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LEGISLATIVE PRACTICE REGARDING TORT CLAIMS AGAINST THE STATE

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It is common knowledge that the doctrine of the immunity of the sovereign from suit, well established as it was at common law,¹ has been breaking down at numerous points. The performance by the government of tasks which bring it into competition with private enterprise and which greatly increase the chance of harm to the citizen has, in the opinion of scholars, rendered the assumption of liability by it for negligent injury desirable.² Whether as a matter of social policy this should be done is, perhaps, debatable.³ However, this aspect of the problem will not be considered here. Rather, the attempt will be made to determine what the present situation is with respect to tort liability of the sovereign and how legislatures are actually dealing with matters of this kind. The discussion will be confined as closely as possible to situations involving injuries occasioned by governmental activities of the state as distinct from its political subdivisions. Contract claims and cases involving the appropriation of property in eminent domain proceedings will be treated only incidentally.

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1. 3 WILLOUGHBY, CONSTITUTIONAL LAW (2d ed. 1929) § 887; Notes (1926) 42 A. L. R. 1464; (1927) 50 A. L. R. 1408.

2. Borchard, *Government Liability in Tort* (1924) 34 YALE L. J. 1, 129, 229; Maguire, *State Liability for Tort* (1916) 30 HARV. L. REV. 20.

3. It is generally argued that since the state now performs many functions in addition to those historically considered as governmental which are similar to those performed by private service companies, it should assume the same liability as that imposed on ordinary persons and corporations. The conclusion does not necessarily follow. It may be that the state, in the performance of services valuable to the general public, should not be hampered and harrassed by the claims of private individuals injured as an incident to the rendering of such service. This point has been generally minimized in discussions of the subject. It may be noted that Tennessee, having previously authorized suit, later passed a statute forbidding its courts to entertain such actions. CODE ANN. (Shannon, 1917) § 4507. Alabama adopted a constitutional provision forbidding suit after having previously permitted it. CONST. (1901) art. I, § 14.

At the outset it is necessary to notice the diversity of constitutional provisions with respect to suits against the state. Though nearly half of the states of the union have no such provisions,⁴ and in four others suits against the state are flatly prohibited,⁵ a large number make some arrangement for the maintenance of actions against them by aggrieved citizens. By far the most common measure of this sort is that the legislature shall provide by law in what manner and in what court suits shall be brought against the state. In substance this provision is to be found in thirteen state constitutions,⁶ while in four others it is altered only by the requirement that the legislature shall act by general law.⁷ A recommendatory judgment of the supreme court is provided for by two states,⁸ and in one the creation of a court of claims is contemplated.⁹ The constitution of Louisiana requires that when suit is authorized by the legislature, the method of procedure and the effect of the judgment shall be provided for.¹⁰ Constitutional provisions permitting suit are ordinarily said not to be self executing,¹¹ thus being distinguished from the provision that private property shall not be taken for public purposes without compensation, which has been held to authorize suit even in the absence of constitutional or statutory authority.¹²

4. Colorado, Connecticut, Delaware, Georgia, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, Oklahoma, Rhode Island, Texas, Utah, Vermont and Virginia.

5. ALA. CONST. (1901) art. I, § 14; ARK. CONST. (1874) art. V, § 20; ILL. CONST. (1870) art. IV, § 26; W. VA. CONST. (1872) art. VI, § 35.

6. ARIZ. CONST. (1910) art. IV, § 18; CAL. CONST. (1879) art. XX, § 6; KY. CONST. (1891) § 231; NEB. CONST. (1920) art. V, § 22; N. D. CONST. (1889) § 22; OHIO CONST. (as amended 1912) art. I, § 16; PA. CONST. (1873) art. I, § 11; S. C. CONST. (1895) art. XVII, § 2 (refers to claims rather than suits); S. D. CONST. (1918) art. III, § 27; TENN. CONST. (1870) art. I, § 17; WASH. CONST. (1889) art. II, § 26; WIS. CONST. (1848) art. IV, § 27; WYO. CONST. (1889) art. I, § 8.

7. FLA. CONST. (1885) art. III, § 22; IND. CONST. (1851) art. IV, § 24; NEV. CONST. (1864) art. III, § 22; ORE. CONST. (1857) art. IV, § 24.

8. IDAHO CONST. (1889) art. V, § 10; N. C. CONST. (1868) art. IV, § 9.

9. N. Y. CONST. (as amended 1925) art. VI, § 23.

10. LA. CONST. (1921) art. III, § 35.

11. *State v. Dart*, 23 Ariz. 145, 202 Pac. 237 (1921); *Riddoch v. State*, 68 Wash. 329, 123 Pac. 450 (1912). And see cases holding that statutes authorizing suit do not themselves create liability, *infra* note 23.

12. *State Pk. Comm. v. Wilder*, 260 Ky. 190, 84 S. W. (2d) 38 (1935); *Pelt v. La. State L. S. S. Bd.*, 178 So. 644 (La. App. 1938); *Perkerson v. State Highway Bd.*, 192 S. E. 475 (Ga. App. 1937). See *McNeel v. State*, 120 Neb. 674, 234 N. W. 786 (1931). But see *State Highway Comm. v. Adams*, 178 Okla. 270, 62 P. (2d) 1013 (1936), holding that the constitutional provision in question does not authorize suit against the state for consequential or resulting damages arising from the construction of a highway over a properly acquired right of way; *Dougherty v. Vidal*, 37 N. M. 256, 21 P. (2d) 90 (1933), apparently applying the rule of immunity of suit in the case of an injury to property as a

Thus it appears necessary to look to the statutes in the various jurisdictions in order to determine the extent to which liability has been assumed. Considerable diversity both in the statutes themselves and in the interpretation placed upon them by courts is at once observed. In order to facilitate discussion, a rough classification has been attempted which, it is believed, includes all the devices which have been employed by state legislatures in handling matters of this kind.

