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No. 13722

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF ARIZONA, A PUBLIC BODY; MAJOR GEN. A. M. TUTHILL, THE ADJUTANT GENERAL, CONSTITUTING THE ARIZONA NATIONAL GUARD; AND THOMAS L. KIMBALL, DIRECTOR, AND DR. W. J. RICHARDS, FRED FAVER AND JACK MANTLE, MEMBERS OF AND CONSTITUTING THE ARIZONA GAME AND FISH COMMISSION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES

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STATE OF ARIZONA, A PUBLIC BODY; MAJOR GEN. A. M. TUTHILL, THE ADJUTANT GENERAL, CONSTITUTING THE ARIZONA NATIONAL GUARD; AND THOMAS L. KIMBALL, DIRECTOR, AND DR. W. J. RICHARDS, FRED FAVER AND JACK MANTLE, MEMBERS OF AND CONSTITUTING THE ARIZONA GAME AND FISH COMMISSION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES

STATEMENT

This is an appeal from a judgment dismissing a third-party complaint filed by the United States against the State of Arizona and certain of its agencies and officials, appellees here.

On December 12, 1949, Roderick J. Krause, a minor, and his father, Joseph L. Krause, filed suit under the Federal Tort Claims Act against the United States, the appellant here (R. 4). Their complaint alleged that Roderick had been injured on April 2, 1949, as a

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result of an explosion of a bazooka shell on the Fort Huachuca Reservation in Arizona (R. 4).

The United States moved before answering for leave to make the State of Arizona and certain of its agencies and their officials, appellees here, parties to the action and to serve upon them a third-party complaint. Pursuant to an order granting this motion, the United States served its third-party complaint, alleging that more than a month before the shell exploded the Reservation on which Roderick was injured had been deeded over to the State of Arizona, and that prior to the time of his injury "the State of Arizona, through its agencies the Arizona Game and Fish Commission and the Arizona National Guard took possession of said Reservation and was in full possession and control at [that] time * * *" (R. 6). The third-party complaint, further asserting that the Krause suit against the United States resulted from "acts and omissions" of "agents of the State of Arizona and its agencies [in] fail[ing] to take proper care for the protection of said Roderick J. Krause, while on said premises by its permission," demanded judgment against appellees for "indemnity and/or contribution" so as to "indemnify and hold harmless the United States of America for any judgment rendered" against it in favor of the Krauses (R. 6, 7).

Appellees moved to dismiss the third-party complaint on the ground that the district court lacked jurisdiction (R. 8). This motion was supported by a memorandum which argued that the Arizona Legislature had prescribed certain conditions upon which suit might be brought against the State, that the

United States had not complied with those conditions, and that the district court therefore lacked jurisdiction. Appellees also filed an answer denying generally the essential allegations of the third-party complaint (R. 9).

The district court tried only the Krause action against the United States. On December 6, 1951, the court awarded judgment to Roderick Krause and to his father. An appeal by the United States from that judgment was dismissed by this Court on June 2, 1952, for failure to comply with the docketing requirements of Rule 73 (g) of the Federal Rules of Civil Procedure. 197 F. 2d 329.

Four months later, on October 6, 1952, the district court granted appellees' motion to dismiss the third-party complaint and ordered the third-party proceedings dismissed without prejudice as to appellees. The district court wrote no opinion. Its minute entry of October 6 merely contains a formal recital, granting the motion to dismiss and ordering the dismissal (R. 11).[1]

QUESTIONS PRESENTED

1. Whether, in a Federal Tort Claims Act suit, the district court has jurisdiction over a State impleaded as a third-party defendant even though Article III

[1] We are informed that at the hearing of the motion to dismiss, at which no court reporter was present, the court stated to counsel that it had no jurisdiction because (1) jurisdiction of controversies between the United States and a State is vested by the Constitution in the Supreme Court and (2) the United States had not complied with the conditions prescribed by Arizona statute for bringing suit against that State.

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of the Federal Constitution vests original jurisdiction in the Supreme Court over cases in which a State is a party.

