Constitutional Law--Sovereign Immunity of State Agency

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CONSTITUTIONAL LAW—SOVEREIGN IMMUNITY OF STATE AGENCY.

P brought an action against D, a state agency authorized by the legislature to sue and be sued, for damages resulting from alleged negligence in construction of the West Virginia Turnpike. The circuit court sustained a demurrer to the declaration, on the ground that D is a state agency exercising essential governmental functions and so is immune from tort liability, and certified the question of immunity to the Supreme Court of Appeals. Held, that, even though D may be exercising governmental functions, it is not such an agency of the state as to be entitled to immunity from suit or action. Hope Natural Gas Co. v. West Virginia Turnpike Comm'n, 105 S.E.2d 630 (W. Va. 1958).

The West Virginia constitution provides that "The State of West Virginia shall never be made defendant in any court of law or equity..." except as garnishee or suggestee. W. Va. Const. art. VI, § 85. This provision is absolute, and the immunity extends to all governmental agencies of the state. Stewart v. State Road Comm'n, 117 W. Va. 352, 185 S.E. 567 (1936). Although this mandate is clear and unambiguous, the courts have found considerable difficulty in determining just when an action or suit against a state officer or agency has the effect of making the state defendant.

On the lower—municipal and county—levels, immunity generally depends upon whether the activity out of which the litigation arose is a governmental or proprietary function. If it is proprietary, the action may be maintained. Ward v. County Court, 141 W. Va. 730, 93 S.E.2d 44 (1956). If the function is governmental, the action or suit must be dismissed. Shaffer v. Monongalia Gen. Hosp., 135 W. Va. 163, 62 S.E.2d 795 (1950). Courts, however, exercise considerable discretion in determining what is governmental and what proprietary. There is a rebuttable presumption that the function is governmental. Hayes v. Cedar Grove, 126 W. Va. 828, 30 S.E.2d 726 (1944); see also, Ward v. County Court, supra; Van Gilder v. Morgantown, 136 W. Va. 831, 68 S.E.2d 746 (1949); Shaffer v. Monongalia Gen. Hosp., supra.

A state officer acting within the scope of his authority is generally immune from suit. Hardy v. Simpson, 118 W. Va. 440, 190 S.E. 680 (1937). If he acts wrongfully, however, he has exceeded his authority, and may be held personally liable. Watts v. State Road Comm'n, 117 W. Va. 398, 185 S.E. 570 (1936) (dictum). He may also be compelled by mandamus to perform a duty required by law.
**State ex rel. Summers v. Sims, 97 S.E.2d 295 (W. Va. 1957); Hardy v. Simpson, supra.** The officer may also be subjected to suit when its object is not to direct his discretion or affect an established monetary or proprietary interest of the state. *Walter Butler Bldg. Co. v. Soto, 97 S.E.2d 275 (W. Va. 1957); Douglass v. Koontz, 187 W. Va. 345, 71 S.E.2d 319 (1952); Fidelity & Deposit Co. v. Shaid, 103 W. Va. 482, 137 S.E. 878 (1927); cf. Hamill v. Koontz, 134 W. Va. 439, 59 S.E.2d 879 (1950). The state's interest must be direct and immediate, not merely incidental or consequential, to bar suit against an officer. *Coal & Coke Ry. v. Conley, 67 W. Va. 129, 67 S.E. 613 (1910).* However, if he is only a nominal party, and the true purpose of the suit is to enjoin the state, it cannot be maintained. *Blue Jacket Consol. Copper Co. v. Scherr, 50 W. Va. 533, 40 S.E. 514 (1901).* "The state acts only by officers, and where the action against them is based on no personal interest, but only because officers, and the liability falls, not on them, but the state, the state is the real party." *Miller v. State Board of Agriculture, 46 W. Va. 192, 193, 32 S.E. 1007, 1008 (1899). Accord, Johnson v. State Board of Agriculture, 46 W. Va. 196, 32 S.E. 1039 (1899).*

When the defendant is a state board or commission, possibly created as a public corporation with the right to sue and be sued, the criteria for immunity are much the same as for a state officer. Here, however, the "governmental" nature of the agency's activity may be secondary to the origin and application of funds used in the agency's operations. An agency exercising governmental functions may not be sued for specific performance of a contract, nor for damages for its breach. *Schippa v. West Virginia Liquor Control Comm'n, 132 W. Va. 51, 53 S.E.2d 609 (1948); State ex rel. Gordon v. State Board of Control, 85 W. Va. 739, 102 S.E. 688 (1920); Miller Supply Co. v. State Board of Control, 72 W. Va. 524, 78 S.E. 672 (1913). Neither is it liable for a tort. Armacost v. Conservation Comm'n, 126 F. Supp. 414 (S.D.W. Va. 1954); Mahone v. State Road Comm'n, 99 W. Va. 397, 129 S.E. 320 (1925); Barber v. Spencer State Hosp., 95 W. Va. 463, 121 S.E. 497 (1924). The rule appears to be otherwise, however, when the agency collects and disburses its own funds without dependence upon the state's treasury or the state's faith and credit, even though the activity might well be considered or declared "governmental." *Guaranty Trust Co. v. West Virginia Turnpike Comm'n, 109 F. Supp. 286 (S.D.W. Va. 1952); Hope Natural Gas Co. v. West Virginia Turnpike Comm'n, supra; Tompkins v. Kanawha Board, 19 W. Va. 257 (1881); cf. City of
Charleston v. Southeastern Constr. Co., 134 W. Va. 666, 64 S.E.2d 676 (1950); Schippa v. West Virginia Liquor Control Comm'n. supra. It might be noted here that when a state agency is a suitor, a counterclaim arising out of the same transaction will be entertained, providing it is not in excess of the state's claim. State Road Comm'n v. Ball, 138 W. Va. 349, 76 S.E.2d 55 (1953); State, by Davis v. Ruthbell Coal Co., 133 W. Va. 319, 56 S.E.2d 549 (1949).

While the concept of sovereign immunity may not be desirable in modern society, so long as the present constitutional provision prevails, the courts will be called upon to decide when an action or suit has the effect of making the state defendant. It appears that the established principles are adequate for reaching such decisions, although it would seem that some of the past decisions have resulted from misapplication of these principles.

R. G. D.

Evidence—Admissions and Confessions Distinguished.—D was convicted of armed robbery. When D was taken into custody by police officers he made a statement of his activities on the evening of the alleged crime, in which statement he admitted eating food which contained garlic. At the trial a witness, who was at the scene of the robbery, testified that the odor of garlic emanated from one of the accused. The trial court admitted into evidence the statement made by D as a confession. Held, that the statement made by D was technically an admission and not a confession; however, since the trial court determined that the statement was voluntarily made, it was admissible as substantive evidence of the activities described therein. State v. Buffa, 51 N.J. Super. 218, 143 A.2d 833 (1958).

Although a distinction exists between admissions and confessions, the courts have been inclined to treat them interchangeably.

It should be noted at the outset that it is a well recognized principle that admissions and confessions are not objectionable as hearsay. Cf. Herbert v. Lankershim, 9 Cal. 2d 409, 71 P.2d 220 (1937); Anthus v. Rail Joint Co., 231 N.Y. 557, 132 N.E. 887 (1921).

An admission differs from a confession in that the former is an acknowledgment of facts and circumstances which, if taken in connection with proof of other facts, will permit an inference of guilt, while the latter is a acknowledgment of guilt of the criminal act or a part thereof. Gulotta v. United States, 113 F.2d 863 (8th Cir. 1940).