sisting in the face of an imminent danger, where a man of ordinary prudence would not) in the position of assuming the risk—a position more favorable to defendant (plaintiff in error) than that of contributory negligence.

It is further argued that Horton's own conduct in using the Buckner gauge without the guard-glass, when he could have cut this off, and used the gauge-cocks, said to be an entirely safe instrumentality, was unquestionably the proximate cause of his injury. But there was evidence to show that the gauge-cocks themselves were not a safe instrumentality, because of their liability to become clogged. Hence, at the utmost, there was here no more than a question for the jury.

Other points are raised, but they are quite unsubstantial, and require no particular mention.

*Judgment affirmed.*

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## BASSO *v.* UNITED STATES.

### APPEAL FROM THE COURT OF CLAIMS.

No. 143. Argued January 6, 1916.—Decided January 17, 1916.

The rule that the Court of Claims has not jurisdiction of actions founded on tort is based on a policy imposed by necessity that governments are not liable for unauthorized wrongs inflicted on the citizens by their officers, even though occurring while engaged in discharge of official duties. *Schillinger v. United States*, 155 U. S. 163. Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officer of the Government. *Schillinger v. United States*, 155 U. S. 163.

Neither *Dooley v. United States*, 182 U. S. 222, nor *United States v. Lynah*, 188 U. S. 445, sustaining jurisdiction of the Court of Claims in cases respectively to recover sums wrongfully exacted for taxes and for compensation for property taken for public purposes, over-

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rules, or is antagonistic to, *Schillinger v. United States*, 155 U. S. 163, which is subsisting authority of this court that the Court of Claims has no jurisdiction of an action for a claim for private injury to an individual through the tortious act of an officer of the United States. 49 Ct. Cl. 702, affirmed.

THE facts, which involve the jurisdiction of the Court of Claims in cases founded on a tort of an officer of the United States, are stated in the opinion.

*Mr. Henry M. Ward* for appellant:

The Court of Claims has jurisdiction over a claim *ex delicto*, founded upon the Constitution of the United States. *Dooley v. United States*, 182 U. S. 222; *United States v. Lynah*, 188 U. S. 445.

In *United States v. Welch*, 217 U. S. 333; *United States v. Grizzard*, 219 U. S. 180; *United States v. Emery*, 237 U. S. 28, the jurisdiction of the Court of Claims has been sustained in actions "sounding in tort" but founded upon a law of Congress or upon an implied contract.

See also *Christie Street Company v. United States*, 136 Fed. Rep. 326; *United States v. Hyams*, 146 Fed. Rep. 15; *Hill v. United States*, 149 U. S. 593.

The *Schillinger Case* has been limited, if not overruled, by the more recent decisions of this court, cited above, and consequently the proper construction of the Tucker Act is that claims founded upon the Constitution or any law of the United States are now within the jurisdiction of the Court of Claims whether based upon contract or tort.

Irrespective of the authority of the recent decisions of this court this contention is supported by the well-settled rules of statutory construction.

It was manifestly the intention of Congress in enacting the Tucker Act to give the Court of Claims jurisdiction of cases sounding in tort but founded upon the Constitution. Jurisdiction of claims upon contract the court already

had, and the words founded upon the Constitution are meaningless unless they apply to torts. See Act of February 24, 1855, 10 Stat. 612; Act of July 4, 1864, 13 Stat. 381; Act of March 3, 1887, known as the Tucker Act, 24 Stat. 505; and see § 1059, Rev. Stat.

This construction of the Tucker Act, for which appellant contends, gives effect to its language but does not extend the jurisdiction of the Court of Claims to embrace all torts committed by agents of the Government. *Peabody v. United States*, 291 U. S. 530, distinguished.

Ordinary torts are clearly omitted from the grant of jurisdiction, but where officers of the Government by a misconstruction of the law deprive a man of his liberty in violation of his constitutional rights, his claim is founded on the Constitution and he has the same right of redress as those whose money was taken in payment of customs duties under the same misconstruction of the law.

*Mr. Assistant Attorney General Huston Thompson for the United States.*

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appellant is a Spanish subject who resided, at the time his alleged cause of action accrued and at the time his petition was filed in the Court of Claims, in the Island of Porto Rico.

Porto Rico was ceded to the United States by the Treaty of Paris, ratifications of which were exchanged April 11, 1899. The Island was occupied by the military forces of the United States prior to January 1, 1899, and February 1, 1899, the President of the United States by order promulgated the "Amended Customs Tariff and Regulations for Ports in Porto Rico," which fixed and provided for the collection of duties upon all articles imported into

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Porto Rico. And duties were collected thereafter in accordance with such tariff and the amendments thereto made from time to time until May 1, 1900.

Certain officers of the army were designated to act and did act as collectors of customs under such tariff at the several ports of entry in Porto Rico and enforced such tariff upon merchandise brought into Porto Rico from the United States and from foreign countries.

Under authority of general order No. 88 the general commanding in the Island established a provisional court of the United States for the Department of Porto Rico.

On or about July 13, 1899, by information filed by the prosecuting officer of the provisional court, appellant was charged before that court with the crime of having imported from the United States into Porto Rico certain merchandise without having made entry of the same in the custom house and without having paid duty thereon. He was arraigned, pleaded not guilty, and the case was set for trial.

