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Present and Possible Future Enforcement Procedures in Claims against the State

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committee on the whole on 'legislative department,' and no discussion of it is found anywhere in the journal."⁵ It was his opinion that perhaps the provision was adopted by the convention because they contemplated possible involvement and harassment of the state by reason of inherited debts and obligations.

The historical origins of sovereign immunity from suits are found in the medieval concept of the divine right of kings, which in England was expressed in the ancient maxim, "The King can do no wrong."⁶ It would seem that such a notion would be totally repugnant to a country such as ours, dedicated as it has been from an early date to the principles of equality and due process of law; however, such has not been the case. In a number of early cases after the Revolution the doctrine was vigorously applied in both state and federal courts.⁷ Indeed, so intense was the need felt for the substance of the doctrine, that its apparent impairment by a federal court decision in 1793, wherein article III, section 2, of the United States Constitution⁸ was interpreted as subjecting a state to the court's jurisdiction at the instance of the citizen of another state,⁹ promptly gave rise to the eleventh amendment, wherein such subjection of a state to federal jurisdiction was expressly prohibited.¹⁰

In 1907 Justice Holmes, for the first time in the long history of the doctrine, made an attempt to justify it as a legal principle. He said, "[T]here can be no legal right as against the authority that makes the law on which the right depends."¹¹ Also, some writers have recognized that the public policy in favor of noninterference with the performance of governmental functions is an important factor to be considered, and should be balanced against the

⁵ Bouchelle, *Repeal of Section 35 of Article VI of the West Virginia Constitution and Adoption of Amendment Permitting Suits and Actions Against the State*, 48 W. VA. L.Q. 259, 260 (1941).

⁶ Note, 40 MINN. L. REV. 234 (1955); Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349 (1925).

⁷ The slogan was solemnly renounced by the Supreme Court as forming any part of the law of the United States in *Langford v. United States*, 101 U.S. 341 (1879); however, most cases fail even to pay lip-service to this renunciation.

⁸ "The judicial power [of the United States] shall extend to all cases . . . between a State and Citizens of another State."

⁹ *Chisholm v. Georgia*, 2 U.S. 419 (1793).

¹⁰ This amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

¹¹ *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). For an exhaustive refutation of both the logic and practicality of the statement see Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 757, 1039 (1927).

need for judicial protection of individual rights from illegal state action.¹²

Whatever the justification, or lack of it, it is a well settled principle in this country that neither the federal government nor a state may be sued by its citizens without its consent, and the constitutions of four states expressly provide that they may not be made a defendant at law or in equity.¹³

II

Fortunately for West Virginians, there are statutes in this state which "provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section 35, article 6 of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be determined in a court of law or equity. . . ."¹⁴ These provisions set up a process whereby claims against the state, its subdivisions or agents, may be heard by the attorney general who in turn, when the facts seem to justify, may make recommendations to the director of the budget concerning awards. The list of awards is then submitted to the legislature for appropriation.¹⁵

Jurisdiction of the attorney general extends to the following matters:

1. "Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies, which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.
2. "Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of set-off or counterclaim on the part of the state or any of its agencies.
3. "The legal or equitable status, or both, of any claims

¹² See Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1062 (1946); Note, 55 COLUM. L. REV. 73 (1955).

¹³ ALA. CONST. art. 1, § 14; ARK. CONST. art. 5, § 20; ILL. CONST. art. IV, § 26; and of course W. VA. CONST. art. VI, § 35. One state has a statutory provision to the same effect. TENN. CODE ANN. § 8634 (Williams 1934).

¹⁴ W. VA. CODE ch. 14, art. 2, § 1 (Michie 1955). Thus the legislature has, at least impliedly, recognized the injustices created by the present constitutional provision.

¹⁵ W. VA. CODE ch. 14, art. 2, §§ 1-12 (Michie 1955). For an example of such a general appropriation by the legislature, see W. Va. Acts 1957, ch. 13.

referred to the attorney general by the head of a state agency for advisory determination."¹⁶

Although the attorney general's jurisdiction in this area is quite broad, the citizen is not limited to this procedure alone for satisfaction of his claim. Another method commonly used is to submit the claim to a member of the legislature in the form of a special bill authorizing the specific agency or subdivision concerned to pay the claimant. This bill, if passed by the legislature, authorizes payment by the state.¹⁷