GENERAL PROVISIONS AUTHORIZING SUIT

Fourteen states have adopted general statutory provisions authorizing suits on claims against the state.¹³ However, a difficult question of interpretation arises when the attempt is made to discover the extent to which suit is made possible by these laws. To a layman, the word "claim" would probably mean any demand against the state whether arising out of contract or tort. But it seems to be definitely established, in jurisdictions where the point has arisen, that permission to sue for injuries arising out of the negligent acts of state agents is not granted by a general statute permitting suits on "claims" against the state.¹⁴ The ground of the distinction is not

result of changing the grade of a road. An interesting problem is raised by the fact that those states which expressly prohibit the bringing of suits against the state also have the constitutional prohibition against taking property without compensation. ALA. CONST. (1901) art. I, § 23; ARK. CONST. (1874) art. II, § 22; ILL. CONST. (1870) art. II, § 13; W. VA. CONST. (1872) art. III, § 9. It seems possible that the eminent domain provision would be considered controlling in cases involving the exercise of this power. See *Smith v. Inge*, 80 Ala. 283 (1885). But see *Dougherty v. Vidal*, *supra*. All of the states in question have eminent domain statutes which seem to afford adequate remedies to injured property owners. ALA. CODE ANN. (Michie, 1928) c. 286; ARK. DIG. STAT. (Crawford & Moses, 1921) c. 56; ILL. REV. STAT. (Cahill, 1931) c. 47; W. VA. CODE (Barnes, 1923) c. 42. As to possible redress in the federal courts under the Fourteenth Amendment see DOBIE, *FEDERAL PROCEDURE* (1928) § 133; 3 WILLLOUGHBY, *CONSTITUTIONAL LAW* (2d ed. 1929) §§ 889, 893.

13. ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4379; CAL. GEN. LAWS (Deering, 1923) Act 7928; IND. STAT. ANN. (Burns, 1933) §§ 4-1501 (limited to contract claims); KY. STAT. ANN. (Baldwin's Rev. of Carroll, 1936) § 340; MASS. ANN. LAWS (1933) c. 258, §§ 1-5; MISS. CODE ANN. (Hemingway, 1927) § 3370; NEV. COMP. LAWS (Hillyer, 1929) § 9200; N. D. COMP. LAWS ANN. (1913) § 8175; S. D. COMP. LAWS (1929) § 2109; VA. CODE (1930) §§ 2173, 2578 (limited to pecuniary claim on any legal ground); WASH. COMP. STAT. (Remington, 1933) § 886; WIS. STAT. (1937) § 285.01.

14. *Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28, 24 N. E. 854 (1890); *Burroughs v. Commonwealth*, 224 Mass. 28, 112 N. E. 491 (1916); *Davis v. State*, 30 Idaho 137, 163 Pac. 373 (1917); *Payne v. State Highway Comm.*, 136 Kan. 561, 16 Pac. (2d) 509 (1932); *Bush v. State Highway Comm.*, 329 Mo. 843, 46 S. W. (2d) 854 (1932); *Broyles v. State Highway Comm.*, 48 S. W. (2d) 78 (Mo. App. 1932); *Clodfelter v. State*, 86 N. C. 51, 41 Am. Rep. 440 (1882); *Scales v. Winston-Salem*, 189 N. C. 469, 127 S. E. 543 (1925); *Campbell Bldg. Co. v. State Road Comm.*, 70 P. (2d) 857 (Utah 1937); *Northwestern*

entirely clear. The leading case on this subject seems to be that of *Murdock Parlor Grate Co. v. Commonwealth*,¹⁵ decided by the Supreme Judicial Court of Massachusetts in 1890. A tort action had been brought against the state predicated on a statute giving the superior court jurisdiction of "all claims against the commonwealth, whether at law or equity." In dismissing the petition, the court said:¹⁶

"While the words 'all claims' may, in their colloquial use, include a demand for damages occasioned by a tort to person or property, in its more proper, judicial sense it is a demand of some matter as of right, made by one person upon another for some particular thing or compensation therefor, or to do, or to forbear to do, something as a matter of duty."

The court further remarked that the legislature could not be said to have intended to create liability of a sort not previously assumed, and concluded that since contract liability had always been recognized and tort liability had not, the word "claim" had reference to the former and not the latter. It thus seems that the word "claim" may be defined as a demand based on a previously existing or recognized type of liability. If this is true, the word may or may not include a demand for recompense for injuries of the tort type, depending upon whether the state had previously assumed liability in that field. The word "claim" has also been said to be synonymous with "cause of action,"¹⁷ which seems a rather more concise way of saying the same thing. If the state, then, has previously assumed liability for injuries of the tort type, it would seem that a statute granting permission to sue on all claims would include actions for damages for injuries to person or property. The fact that such liability has not been assumed is probably the reason why, with the exception of the few states which specifically authorize suits for negligence,¹⁸ general statutes giving permission to sue on claims against the state have been held not to include actions for injuries of a tortious character. However, in the main, the cases have flatly asserted that "claims" refers to contract actions only, without attempting an explanation.¹⁹ Possibly for

& Pac. Hyp. Bank v. State, 18 Wash. 73, 50 Pac. 586 (1897); *Riddoch v. State*, 68 Wash. 329, 123 Pac. 450 (1912); *State ex rel. Robinson v. Superior Ct.*, 46 P. (2d) 1046 (Wash. 1935); *Houston v. State*, 98 Wis. 481, 74 N. W. 111 (1898).

15. 152 Mass. 28, 24 N. E. 854 (1890).

16. *Id.* at 30, 24 N. E. 855.

17. *State ex rel. Robinson v. Superior Ct.*, 46 P. (2d) 1046 (Wash. 1935).

