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If, in fact, there is present a situation so fraught with the possibility of fraud or unfairness that the statutory provisions of the N. I. L. are not adequate, then it seems that legislation is the only sound solution. Nothing but uncertainty can arise out of an encroachment upon these statutory provisions by judicial decisions. Undoubtedly this situation presents a ripe opportunity for collusion between unscrupulous finance companies and dealers to take unfair advantage of the buyer.¹⁷ Clearly in some cases the finance company has actually participated in the transaction to such an extent that it cannot be a holder in due course within the statutory provisions. But in other cases there is no evidence of such direct participation in the transaction by the finance company as would charge it with "actual notice" or bad faith as required by the N. I. L. In the absence of additional legislation, it is submitted that innocent finance companies that come within the definition of a holder in due course under the existing statutes, should not be deprived of that position because of a tendency of the courts to "catalogue" them in the same class with unscrupulous companies by the indiscriminate or deliberate use of such terms as "close connection." Such a result seems especially unreasonable in the light of the fact that a certain amount of participation by the finance company, as pointed out earlier, is essential in order to avoid unreasonable delay or risks.¹⁸

BOBBY G. BYRD.

State Tort Claims Act—Construction

In three recent cases¹ the question whether the North Carolina Tort Claims Act² should be strictly or liberally construed has been presented to the court. In *Lyon & Sons v. Board of Education*,³ the issue was

¹⁷ In *Davis v. Commercial Credit Corp.*, 87 Ohio 311, 94 N. E. 2d 710 (1950), the court found that the finance company engaged in a conspiracy with the dealer to defraud the buyer. But for something of a reversal of the usual situation see *Mutual Finance Corp. v. Dickinson*, 123 N. J. L. 62, 7 A. 2d 859 (Sup. Ct. 1938) and *Motor Finance Corp. v. Huntsberger*, 116 Ohio St. 317, 156 N. E. 111 (1927), where the courts indicated that if any collusion existed, it was between the purchaser and the dealer.

¹⁸ Another problem which frequently arises is whether the simultaneous execution of the note with a conditional sales contract destroys its negotiability. According to the weight of authority it does not. *Commercial Credit Corp. v. Orange County Machine Works*, 34 Cal. 2d 766, 214 P. 2d 819 (1950); *Mutual Finance Co. v. Martin*, 63 So. 2d 649 (Fla. 1953); *Implement Credit Corp. v. Elsinger*, 268 Wis. 143, 66 N. W. 2d 657 (1954), *rehearing denied*, 67 N. W. 2d 873 (1955); 2 WILLISTON, SALES § 332, p. 291 (Rev. ed. 1948). But some cases have held that negotiability is destroyed. Note, 98 U. OF PA. L. REV. 244 (1949).

¹ *Floyd v. State Highway and Public Works Commission*, 241 N. C. 461, 85 S. E. 2d 703 (1955); *Alliance Co. v. State Hospital at Butner*, 241 N. C. 329, 85 S. E. 2d 386 (1955); *Lyon & Sons v. Board of Education*, 238 N. C. 24, 76 S. E. 2d 553 (1953).

² N. C. GEN. STAT. § 143-291 *et seq.*, as amended in 1953.

³ 238 N. C. 24, 76 S. E. 2d 553 (1953). Discussed in note, 32 N. C. L. REV. 242 (1954), as to subrogation.

whether the right of subrogation existed under the act. In saying that the right existed, Justice Parker stated that most statutes waiving a government's immunity had been strictly construed, but that the current trend of legislative policy and judicial thought is away from such construction. In *Alliance Co. v. State Hospital at Butner*,⁴ a prisoner detained at a state penal institution and negligently operating a hospital truck was held not to be an employee within the meaning of the Tort Claims Act. Justice Bobbitt, in a concurring opinion, argued that, if immunity is to be waived beyond the provisions of the Act as strictly construed, this is a matter for the General Assembly to decide. Then in *Floyd v. State Highway and Public Works Commission*,⁵ plaintiff claimed a maintenance supervisor of the State Highway and Public Works Commission was negligent in failing to see that his instructions were carried out with respect to the use of larger tile for a fill, after he had notice that the fill had washed out once before. The fill again washed out and plaintiff's intestate was killed when he drove his car into the washout. In denying recovery, Justice Higgins, writing the majority opinion, stated that since the Act is in derogation of sovereign immunity, the sounder view is that it should be strictly construed. Justice Parker dissented in the latter two cases, arguing against a strict construction.

