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SOVEREIGN IMMUNITY IN PROBATE PROCEEDINGS

WILLIAM F. FRATCHER*

A will, containing both specific devises and a devise of the residue of the estate to private persons, and a codicil, confirming the specific devises but devising the residue to the State of Missouri, were admitted to probate in common form, ex parte and without notice to interested persons.¹ The residue included a remainder in real property. The residuary devisees under the will commenced a contest of the codicil in the circuit court on grounds of undue influence and lack of testamentary capacity.² At suit of the Attorney General the Missouri Supreme Court issued a writ of prohibition forbidding trial of the contest on the ground that the State was a necessary party defendant which, by reason of sovereign immunity, could not be joined without its own consent.³

To the extent that it has not been modified by the federal and state constitutions and statutes or by its inapplicability to local conditions, the law in force in England in 1607 is the law of Missouri.⁴ It thus becomes ma-

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1. Probate in common form, ex parte, without notice to interested parties, is authorized by §§ 473.017, .023, RSMo 1959. Notice is given after the grant of letters testamentary. § 473.033, RSMo 1959.

2. This is the procedure for contest of a will which has been admitted to probate in common form by a probate court. § 473.083, RSMo 1959.

3. *State v. Hall*, 389 S.W.2d 798 (Mo. En Banc 1965). The state had appeared specially in the circuit court and moved to dismiss the contest on the grounds that it had not been served with process and that it had not waived its sovereign immunity. The circuit court dismissed the state as a party but refused to dismiss the contest otherwise, on this motion and a subsequent motion filed by a specific devisee. The Missouri Supreme Court gave very little attention to whether failure to serve the State would be a ground for prohibition. Section 473.083, RSMo 1959 provides for dismissal of a will contest on motion if all parties defendant are not served within sixty days "in the absence of a showing by the plaintiff of good cause for failure to secure and complete service." As the quoted language has been held to confer discretion on the circuit court, it would seem that failure to serve within the prescribed period does not ipso facto deprive the circuit court of jurisdiction. *Hanna v. Sheetz*, 205 S.W.2d 955 (K.C. Mo. App. 1947). See *Gresham v. Talbot*, 326 Mo. 517, 31 S.W.2d 766 (1930). Cf. *Cole v. Smith*, 370 S.W.2d 307 (Mo. 1963), discussed in Fratcher, *Trusts and Succession in Missouri*, 30 Mo. L. REV. 82, 90 (1965); *Blatt v. Haile*, 291 S.W.2d 85 (Mo. 1956).

4. § 1.010, RSMo 1959; *Osborne v. Purdome*, 244 S.W.2d 1005 (Mo. En Banc 1951), *cert. denied*, 343 U.S. 953, *rehearing denied*, 343 U.S. 988 (1952); *Gillilan v. Gillilan*, 278 Mo. 99, 212 S.W. 348 (1919); *Duke v. Harper*, 66 Mo. 51 (1877).

terial to examine the scope of the doctrine of sovereign immunity from suit in English law and the way in which this doctrine has been applied by American courts.

Prior to 1858 there was no such thing as probate of a will devising real property in England. Like a grantee under a deed, the devisee under a will of real property simply took possession of the devised land on the death of the testator. If the heir of the testator or a devisee under a different will of the same testator wished to challenge the possessor's title, he brought an action of ejectment and the issue of the validity of the will under which the defendant claimed was litigated in that action. Suits to establish and construe wills of real property were sometimes conducted in equity.⁵

Under the rules of the feudal system, a feudal lord could not be sued in his own court without his permission. Consequently, the king could not be made a defendant in a royal court without his consent.⁶ If it was necessary to sue the king, the proper procedure was by petition of right. If the king endorsed the petition with his fiat the action was then conducted substantially like an action against a private person; if the king refused his fiat, the action could not proceed.⁷ In modern times, the king granted or denied the fiat on the advice of the Secretary of State for the Home Department, who consulted the Junior Counsel to the Treasury and the Attorney-General before tendering his advice.⁸

5. SHEPPARD, GRAND ABRIDGMENT, Part IV, p. 98 (1675); SWINBURNE ON TESTAMENTS 122 (1635); WILLIAMS ON EXECUTORS AND ADMINISTRATORS 6. 320-21 (3rd Am. ed., 1849); THEOBALD ON WILLS 71, 75 (5th ed., 1900). A devise of real property was looked upon as a conveyance by way of appointment. A will disposing of both real and personal property could be admitted to probate, but, until 1858, the probate had no effect as to real property. Court of Probate Act, 1857, 20 & 21 Vict. c. 77, § 63, was interpreted as extending the binding effect of such a probate to real property. *Beardsley v. Beardsley*, 1 Q.B. 746 (1899). The Land Transfer Act, 1897, 60 & 61 Vict. c. 65, § 1(3), authorized probate of a will which disposed only of real property.

6. *The King v. The Abbot of Shrewsbury*, SELECT CASES IN THE EXCHEQUER CHAMBER (Selden Society Vol. 64) 102, 104 (1485); In the Goods of His Majesty King George the Third, Deceased, 1 Add. 255, 162 Eng. Rep. 89 (1822); WATKINS, THE STATE AS A PARTY LITIGANT 7-13 (1927).

7. SHEPPARD, GRAND ABRIDGMENT, Part III, pp. 77, 87-89 (1675); 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 7-45 (1926); ANSON, LAW AND CUSTOM OF THE CONSTITUTION, Vol. II, Pt. II, 334-38 (4th ed. 1935); WATKINS, THE STATE AS A PARTY LITIGANT 16-31 (1927); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1-9 (1963).

