

CLAIMS
AGAINST
THE
STATE

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CLAIMS AGAINST THE STATE

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CLAIMS AGAINST THE STATE

INTRODUCTION

In this period of Wisconsin's history there appears to be a tendency not only to strike out into new areas of state activity as dictated by changing conditions but also to review, consolidate and re-evaluate some of the functions and activities of the state which have accumulated in the first century of statehood. This latter movement tends to approach the problems of what has been and is being done from a functional point of view, concerning itself more with an activity than with an organization.

One of the segments of Wisconsin state governmental activity which has never been summed up in any clear and concise statement relates to claims against the state. No one has ever assembled the many conditions under which claims may be brought against the state and the diversified machinery which exists for instituting and settling such claims. Piecemeal legislation has sought to deal with the substance and procedures in a limited number of cases. The scattered constitutional and statutory provisions on this subject are frequently deceiving unless they are read in connection with the generally overlooked body of case law developed by the State Supreme Court setting forth the limitations on the suability and liability of the state. A substantial number of the most difficult decisions fall upon the legislature biennially without any provision being made to provide them with either the criteria or machinery for making sound and consistent decisions.

In 1951 members of the legislature, confronted with an abnormally large number of so-called moral claims against the state, urged that a study of the problem be undertaken to bring together the basic information about the suability and liability of the state and the existing machinery for adjudicating claims against the state. A graduate student in the University Law School was assigned as the first research fellow of the Legislative Reference Library to study this problem. He was Edmund P. Arpin, now a bill draftsman and research worker for the library.

This report is a somewhat condensed version of his original report which was utilized as a thesis in partial fulfillment of the requirements for an S.J.D. degree from the University of Wisconsin Law School. It seeks to bring together the segments of the Wisconsin plan of claims procedure and to provide some of the salient features of alternative programs in other states. The extensive area of municipal liability is not covered by this report.

This study was instituted and completed before the legislature of 1953 directed the Judicial Council to undertake a study of the subject. This report is exclusively a background study, and it is submitted at this time with the hope that it will provide some of the basic information upon which the Judicial Council and the legislature may build.

September 1953

CLAIMS AGAINST THE STATE

I. THE DOCTRINE OF SOVEREIGN IMMUNITY

A. Current Effects of Immunity

White is seriously injured when struck by a state-owned automobile negligently operated by a state employe in the performance of official business.

Brown has paid a large sum in taxes pursuant to a state law subsequently declared unconstitutional when contested by another taxpayer.

Black performs under a road construction contract with the state and is refused payment of the full contract price by the State Highway Commission.

Such clashes of conflicting interests between the state and its citizens have become increasingly common with the progressively more integrated relationship between government and the individual. Among persons, conflicts of a similar nature are governed by corresponding rights and duties which are enforceable in the courts. The common law, however, by the doctrine of sovereign immunity, denies that the sovereign is answerable in its courts for the wrongs it may do to its subjects. Thus, no matter how grievous the injuries to White, Brown or Black; no matter how clear the fault of the state, neither of the 3 would, in the absence of state law to the contrary, have a legal right to look to the state for payment of their damages.

The practical effect of the operation of the doctrine of sovereign immunity today is graphically demonstrated by the number of bills to appropriate sums in settlement of such claims against the state which are introduced in each session of many state legislatures. In the 1953 session of the Wisconsin legislature, 39 claims, aggregating \$132,686.52, were presented for legislative action. Undoubtedly, this procedure results in some hardship to the legislature and the claimants, alike, raising the question whether such claims might be more expeditiously processed by a statutory modification of the immunity doctrine. Before considering this question with particular reference to Wisconsin, it may be helpful to review, as background material, the essence of the doctrine of sovereign immunity, its historical development and the manner in which claims against the state are presently processed in Wisconsin.

B. The Dual Essence of Sovereign Immunity

As expounded by the courts, the sovereign immunity concept embodies 2 closely interwoven yet distinctly separate components; the sovereign's immunity from suit without its consent and the sovereign's immunity from liability not expressly assumed by it. Because of this dual immunity, statutes providing that the state may be sued in the same manner as individuals fail to afford a remedy in situations where the state has not expressly assumed liability.⁽¹⁾ Conversely, it has been strongly intimated that a

⁽¹⁾ Anno. 13 A.L.R. 1276; 169 A.L.R. 105.

statute providing for state liability in a certain class of case is not enforceable unless the state has expressly consented to be sued in such a case.⁽²⁾ Because of this predisposition on the part of the courts to extend zealous protection to the sovereign in the face of contrary legislative intent, an act designed to change the rule must be carefully drafted so as to provide clearly and expressly, first, for the state's assumption of the desired liability and, secondly, for the general consent by the state to its enforcement, whether by suits against the state or otherwise.

C. Historical Development of Sovereign Immunity

It is not altogether startling that the medieval period which witnessed the formation of centralized government under the personal sovereignty of an autocratic king brought along with the proposition, "The king can do no wrong," the rule that he could not be held accountable for his actions or those of his agents. Thus, in England, where the doctrine of sovereign immunity apparently received its widest acceptance, the person of the king was immune from suit in his own courts.⁽³⁾ Later, when the sovereignty of the king was transferred to Parliament, his personal immunity was extended to cover the institutional government as well.⁽⁴⁾

Granted that the doctrine of sovereign immunity was a logical development in the faraway days of the divine right of kings, we may well wonder how the doctrine which flowered in authoritarian climate became firmly rooted in the common law of a nation conceived out of rebellion against irresponsible sovereignty. Even in the beginning of our legal history there was clearly a choice of alternative policies since the immunity rule was far from universal, many of the countries of continental Europe having for some time permitted suits against themselves.⁽⁵⁾ Legal scholars are prone to dismiss the adoption of the doctrine by American courts as an unhappy historical accident occasioned by the general acceptance of the great body of English precedent. Accordingly, it has been said that the doctrine was accepted without any recognition of necessity for explanation and without a consideration of whether it was valid, essential or desirable.⁽⁶⁾ The courts, in retrospect, have sought to justify the doctrine on several grounds. The U.S. Supreme Court, speaking through Justice Holmes, has defended the doctrine as an expression of the logical relationship between the sovereign and the law. "A sovereign is exempt from suit," Holmes said, "not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."⁽⁷⁾ And again, "We must realize that the authority that makes the law is itself superior to it, and that if it consents to apply to itself the rule that it applies to others, the consent is free and may be withheld."⁽⁸⁾ This position has been

⁽²⁾ Holzworth v. State, 238 Wis. 63, 298 N.W. 163 (1941).

⁽³⁾ Borchard, Government Liability in Tort, 34 Yale L. J. 1 (1924).

⁽⁴⁾ Schumate, Settlement of Claims Against the State, Nebraska Legislative Council (1941)

⁽⁵⁾ Borchard, Government Liability in Tort, 36 Yale L. J. 1039 (1926).

⁽⁶⁾ Watkins, The State as a Party Litigant, p. 55.

⁽⁷⁾ Kawananakoa v. Polyblank, 205 U.S. 349 (1907).

⁽⁸⁾ The Western Maid, 257 U.S. 419 (1922).

criticized as placing metaphysical speculation on the inherent nature of sovereignty above the pragmatic consideration of how best to promote justice.⁽⁹⁾ Some state courts, on the other hand, have said that the reason for the immunity of the sovereign rests on considerations of sound public policy,⁽¹⁰⁾ the idea being that the sovereign in the discharge of its varied public service functions should not be hamstrung by the suits of those comparatively few individuals claiming to have suffered injury incidental to the conferring of the governmental service. This attempt to justify the doctrine of sovereign immunity on strategic grounds seems to beg the essential question of whether a contrary rule would have a substantial effect on the sovereign's ability to discharge its functions efficiently, and, moreover, ignores the conflicting ethical consideration of an equitable distribution of risks. In the final analysis, however, whether or not the doctrine can be justified on one ground or another, the matter of practical significance today is that the rule developed to suit medieval attitudes was embraced by our courts as a part of that great body of common law inherited from England.

D. Application of Sovereign Immunity to the States

The states, having retained all attributes of sovereignty not expressly surrendered to the federal government under the Constitution,⁽¹¹⁾ continued to possess all elements of sovereign immunity not therein relinquished. The Constitution, as amended, provides that a state may be sued in federal court without its consent by the U.S., a sister state and a foreign nation.⁽¹²⁾ With respect to all persons, whether citizens or not, the states, under the Constitution, retained a full measure of sovereign immunity. The extent to which a particular state adheres to its immunity is, then, a matter solely within state policy, and, as might be expected, at this level of policy there are wide variations from state to state.

(9) Borchard, Government Liability in Tort, 36 Yale L. J. 1100(1926)

(10) e.g. Apfelbacher v. State, 160 Wis. 565, 152 N.W. 144 (1915)

(11) Ex Parte Ayres, 123 U.S. 443 (1887).

(12) U.S. Constitution, Art. III, section 2; 11th amendment, the latter overruling Chisholm v. Georgia, 2 Dall. 419 (U.S. 1792) which construed Art. III, section 2, as permitting suits against a state in federal court by a citizen of another state.

II. CLAIMS AGAINST THE STATE OF WISCONSIN

A. The Legislative Function

1. Introduction

In Wisconsin the practice of presenting claims against the state to the legislature for adjustment grew out of the necessity occasioned by the doctrine of sovereign immunity. The power of the legislature to appropriate public funds to satisfy such claims rests on the rationale that appropriations of this kind serve to maintain the public confidence in the good faith of the state in meeting its moral obligations; they are, therefore, for a public purpose and valid.⁽¹⁾ The exact line over which a claim ceases to be a moral obligation of the state and becomes a mere request for a gratuity has never been clearly drawn, but, at least, where the claim is based on facts which as between individuals would give rise to no cause of action, it cannot be regarded as a moral obligation. An appropriation to satisfy such claim is, therefore, void as being for a purely private purpose.⁽²⁾

Although Wisconsin has relaxed its sovereign immunity to the extent that it recognizes certain classes of legally enforceable obligations, except in special cases where an administrative or direct judicial remedy is provided, all claims against the state, legal and moral, must in the first instance be presented to the legislature.

2. Presenting Claims to the Legislature

Although the statutes provide, "All claims of every kind against the state requiring legislative action...shall be filed in the office of the director of budget and accounts...",⁽³⁾ this does not in practice preclude a claimant from having his claim introduced directly into the legislature as a bill. As a matter of fact, in the sessions from 1941 through 1951, 99 claims were introduced into the legislature in bill form. During the same period, only 37 claims were filed in the manner directed by statute, and 18 of these were filed in the 1951 session.

Proceeding in the statutory manner of presenting a claim to the legislature, the claimant files a verified statement of his claim in duplicate with the office of the Director of Budget and Accounts. Although the director is expressly empowered to examine claimants under oath and to make recommendations to the legislature, his practice is to refer the claim directly to the chief clerk of the senate, designating only the fund out of which the claim is payable if allowed. If the claim is for payment of past services rendered the state, the chief clerk is, in turn, required to transmit a copy to the Attorney General,⁽⁴⁾ this being the only case in which the Attorney General has the statutory duty to appear and represent the state in regard to a claim requiring legislative action. All claims transmitted from the office of the Director of Budget and Accounts are read in the senate and referred to the

(1) In re Will of Heinemann, 201 Wis. 484, 230 N.W. 698 (1930).

(2) State ex rel. Consolidated Stone Co. v. Houser, 125 Wis. 256, 104 N.W. 77 (1905).

(3) Wis. Stats. (1951) s. 15.18 (8).

(4) Wis. Stats. (1951) s. 13.21.

Joint Committee on Finance, a statutory standing committee composed of 14 members, 5 from the senate and 9 from the assembly.⁽⁵⁾ Hearings on claims, which are held in the discretion of the committee, are informal. The claimant may appear in person or by attorney; the state, unless the claim is for past services, is often not formally represented. After a consideration of the claim, with or without a hearing, the Joint Committee on Finance reports it back to the senate with a recommendation. There is no prescribed procedure from this point on. In theory, the committee could recommend allowance of the claim and sponsor it as a committee bill, in order that it could proceed through the regular lawmaking process. In practice, however, out of a total of 73 claims filed in the statutory manner from 1921 through 1951, the committee has recommended disallowance or indefinite postponement in exactly 73 cases. Moreover, during that period, no appropriation in settlement of a claim against the state has been based directly on a claim filed in the statutory manner, although there have been several instances where a claim so submitted has been disallowed only to be subsequently enacted when introduced as a bill.⁽⁶⁾

A claimant interested in the eventual allowance of his claim would do well to have it introduced directly into the legislature as a bill sponsored by the senator or assemblyman from his district. By identifying his legislator with his cause, the claimant may well succeed in providing that vigilant stewardship required to steer a bill, especially a private one, safely past the varied legislative pitfalls. Upon introduction into either the senate or the assembly, the bill is read and referred to committee. In some cases it is referred to the appropriate subject matter committee but usually to the Joint Committee on Finance, where, as an appropriation measure, it must ultimately be considered in any event.⁽⁷⁾ As in the case of a claim filed in the statutory manner, a copy of a bill based on past services rendered is transmitted to the Attorney General, who has the statutory duty to appear before the committee to represent the interests of the state.⁽⁸⁾ After consideration by the committee, again with or without a hearing, the bill is reported back to the house from which referred, usually with a recommendation for passage, rejection or indefinite postponement. Not infrequently, where a claim is deemed otherwise deserving, the committee will propose an amendment reducing the size of the claim; or such an amendment may thereafter be offered from the floor. As an appropriation measure, the bill when voted upon requires a quorum of three-fifths of the elected members in both houses.⁽⁹⁾ To become law, the bill must pass both senate and assembly and be signed by the Governor; or if the Governor should veto the bill, it must be re-passed in each house by two-thirds of the members present.⁽¹⁰⁾ All this seems a somewhat precarious routine for a bill in which usually only one person has a vital stake; yet, of the 99 claim bills introduced during the legislative sessions from 1941

(5) Wis. Stats., 1951, sections 13.05, 13.06.