2. If the first question is answered in the affirmative, whether the United States, in order to implead the State as a third-party defendant in a Federal Tort Claims Act suit, must comply with the conditions prescribed by the State in waiving its immunity from suit.

CONSTITUTION AND STATUTES INVOLVED

1. Article III, Section 2, Clause 2, of the United States Constitution provides in pertinent part:

> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction.

2. 28 U. S. C. 1251 (b) provides in pertinent part:

> The Supreme Court shall have original but not exclusive jurisdiction of:
>
> * * * * *
>
> (2) All controversies between the United States and a State.

3. 28 U. S. C. 1345 provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

4. 28 U. S. C. 1346 (b)—part of the Federal Tort Claims Act—provides:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, 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.

ARGUMENT

This case does not present the question as to whether third-party practice is available in litigation under the Federal Tort Claims Act. Any doubts concerning this question were put completely to rest by the United States Supreme Court two years ago in *United States* v. *Yellow Cab Co.*, 340 U. S. 543. There the Court, pointing out that "the Act expressly makes the Federal Rules of Civil Procedure applicable and Rule 14 provides for third-party practice," concluded that third-party practice may be invoked by, as well as used against, the United States in a Federal Tort Claims Act suit. 340 U. S. 543, 553. To make it doubly clear that the Act must be construed to allow the United States the benefits of third-party practice, the *Yellow Cab* decision expressly notes that where "an injured party recover[s] judgment against

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the Government" under the Act, the United States "should be able to enforce" its rights against a third party "by impleading" that third party "as a third-party defendant." 340 U. S. 543, 551–552. Just as the United States may be impleaded under the Act as a third-party defendant (*Newsum* v. *Pennsylvania Railroad,* 97 F. Supp. 500), so may the United States, where suit is brought against it under the Federal Tort Claims Act, institute third-party proceedings against another defendant in accordance with the third-party practice provisions of Rule 14. *Englehart* v. *United States,* 69 *F. Supp.* 451, 455 (D. C. Md.); *DiBenedictis* v. *United States,* 103 F. Supp. 462 (D. C. Pa.); see also *United States* v. *Yellow Cab Co.,* 340 U. S. 543, 552, 553.

Notwithstanding this availability to the United States of third-party practice in Federal Tort Claims Act suits, the court below refused to allow the United States to prosecute its third-party claim against Arizona.[2] Underlying this refusal apparently were two contentions: (1) that Arizona, as a sovereign state, is in a preferred position and immune from third-party proceedings in a district court because the Constitution vests exclusive jurisdiction in the Supreme Court over controversies between the United States and a State; and (2) that the third-party complaint does not state a cause of action because it fails to

[2] Naming not only Arizona itself but several of the State's officials as third-party defendants does not alter the fact that the third-party suit is one against the State. *Great Northern Ins. Co.* v. *Read,* 322 U. S. 47, 50; *Ford Co.* v. *Dept. of Treasury,* 323 U. S. 459; *Mine Safety Co.* v. *Forrestal,* 326 U. S. 371.

allege compliance by the United States with the conditions prescribed by the Arizona Legislature for bringing suit against that State. It is to these two contentions we now turn.

I

The third-party proceedings do not fall within the exclusive jurisdiction of the Supreme Court

The failure of the court below to recognize that there is no constitutional bar to its exercise of jurisdiction over the third-party claim against the State clearly constituted reversible error.

It is of course true that Article III, Section 2 of the Federal Constitution (*supra,* p. 4) grants original jurisdiction to the Supreme Court in cases "in which a State shall be Party." And it is also true that this grant has been interpreted to include suits by the United States against a State. *United States* v. *Texas,* 143 U. S. 621; see *United States* v. *West Virginia,* 295 U. S. 463, 470. But it is well settled that this grant of *original* jurisdiction by Article III does not by itself confer *exclusive* jurisdiction on the Supreme Court over cases to which States are parties. *United States* v. *California,* 297 U. S. 175; *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 464; *Case* v. *Bowles,* 327 U. S. 92, 97.