8. Petitions of Right Act, 1860, 23 & 24 Vict. c. 34, §§ 1-3; 9 HALSBURY'S LAWS OF ENGLAND 694 (2d ed. 1933). The Crown Proceedings Act, 1947, 10 & 11 Geo. 6, c. 44, §§ 1, 2, permits suits to be maintained against the king and government departments without the consent of the king or anyone else. Consequently, it is no longer necessary to proceed by petition of right.

It is accepted doctrine that the king was under a duty to grant the fiat if the petition stated a cause of action,⁹ and there is reason to believe that a Home Secretary who advised denial of the fiat without good cause would be liable in damages to the petitioner.¹⁰

Although the king could not be made a defendant in his own court without his consent, the rule did not extend to appeals. If the king was a plaintiff or otherwise a party in the trial court, a losing private party could make the king a defendant to a writ of error without the king's permission.¹¹ When, on the death of a subject, the king became entitled to real property of the deceased by escheat, forfeiture or devise, the old procedure for establishing the king's title was by inquest of office.¹² This

9. *Ryves v. Duke of Wellington*, 9 Beav. 579, 599, 50 Eng. Rep. 467, 475 (1846); *Re Nathan*, [1884] 12 Q.B. 461, 474; *Dyson v. Attorney-General*, [1911] 1 K.B. 410, 421-22 (C.A.).

10. *Greenwood, The Liability of Crown Officers for Advising Refusal of the Fiat*, 8 MCGILL L.J. 134 (1962).

11. *The Queen v. Paty*, 2 Salk. 504, 91 Eng. Rep. 431 (1705); *Lloyd v. Skutt*, 1 Dougl. 350, 99 Eng. Rep. 225 (1780); *O'Connell v. The Queen*, 11 Cl. & Fin. 155, 8 Eng. Rep. 1061 (1844). *Accord*, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-12 (1821); *Bannard v. New York State Natural Gas Corp.*, 404 Pa. 269, 172 A.2d 306 (1961); *State v. Moore*, 77 W.Va. 325, 87 S.E. 367 (1915). There were some exceptions in criminal cases. *Crawle v. Crawle*, 1 Vern. 170, 23 Eng. Rep. 393 (1683); *The Queen v. Paty*, *supra*.

This question points to a problem which is basic in the whole field of sovereign immunity. Virtually all judicial proceedings, original and appellate, were instituted by writs running in the king's name. Originally all or most of them were *ex gratia*, that is, they were issued only if the king or some senior officer to whom he had delegated discretion, chose to approve. Eventually nearly all of them became *de cursu*, that is, they were issued by an inferior clerk, who had no discretion at all and was bound to issue a writ when tendered the prescribed fee. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL* 206-53 (Selden Society Vol. 77, 1959). See also, TURNER, *ed.*, *BREVIA PLACITATA* xlviii-lix (Selden Society Vol. 66, 1951). It is understandable that writs running in the king's name which commanded the king himself to act should remain *ex gratia* longer than most others and that humble petitions should be addressed to the king for the issuance of such writs long after they had actually become *de cursu*. Even the petition of right procedure had really become *de cursu* long before the formal requirement of the king's fiat was abolished by statute in 1947. *Supra* notes 7-10.

The nineteenth century American judges who developed the doctrine of sovereign immunity here either did not realize, or did not wish to understand, that the requirement of the king's consent to litigation was often a mere fiction, such as the fiction that the President of the United States has personally authorized all of the judicial process issued by courts-martial in his name. *E.g.*, *MANUAL FOR COURTS-MARTIAL UNITED STATES* 1951 559, 563 (1951).

12. 3 BLACKSTONE, *COMMENTARIES* *258-60; FINCH, *LAW* 323-35 (1759); 4 COKE, *INSTITUTES* *196-98, 225-26; THOMAS, *NOTES TO COKE'S REPORTS*, Vol. I, p. 106, note T2 (1826). Crown grants and leases made before completion of the inquest proceedings are void under Stat. 18 Hen. 6, c. 6 (1439). For the early development of these proceedings, see VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL* 61-81 (Selden Society Vol. 77, 1959).

was a quasi-judicial administrative proceeding conducted by an escheator or a special commission, assisted by a jury. Like the modern coroner's inquest, this type of proceeding did not have definite parties or service of process. If the king's officers seized land under color of their offices without an inquest of office, the disseisee could maintain an assize of novel disseisin against the officers, without royal consent.¹³ If there was an inquest of office, a private person claiming the land adversely to the king had several possible remedies. If he relied upon facts found by inquest, he could proceed against the king by *monstrans de droit*.¹⁴ If he denied the facts found by the inquest, he could proceed against the king by traverse.¹⁵ In either case, the king's consent was not needed, probably because these proceedings were looked upon as appeals from the inquest. Thus a private person claiming land which had belonged to a deceased person adversely to the king almost always had a complete remedy without the king's permission.

English officials have not forgotten the fate of Sir Richard Empson and Edmund Dudley, the lawyers who served King Henry VII as commissioners of escheats. Some of their noteworthy success in getting land for the king appears to have been due to their arbitrary methods of depriving interested persons of the opportunity to traverse inquests of office. The popular outcry against them was so great that King Henry VIII found it politically expedient to order the beheading of his father's

13. Statute of Westminster I, 3 Edw. 1, c. 24 (1275); 2 COKE, INSTITUTES *206. The plaintiff could recover the rents and profits from the time of the wrongful seizure. *Articuli Super Chartas*, 28 Edw. 1, stat. 3, c. 19 (1300).