(6) e.g. Claim 3-S, 1951; Bill No. 511, A., 1951; Wis. Laws, 1951, ch. 657.

(7) Wis. Stats., 1951, section 13.06.

(8) Wis. Stats., 1951, section 13.21.

(9) Wis. Constitution, Art. VIII, section 8.

(10) Wis. Constitution, Art. V, section 10.

through 1951, 37 bills were enacted into law. Thus, although the period shows a percentage of enactment of 37.7 per cent, the total sum awarded comprised only 15.6 per cent of the total amount originally claimed.

To further illustrate the basic inequality between the statutory method of presenting claims to the legislature and the direct introduction of a claim in the form of a bill, the following table compares the use and effectiveness of the 2 procedures during the period 1941-51.

	Claims			Bills			
	No.	Amount	Awarded	No.	Amount	Laws	Awarded
1941	6	\$ 6,491.60	0	17	\$ 50,476.04	5	\$ 6,534.51
1943	4	10,000.00	0	14	102,314.21	5	2,256.11
1945	5	403,987.61*	0	9	60,948.98	3	5,441.00
1947	3	9,632.63	0	11	18,444.28	3	2,706.91
1949	1	131.45	0	22	66,604.36	8	21,597.06
1951	18	39,913.18	0	26	60,878.77	13	17,760.21
1953**	5	4,334.32		34	128,352.20		
Total	37	\$470,156.47	0	99	\$359,366.64	37	\$56,295.80

*Includes \$398,187.37 in refunds claimed on insurance license fees allegedly illegally assessed.

**1953 data incomplete and not included in totals.

3. Limitation on Presenting Claims

The state Constitution provides that, "No appropriation shall be made for the payment of any claim against the state, except claims of the U.S. and judgments, unless filed within 6 years after the claim accrued."⁽¹¹⁾ This limitation, however, is held not to apply to moral obligations on the ground that the word "claim" denotes a demand as of right.⁽¹²⁾ The 6-year period, therefore, applies only where the state has assumed liability, either by statute or by virtue of its contract, leaving the most prevalent types of claims to be presented at the leisure of the claimant. In the 1951 legislative session, one claim bill asked for an "equitable" refund on a transaction dating back to 1907.⁽¹³⁾ Furthermore, since nothing analogous to the doctrine of res judicata, which bars more than one final decision on the merits in judicial proceedings, pertains to decisions of the legislature disallowing claims, a claimant whose moral claim is rejected by one legislature may present the same claim to as many succeeding legislatures as his persistence permits. Such perseverance has been known to bring its eventual reward.⁽¹⁴⁾

(11) Wis. Constitution, Art. VIII, section 2.

(12) *In re Will of Heinemann*, 201 Wis. 484, 230 N.W. 698 (1930).

(13) Bill No. 429, A., 1951.

(14) e.g. Bill No. 95, A., 1931; Bill No. 498, A., 1933; Bill No. 449, S., 1935; Wis. Laws, 1935, ch. 431.

4. The Claim Trend

Inasmuch as the problem posed by claims against the state is generally depicted as an ever-growing dilemma, it is somewhat surprising to discover that neither the number of claims presented to the legislature nor the amounts awarded show a steady long-term increase. As early as 1911, 36 claim bills were introduced into the legislature, and the total amount awarded on the 13 bills enacted was in excess of \$16,000. These figures are well above the 1941-51 averages.

Looking beyond the bare statistics, the significant claims trend appears in the distinct shift in the substance, rather than in the numbers, of the claims presented for adjustment. Of the 36 claim bills introduced in 1911, only 4 involved claims sounding in tort; i.e. those arising from the negligent or wrongful act of an officer, agent or employe of the state; the vast majority concerned claims arising from contracts, refunds and workmen's compensation for state employes. Subsequently, as administrative procedures were developed for processing routine refunds and workmen's compensation claims, the number of claim bills gradually declined--to 15 in 1919 and to 13 in 1925. In 1933, however, the downward quantitative trend was sharply reversed as 30 claim bills were introduced; 18 of these involved claims sounding in tort. From that time on, tort claims have been in the ascendancy. The present peak was attained in the 1951 session when 21 of the 26 bills and 15 of the 18 claims filed in the statutory manner involved tort-type cases.

Although the tort claim is obviously the main substantive root of the present claims problem, a further breakdown into the more prevalent types of such claims may be of some practical value. The following special classes of claims have predominated in the legislature from 1941 through 1951: (1) injuries to persons and property caused by defective construction and maintenance of state highways and bridges; (2) personal injuries resulting from the unsafe conditions of premises owned and maintained by the state; (3) incidental damages to real property resulting from state construction projects; (4) damages caused by the unwarranted action of state agents acting under color of police power measures; and (5) property damages inflicted by escaped inmates of state penal institutions. In addition, claims for damages attributed to the negligent operation of national guard vehicles are common under present military circumstances. (15)

B. The Administrative Function

1. Introduction

Although relying primarily upon the direct action of its legislature to settle claims against the state, Wisconsin has established some administrative machinery to operate within limited areas of the claims field. These extra-legislative devices are of 3 general types: (1) permanent administrative bodies having jurisdiction over the settlement of a particular class of claims; (2) temporary commissions named to settle, or to make recommendations for the legislative settlement of a particular claim situation;

(15) e.g. 15 of the 18 claims filed through the office of the Director of Budget and Accounts for the 1951 session involved claims arising from the operation of national guard vehicles.

and (3) regular departments of state government having authority to settle certain routine claims arising in the ordinary course of departmental business.

2. Permanent Claims Agencies

The state has created 3 permanent administrative agencies having certain claims settlement functions. 2 of these bodies, the Board of Tax Appeals and the Industrial Commission are full-time agencies which, as one part of a more comprehensive function, hear and determine special classes of claims falling within their prescribed jurisdictions. The third permanent body, the Commission for the Relief of Innocent Prisoners, is an ex officio board which meets only when a claim has been filed for its consideration.

a. Board of Tax Appeals

Composed of 3 members appointed to 6-year terms by the Governor, with the advice and consent of the senate, the Board of Tax Appeals⁽¹⁶⁾ is the final administrative authority in determining questions of fact and law arising under state tax laws. As to claims against the state, the board's jurisdiction extends to applications for tax abatements and refunds which have been denied by the Department of Taxation or the assessor of incomes.

A taxpayer aggrieved by an adverse decision by the department or the assessor may within 30 days thereafter file a petition of review with the Board of Tax Appeals. A copy of the petition is transmitted to the Department of Taxation, which then has 30 days to file an answer. At the hearing, held before one board member, the state is represented by the department's counsel. In the conduct of the hearing, board members can subpoena witnesses and compel the production of documents. After the completion of the hearing, the presiding member reports the matter to the full board, which makes a finding of fact and files a written decision. That decision is final unless one of the parties, within 30 days thereafter, files a petition for judicial review pursuant to the Administrative Procedure Act.⁽¹⁷⁾ Where the taxpayer is an individual, however, the circuit court of his residence, rather than the Circuit Court for Dane County, has jurisdiction on review.

In the event the final decision is in favor of the taxpayer, payment of the refund found due is certified by the Department of Taxation or the assessor of incomes, whichever had original jurisdiction over the application.

b. Industrial Commission

Like the Board of Tax Appeals, the Industrial Commission⁽¹⁸⁾ is comprised of 3 members appointed to staggered terms of 6 years by the Governor, with the advice and consent of the senate. Among its other duties, the commission administers the Workmen's Compensation Act,⁽¹⁹⁾ and since the state has been made an employer subject to the act, the commission determines the disputed

(16) Wis. Statutes, 1951, section 73.01 et seq.

(17) Wis. Statutes, 1951, ch. 227.

(18) Wis. Statutes, 1951, section 101.02.

(19) Wis. Statutes, 1951, ch. 102.

compensation claims of state employes.

In the event of a dispute between the state and an employe over a workmen's compensation claim, either party may apply to the commission to hear and determine the matter. An application for hearing, and copy, is filed with the commission, which serves the copy on the adverse party who has 10 days to answer. Hearings are held before a single examiner, with the Attorney General representing the interests of the state as employer. The examiner's finding of fact and order are final unless either party appeals to the commission. On appeal, the commission reviews the record and may affirm or set aside the order, or direct the taking of additional testimony. Either party may appeal a final order of the commission by commencing an action against the commission and the adverse party in the Circuit Court for Dane County. From there, final appeal lies to the Supreme Court.

When an award against the state becomes final, it is paid out of the appropriation for the salary or maintenance of the injured employe, if sufficient; otherwise, payment is made from the general fund.⁽²⁰⁾ Over the past 5-year period, payments by the state in cases settled by the commission have averaged almost \$65,000 per year.⁽²¹⁾

c. Commission for the Relief of Innocent Prisoners

The Governor and the Director of the State Department of Public Welfare constitute a Commission for the Relief of Innocent Prisoners who have been convicted of a crime against the state.⁽²²⁾ The commission's jurisdiction is limited to: (1) claims of persons who have served a term of imprisonment for a crime of which he claims to be innocent; and (2) claims of persons who have been pardoned on the ground of innocence. Therefore, one who was convicted and imprisoned and whose conviction was later reversed on appeal is not entitled to be compensated by the commission because he has neither served a term of imprisonment, nor had his term shortened by pardon.⁽²³⁾

The jurisdiction of the commission is invoked by the filing of a petition in which claimant states the facts upon which relief is sought. If, after a hearing, the commission finds, on the basis of facts arising since the conviction, that the petitioner is innocent beyond a reasonable doubt, and that he did not contribute in any way in bringing about his conviction, it makes an award which will compensate him for his wrongful imprisonment. The award, however, must not exceed \$5,000, nor may it be at a rate greater than \$1,500 for each year of imprisonment. It is paid from a special appropriation made to the Department of Public Welfare. If the commission should find that the amount it is able to award is not adequate, it will report to the legislature an amount which

(20) Wis. Statutes, 1951, section 20.07 (3).

(21) 1950--\$57,661; 1949--\$106,230; 1948--\$56,720; 1947--\$54,562; 1946--\$55,506.

(22) Wis. Statutes, 1951, section 285.05.

(23) 11 Atty. Gen. 872, 1922.

it deems just. The findings and award of the commission are subject to review in the Circuit Court for Dane County as provided by the Administrative Procedure Act. (24)

Although it has been in existence since 1913, the commission has heard only 18 claims, making 2 awards totaling less than \$2,500. Moreover, in one of the cases in which an award was made, the commission appears to have acted beyond its jurisdiction, the claimant having been released from prison upon reversal of his conviction. (25) Despite such occasional deviation from the statutory standard, the commission's narrow jurisdiction and the heavy burden placed upon the claimant of proving his innocence beyond a reasonable doubt (26) would seem largely responsible for the commission's tranquility over the years.

Claims for unjust imprisonment beyond the limited jurisdiction of the commission are, of course, referable to the legislature as moral claims. (27) Moreover, a claimant denied relief upon resort to the remedy afforded by the commission is apparently not barred from thereafter presenting the same claim to the legislature. (28) In 1911, one Johnson was, on his plea of guilty, sentenced to life imprisonment for murder. Subsequently his conviction was set aside on the ground that his plea had been coerced by third degree methods. Later Johnson filed a claim for \$5,000 before the commission, which assumed jurisdiction although the petitioner had not served a term of imprisonment. After a hearing, the claim was refused on the ground that Johnson, by his plea of guilty, had contributed in causing his conviction. On appeal, the circuit court sustained the commission's ruling. (29) Thereafter, bills to compensate Johnson were introduced, but not passed, in the legislative sessions of 1931 and 1933. Finally, in 1935, a bill was enacted awarding him \$5,000. (30)

3. Temporary Claims Commissions

Occasionally, the legislature, instead of undertaking the settlement of a particular claim by direct action, has appointed a special commission to make a further investigation of its merits. In some instances, such a commission has been empowered to settle the claim on behalf of the state; in others, it has been authorized merely to investigate the claim and file a report for the advice of the legislature.

Acts vesting power in a special commission to effect a final settlement of a given claim in the name of the state have apparently fallen out of favor in more recent years. Presumably, this device would be available only in the case of a legal claim. It would appear very doubtful that the legislature could delegate to another agency its power to settle mere moral obligations of the state. Even in the case of a commission empowered to settle a

(24) Wis. Statutes, 1951, section 227.16 et seq.

(25) In re Hammond (Dec. 22, 1926).

(26) LeFevre v. Goodland, 247 Wis. 512, 19 N.W. (2d) 884 (1945).

(27) e.g. Bill 185, S. (1951).

(28) e.g. Bill No. 95, A., 1931; Bill No. 498, A., 1933; Bill No. 449, S., 1935; Wis. Laws, 1935, ch. 431.

(29) In re Johnson, Circuit Court for Dane County, March 21, 1923

(30) Wis. Laws, 1935, ch. 431.

certain legal claim based on contract, the Supreme Court questioned, without deciding, the constitutionality of an act which made an appropriation of public money to settle such a claim dependent in amount upon the determination of persons not constitutional officers. (31) At the time, however, the Secretary of State was the constitutional auditor. That provision in the Constitution has since been repealed, and now audit is provided for by statute only. (32) This would seem to remove any lingering constitutional doubts on the use of a commission for the settlement of legal claims against the state.