18. Arizona, California, Nebraska and North Carolina, in note 13, *supra*.

19. *Davis v. State*, *Bush v. State Highway Comm.*, *Clodfelter v. State*, *Riddoch v. State*, *Houston v. State*, all *supra* note 14, are examples.

the same reason statutory provisions requiring the presentation of claims to the auditor or a similar official as a condition precedent to bringing suit²⁰ seem to refer to contract cases only. In Nebraska, where negligence claims are included in the statute, it has been held that two distinct classes of claims are recognized and of these two, only claims arising out of contract need be referred to the auditor.²¹

Another problem of considerable intricacy has to do with the effect of a statute permitting suit against the state with reference to the assumption of liability for the injury out of which the litigation arises. The decided weight of authority seems to be that merely authorizing suit, whether by general or special²² act, does not constitute an assumption of liability but merely creates an additional remedy for enforcing such liability as already existed.²³ A small minority, however, holds that permission to sue is in itself an assumption of liability if facts showing injury of the type covered by the statute are proved.²⁴ The first group of cases rests upon the ground that immunity from suit and immunity from liability are distinct things and that since acts in derogation of the sovereign's immunity are to be strictly construed,²⁵ the inference that liability is assumed simply because permission to sue is given should not be made. Courts in the latter group appear content to point out the apparent absurdity of authorizing a suit in circumstances where prosecution of the action would be futile and conclude that the legislature must have intended to permit recovery. At first glance, the preferable view would seem to be that which is taken

20. Most of the states have provisions of this kind. See, e.g., ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 28; IOWA CODE (1935) § 84-e6; OHIO GEN. CODE ANN. (Page, 1937) §§ 242, 244; VT. PUB. LAWS (1933) §§ 504-509. For an interpretation of such a statute see *Thoreson v. State Bd. of Examiners*, 21 Utah 187, 60 Pac. 982 (1900). But see *Wilkinson v. State*, 42 Utah 483, 134 Pac. 626 (1913).

21. *McNeel v. State*, 120 Neb. 674, 234 N. W. 786 (1931).

22. Special acts authorizing suit are considered in greater detail *infra*, pp. 12-16.

23. *State v. Hill*, 54 Ala. 67 (1875); *State v. Sharp*, 21 Ariz. 424, 189 Pac. 631 (1920); *Walker v. Dep't of Public Works*, 108 Cal. App. 508, 291 Pac. 907 (1930); *Davis v. State*, 30 Idaho 137, 163 Pac. 373 (1917); *Murdoch Parlor Grate Co. v. Commonwealth*, 152 Mass. 28, 24 N. E. 854 (1890); *Stewart v. State Highway Comm.*, 166 Miss. 43, 148 So. 218 (1933); *Shear v. State*, 117 Neb. 865, 223 N. W. 130 (1929); *Smith v. State*, 227 N. Y. 405, 125 N. E. 841 (1920); *Brooks v. State*, 68 S. W. (2d) 534 (Tex. Civ. App. 1934); *Riddoch v. State*, 68 Wash. 329, 123 Pac. 450 (1912); *Apfelbacher v. State*, 160 Wis. 565, 152 N. W. 144 (1915). See Note (1921) 13 A. L. R. 1276.

24. *Pennington's Admr. v. Commonwealth*, 242 Ky. 527, 46 S. W. (2d) 1079 (1932); *Graham v. State*, 109 S. C. 301, 96 S. E. 138 (1918). See *Bakken v. State*, 56 N. D. 861, 219 N. W. 834 (1928).

25. This proposition seems to be universally accepted. See, generally, the references cited *supra* note 1.

by this group of courts. It seems reasonable to assume that a legislature, in granting permission to sue, would not intend the privilege so conferred to be entirely valueless. The position taken by the majority, however, is consistent with the meaning of the word "claim" as used in the cases previously referred to. As has been pointed out, the word signifies only demands predicated on previously existing liability. Therefore, even if it were to be assumed that statutes giving permission to sue on all claims against the state constituted an admission of liability on such claims, the admission would be only of a liability already existing, which would be meaningless. The position of the minority may readily be distinguished on two grounds. First, in none of the jurisdictions adhering to the view that permission to sue constitutes an assumption of liability, is there a general statutory provision for suits against the state. Secondly, in the two jurisdictions which clearly hold to this effect, the decisions setting forth the doctrine involved the effect of special acts, giving named individuals the power to sue for specified injuries.²⁶ Acts of this type will be considered in more detail in another connection.²⁷ It is far easier to discover a legislative intention to assume liability in situations of this character than in the case of statutes purporting to deal with the problem generally. Thus, with reference to general statutes, it seems evident that the correct position is that liability is not assumed by giving permission to sue. This conclusion is further substantiated by the general legislative practice of assuming tort liability in specific types of cases, which will be mentioned hereafter.²⁸

Even though liability is expressly assumed by the state, the extent of the assumption must be determined. Here, also, courts have been zealous to confine liability as narrowly as possible. The definite tendency has been to restrict recovery to the precise circumstances mentioned in the statute.²⁹ Furthermore, the acts have been viewed not as constituting

26. Pennington's Admr. v. Commonwealth, Graham v. State, both *supra* note 24.

27. *Infra* pp. 12-16.

28. *Infra* pp. 11, 12.

29. Thus, it has been held that a statute authorizing suit in the state courts did not permit suit in the federal courts. *Dunnuck v. Kansas State Highway Comm.*, 21 F. Supp. 882 (1st D. Kan. 1937). A statute authorizing suit by injured persons but not specifically permitting subrogation was held not to permit a subrogee to sue. *American Mut. Liability Ins. Co. v. State Highway Comm.*, 146 Kan. 239, 69 P. (2d) 1091 (1937). The recovery of damages for mental anguish suffered by a widow because of the death of her husband was said not to be authorized by a statute specifically referring only to physical injuries.

a definite admission of liability, which leaves the court only the task of determining the amount to be paid, but rather as placing the state in the same position as a private litigant, who may avail himself of such defenses as contributory negligence and assumption of risk.³⁰ This position seems clearly sound. In view of the general doctrine of immunity, the assumption of liability involves questions of policy which are for the legislature rather than the courts and it is not to be presumed that the legislature would intend to place the state in a worse position than a private litigant. In accordance with the same general principle, compliance with all conditions precedent required by the statute has been insisted upon³¹ and the power of the legislature to withdraw consent in such a way as to bar pending litigation has been sustained.³²

GENERAL PROVISIONS FOR THE ADMINISTRATIVE HANDLING OF TORT CLAIMS

Aside from what might be called the orthodox procedure of settling tort claims by reference to a court, a tendency is observed to create administrative tribunals for handling cases of this sort. This device has, of course, been employed by the federal government.³³ Among the states, it is interesting to note that of those which have gone the farthest in overthrowing the traditional conception of the sovereign's immunity is one which has a constitutional prohibition against suing the state in any circumstances. Illinois has created a court of claims with jurisdiction to "hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, *ex contractu* and *ex delicto*, which the State, as a

Cooper v. South Carolina Highway Dep't, 190 S. E. 499 (S. C. 1937). Limitation of the amount of recovery is valid. Commonwealth v. Daniel, 266 Ky. 285, 98 S. W. (2d) 897 (1936). See, generally, Stewart v. State Highway Comm., 166 Miss. 43, 148 So. 218 (1933).

