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Annual Survey of Virginia Law - Administrative Law

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VIRGINIA SECTION

THE THIRTEENTH ANNUAL SURVEY OF VIRGINIA LAW: 1967-1968

ADMINISTRATIVE LAW

*W. Hamilton Bryson**

This year's survey of Administrative Law focuses upon the four cases involving administrative agencies or municipal corporations decided last term by courts sitting in Virginia. Though few in number, the cases presented a wide range of issues including the review of a determination of the State Corporation Commission on an application for a branch bank,¹ a condemnation case,² the availability of a tort remedy against a municipal corporation³ and a contest over the constitutionality of the Virginia Industrial Building Authority.⁴

Corporation Commission Approval of Branch Bank

The delicate task of balancing the business interest in maintaining an unhampered potential for growth and customer service against the public interest in avoiding unnecessary and destructive duplication of economic effort fell once again to the Supreme Court of Appeals in its review of the State Corporation Commission's decision to act favorably upon the application of the Schoolfield Bank for a branch office in downtown Danville. In *Security Bank v. Schoolfield Bank*⁵ the Supreme Court of Appeals affirmed the Commission's determination, which was based on evidence that the sole office of the applicant bank was frequently crowded, was short of parking space, and lacked drive-in facilities. In addition, the Commission found that there was no room for further expansion at that location, that most of the bank's customers resided closer to the site of the proposed branch office, that the seven intervening banks were all in good financial condition, and that there was a favorable trend of economic growth in the city of Danville. The latter two factors evidently assured the Commission that the existence of a new branch would not jeopardize the position of the other local banks. In view of this evidence the Commission specifically

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¹ *Security Bank & Trust Co. v. Schoolfield Bank & Trust Co.*, 208 Va. 458, 158 S.E.2d 743 (1968).

² *Fugate v. Martin*, 208 Va. 529, 159 S.E.2d 669 (1968).

³ *Mahone v. McGraw Edison Co.*, 281 F. Supp. 582 (E.D. Va. 1968).

⁴ *Button v. Day*, 208 Va. 494, 158 S.E.2d 735 (1968).

⁵ 208 Va. 458, 158 S.E.2d 743 (1968).

held that it was "satisfied that public convenience and necessity [would] be served"⁶ by granting the application.

Commissioner Catterall dissented from the opinion of the Commission on the ground that there was no showing of any need for another bank where the branch was to be opened since there were already seven banks within one thousand feet of this location. But Commissioners Dillon and Hooker and the Supreme Court of Appeals have ruled that "public convenience and necessity" does not mean an absolute or indispensable necessity,⁷ but refers to a public need in the sense that approval of an application would result in a benefit to customers and to the public generally. The Commission found that this test was satisfied with respect to Schoolfield's application because the establishment of the branch was necessary to adequately serve the applicant's existing customers and to keep pace with the expanding need for banking facilities which was expected to result from the renovation and expansion of downtown Danville.

In upholding this determination, the Court cited with approval *Wall v. Fenner*⁸ which interpreted a similar South Dakota statute and held that the purpose of a statute requiring that the "public convenience and necessity" be served by the expansion of banking facilities is to protect the public

from the evils of unsound and imprudent banking. While the adequacy of existing banking facilities may be considered in the determination of public convenience and necessity it does not follow that because there are adequate banking facilities that public convenience and necessity justifying another bank cannot exist. If such were the case, the statute would tend to deter competition and foster a monopoly. We are satisfied that this was not the intent of the legislature.⁹

The Virginia Court followed the reasoning and language of this case closely in determining that the purpose of the Virginia statute is to promote a sound and responsible banking establishment and not to provide unfair advantages to a few banks. In the Danville situation it was clear from the evidence that the creation of an additional branch bank would not injure other local banks, but rather would be in the interests of public service and convenience.

The holding of the Supreme Court of Appeals is in line with the Commonwealth's general policy of encouraging the growth of its banking industry in order to be better able to meet out-of-state competition in

⁶ This standard for reviewing applications is provided by VA. CODE ANN. § 6.1-39(a) (1966).

⁷ 208 Va. at 461, 158 S.E.2d at 745.

⁸ 76 S.D. 252, 76 N.W.2d 722 (1956).

⁹ *Id.* at 259, 76 N.W.2d at 726.

financing large projects, a goal which the previous fragmentation of the banking establishment precluded. In 1962¹⁰ banks were allowed to grow by merging with banks in other counties so that Virginia corporations would not have to seek investment capital outside the state. In addition, the 1968 General Assembly granted the Corporation Commission authority to amend the charters of state banks and give them powers similar to those possessed by federally chartered banks.¹¹ In this manner state banks can be kept in a favorable competitive position with national banks.

