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Sovereign Immunity - A Still Potent Concept in Wyoming

M. E. Saltmarsh

SOVEREIGN IMMUNITY–A STILL POTENT CONCEPT IN WYOMING

The doctrine of sovereign immunity was derived from the practices of our English ancestors. It appears to be beyond question that from the time of Edward the First until the Crown Proceedings Act of 1947 the King of England was not subject to suit in the courts of that Country, unless his prior consent had been obtained on a petition of right.[1]

There is in this country, however, no such thing as a petition of right, as there is no such a thing as a kingly head of the nation, or to any of the states which compose it. There is vested in no officer or body the authority to consent that the state shall be sued except in the legislature, which may give consent on any terms it sees fit to impose. Today the state may be sued on its contracts, when expressely so provided by statute, and in instances in which the state consents to the action.

In *Chisholm v. Georgia,*[2] the court expressed some doubt as to whether the United States would be subject to the rule, but saw no reason why a state could not be sued. In *Cohen v. Virginia,*[3] Mr. Chief Justice Marshall gave the first recognition of the general doctrine of sovereign immunity. The counsel for the defendant had brought up the proposition that a sovereign independent state was not suable except by its own con-

1. Sovereign immunity began with the personal prerogatives of the King of England. In the Feudal structure the lord of the manor was not subject to suit in his own courts. 1 Pollock and Maitland, The Hostory of English Law 518 (1909 ed.). The King, the highest feudal lord, enjoyed the same protection; no court was over him. 1 Pollock and Maitland, The History of English Law, at pp. 512-517. Prior to the sixteenth century, this right of the King was purely personal. Only out of sixteenth century metaphyhical concepts of the nature of the state did the King's prerogative become the sovereign immunity of the state. Watkins, The State as a Party Litigant, at p. 11. There is some evidence that the original meaning of the pre-sixteenth century maxim—that the King could no do wrong—was merely that the King was not privileged to do wrong. Borchard, Governmental Responsibility in Tort, 34 Yale L.J. 1, 2.

   The immunity was based more on lack of jurisdiction in the King's courts than on strict denial of relief. There was, however, jurisdiction in the Court of Exchequer for equitable relief against the crown. ". . . the party ought in this case to be relieved against the King, because the King is the fountain and the head of justice and equity; and it shall not be presumed he will be defective in either. And it would derograte the King's honour to imagine, that what is equity against a common person should not be equity against him." Per Stkyns, B., Pawlett v. The Attorney General, 145 Eng. Rep. 550, 552 (1668); see Dyson v. Attorney General, 1 K. B. 401, 415 (1912).

   The method for obtaining legal relief against the crown was the petition of right. The action could not be brought in the King's courts because of their lack of jurisdiction to hear claims against the King, which was barred only by his prerogative. It seems reasonably clear that the petition has assumed the character of a definite legal remedy against the Crown.

   The main use of the petition in early common law was in real action which at that time covered considerable territory. The basic principle was that the petition was proper "whenever the subject could show a legal right to redress." Holdsworth, The History of Remedies Against the Crown, 38 L. Quar. Rev. 141, 156. The early precedents may even be read as allowing a petition of right against the King for the torts of his servants; that the courts refused to do so arose because of the formalistic and mistaken idea that concepts of vicarious liability did not apply to the crown. Id. at 294-296.
2. 2 Dall. 419 (1793).
3. 6 Wheat. 264 (1821).

sent. "This general proposition," Marshall concurred, "will not be controverted."[4]

Here, our interest lies in whether the doctrine of sovereign immunity attaches to the activities of Administrative Agencies, and if so to what extent. An Administrative Agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rule making. The administrative process is a governmental tool. By whatever label it is known, the agency is a tool designed to give practical answers to immediate problems. The only explanation worthy of consideration for the sovereign immunity doctrine today is that the possible subjection of the State and Federal Governments to private litigation might constitute a serious interference with performance of their functions and with their control over their respective instrumentalities, funds and property.

Investigation of Wyoming territorial laws reveals no instances in which suits against the territory were permitted. The constitution of Wyoming did not abrogate territorial statutes and they remain in force as laws of the state. The Constitution in Article 1, Section 8, provides, "Suits may be brought against the State in such manner and in such courts as the legislature may by law direct." The Wyoming statute dealing with actions against the State Administrative Agencies[5] limits the jurisdiction to the state courts as well as specifying that any such action shall be deemed an action against the state. Specific agencies to which this treatment applies are enumerated in the aforementioned statute. The statute, however, does not subject such agencies to suit generally, but merely provides to the extent, "any action permitted by law, which shall be brought against them. . . ." Apparently it takes another statutory provision to authorize a suit against one of these agencies. It was noted by the Court in the *Utah Construction Co. v. State Highway Commission*[6] case that the constitutional provision in Article 1, Section 8 is not self-executing. The right to bring suit in this instance was founded on a provision of the highway department act which provided that the Commission may be sued "upon any contract executed by it."[7] In the same opinion the Wyoming Supreme Court stated, "a suit against the Highway Commission is one against an arm or the alter ego of the state, such a claim is one against the state." The theory is the State Administrative Agencies have neither the funds nor the ability to respond in damages, should liability be established. Agencies other than the State Highway Commission enumerated in Wyoming Statutes 1957, 1-1018 are the Wyoming Farm Land Board, Board of Land Commissioners, State Board of Charities and Reform, Public Service Commission of Wyoming, State Board of Equalization of Wyoming, and the Trustees of the University of Wyoming. However, this statute does not expressly