30. Commonwealth v. Madison, 269 Ky. 571, 108 S. W. (2d) 519 (1937); Pennington's Admr. v. Commonwealth, 242 Ky. 527, 46 S. W. (2d) 1079 (1932); Jones Co. v. State, 122 Me. 214, 119 Atl. 577 (1923); Cooper v. South Carolina Highway Dep't, 190 S. E. 499 (S. C. 1937). The same thing seems to be true where the matter is handled by a court of claims. See Jackson v. State, 261 N. Y. 134, 184 N. E. 735 (1933).

31. State v. Superior Ct., 58 P. (2d) 1322 (Cal. App. 1936). See Thweatt v. State, 66 Ga. 673 (1881); Davis v. State, 30 Idaho 137, 163 Pac. 373 (1917); Mills v. Stewart, 76 Mont. 429, 247 Pac. 332 (1926); Scotts Bluff County v. State, 133 Neb. 508, 276 N. W. 185 (1937); Goodhope v. State, 50 S. D. 643, 211 N. W. 451 (1926).

32. Dunn Const. Co. v. State Bd. of Adjustment, 234 Ala. 372, 175 So. 383 (1937); *Ex parte* State, 52 Ala. 231 (1875).

33. 40 STAT. 1157, 28 U. S. C. (1928) §§ 241-293. See generally, Katz, *Federal Legislative Courts* (1930) 43 HARV. L. REV. 894, 904-907; Note (1933) 46 HARV. L. REV. 677.

sovereign Commonwealth should, in equity and good conscience, discharge and pay."³⁴ It has been suggested that, in view of the constitutional provision, the judgment of the court of claims must be merely recommendatory, since to allow a conclusive determination by the court would be to permit suit against the state.³⁵ In view of the fact that these judgments seem to be paid as a matter of practice,³⁶ the question seems to be of little importance. It seems clearly arguable, however, that the legislature might constitutionally delegate to such a court or other administrative body the final power to decide what claims should be paid. This would be in the nature of a delegation of the legislative power to decide when appropriations should be made,³⁷ and hence would not violate the constitutional provision against suit. Dean Waterman has pointed out that in Arkansas, a state having a similar constitutional provision, the legislature may apparently appropriate money in advance for the payment of claims and make the decision of an administrative body, as to what claims should be paid, final.³⁸

New York has also created a court of claims, though in this case constitutional difficulties of the sort present in Illinois are not to be found.³⁹ The decisions, however, indicate a tendency to restrict the jurisdiction of this tribunal. The power of the legislature to pay claims is itself subject to limitation.⁴⁰ The position seems to be taken that the legislature cannot give jurisdiction to the court of claims to hear and determine any claim which could not legally be paid by the legislature itself. Thus, only those claims which create a legal or a moral obligation on the state can be made the subject of adjudication before this tribunal.⁴¹ Aside from the general jurisdictional limitation, the state's liability is tested as that of a private

34. ILL. REV. STAT. (1937) c. 37, §§ 462 ff.

35. See Waterman, *One Hundred Years of a State's Immunity From Suit* (1936) 14 TEX. L. REV. 135, 159, and authorities cited.

36. See, e. g., Ill. Laws 1937, p. 75, for an appropriation made to pay awards of the court of claims.

37. See *Gordon v. United States*, 117 U. S. 697 (1864) (opinion prepared by Taney, C. J. in 1864, but not officially adopted). As to the power to make the decision of the administrative board final, see *Quinton v. Board of Claims*, 165 Tenn. 201, 54 S. W. (2d) 953 (1932).

38. Waterman, *supra* note 35, at 160-163.

39. COURT OF CLAIMS ACT §§ 263 ff.

40. See *Jackson v. State*, 261 N. Y. 134, 184 N. E. 735 (1933). The power to appropriate money to pay claims is discussed *infra*, pp. 16, 17.

41. *Corrigan v. State*, 142 Misc. 160, 254 N. Y. Supp. 146 (Ct. Cl. 1931). The cases are reviewed in Note (1929) 38 YALE L. J. 388.

individual would be, and the ordinary defenses present in such cases may be raised.⁴²

The Illinois statute is silent on the question of appeals. Provision is made, however, for exclusive jurisdiction of the court of claims,⁴³ and apparently the view which is taken of the nature of the power exercised would preclude a consideration of the determination of the administrative body by a constitutional court.⁴⁴ New York, on the other hand, provides for appeal and a rather extensive type of judicial review.⁴⁵

In two other states, general provision is made for administrative handling of tort claims. Arkansas, as has been said, in spite of a constitutional provision prohibiting suits against the state, has established a claims commission which apparently has general jurisdiction over claims of all types.⁴⁶ In Michigan, the State Administrative Board has been given power to pay claims for the negligent construction and maintenance of highways.⁴⁷ In Tennessee, it appears to be the practice to require approval of the Board of Claims as a condition to the payment of some tort claims.⁴⁸ Very generally claims arising from contract are treated administratively.⁴⁹ In some states this is done by a single official, usually the auditor,⁵⁰ while in others a group of persons, usually state officers of high rank, acts on claims of this nature.⁵¹ In still others, the attorney general is given power to investigate claims on behalf of the legislature.