Litigation Against State Agencies

Two cases involving suits by or against the government were decided last term: *Fugate v. Martin*¹² in the Supreme Court of Appeals and *Mahone v. McGraw Edison Co.*¹³ in the federal court for the Eastern District of Virginia.

Fugate v. Martin was a condemnation proceeding instituted by the State Highway Commission which sought to appropriate a narrow strip of the property owner's land. In determining the amount of compensation to be paid, the commissioners of the court took into account a deed between the landowner's predecessor and the Highway Commission in which the Commission had covenanted not to obstruct access to the property. Apparently accepting the property owner's contention that the covenant established a property right which was "taken" upon breach of the contract, and rejecting the Commission's contention that the deed was irrelevant in a condemnation proceeding, the lower court accepted the commissioners' findings and awarded the recommended compensation.

On appeal, the Supreme Court of Appeals reversed the lower court on the grounds that the commissioners should not have considered the deed between the property owner and the Commission. The Court's rationale was that a condemnation proceeding is concerned with property rights rather than contract rights; the breach of a contract is immaterial unless it shows property damage arising from condemnation. Since the owners had introduced the covenant not as evidence that property rights were damaged, but in order to prove and receive damages for breach of contract,¹⁴ such considerations were outside the scope of the commissioners' function. That function, stated the Court, is merely to determine "the value of the land taken and damages . . . which may accrue to the residue

¹⁰ Va. Acts of Assembly 1962, ch. 404, at 565-66.

¹¹ Va. Acts of Assembly 1968, ch. 325, at 434; VA. CODE ANN. §§ 6.1-5.1 (Supp. 1968).

¹² 208 Va. 529, 159 S.E.2d 669 (1968). For further discussion of this case see Spies, *Property, 1967-1968 Annual Survey of Virginia Law*, 54 VA. L. REV. 1244, 1246 (1968).

¹³ 281 F. Supp. 582 (E.D. Va. 1968).

¹⁴ 208 Va. at 531, 159 S.E.2d at 671.

. . . by reason of the taking."¹⁵ Because this statutory grant of power must be strictly construed,¹⁶ an alleged breach of contract by the Commonwealth may not be considered in a condemnation proceeding. The proper procedure is to present the claim to the administrative department responsible for the breach¹⁷ and sue the Commonwealth in the Circuit Court of the City of Richmond if the claim is denied.¹⁸

In the sovereign immunity case, *Mahone v. McGraw Edison Co.*,¹⁹ the city of Richmond was joined as a third party defendant in an action for negligence brought by an injured man against the manufacturer of a defective switch activator assembly. The court ruled that there could be no recovery by the third party plaintiff from the city of Richmond because, in operating the recreational facility where the plaintiff was injured, the city was performing a governmental function.²⁰ The court based its holding both on prior case law and on Virginia Code section 15.1-291 which specifically grants immunity to any city or town in the operation of a recreational facility in an action for simple negligence.²¹

While the general rule is that neither the Commonwealth nor its subdivisions or departments can be sued in tort, a municipal corporation may be sued as if it were a private corporation for torts committed while it is acting in a non-governmental capacity.²² In such a situation, notice must be given within sixty days after the cause of action has accrued,²³ and jurisdiction and venue are governed by section 8-42.1 of the Code which precludes a federal court from hearing the case.²⁴

The main problem arising in this context is that the line of demarcation between governmental and non-governmental functions is, to say the least, somewhat vague. As the Court in *Mahone* observes, the general test is whether or not the activity is proprietary. If it is not, and if the "act is for the common good of all without the element of special corporate benefit, or pecuniary profit . . . , there is no liability."²⁵ Such abstract definitions seldom produce clear cut answers in concrete cases; and as the

¹⁵ VA. CODE ANN. § 33-63.1 (Supp. 1968).

¹⁶ *E.g.*, *Dillon v. Davis*, 201 Va. 514, 519, 112 S.E.2d 137, 141 (1960); *Painter v. St. Clair*, 98 Va. 85, 34 S.E. 989 (1900).

¹⁷ VA. CODE ANN. § 2.1-223.1 (1966).

¹⁸ VA. CODE ANN. § 8-752 (Supp. 1968), §§ 8-38(9) to -40 (1957).

¹⁹ 281 F. Supp. 582 (E.D. Va. 1968).

²⁰ *Id.* at 584.

²¹ VA. CODE ANN. § 15.1-291 (1964).