In discussing the construction of a statute waiving the immunity of a state, certain established principles should be recalled. The North Carolina court has repeatedly proclaimed that the state cannot be sued without its consent;⁶ this immunity is absolute and unqualified.⁷ Furthermore, an agency of the state may be sued only when and as authorized by statute,⁸ and even if authority to use the agency is given, it does not extend to actions for torts unless expressly provided.⁹ The remedy given to injured individuals before the State Tort Claims Act was a right

⁴ 241 N. C. 329, 85 S. E. 2d 386 (1955).

⁵ 241 N. C. 461, 85 S. E. 2d 703 (1955).

⁶ This is apparently based on the construction given the Eleventh Amendment to the Constitution of the United States in *Hans v. Louisiana*, 134 U. S. 1 (1890). See also: *Smith v. Hefner*, 235 N. C. 1, 68 S. E. 2d 783 (1951); *Dalton v. State Highway and Public Works Commission*, 223 N. C. 406, 27 S. E. 2d 1 (1943); *Prudential Insurance Co. v. Powell*, 217 N. C. 495, 8 S. E. 2d 619 (1940).

⁷ *Schloss v. State Highway and Public Works Commission*, 230 N. C. 489, 53 S. E. 2d 517 (1949); *Dalton v. State Highway and Public Works Commission*, 223 N. C. 406, 27 S. E. 2d 1 (1943).

⁸ *Burgin v. Smith*, 151 N. C. 561, 66 S. E. 607 (1909); *Moody v. State Prison*, 128 N. C. 12, 38 S. E. 131 (1901).

⁹ "It was a hardship on plaintiff, but no legal wrong of the defendant. It goes without saying that State authorities should exercise due care in the performance of governmental functions, but for the failure, in cases of this nature, no liability attaches." *Reeves v. Asheville Construction Co.*, 194 N. C. 817, 818, 140 S. E. 733, 734 (1927). See also: *Carpenter v. Atlanta and Charlotte Air Line Ry. Co.*, 184 N. C. 400, 114 S. E. 693 (1922); *Jones v. Commissioners of Franklin County*, 130 N. C. 451, 42 S. E. 144 (1902).

of action against the employees of the agency,¹⁰ or against officials of the state in limited cases,¹¹ or on appeal to the legislature for an appropriation.¹²

Most of the states which have passed acts allowing the state or its agencies to be sued have construed such acts strictly.¹³ In at least one case a *constitutional* provision allowing suits against the state has been strictly construed.¹⁴ The reasons given for such construction are: (1) since the acts are in derogation of common law, or in derogation of sovereignty, it is elemental that they are to be strictly construed;¹⁵ (2) actions against the state would impair respect for sovereignty and make inroads upon the public revenue;¹⁶ (3) there can be no legal rights against the authority that makes the law upon which such rights depend;¹⁷ (4) suits against the state would subject it to manifold, indefinite, and interminable liability;¹⁸ and (5) there would be crippling interferences with government if the acts were liberally construed.¹⁹

In those states in which statutes authorizing suits against the state have been liberally construed, this result usually is obtained because such statutes have been passed in furtherance of constitutional provisions.²⁰ Another reason given is that such statutes are merely remedial and do not create a new right of action.²¹

'It is gradually being recognized that states, through their officers and agents, can and do commit tortious acts.'²² States are making an un-

¹⁰ *Miller v. Jones*, 224 N. C. 783, 32 S. E. 2d 594 (1945); *Carpenter v. Atlanta and Charlotte Air Line Ry. Co.*, 184 N. C. 400, 114 S. E. 693 (1922).