In the case of contract claims, much is to be said in favor of administrative determinations. Usually the fact issues are not particularly complicated and little knowledge of law is required to reach a solution. Furthermore, determination by a single official or a small group may tend

42. See *Penner v. State*, 236 App. Div. 472, 261 N. Y. Supp. 89 (4th Dep't 1932).

43. ILL. REV. STAT. (1937) c. 37 § 474.

44. Waterman, *loc. cit. supra* note 38.

45. N. Y. COURT OF CLAIMS ACT § 29.

46. Waterman, *loc. cit. supra* note 38. The claims commission was continued by act of the 1937 legislature. Ark. Acts 1937, no. 252.

47. MICH. COMP. LAWS (1929) § 238.

48. See Tenn. Pub. Acts 1935, pp. 348, 349; *Quinton v. Board of Claims*, 165 Tenn. 201, 54 S. W. (2d) 953 (1932).

49. The various administrative devices are discussed without distinguishing tort from contract claims in Note (1931) 44 HARV. L. REV. 432.

50. See the examples cited *supra* note 20.

51. e.g. ALA. CODE ANN. (Michie, 1928) § 917; CAL. GEN. LAWS (Deering, 1937) Act 7934; Idaho Code Ann. (1932) §§ 65-908; MONT. REV. CODE ANN. (Anderson & McFarland, 1935) §§ 232-248; NEV. COMP. LAWS (Hillyer, 1929) § 9200; S. C. CODE (1932) §§ 2071, 2073; TENN. CODE ANN. (Michie, 1932) § 368. The Board of Claims created by this section is apparently given some jurisdiction with respect to the approval of tort claims. See Tenn. Pub. Acts 1935, pp. 348, 349. UTAH REV. STAT. ANN. (1933) §§ 26-0-21 ff.

to expedite the granting of relief. Tort questions, on the other hand, present somewhat different problems. Matters such as contributory negligence, the assumption of risk and proximate cause frequently involve complicated questions demanding the highest type of legal ability for their solution. Furthermore, they are matters which are dealt with customarily by lawyers and infrequently by business men. Thus it would seem that wherever possible, the judicial process should be resorted to in cases of this kind. The same thing might be said with some force as to contract claims whenever there is a substantial controversy. Therefore, if the administrative process is to be utilized in this field, it should be done by the use of a tribunal of lawyers rather than laymen. This is expressly recognized in the New York⁵² statute. The fact that administration has thus far been largely in the hands of other persons is probably due to the infrequency with which tort liability has been assumed by the states.

The court of claims would seem to present the ideal solution in densely populated states where the number of claims is sufficient to occupy the entire attention of a body of experts. All tort matters and controverted contract cases should be handled by them. If the number of ordinary claims is insufficient, the court might be utilized, as in Illinois, for the adjudication of workmen's compensation cases involving the state. However, in smaller and predominantly agricultural states, the creation of such a tribunal would seem unwarranted in view of the probable number of claims which it would be called upon to handle. Barring constitutional prohibitions against suit, it would seem that power should be given to the courts to adjudicate these matters. The assumption of liability should be clear and definite. It is believed that there would be no difficulties from the constitutional standpoint, in view of the judicial nature of the function intrusted to the courts.⁵³

52. Ten years experience as a practising attorney is required of judges of the court of claims. COURT OF CLAIMS ACT § 2.

53. The nature of the judicial function has not generally been considered as carefully in the states as in the federal government. See, *passim*, Nutting, *Non-Judicial Functions of the District Court in Iowa* (1934) 19 IOWA L. REV. 385. It is believed, however, that providing that the decision were not made subject to further review, the state courts would regard the adjudication of claims as being judicial in character, as has the Supreme Court of the United States. See Katz, *loc. cit. supra* note 33.

ASSUMPTION OF LIABILITY FOR SPECIFIC TYPES OF INJURIES

Though adhering to the general principle of the immunity of the sovereign, it has been relatively common practice for the legislature to assume liability for injuries of the tort type in certain classes of cases. Constitutionally, the power to do this seems to be unquestioned.⁵⁴ No attempt has been made to compile an exhaustive list of the situations in which liability has been assumed. A sampling process will indicate the possibilities with sufficient clarity. One of the earliest examples of this type of legislation is to be found in the laws passed by the New York legislature assuming liability for the negligent acts of state agents in connection with the operation of canals.⁵⁵ The most common type of assumption seems to be that arising in connection with the maintenance of state highways.⁵⁶ Liability for injuries to cattle caused by the livestock sanitary board was assumed by the Louisiana legislature.⁵⁷ Numerous other examples may doubtless be discovered by an examination of the statutes in the various states. In general, what has been said with respect to the strict construction placed upon statutes assuming liability and the necessity of a definite assumption of liability as distinct from a mere authorization to sue, is applicable to legislation of this kind as well as that of a more general type.⁵⁸

Granting that the legislature has power under the constitution to assume liability in certain types of cases while denying it in others, one

54. It is well established that the legislature has the power to make reasonable classifications. See, *passim*, WILLIS, CONSTITUTIONAL LAW (1936) 580 ff. No cases have been discovered in which the suggestion has been made that the classifications found in this field have been unreasonable. Possible limitations on the power of the legislature to act specially in dealing with claims are considered *infra* pp. 16, 17.

55. New York Laws 1870, c. 320.

56. e. g., MICH. COMP. LAWS (1929) § 238; VT. PUB. LAWS (1933) §§ 4697, 4698; Minn. Laws 1937, c. 480. Also the statutes considered in the following cases: Heron v. Riley, 209 Cal. 507, 284 Pac. 209 (1930); Murphy v. Town of Norfolk, 94 Conn. 592, 110 Atl. 62 (1920); Payne v. State Highway Comm., 136 Kan. 561, 16 P. (2d) 509 (1932); State *ex rel.* State Highway Comm. v. Bates, 317 Mo. 696, 296 S. W. 418 (1927) (contract claim); Cooper v. S. C. Highway Dep't, 190 S. E. 499 (S. C. 1937); Quinton v. Board of Claims, 165 Tenn. 201, 54 S. W. (2d) 953 (1932).

