fendant to present his evidence is thereby settled in the defendant's favor. And, furthermore, since a second appeal can be perfected after the new trial which follows the reversal of a directed verdict, the defendant should not be refused an opportunity to present his evidence in the instant case merely on the ground that "piecemeal appeals" might result. If the circuit court had desired to prevent this result, it could have allowed the defendant to offer his evidence there.

Procedure—Liability of Government Corporation for Costs—Authorization to "Sue and Be Sued"—[Federal].—The Reconstruction Finance Corporation brought suit in a federal district court to protect trade marks which had been assigned to it as security for loans, and later purchased at a bankruptcy sale. The RFC was incorporated by act of Congress[1] and is empowered to "sue and be sued" in any court of competent jurisdiction.[2] The trade marks litigation was decided against the RFC,[3] but costs for the defendant were denied, the district court asserting that costs may be imposed against a governmental agency only to the extent permitted by law, and that no law permits costs to be assessed against the RFC.[4] On appeal, *held*, since costs are a normal incident of suit, Congressional authorization for the RFC to "sue and be sued" indicates an intention to permit costs to be assessed against it. Reversed and remanded. *RFC v. J. G. Menihan Corp.*[5]

This is the first case holding that the forty government-owned corporations which Congress chartered with power to "sue and be sued"[6] are subject to assessment by a court for costs where Congress has not so expressly provided. In two previous cases other circuit courts of appeals have reached the opposite result.[7]

It has uniformly been held that as a part of the Federal Government's immunity from suit without consent in a federal court, the government may be assessed for costs only when it assents.[8] This traditional immunity of the sovereign is based both on the patent impracticability of enforcing judicial decrees against a predominating organization which may refuse to submit, and on the desirability of permitting the government to function unencumbered by adverse private claims.[9] Since any portion of the immunity may be waived, when explicit Congressional authorization to assess

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provides: "A new trial may be granted to all or any of the parties . . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . . ."

[1] 47 Stat. 5 (1932), 15 U.S.C.A. § 601 (1939).

[2] 47 Stat. 6 (1932), 15 U.S.C.A. § 604 (1939).

[3] RFC v. J. G. Menihan Corp., 28 F. Supp. 920 (N.Y. 1939).

[4] RFC v. J. G. Menihan Corp., 29 F. Supp. 853 (N.Y. 1939).

[5] 111 F. (2d) 940 (C.C.A. 2d 1940), cert. granted 61 S. Ct. 26 (1940).

[6] Keifer & Keifer v. RFC, 306 U.S. 381, 390 (1939).

[7] Nat'l Home v. Wood, 81 F. (2d) 963 (C.C.A. 7th 1936); FDIC v. Barton, 106 F. (2d) 737 (C.C.A. 10th 1939).

[8] Shewan & Sons v. United States, 267 U.S. 86, 87 (1925). No distinction between the government and its agencies in the matter of costs appears to have been made in Rule 54(d) of the Federal Rules of Civil Procedure.

[9] United States v. Shaw, 309 U.S. 495, 501 (1940).

costs against the government is lacking the courts may be called upon to determine whether Congress nevertheless intended to waive the government's immunity.[10]

When the "government itself,"[11] as distinguished from government-owned and chartered corporations, is a litigant, the relinquishing of sovereign privileges is strictly construed,[12] and permission to assess costs is not considered implicit in permission to sue or be sued.[13] Thus the United States has been permitted to recover costs in trial courts in civil actions,[14] even though it was not liable for costs when a private litigant prevailed,[15] and a statute allowing costs against the United States where it is an unsuccessful defendant has been held not to authorize imposition of costs against it where it is an unsuccessful plaintiff.[16] Furthermore, when the government institutes suit, its own claim may be reduced by a counterclaim to the entry of which it does not consent,[17] but no affirmative judgment, even for costs, can be entered against the government by reason of the successful counterclaim.[18]

Where, however, the government acts in a capacity or in a manner which is considered remote from the integral functions of government, there is less reluctance on the part of courts to imply permission of the government to be sued or to be assessed for costs. Thus, when the government becomes a partner in,[19] or the owner of,[20] a commercial enterprise, it is deemed to have waived its immunity, rather than to have endowed the private organization with the attributes of sovereignty.

If these government corporations were to be viewed as integral parts of the government, it would be expected that courts would not assess costs against them on the basis of their authorization to "sue and be sued" except insofar as they were deemed to be commercial enterprises. However, in three recent cases the Supreme Court has had occasion to consider the status of these corporations, and there is some indication that in respect to them waivers of governmental immunity may be more liberally construed. In *Keifer & Keifer v. RFC*,[21] the Supreme Court decided that a subsidiary of

[10] Keifer & Keifer v. RFC, 306 U.S. 381, 389 (1939).