14. *Ormonde v. The King*, SELECT CASES IN THE EXCHEQUER CHAMBER (Selden Society Vol. 64) 138 (1489); 3 BLACKSTONE, COMMENTARIES *260; FINCH, LAW 324-25 (1759); SHEPPARD, GRAND ABRIDGMENT, Part III, 78-80 (1675); THOMAS, NOTES TO COKE'S REPORTS, Vol. I, p. 125, note 4, Vol. II, p. 428, note B (1826); WATKINS, THE STATE AS A PARTY LITIGANT 14-16 (1927).

15. *Champernon v. The King*, SELECT CASES IN THE EXCHEQUER CHAMBER (Selden Society Vol. 51) 29 (1426); Stats. 34 Edw. 3, c. 14 (1360), 36 Edw. 3, c. 13 (1362), 2 & 3 Edw. 6, c. 8 (1548); 2 COKE, INSTITUTES *689; BLACKSTONE, COKE, FINCH, SHEPPARD, THOMAS, WATKINS, *supra* notes 12 and 14.

Sections 470.060-.160, RSMo 1959, originally enacted in 1824, authorize proceedings which resemble the inquest of office to determine the right of the state to lands by escheat. The prosecuting attorney files an information in behalf of the state in the circuit court. Persons claiming an interest adversely to the state may "traverse or deny the facts stated in the information" and may appeal from a judgment in favor of the state. This scheme provides adequate protection to heirs at law but it would seem that a devisee could not maintain a traverse unless the will under which he claims has been admitted to probate. *Farris v. Burchard*, 242 Mo. 1, 145 S.W. 825 (1912). If the probate court has made a common form decree of intestacy, it would seem to follow from *State v. Hall*, *supra* note 3, that the will could not thereafter be admitted to probate although unquestionably valid.

faithful and profitable servants.¹⁶ The recent decision in *State v. Hall*¹⁷ involved precisely the elements which roused the popular fury against Empson and Dudley: (1) the state asserts title to land, theretofore privately owned, in an ex parte proceeding of which no notice is given; (2) the citizen who is deprived of his claim to the land, without notice or any opportunity to be heard, is not allowed to appeal.

The transfer of the English rules to this country has involved several difficulties. First, inquest of office has not been used so *monstrans de droit* and traverse have not been available. Second, there being no king to give the royal fiat, there has been a tendency to hold that the consent of a state to suit against itself must be given by statute.¹⁸ Although the assize of novel disseisin has not ordinarily been available, it has usually been held that, in the absence of a substitute remedy created by statute, a citizen whose lands have been seized by state officers without lawful authority may maintain ejectment against the officers as individuals without the consent of the state.¹⁹ Similarly, an injunction against a threatened unlawful seizure of property by state officers usually may be secured without the consent of the state to the maintenance of the suit.²⁰ Moreover,

16. 4 COKE, INSTITUTES *196-98; 1 COBBETT'S STATE TRIALS 286 (1809). Empson and Dudley's methods, principally holding inquests of office secretly and excluding all testimony unfavorable to the king, were prohibited by Stat. 1 Hen. 8, c. 8 (1509). Like Al Capone, the offense for which Empson and Dudley were prosecuted ("constructive treason") was not that which aroused popular indignation against them.

17. *Supra* note 3.

18. Annot., 42 A.L.R. 1464 (1926); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 19-21 (1963).

19. The leading case is *United States v. Lee*, 106 U.S. 196 (1882). See also *Tindal v. Wesley*, 167 U.S. 204 (1897); *King v. Harris*, 134 Ark. 337, 203 S.W. 847 (1918); *St. Mary Parish Land Co. v. State Mineral Bd.*, 167 So.2d 509 (La. App. 1964); *Weyler v. Gibson*, 110 Md. 636, 73 Atl. 261 (1909); *Bannard v. New York State Natural Gas Corp.*, 404 Pa. 269, 172 A.2d 306 (1961); *State v. Lain*, 349 S.W.2d 579 (Tex. 1961); Annot., 108 Am. St. Rep. 838 (1906), Am. & Eng. Cas. 1913C 357 (1913), 44 L.R.A. (n.s.) 210 (1913), 160 A.L.R. 332 (1946); WATKINS, *THE STATE AS A PARTY LITIGANT* 98-116 (1927). See *Anselmo v. Cox*, 135 Conn. 78, 60 A.2d 767 (1948), cert. denied, 335 U.S. 859 (1948); *Roddy v. State*, 65 Idaho 137, 139 P.2d 1005 (1943) (suit to quiet title); *McKeown v. Brown*, 167 Iowa 489, 149 N.W. 593 (1914); *Richardson v. Liberty Oil Co.*, 143 La. 130, 78 So. 326 (1921), writ of error dismissed, 250 U.S. 648 (1921); *Dunne v. State*, 162 Md. 274, 159 Atl. 751 (1932), cert. denied, 287 U.S. 564 (1932); *Tebbs v. Platte County*, 325 Mo. 304, 308, 28 S.W.2d 656, 657 (1930); *McCarty v. Clark County*, 101 Mo. 179, 183, 14 S.W. 51 (1890). Cf. *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Luttrell v. State Highway Comm'n*, 379 S.W.2d 137 (St. L. Mo. App. 1964).

