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CASE COMMENTS

Action Against State—Liability and Consent of State to Suit—Consent Not Prerequisite in Colorado

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Plaintiff and other Colorado race track associations brought an action against the Racing Commission and the State Treasurer for a declaratory judgment to determine, first, whether under the state pari-mutuel racing act the "breakage"[1] belonged to the tracks or to the State, and, secondly, whether plaintiffs were entitled to receive back from the State Treasurer the "breakage" paid to the State under protest. By stipulation of the parties the trial court's decision was limited to the first question only, and decision of the second was deferred. The Colorado Supreme Court reversed a judgment adverse to plaintiffs, and held the "breakage" should be retained by the tracks.[2] Plaintiff thereupon applied to the trial court for determination of its second prayer; and, after hearing, the court entered judgment in plaintiff's favor for $22,000. Defendants sought a reversal on the ground the suit was one against the State in its sovereign capacity; that the State could not be sued without its consent; that the State had not consented to the suit, either by its participation in the original trial or otherwise; and that there was no fund from which the judgment could be paid. The Supreme Court affirmed the judgment in an opinion which describes the doctrine of sovereign immunity as "archaic" and "outmoded." The Court held a citizen is entitled to a judicial determination of his rights, whether they collide with an individual or with the sovereign state. *Colorado Racing Comm'n v. Brush Racing Ass'n,* 316 P.2d 582 (Colo. 1957).

In a case decided two months earlier, the Court, while it did not expressly abrogate the rule of state immunity, accomplished the same result in a contract action by adopting a theory of implied waiver. In that case, defendant, the Colorado Department of Agriculture, awarded to plaintiff a contract for spraying grasshopper-infested range land. Plaintiff's bid of thirteen cents per acre was made with the understanding that a million and a half acres were to be sprayed, and the written contract so provided. Plaintiff was permitted to spray only 240,000 acres and was paid for that amount at the contract rate. He then brought suit for damages for breach of contract. A motion to dismiss was granted, on the ground the State had not consented to the suit. The Supreme Court reversed, holding that when a state agency enters into an authorized contract it thereby waives the State's immunity from suit. *Ace Flying Service, Inc. v. Colorado Dep't of Agric.,* 314 P.2d 278 (Colo. 1957).

In a concurring opinion in the *Ace Flying Service* case, Justice Moore contended the doctrine of sovereign immunity was contrary to the constitutional guaranty of due process, in that it denied to a plaintiff his "day in court" whenever his opponent was the State.[3] The majority

[1] "Breakage" is the amount of odd pennies left over after computing winning wagers to the nearest dime.
[2] Centennial Turf Club v. Racing Comm'n, 129 Colo. 529, 271 P.2d 1046 (1954).
[3] 314 P.2d at 282.

of the Court, however, followed the usual practice in such cases and declined to determine the constitutional question when the case could be decided on another ground. In the *Racing Commission* case the "implied waiver" theory could not be applied, and the Court then squarely faced the constitutional issue and declared the courts are open to decide the rights of citizens, and a remedy will not be denied solely because the adversary is the State.

Thus, while courts of other jurisdictions have adhered strictly to the doctrine of immunity,[4] and have left it to the legislatures to relax its application by statute, Colorado has become a pioneer in abandoning, by judicial action, the rule that the state may not be sued without its consent.

The rule of sovereign immunity is one of the oldest known to the common law, beginning with the theory that the king was above the law and could do no wrong. It is also one of the most firmly entrenched, finding its later justification in the idea that it is against public policy to allow the state's treasury, belonging to all the people, to be depleted at the suit of a few.

The history of the rule in Colorado began in 1895 with the so-called "Benedictine Sisters Case,"[5] an advisory opinion given by the Supreme Court to the House of Representatives. The House had before it a bill already passed by the Senate, providing for compensation to the Sisters for damage to their building, caused by the State's construction of a canal. The House asked the Court, first, whether the State was liable; and, secondly, if the State was liable, whether it was within the province of the Legislature to determine and pay the damages. The Court advised that the injury was in effect a taking of private property for public use, and the State was constitutionally liable for just compensation;[6] but that since the State was immune from suit the liability could not be enforced in the courts, and the Legislature was the proper body to determine the damages and provide for payment.

The question was presented to the Court in an actual controversy forty years later, when a telegraph company sued for "just compensa-

[4] For collection of cases see Annots., 25 A.L.R.2d 203 (1952); 42 A.L.R. 1464 (1926).
[5] In re Constitutionality of Substitute for Sen. Bill 83, 21 Colo. 69, 39 Pac. 1088 (1895).
[6] Colo. Const. art. II § 15 (1876).

tion" for damages caused in removing its pole lines to make way for construction of a state hospital building. The Court held that although the State might be liable the courts could not entertain the suit in the absence of the State's consent, and plaintiff's only recourse was to the Legislature.[7]

Until 1952 the Colorado court applied the doctrine of sovereign immunity without limitation in any action which was clearly against the State in its sovereign capacity. At the same time, in Colorado as in other jurisdictions, there developed a distinction between suits against the State as sovereign and suits against the State as proprietor. The State could be sued regardless of its consent in any case involving its "purely business" functions, for example the leasing of state lands.[8]

Further, there was established the principle that a suit against a state officer or agency is not necessarily a suit against the state. If an officer, acting unlawfully and in excess of his authority, invades private rights, he may be sued for redress. Since his acts are not authorized or sanctioned by the state, he cannot escape liability by invoking the state's immunity.[9]