In respect to moral claims the legislature has shown a tendency in recent years to utilize that type of commission having investigatory and recommendatory powers only, reserving the ultimate decision to itself. The 1951 legislature created a temporary commission, composed of the Attorney General, the Director of Budget and Accounts and the State Auditor to investigate numerous claims for damages to property arising out of the construction and maintenance of the power plant serving the State Prison and Central State Hospital at Waupun. (33) The commission's function was limited to ascertaining facts on which the claims were based and making appropriate recommendations for their settlement to the 1953 legislature. Hearings were held during the summer of 1952, at which time interested parties were afforded an opportunity to testify under oath. In its final report, the commission recommended disallowance of all such claims, totaling \$46,791 in the aggregate, on the grounds that the plant was operated in a manner consistent with good engineering practice and that the damages, if any, caused by the blasting operations were impossible to determine since all the houses had cracks of a natural origin. (The report appears in The Senate Journal of March 19, 1953, beginning on page 491.) The 1953 legislature by Bill 859, A., created a special commission composed of the Attorney General, budget director and the head of the department involved, to investigate all claims presented to the 1953 legislature in bills which were not disposed of prior to recess and to report its findings and recommendations to the adjourned session in October 1953.

4. Departmental Settlement of Routine Claims

The statutes provide for the payment of certain administrative-type claims by the department of state government immediately concerned. The manner of submitting such claims and subsequent procedure is governed by the statutes as supplemented by the departmental regulations. Payment of allowed claims is made out of funds appropriated by the legislature for that purpose. (34) Claims processed at the departmental level consist of: (a) refunds of various taxes and fees; and (b) special compensatory awards especially provided for by statute.

(31) State ex rel. Martin v. Doyle, 38 Wis. 92 (1875).

Martin v. State, 51 Wis. 407, 8 N.W. 248 (1881).

(32) Wis. Laws, 1947, ch. 9; Wis. Statutes, 1951 section 15.18.

(33) Wis. Laws, 1951, ch. 439.

(34) e.g. Wis. Statutes, 1951 section 20.06 makes provision for the payment of various refunds; funds for payment of compensatory awards are provided in departmental budgets.

a. Refunds

(1) Income and inheritance taxes--Pursuant to section 71.10 of the statutes, applications for income tax refunds are filed with the Department of Taxation or the assessor of incomes, depending on which made the assessment. Such claims may be filed as long as 4 taxable years from the date of payment of the tax, and the claim must be acted upon by the department within one year; otherwise, it is deemed allowed. As previously stated, a claimant may appeal an adverse departmental determination to the Board of Tax Appeals. Allowed claims are certified for refund to the State Treasurer for payment. (35)

Refund of inheritance taxes overpaid is provided under section 72.08. Where it is shown by the orders or records of the probate court that the tax was overpaid, refund of the amount in excess of that actually due will, on application, be made by the Department of Taxation's ordering payment out of the state treasury or by the treasurer of the county of probate.

(2) Motor fuel tax--Section 78.14 (1) provides that where fuel consigned to, or in the possession of, a licensed wholesaler is destroyed without his fault, the wholesaler may, within 15 days thereafter, apply to the motor fuel tax division of the Department of Taxation for a refund of the tax paid on such fuel. Under section 78.14 (2), one who purchases motor fuel for purposes other than use on the public highways of the state may apply for a refund of the state tax paid on purchase. This is of principal benefit to farmers, owners of airplanes and concerns utilizing motor fuel for industrial purposes. Such claims must be filed not later than 6 months after the date of purchase and must be made on a form prescribed and furnished by the Department of Taxation.

On claims made by wholesalers and purchasers, the department is authorized to make such investigation as it deems necessary to determine any issue raised. The department pays approved claims out of the taxes collected under the Motor Fuel Tax Act. (36)

(3) Motor vehicle registration fees--Under section 85.01 (4) (ha), an owner of a registered motor vehicle who is called into military service and whose vehicle will not be used on the public highways of this or another state during the remaining portion of the registration year may apply for a pro rata refund of the registration fee covering the unexpired portion of the registration year. Such claims are filed on a form prescribed and provided by the Motor Vehicle Department and must be accompanied by the surrender of claimant's certificate of registration and automobile license plates.

(35) From Wisconsin Department of Taxation, Individual and Corporation Income Tax Refunds, 1948-1951: 1950-51--\$730,104.10; 1949-50--\$754,049.23; 1948-49--\$538,302.64.

(36) From Wisconsin Department of Taxation, Motor Fuel Tax Division: Refunds of Motor Fuel Taxes, 1948-51: 1950-51--\$5,040,217; 1949-50--\$4,835,182; 1948-49--\$4,704,388.

(4) Beverage and cigarette taxes--Under section 139.26 (1a) where a beverage tax has been paid either on liquor supplied to hospitals for medicinal purposes or on alcohol supplied to institutions of learning for nonbeverage purposes, the purchaser may apply to the Commissioner of Taxation for refund. Section 139.03 (7) of the statutes provides for refunds of the beverage tax in cases where the stamps are returned unused, where the liquor taxed has become unfit for use as a beverage or where the beverage has been sold to the armed forces of the U.S. Refunds allowed are certified by the Commissioner of Taxation to the State Treasurer for payment. Section 139.50 (17) of the statutes makes similar provision for the refund of cigarette taxes paid in cases where the tobacco product is damaged beyond use or where the tax stamps are returned unused.

(5) Escheated moneys--Section 318.03 (4) provides that where moneys have escheated to the state as unclaimed legacies or shares of the estates of deceased persons, the same may be refunded by the State Treasurer to the proven rightful owner.

(6) Purchase price on void sale of state lands--Section 24.34 provides that in case of a void sale of state lands, an innocent purchaser or successor may apply to the Commissioners of the Public Lands for a refund of the purchase price with interest. If, on proof, the commissioners are satisfied that the claim is valid, they order payment out of the state treasury.

(7) Miscellaneous refunds--Section 76.13 (3) provides for refund of an over-assessed public utility tax; section 76.38 makes similar provision in the case of telephone company license fees. Section 209.02 provides for the refund of insurance company deposits against future fee assessments. Provisions for the refund of amounts deposited to the credit of inmates of certain state institutions are made by sections 47.07 (1) and 50.053 (2) of the statutes.

b. Compensatory awards

(1) Indemnity for slaughtered animals, etc.--Pursuant to section 95.35 the owner of each farm animal condemned and slaughtered in the disease control work conducted by the state may apply to the Department of Agriculture for an indemnity payment equal to half the difference between the net salvage and appraised value of the animal, not to exceed \$90 for a registered animal and \$40 for an unregistered one. Along with the statement of his claim, the owner must send the department the file of the condemnation proceedings. The statement of the claim and a report of the sum found due from the state are transmitted by the department to the Director of Budget and Accounts, who audits the claim and makes payment out of a fund provided in the department's annual budget. (37)

(37) From State Department of Agriculture: Indemnity Payments for Slaughtered Animals (Bangs disease): 1951-52 (to April)--\$240,971.24; 1950-51--\$101,156.84; 1949-50--\$161,178.54.

Section 94.765 provides an indemnity payment of \$3 for each bee colony destroyed by the direction of the Department of Agriculture. Upon certification of the claim by the department, payment is made by the State Treasurer out of funds paid to the state pursuant to the occupational tax on beekeepers.

(2) Claims for bear and deer damage--Section 29.595 provides that where an owner or lessee of property has suffered damages from wild bear or deer, he may, within 10 days thereafter, file a verified statement of his claim with the Conservation Commission. The commission investigates and attempts to settle all such claims. When the commission and the claimant cannot agree on the amount of damages, the commission applies to the circuit court of claimant's residence for a determination of the issue. Allowed claims are paid pro rata at the end of the fiscal year from a fund provided in the commission's annual budget. In recent years, the amount provided has usually been sufficient to pay all allowed claims in full. (38) A 1953 act, Chapter 129, Laws of 1953, provides a special procedure for recovery of damages extending over period as long as 6 months and for a review of the findings of the circuit court pursuant to Chapter 227 of the statutes.

(3) Compensation of emergency forest fire fighters--Section 26.14 entitles emergency fire wardens and those assisting them in fighting forest fires to file an itemized bill for their services and expenses with the Conservation Commission. If satisfied with the correctness of the claim, the commission forwards it to the State Treasurer for payment out of the general fund. The county concerned is, in turn, billed for half of this expense.

(4) Compensation of reassessors--Section 70.81 provides that where the State Department of Taxation orders a reassessment of property taxes levied by a taxing district, the reassessors acting pursuant to such order are entitled to compensation from the state. In filing his claim, the reassessor executes a voucher for the amount claimed on a blank form furnished by the Department of Taxation. Upon examination and approval of the claim, the department transmits it to the Director of Budget and Accounts for audit and payment. The taxing district involved must ultimately reimburse the state.

C. The Judicial Function

The role played by the state courts in the settlement of claims against the state is necessarily limited to the extent to which the state has relinquished its common law immunity from liability and suit. Wisconsin has given its courts an important part in the settlement of claims against the state by providing for: (1) suits against the state on certain claims disallowed by the legislature; (2) judicial review of administrative determinations; and (3) original actions against the state in certain special cases.

1. Suits on Claims Requiring Prior Legislative Action

Since the settlement of all claims against the state not otherwise provided for by statute is left to the legislature, all

(38) From Conservation Commission: Payments for Bear and Deer Damages, 1948-1951: 1950-51--\$40,000; 1949-50--\$46,471.98; 1948-49--\$52,245.22.

claims based on the common law principles of contract, equity and tort are, in the first instance, presentable only to the legislature for allowance. Our next concern is to determine what check the courts have been given over the legislative disallowance of such claims.

a. General statutory consent

The State Constitution left the matter of permitting suits against the state to the legislature by providing "The legislature shall direct by law in what manner and in what courts suits may be brought against the state."⁽³⁹⁾ This provision is not self-executing, however, and suits against the state cannot be maintained without an implementing act of the legislature.⁽⁴⁰⁾ By 1850, the legislature had responded to the constitutional mandate. Under the original statute⁽⁴¹⁾ "any person deeming himself aggrieved by the refusal of the legislature to allow any just claim against the state" could file a petition in the Supreme Court asking for a determination of the state's liability thereon. Disputed issues of fact were to be certified to a circuit court for trial by jury. No judgment against the state could be paid without an appropriation by the legislature, and no execution could issue against the state. In 1860, the statute was amended to make judgments against the state payable on audit by the Secretary of State.⁽⁴²⁾ Thereafter, the consent statute remained substantially unchanged until 1935 when the procedure was simplified by vesting original jurisdiction over suits on disallowed claims in the circuit court for Dane county.⁽⁴³⁾

b. Liability and suability under the consent statute

At first impression, a statute, such as section 285.01, permitting suits against the state on "all claims" refused by the legislature would seem to constitute a substantial surrender of the state's sovereign immunity. However, the general rule in states having such a statute is that it does not waive the state's immunity from liability but merely provides a remedy for enforcing such liability already expressly assumed by the state. Under this view, the consent to suit effected by the statute is general, but the issue of liability in each case must be determined in accordance with the rules peculiar to the sovereign, not under the law applicable as between persons.⁽⁴⁴⁾

A study of the Wisconsin cases construing the state's consent statute reveals a somewhat more restricted interpretation of the consent. In Wisconsin, the consent itself has been held to be limited to those cases involving pre-existing liability. In essence, this view is based on the premise that the word "claim", as used in the statute, signifies a legal debt or demand as of right, rather than cause of action in the ordinary sense.

The attitude of the Wisconsin Supreme Court toward the state's general consent statute might be viewed in truer perspective when

(39) Wis. Const., Art. IV, section 27.

(40) Dickson v. State, 1 Wis. 122, 1853.

(41) Wis. Laws, 1850, ch. 249.

(42) Wis. Laws, 1860, ch. 326.

(43) Wis. Laws, 1935, ch. 483; Wis. Statutes, 1951, section 285.01.

(44) Anno. 13 A.L.R. 1276; 169 A.L.R. 105.

considered in connection with actual actions against the state involving principles of contract, equity, tort and statutory liability.

(1) Contract--Since even under the common law the state was deemed to have assumed liability on its contracts, liability which could not be enforced because of the sovereign's immunity from suits,⁽⁴⁵⁾ our court found no difficulty in holding that suits in contract against the state were permitted under the general consent statute. The rules of contract liability invoked against the state necessarily differ in some respects from those applied to individuals and corporations. Nevertheless, where the contract falls within the state's general power to contract and has been made by an authorized officer, the liability of the state is determined under the same rules applicable as between individuals.⁽⁴⁶⁾

(2) Equity--Although suits against the state founded on contract did not require a construction as to the extent of the consent statute since the state was deemed to have expressly assumed liability by its contract, the question eventually arose as to the statute's effect on the type of claim situations in which the state had not explicitly assumed liability. Generally speaking, did the statute by consenting to suits on "all claims" disallowed by the legislature extend to actions on all demands for compensatory damages which the legislature refused to adjust to the claimant's satisfaction? In particular, was an action based on established equitable principles maintainable against the state? In answering both questions in the negative, the state Supreme Court laid down the rule that the words "all claims" used in the statute referred only to those claims which in established legal principles rendered the state a debtor of the claimant. Accordingly the rule evolved that suits against the state based solely on equitable principles were not within the consent afforded by the statute.

The case of Chicago M. & S.P. Ry. v. State⁽⁴⁷⁾ was the first attempt to bring an equitable action against the state. There, plaintiff sought an order restraining the state from collecting an allegedly inequitable tax. In dismissing the action for want of the state's consent, the court held that the general consent statute "relates only to actions upon those ordinary claims which, if valid, render the state a debtor to the claimant and not to equitable actions brought against the state to restrain it from perpetrating an alleged threatened injustice".