20. The leading case is *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). See also *Weiland v. Pioneer Irr. Co.*, 259 U.S. 498 (1922); *Pub. Serv. Co. v. Corboy*, 250 U.S. 153 (1919); *Greene v. Louisville & I.R. Co.*, 244 U.S. 499 (1917); *Western Union Tel. Co. v. Andrews*, 216 U.S. 165 (1910); *Ex parte Young*, 209 U.S. 123 (1908); *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891);

there are a number of recent decisions that the state itself may be sued to recover property unlawfully seized, or its value, without any further consent than that given by the due process and just compensation clauses of the federal and state constitutions.²¹ The doctrine of sovereign immunity has been applied in this country chiefly to shield the states from liability on bonds issued to finance "internal improvement" schemes which proved to be unwise and a rebellion which was unsuccessful.²² This use of the doctrine was a phenomenon of the nineteenth century and it was aimed mainly at nonresident speculators who bought up depreciated state

Davis v. Gray, 83 U.S. 203 (1873); Engelhardt v. Jenkins, 141 So.2d 193 (Ala. 1962); State Road Dep't v. Tharp, 146 Fla. 745, 1 So.2d 868 (1941); State Road Dep't v. Harvey, 142 So.2d 773 (Fla. App. 1962); Murdock v. Perkins, 219 Ga. 756, 135 S.E.2d 869 (1964); Carson v. Sullivan, 284 Mo. 353, 223 S.W. 571 (1920); Bohannon v. Camden Bend Drainage Dist., 240 Mo. App. 492, 208 S.W.2d 794 (1948); City of E. Orange v. Palmer, 82 N.J. Super. 258, 197 A.2d 410 (1964); Philadelphia Life Ins. Co. v. Commonwealth, 410 Pa. 571, 190 A.2d 111 (1963); White Eagle v. Gunderson, 48 S.D. 608, 205 N.W. 614 (1925); Griffin v. Hawn, 341 S.W.2d 151 (Tex. 1960); Annot., 43 A.L.R. 408 (1926); Annot., 44 L.R.A. (n.s.) 206 (1913); WATKINS, THE STATE AS A PARTY LITIGANT 98-116 (1927); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 21-29 (1963). See, Southall v. Stricas, 153 So.2d 234 (Ala. 1963); Trippe v. Port of New York Authority, 14 N.Y.2d 119, 198 N.E.2d 585, 249 N.Y.S.2d 409 (1964); Shingleton v. State, 133 S.E.2d 183 (N.C. 1963).

21. State v. Hollis, 93 Ariz. 200, 379 P.2d 750 (1963); Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1944); Boxberger v. State Highway Dep't, 126 Colo. 438, 250 P.2d 1007 (1952); State v. Geiger & Peters, Inc., 196 N.E.2d 740 (Ind. 1964); Commonwealth v. Kelley, 314 Ky. 581, 236 S.W.2d 695 (1951); Bernard v. State Dep't of Pub. Works, 127 So.2d 774 (La. App. 1961); Cope v. Louisiana Live Stock Sanitary Bd., 176 So. 657 (La. App. 1937); Michalski v. United States, 49 N.J. Super. 104, 139 A.2d 324 (1958); Sale v. State Highway and Pub. Works Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955); Tomasek v. State, 248 P.2d 703 (Ore. 1952); Makela v. State, 205 A.2d 813 (Vt. 1964); Morris v. Elizabeth River Tunnel Dist., 203 Va. 196, 123 S.E.2d 398 (1962). See Angelle v. State, 212 La. 1069, 34 So.2d 321 (1948). Cf. State *ex rel.* State Park Bd. v. Tate, 295 S.W.2d 167 (Mo. En Banc 1956) (state can be sued without its consent for partition); Youngstown Mines Corp. v. Prout, 124 N.W.2d 328 (Minn. 1963) (state can be sued without its consent for breach of mineral lease).

For the Missouri constitutional provisions, see note 41 *infra*.

22. Annots., 2 A.L.R.2d 677 (1948); 42 A.L.R. 1464 (1926); 44 L.R.A. (n.s.) 189 (1913); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 19 (1963); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 481, 485 (1953).

The only authorities on the doctrine of sovereign immunity cited in the opinion in *State v. Hall*, *supra* note 3, were *Nacy v. Le Page*, 341 Mo. 1039, 111 S.W.2d 25, (1937), and *Kleban v. Morris*, 363 Mo. 7, 247 S.W.2d 832 (1952). Like the nineteenth century state bond cases in which the doctrine of sovereign immunity received its greatest development, both of these cases involved attempts to reach funds in the state treasury without legislative appropriation for the purpose. They have little or no bearing on the question involved in *State v. Hall*, that is, whether, when the State attempts to seize property in private hands, the citizens who claim it are entitled to their day in court. The distinction between these questions is made clear in the opinion of Mr. Justice Iredell in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 439-40 (1793).

bonds at a fraction of their face amount. The current trend is to abolish the doctrine of sovereign immunity altogether, either by statute or by judicial decision, so as to make the states subject to suit like private corporations.²³

Prior to 1858 some three hundred seventy ecclesiastical courts had exclusive jurisdiction in England over the probate of wills and the appointment of administrators of decedents' estates.²⁴ Their jurisdiction was limited to personal property. Initial applications for grants of probate or letters of administration were ordinarily conducted in common form, ex parte, without definite parties and without notice. If there was a will the executor deposited it in the registry of the ecclesiastical court with his affidavit that he believed it to be the last will and testament of the deceased and, if the will appeared to be in proper form, a grant of probate was issued to him without more. If there was no will, the next of kin entitled to administration filed an affidavit and bond and was issued letters of administration. If, within thirty years, someone wished to contest the will or the appointment of the personal representative, he could do so by a suit in the ecclesiastical court. In such case interested parties, including the legatees under a contested will, had to be served with citations. If such a party could not be served, the suit could proceed without him but he would not be bound by the decree.²⁵

