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States--Actions--What are Suits Against the State

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STUDENT NOTES AND RECENT CASES.

STATES—ACTIONS—WHAT ARE SUITS AGAINST THE STATE.—The question of the liability of States for the negligent acts of their agents has been raised in numerous recent cases.¹ The courts have almost unanimously adhered to the ancient doctrine, that, "it is better for an individual to suffer than for the state to be inconvenienced," and have denied recovery. These cases often occasion serious hardships. Does the result accord with American principles? According to our theory, governments are instituted among men for the benefit of the governed. The bill of rights insures a remedy for every wrongful injury.² It is not contradictory, then, to say that, when the agents of the state negligently inflict an injury upon one of its subjects, such injured person is denied the benefit of legal process to secure compensation for his loss?³ The State has an interest in having its individual subjects compensated, so far as is practicable, for injuries caused by the wrongful acts of others. Society has an interest in the welfare of its members, which interest is better secured by giving a remedy for damages negligently inflicted upon them. The injured party has an interest in securing compensation for the injury which he has received.⁴ Does the interest of the state in not being subject to suits outweigh these various interests which must be sacrificed by the application of the doctrine of sovereign immunity from suits? Would it not be wise to limit the doctrine in its application?⁵ The modern tendency is toward governmental ownership of many industries, which have been conducted in the past by private individuals. Municipal corporations engage in extensive commercial enterprises.⁶ Convict labor is employed in

¹ *Barber v. Spencer State Hospital*, 121 S. E. 497, (W. Va. 1924).

² See Article III, Section 17, Constitution of West Virginia.

³ In *Fowler v. City of Cleveland*, 100 Ohio State 158, 126 N. E. 72 (1919) Johnson in delivering the opinion of the court said: "To adhere to the ancient rule in the presence of existing relations would seem to involve the obvious contradiction that the state which is formed to protect society, is under no obligation, when acting itself, to protect an individual member of society. Such conceptions of sovereign prerogative are not only illogical, but they offend the spirit of our institutions. We have successfully striven, under a system of checks and balances, to reconcile liberty with authority. Authority should be reconciled with justice." See note to this case in 9 A. L. R. 143, also 5 Cornell L. Q. 90-93.

⁴ See ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW*, 91-93.

⁵ Some cases allow recovery for all negligent acts of the agents of municipal corporations. *Kaufman v. City of Tallahassee*, 94 So. 697 (Fla. 1922).

⁶ *Wigal v. City of Parkersburg*, 74 W. Va. 25, 28 (1914), 81 S. E. 554.

penal institutions for profit; and farms are often conducted in connection with state charitable institutions.⁸ With this growing tendency we shall expect an increasing number of injuries to go without redress, unless the doctrine of non-suability of states is reasonably limited.

The question was before the Supreme Court of Appeals of West Virginia in a recent case in which it appeared that the plaintiff's intestate received injuries, from which he died, while operating a tractor on a state farm. The injury was caused by the negligence of the overseers of the State Hospital in not keeping the tractor in proper repair. The State Hospital was made defendant in an action for the wrongful death of the intestate. *Held*, the action is not maintainable since it is in effect a suit against the state.⁹ Here is unquestionably a case of hardship. The negligent acts of the agents of the defendant have caused the plaintiff injury for which the law affords no relief, because of the survival of the ancient doctrine that "the King can do no wrong."¹⁰ If the Court holds as in the principal case, that this is in effect a suit against the state, the suit is barred by Article IV, Section 35 of the Constitution of West Virginia which reads: "The State of West Virginia shall never be made defendant in any court of law or equity."¹¹ Would not a liberal construction of this constitutional provision permit suits against the agents of the State to recover for injuries inflicted in carrying on enterprises not governmental in their nature, and thus avoid hardships?¹²

In *Thompkins v. The Kanawha Board* 19 W. Va. 257 the property of the defendant corporation belonged to the state and the corporation was engaged in dredging the Kanawha river for the benefit of the state. Recovery was allowed against the board for loss caused by the negligence of the agents of the Board. Is there a distinction between that case and the principal case? Chapter 15-M, Section 1, Code, 1923 makes the Board of Control a Corpo-

⁷ State ex rel Gordon v. State Board of Control, 85 W. Va. 739, 102 S. E. 688 (1920).

⁸ Barber v. Spencer State Hospital, *Supra*.

⁹ *Idem*.

¹⁰ Muller Supply Co. v. State Board of Control, 72 W. Va. 524, 78 S. E. 672 (1913). For a discussion of the non-suability of states generally see the dissenting opinion of Mr. Justice Iredell in *Chisholm v. Georgia*, 2 Dallas 419 (U. S. 1793) beginning at 429. See also John M. Maguire, "State Liability for Tort," 30, HARV. L. R. 20, CHAPIN ON TORTS, 196-197.

¹¹ Workmen's Compensation Act expressly excepts the state of West Virginia from the operation of the section which imposes absolute liability on employers who do not elect to pay the premiums provided by the act, or are in default of such payment. Chapter 15-P Section 26, Code 1923.

¹² See the dissenting opinion of Wanamaker, J. in *Aldrich v. City of Youngstown*, 106 Ohio State 342, 140 N. E. 164. In which the majority of the court overruled *Fowler v. City of Cleveland supra*, note 3.

ration, Section 5 of the same chapter vests the title to the property of state institutions in that Board. The decision of the court in the principal case rested upon the assumption that the suit was properly brought against the State Board of Control. Is it going too far to say that the State Board of Control is an entity apart from the state and subject to suit in those cases where its agents wrongfully inflict injuries upon others in the performance of non-governmental duties?

—E. L. D.

SPECIFIC PERFORMANCE—FAIR AND EQUITABLE CONTRACTS.—P took an option from D for a lot 60 feet deep, P indicating that he was purchasing for the city. Evidence was conflicting as to whether D made the contract with the understanding that she did not mean to convey any part of two houses situated on the rear of the lot. A lot of the depth agreed upon would include a part of the houses. P sought to enforce the contract as an individual. *Held*, specific performance refused. *Hastings v. Montgomery*, 122 S. E. 155 (W. Va. 1924).

The court said that to entitle one to a decree for specific performance, the contract must be "free from fraud and mistake, and fair and equitable in its terms." There are many instances in which, though no actual fraud exists, there is a want of that equality and fairness which may be said to be essential for specific performances. FRY, SPECIFIC PERFORMANCE, 6TH ED. 185; STORY, EQUITY JURISPRUDENCE, 1026, 1034, 1037; POMEROY, EQUITY JURISPRUDENCE, 2D ED. 785. The statement that the contract must be fair is one which is common in many cases, but the definition of the word, or a correct understanding of what unfairness is necessary to refuse specific performance, is not always clear. Conceding the contract to be valid, should a court of equity, under all the circumstances, specifically enforce the contract? If the enforcement of the contract would impose a burden "utterly disproportionate to the benefit secured to the plaintiff," the contract is unfair, and specific performance will be refused. *City of London v. Nash*, 3 Atk. 512; *Kimberly v. Jennings*, 6 Sim. 340; *Clark v. Rochester L. and N. F. R.R. Co.*, 18 Barb. 350 (N. Y. 1854). See also *Conger v. New York W. S. and B. R. R. Co.*, 120 N. Y. 29, 23 N. E. 983. The

¹³ Cf. *Sargent County v. State*, doing business as the Bank of North Dakota 47 N. D. 561, 182 N. W. 270. See note to this case in 35 HARV. L. R. 335.