In a subsequent case⁽⁴⁸⁾ plaintiffs brought an action in equity requesting a court order directing the state to redeem certain tax certificates on land which the state had purchased after the perfection of the tax lien. While conceding that the state had taken title subject to the tax lien, the court dismissed the action, holding that the consent statute "relates only to claims which, if valid, render the state a debtor to claimant and not to equitable claims". Thus, the rule of the prior case barring injunctive actions against

⁽⁴⁵⁾ 49 Am. Jur., States, section 62.

⁽⁴⁶⁾ Sholes v. State, 2 Pin. 499, 1850.

⁽⁴⁷⁾ 53 Wis. 509, 10 N.W. 560, 1881.

⁽⁴⁸⁾ Petition of Wausau Inv. Co., 163 Wis. 283, 158 N.W. 81, 1916.

the state was extended to exclude all actions in equity, even if the only relief sought is the recovery of money.

A very recent case⁽⁴⁹⁾ illustrates the rather technical distinction between the permitted actions at law for the recovery of a debt and the prohibited actions in equity for the recovery of money unjustly withheld. There, a county clerk embezzled state hunting and fishing license fees collected by him and used county funds in remitting the amount of the fees to the state. When the county sued the state to recover the amount of these funds, the Attorney General, on behalf of the state, contended that the action was governed by the rule excluding suits on equitable claims. The court, in holding that the suit was covered by the consent statute, ruled it an action at law for money had and received rather than an "equitable claim" on the ground that the clerk in collecting and remitting the fees acted as the state's agent. The court conceded that the action to recover money had and received is based on equitable considerations, but added that it is an action not to recover an "equitable claim" but one to recover an obligation "implied in law" and, therefore, within the statutory consent.

(3) Tort---Historically, the sovereign is deemed not responsible for the torts of its officers and agents. The enactment of a general consent statute, however, raises the question whether the state thereby consents to be sued in tort and to have its liability determined under the same rules applicable as between persons. Most courts have held that although a consent statute may waive the state's immunity to suit on a tort claim, it does not enlarge the state's common law liability; that, therefore, a suit in tort fails because the state, in the absence of an express statute to the contrary, is not liable for the torts of its officers and agents.⁽⁵⁰⁾ The courts of several states,⁽⁵¹⁾ including Wisconsin, have taken the position that the statutory consent is limited to actions at law on contract, in other words claims recognized as legal by the common law but which were unenforceable because of the state's immunity to suit. Under this view, tort actions brought against the state fail initially at the consent level. If, however, consent is provided by special act, the action fails on the ground that the state is not liable in tort.⁽⁵²⁾ On the other hand, if liability in a special class of cases is expressly assumed by the state but is unaccompanied by an express consent to suit in such cases, it has been held that the liability is unenforceable under the general consent statute.⁽⁵³⁾

In Wisconsin, the question of whether the state is suable in tort under the general consent statute was first decided in the negative by Houston v. State⁽⁵⁴⁾. In that case, plaintiff's suit was based on the wrongful condemnation and slaughter of his cattle by order of a state veterinarian acting under color of a disease control act. Alleging that the cattle had been in fact disease free,

(49) Trempealeau County v. State, 260 Wis. 602, 1951.

(50) 13 A.L.R. 1276; 169 A.L.R. 105.

(51) e.g. Murdock Parlor Grate Co. v. Com., 152 Mass. 28; 24 N.E. 854, 1890; Houston v. State, 98 Wis. 481; 74 N.W. 111, 1898.

(52) Appelbacher v. State, 160 Wis. 565; 152 N.W. 144, 1915.

(53) Holzworth v. State, 238 Wis. 63; 298 N.W. 163, 1941.

(54) 98 Wis. 481; 74 N.W. 111, 1898.

plaintiff first submitted a claim to the legislature and upon its disallowance commenced an action against the state in the manner provided by statute. The court conceded that the state's agent had committed a tort by acting beyond the authority of the control act but dismissed the action on the ground that under the consent statute the state had not consented to suits in tort but only on "claims which, if valid, render the state a debtor to claimant". Thus the court decided the case without ruling on whether the state would be liable in tort if its statutory consent to suit extended to tort actions.

The court finally answered the basic question concerning the state's liability status in tort some 15 years later in the case of Apfelbacher v. State⁽⁵⁵⁾. Apparently on the basis of the decision that the general consent statute did not affect suits in tort, the legislature of 1913 passed a special act⁽⁵⁶⁾ enabling one Apfelbacher to bring an action to determine the state's liability for damage to his property resulting from the allegedly negligent use of a dam operated in connection with a state fish hatchery. The state having expressly consented to the suit, the court was obliged to decide the case on the issue of liability, and its decision in favor of the state was based squarely on the proposition that the state in the discharge of a governmental function is not liable for the torts committed by its officers, agents and employees. The court further held that the operation of a fish hatchery was a governmental function falling within the scope of governmental immunity previously granted to municipalities⁽⁵⁷⁾. It expressly left open for future consideration the question of whether or not the rule imposing liability in the discharge of proprietary functions as applied to municipalities⁽⁵⁸⁾ would be also invoked against the state.

Having determined that the general consent statute did not embrace suits against the state in tort and, moreover, given special consent, that the state was not liable in tort, it remained for the court to decide whether general liability assumed by the state in a specified type of tort situation would be cognizable under the general consent statute if consent were not otherwise granted.

The state's Safe Place Statute provides "Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building...as to render the same safe⁽⁵⁹⁾... (and) the term 'owner' shall mean and include every person, firm, corporation, state, county, town, city..."⁽⁶⁰⁾ etc. In Holzworth v. State⁽⁶¹⁾ plaintiff was injured when he fell through an open exit while attending a football game in the stadium of the state university. Alleging that his injuries were caused by the unsafe condition of the stadium, plaintiff based his suit primarily

(55) 160 Wis. 565; 152 N.W. 144, 1915.

(56) Wis. Laws, 1913, ch. 624.

(57) Bernstein v. Milwaukee, 158 Wis. 576; 149 N.W. 382, 1914.

(58) State Journal P. Co. v. Madison, 148 Wis. 396; 134 N.W. 909, 1912.

(59) Wis. Statutes, 1951, section 101.06.

(60) Wis. Statutes, 1951, section 101.01 (13).

(61) 238 Wis. 63; 298 N.W. 163, 1941, Comment 1942 Wis. Law Review 138.

on the ground that the state, by the Safe Place Statute, had assumed liability for injuries attributable to defects in the construction and maintenance of its buildings. The trial court agreed and held that the suit was maintainable as based on a "claim" within the scope of the general consent statute. The Supreme Court, however, reversed the lower court and ordered the action dismissed. In holding that consent for the action was lacking, the court observed that the previous cases were binding authority that the words "all claims" in the present consent statute refer only to "claims which, if valid, render the state a debtor to claimant", saying, "It having been the law of this state for more than fifty years that (the consent statute) did not authorize an action against the state for tort, it is considered that such should continue to be the rule until the law is changed by act of the legislature." Although the holding that consent for the suit was lacking rendered the decision complete, the court apparently felt constrained to make the further observation that the Safe Place Statute, in merely including the state as a party subject to its terms, did not impose liability on the state. In this connection the court said, "No cause of action exists against the state on account of the wrongful acts of its officers and agents unless the state has clearly and definitely consented that it shall be so liable." It was the opinion of the court that the statute only "lays down a standard of care and if those to whom it applies violate the provisions of the statute, they are guilty of negligence ... a private individual, a county, town or city becomes liable for the reason the rule of respondeat superior applies to them, but the rule does not apply to the state nor is there language used in the statute which indicates any intention on the part of the legislature to change the rule with respect to liability of the state for the acts of its officers and agents".

The court's holding on the issues arising out of the Safe Place Statute left undisposed plaintiff's contention that, irrespective of statute, the state should be held liable at common law for torts committed in the conduct of a proprietary enterprise, such as the profit-making operation of a football stadium. Although the point was expressly reserved for future consideration in Apfelbacher v. State, the court summarily dismissed it, saying that since the state's immunity from liability in tort was so well established by precedent, no distinction would be drawn in claims against the state between torts committed in pursuance of a proprietary activity and those flowing from a governmental function.

Whatever may be the ultimate status of the Holzworth Case in any future judicial hall of fame, its clear-cut rulings in respect to the suability and liability of the state render it a worth-while object of study in connection with the required form and substance of statutes intended to establish additional areas of state responsibility.

(4) Statutory Liability--The consistent line of decisions holding the state has no common law liability in tort has induced many states to assume liability by statute in certain general tort situations. Statutes assuming state liability for the negligent operation of state-owned and operated motor vehicles on official business are perhaps the most prevalent in this field.

The decision in Holzworth v. State, however, casts some doubt over the effectiveness of the several attempts which have been made to make the state of Wisconsin a responsible party in certain types of tort claims. It appears possible that the legislature of 1913⁽⁶²⁾ might have intended, by its inclusion of the state as an "owner" subject to the statute and its inclusion of "public building" within the statutory scope, to render the state liable for injuries resulting from the breach of the statutory duty to construct and maintain a safe place for employees and frequenters. The decision that the state will be held liable in tort only if it "clearly and definitely consents" to such liability and that liability will not be inferred could, if carried to the dryly logical extreme, vitiate the two other statutes under which the state has ostensibly assumed liability in tort. The statutes in question are section 85.095 relating to claims arising from the negligent operation of state or municipally-owned and operated motor vehicles and section 114.065, as created by Chapter 244, Laws of 1953, relating to claims arising from the negligent operation of state-owned and operated aircraft.

In regard to claims for damages resulting from the negligent operation of state-owned and operated motor vehicles, section 85.095 (2) provides as follows:

"Any person...suffering any damage proximately resulting from the negligent operation of a motor vehicle owned and operated by any municipality.../Including the state/⁽⁶³⁾ and which damage is occasioned by the operation of such motor vehicle in the performance of its business, may file a claim therefor against such municipality and the governing body thereof shall have the right to allow, compromise, settle and pay the same."

The statute further provides that claims against the state shall be filed with the Director of Budget and Accounts under section 15.18 (8). No time limit is prescribed for filing. Actions against the state, after disallowance of the claim by the legislature, are brought under section 285.01, the general consent statute, and payment of any amount recovered is pursuant to section 285.04, under which the judgment is audited and paid by the Director of Budget and Accounts. Expressly, then, the statute entitles the claimant to file a claim against the state, a privilege already granted under section 15.18 (8); it grants the legislature the right to pay the claim, a right already inherent under the general power to appropriate money in settlement of moral obligations of the state; and it consents to be sued as provided in the general consent statute. Nowhere in the text of the statute is there an express statement that the state has waived its immunity from liability in such cases. Although both the title to the act⁽⁶⁴⁾ and the section title contain the words "state liability", the wording of the title to a general act is of no effect if there are no ambiguities in the wording of the law⁽⁶⁵⁾ and the section title is not a part of the law.⁽⁶⁶⁾

⁽⁶²⁾ Wis. Laws, 1913, ch. 588.

⁽⁶³⁾ Wis. Statutes, 1951, section 85.095 (1) (a).

⁽⁶⁴⁾ Wis. Laws, 1947, ch. 183.

⁽⁶⁵⁾ Moyer v. Oshkosh, 151 Wis. 586; 139 N.W. 378, 1913.

⁽⁶⁶⁾ Wis. Statutes, 1951, section 370.001 (6).

Admittedly, the inference that the legislature intended the state to assume liability in these cases is unmistakable; but the holding in Apfelbacher v. State that consent to suit does not in itself affect the state's immunity from liability, coupled with that in Holzworth v. State that state liability will not be inferred but must be assumed by clear and express terms, appear to furnish adequate grounds for holding that the state has not effectively assumed liability for the negligent operation of its motor vehicles. The same arguments could be advanced against the statute purporting to assume state liability for the negligent operation of its aircraft, for that law is patterned substantially after the motor vehicle liability statute.

Although the state has been included as a party in the municipal motor vehicle liability statute since 1947, the court has yet to construe the act as to its application to the state. In fact, the records of the Department of Budget and Accounts do not disclose any judgment of a lower court in such an action which has been processed in accordance with section 285.04. Thus far, the only official matter dealing with the statute concerns its possible application to claims resulting from the negligent operation of army vehicles by members of the Wisconsin National Guard. It is perfectly clear that the statute has no application here because it requires the vehicle to be both owned and operated by the state;⁽⁶⁷⁾ National Guard vehicles are owned by the federal government and are merely loaned out to the state units. Conversely, unless the National Guard unit has been ordered into active federal service, members thereof are not employees of the United States within the purview of the Federal Tort Claims Act.⁽⁶⁸⁾

c. Action under the consent statute

Up until now, our inquiry has been concerned with the rules which determine what general classes of claims may be made the subject of a suit against the state under the general consent statute. Once given a case falling within the limits of consent as defined by the court, however, certain statutory requirements further qualify or affect the right of bringing an action against the state.

(1) Jurisdictional requirements--It is a general rule that where the sovereign has conditioned its consent to suit by prescribing a certain procedure to be followed, strict compliance is a jurisdictional matter, and suit will not lie unless all such requirements have been fully met.⁽⁶⁹⁾ Therefore, because the state's consent statute expressly requires that the claim first be refused by the legislature, a complaint which fails to aver the performance of this condition precedent is fatally defective.⁽⁷⁰⁾ Moreover, it has been held that it is not alone sufficient that the legislature disallowed the claim, but it must be apparent that the disallowance was on the merits, and not because of some technical defect in its presentation.⁽⁷¹⁾ The consent statute also requires that plaintiff file a bond to indemnify the state against the payment of costs, and a plaintiff's failure to file a bond, in all cases, deprives the court of jurisdiction to try the action.⁽⁷²⁾

⁽⁶⁷⁾ 37 Atty. Gen. 162, 1948; 40 Atty. Gen. 178, 1951.