4. Id. at p. 380.
5. Wyo. Stat. § 1-1018 (1957).
6. 45 Wyo. 403, 19 P.2d 951 (1933).
7. Wyo. Stat. § 24-29 (1957).

make these agencies subject to suit and the Supreme Court did not decide this issue in *Harrison v. Wyoming Liquor Commission*[8] stating, "It is not necessary to determine the meaning of the statute and we do not do so. . . ."

Should a party seek to bring action against an agency, either because it refuses to act or because it has taken action detrimental to the party, it would appear, reading the constitutional provision and the statutory provision toegther, that the action would not be allowed against a State Administrative Agency unless specifically authorized and properly supported by a statute granting that privilege. The inclusion in the constitution of such remedies as mandamus and certiorari indicates there is an implied waiver of the dotcrine of sovereign immunity where these remedies are available. In addition, many of the organic statutes creating administrative agencies in Wyoming expressly authorize judicial review of specified types of administrative action.[9]

Various means have been devised to get around the doctrine of sovereign immunity. Two such techniques frequently used are first, to sue the officer rather than the state, and second, to allege that the state is engaging in private rather than governmental functions. One generalization which is usually but not always followed is that sovereign immunity does not prevent a suit against a state or federal officer when found to be acting in violation of the constitution or beyond his authority. This proposition is set forth at some length in Ex parte Young.[10] In other instances the Supreme Court has discarded the fiction and based its decision on the reality of the situation. Mr. Justice Frankfurter described it this way, "The state of the law regarding litigation brought formally against an official but intrinsically against the government is . . . compounded of confusion and artificialities. . . ."[11]

It seems doubtful if a suit against an officer, but in substance a suit against an agency, hence the state, would be successful in Wyoming. Dictum in the *Harrison* case indicates that the Wyoming Supreme Court would be inclined to view such actions as being against the state. The Court emphasized that it is generally held that statutes authorizing suit against the state are to be strictly construed, since they are in derogation of the state's sovereignty. After quoting *Great Northern Life Insurance Co. v. Read*[12] in which it was stated, "the history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedure," the Wyoming Court made it clear that it had no right to interpret the statute referred to above as though it included a board or commission which had not been included therein.

8. 63 Wyo. 13, 177 P.2d 397, 399 (1946).
9. See Anderson, "Reviewability of Administrative Action in Wyoming," supra p. ____.
10. 209 U.S. 123 (1908).
11. Snyder v. Buck, 340 U.S. 15 (1950).
12. 322 U.S. 47.

The Court stated: "Any Officer, Board of Commission of the State of Wyoming which engages in contractral relations with the public may through the Attorney General bring an action upon the contract in the name of the State of Wyoming.[13] We are not free to assume that these officers and agencies may be reciprocally sued in their own name for they are only authorized to sue in the name of the state. The state having power to enforce its rights in the courts in no manner surrenders its immunity as a sovereign from suit by others. As set forth in *Daugherty v. Vidal*,[14] the right of the state to sue in its own courts has always stood side by side wtih its right not to be sued."

National Surety Co. v. Morris[15] is an example of the state placing itself in the same position as a private business. Money was deposited by the Wyoming State Treasurer in Wyoming banks under the Depository Act in which the state required a surety bond. The defense of sovereign immunity was raised as the state attempted to gain preference over other creditors when the bank closed. The court indicated that when the state puts itself on a level with private individuals by engaging in a business enterprise, it, to that extent, loses its character as a sovereign. Although this appears equally true as to the Liquor Commission which engages in the wholesale distribution of alcholic beverages in Wyoming, the Court took a very narrow view of what constitutes private business and held that this was a governmental function. Apparently the doctrine of sovereign immunity has been drained of little of its vitality in the Wyoming Supreme Court.

In conclusion, the doctrine of sovereign immunity which was handed down to us from the English Kings is still very much upon the scene today in Wyoming. Various techniques have been devised to by-pass the rule, for the most part they have not met with any outstanding success. With big government becoming larger in leaps and bounds it seems doubtful indeed that we will see any weakening of the doctrine of sovereign immunity in the foreseeable future.

M. E. SALTMARSH

13. Wyo. Stat. § 1-1019 (1957).
14. 37 N.M. 256, 21 P.2d 90, 93 (1933).
15. 34 Wyo. 134, 241 Pac. 1063 (1925).