23. By judicial decision: *Souza & McCue Constr. Co. v. Superior Ct.*, 20 Cal. Repr. 634, 370 P.2d 338 (1962); *Colorado Racing Comm'n v. Brush Racing Ass'n*, 316 P.2d 582 (Colo. 1957); *Ace Flying Serv., Inc. v. Colorado Dep't of Agriculture*, 136 Colo. 19, 314 P.2d 278 (1957); *George & Lynch, Inc. v. State*, 197 A.2d 734 (Del. 1964). See *Spaur v. City of Greeley*, 372 P.2d 730 (Colo. 1962); *State v. Shinkle*, 373 P.2d 674 (Ore. 1962). By statute: e.g., 28 U.S.C. § 1346; ARIZ. REV. STAT. ANN. § 12-821 (1956); CALIF. GOV'T CODE § 945 (1964 Supp.); KY. REV. STAT. §§ 44.020-.160 (1962); LA. STAT. ANN. §§ 5101-10 (1964 Supp.); MASS. GEN. LAWS ANN., c. 258, § 1 (1959); MICH. COMP. LAWS §§ 691.101-.151 (1948); NEB. REV. STAT. § 24-319 (1964); N.Y. CT. CL. ACT § 8 (McKinney's N.Y. Consol. Laws, Vol. 29A, Pt. 2, 1963); CODE OF VA., 1950, §§ 8-38, 8-40 (1957 ed.). The doctrine of sovereign immunity was abolished in England by the Crown Proceedings Act, 1947, 10 & 11 Geo. 6, c. 44, §§ 1, 2, except that, by § 40(1), the Queen may not be sued for torts committed by her personally. For the Australian legislation, see Kennedy, *Suits By and Against the Crown*, 6 CAN. BAR REV. 329, 334 (1928). See also Abbott, *Abolition of Sovereign Immunity in Washington*, 36 WASH. L. REV. 312 (1961); Dawn, *Sovereign Immunity in Colorado, and the Feasibility of Judicial Abrogation*, 35 U. COLO. L. REV. 529 (1963).

24. 4 COKE, INSTITUTES *335-341; 2 BLACKSTONE, COMMENTARIES *488-519; 3 *Id.* *61-68; SHEPPARD, GRAND ABRIDGMENT, Part IV, 98 (1675); SWINBURNE ON TESTAMENTS, Part VI, p. 69 (1635); FLOYER, PROCTOR'S PRACTICE IN THE ECCLESIASTICAL COURTS 1-31 (1746); Ryves v. Duke of Wellington, 9 Beav. 579, 50 Eng. Rep. 467 (1846). For a list of these ecclesiastical courts, see NICOLAS, NOTITIA HISTORICA 142-204 (1824).

25. *Drewitt v. Drewitt*, 58 L.T. 684, 52 J.P. 232 (1888).

When a person was found to have died intestate without next of kin, the king was entitled to his personal property as *bona vacantia* and the king's nominee was appointed administrator. After such a common form appointment a person claiming to be next of kin or executor under a will could bring suit in the ecclesiastical court to secure revocation of the letters of administration issued to the king's nominee. Despite the fact that the king was the real party in interest, his consent was not required for the maintenance of such a suit.²⁶ Moreover, it would seem that if the king was legatee under a will admitted to probate in common form, the next of kin could contest the will without the king's consent. This is indicated by the proceedings relative to John Camden Neild, the famous Chelsea miser who died in 1852 leaving a will which bequeathed the residue of his estate, some £500,000, to Queen Victoria.²⁷ On application of the executors, the will was admitted to probate in common form on October 21, 1852. The next of kin commenced a suit to contest the will and they were allowed to proceed to trial, the common

26. *Kane v. Maule*, 2 Sm. & Giff. 331, 65 Eng. Rep. 423 (1854), *aff'd sub. nom.* *Kane v. Reynolds*, 4 De G., M. & G. 565, 43 Eng. Rep. 628 (1854); *Partington v. Reynolds*, 6 W.R. 615 (1858); *Atkinson v. Her Majesty's Proctor*, L.R. 2 P. & D. 255 (1871).

Moreover, even if the estate did pass to the king as *bona vacantia*, creditors of the deceased could enforce their claims against it. *Magit v. Johnson*, 2 Doug. K.B. 542, 99 Eng. Rep. 344 (1780); Bourne, *Bona Vacantia—The Crown's Liability for Debts of Deceased—Rights of Creditors*, 27 CAN. BAR REV. 592 (1949). The plaintiff in *In re Blake* [1932] 1 Ch. 54, claiming as next of kin, sought by petition of right to secure funds which were paid over to the Crown as *bona vacantia* in 1883 and mingled with public funds. It was held that she was barred by the statute of limitations.

It will be recalled that there was no probate of wills of land prior to 1858 but that they could be proved in equity. *Supra* note 5. In *Reeve v. Attorney-General*, 2 Atk. 223, 26 Eng. Rep. 538 (1741), the owner of land died without heirs, leaving a will. The Attorney-General contended that the will was invalid and that, consequently, the land had escheated to the king. The court held that the beneficiaries under the will could maintain a suit in equity against the Attorney-General to establish the validity of the will. *Accord*, *Burney v. Macdonald*, 15 Sim. 6, 60 Eng. Rep. 518 (1845); *Rittson v. Stordy*, 3 Sm. & Giff. 230, 65 Eng. Rep. 637 (1855), *aff'd*, 2 Jur. (n.s.) 410 (1856).