⁽⁶⁸⁾ Satcher v. U.S., 101 F. Supp. 919, 1952.

⁽⁶⁹⁾ Anno. 42 A.L.R. 1464, 1477.

⁽⁷⁰⁾ Chicago M. & S.P. Ry. Co. v. State, (supra, footnote 47)

⁽⁷¹⁾ Sehin v. State, 256 Wis. 495; 41 N.W.(2d) 596, 1950.

⁽⁷²⁾ State ex rel. Martin v. Reis, 230 Wis. 683, 284 N.W. 580, 1939.

(2) Statutes of limitation--Shortly after the enactment of the first general consent statute, the court held that the intent of the legislature in providing that the state might be sued was to enable the state to set forth the same defenses applicable to suits between individuals; and, therefore, where plaintiff brought suit against the state on a contractual obligation which had accrued more than 6 years prior to the commencement of the action, the state's defense based on the 6-year statute of limitations was held good. (73)

Since there is a different statute governing limitations on tort actions, (74) the rule entitling the state to set up general statutes of limitation may assume increased importance in respect to statutory claims based on the negligent operation of state-owned and operated motor vehicles. (75) Assuming for now that the state has effectively assumed liability in the cases, the statute provides only that suits must be commenced within 6 months after disallowance of the claim by the legislature and places no limitation on the time such claims shall be filed. The constitutional provision placing a limitation on allowable claims (76) would enable the legislature to allow such claims if filed within 6 years after accrual. However, the general statute limiting actions on personal injury claims (77) requires the claimant to serve notice of his claim on the other party within 2 years after the event causing the damage, or, in the alternative, to commence the action within 2 years after the event. In the case of a claim for wrongful death, the general statute (78) requires that the action be brought within 2 years after the accrual of the cause of action. Therefore, in order to take advantage of the consent provision in the state motor vehicle liability statute, claims for personal injuries thereunder should be filed with the Director of Budget and Accounts within 2 years after the event; and action, of course, must be commenced within 6 months after disallowance instead of as provided by the general statute of limitations. Assuming that claims for wrongful death fall within the purview of the state liability statute, such claims should be filed in the first legislative session following the event so that if the claim is disallowed an action could be started within 2 years after accrual of the cause of action, as well as within 6 months after disallowance. While the court might possibly hold that the 6 months limitation provided in the state liability statute excludes application of general statutes of limitation, the safer course would be to comply with both special and general limitations.

The problem of construing the general statute of limitations in connection with the state aircraft liability statute has been obviated by the provision that such claims must be filed with the prescribed body within 90 days after the accident and suit commenced within 6 months after disallowance.

(3) Counterclaims by the state--In the case of Clas v. State, (79) the court indicated that a claimant in bringing

- (73) Baxter v. State, 10 Wis. 398, 1860.
 (74) Wis. Statutes, 1951, section 330.19 (5).
 (75) Supra, footnote 63.
 (76) Supra, footnote 10.
 (77) Supra, footnote 74.
 (78) Wis. Statutes, 1951, section 330.21 (3).
 (79) 196 Wis. 430; 220 N.W. 185, 1928.

an action against the state subjects himself to a possible counterclaim made on behalf of the state. There, plaintiff, an architect, had brought suit against the state to recover the balance allegedly owing on plans furnished a state agency. The state, by the Attorney General, interposed a counterclaim for payments already made to plaintiff, contending that the state was not bound because the plans submitted by plaintiff called for a structure costing more than the available appropriation. Although the state was held not liable for that reason, the counterclaim was dismissed on the ground that the pleadings and record failed to disclose that the Attorney General was authorized to prosecute the state's claim by the Governor or the legislature as required by statute.⁽⁸⁰⁾ Thus, by first obtaining the necessary authorization, the Attorney General may prosecute counterclaims on behalf of the state; and although this device does not appear to have been used much in the past, it could become an important factor in actions brought under the state motor vehicle liability statute.

(4) Payment of judgment, costs and interest--In the absence of a statutory provision for the audit and payment of judgments rendered against the state, the determination of a court is only a recommendation to the legislature because the legislature cannot be ordered to make an appropriation, nor can execution issue against the state.⁽⁸¹⁾ Moreover, without statutory authorization, the costs of such action cannot be assessed against the state.⁽⁸²⁾ Wisconsin, however, has provided by statute⁽⁸³⁾ that judgments and costs awarded against the state are to be audited by the Director of Budget and Accounts and paid out of a fund appropriated for that purpose.⁽⁸⁴⁾ However, no general provision has been made for the payment of interest on claims reduced to judgment, for which the state is not liable in the absence of contract or statute.⁽⁸⁵⁾

d. Suits against state agencies

As a general proposition, an agency of the state is clothed with the same immunity as the state itself and cannot be sued except with the state's consent.⁽⁸⁶⁾

In some instances, a particular state agency has been designated as a body corporate by the creative statute, and it has been argued that this deprives the agency of the immunity from suit and liability enjoyed by the state and subjects it to the law applicable to private corporations. In Sullivan v. Board of Regents of Normal Schools,⁽⁸⁷⁾ plaintiff, without complying with the terms of the consent statute, brought suit against the board, which was created as a body corporate, for wages owing under a contract of employment. The court dismissed the action for want of consent, holding that because the board performed a governmental function it was entitled to the same immunity as the state itself. The mere fact that the

(80) Wis. Statutes, 1951, section 14.53 (1).

(81) Anno. 42 A.L.R. 1464, 1465.

(82) Baxter v. State, (supra, footnote 73).

(83) Wis. Statutes, 1951, section 285.04.

(84) Wis. Statutes, 1951, section 20.07 (4).

(85) Frederick v. State, 198 Wis. 399; 224 N.W. 110, 1929.

(86) Anno. 42 A.L.R. 1464, 1486.

(87) 209 Wis. 242; 244 N.W. 563, 1932; comment 8 Wis. Law Review 385.

board had been designated as a body corporate was not in itself sufficient to change the general rule. In such cases, the court will look beyond the record to determine the true identity of the party against whom the relief is sought, whether it is the defendant agency or really the state. The general test lies in determining whether the agency is performing an essentially governmental function with pecuniary gain being merely incidental, or whether it is acting primarily in a proprietary capacity with the making of profit the main objective of its existence. In the former case, a judgment for the plaintiff would in practical effect operate against the state, though not a party to the record, and, therefore, the action cannot be maintained without the state's consent. Where, however, the agency is primarily a profit-making enterprise, a judgment against it will not directly affect the state, and an action against it will lie without the state's consent.

A statute creating a governmental agency may provide that the agency can sue or be sued in its own name.⁽⁸⁸⁾ Such a provision does not have the effect of waiving immunity from suit in a case where the court's judgment would control the action of the state or subject it to liability.⁽⁸⁹⁾ On the other hand, such a "sue or be sued" clause has the effect of subjecting the agency to suit, even though it exercises a governmental function, in cases where the court's judgment would affect only the agency as distinct from the state. Accordingly, it has been held that the Public Service Commission was suable without regard to the consent statute where the object of the action was the recovery of an invalid fee collected by the commission which had not yet been paid into the state treasury.⁽⁹⁰⁾ Here, the suit was maintainable because the judgment would affect only the disposition of money which the state was not entitled to and which was still in the custody of the agency sued. Had the commission paid the fee in controversy into the state treasury, the judgment then would have been against the state and could not have been maintained except by compliance with the consent statute.

e. Actions against state officers and agents

Since state government necessarily functions through individual officers and agents, a person suffering damage by reason of governmental action or inaction may sometimes circumvent the state's immunity by proceeding directly against the individual officer or agent responsible. Actions in mandamus and those in tort are the 2 most typical examples of looking to such individuals for redress rather than to the state itself. The question remains under what circumstances the individual officer or agent is shielded by the immunity of the government he serves.

A situation somewhat analogous to a suit against a state agency is presented when a writ of mandamus is brought to compel a state officer to perform a certain official act. In such case, whether or not the immunity of the state inures to the benefit of the officer depends primarily upon the nature of the act sought to be compelled. The general rule is that where the act in question is a clear and definite ministerial duty, and there is no substantial controversy

(88) e.g. Wis. Statutes, 1951, section 195.01 (9).

(89) Anno. 42 A.L.R. 1464, 1486.

(90) Mil. Gas Light Co. v. P.S.C., 250 Wis. 54, 26 N.W.(2d)287, 1947.

of fact, the action against the officer is not an action against the state and may be maintained without the state's consent; but where the act is one of a discretionary nature requiring the exercise of political or governmental power, so that to compel the officer to act in a particular manner is to compel the state, the suit is in effect against the state and mandamus will not lie.⁽⁹¹⁾ Accordingly, it has been held that mandamus was proper to compel the Secretary of State, then the state auditor, to audit a particular claim, the payment of which was provided for by statute;⁽⁹²⁾ but, on the other hand, that mandamus would not lie against the secretary to compel the payment of a certain claim where the statute providing for its settlement required his approval as a prerequisite to payment.⁽⁹³⁾ Once given a situation open to mandamus, the remedy is effective for more than compelling the performance of the act sought; by statutory provision,⁽⁹⁴⁾ the prevailing plaintiff is entitled to recover both his damages and costs.⁽⁹⁵⁾

A different situation is presented where a state officer or agent is sued in his individual capacity for a tort committed in the performance of an official duty. Here, there is no opportunity for the court's judgment to impinge upon the sovereignty of the state; the real question is whether, as a matter of sound public policy, one who acts on behalf of the state should be afforded immunity beyond that enjoyed by one who acts solely for himself. The solution has been to make the degree of immunity extended to such officer or agent dependent upon the character of the duty giving rise to the particular act in issue. Accordingly, an officer acting in a judicial capacity is never responsible in tort for any judgment he may render, however erroneously, negligently or maliciously he may act;⁽⁹⁶⁾ and an official acting in a quasi-judicial capacity also enjoys complete immunity,⁽⁹⁷⁾ except insofar as his action constitutes an abuse of discretion and invades the private property right of another.⁽⁹⁸⁾ A public official acting in a ministerial capacity, on the other hand, acts at his peril and is liable for damages if his act is illegal or negligent.⁽⁹⁹⁾ In addition, where a public officer engages in activity of a more private character, so as to concern particular individuals as well as the public generally, he is liable for damages arising from wrongful or negligent conduct.⁽¹⁰⁰⁾

While a discussion of the individual liability of state officers and agents may seem somewhat unrelated to the problem of claims against the state, the very fact that they are exposed to liability in the performance of their official duties necessarily has some effect upon the administration of state government. The comment has been made that this exposure to personal liability in the face

(91) State ex rel. McDonald v. Nemachek; 199 Wis. 13, 225 N.W. 170, 1929.

(92) State ex rel. Sloan v. Warner, 55 Wis. 271, 9 N.W. 795, 1882.

(93) State ex rel. Martin v. Doyle, 38 Wis. 92, 1875.

(94) Wis. Statutes, 1951, section 293.04

(95) State ex rel. Lathers v. Smith, 242 Wis. 512; 8 N.W. (2d) 345, 1943.

(96) Steele v. Dunham, 26 Wis. 393, 1870.

(97) Wasserman v. Kenosha, 217 Wis. 223; 258 N.W. 857, 1935.

(98) Lowe v. Conroy, 120 Wis. 151; 97 N.W. 942, 1904.

(99) Reichert v. Milwaukee County, 159 Wis. 25; 150 N.W. 40, 1914.

(100) Robinson v. Rohr, 73 Wis. 436; 40 N.W. 668, 1889 (members of a town board taking actual part in a construction project).

of the sovereign's immunity constitutes "defective social engineering".⁽¹⁰¹⁾ This view maintains that it is unfair to impose such a heavy personal burden upon those performing public service, and that it is also inequitable to restrict the injured citizen to the usually inadequate resources of the individual agent, while the financially responsible principal, the state, is permitted to remain aloof. Wisconsin, however, has sought to alleviate these injustices to some extent by certain statutory provisions under which the state will step in and relieve the individual officer or agent of at least a part of his burden. For example, a statute enacted in 1943 provides:

"Where the defendant in any action...except an action for false arrest, is a public officer and is proceeded against in his official capacity, and the jury or court finds that he acted in good faith, the judgment as to damages and costs entered against the officer shall be paid by the state or political subdivision of which he is an officer."⁽¹⁰²⁾

It is important to note that this statute is expressly limited in its application to public officers. A public officer, as distinguished from a public agent or employee, has been defined as a person on whom is devolved by law the exercise of some portion of the sovereign power of the state, the nature of the duties, rather than the mode of election or the amount of salary, being the controlling element.⁽¹⁰³⁾ Thus, the statute offers no protection to agents and employees of the state who may commit torts in the good faith discharge of their governmental duties. In such situations, however, the state may furnish counsel for the defense of the agent or employee proceeded against under another statute which provides:

"The attorney-general shall at the request of the head of any department of state government approved by the governor, appear for and defend...any agent, inspector or employe of such department charged with the enforcement of law, or the custody of inmates of state institutions or prosecution for violation of law, in any tort action except malpractice against him based upon any act...arising out of the lawful discharge of (his) duties..."⁽¹⁰⁴⁾

Similar provision is made for members of the National Guard in regard to civil or criminal actions arising out of the performance of their military duties.⁽¹⁰⁵⁾

2. Proceedings on Claims Requiring Prior Administrative Action

a. Judicial review from permanent claims agencies

The determinations of the Board of Tax Appeals and the Commission for the Relief of Innocent Prisoners have been made subject to review⁽¹⁰⁶⁾ as provided in the Uniform Administrative Procedure Act.⁽¹⁰⁷⁾ In brief, the act provides that the aggrieved party

⁽¹⁰¹⁾ Borchard, Government Liability in Tort, 34 Yale L.J. 1, 8, 1926.