²² *Norfolk v. Hall*, 175 Va. 545, 9 S.E.2d 356 (1940); *Hoggard v. Richmond*, 172 Va. 145, 200 S.E. 610 (1939).

²³ VA. CODE ANN. § 8-653 (Supp. 1968).

²⁴ VA. CODE ANN. § 8-42.1 (Supp. 1968). This section allows tort cases against local governments and agencies to be brought only "in a court of the Commonwealth."

²⁵ 281 F. Supp. at 584.

government increases its activities in areas previously reserved for private endeavor, the distinction between the two functions is apt to become even more obscure. In order to alleviate this inevitable problem, the legislature should attempt to establish definitive guidelines for private citizens seeking redress for the negligent conduct of municipal corporations.

The Industrial Building Authority

The case of *Button v. Day*²⁶ involved an original petition for mandamus to test the constitutional validity of the Virginia Industrial Building Authority Act.²⁷ The Authority was an administrative agency established by the General Assembly to encourage the development of industry within the state and was delegated power to guarantee, out of a specific fund, loans to private industry for the location of future plants within the state. Although the General Assembly had appropriated 2500 dollars for the use of the Authority, the Comptroller refused to disburse the money on the grounds that the Authority's power contravened the credit clause of the Virginia Constitution.²⁸ The Attorney General then petitioned the Supreme Court of Appeals for a writ of mandamus²⁹ which was denied on the ground that the Commonwealth was applying the credit of the state to private debts in violation of the constitutional prohibition.

The credit clause of the Virginia Constitution is explicit in its language: "Neither the credit of the State, nor any county, city or town, shall be, directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation . . ." ³⁰

The Attorney General argued that the functions of the Authority were to stimulate industrial growth, reduce unemployment and foster economic well-being in the state, all of which constituted proper governmental functions. In rejecting this contention the Court pointed out that not every method for advancing proper governmental goals is necessarily permissible. It found that the primary function of the Authority was to guarantee otherwise unobtainable loans which had been secured by private firms from private sources to finance construction or improvement of privately owned industrial plants; benefit to the state was only incidental.

The Attorney General attempted to deemphasize the credit-producing function of the Authority by arguing that only one appropriation had been made and that, due to the limited nature of the special fund, further appropriations would not be necessary in the future. The Court made it

²⁶ 208 Va. 494, 158 S.E.2d 735 (1968).

²⁷ VA. CODE ANN. §§ 2.1-64.4 to -64.14 (1966).

²⁸ VA. CONST. art. XIII, § 185.

²⁹ Original jurisdiction over petitions for mandamus is provided for in VA. CODE ANN. § 8-714 (1957).

³⁰ VA. CONST. art. XIII, § 185.

clear that, so long as the primary purpose of the fund was to grant credit to private interests, it could not constitutionally stand regardless of how it had been established. The Court intimated, however, that had the funds been directed toward public ownership of the facilities, the Authority would have passed muster even though the facilities might have been privately operated. Moreover, the plan would have been permissible if the money used to guarantee loans had not come from appropriations of public funds or if the state had given money outright to the private interests. But, as created, the Authority was clearly a government agency holding funds for possible future payment of private debts and it clearly transgressed the letter and the spirit of the credit clause.

At the conclusion of its opinion, the court pointed to a proposed amendment to section 185 of the Constitution which had been approved by the 1966 session of the General Assembly and referred to the next session:

This section shall not be construed to prohibit the General Assembly from establishing an authority with power to insure and guarantee loans secured by first deed of trust or first mortgage on privately owned industrial plants to finance industrial development and industrial expansion, and from making appropriations to such authority to enable it to exercise such power.³¹

Unfortunately this proposed amendment was not passed by the 1968 legislature. If Virginia is to continue with the Industrial Building Authority program, an amendment such as this is a necessity.

Despite this painful lesson regarding extension of credit to the private sector of the economy, the leaders of the Commonwealth should recognize that a prudent approach to government support of industrial ventures can be vital to the industrialization and economic well-being of the Commonwealth. The legislation establishing the Industrial Building Authority represented such an approach, giving creditors access only to a specific and limited fund and restricting the power of the Authority to increase the extension of state credit or borrow money. With these factors in mind, the General Assembly should again consider the 1966 legislature's proposed amendment to section 185 so that the Authority can be resuscitated.

³¹ *Button v. Day*, 208 Va. 494, 505, 158 S.E.2d 735, 742 (1968). The resolution referred to is S.R. No. 39, Va. Acts of Assembly 1966, ch. 726, at 1583-84.