In *Kitchener v. Kitchener*, 18 L.J. Ch. (1849), legatees of personal property under a will were permitted to join the Attorney-General as a party defendant to a suit in equity for administration of the estate, when he claimed that the interest of one of the legatees had passed to the queen by forfeiture. This, of course, would result in a decree of distribution determining whether or not the queen did take.

See, also, *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.).

27. 20 L.T. App. ii (Sept. 25, 1852).

form probate having been revoked accordingly. The contest failed and the will was admitted to probate in solemn form on February 17, 1853.²⁸

There would seem to be three reasons why the king's consent was not required to a suit to contest a will or revoke letters of administration naming him as a defendant. First, prior to the Reformation, the ecclesiastical courts were not royal courts; an appeal from them lay, in theory at least, to the Papal Curia in Rome and the Pope was, or claimed to be, the feudal overlord of the king.²⁹ The statute of Henry VIII abolishing appeals to Rome carefully preserved existing rights by permitting an appeal to another tribunal in probate litigation to which the king was a party.³⁰ Second, common form probate proceedings and proceedings to challenge the results reached in them are not ordinary adversary litigation. Proponent and contestant may be nominal parties in the latter but both are really *ex parte* proceedings to determine the status of a *res*. In this they resemble very closely the inquest of office. As the Missouri Supreme Court has said:

But proceedings in reference to the establishment or invalidating of a will stand on a different foundation from ordinary actions

28. Records of the Prerogative Court of the Province of Canterbury, Principal Probate Registry, Somerset House, London. The will appointed the person filling the office of Keeper of the Queen's Privy Purse as executor and the Honorable Charles Beaumont Phipps received the common form grant of probate in that capacity.

In *Newland v. Attorney-General*, 3 Meriv. 684, 36 Eng. Rep. 262 (1809), an executor was permitted to maintain a suit in equity against the Attorney-General to ascertain whether a bequest to the government for payment of the national debt was valid and, if so, what he should do with it. He was instructed to dispose of it as the king should direct. In *Nightingale v. Goulburn*, 5 Hare 484, 67 Eng. Rep. 1003 (1847), *aff'd*, 2 Ph. 594, 41 Eng. Rep. 1072 (Ch. 1848), the next of kin of a testator was allowed to maintain a suit in equity against the Chancellor of the Exchequer for a determination that a bequest to the Chancellor on trust for Great Britain established a resulting trust for the plaintiff. It was held that the bequest created a valid charitable trust. In *Ashton v. Lord Langdale*, 15 Jur. 868 (1851), an executor was allowed to maintain a suit in equity against the Commissioners for the Reduction of the National Debt to determine the validity and effect of a bequest to them. The validity and effect of a bequest to the United States was determined in equity in *The President of the United States of America v. Drummond* (1838), referred to in *Whicker v. Hume*, 7 H.L.C. 124, 155, 11 Eng. Rep. 124, 155 (1858).

29. *Cf. Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), holding, prior to the adoption of the Eleventh Amendment, that, although a private person could not sue a state in its own courts without its consent, he could do so in the federal courts.

30. Stat. 24 Hen. 8, c. 12, § 9 (1532). The King's suit for annulment of his marriage to Catherine of Aragon was pending in the Papal Curia when this statute was enacted. Appeals to the Papal Curia from the king's courts had been forbidden long before. Stats. 27 Edw. 3, c. 1 (1353); 28 Edw. 3, Stat. 2, c. 1 (1363).

at law or causes of action. They are of the nature of a proceeding *in rem*, and simply amount to a revival of the same matter in the Circuit Court which has been previously had in the County Court. The same legal rules that govern the investigation in the County Court apply in the Circuit Court. The heirs at law and devisees are made nominal parties, but in truth the proceeding is *ex parte*³¹

Third, although, in modern English practice, the contestant of a will admitted to probate in common form is called "plaintiff," the proceeding is really an appeal from the common form decree of probate.³² This becomes evident when it is seen that the proponent, not the nominal plaintiff, has the burden of proving testamentary capacity and due execution.³³ Thus a will contest is very similar to the *monstrans de droit* and the traverse by means of which a private person could appeal from an inquest of office without the king's fiat. Probate and appointment of an administrator have, in fact, replaced the inquest of office as the proceedings by which the king establishes his title to real property of a deceased person to which he has succeeded by devise or escheat.³⁴

31. *Garvin's Adm'r v. Williams*, 50 Mo. 206, 212 (1872). See also, *Campbell v. St. Louis Union Trust Co.*, 346 Mo. 200, 139 S.W.2d 935 (1940); *Ewart v. Dalby*, 319 Mo. 108, 5 S.W.2d 428 (1928); *Bradford v. Blossom*, 207 Mo. 177, 105 S.W. 289 (1907); *Calnane v. Calnane*, 223 Mo. App. 381, 17 S.W.2d 566 (1929).

32. For the modern English practice in probate and will contest proceedings, which resembles very closely the old practice in the ecclesiastical courts and the present practice in Missouri, see Fratcher, *Fiduciary Administration in England*, 40 N.Y.U.L. REV. 12, 49-56, 67-71 (1965).