¹¹ *Wilkins v. Burton*, 220 N. C. 13, 16 S. E. 2d 406 (1941); *Old Fort v. Harmon*, 219 N. C. 241, 13 S. E. 2d 423 (1941). See note, 23 N. C. L. Rev. 270 (1945), for discussion of distinction between liability for violation of discretionary duties and liability for violation of ministerial duties.

¹² Under Article IV, Section 9 of the North Carolina Constitution, the Supreme Court has original jurisdiction to hear claims against the state, but its decisions shall be merely recommendatory. The General Assembly alone decides whether a claim against the state is just and shall be paid. *Rotan v. State*, 195 N. C. 291, 141 S. E. 733 (1928).

¹³ For a summary by states of state tort claims acts, see Leflar and Kantrowitz, *Tort Liability of the States*, 29 N. Y. U. L. Rev. 1363 (1954).

¹⁴ *People v. Birch Securities*, 86 Cal.2d 703, 196 P.2d 143 (1948).

¹⁵ *Hailey v. City of Newark*, 22 N.J. 139, 36 A.2d 210 (1944).

¹⁶ *Quinton v. Board of Claims*, 165 Tenn. 201, 54 S.W.2d 953 (1932).

¹⁷ *Kawanankoa v. Polyblank*, 205 U. S. 349 (1907); *Arnold v. State*, 48 N. M. 596, 154 P. 2d 257 (1944).

¹⁸ *State v. Dickerson*, 141 Tex. 475, 174 S.W.2d 244 (1943).

¹⁹ *Harrison v. Wyoming Liquor Commission*, 63 Wyo. 13, 177 P.2d 397 (1947). But in *Great Northern Life Ins. Co. v. Read*, 322 U. S. 47 (1944), it was held that when authority to sue a sovereign is given, it is liberally construed to accomplish its purpose.

²⁰ Construction of such statutes should not be so strict as to violate the legislative intent or reflect on dignity of the state. *Lewis v. State*, 207 La. 194, 20 So. 2d 917 (1945); *Jackson v. State*, 261 N. Y. 134, 184 N. E. 735 (1933); *Northwestern and Pacific Bank v. State*, 18 Wash. 73, 50 Pac. 586 (1897).

²¹ *Lewis v. State*, 207 La. 194, 20 So. 2d 917 (1945).

²² This is generally recognized by the mere enactment of tort claims acts by the states. But the North Carolina court as late as 1949 said, as to the State High-

precedented expansion into many fields of activity and subjecting their citizens to increasing risks from "defective, negligent, perverse or erroneous administration"²³ of these activities. Along with this expansion come acts such as the North Carolina Tort Claims Act,²⁴ which recognize the moral duty imposed by considerations of equity and justice.²⁵ When a state thus discards its mantle of sovereignty, it would seem inconsistent to whittle the consent down by a strict construction.²⁶ "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."²⁷

Some arguments that may be advanced in favor of a liberal construction of such statutes are: (1) they are intended to relieve the state legislatures from the pressure of private claims, so that the legislatures may devote their time to matters of public concern;²⁸ (2) prerogatives of governments should yield to needs of their citizens;²⁹ (3) when a state consents to be sued, it should occupy the same position as a private citizen and be entitled to no special privileges;³⁰ and (4) the courts should not be concerned with the problem of financing the possible results of suits against the state, but should leave it to the legislature to require liability insurance.³¹

Perhaps the question of strict construction because of sovereign immunity is best summed up by the Supreme Court of Arkansas in a decision in 1851.³²

"A notion which might have been plausibly challenged, if the question was an open one in the courts of this country, as a sickly

way and Public Works Commission: "It is as powerless to exceed its authority as is a robot to act beyond the limitations imposed by its own mechanism. It can commit no actionable wrong." *Schloss v. State Highway and Public Works Commission*, 230 N.C. 489, 53 S.E.2d 517 (1949).