⁽¹⁰²⁾ Wis. Laws, 1943, ch. 377; Wis. Statutes, 1951, section 270.58.

⁽¹⁰³⁾ Martin v. Smith, 239 Wis. 314, 1 N.W.(2d) 163, 1941.

⁽¹⁰⁴⁾ Wis. Statutes, 1951, section 14.53 (12).

⁽¹⁰⁵⁾ Wis. Statutes, 1951, section 21.13.

⁽¹⁰⁶⁾ Wis. Statutes, 1951, sections 73.015 (2) and 285.05 (5).

⁽¹⁰⁷⁾ Wis. Statutes, 1951, sections 227.01-227.21.

to an administrative decision subject to review may institute proceedings by serving a petition on the agency and filing it with the circuit court for Dane County within 30 days after the service of the agency's decision.(108) Review is on the record, but the court may under certain circumstances taken additional evidence.(109) The court may affirm the decision of the agency, or may reverse or modify it, only, however, on certain grounds specified by statute.(110) Any party to the record, including the agency, may appeal the decision of the reviewing court to the State Supreme Court.(111)

Review of the decisions of the Industrial Commission in workmen's compensation cases is provided for in a separate section.(112) Any aggrieved party, including the state as an employer, may within 30 days after the commission's order commence an action against the commission and the adverse party in the circuit court for Dane County. The commission files an answer, together with the record and all other documentary material pertaining to the case. Upon hearing, the court may confirm the commission's order, or may set it aside but only on specified statutory grounds.(113) Any party aggrieved by the decision of the reviewing court, including the state or the commission, may appeal to the Supreme Court.(114)

b. Action on denied departmental claims

As a practical matter, the applications for statutory refunds and compensatory awards filed with the department of state government concerned do not provide situations requiring a resort to the judiciary. Where the claimant in presenting his claim follows the prescribed statutory procedure, as supplemented by the pertinent departmental regulations, and furnished a satisfactory showing of proof, the department will certify the refund or award for payment as a matter of course. The question could conceivably arise, however, as to what course a claimant might pursue in the event his application for a refund or award is denied by the department concerned.

Where the matter is under the jurisdiction of the State Department of Taxation, as the majority of refunds are, an appeal from an adverse decision of the department lies to the Board of Tax Appeals.(115) If the Department of Taxation has certified a refund for payment, and the State Treasurer fails to pay it within 60 days, the claimant is authorized to bring an action against the treasurer to recover the amount certified.(116)

No comparable review procedure is indicated on claims filed with other departments. This does not necessarily mean, however, that a claimant is without further remedy. Where there is no substantial issue of fact involved, and an appropriation is available

(108) Wis. Statutes, 1951, section 227.16.

(109) Wis. Statutes, 1951, section 227.19 (1).

(110) Wis. Statutes, 1951, section 227.20 (1).

(111) Wis. Statutes, 1951, section 227.21.

(112) Wis. Statutes, 1951, section 102.23.

(113) Wis. Statutes, 1951, section 102.23 (1) "(a) That the commission acted without or in excess of its powers. (b) That the order or award was procured by fraud. (c) That the findings of fact by the commission do not support the order or award."

(114) Wis. Statutes, 1951, section 102.25.

(115) Wis. Statutes, 1951, section 73.01 (6) (a).

(116) Wis. Statutes, 1951, section 71.11 (19) (c).

out of which the claim is payable, the claimant could compel an audit of the claim by bringing mandamus proceedings against the responsible official.⁽¹¹⁷⁾ If a substantial issue of fact exists, so that mandamus will not lie, claimant might be best advised to request a departmental hearing, from which would lie a resort to judicial review.⁽¹¹⁸⁾ If this course is for some reason unavailable, claimant could, of course, present his claim to the legislature; but, if disallowed there, he could bring an action against the state only if the claim is based on contract principles.⁽¹¹⁹⁾ Claims for refunds would appear to be within the statutory consent, as interpreted by the court, being "claims which, if valid, render the state a debtor to claimant". Claims for compensatory awards, if of an indemnity nature, might well be held beyond the purview of the consent statute under the doctrine of Holzworth v. State.⁽¹²⁰⁾ However, if the statute providing for a compensatory award can be said to create an implied contractual relationship between the state and the claimant, as in the case of the compensation of volunteer forest-fire fighters, an action against the state will lie upon the refusal of the claim by the legislature.⁽¹²¹⁾

3. Claims Within Original Jurisdiction

The legislature may create special classes of cases in which an action against the state is maintainable without a prior resort to the legislature as required by the general consent statute.⁽¹²²⁾ Obvious advantages result from enabling the courts to assume original jurisdiction over such strictly legal controversies as, for example, those involving the validity of certain state taxes, or, the title or possessory rights to property as between the state and an individual.

a. Suits to recover taxes

In regard to business and commodity taxes, the policy of the state is to make the payment of the tax a condition precedent to an action to test the validity of the assessment. After payment, the statutes permit a direct action against the state to challenge the validity of the tax in the following cases.

(1) Public utilities tax--Section 76.20 of the statutes provides that the complaining taxpayer may, within 6 months after payment of the tax, bring suit against the state in the circuit court for Dane County to recover that part of the tax that exceeds the proper amount.

(2) Insurance carrier license fee--Section 76.38 of the statutes allows for the recovery of excessive fees by an action against the state brought in the same manner and under the same conditions prevailing in respect to the public utilities tax.

(3) Motor fuel tax--Section 78.18 of the statutes permits a wholesaler paying the tax under protest to sue the state, within 90 days after payment and in the circuit court of the county

⁽¹¹⁷⁾ State ex rel. Sloan v. Warner, (supra, footnote 92).

⁽¹¹⁸⁾ Wis. Statutes, 1951, section 227.15.

⁽¹¹⁹⁾ Houston v. State, (supra, footnote 54).

⁽¹²⁰⁾ Supra, footnote 61.

⁽¹²¹⁾ Rosenbluth v. State, 222 Wis. 623; 269 N.W. 292, 1936.

⁽¹²²⁾ Wadhams Oil Co. v. State, 210 Wis. 448; 245 N.W. 646, 1933.

in which he conducts his business, to recover the amount of the tax illegally assessed, together with interest.

(4) Beverage and cigarette taxes--Section 139.04 of the statutes provides that a taxpayer paying the beverage tax under protest may, within 90 days after payment, sue the state to recover the amount of the tax illegally assessed. Section 139.50 (26) makes a similar provision in the case of cigarette taxes.

b. Suits concerning property rights

The statutes permit the state to be made a party defendant in the following types of cases concerning legal rights in property in which the state has an interest.

(1) Quiet title actions--Section 262.10 provides that the state can be made a party defendant in an action to quiet title to real estate in the same manner as an individual. The summons is served on the Attorney General. In such action, no judgment for the recovery of purchase price or costs can be rendered against the state.

(2) Partition actions--Section 276.48 permits that the state be made a defendant in a partition action in the same manner as an individual. The summons and all required notices are served on the Attorney General who appears on behalf of the state. The amount of costs and expenses taxed to the state are certified by the Attorney General and are paid out of the treasury on the warrant of the Secretary of State.

(3) Garnishment of state officers and employees--Section 267.22 enables the state to be made a garnishee defendant in a circuit court garnishment action brought by a judgment creditor of a state officer or employee. Section 304.21 makes a similar provision in respect to garnishment actions in justice court.

(4) Recovery of forfeitures--Section 288.19 provides that the owner of property forfeited to the state, or to an officer for the use of the state, may bring an action in circuit court to recover such property.

(5) Recovery from absentee insurance fund--Under the "Uniform Absence as Evidence of Death and Absentee's Property Act", sections 268.22 to 268.34, upon distribution of the absentee's estate, 5 per cent of the value thereof is paid to the State Treasurer who invest all such funds in a separate account. Section 268.31 (3) then provides that in the event such an absentee returns, he may proceed against the State Treasurer in the court having had jurisdiction over the absentee proceedings. The court may order payment to the claimant of such part of the accumulated absentee fund from all sources as in the court's opinion may be fair and adequate under the circumstances.

(6) Recovery of escheated property--Section 318.03 (4) provides that a claimant of a share of a decedent's estate which has escheated to the state may, within 7 years after publication of the notice of receipt by the State Treasurer, file in the county court in which the estate was settled a petition alleging

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the basis of his claim. If, after a hearing on notice to the state, the claim is established, the county court so certifies to the Director of Budget and Accounts, who audits the claim and certifies it for payment by the State Treasurer. Section 220.25 (5) (d) provides a somewhat similar procedure for suits against the state to recover escheated bank deposits.

III. CLAIMS PROCEDURES IN OTHER STATES

A. Common Ground: Sovereign Immunity

Because the doctrine of sovereign immunity has been recognized throughout the United States, ⁽¹⁾ all states, at the outset, had a common point of origin in the matter of handling claims against the state. Under the doctrine, the right of an aggrieved citizen to petition his state legislature furnished the only avenue of asserting such a claim. Usually the relief, when granted, takes the form of a special act appropriating a sum of money in settlement of the particular claim. Except where prohibited by the State Constitution, the power of the legislature to appropriate public funds in the settlement of claims against the state is recognized, even though the obligation to pay is no more than a moral one. ⁽²⁾

B. Basic Policy Considerations

Although still the primary procedure in many states, the practice of adjusting claims against the state by special acts of the legislature has some widely recognized disadvantages. The criticisms most commonly noted are: (1) the long interval between legislative sessions frequently delays consideration of the claim to the hardship of the claimant; (2) regular investigatory machinery in aid of this function has not been provided for most legislative claims committees, and, therefore, recommendations and decisions are often made in a factual vacuum; (3) the hearing and determination of claims often involve complex issues of law more properly left to a judicial-type body; and (4) the process invites the nonjudicial influence of political considerations. The interplay of these factors tends to result in inequality of treatment among individual claimants and a confusing lack of uniformity in legislative "decisions".

While the courts have frequently stated that the doctrine of sovereign immunity rests on public policy, ⁽³⁾ the technicalities, inconvenience and embarrassment involved in the legislative settlement of claims against the state have led lawmakers of many states to the position that public policy demands a more systematic method of settling such claims. Judging by recent legislative actions in various states and the number of state-sponsored studies conducted in this field, the pressure in this direction is constantly growing.

The basic policy of a state in regard to claims against it is often revealed by a provision in its Constitution. In most instances, such a provision sets forth an expression of general policy, leaving to the legislature the creation of any necessary implementing machinery. The Constitutions of several states, however, prescribe in some detail the manner of hearing and determining such claims.

C. Constitutional Provisions

State policy in regard to the state's common law immunity from suit is expressed in the Constitutions of 22 states. In 19⁽⁴⁾

(1) 81 C.J.S., States, section 214; 49 Am. Jur., States, section 91.

(2) 81 C.J.S., States, section 212; 49 Am. Jur., States, section 73.

(3) 49 Am. Jur., States, section 91.

(4) Ariz., Calif., Del., Fla., Ind., Ky., La., Nebr., Nev., N.D., Ohio, Oreg., Pa., S.C., S.Dak., Tenn., Wash., Wis., Wyo.

of these it is provided that suits against the state may be brought in the manner and in the courts as directed by the legislature. Since a provision of this kind is not self-executing, however, it is at best a mandate to the legislature to provide some procedure under which the state can be sued.⁽⁵⁾ The Constitutions of Ala., Ark., Ill. and W.Va., on the other hand, embrace the common law principle of sovereign immunity by providing that the state shall never be a defendant in any court of law or equity.⁽⁶⁾

The Constitutions of Mich. and N.Y. prohibit the legislature from auditing or allowing any private claim or account.⁽⁷⁾ However, both Constitutions make provision for the settlement of such claims by other agencies--in Mich.⁽⁸⁾ a Board of State Auditors, and in N.Y.⁽⁹⁾ a judicial Court of Claims.

In addition to Mich. and N.Y. the Constitutions of 4 other states create specific machinery for the processing of claims against the state. The Constitutions of Idaho and N.C. provide that the state supreme court shall have original jurisdiction to hear claims against the state and to render a recommendatory decision for the advice of the legislature.⁽¹⁰⁾ Mont. and Utah have constitutional provisions creating an ex officio Board of Examiners composed of designated constitutional officers to examine and recommend adjustment of all claims filed against the state.⁽¹¹⁾ In both states, the legislature is expressly forbidden to allow any claims until duly examined and approved by the board.

D. Competing Methods of Claim Adjustment

Although virtually all states have enacted some general legislation pertaining to the disposition of certain types of claims against the state, the scope of such provisions varies from state to state in accordance with the extent to which a given state is willing to relinquish the protection afforded by its common law immunity. The statutes dealing with the claims problem fall into 2 broad categories: those which assume state liability in designated classes of cases; and those which prescribe procedures for the hearing and determining of recognized claims. Many states have no liability-type statute, and in such case, where a responsibility comparable to that imposed on individuals, to those acts which assume state liability in only one particular class of case, as, for example, the negligent operation of state-owned and operated motor vehicles, or the negligent construction and maintenance of state highways. Because there is no perceptible pattern to these substantive statutes, their main significance, for our purposes, is in illustrating the differing state policies regarding the desirable degree of sovereign responsibility. For that reason, the general survey which follows will be confined to a consideration of those statutes prescribing procedures under which claims filed against the state are systematically adjusted.