33. *Cleare v. Cleare*, 1 P. & D. 655 (1869); *Atter v. Atkinson*, 1 P. & D. 668 (1869); *Sukh Dei v. Kedar Noth*, [1901] L.R. 28 Ind. App. 186 (P.C.); TRISTRAM & COOTE, *PROBATE PRACTICE* 659 (21st ed. 1960). Moreover, the proponent, although nominally a defendant, has the usual plaintiff's right to open and close. *Cross v. Cross*, 3 Sw. & Tr. 292, 164 Eng. Rep. 1287 (1864); *Hutley v. Grimstone*, 5 P.D. 24 (1879). The contestants are only nominal plaintiffs, *Jackson v. Braithwaite*, 63 L.T. 231 (C.A. 1890).

34. *Court of Probate Act*, 1857, 20 & 21 Vict. c. 77, §§ 3, 4, 23, 35, 61, 62, 63, 64, transferred jurisdiction over probate of wills and appointment of administrators from the ecclesiastical courts to a newly-established secular Court of Probate. It also extended probate to include wills of land and provided for trial by jury in will contests. Trial by jury was not used in the ecclesiastical courts but it was the form of trial in the inquest of office and the action of ejectment, which were, before this act, the proceedings used to determine the validity of wills of land. *Intestate's Estates Act*, 1884, 47 & 48 Vict. c. 71, § 5, explicitly recognizes the right of the queen to establish title by escheat in the High Court of Justice, which had by then acquired the jurisdiction of the Court of Probate, without inquest of office. The act was careful to preserve the citizen's right to appeal from any determination in favor of the queen made in proceedings which were in substitution for the inquest of office. *Escheat (Procedure) Act*, 1887, 50

Missouri procedure on will contests is almost identical in all respects with the English. The will is first proved in common form, *ex parte*, without parties or notice, in the probate court.³⁵ A contest may then be filed in the circuit court and all legatees under the contested will must be made defendants and served with process.³⁶ Although the contestant is the nominal plaintiff, the burden of proof of testamentary capacity and due execution is, as in England, on the proponent of the will.³⁷ The Missouri Supreme Court has held that, in a will contest, the circuit court is a superior court of probate, not a court of law or equity, and that the proceeding is in the nature of an appeal from the common form decree of probate.³⁸

As the doctrine of sovereign immunity is derived from English law, it would seem that it ought not to apply in will contests in this country

& 51 Vict. c. 53, § 2, abolished inquests of office for escheats. See also, 22-3 Vict. c. 21, § 25 (1859); 33 & 34 Vict. c. 23 (1870).

Under the Administration of Estates Act, 1925, 15 Geo. 5, c. 23, §§ 1, 30, 45, 46, title to both real and personal property passes to the executor or administrator, escheat is abolished, and, if the decedent died intestate without heirs, the Treasury Solicitor is appointed administrator and distributes the net estate, including both real and personal property, to the queen (that is, the public treasury), as *bona vacantia*.

The Revised Statutes of Missouri still contain provisions for original proceedings in the circuit court in the nature of an inquest of office to determine the state's right to take land by escheat. *Supra* note 15. It is probable that these provisions have been superseded by the Missouri Probate Code of 1955, which appears to confer exclusive original jurisdiction over descent and distribution of lands of deceased persons upon the probate court in probate and administration proceedings. §§ 472.010(11), 472.020, 473.087, 473.617, 473.663, RSMo 1959. See *Stowe v. Stowe*, 140 Mo. 594, 41 S.W. 951 (1897). Cf. *State ex inf. Kell v. Buchanan*, 357 Mo. 750, 210 S.W.2d 359 (1948); *Farris v. Burchard*, 242 Mo. 1, 145 S.W. 825 (1912).

35. *Supra* note 1.

36. *Supra* note 2.

37. *Buchholz v. Cunningham*, 340 Mo. 302, 100 S.W.2d 446 (1937); *Rock v. Keller*, 312 Mo. 458, 278 S.W. 759 (1926); *Chambers v. Chambers*, 297 Mo. 512, 249 S.W. 415 (1923); *Lindsay v. Shaner*, 291 Mo. 297, 236 S.W. 319 (1921); *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S.W. 46 (1908); *Mowry v. Norman*, 204 Mo. 173, 103 S.W. 15 (1907); *Goodfellow v. Shannon*, 197 Mo. 271, 95 S.W. 979 (1906); *Cowan v. Shaver*, 197 Mo. 203, 95 S.W. 200 (1906); *Morton v. Heidorn*, 135 Mo. 608, 37 S.W. 504 (1896); *McFadin v. Catron*, 120 Mo. 252, 25 S.W. 506 (1894); *Carl v. Gobel*, 120 Mo. 283, 25 S.W. 214 (1894); *Maddox v. Maddox*, 114 Mo. 35, 21 S.W. 499 (1893); *Lamb v. Helm*, 56 Mo. 420 (1874).