²³ Borchard, *Government Liability in Tort*, 34 YALE L. J. 1, 129, 229 (1924-25). Professor Borchard referred to the "unexampled expansion of the police power in the United States." What about expansion from 1924 to 1955? See also Borchard, *Governmental Responsibility in Tort*, 36 YALE L. J. 1, 757, 1039 (1926-27); Anderson, *Claims Against States*, 7 VAND. L. REV. 234 (1954).

²⁴ N. C. GEN. STAT. § 143-291 *et seq.*, as amended in 1953.

²⁵ *Jackson v. State*, 261 N. Y. 134, 184 N. E. 735 (1933).

²⁶ *United States v. Aetna Casualty & Surety Co.*, 338 U. S. 366 (1949), citing *Anderson v. John L. Hayes Construction Co.*, 243 N. Y. 140, 153 N. E. 28 (1926). See also Seavey, "Liberal Construction" and the Tort Liability of the Federal Government, 67 HARV. L. REV. 994 (1954).

²⁷ Cardozo, J., in *Anderson v. John L. Hayes Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29 (1926).

²⁸ See dissents by Parker, J., in *Alliance Co. v. State Hospital*, 241 N. C. 329, 334, 85 S. E. 2d 386, 390 (1955), and in *Floyd v. State Highway and Public Works Commission*, 241 N. C. 461, 467, 85 S. E. 2d 703, 707 (1955).

²⁹ *United States v. Yellow Cab Co.*, 340 U. S. 543 (1951).

³⁰ *State v. Stanolind Oil & Gas Co.*, 190 S. W. 2d 510 (Tex. Civ. App. 1945).

³¹ See Leflar and Kantrowitz, *Tort Liability of the States*, 29 N. Y. U. L. Rev. 1363 (1954), for a discussion of this possibility.

³² *State v. Curran*, 12 Ark. 321, 345 (1851).

exotic in American soil, where government is not prescribed to the people by a superior power, but is merely the organ of their own sovereignty and the creation of laws enacted by themselves, and which derive all their obligatory force from the mutual consent of those who are to render them obedience.

"The right of a citizen to sue a state, then is not derogatory to common right, or subversive of the true principles of the common law, but is clearly in harmony with both. . . ."

North Carolina has consistently recognized that claims against the state not only will be made,³³ but that they should be compensated.³⁴ In saying that the State Tort Claims Act should be strictly construed, it is submitted that the supreme court is following an out of date doctrine of governmental immunity, and is refusing to recognize the apparent legislative intent in passing such an act.

RICHARD O. GAMBLE.

Statutes—Determination of Moment at Which Newly Enacted Statute Attains Force of Law

The Supreme Court of Pennsylvania recently refused to apply to a tax statute the general rule that a day is regarded in the law as an indivisible unit of time which begins with its first moment, and thus, a statute is ordinarily deemed to take effect from the beginning of the day on which it is enacted.¹ Decedent died at 11:55 a.m. on the morning of 21 December, 1951. On the same day, the governor signed a bill which increased the collateral inheritance tax rate from 10 per cent to 15 per cent, and which was to become effective immediately upon its final enactment. There was no evidence as to the exact time of day when the governor signed the bill, but the Commonwealth, relying on the general rule, assumed the statute to have been operative from the first moment of the day of its enactment, and therefore in effect at decedent's death. The court held that the Commonwealth had failed to prove that the new law was actually in effect at the time of decedent's death, and that the lower court's verdict for a 10 per cent taxation was proper. It added that the general rule relied on by the Commonwealth was a legal fiction, and would be disregarded whenever its application would unjustly impair personal or property rights. In such cases, the court said that it would take cognizance of the actual hour or time of the passage of the statute.

³³ N. C. CONST. Art. IV, § 9: "The Supreme Court shall have original jurisdiction to hear claims against the State. . . ."

³⁴ *Rotan v. State*, 195 N. C. 291, 141 S. E. 733 (1928).

¹ *In re Grant's Estate*, 377 Pa. 264, 105 A.2d 80 (1954).