57. Pelt v. La. State L. S. S. Bd., 178 So. 644 (La. App. 1938).

58. Thus, a statute authorizing suit against the Highway Commission in contract does not permit suit to be brought in tort. Campbell Bldg. Co. v. State Road Comm., 70 P. (2d) 857 (Utah 1937); Payne v. State Hwy. Comm., 136 Kan. 561, 16 P. (2d) 509 (1932); Bush v. State Highway Comm., 329 Mo. 843, 46 S. W. (2d) 854 (1932). Damages of a sort not contemplated with the act will not be allowed. Cooper v. S. C. Highway Dep't, 190 S. E. 499 (S. C. 1937). Of course, if a constitutional prohibition against suit exists, the legislature cannot consent to suit being brought against a state agency. Arkansas State Highway Comm. v. Nelson Bros., 87 S. W. (2d) 394 (Ark. 1935).

may well speculate as to the reasons underlying the adoption of such laws. The motivation of legislation here, as elsewhere, is extremely difficult to discover. In all of the situations in which liability is assumed it may be taken for granted that the state is performing a governmental function. But in the construction of highways, for example, the state is engaging in an activity which will frequently result in injuries to individuals and in which the possibility of negligent damage is very great. The same thing is, perhaps, true in other situations in which recovery is allowed. However, it is impossible to discover a consistent scheme running through the statutes and to make valid distinctions between situations in which the legislature has seen fit to make the state responsible for injuries and those in which it has not. The danger of partiality, though perhaps not as great as where liability is assumed by special legislation,⁵⁹ is still present. The preferable course would seem to be either to assume liability for all negligent injuries or to deny it in all cases. But an all-inclusive assumption is extremely rare.⁶⁰

ASSUMPTION OF LIABILITY BY SPECIAL LEGISLATION

Thus far the power of the legislature to assume or not to assume liability, to assume conditionally or in particular types of cases, has appeared to be unrestricted. The question as to whether the state may divest itself of its immunity in favor of a single individual and with reference to a particular injury has not, as yet, been considered. The practice of enacting special laws granting permission to sue the state, though specifically prohibited by four state constitutions,⁶¹ seems to be habitual in two jurisdictions⁶² and relatively common in several others. However, in two

59. *Infra* pp. 12-16.

60. The Illinois statute seems to be the nearest approach to a universal assumption of liability. ILL. REV. STAT. (1937) c. 37, §§ 462 ff. In New York, jurisdiction is confined to cases in which legal liability has previously been assumed and to cases in which jurisdiction has been validly conferred on the court of claims by special act. See *infra*, p. 15.

61. FLA. CONST. (1885) art. III, § 22; State v. Love, 99 Fla. 333, 126 So. 374 (1930); IND. CONST. (1851) art. IV, § 24; NEV. CONST. (1864) art. III, § 22; ORE. CONST. (1857) art. IV, § 24; Altschul v. State, 72 Ore. 591, 144 Pac. 124 (1914).

62. Texas Laws 1937, show 65 authorizations to sue the state in individual cases. The form of the authorization is that of a concurrent resolution without the governor's signature. Kentucky Acts 1938, indicate that 74 actions against the state were authorized. Here again, a resolution neither approved nor disapproved by the governor was used. A limitation of liability is ordinarily included and the auditor is directed to pay the amount of any award made. In

comparatively recent cases,⁶³ legislation of this type has been declared invalid, principally on the ground that a constitutional prohibition of special legislation has been violated. This problem must now be considered.

A preliminary point should be disposed of first. Here, as in the case of general statutes, the question arises as to whether granting permission to sue in itself constitutes an assumption of liability. As has been pointed out,⁶⁴ where general permission to sue is granted, it seems to be held universally that no assumption of liability is thereby created. However, in the case of special authorizations, the cases are in conflict. Probably the majority of jurisdictions in which the point has arisen have held against the assumption of liability,⁶⁵ though there is authority *contra*.⁶⁶ It is submitted that in the case of special authorizations it should be held that liability is assumed. A question of legislative intention is primarily involved in both cases. Where there is a general statute, it seems evident, for reasons previously indicated,⁶⁷ that the intention is simply to permit suit to be brought. But where there is special authorization, it would seem clear that the passage of the act would be the merest futility unless the purpose of the legislature was to make the state liable in the particular situation involved.

Turning now to the constitutional validity of special legislation of this character, it appears that those courts which deny the power of the legislature to pass acts of this kind base their case on a complex of constitutional provisions which are designed to secure uniformity of treatment. Provisions prohibiting the passage of a special law where a general law can be made applicable,⁶⁸ prohibiting the granting of exclusive privileges and immunities,⁶⁹ preventing the enactment of discriminatory legislation,⁷⁰

Texas, authorization to sue is held not to admit or create liability. *Brooks v. State*, 68 S. W. (2d) 534 (Tex. Civ. App. 1934). The contrary result is reached in Kentucky. *Pennington's Adm'r v. Commonwealth*, 242 Ky. 527, 46 S. W. (2d) 1079 (1932).

63. *Sirrine v. State*, 132 S. C. 241, 128 S. E. 172 (1925); *Cox v. State*, 279 N. W. 482 (Neb. 1938).

64. *Supra*, p. 5.

65. *Brooks v. State*, 68 S. W. (2d) 534 (Tex. Civ. App. 1934); *Apfelbacher v. State*, 160 Wis. 565, 152 N. W. 144 (1915); *Shear v. State*, 117 Neb. 865, 223 N. W. 130 (1929).

66. *Pennington's Adm'r v. Commonwealth*, 242 Ky. 527, 46 S. W. (2d) 1079 (1932); *Sirrine v. State*, 132 S. C. 241, 128 S. E. 172 (1925).

67. *Supra*, p. 5.

68. e. g., NEB. CONST. (1920) art. III, § 18.

69. e. g., PA. CONST. (1873) art. II, § 7; N. Y. CONST. (1894) art. III, § 18.

70. U. S. CONST. AMEND. XIV.

and requiring equal protection of the law⁷¹ are among those chiefly considered. An analysis of the opinions reveals a general tendency to assume conclusions and to jump across logical chasms with considerable ease. Thus, two courts have seized upon the constitutional provision that the legislature shall provide by law for suits against the state and have deduced from that premise the conclusion that the legislature must act by *general* law, which is a palpable *non-sequitur*.⁷² It is also assumed that the constitutional provisions referred to are applicable to the situation at hand.