In the *California* case, instituted as a suit by the United States against California in a district court, the State's contention that the Supreme Court alone had jurisdiction over suits between the United States and a State was flatly rejected. The Supreme Court

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found nothing in the Constitution which prohibits Congress from conferring "on inferior courts concurrent original jurisdiction of such suits." 297 U. S. 175, 187. Again, in the *Georgia* case, the Supreme Court observed that the grant of original jurisdiction by Article III "does not grant exclusive jurisdiction" to the Supreme Court. *Georgia* v. *Pennsylvania Railroad,* 324 U. S. 439, 464.

Case v. *Bowles, supra,* also arose out of a suit by the United States against the State of Washington in a district court. The State there raised the same contention—that the Supreme Court had exclusive jurisdiction under Article III, that the district court lacked power to try the case, and that "*United States* v. *California* should be re-examined" by the Supreme Court. Petitioner's Brief, No. 261, Oct. Term, 1945, p. 37. But the Court, once again striking down the contention and adhering to its earlier decisions, declared it "well settled that despite Article III, Congress can give the district courts jurisdiction to try controversies between a State and the United States." *Case* v. *Bowles,* 327 U. S. 92, 97.

The Constitution, therefore, has never been understood to deprive the district courts of jurisdiction over suits instituted by the United States against a State.[3]

[3] For cases which, in addition to those cited above, show that the lower courts may exercise jurisdiction over controversies by the United States against a State, see *Hunt* v. *United States,* 278 U. S. 96 (arose as suit in a district court by the United States against Arizona officials—in effect a suit against Arizona); *Utah* v. *United States,* 284 U. S. 534 (arose as suit in a district court between Utah and United States); *State of Minnesota* v. *United States,* 125 F. 2d 636 (C. A. 8) (arose as suit in a district court between Minnesota and United States); *United States* v. *Ladley,* 51 F. 2d 756, 757 (D. C. Idaho) (where Idaho intervened and the district court held that it does not "lose jurisdiction * * * under Section 2 of article 3 of the Constitution * * * because of the state becoming a party"); see also *Ames* v. *Kansas,* 111 U. S. 449, 468–469, ruling that clause 2 of Section 2 does not grant exclusive jurisdiction in the cases enumerated, including those to which a State is a party; *United States* v. *Ingram,* 99 F. Supp. 465 (D. C. Ark.) (suit by United States against State Highway Commission).

Nor does the Constitution make the Supreme Court the exclusive forum for suits filed by an individual State against the United States. A State may therefore institute such a suit in the lower courts. *United States* v. *Louisiana,* 123 U. S. 32. And the district courts have regularly exercised jurisdiction under the Federal Tort Claims Act itself over suits instituted by a State against the United States. *United States* v. *State Road Department of Florida,* 189 F. 2d 591 (C. A. 5), certiorari denied, 342 U. S. 903; *California* v. *United States,* 91 F. Supp. 722 (D. C. Cal.).

Indeed, the only possible support for ever asserting that the Supreme Court had exclusive jurisdiction over suits between a State and the United States was derived not from the Constitution but from the provisions of Section 233 of the former Judicial Code (old 28 U. S. C. 341). This Section, originally part of the Act of September 24, 1789 (1 Stat. 80) and re-enacted as Section 233 of the March 3, 1911, Judicial Code (36 Stat. 1156), declared that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party." But Section 233 was directly repealed by the 1948 revision of Title 28 of the United States Code (68 Stat. 869, 996). And Section 233 was replaced in

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the 1948 revision by Section 1251 of Title 28 U. S. C., which expressly provides that "the Supreme Court shall have original but not exclusive jurisdiction of: * * * (2) All controversies between the United States and a State." *Supra,* p. 4. The Revisers Notes to 28 U. S. C. 1251 recognize that "the original jurisdiction conferred on the Supreme Court by Article III, Section 2 of the Constitution is not exclusive by virtue of that provision alone" and that "Congress may provide for or deny exclusiveness." There can, of course, be no clearer statement of the intent of Congress to deny such exclusiveness than its declaration in new 28 U. S. C. 1251 that the Supreme Court's jurisdiction shall be "original but not exclusive."