It is not easy to define the line where a suit nominally against a state agency ceases to be a suit against the sovereign. Courts have generally stated the test in terms of "controlling" state action—a suit against the state is one in which a judgment for the plaintiff could operate to compel performance of an obligation which belongs to the state in its political capacity, or subject it to a liability for payment of funds out of the state treasury. If a plaintiff is seeking governmental action which the state would not otherwise take, or the payment of money which would not otherwise be paid, the suit is one against the state in its sovereign capacity and cannot be maintained in the absence of the state's consent.[10]

From this distinction the Colorado court took the logical next step and in the *Boxberger* and *Dawson* cases,[11] decided in 1952, adopted further limitations on the immunity rule. The *Boxberger* case was a suit for cancellation of a deed. It did not involve illegal action by the state agency, but was grounded on mutual mistake. The court pointed out the action was not one in tort, not one to impose liability on the state or to recover money from the state treasury, but merely an action to restore the status quo. In such a case, the court held, the doctrine of sovereign immunity must give way to the constitutional rights of the citizen.

The *Dawson* decision was the forerunner of the *Ace Flying Service*

[7] State v. Colorado Postal Telegraph Co., 104 Colo. 436, 91 P.2d 481 (1939). See also Mitchell v. Board of County Commissioners, 112 Colo. 582, 152 P.2d 601 (1944); Parry v. State Board of Corrections, 93 Colo. 589, 28 P.2d 251 (1933).

[8] State Board of Land Commissioners v. Carpenter, 16 Colo. App. 436 (1901). See also Annot., 40 A.L.R.2d 927 (1955).

[9] Alfred v. Esser, 91 Colo. 466, 15 P.2d 714 (1932).

[10] Annot., 160 A.L.R. 332 (1946).

[11] Boxberger v. State Highway Dept., 126 Colo. 438, 250 P.2d 1007 (1952); State Highway Dept. v. Dawson, 126 Colo. 490, 253 P.2d 593 (1952).

case, holding that the State's authorized contracts are enforceable to the same extent as those of an individual. Plaintiff Dawson had furnished gravel to the State Highway Department, which refused payment in the belief that plaintiff was not the owner. In overruling the State's defense of sovereign immunity the court emphasized that funds had been appropriated and "earmarked" for the project in question, and a judgment would result in no additional financial burdens on the state. Said the court, "Here no further liability would accrue other than that anticipated and for which provision is made."[12]

It should be noted that in none of the Colorado cases was there any attempt to establish the State's liability in tort. Actions not based on contract were brought on an "eminent domain" theory, *i.e.*, for compensation for property taken for public use. This was done to escape the rule against tort liability, established in actions against counties. Counties in Colorado are by statute subject to suit,[13] but it has been held consistently that the county, as a branch of government, is not liable for the torts of its agents.[14] Thus, even in the *Racing Commission* case, the court has not touched the State's immunity in tort actions, where the rule is not merely that the State is not *suable,* but that the State is not *liable.*

The *Racing Commission* case might have been decided without upsetting the immunity rule, by a holding that the action was not against the State but against the State Treasurer for money unlawfully collected. Since the State interposed the defense, however, the Court decided the question directly, by holding not that the immunity rule was inapplicable but that there was no immunity. In doing so the Court has carried to its ultimate conclusion the trend set in motion by the *Boxberger* and *Dawson* cases.

The effect of the *Dawson* case was that the State might be sued in any case where the plaintiff's claim might be paid from an appropriation already made. The same implication is present in the *Ace Flying Service* case. This holding was the source of the State's defense in the *Racing Commission* case that there was no fund from which the judgment could be paid. Behind this contention is a recognition of the constitutional requirement that no funds may be paid from the state

[12] 126 Colo. at 493, 253 P.2d at 594.
[13] Colo. Rev. Stat. Ann. § 36-1-1 (1953).
[14] Richardson v. Belknap, 73 Colo. 52, 213 Pac. 119 (1923); Board of Commissioners v. Ball, 22 Colo. 125, 43 Pac. 1000 (1896); Board of Commissioners v. Bish, 18 Colo. 474, 33 Pac. 184 (1893). Cf. Board of Commissioners v. Adler, 69 Colo. 290, 194 Pac. 621 (1920); Board of Commissioners v. Colorado Springs, 66 Colo. 111, 180 Pac. 301 (1919).

treasury except upon appropriation lawfully made by the legislature.[15] It is also acknowledged that a judgment against the state cannot be collected by execution;[16] in any action against a state the court's authority ends with the judgment. Thus the State's argument was in effect that since the courts could go no further they should not go so far—that since the State's consent might be required to collect the judgment there was no room to relax the requirement of consent to bring the suit.

In rejecting this contention the court has accomplished a complete reversal of the advice given in the *Benedictine Sisters* case. The court in 1895 declared it was the duty of the legislature, and the legislature only, to determine the State's liability to a suitor who claims he has been injured by the State. The 1957 court has placed that duty in the courts, where it more properly belongs. It may be true that the suitor must still go to the legislature for payment of whatever may be due him, but he goes with a claim supported by a court's determination of validity. The court cannot compel action by the legislature. Control of the treasury is a legislative power with which the courts cannot interfere. But the procedure now evolved by the court is a reasonable one, placing responsibility for initial determination of the claim in the courts.

[15] Colo. Const. art. V § 33 (1876).
[16] 81 C.J.S. 1343, States § 232 (1953).