It is a matter of some doubt as to where the weight of authority lies, and since the decisions are relatively few, the matter is of no great importance. It seems probable, however, that in the majority of jurisdictions in which the question has arisen it has been decided either expressly or by necessary implication that special legislation is permissible,⁷³ at least where no specific prohibition against the type of statute involved is present.⁷⁴ Here, too, the opinions are not entirely satisfactory. The general position seems to be that, since granting permission to sue is a matter of grace rather than right, the legislature is not compelled to observe the requirements of uniformity which are prescribed with reference to legislation generally.⁷⁵ However, in order to avoid the effect of the constitutional provision against making gifts of public money, it has been necessary for some courts to say that the granting of permission to sue is simply the recognition of a previously existing obligation which the

71. *Ibid.*

72. *Cox v. State*, 279 N. W. 482 (Neb. 1938); *Collins v. Commonwealth*, 262 Pa. 572, 106 Atl. 229 (1919). *Cf. Philadelphia v. Commonwealth*, 270 Pa. 353, 113 Atl. 661 (1921). The *Cox* case is discussed at some length in Nutting, *Special Legislation in Nebraska* (1938) 17 NEB. L. BULL. 332.

73. *Brooks v. State*, *Pennington's Admr. v. Commonwealth*, both *supra* note 62; *Mills v. Stewart*, 76 Mont. 429, 247 Pac. 332 (1926); *Apfelbacher v. State*, 160 Wis. 565, 152 N. W. 144 (1915); *Jones Co. v. State*, 122 Me. 214, 119 Atl. 577 (1923). In New York, special acts are used for the purpose of giving the court of claims jurisdiction over cases where there has been no previous statutory assumption of liability. See note 77, *infra*. In Minnesota, the commissioner of Highways has been authorized to settle claims in special cases. Minn. Laws 1937, c. 480.

74. Thus, in Oklahoma an act was invalidated which violated certain constitutional provisions prohibiting special acts in connection with schools. *Union School Dist. No. 1 v. Foster Lumber Co.*, 142 Okla. 260, 286 Pac. 774 (1930). However, the legislature seems to have enacted a number of special laws permitting suit to be brought against the state for tort injuries. See OKLA. COMP. STAT. (1931) § 12286; Laws 1936-7, c. 66, art. 11; c. 65, arts. 7, 8, 9.

75. See, e. g., *Mills v. Stewart*, 76 Mont. 429, 247 Pac. 332 (1926). See also the cases cited *infra* note 86.

state ought equitably to perform.⁷⁶ In New York, special acts giving jurisdiction to the court of claims are held valid only when a legal or moral obligation can be said to exist against the state.⁷⁷ It is, perhaps, arguable that the moral obligation exists in all cases arising out of similar facts and that, therefore, the legislature, in selecting a particular person to be the recipient of its bounty is in reality giving money to that person at the expense of others. But since the obligation, if any, is moral rather than legal, it is perhaps a matter requiring the exercise of legislative discretion. Where the effect of the statute is simply to permit suit rather than to assume liability, it has been said that the constitutional provisions have not been violated, apparently on the theory that since the legislative consent really amounts to nothing no one is either benefited or harmed as a result of the statute.⁷⁸ This is probably true but offers an amazing commentary on the futility of legislative action under such a construction of the statute.

Aside from general requirements designed to secure uniformity, the constitutional admonition that no special law shall be passed where a general law can be made applicable, which is found in many state constitutions, must be considered. In those states which hold that the legislature is the sole judge as to this,⁷⁹ there is of course no difficulty. In other states, the extent to which courts are content to rely on the presumptive validity of statutes seems to be the determining factor. Thus, in Nebraska⁸⁰ and Pennsylvania⁸¹ special acts have been invalidated, apparently because they do not show on their face any reason for treating the claim presented in a different manner from others. On the other hand, the possibility that special reasons unknown to the court may legitimately have influenced the passage of the act has been recognized.⁸² It is impossible to generalize successfully with reference to this point

76. *Mills v. Stewart*, 76 Mont. 429, 247 Pac. 332 (1926). See *Fairfield v. Huntington*, 23 Ariz. 528, 205 Pac. 814 (1922). The objection that the statute is retroactive is met by the same reasoning, as the *Fairfield* case indicates.

77. *Corrigan v. State*, 142 Misc. 160, 254 N. Y. Supp. 146 (Ct. Cl. 1931), *aff'd*, 260 N. Y. 645, 184 N. E. 129 (1932).

78. *Apfelbacher v. State*, 160 Wis. 565, 152 N. W. 144 (1915).

79. *e. g.*, *Arizona*. See *Fairfield v. Huntington*, 23 Ariz. 528, 205 Pac. 814 (1922).

80. *Cox v. State*, 279 N. W. 482 (Neb. 1938).

81. *Collins v. Commonwealth*, 262 Pa. 572, 106 Atl. 229 (1919).

82. See *Woodall v. Darst*, 71 W. Va. 350, 77 S. E. 264 (1912), 44 L. R. A. (N. S.) 83 (1912).

since theories of the nature and extent of judicial review vary so widely among the states.

It is suggested that the true issue in these cases is whether the constitutional requirements in question were intended to apply to legislative authorization to sue or to assumptions of liability. In view of the fact that the theory of immunity from suit, with its implications that permission might be granted conditionally or arbitrarily withdrawn,⁸³ was well established at common law, it seems likely that there was no intention to impose upon the legislature the duty of acting uniformly. Where, as in Kentucky, unbroken legislative practice from the earliest times has indicated that these matters are to be dealt with specially,⁸⁴ there is additional reason for adopting this position. Where liability is assumed by the statute, and especially where the proper official is directed to pay the judgment, the action of the legislature seems closely analogous to the exercise of the power to appropriate money which, subject to certain limitations hereinafter considered, may clearly be exercised specially. Thus, the preferable view would appear to be in favor of the validity of special legislation of this type, though the question is admittedly not free from doubt.