[11] In United States v. Shaw, 309 U.S. 495, 501 (1940), Mr. Justice Reed refers to "government as distinct from its functionaries."

[12] Dupont v. Davis, 264 U.S. 456, 462 (1924).

[13] Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938) ("The sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act . . . . although the sovereign does not pay costs."); United States v. Verdier, 164 U.S. 213, 217 (1896).

[14] Pine River Logging Co. v. United States, 186 U.S. 279, 280, 296 (1902).

[15] United States v. Worley, 281 U.S. 339 (1930).

[16] The Glymont, 66 F. (2d) 617 (C.C.A. 2d 1933).

[17] Guaranty Trust Co. v. United States, 304 U.S. 126 (1938). In admiralty, since the subject of the action is there viewed as the collision, rather than as the claim of either party, if the government brings a libel, it is subject to judgment on the cross-libel. Luckenbach Steamship Co. v. The Thekla, 266 U.S. 328 (1925).

[18] United States v. Shaw, 309 U.S. 495 (1940).

[19] Bank of United States v. Planters' Bank, 9 Wheat. (U.S.) 904 (1824).

[20] Salas v. Panama R. Co., 234 Fed. 842 (C.C.A. 2d 1916).

[21] 306 U.S. 381 (1939), noted in 37 Mich. L. Rev. 1166 (1939).

the RFC was suable even though Congress had not expressly so provided.[22] In *FHA v. Burr*,[23] the Court determined that the Federal Housing Administration was subject to garnishment proceedings despite lack of explicit Congressional authorization.[24] That these decisions have not repudiated the strict construction doctrine in respect to waiving sovereign immunity is demonstrated by the holding in *United States v. Shaw*,[25] in which Mr. Justice Reed applies the traditional doctrine.[26] But by way of dictum he states that "when authority is given" to "special government activities, set apart as corporations or individual agencies . . . . it is liberally construed."[27]

Restricted to the particular situation, the result in the instant case appears sound in that the RFC, in suing for trade-mark infringement, acts more like a private commercial enterprise[28] than like a part of the government itself;[29] but this justification may not be present in other cases where a government-owned corporation is an unsuccessful litigant.[30] Use of the corporate form alone should not be the crucial test of whether the waiver of sovereign immunities should be strictly construed, for integral governmental tasks might best be performed through some such organizational device.[31] In the absence of explicit consent by Congress to have costs assessed against the corporation in any appropriate case, perhaps the courts might adopt a flexible rule and assess costs only when the litigation involves the corporation acting in a capacity traditionally considered not essential to government.[32]

[22] Since the subsidiary, the Regional Agricultural Credit Corporation, was viewed as being a part of the RFC's agricultural assistance program, to allow the Regional Agricultural Credit Corporation greater immunities than the RFC would in effect allow the RFC to do indirectly what it could not do directly.

[23] 309 U.S. 242 (1940).

[24] It was said that "authority once given is to be liberally construed" (ibid., at 245), but it was also pointed out that the conclusion reached involved no increase of substantive liability (ibid., at 248).

[25] 309 U.S. 495 (1940).

[26] United States v. Shaw, 309 U.S. 495, 502 (1940). "It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by Congress. . . . ."

[27] Ibid., at 501. See Sloan Shipyards v. Emergency Fleet Corp., 258 U.S. 549 (1922).

[28] See the collection of authorities in The Pesaro, 277 Fed. 473 (D.C. N.Y. 1921), rev'd on the facts 271 U.S. 562 (1921).

[29] Keifer & Keifer v. RFC, 306 U.S. 381, 388 (1939). "Therefore the government does not become the conduit of its immunity in suits against its agents merely because they do its work. . . . ."

[30] Suits against agencies of the government have been treated as suits against the government itself where the government appeared to be the real party in interest, Schroeder v. Davis, 32 F. (2d) 454 (C.C.A. 8th 1929), even though the agency had power to sue and be sued in its own name, State Highway Com'n of Wyoming v. Utah Construction Co., 278 U.S. 194 (1929). The tax immunity of such agencies has been assumed. Graves v. New York ex rel. O'Keefe, 306 U.S. 467, 477 (1939).

[31] McDiarmid, Government Corporations and Federal Funds, c. X (1938); Thurston, Government Proprietary Corporations, 21 Va. L. Rev. 352, 466 (1935).

[32] Costs, if assessed against a government agency, would be on the same basis as costs assessed against private litigants. Where costs include attorneys' fees, as they may in equity, and do in the principal case, the aggregate of such costs might be a substantial financial burden upon the government.