

December 1936

## Immunity of State Agency from Suit

J. E. C.

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

J. E. C., *Immunity of State Agency from Suit*, 43 W. Va. L. Rev. (1936).

Available at: <https://researchrepository.wvu.edu/wvlr/vol43/iss1/8>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

## IMMUNITY OF STATE AGENCY FROM SUIT

The constitutional provision rendering the state immune from suit<sup>1</sup> has been the basis of a number of holdings, both as to the contract<sup>2</sup> and the tort liability<sup>3</sup> of state agencies. It seems that this provision is to be regarded as absolute and unqualified.<sup>4</sup> There is little doubt that this is true so far as suits against the state proper are concerned; the difficulty arises when the suit is against some agency or officer of the state. Suits against state agencies may be divided into three groups: those in which the court has said the agency was acting for the state and therefore entitled to the same immunity as the state enjoys;<sup>5</sup> those in which the court has said dogmatically that the suit was not against the state and permitted the suit;<sup>6</sup> and those in which judicial proceedings against state officers have been permitted for failure to perform their duty, for acting in excess of their authority, or for acting under an unconstitutional statute.<sup>7</sup>

Aside from any constitutional inhibition there is a rule of substantive law prohibiting suits against a state without its consent. This is illustrated by the holdings in Virginia, where there is no constitutional inhibition, but where a suit is not permitted against the state without its consent.<sup>8</sup> Even where the state may consent to suit, this consent may be withdrawn, and when given is strictly construed.<sup>9</sup> This rule of substantive law seems to have a

---

<sup>1</sup> W. VA. CONST., art. 6, § 35.

<sup>2</sup> *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007 (1899); *Miller Supply Co. v. State Board of Control*, 72 W. Va. 524, 78 S. E. 672 (1913); *Gordon v. State Board of Control*, 85 W. Va. 739, 102 S. E. 688 (1920).

<sup>3</sup> *Barber's Adm'x v. Spencer State Hospital*, 95 W. Va. 463, 121 S. E. 497 (1924); *Mahone v. State Road Commission*, 99 W. Va. 397, 129 S. E. 320 (1925); for collection of cases, see Price, *Governmental Liability for Torts in West Virginia* (1932) 38 W. VA. L. Q. 101.

<sup>4</sup> *Stewart v. State Road Commission*, 185 S. E. 567 (W. Va. 1936).

<sup>5</sup> *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007 (1899); *Miller Supply Co. v. State Board of Control*, 72 W. Va. 524, 78 S. E. 672 (1913); *Gordon v. State Board of Control*, 85 W. Va. 739, 102 S. E. 688 (1920); *Barber's Adm'x v. Spencer State Hospital*, 95 W. Va. 463, 121 S. E. 497 (1924); *Mahone v. State Road Commission*, 99 W. Va. 397, 129 S. E. 320 (1925).

<sup>6</sup> *State v. Moore*, 77 W. Va. 325, 87 S. E. 367 (1915); *Fidelity & Deposit Co. v. Shaid*, 103 W. Va. 432, 137 S. E. 878 (1927); *State v. George*, 116 W. Va. 465, 181 S. E. 713 (1935).

<sup>7</sup> *Davis v. West Virginia Bridge Commission*, 113 W. Va. 110, 166 S. E. 819 (1932); *Yost v. State Road Commission*, 96 W. Va. 184, 191, 192, 122 S. E. 527 (1924); *Blue Jacket Consol. Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514 (1901).

<sup>8</sup> *Commonwealth v. Ferries Co.*, 120 Va. 327, 92 S. E. 804 (1917); *Maury v. Commonwealth*, 92 Va. 310, 23 S. E. 757 (1895); *Corwall v. Commonwealth*, 82 Va. 644 (1887).

historic origin, based on the divine right of kings, as exemplified by the statement, "The King can do no wrong." How this fictitious feudal principle came to be carried over into our governmental system after our separation from England has been the basis of much conjecture. It is indeed startling to find in a system of government where the state is supposedly for the benefit of the people, that we still have this principle which is the watchword of tyrannical government.

While there is some justification for allowing suits against the state only with its consent, there would seem to be no justification for a rule which is so absolute that the state government cannot give its consent. This is the position in which the state government of West Virginia finds itself. In *Stewart v. State Road Commission*<sup>10</sup> the court said in referring to this constitutional provision, "There is no specific exception to this inhibition. Such a provision is ordinarily construed to be absolute and unqualified." However West Virginia is not alone in this position. There are three other American jurisdictions having the same or similar constitutional provisions<sup>11</sup> and the courts of these states have construed their provisions in the same manner as our court.<sup>12</sup>

In two recent West Virginia cases the court decided that an action of assumpsit could not be maintained against the State Road Commission<sup>13</sup> and that the State Road Commission could not be compelled by mandamus to pay a judgment obtained against it in an action based on alleged appropriation of land without purchase or condemnation.<sup>14</sup> In refusing to permit these actions to be maintained against the State Road Commission the court suggested three remedies which might be available to a person to protect his rights. These suggested remedies are: mandamus to compel the officer to perform his duty, or a proceeding against the officer or his agent

---

<sup>9</sup> *Miller v. Pillsbury*, 164 Cal. 199, 128 Pac. 327, Ann. Cas. 1914B 886 (1912); *Commonwealth v. Weller*, 82 Va. 721, 1 S. E. 102 (1887); *Dunnington v. Ford*, 80 Va. 177 (1885).

<sup>10</sup> 185 S. E. 567 (W. Va. 1936).