⁽⁵⁾Anno. 42 A.L.R. 1464, 1472.

⁽⁶⁾Ala. Const., Art. I, section 14; Ark. Const., Art. V., section 20; Ill. Const., Art. IV, section 26; W.Va. Const., Art. VI, section 35.

⁽⁷⁾Mich. Const., Art. V, section 34; N.Y. Const., Art. III, section 19.

⁽⁸⁾Mich. Const., Art. VI, section 20; but see infra p. 38.

⁽⁹⁾N.Y. Const., Art. VI, section 23; see infra p. 40.

⁽¹⁰⁾Idaho Const., Art. V, section 10; N.C. Const. Art. IV, section 13.

⁽¹¹⁾Mont. Const., Art. VII, section 20; Utah Const., Art. VII, section 13.

Disregarding the procedure, common to most states whereby claims specifically provided for by law are audited and paid by the state auditing officer, the 4 basic methods of providing for the systematic adjustment of claims against the state are effectuated by:

1. Granting consent to suits on claims against the state;
2. Creating an ex officio board which examines claims and which, in some states, makes recommendations for their settlement to the legislature, and, in others, renders a final decision on claims falling within a prescribed standard of state liability;
3. Creating an administrative court of claims, composed of appointed members, which renders quasi-judicial judgments on claims falling within the prescribed standard of state liability;
4. Establishing within the constitutional judiciary a court of claims which hears and determines claims against the state, brought in the form of suits, under a standard of liability comparable to that imposed upon persons.

A more complete picture of these procedures in operation requires their inspection in some detail.

1. Consent to Suits

Fourteen states⁽¹²⁾ have statutes which, under certain prescribed conditions, grant consent to the commencement of actions on claims against the state. Although the state's consent may be broadly phrased, such as allowing suits on "all claims", it is generally held that such statutes waive only the state's immunity from suit in cases involving pre-existing liability and do not create any additional liability. Therefore, attempts to bring suit on a tort claim under general consent statutes have failed for the reason that the state is deemed not liable for the torts of its officers and agents in the absence of a statute clearly and explicitly assuming such liability.⁽¹³⁾ Some courts have arrived at the same result by holding that the consent itself did not extend to tort actions because the words "all claims" refer only to contracted debts, not to causes of action in tort.⁽¹⁴⁾ Moreover, even where the consent statute by express terms includes actions for negligence, it is held that this does not constitute an assumption of liability by the state for the torts of its officers and agents acting in a governmental capacity;⁽¹⁵⁾ but under such a statute the state has been held liable for negligence in the conduct of a proprietary function.⁽¹⁶⁾

(12) Ariz. (contract, negligence); Calif. (contract, negligence, property damage); Idaho (claims); Ind. (contract); Mass. (claims in law or equity); Miss. (auditable claims); Nebr. (auditable claims); N.C. (claims); N.D. (contract); Nev. (auditable claims); S.D. (auditable claims); Va. (claims in law or equity); Wash. (claims); Wis. ("all claims" refused by the legislature).

(13) Anno. 13 A.L.R. 1276; 169 A.L.R. 105.

(14) Murdock Parlor Grate Co. v. Com., 152 Mass. 28; 24 N.E. 854, 1890; Houston v. State, 98 Wis. 481, 74 N.W. 111, 1898.

(15) Walker v. Dept. of Public Works, 108 C.A. 508, 291 Pac. 907, 1930.

(16) People v. Superior Court, 29 C. (2d) 754, 178 P.(2d) 1, 1947.

In most states, a judgment of the court against the state constitutes only a recommendation to the legislature to appropriate a sum to pay the claimant's damages. This, of course, the court is without power to order. A few states, however, have provided that upon filing of the transcript of judgment payment will be made by the auditor from an appropriation annually provided for that purpose.⁽¹⁷⁾

In lieu of general consent statutes, several states have waived their immunity from suit and liability in a select class of claims.⁽¹⁸⁾ On the other hand, some state legislatures enact special consent statutes enabling a particular claimant to obtain a judicial determination on his claim. Except in the case of a contract, however, this device cannot be used effectively in most states since the general rule is that such an act merely waives the state's immunity from suit without affecting its immunity from liability.⁽¹⁹⁾ Moreover, an act waiving the state's immunity from liability as to a particular claimant has been held to be an unconstitutional type of special legislation.⁽²⁰⁾ In those few states which make rather general use of special consent acts, the courts take the position that the legislature by consenting to suit clearly implied that the state's liability was to be determined under the same rules applicable to suits between persons.⁽²¹⁾

2. Ex Officio Claims Boards

In addition to the constitutional claims boards in Mont. and Utah, 10 other states⁽²²⁾ have statutory ex officio bodies with jurisdiction over claims filed against the state. Although the composition of all 12 boards is rather uniform, the typical agency being staffed by 3 state officers acting ex officio, there are substantial differences in their respective jurisdictional powers and functions.

The jurisdiction of 7 of the boards⁽²³⁾ extends to all claims filed against the state. Generally, where a claim is based on an existing appropriation, the board may on approval order its payment by the auditor. Where no appropriation is available, or where the claim is not otherwise provided for by law, the prevailing practice among the boards is to report the claim to the legislature with an appropriate recommendation. Calif. and Nebr. permit suits against the state on disallowed legal claims; Idaho provides a further resort to its Supreme Court for a recommendatory decision; and

(17) e.g. Wis. Statutes, 1951, section 285.04.

(18) e.g. Minnesota (title to property); Oregon (highway contract and title to real property; Connecticut (negligent operation of state-owned and operated motor vehicles).

(19) Anno, 13 A.L.R. 1276, 1280; 169 A.L.R. 105, 109.

(20) Cox v. State 134 Nebr. 751; 279 N.W. 482, 1938; as to implications involving the equal protection clause of the Federal Constitution see Apfelbacher v. State, 160 Wis. 565, 576, 577; 152 N.W. 144, 148, 1915.

(21) Pennington's Adm'r. v. Com., 242 Ky. 527; 46 S.W. (2d) 1079, 1932; Westerson v. State, 207 Minn. 412; 291 N.W. 900, 1940.

(22) Ala., Ark., Calif., Idaho, Iowa, Ky., Nebr., Nev., S.C., Tenn.

(23) Calif. Gov. C.A. (Deering) Tit. 2:16007; Idaho Code, 1947, section 67-2018; Iowa Code Ann., 1946, section 25.1; Mont. Rev. Code (Choate & Wertz, 1947) section 82-1101; Nebr. Rev. Statutes, 1943, section 81-857; Nev. Comp. Laws, 1929, section 6921; Utah Comp. Laws, 1943, section 26-0-1.

Mont. allows a disappointed claimant an appeal to the legislature. The decisions of the other 3 boards are not subject to appellate procedures.

The Ala. State Board of Adjustment⁽²⁴⁾ is vested with comprehensive, but specifically enumerated, jurisdiction over claims arising in contract, tort and equity. Upon the allowance of any claim, the board orders its payment out of a standing appropriation.

The boards of Ark. and S.C.⁽²⁵⁾ are limited in jurisdiction to claims in contract. The Ark. board orders payment of allowed claims out of a special appropriation, while the S.C. board merely reports its recommendations to the legislature.

Ky.'s board⁽²⁶⁾ is unusual in that it has jurisdiction only over claims based on negligence. Allowed claims, not to exceed \$5,000, are paid out of the appropriation to the department of government involved or out of the general fund. A judgment of the board may be filed with the circuit court, and it then has the same force and effect as a judgment filed against an individual. This is the only instance where a state has permitted execution to lie on a judgment against it. Decisions of the board are appealable to the circuit court and, from there, to the state court of appeals.

The claims board of Tennessee⁽²⁷⁾ has jurisdiction limited to claims for damages founded on the negligent construction and maintenance of state highways and those arising from the activities of the state highway patrol. Claims allowed by the board are, on approval of the Governor, paid from the general highway fund.

Because of the extensive dissimilarities in the jurisdictions and practices of the various state claims boards, a more thorough appreciation of the administrative approach to the claims problem can perhaps be attained by a more detailed consideration of the procedures followed by several representative boards, each typifying a different degree in the refinement of the administrative process.

a. The Nebraska Sundry Claims Board,⁽²⁸⁾ staffed by the Attorney General, the Auditor of Public Accounts and the Tax Commissioner, has jurisdiction over "all claims against the State of Nebr. for the payment of which no moneys have been appropriated". Claims are filed with the secretary of the board in triplicate, one copy being referred to the governmental department involved which makes an investigation of the claim and files its report with the board. Hearings, which are held at the discretion of the board, are generally called when there is a factual dispute in a case of a type in which the state should assume responsibility. All determinations of the board, whether affirmative or negative, are referred to the legislative claims committee, which, in turn, is free in all cases

(24) Ala. Code, 1940, Tit. 55:333 et seq.

(25) Ark. Statutes Ann., 1947, s. 7-102; S.C. Code, 1942, s. 2071.

(26) Ky. Rev. Statutes, (1950 Supp.) s. 44.070 et seq.

(27) Tenn. Code Ann. (Mitchie, 1938) s. 3046 (1), (2).

(28) Supra, footnote 23; Barlow, Legislative Settlement of Claims Against the State of Nebraska, 29 Nebr. L. Rev. 426.

to follow or disregard the findings of the board. As a matter of practice, however, the board's recommendations are almost uniformly adopted by the claims committee. The committee lumps all approved claims into one appropriation bill and reports it to the legislature. Once on the floor, the bill is subject to amendments which may strike certain claims, change the amounts awarded, or add new claims not previously considered by the board or the committee. When the final bill goes to the Governor, he has the power to strike individual claims, and if this power is exercised, the claims stricken fall from the bill unless re-passed by the legislature by a 3/5 majority of the elected members.

b. The California State Board of Control(29) is composed of the Director of Finance, the Controller and a third member appointed by the Governor. Although the board has jurisdiction over all classes of claims against the state, its powers vary in accordance with the type of claim presented.

The board has an advisory appellate jurisdiction over claims on available appropriations which have been disallowed on audit by the controller. A decision by the board favorable to the claim obliges the auditor to reconsider, with a final appeal on a second rejection lying in the legislature.

The most significant function of the board, however, is concerned with 3 general classes of claims over which it exercises primary jurisdiction: (1) claims provided for by law where no appropriation is available for their payment; (2) claims not otherwise provided for by law (moral claims); and (3) claims arising from the negligent operation of state-owned and operated motor vehicles, a special class of case in which the state has expressly assumed liability in tort. The period of limitations for the presentation of claims to the board is 2 years after accrual, except in the last class of case where the period is one year.

In regard to claims provided for by law where no appropriations are available, only claims allowed by the board are, upon approval of the Governor, referred to the legislature for final allowance. Disallowed claims founded on contract, negligence(30) and the taking or damaging of private property by governmental activity may be made the subject of appeal by commencement of an action against the state in a designated court within 6 months after disallowance.

In respect to moral claims, since the board only makes recommendations to the legislature, which makes the final decision, no appeal lies from an advisory opinion of the board.

In cases involving the alleged negligent operation of state-owned and operated vehicles, the board orders payment of approved claims from a special appropriation without further referral to the legislature. In the event such a claim is rejected by the board, an appeal to the courts lies through the commencement of a suit

(29)Supra, footnote 23.

(30)Supra, footnotes 15 and 16.

against the state within 6 months after disallowance.

c. The Alabama State Board of Adjustment(31) has as its members the State Treasurer, the Secretary of State and the Director of Finance. Because Ala. has assumed a broad standard of sovereign responsibility, the board has a comprehensive, even if expressly enumerated, claims jurisdiction including, among other more specialized types, claims sounding in tort, those arising in contract express or implied, and workmen's compensation claims of state employees. All claims, except those for wrongful death and those of a minor, must be filed with the board within one year after accrual.

Once a claim has been filed, the board has broad investigatory powers and may subpoena witnesses and compel the production of documents. Since Ala.'s Constitution prohibits the state from being made a defendant in any suit in law or equity, decisions of the board disallowing claims are necessarily final; and there is no provision for an appeal by the state from the allowance of a claim.

To satisfy an award, the board may order payment out of the appropriation to the department of government involved, or if this fund is insufficient, it may authorize the comptroller to draw a warrant on the general fund. In addition, the sum of \$50,000 is appropriated annually by the legislature to provide a special fund for the payment of allowed claims.

3. Administrative Courts of Claim

The idea of providing a special tribunal of appointed judges to hear and determine claims against the state can be traced back to the creation, in 1855, of the United States Court of Claims.(32) Although at the outset only an advisory agency of Congress on pending claims bills, through amendments to the original act, the court acquired actual adjudicating powers. At present, the court has jurisdiction to render final decisions, subject to the right of appeal to the Supreme Court, in cases involving: (1) claims against the federal government arising under the Constitution, laws and regulation of the United States; (2) claims in contract express or implied; (3) claims not based on tort where the claimant would be entitled to redress in a court of law, equity or admiralty if the United States were suable; (4) claims by federal employees and officers for the payment of fees and salaries; and (5) claims filed with executive departments and referred to the court for settlement. Although the court, thus, exercises power of a clearly judicial nature, it has been held a legislative, not a judicial, court.(33) The most recent extension of federal liability, however, has been made outside of the immediate jurisdiction of the Court of Claims. Under the Federal Tort Claims Act,(34) the United States has assumed comprehensive tort liability, with the district courts having original jurisdiction over such actions.

(31)Supra, footnote 24.