At the trial he entered a plea that §§ 2865 and 3082 of the Revised Statutes of the United States were without force or effect in Porto Rico, that the latter was part of the United States and that there was no warrant in law for imposing duties on goods brought from the United States into the Island.

The defenses were not allowed, he was found guilty, sentenced to imprisonment and was imprisoned for twenty-seven days.

He alleged the foregoing facts in his petition and that he suffered damages thereby in the sum of \$10,000, \$7,500 general and \$2,500 special damages. That he is advised by counsel that the act for which he was accused and condemned did not then constitute a crime; that the said sections of the Revised Statutes of the United States under which the provisional court claimed authority to act were not in force in Porto Rico and the court was

wholly without jurisdiction in the premises and its sentence was null and void, and that by reason of such accusation, trial, conviction, sentence and imprisonment he was deprived of his liberty without due process of law in violation of the Constitution of the United States.

Judgment was prayed for the sum of \$10,000.

The United States filed a general traverse of the petition but subsequently moved to dismiss upon the ground that the court had no jurisdiction to consider it, it presenting "an action for damages in a case sounding in tort."

The motion was sustained and judgment entered dismissing the petition for want of jurisdiction. This appeal was then taken.

Appellant concedes that "the cause of action not merely 'sounds in tort' but is based wholly upon the tortious actions of the agents of the United States." He, however, contends that the Court of Claims has jurisdiction under the Tucker Act over claims *ex delicto* founded upon the Constitution of the United States. And, this, he further contends, is supported by the recent decisions of this court, and relies especially upon *Dooley v. United States*, 182 U. S. 222.

But that case did not overrule *Schillinger v. United States*, 155 U. S. 163, which, counsel says, holds directly contrary to his contention and that he has not the ingenuity to suggest how the court can now decide the case at bar in appellant's favor without at least by implication overruling the *Schillinger Case*. We are not disposed to overrule the case, either directly or by implication. The court found nothing in it antagonistic to the reasoning and conclusion reached in the *Dooley Case*.

In *United States v. Lynah*, 188 U. S. 445, the *Schillinger Case* was treated as subsisting authority, and Mr. Justice Brown, who wrote the opinion in the *Dooley Case*, in his concurring opinion in the *Lynah Case*, considered it as correctly declaring the law.

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The *Dooley Case* and cases subsequent to it which are relied upon by appellant concerned the exaction of duties or taxes by the United States or its officers or property taken by the Government for public purposes.<sup>1</sup> In such cases jurisdiction in the Court of Claims for the recovery of the duties and taxes or for the value of the property taken was declared.

In the case at bar (assuming as true all that is charged) there was a wrong inflicted, if a wrong can be said to have been inflicted by the sentence of a court legally constituted after judgment upon issues openly framed by the opposing parties both of fact and the applicable law, whether that law was §§ 2865 and 3082 of the Revised Statutes or the Constitution of the United States. But conceding that a wrong was inflicted through these judicial forms, the case nevertheless is of different character from the *Dooley Case*, as was also the *Schillinger Case*. The latter case passed upon the jurisdiction of the Court of Claims in actions founded on tort and declared the general principle to be, based on a policy imposed by necessity, that governments are not liable (155 U. S., p. 167), "for unauthorized wrongs inflicted on the citizen by their officers, though occurring while engaged in the discharge of official duties." And it was further said (p. 168): "Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on wrongful proceedings of an officer of the government." *Gibbons v. United States*, 8 Wall. 269, 275; *Morgan v. United States*, 14 Wall. 531, 534.

The *Schillinger Case* was cited in the *New Orleans-Belize Royal Mail v. United States*, ante, p. 202, in rejection of a contention that the United States was liable for services imposed by their officers outside of a contract

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<sup>1</sup> *United States v. Welch*, 217 U. S. 333; *United States v. Grizzard*, 219 U. S. 180; *United States v. Emery*, 237 U. S. 28.

with the Royal Mail Company, in the performance of which the vessel owned by the company was damaged.

We repeat, therefore, that the *Schillinger Case* being subsisting authority, and appellant conceding that if such be its value it is controlling, further discussion is unnecessary.

*Judgment affirmed.*

MR. JUSTICE McREYNOLDS took no part in the consideration and decision of this case.

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WHITE *v.* UNITED STATES.

FORD *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 153, 154. Argued January 7, 1915.—Decided January 17, 1916.

The act of March 4, 1913, c. 148, 37 Stat. 891, granting officers of the Navy, who had been advanced in rank, the pay and allowances of the higher rank, applies only to officers on the active list and does not apply to officers on the retired list who were assigned for active service after their retirement.

In construing a statute the court will regard it as more rational to assume that Congress was dealing with present affairs than that it was reopening finished transactions.

The general rule of statutes relating to duty and pay of naval officers is found in Rev. Stat., § 1462, providing that no officer on the retired list shall be employed in active duty except in time of war.

49Ct. Cl. 702, affirmed.

THE facts, which involve the construction of various statutes of the United States relating to pay of retired naval officers while on active service, are stated in the opinion.

*Mr. Frederick A. Fenning*, with whom *Mr. Lloyd*