38. The leading case is *Dickey v. Malechi*, 6 Mo. 177 (1839). Accord, *State v. Strother*, 289 S.W.2d 73 (Mo. En Banc 1956), discussed in Fratcher, *Trusts and Succession*, 22 Mo. L. Rev. 390, 403 (1957); *Davis v. Davis*, 252 S.W.2d 521 (Mo. 1952); *Fletcher v. Ringo*, 164 S.W.2d 904 (Mo. 1942); *Harrell v. Harrell*, 284 Mo. 218, 223 S.W. 919 (1920); *Johnson v. Brewn*, 277 Mo. 392, 210 S.W. 55 (1919); *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S.W. 46 (1908); *Rice v. Rice*, 239 Mo. App. 739, 197 S.W.2d 994 (1946); *Schaff v. Peters*, 111 Mo. App. 447, 90 S.W. 1037 (1905).

if it did not in England, and the few reported American cases support this view. In *United States v. Fox*,³⁹ a will devising land to the United States was presented for probate in a New York surrogate court. It was contested by the heirs and denied probate by the New York courts. The Supreme Court of the United States affirmed the state court judgment. The question of sovereign immunity was squarely raised in *Hogston v. Bell*,⁴⁰ which involved a will devising property to the State of Indiana. It was held that the heirs could contest the will without the consent of the state.

The undesirability of the rule laid down by the Missouri Supreme Court is manifest. There being no notice of common form probate and no thorough examination of the handwriting incident to it, the probate of a forged will is easy. According to the decision, if the state is a legatee, such a will cannot be contested. Will forgers are being invited to insert a five dollar bequest to the state in their product. Moreover, it would seem to follow from the decision that, if the probate court, in an ex parte common form proceeding, should determine that the deceased died intestate without heirs, so that his estate escheated to the state, neither the heirs nor the proponents of a valid will could contest this determination in the circuit court. Perhaps creditors of the deceased could not file claims.

The United States Supreme Court has held that a state statute which permits a conclusive adjudication in a probate proceeding against a person who has not been notified of the proceeding is invalid because it denies due process of law.⁴¹ The decision in the instant case gives pre-

39. 94 U.S. 315 (1876).

40. 185 Ind. 536, 112 N.E. 883 (1916). In the following cases involving legacies or devises to a state, private persons questioning the validity or effect of the dispositions were allowed to do so in the normal course of litigation: *State v. Blake*, 69 Conn. 64, 36 Atl. 1019 (1897) (collateral attack by state on decree of distribution); *Dickson v. United States*, 125 Mass. 311 (1878) (executor's suit for instructions); *In re Beck's Estate*, 44 Mont. 561, 121 Pac. 784 (1912) (declaratory judgment suit by state); *Vestal v. Pickering*, 125 Ore. 553, 267 Pac. 821 (1928) (suit by heir against executor for construction); *In re Edge's Estate*, 339 Pa. 67, 14 A.2d 293 (1940) (appeal from order of distribution); *Bond v. State*, 45 Wyo. 133, 16 P.2d 53 (1932) (declaratory judgment suit by state). In *In re Matysiak's Estate*, 252 N.Y.S.2d 909, 43 Misc.2d 1063 (Sur. 1964), an administratrix was allowed to maintain a discovery proceeding against a state agency. In *Succession of Rolland*, 8 So.2d 546 (La. App. 1942), it was held that the state, which claimed a mortgage on estate assets, could be joined as a party in a proceeding for distribution of an estate.

41. *Scott v. McNeal*, 154 U.S. 34 (1894). See also, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Levy, Probate in Common Form in the United States: The Problem of Notice in Probate Proceedings*, 1952 Wis. L. REV. 420. Cf. *Cunnius v. Reading School Dist.*, 198 U.S. 458 (1905); *In re Estate of Pierce*, 245 Iowa 22, 60 N.W.2d 894 (1953).

cisely this effect to the Missouri Probate Code. The due process of law clauses of the American federal and state constitutions are derived from a statute enacted in the reign of King Edward III, which declared

that no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.⁴²

The statute of Edward III is in force in Missouri.⁴³ The decision in *State v. Hall*⁴⁴ appears to mean that any man may be put out of land or disinherited without even being notified, much less "brought in answer by due process of law."

Sir John Holt served with distinction for twenty-one years as Lord Chief Justice of England. His courageous decisions outlawed slavery,⁴⁵ put an end to prosecutions for witchcraft,⁴⁶ imposed liability on voting officials who denied the franchise to qualified electors,⁴⁷ and championed the right of private persons to proceed against the Crown.⁴⁸ If Chief Justice Holt were to visit Missouri today it is likely that he would tell us, in his blunt, forthright way, that the decision in *State v. Hall*⁴⁹ was a travesty of justice and a gross denial of due process of law. Would we listen or would we ignore the old judge as an archaic crackpot with an absurd prejudice against arbitrary tyranny?

42. 28 Edw. 3, c. 3 (1354). This was a great extension of the similar provision of Magna Carta, 9 Hen. 3, c. 29 (1225), because the latter protected only freemen. At that time some 88% of the population was unfree.

The Missouri Constitution of 1945 declares:

"That no person shall be deprived of life, liberty or property without due process of law." (Art. I, § 10);

"That private property shall not be taken or damaged for public use without just compensation." (Art. I, § 26.)

43. *Supra* note 4.

44. *Supra* note 3.

45. *Smith v. Gould*, 2 Ld. Raym. 1274, 92 Eng. Rep. 338 (1707); *Smith v. Browne*, Holt. K.B. 495, 90 Eng. Rep. 1172 (1701); *Chamberlain v. Harvey*, 1 Ld. Raym. 146, 91 Eng. Rep. 994 (1697).

46. FOSS, *BIOGRAPHIA JURIDICA* 353-54 (1870).

47. *Ashby v. White*, 14 Howell's State Trials 779 (1704).

48. *The Case of the Bankers*, 14 Howell's State Trials 1, 29, 34-35 (1700), discussed in Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 7 (1963); *The Queen v. Paty*, 2 Salk. 503, 91 Eng. Rep. 431 (1705).

49. *Supra* note 3.