(32)Act of Feb. 24, 1855, c. 122; 28 U.S.C.A. s. 2501 et seq. Naylor, The United States Court of Claims, 29 Georgetown L.J. 719.

(33)Williams v. United States, 289 U.S. 553, 1933.

(34)60 Stat. 842, 1946; 28 U.S.C.A. ss. 1346, 2671 et seq.

Following the lead of the federal government, Ill., Mich. and W.Va. have by statute created special administrative tribunals, each designated as a "court of claims", to hear and determine all claims against the state within a prescribed jurisdiction. Like the United States Court of Claims, the courts of Ill., Mich. and W.Va. are considered administrative arms of the legislature and not courts within the state judiciary.⁽³⁵⁾ New York, which for some years had such an administrative court of claims, has recently elevated the body to a constitutional judiciary status.⁽³⁶⁾

a. The Illinois Court of Claims⁽³⁷⁾ consists of 3 judges appointed by the Governor, with the advice and consent of the senate, to 6-year terms at a salary of \$4,000 per annum. The court has jurisdiction over: (1) claims founded on contract with the state; (2) claims based on a state law or regulation; (3) claims sounding in tort where the damages claimed do not exceed \$7,500; (4) workmen's compensation claims of state employees; and (5) claims for recoupment by the state against any claimant.

All such claims against the state must be filed with the court within 2 years after accrual, except that those of persons under a disability may be filed up until 2 years after its removal.

In proceedings before the court, the state is represented by its Attorney General. To acquire additional evidence, the court may issue subpoenas, require the production of documents and order the examination of a claimant under oath.

Except for workmen's compensation awards which are paid from an available appropriation, all awards made by the court are reported to the legislature for payment. Despite the constitutional prohibition against the state being made a defendant in any suit in law or equity, the jurisdiction of the Court of Claims has been sustained on the ground that the court acts only as an administrative arm of the legislature and that, therefore, its determinations are only recommendatory and require a subsequent appropriation by the legislature to become final.⁽³⁸⁾ The remedy afforded by resort to the Court of Claims is, nevertheless, exclusive; and, except where the court grants a new trial for just cause, no disallowed claim will be reconsidered. Moreover, it is the express policy of the state general assembly to make no appropriation to pay any claim cognizable by the court unless the same has been heard and favorably reported by the court.

b. The Michigan Court of Claims⁽³⁹⁾ is the only such court to which the judges are not specially appointed. It consists

(35) Fergus v. Russel, 277 Ill. 20; 115 N.E. 166, 1917; Manion v. State Highway Comm'r, 303 Mich. 1; 5 N.W. (2d) 527, 1942; State v. Sims, 127 W.Va. 786; 34 S.E. (2d) 585, 1943.

(36) N.Y. Const., Art. VI, s. 23.

(37) Ill. Statutes Ann. (1951 Supp.) s. 126.070 (5) et seq.

(38) Fergus v. Russel, (supra, footnote 35).

(39) Mich. Statutes Ann. (1951 Supp.) s. 27.3548 et seq.; also Moynihan, Michigan's Court of Claims, State Government, Oct., 1947.

of one or more circuit judges selected by the presiding circuit judge to serve in a given term of court. Four regular court terms are held each year in the capital city of Lansing, and special terms of court may be held elsewhere as required. Although the act grants to the court exclusive jurisdiction "to hear and determine all claims ex contractu and ex delicto against the state", it has been held to have no jurisdiction over claims arising out of torts committed by the state's agents and employees on the ground that the state had not explicitly assumed such liability.⁽⁴⁰⁾ Following this decision, the act was amended in 1943 to provide state liability in all cases sounding in tort,⁽⁴¹⁾ but this provision was repealed in 1945. In its stead, it was provided that the state would assume liability in cases involving the negligent operation of state-owned and operated motor vehicles.⁽⁴²⁾

Action on a claim against the state is commenced by filing a verified statement of the claim in triplicate with the clerk of court. One copy is retained by the court; another is transmitted to the Attorney General, who represents the state; and the third is sent to the department of government involved in the complaint. The state is required to file an answer, or other appropriate pleading, within 15 days from the filing of the claim. Trial is without jury but in other respects is, wherever possible, governed by the same rules pertaining to circuit court practice. Where the state raises no issue of fact, judgment for the claimant may be rendered on stipulation.

Judgments rendered against the state are paid from the annual appropriation to the department of government responsible, when sufficient; in addition, a fund of \$30,000 is provided annually in the court's budget for the payment of judgments which cannot be met by the individual departments. If neither of these methods of payment is available, unpaid claims are referred to the next session of the legislature for special appropriations.

Although Mich.'s Court of Claims is also deemed a legislative court,⁽⁴³⁾ its marked similarity to a judicial court, as evidenced by its composition and procedure, is further intensified by the allowance of appeals from it to the Supreme Court of Appeals. Since the state's Constitution prohibits the legislature from auditing or allowing any private claim or account, the remedy afforded by resort to the Court of Claims is necessarily exclusive, the constitutional Board of State Auditors having been, for all practical purposes legislated out of existence.⁽⁴⁴⁾

c. The West Virginia Court of Claims⁽⁴⁵⁾ is composed of

(40) McNair v. State Highway Dept., 305 Mich. 181; 9 N.W. (2d) 52, 1943.

(41) Mich. Statutes Ann., (1951 Supp.) s. 27.3548 (25), (repealed by pub. Acts, 1945, No. 267).

(42) Mich. Statutes Ann. (1951 Supp.) s. 27.3548 (41).

(43) Manion v. State Highway Comm'r. (supra, footnote 35).

(44) Abbott v. Mich. State Industries, 303 Mich. 575; 6 N.W. (2d) 900, 1942.

(45) W.Va. Code Ann. (Mitchie, 1949) s. 1143 et seq.

3 part-time judges appointed to 6-year terms by the Governor with the advice and consent of the senate. The judges are paid on a per diem basis for time actually served and cannot be otherwise employed by the state. The court's jurisdiction is broadly phrased, extending to "claims liquidated and unliquidated, ex contractu and ex delicto against the state or any of its agencies which the state ...should inequity and good conscience discharge and pay". Several special classes of claims are expressly excluded from the court's otherwise plenary jurisdiction; these include, among others, claims of members of the militia or national guard, claims arising from injury to or death of an inmate of a state penal institution, and workmen's compensation claims of state employees.

Except where a claimant is under disability, all claims must be filed with the court within 5 years after accrual. In case of incapacity, a claim may be filed up until 2 years following the removal of the disability.

After the claimant has filed with the clerk of court, the Attorney General and the head of the department involved confer with him to determine if there is a basis for settlement. If a dispute remains, the parties stipulate the facts in issue to the court, so as to confine the hearing to the issues as narrowed down by the pre-trial conference. If additional evidence is needed, the court has power to subpoena witnesses and require the production of documents.

In addition to the regular trial procedure, 2 summary type proceedings are available in certain cases. Where a claim of \$1,000 or under is not within an existing appropriation, and both the department of government charged and the Attorney General concur in its validity, the department prepares a record of the claim and refers it to the court for final approval. Under the second type of summary procedure, the Governor or a department of government may submit a claim to the court for an advisory opinion as to the state's liability. These short proceedings, if resulting in a decision against the claimant, do not bar him from resorting to the regular trial procedure. There is no provision, however, for appeal from a final determination of the court in a regular proceeding.

Awards of the court may be paid immediately after judgment if the claim is based on an existing appropriation, or if a sufficient amount remains in the annual appropriation for the payment of contingent claims. If such funds are not available, the claimant must await the next legislative session for a special appropriation.

4. Judicial Court of Claims

The New York Court of Claims⁽⁴⁶⁾ consists of 6 full-time judges appointed by the Governor, with the advice and consent of the senate, to terms of 9 years, at an annual salary of \$10,000. As to jurisdiction, the Court of Claims Act⁽⁴⁷⁾ provides: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as apply to actions in the

⁽⁴⁶⁾Supra, footnote 36.

⁽⁴⁷⁾New York Laws, 1939, ch. 860.

Supreme Court against individuals or corporations provided the claimant complies with the limitations of this article." Thus, without mentioning the word "tort", the statute waives the state's immunity from liability for the torts of its officers, agents and employees, though it is still relevant to inquire whether a given act of negligence is actionable within the statutory test since the rules of individual liability are not universally applicable to the sovereign. (48)

Tort claims, other than for wrongful death, and claims on contracts must be filed with the court within 90 days after accrual or in the alternative, a written notice of intention to file a claim must be filed within that time and the claim itself filed within the 2-year period. A straight 2-year period applies to the filing of most other classes of claims.

After the filing of a claim and prior to trial, the state by the Attorney General may examine the claimant adversely, and the claimant may also be granted the right to adverse an agent of the state. While there is no set procedure for the settlement of undisputed claims, the state, in an appropriate case, can rest after the claimant puts in his case, or it may submit the case on an agreed-upon statement of facts. An appeal may be taken from the judgment of the Court of Claims to the Appellate Division and from there to the Court of Appeals.

Judgments against the state are paid out of the annual appropriation provided in the court's budget bill. If this amount is exhausted, the comptroller purchases the judgment from the claimant as an investment for certain sinking funds of the state. When the next appropriation is made available, the sinking funds are reimbursed with interest. This device saves the successful claimant from having to wait until the next session of the legislature for payment and serves to render a judgment against the state, for all practical purposes, enforceable.

E. Concluding Observations

1. In General

Only a relatively small minority of states have effectively dealt with the growing problem of adjusting claims against the state, most states apparently preferring to remain at least partly shielded by the common law doctrine under which a state enjoys immunity from liability and suit. Indeed, in a surprisingly large number of states, the exclusive remedy available to a claimant is the somewhat dubious privilege of appealing to the legislature for a special appropriation discharging the claim as a "moral" obligation of the state.

(48) Goldstein v. State, 281 N.Y. 396; 24 N.E. (2d) 97, 1939

The court in construing a statute assuming comprehensive state liability as not applicable to a bystander's injury unintentionally inflicted by a state policeman in apprehending a criminal said, "The history of the development of our form of government demonstrates that officials in performing certain functions of government cannot by their official acts create a liability against the state by their negligent performance." (p. 405).

Even among those states which have endeavored to meet the problem, there is great disparity in the proffered solutions. Despite the legal ramifications involved, however, all states, save one, have continued, in one form or another, to treat the main substance of the problem within the legislative rather than the judicial function. Efforts to provide a judicial remedy beyond the legislature by the general consent to suits on "all claims" have, in general, proven effective only around the outer fringe of the over-all problem. Because of the courts' adherence to the non-liability concept inherent in the doctrine of sovereign immunity, the suit remedy, standing alone, is commonly available only in respect to the contractual debts of the state. Today, the focal point of the claims problem is centered in the tort field.

Although the general inclination among states is to regard the settlement of claim as a matter for the legislature, various attempts have been made to provide a more judicial atmosphere for the settlement of claims at the legislative level.

The first forward step in the refinement of the legislative processing of claims involves the creation of an ex officio agency to investigate claims filed against the state and make recommendation for their settlement to the legislature. This device, in making provision for orderly factual investigations, supplies one essential to an informed decision generally lacking where claims are referred directly to the legislature for settlement. Whether the state officers comprising the board are more capable of deciding complex legal questions than the legislators themselves is perhaps open to doubt. Moreover, since the legislature is free to disregard the findings of the board, or bypass it entirely, this approach, at best, only partially obviates the difficulties implicit in having individual legal controversies resolved by a legislative body.

The next advance toward providing a systematic method of claims adjustment within the legislative framework calls for the creation of a quasi-judicial agency to hear and render decisions on claims falling within a prescribed standard of state liability. Whether such body is termed a claims board or a court of claims usually depends on whether its members serve ex officio or are specially appointed. Within this basic structure, there are variations in the powers of the several agencies to effectuate a final determination. Where each award made by such agency requires a subsequent special appropriation of the legislature, its function is sustained, not on a valid delegation of legislative power rationale, rather on the ground that its action is not final and is only recommendatory to the legislature. But where the agency's prescribed jurisdiction over claims is both broad and exclusive, and its awards are payable immediately out of a standing appropriation, the legislature has relinquished all but nominal control over the field. A further judicial aspect has been added in a few states by permitting an appeal from the agency to the courts.

The final procedural and substantive progression in the orderly adjustment of claims against the state is realized in the complete severance of this function from the legislative branch and the vesting of exclusive jurisdiction over claims in a special court within the constitutional judiciary, with a proviso that the state shall be deemed liable and suable under the same rules applicable to individuals and corporations. So far, only N.Y. has assumed this advanced position.

2. The Wisconsin Situation

Wisconsin, although by tradition a forerunner in the field of social legislation, has lagged somewhat behind leading states in providing an efficient general procedure for the settlement of claims against the state. However, despite the fact that the state has, in the main, retained the common law method of settling claims by special acts of the legislature, it has remained ahead of the majority of other states in assuming some degree of legal responsibility and in providing appropriate remedies for enforcement. Among its more important concessions, the state has provided for special administrative and departmental settlement of claims for refunds and compensatory awards and has consented to be sued on claims arising in contract which have been refused by the legislature. Nevertheless, most classes of claims must still be presented to the legislature for allowance, and it is questionable whether this method of settlement is adequate to meet modern day demands. The placing of primary emphasis on the possibilities of adopting a more efficient procedure for adjusting claims does not signify an intent to minimize the importance of formulating a just standard of state responsibility, a problem which has been made more acute by the rising numbers of tort claims filed against the state. In this connection, the trend among some of the more progressive states, and in the federal government, is toward the acceptance of a standard of sovereign responsibility comparable to the degree of liability imposed upon the individual.

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