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THE VIRGINIA CONSTITUTION

Limitation of Powers of State Improvement Agencies

In *Harrison v. Day*¹ the State Comptroller challenged the constitutionality of actions of the State Ports Authority. The Authority had contracted with the Norfolk & Western Railway to purchase property on which to construct new port facilities. The Authority intended to develop these facilities and then lease them to the Norfolk & Western Railway to operate in the public interest. In order to initially finance the purchase and construction, the Authority issued and sold revenue bonds. The bonds were secured by a trust agreement and by a lease, which contained a provision exempting the Railway from State taxes. The State Comptroller questioned whether these intended transactions by the Authority violated sections in the Virginia Constitution prohibiting tax exemptions and State competition with private enterprise.² The Supreme Court of Appeals of Virginia held that the activities of a state agency performing proper governmental functions are not rendered private functions by the agency's leasing its facilities to an individual or corporation for performance of the function involved.

Before the Constitution of 1902, the situation in the instant case would have presented no legal question. Legislation passed in 1896 gave the State power to lend or advance money to private corporations which were engaged in works of public improvement. The Legislature passed this act feeling that such a policy would facilitate commercial development in Virginia.

The impracticality of this legislation readily manifested itself, however, when many of the corporations receiving such aid quickly proved themselves bad risks.³ Because of the losses

¹ *Harrison v. Day*, 202 Va. 967, 121 S.E.2d 615 (1961).

² VA. CONST. § 185:

Neither the credit of the State, nor of any county, city or town, shall be, directly or indirectly, under any devise or pretense whatsoever, granted to the aid of any person, association, or corporation, nor shall the State, or any county, city or town subscribe to or become interested in the stock or obligations of any company, association or corporation, for the purpose of aiding in the construction or maintenance of its work; nor shall the State become a party to or become interested in any work of internal improvement, except public roads and public parks . . .

³ *Almond v. Day*, 197 Va. 782, 91 S.E.2d 660 (1956).

experienced by the State, the Legislature revised part of the old Constitution by inserting the limitations which now appear in Section 185.⁴

In order to soften the rather stringent restrictions of Section 185, the Supreme Court of Appeals of Virginia began to consider whether works of internal improvement satisfied a governmental purpose or merely a private purpose. The following cases show how this "governmental purpose" doctrine has been applied.

Perhaps the most obvious application of this doctrine appears in *Almond v. Gilmer*, where the Supreme Court of Appeals held that State operation of a ferry fulfilled a valid governmental purpose because one may consider a ferry an extension of a highway.⁵ Since Section 185 expressly makes State maintenance of highways legal, it follows that State operation of a ferry—a mere extension of the highway—constitutes a valid governmental purpose.

*Almond v. Day*⁶ discussed the application and theory of the doctrine more explicitly. The Board of Trustees of the Virginia Supplemental Retirement System wished to invest funds under its control in securities for the State's benefit. The Court held that the "animating purpose" and the object a State Agency sought to accomplish were the necessary factors to consider in judging the constitutionality of the transaction in view of Section 185.

The Court also stated that if State funds were used to purchase securities for State purposes it would not matter whether a private corporation or an individual benefitted from the transaction. This case seems to state the more general policy upon which all cases of that sort have been decided. For example, operation of shuttle busses through the Elizabeth River Tunnel⁷ and the Hampton Roads Bridge Tunnel⁸ were declared valid

⁴ *Ibid.*

⁵ *Almond v. Gilmer*, 188 Va. 822, 51 S.E.2d 277 (1949).

⁶ *Almond v. Day*, *supra* note 3.

⁷ *Elizabeth River Tunnel District v. Beecher*, 202 Va. 452, 117 S.E.2d 685 (1961).

⁸ *Almond v. Day*, *supra* note 3.

activities of the State because the service was incidental to the State highway system and therefore was "incidental and necessary to the performance of the State's governmental functions."⁹

In *Harrison v. Day*¹⁰ the Supreme Court declared the State Ports Authority's development of harbor facilities at Hampton Roads a valid governmental purpose. The Court held that the internal improvement provisions in the Constitution were not intended to limit State development only to those functions "that are inherent and necessary to the government and without which it cannot be maintained."¹¹ The government, in addition to providing such improvements as these may foster such activities as provide for the welfare and prosperity of its people.

*Shenandoah Lime Co. v. Governor*¹² seems to show the application of the governmental purpose doctrine in its most distinct sense. The State wished to operate lime-grinding facilities in order to provide useful labor for its convicts. The Supreme Court held such action to be constitutional, proclaiming the development and operation of such facilities incidental to the performance of a governmental function. The striking difference between this case and other cases of its kind is that the internal improvements in the other cases were for the direct benefit of the general public.

One may discern from these cases three basic criteria which appear to form the foundation of the "governmental purpose" doctrine as the Virginia Supreme Court of Appeals has applied it. The Court seems to consider developments as fulfilling a valid governmental purpose (1) when they constitute a mere extension of something which has been previously erected in the fulfillment of a governmental purpose, (2) when they are incidental to a government function, and (3) when they are for the prosperity and welfare of the public. *Harrison v. Day* seems to fall most easily into the third category. It differs from cases previous to it only in that it is more liberal in permitting obvious benefits to a private corporation.

J.F.P.

⁹ *Ibid.*

¹⁰ *Harrison v. Day*, *supra* note 1.

¹¹ *Id.* at 775.

¹² *Shenandoah Lime Co. v. Governor*, 115 Va. 865, 80 S.E. 753 (1913).