<sup>11</sup> ALA. CONST. OF 1901, art. I, § 14; ARK. CONST., art. V, § 20; ILL. CONST., art. IV, § 26.

<sup>12</sup> *National Cigar Co. v. Dulaney*, 96 Ill. 503 (1880); *People v. Sanitary District*, 210 Ill. 171, 71 N. E. 334 (1904); *Alabama Girls' Industrial School v. Reynolds*, 143 Ala. 579, 42 So. 114 (1904); *Alabama Girls' Industrial School v. Adler*, 144 Ala. 555, 42 So. 116, 113 Am. St. Rep. 58 (1905); *Cox v. Board of Trustees*, 161 Ala. 639, 49 So. 814 (1909); *Pitecock v. State*, 91 Ark. 527, 121 S. W. 742, 134 Am. St. Rep. 88 (1909).

<sup>13</sup> *Watts v. State Road Commission*, 185 S. E. 570 (W. Va. 1936).

<sup>14</sup> *Stewart v. State Road Commission*, 185 S. E. 567 (W. Va. 1936).

individually either for damages or for an injunction. In all fairness it must be admitted that to some extent these remedies would afford a citizen ample protection. It would, for example, be possible to enjoin a state officer or agency from committing an unlawful, illegal or unconstitutional act.<sup>15</sup> As the court suggests, the officer's act is purely personal though the state may derive the benefit of the act, for the state as the king can do no wrong. However the court seemingly permitted the West Virginia Bridge Commission to be proceeded against as an official body, though it said their action was unlawful, putting it on the basis that where there is an adequate charge of unlawfulness there is present a question for judicial determination.<sup>16</sup> Thus there is seemingly a situation where it is possible to proceed against a state agency officially, at some times, and at others only against the officer personally. Such a situation does not make for clarity and harmony in the law.

While mandamus is an effectual method of compelling a state officer to perform his ministerial duty,<sup>17</sup> yet it will not lie to compel a state officer or board to perform a contract between the state and an individual,<sup>18</sup> therefore, it would not afford adequate relief in all instances.

The suggestion that the state officer or his agent might be held personally liable in damages for the act also has its objectionable features. While it is a possibility in every suit that the defendant will not have sufficient resources to satisfy the judgment, yet it would seem that where the state receives the benefit of the agent's act it should share the liability for the act with him.

The constitutional provision in question cannot be waived even by creating the agency as a corporation with power to sue and be sued,<sup>19</sup> for the courts usually think of these agencies as performing governmental functions, and therefore entitled to the same immunity as the state. However, if the court thinks that the function is not governmental they may permit a suit to be maintained, though this seems to be the exceptional case.<sup>20</sup> A more realistic

---

<sup>15</sup> *Turkey Knob Coal Co. v. Hallanan*, 84 W. Va. 402, 99 S. E. 849 (1919); *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 146, 67 S. E. 613 (1910).

<sup>16</sup> *Davis v. West Virginia Bridge Commission*, 113 W. Va. 110, 166 S. E. 819 (1932).

<sup>17</sup> *Draper v. Anderson*, 102 W. Va. 633, 135 S. E. 837 (1926); *State v. Shawkey*, 80 W. Va. 638, 93 S. E. 759 (1917).

<sup>18</sup> *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007 (1899); *Gordon v. State Board of Control*, 85 W. Va. 739, 102 S. E. 688 (1920).

<sup>19</sup> *Alabama Industrial School v. Adler*, 144 Ala. 555, 42 So. 116 (1905); *Stewart v. State Road Commission*, 185 S. E. 567 (W. Va. 1936).

<sup>20</sup> *Tompkins v. The Kanawha Board*, 19 W. Va. 257 (1881).

view was reached in Arkansas where, in considering the right of suit against the State Road Commission under a constitutional provision similar to ours, the court said that the state could not expect to engage in modern business and still cling to the ancient prerogative of the king.<sup>21</sup> This would seem to be the better approach to the liability of state agencies; especially in view of the present-day trend of state governments to take over functions formerly performed by local governmental bodies and to engage more and more in the field of business.

There seems to be no necessity for the strictness of our constitutional provision. The fact that this provision is not found in the constitutions of forty-four of the American states seems to indicate that there is no great need for such a provision, and a modification of it might be proper. A change to a less absolute provision would not be anything radical, for the state would still have to give its consent before the suit could be brought and would at all times have control over the number of suits and the manner in which they could be brought. Neither would a provision permitting suits against the state with its consent tend to disrupt the administration of state business, for the state is amply equipped to defend itself, and as a matter of fact is often called on to do so even under the present provision though this provision absolutely prohibits such suits. The recent passage of the garnishee amendment<sup>22</sup> would seem to indicate that there is a demand for liability of state officers; and if the public wishes to extend this liability, it will probably lead to a number of amendments which will gradually break down the present absolute provision. If this be the case it would seem more desirable to make a complete change in this constitutional provision at one time, rather than to have a number of changes over a period of years, which will merely add to the existing confusion. The West Virginia Constitutional Commission in its report several years ago, proposed an amendment which would permit the state to be sued with its consent.<sup>23</sup> However, nothing has been done to place this proposed amendment before the people, and it seems that some steps should be taken to do this.

J. E. C.

---

<sup>21</sup> *Arkansas State Highway Commission v. Dodge*, 181 Ark. 539, 552, 553, 26 S. W. (2d) 879 (1930).

<sup>22</sup> W. Va. Acts 1935, c. 23.

<sup>23</sup> White, *Amendments Proposed by the West Virginia Constitutional Commission* (1931) 38 W. VA. L. Q. 1.