Regardless of whether the citizen submits his claim through the attorney general's office or directly to the legislature, he still may not obtain relief even though the funds are appropriated or payment is authorized. The state auditor may refuse to pay a particular appropriation or the particular state agency or subdivision involved may refuse to pay even though authorized to do so, in which case the claimant is forced to seek mandamus relief against one or other as the case may be. The defense usually employed in such case is the absence of a "moral obligation" on the part of the state to pay the claim.¹⁸ The existence of a moral obligation would, of course, normally be a question of fact for a jury, but since the supreme court has original jurisdiction in mandamus actions against state agencies and officers, there is no opportunity for a jury trial of this question, and, as yet, no workable rule has been developed by the court for determining its answer. In cases of negligent injury to property the court has said a moral obligation of the state, declared by the legislature to exist in favor of a claimant, will be sustained, and an appropriation for payment upheld, when the conduct of agents or employees of the state which proximately caused such injury is such as would be *judicially* held to constitute negligence in an action for damages between private persons.¹⁹ Thus a much

¹⁶ W. VA. CODE ch. 14, art. 2, § 4 (Michie 1955). Note that under this section West Virginia will recognize tort claims brought against it, whereas many states will not. See *Talley v. Northern San Diego County Hosp. Dist.*, 41 Cal. 2d 83, 257 P.2d 22 (1953); *Manion v. State*, 303 Mich. 1, 5 N.W.2d 527, *cert. denied*, 317 U.S. 677 (1942).

¹⁷ E.g., W. Va. Acts 1957, ch. 172. In *State v. Sims*, 130 W. Va. 623, 46 S.E.2d 90 (1947), the court held that provisions of art. IV, § 35, do not prevent the recognition of a "moral obligation" upon the part of the state which may be discharged by the appropriation of public funds to private individuals.

¹⁸ For a general discussion of the case law in West Virginia on the sovereign immunity of state agencies, see the comment in this by Mr. Robert G. Dorsey. See also, Note, 43 W. VA. L.Q. 66 (1936); Comment, 30 W. VA. L.Q. 291 (1924).

¹⁹ *State v. Sims*, 139 W. Va. 92, 79 S.E.2d 277 (1953); *Price v. Sims*, 134 W. Va. 173, 58 S.E.2d 657 (1950).

stronger case would be required of a claimant to recover on a "moral obligation" than would be needed had the case been tried before a jury in the circuit court. And still, the five judges of the supreme court, being only human, will differ as to when an act will judicially constitute negligence. The claimant and the state, therefore, are not only being deprived of a trial by jury; their case, in effect, is being tried by a five-man jury which is not even required to reach a unanimous verdict. This is but one example of the inadequacies of the present procedure, which has been forced on the citizens and the state by the immunity provision of the constitution.

In considering the special bills of authorization put forth for the claimant by a member of the legislature to be passed by that body, a more obvious procedural inadequacy immediately becomes apparent. It would be naive to assume that political-pull, political pressures, and political affiliations have nothing to do with the passage of such bills; consequently politics, which has no place in the wheels of justice, becomes inexorably enmeshed therein, to the possible prejudice of the claimant, or perhaps, even the state. Admittedly, this procedure has the advantage of simplicity, yet justice should be administered without fear or prejudice—two elements which might possibly arise during consideration of a claimant's proposed special bill.

III

If the proposed amendment to article VI, section 35 be adopted,²⁰ the more obvious defects of the present procedure mentioned above, along with other inadequacies, could be cured by legislation. This section, if amended would read: "The State of West Virginia, including any of its subdivisions, may be made a party defendant in such cases and under such conditions as may be prescribed by law." The constitutions of nineteen states provide that the state shall be subject to suit in such manner and in such courts as the legislature shall determine.²¹ Although the amendment as proposed by the constitutional revision commission does not specify that suits shall be tried "in such courts as the legislature

²⁰ A similar amendment was proposed almost thirty years ago; however it died in the legislature. It provided that "the State of West Virginia shall never be made defendant in any court of law or equity without its consent, hereafter duly given by the Legislature." W. VA. LEGISLATIVE HANDBOOK, *Report of Constitution Commission* 80 (1931).

²¹ Arizona, California, Florida, Indiana, Kentucky, Louisiana, Nebraska, New York, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Washington, Wisconsin and Wyoming.

may determine," it is submitted that the legislature would do well to provide a court system for litigation of claims against the state. West Virginia should not let herself slip into the mire in which other states have found themselves, even without a constitutional provision as harsh as ours. Why cast off our present immunity provision if we cannot improve on the claim procedures now in force thereunder?

"Adjudication of controversies is better than settlement of controversies by sheer force, whether or not the government is one of the parties. Yet a holding that sovereign immunity is a bar to a decision on the merits when a state . . . is one of the parties means that the controversy is likely to be disposed of by use of force, or at best by resort to political power. Even though the courts are especially qualified to decide questions of law and fact concerning property and contracts and torts, these are the very questions which the doctrine of sovereign immunity most often prevents the courts from deciding.