28 U. S. C. 1345, *supra,* p. 4, further effectuates this intent with respect to third-party proceedings instituted, as in the instant case, by the United States, by specifically conferring on the district courts "original jurisdiction of all civil actions, suits or proceedings" commenced by the United States. Moreover, apart from the jurisdiction conferred by Section 1345, there can be no doubt, in light of the *Yellow Cab* case, *supra,* p. 5, of the district court's jurisdiction under the Federal Tort Claims Act over the instant third-party proceedings. To hold otherwise would be to impute to Congress an intent that actions by the United States against States, to recover indemnity or contribution otherwise due, would have to be brought as original actions in the Supreme Court with the attendant burdening of the docket of that Court with cases which more appropriately could be determined in a district court. Cf. *Massachusetts* v. *Missouri,* 308 U. S. 1, 19.

II

The United States does not have to comply with conditions prescribed by Arizona in waiving its immunitty from suit

Nor is there any merit to appellees' argument that the district court lacked jurisdiction because "the only provision upon which [the United States] could maintain an action is under provisions contained in Section 27–101 [Arizona Code Ann., 1939], and there is no allegation in the third-party complaint that these provisions have been followed as required by law."[4] We show below that our constitutional plan of government prohibits conditioning the inherent right of the United States to sue Arizona on compliance with the conditions of Section 27–101. We also demonstrate that the evolution of the provisions of Section 27–101 and its related provisions shows that the Arizona statute was not intended to apply to the United States.

A. The conditions imposed by Arizona in waiving its sovereign immunity from suit apply to those who could not sue the State absent that waiver and are therefore inapplicable to the United States

A State is of course immune from suit by its own citizens, by citizens of another State, and by a foreign state, all of whom must obtain the consent of the State prior to bringing suit. *Hans* v. *Louisiana,* 134 U. S. 1; *Monaco* v. *Mississippi,* 292 U. S. 313, 329; United States Constitution, 11th Amendment. If the State chooses not to grant its consent as to such

[4] Memorandum in support of motion to dismiss, filed by appellees in the district court.

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parties, its immunity fully protects it from suit by them. If it does grant consent, there is no doubt that it can make its grant contingent on compliance with any conditions it sees fit. *Smith* v. *Reeves,* 178 U. S. 436, 441–442. Whenever a "state consents to be sued * * * the state has the right to couple with its consent to be sued" any terms and conditions "it prescribes." 25 Ruling Case Law 416, relied on in *State of Arizona* v. *Miser,* 50 Ariz. 244, 72 P. 2d 408, 413. That is the purpose of Section 27–101 of the Arizona Code. It provides that "persons having claims on Contract or for negligence against the State, which have been disallowed, may on the terms herein contained, bring action thereon against the State, and prosecute the same to final judgments" (Arizona Code Ann., 1939 ed.). Before bringing suit, therefore, the claim must first be disallowed. *State of Arizona* v. *Angle,* 56 Ariz. 46, 104 P. 2d 172. There must also be compliance with the other "terms" before bringing suit, *e. g.,* the action must be filed within two years after accrual. Section 27–102, Arizona Code Ann., 1939 ed. And, as the Arizona Supreme Court has recognized, "since a sovereign state may be sued only with its consent, the provision of the statute prescribing the course to be followed in prosecuting an action against it constitutes a condition precedent to the right to sue." *State of Arizona* v. *Miser,* 50 Ariz. 244, 256, 72 P. 2d 408, 413. It follows that all those who need the consent of the State before suing it must comply with those conditions precedent.

But only those who need such consent must comply.

Since the conditions precedent are imposed on the basis of the State's right to grant consent to suit on any terms it sees fit, the conditions cannot apply where the State is suable without granting its consent. In the latter situation it is obvious that the State's waiver of immunity from suit and its simultaneous imposition of conditions precedent can have no application. A statute which waives the State's immunity in favor of those who need the State's consent in order to sue it and which imposes conditions on the privilege to sue conferred by the statute cannot abridge the unqualified right of parties empowered to sue the State without its consent.

