Constitutional Law: Sovereign Waiving Privilege of Immunity from Suit can Limit the Amount to Be Recovered

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else ordinary care to avoid injuring plaintiff, after he discovered, or by the exercise of ordinary care, could have discovered, her peril, and that by such failure, if any, she was thereby injured, you will find for the plaintiff."

No clearer statement of the humanitarian doctrine could be desired. Yet the Court, in that case, termed it the humanitarian or last clear chance doctrine, and cited in support the Cumberland Grocery Company case supra, and the Williams Motor Company case, which clearly applies the humanitarian doctrine.

In a recent case,7 the Kentucky Court approved the humanitarian doctrine in its application to railroads, but refused to allow plaintiff to benefit thereby under that particular set of facts. The Court there restricted the doctrine to longitudinal passways sufficiently used to require operators of trains to anticipate the presence of persons on the tracks at those points. It would seem that such restriction is in keeping with the cardinal requirement of the humanitarian doctrine that defendant be under some duty, the breach of which may constitute lack of ordinary care in discovering a negligent plaintiff's peril. Again, in Kinsella et al. v. Meyer's Admr.,8 the Court framed an instruction to be used in the second trial which, it is submitted, is a perfect enunciation of the principles of the humanitarian doctrine. Yet the Court said that the facts presented "a situation that calls for the 'last clear chance doctrine'."

It is submitted that the real distinction to be made between the doctrine of last clear chance and the humanitarian doctrine is that under the latter plaintiff is actively negligent, not helpless, and could by waking up to his condition, remove himself from danger, while defendant is unaware of plaintiff's peril, yet if he had used care he could have discovered plaintiff's condition in time to avoid the injury. It is submitted that it is a matter of practical importance that the distinction between these two doctrines be maintained, since it is evident that a plaintiff might be denied a recovery under the doctrine of last clear chance, and yet be entitled to a judgment under the humanitarian doctrine if defendant is guilty of a breach of a duty to keep a lookout.

STEVE WHITE.

CONSTITUTIONAL LAW: SOVEREIGN WAIVING PRIVILEGE OF IMMUNITY FROM SUIT CAN LIMIT THE AMOUNT TO BE RECOVERED

A recent Kentucky case9 upheld a statute permitting a motorist who collided with a truck operated by an employee of the State Highway Commission to sue the Commonwealth for recovery of not more than $6,000. The court held that such a statute did not violate a con-

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1625 1 Ky. 557, 65 S. W. (2d) 688 (1933), cited supra, n. 11.
8 267 Ky. 508, 102 S. W. (2d) 974 (1937) (automobile-pedestrian case).
institutional provision\(^2\) prohibiting the General Assembly from limiting the amount to be recovered for injuries to persons or property saying that without the enabling act the plaintiff had no remedy since immunity from suit was a privilege which the sovereign could either refuse to waive or waive at its pleasure and with such restrictions as it saw fit to impose.

It is a well established rule both generally\(^3\) and in Kentucky\(^4\) that the state by reason of its sovereignty cannot be sued in its own courts or in any other unless it has expressly consented to such suit except of course where the constitution allows it to be made a party or where it may be made a party in the Supreme Court of the United States.\(^5\)

But the immunity of the state from suit can be surrendered by the General Assembly and it may direct in what manner and in what courts suits may be brought against the Commonwealth.\(^6\)

Moreover it has been held that the right to sue the state is a matter of legislative grace and therefore the extent of the recovery and the manner of proceeding are to be governed by the terms of the grant.\(^7\) In addition the cases seem to be almost unanimous in their holding that the state can lay down any terms it sees fit to impose.\(^8\)

And even though the state consents to suit this is not a contract and the consent can be repealed or modified at any time at the dis-

\(^2\)Ky. Const., Sec. 54.


\(^5\)U. S. Const., Art. III, Sec. 2, par. 1; U. S. Const., Art. XI; Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504 (1890).

\(^6\)Ky. Const., Sec. 231.

\(^7\)Commonwealth v. Stevens, 3 Ky. L. Rep. 165 (1881); Commonwealth v. Chevis, 4 Ky. L. Rep. 325 (case 2; 1883); see Pennington's Administrator v. Commonwealth, 242 Ky. 527, 530 (1932).

\(^8\)Lemon v. Commonwealth, 238 Mass. 599, 129 N. E. 382 (1921); Brown v. Ford, 113 Miss. 678, 73 So. 722 (1917); Ross v. State, 172 N. Y. S. 656 (1919); Commonwealth v. Ferries, 120 Va. 827, 92 S. E. 304 (1917).
cretion of the state even after judgment is rendered since such a judgment cannot be collected by execution; it remaining wholly with the state as to whether it will provide for its payment or refuse to do so.

In conclusion, the principal case apparently reaches the right result in holding that immunity from suit is a privilege which the sovereign may waive at its pleasure and upon such terms as it sees fit, even to the extent of limiting the amount to be recovered in the action allowed. It would seem however that the fear of the legislature that the plaintiff might recover an excessively large judgment was not well founded in this case since the jury found for the plaintiff in the sum of $3,000, only one-half of the limit fixed by the act.

B. T. MOYNAHAN, JR.

*Westinghouse Electric & Manufacturing Co. v. Chambers, 169 Cal. 131, 145 Pac. 1026 (1915); Meyer v. State Land Settlement, 236 Pac. (Cal.) 743 (1930); State v. Woodruff, 150 So. (Miss.) 760 (1933); Stuart v. Smith-Courtney Co., 123 Va. 231, 96 S. E. 241 (1918).