"Five powerful reasons show the need for reform: (1) the injustice of refusing judicial relief when government officers infringe the legal rights of a private party, (2) the impracticability of substituting force or political power for adjudication of controversies that courts are especially qualified to determine, (3) wasteful litigation which stems from judicial fluctuation from one line of authority to another, (4) the almost unbelievable lack of scientific judicial inquiry into the reasons for the basic doctrine, and (5) disappearance of the only reasons that supported the doctrine of sovereign immunity when the doctrine was introduced into American law during the first half of the nineteenth century."²²

Existing types of procedure may be roughly divided into four classes. Many states leave the determination of claims, apart from legislative action, entirely in the discretion of a single executive, frequently the state auditor or comptroller. Occasionally a board of officers, of whom the auditor is usually a member, renders the same service. A number of states allow suits in their general courts, while a few have a specially constituted tribunal, a court of claims, or board of examiners.²³

Of the four classes presented, hearings before a judicial or quasi-judicial tribunal seem preferable to determination by administrative

²² Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages*, 40 CORNELL L.Q. 3 (1954).

²³ For an exhaustive, but perhaps somewhat outdated, classification according to the statutory provisions of the various states, see Notes, 44 HARV. L. REV. 432 (1930).

officers. "Judges are by training and tradition better qualified to handle the problems presented than are officials selected primarily for their executive ability. The latter, burdened with other and different duties, must either sacrifice thoroughness or, what is even more prevalent, leave all investigation to inefficient subordinates largely motivated by political interests."²⁴ In any case, the claim should be decided by a body in which the legislature has confidence, for if an appropriation is needed, it should be prompt and virtually automatic.²⁵ "If the claim is rejected, neither political considerations nor distaste for the rule of law controlling the case should carry weight with the legislature except under the most extraordinary circumstances."²⁶

One of the advantages of a trial by a judicial tribunal in these cases would be the uniformity of decisions which should result. Also more realistic rules might be developed with which the court could work.²⁷ There should, however, be some method provided for compromising claims which do not merit litigation. This task could best be performed, perhaps, by the attorney general or state auditor.

Before the state could be made defendant in a court of law or equity, however, solutions would have to be found for a number of problems which would necessarily arise.²⁸ Six of the more immediate ones might be:

1. Should the legislature provide a special court to try suits and actions on claims against the state or should they be tried by courts of general jurisdiction?
2. If they are tried by courts of general jurisdiction, should a jury be used to decide questions of fact?²⁹
3. If the court system is used, should the consent requirement be completely abolished?

²⁴ *Id.* at 434, 435.

²⁵ Promptness can be achieved by the creation of a contingent fund against which warrants can be drawn, thereby doing away with the necessity for legislative appropriation. E.g., MASS. ANN. LAWS ch. 258, § 3 (1956).

²⁶ Note 23 *supra*, at 435.

²⁷ The presence or absence of a "moral obligation" on the part of the state could be ignored in the sense it is now recognized. See part II, *supra*.

²⁸ For the solutions provided by the federal government, see Court of Claims, 28 U.S.C. §§ 241-293 (1952), as amended, 28 U.S.C. §§ 1491-1494 (Supp. V, 1958).

²⁹ A jury may possibly be prejudiced in favor of the claimant and against the "all-powerful" state.

4. If they are tried by a special court, will this court have one location or will it sit in various parts of the state?

5. If they are tried by courts of general jurisdiction, who will defend the state?

6. Regardless of which system is used, how can the court and the state guard against fraudulent claims?

Space limitations prevent inquiry into possible solutions for these and other problems which would arise should the state submit to the role of defendant in a court of law or equity; however solutions would have to be found in order to properly implement the proposed amendment, *provided*, of course, it is adopted.

T. E. P.

CASE COMMENTS

ANNULMENT—RESIDENCE REQUIREMENTS—APPLICABILITY OF DIVORCE STATUTES.—*P*, a resident of Canada, filed a bill of complaint for annulment in the circuit court of Wayne County, Michigan. The bill alleged that *D* is a resident of Wayne County. The Michigan statute dealing with annulment requires only that one party to the suit be a resident of the county where the bill is filed. The divorce statute, however, may be invoked only upon fulfilling certain additional residence requirements. *Held*, that statutory residence requirements regulating divorce suits are inapplicable to suits for annulment. *Hill v. Hill*, 93 N.W.2d 157 (Mich. 1958).

Provisions similar to those of the Michigan statute are likewise found in the statutes of the majority of jurisdictions. That is, there are specific statutes dealing with the venue requirements for petitions for annulment while another statute provides the residence requirements for divorce suits.

The only important divergence from this scheme is that in many states the venue statute applicable to annulments likewise applies to suits for divorce, so that both jurisdictional and venue requirements must be met in an action for divorce. West Virginia follows this view. *Morgan v. Vest*, 125 W. Va. 367, 24 S.E.2d 329 (1943). However, the question in the principal case is the reverse of the preceding situation, that is, whether or not the sections of the divorce statute relating to jurisdiction apply to petitions for annulment.