The United States is such a party. The absolute right of the United States to sue an individual State without the latter's consent is an essential element of our federal system of government. This right of the United States to sue a State "albeit without [its] consent * * * is inherent in the constitutional plan" and necessary to avoid endangering "the permanence of the Union." *Monaco* v. *Mississippi,* 292 U. S. 313, 329. Accordingly, the United States, in suits instituted by it against the individual States of the Union, has never sought their consent. See *e. g. United States* v. *Texas,* 339 U. S. 707, 709–710 (overruling a motion that Texas' refusal to consent to suit deprived the court of jurisdiction); *United States* v. *Louisiana,* 339 U. S. 699, 701–702 (rejecting a similar motion by Louisiana and refusing to reconsider *United States* v. *Texas,* 143 U. S. 621, 644, 645, where the Court, more than sixty years ago, had held that

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the United States could sue a State without the latter's consent); *United States* v. *California,* 332 U. S. 19; *Case* v. *Bowles,* 327 U. S. 92; *United States* v. *California,* 297 U. S. 175; *United States* v. *Oregon,* 295 U. S. 1; *United States* v. *Utah,* 283 U. S. 64; *Hunt* v. *United States,* 278 U. S. 96;[5] *United States* v. *Michigan,* 190 U. S. 379; *United States* v. *North Carolina,* 136 U. S. 211; *California* v. *United States,* 91 F. Supp. 722, 723 (D. C. Cal.).

Similarly, here, the United States does not need the consent of Arizona to maintain the present proceeding against it and therefore may ignore the statutory conditions precedent imposed by Section 27-101. Judge Yankwich, dealing recently with a similar failure of the United States to comply with the requirements of California law "relating to the manner of presenting claims prior to instituting actions" against a State subdivision, ruled: "Conceding that so far as private persons are concerned, the condition precedent prescribed by the Political Code, the presentation of a claim is the *sine qua non* of recovery, the requirement is not binding on the Govern-

[5] So firmly established is the right of the United States to sue a State without the latter's consent that the brief for the United States in the Supreme Court in the *Hunt* case dismissed Arizona's contention "that the suit was one against the State of Arizona, which had not consented to be sued," with the comment that "the contention is so devoid of merit as not to require argument." No. 44, Oct. T., 1926, Supreme Court, p. 171. The opinion in the *Hunt* case, ignoring the contention—identical in all respects to Arizona's contention in the instant case—shows that the Court agreed that the contention was too devoid of merit to warrant discussion.

ment." *United States* v. *San Diego County,* 75 F. Supp. 619, 620.[6]

This ruling merely reflects the well established doctrine that the United States enjoys a sovereign immunity from the defense of state conditions precedent, state statutes of limitations, and the common law principles of laches. *United States* v. *Thompson,* 98 U. S. 486; *United States* v. *Nashville Ry. Co.,* 118 U. S. 120, 125; *United States* v. *Insley,* 130 U. S. 263; *Stanley* v. *Schwalby,* 147 U. S. 508, 514–515; *Ches. & Del. Canal Co.* v. *United States,* 250 U. S. 123; *Davis v. Corona Coal Co.,* 265 U. S. 219; *Phillips* v. *Commissioner,* 283 U. S. 589, 602; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 132; *Board of Comm'rs,* v. *United States,* 308 U. S. 343, 351; *United States* v. *Summerlin,* 310 U. S. 414.

This Court itself has applied the rule in cases presenting the same question raised by appellees here. In *M'Knight* v. *United States,* 130 Fed. 659, the defendant insisted that the giving of notice, required by Montana statute, was a condition precedent to the right of the United States to maintain the action.