Granted the constitutionality of such legislation, however, it must be conceded that the practice is highly objectionable. It may have been the realization of this fact which has led some courts to deny its validity from the constitutional standpoint. In order to get legislative permission to sue, political pressure must, of course, be brought to bear. As a result, no matter what may be the theoretical situation, it is believed that favoritism and unfortunate types of influence play a much greater part in the legislative determination than do considerations of abstract justice. The basic unfairness of the process renders it undesirable as an ordinary device for the settlement of tort claims.

APPROPRIATIONS FOR THE RELIEF OF INDIVIDUALS

Appropriation for the relief of individuals who have been injured by the negligent or otherwise wrongful acts of state agents is at once the most prevalent and most objectionable means of dealing with the problem under consideration. The great majority of states seem to have se-

83. *Supra* pp. 6, 7.

84. See *Commonwealth v. Haly*, 106 Ky. 716, 51 S. W. 430 (1899).

lected this way of handling the matter.⁸⁵ Constitutionally, the position seems unassailable. Providing only that a moral obligation may be said to exist, and this is a matter in which legislative determination has great weight,⁸⁶ the power to appropriate money in this manner has been sustained by most of the state courts which have ruled on the question.⁸⁷ A few state constitutions provide for a vote of more than a majority of members of the legislature in the case of private appropriations,⁸⁸ but this safeguard does not appear to be particularly effective. All that has been said with reference to the granting of permission to sue by special act applies with even more force to the appropriation device. This method of dealing with claims constitutes legislative justice in its most obnoxious form. The desirability of doing away with the practice constitutes one of the strongest arguments in favor of a general assumption of liability and a statute providing for an orderly method of litigating controverted issues.

85. Recent volumes of the session laws of each state were consulted in an effort to determine legislative practice. The following instances of appropriations for the relief of individuals were discovered which, unless otherwise indicated, involved injuries of the tort type. Ala. Acts 1935, no. 58; Ariz. Laws 1937, c. 62; Cal. Stat. (1933) c. 694 (type of claim not indicated); Colo. Laws 1937, c. 33; Conn. Spec. Acts 1937, p. 758; Del. Laws 1937, c. 68; Fla. Spec. Acts 1935, p. 17; Ga. Laws 1937, res. no. 22; Idaho Laws 1937, p. 351; Ind. Laws 1935, c. 37 (these seem to be mostly contract claims; no claims which are clearly for tort were found); Iowa Laws 1937, c. 12; Kas. Laws 1935, c. 64; La. Acts 1936, no. 117; Me. Resolves 1931, c. 48; Md. Laws 1937, no. 43, p. 1227; Mass. Resolves 1937, c. 50; Miss. Laws Ex. Sess. 1935, c. 89; Mo. Laws 1937 (44 appropriations for relief are shown, but their character is not indicated, except that a number of them are for overpayment of taxes, *et cetera*); Mont. Laws 1937, p. 638; Neb. Laws 1935, c. 123; Nev. Laws 1937, p. 355; N. H. Laws 1937, c. 239; N. J. Laws 1937, c. 111 (pension to widow of employee); N. C. Pub. Laws (1935) c. 281 (pension to widow). The private acts of this state were not available to the writer. Okla. Laws 1936-7, H. J. R. 13; Ore. Laws 1937, c. 427; Pennsylvania (appropriation acts were not available to the writer); R. I. Acts & Res. 1937, c. 2480; S. D. Laws 1931, c. 33; Tenn. Pub. Acts 1935, c. 166, pp. 343, 349 (appropriations subject to approval of board of claims); Utah Laws 1937, c. 164 (basis of claim not given); Vt. Publ. Acts 1937, no. 37, Pt. III (basis of claims not given); Va. Acts 1938, c. 250; Wash. Laws 1937, c. 231, p. 1208 (basis of claims not given); W. Va. Acts 1935, c. 9, p. 88 (basis of claim not given); Wis. Laws 1935, c. 284; Wyo. Laws 1937, c. 135.

86. See *Fairfield v. Huntington*, 23 Ariz. 528, 205 Pac. 814 (1922).

87. *Fairfield v. Huntington*, 23 Ariz. 528, 205 Pac. 814 (1922); *Metz v. Soule*, 40 Iowa 236 (1875); *Opinion of Justices*, 240 Mass. 616, 136 N. E. 157 (1922), 23 A. L. R. 610 (1923); *Mills v. Stewart*, 76 Mont. 429, 247 Pac. 332 (1926); *Munro v. State*, 223 N. Y. 208, 119 N. E. 444 (1918); *Mackey v. Reeves*, 44 S. D. 153, 182 N. W. 700 (1921); *Woodall v. Darst*, 71 W. Va. 350, 77 S. E. 264 (1912); *State v. Carter*, 30 Wyo. 22, 215 Pac. 477 (1923), 28 A. L. R. 1089 (1924). *Contra*: *Bourn v. Hart*, 93 Cal. 321, 28 Pac. 951, 15 L. R. A. 431 (1892); *Chapman v. State*, 104 Cal. 690, 38 Pac. 457 (1894).

88. N. Y. CONST. (1894) art. III, § 20; R. I. CONST. (1842) art. I, § 14.

CONCLUSION

This paper has been concerned only with the collection of legislative and judicial data with respect to actual practice regarding tort claims and has not attempted to answer the fundamental issue of whether the doctrine of the immunity of the sovereign should be abandoned. A marked lack of uniformity in dealing with the problem has been observed. This in itself is perhaps not objectionable. But it seems apparent that certain devices are more desirable than others. Granted that the state should no longer be immune from suit and recovery, it is submitted that general statutes providing for liability and necessary litigation in order to determine its extent are much better than attempts to deal with cases on an individual basis. In states where the volume of litigation justifies it, or where there is a constitutional prohibition of suits against the state, the solution would seem to be the creation of an administrative body, composed of lawyers, to deal with claims. In others, reference to the existing courts seems to be the proper solution. But legislative practice, viewed the country over, must undergo marked revision if this end is to be attained. As yet, the goal of complete governmental responsibility is far from being attained.