[6] Cf. H. R. 1743, 83d Cong., 1st sess., introduced into the House of Representatives on January 14, 1953, and providing "That no agency or officer of the United States shall commence or maintain on behalf of the United States a suit or proceeding against a State in any court without the consent of such State, unless such suit or proceeding has been theretofore specifically authorized by concurrent resolution of the Congress." This bill has not been reported out by the House Committee on the Judiciary. See 99 Cong. Rec. 39 (prelim. print) and House Committee on the Judiciary Legislative Calendar (April 17, 1953), p. 43.

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In summarily rejecting this contention, this Court observed that

> A sufficient answer to this suggestion is that this action is brought by the United States and that its rights in a governmental matter are not affected by state enactments. * * * We need not therefore inquire whether or not Section 906 of the Montana Code * * * could operate to defeat an action for the conversion of such property, where no notice or demand prior to bringing of suit is alleged or shown. (130 Fed. 659, 665.)

Again, in *Pond* v. *United States,* 111 Fed. 989, this Court refused to apply to the United States the requirements of a California statute under which claims, prior to institution of suit, were required to be presented to the executor if an action was pending against the decedent at the time of his death. The California statutory provision that failure to prove such presentation precluded recovery was accordingly held to be no bar to recovery by the United States against the executor. 111 Fed. 989, 995. A similar holding, we submit, is called for here where Arizona relies on the failure of the United States to prove compliance with Section 27–101 of the State Code.

B. The history and language of section 27–101 and its related provisions show that the statute does not apply to suits in federal courts

Section 27–101, in authorizing suits against Arizona, governs only proceedings in the state courts of Arizona and cannot therefore affect the instant proceedings. This is made clear not only by the lack of

power of Arizona to control proceedings in the federal district courts but by the express terms of the statutes out of which Section 27–101 evolved.

Arizona was admitted "into the Union on an equal footing with the other States" on February 14, 1912. 37 Stat. 1729. A few months later, the Arizona Legislature enacted the original statutory provision allowing suit against Arizona, specifically providing that suits against the state may be brought "in any of the courts of this state of competent jurisdiction." Laws of Arizona (1912), Ch. 59, Section 1, p. 283. Another Section of the same enactment provided that on demand of the Attorney General [of Arizona], the "place of trial of any such suit shall be changed to the county of Maricopa." Laws of Arizona (1912), Ch. 59, Section 4, p. 284.

The 1913 compilation of Arizona laws re-enacted the requirement that suits against Arizona were to be brought in the state courts and again authorized the Attorney General to compel the transfer of suits to Maricopa. Secs. 1791, 1794, Rev. Stat. Arizona (1913). In 1928, Struckmeyer's Revised Code of Arizona Laws was published. The "aim" of the Revision was "to reduce * * * in language" the provisions of the existing laws. Revised Code of Arizona (1928), vol. 1, p. vi. With this aim in mind and since it was apparent that the statute permitting suit against Arizona was intended to allow suits only in state courts, the language stating that such suits were to be brought in state courts was eliminated as

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unnecessary and the statute abbreviated to its present form with no specific reference to the state courts. See Section 4379, Revised Code of Arizona (1928), which is identical with the present Section 27–101 in the Arizona Code Ann. of 1939, *supra*. And, underscoring the control that the State had over these proceedings because they were confined to state courts, the provision authorizing the Attorney General to shift any of the proceedings to Maricopa County was re-enacted in the 1928 Revision as Section 4382 and also carried over into the 1939 Arizona Code Ann. as Section 27–104.

Arizona's suggestion that Section 27–101 applies to the instant proceeding in the federal district court is necessarily based on the assumption that Section 27–101 was intended to allow suits against Arizona to proceed in the federal courts as well as the state courts. We submit, however, that the language and history of Sections 27–101 and 27–104, as outlined above, flatly repudiate that assumption.[7] Section 27–101, being applicable only to Arizona state court proceedings, can therefore have no bearing on the instant district court proceeding.

CONCLUSION

For the reasons stated it is respectfully submitted that the district court's order granting the motion

[7] Our survey of the reported cases arising under Section 27–101 disclosed that every such action was brought in the Arizona state courts.

to dismiss the third-party complaint and dismissing the third-party complaint should be reversed.

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