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CLAIMS AGAINST STATES

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In 1924, commencing a leading series of articles on "Government Liability in Tort,"[1] Professor Edward M. Borchard referred to what he called the "unexampled expansion of the police power in the United States." He wrote of the increasing risks which individuals in this country are left to bear from "defective, negligent, perverse or erroneous administration" of the functions of government. If those functions had increased at a considerable rate at the time of his article, what would one say of their extent today? Even the leaders of the New Deal discerned the risks to which increased governmental activity subjected people, and they supported the proposal of the American Bar Association that it was time for the Federal Government to waive its immunity from suit.[2]

States, on the contrary, moved with varying degrees of caution and reluctance in their waiver of such immunity.[3] In a larger sense, the reasons for their waiver are the same as those which justify suit in tort or contract against the United States. The suggestion that injury or damage done by the government, whether by intention or through negligence, in performing its functions for all the people should be borne alone by the unfortunate one upon whom the harm has fallen[4] is lacking in moral justification. There is no adequate reason on principle why government, whether state or national, should not be subject to suit on its contracts, whether express or implied, since it could not be held liable in any event unless it had first authorized the contract, purchase or expenditure.[5]

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1. Borchard, *Government Liability in Tort,* 34 YALE L.J. 1, 129, 229 (1924-25); see also Borchard, *Governmental Responsibility in Tort,* 36 YALE L.J. 1, 757, 1039 (1926-27).

2. By pocket veto of President Coolidge, a general court of claims bill passed by the 70th Congress had previously failed of enactment. The text of the bill, H.R. 9285, may be found in 70 CONG. REC. 4836 (1929). Objection to the bill at that time was generally to its administrative features. See McGuire, *Tort Claims Against The United States,* 19 GEO. L.J. 133 (1931).

3. See *Claims Against The State In Minnesota,* 32 MINN. L. REV. 539 (1948). For a valuable compilation of constitutional and statutory provisions of the states see COUNCIL OF STATE GOVERNMENTS, SETTLEMENT OF CLAIMS AGAINST THE STATES (Still, 1950).

4. One can now sue the state in New York, where the court said, "the now declared public policy of the State is that persons damaged by the torts of those acting as its officers and employees need not contribute their losses to the purposes of government." Sheehan v. North Country Community Hospital, 273 N.Y. 163, 7 N.E.2d 28, 29 (1937).

5. See Goodyear Tire Rubber Co. v. United States, 276 U.S. 287, 48 Sup. Ct. 306, 72 L. Ed. 575 (1928); Leiter v. United States, 271 U.S. 204, 46 Sup. Ct. 477, 70 L. Ed. 906 (1926); Hooe v. United States, 218 U.S. 322, 31 Sup. Ct. 85,

Yet, there is some rationale in the reluctance of states to waive their immunity from suit against them in tort, even though the Federal Government has now done so under the Federal Tort Claims Act.[6] States do not print money; some are more limited than others in sources of taxation. A substantial portion of the increase in state government activity is supported by federal aid which states supplement only up to a point; and a large portion of the increase has relation to desk work out of which personal torts are not so apt to occur. Some states apparently feel that legislative committees can handle their claims work adequately without taking their members too far astray from the other problems of more general public import which the legislature requires of them, whereas it was clear that many members of Congress felt that they should be relieved of private claims work so that they could give needed attention to the many broader national and international problems.[7] Congress and the legislatures, moreover, have been zealous to keep control over the public pursestrings, to protect the government against large unanticipated claims and also not to release control over any function which historically has been conducted by the lawmakers. Press of business in Congress compelled its release of such control as to most tort claims. State legislatures deal with smaller governments and fewer problems, and the urge to relinquish control has not been so pressing upon them.

Some states, moreover, have made provision to cover the eventuality of injury or damage arising out of certain types of activity. Some conduct is apt to result in some amount of personal harm, so that such a state would either permit itself to be sued in the event of injury by this particular type of activity[8] or require insurance on

54 L. Ed. 1055 (1910); Shipman v. United States, 18 Ct. Cl. 138, 147 (1883); Curtis v. United States, 2 Ct. Cl. 144 (1866).

6. STAT. 842 (1946).

7. Prior to the Federal Tort Claims Act:

Congressman Kefauver: "As it works, the departments actually pass on these claims. As the chairman has said, Members of Congress, because of the stress of other matters, simply do not have time to give them judicial consideration." *Hearings before Joint Committee on the Organization of Congress*, 79th Cong., 1st Sess. 69 (1945).

Senator Taylor: "[I]t is absolutely a very poor proposition to ask Senators to spend their time pouring over these claims . . . you are absolutely at a loss if you have not gone through the case yourself.

"So I have found that I had to go through them personally . . . when I was supposed to be familiarizing myself with Dumbarton Oaks, Bretton Woods, or Manpower, and many other things." *Id.* at 218-19.

8. *E.g.*, Connecticut allows suit for injury or damage caused through negligence of a state employee operating a state-owned vehicle. CONN. GEN. STAT. § 8297 (1949).

Minnesota has intermittently allowed groups of suits against the state for damages caused by location, construction, reconstruction, improvement or maintenance of the trunk highway system. Minn. Laws 1945, c. 612; Minn. Laws 1943, c. 662; Minn. Laws 1939, c. 420.

A South Carolina statute permits suit for personal injuries received from highway department fault. Property damage claim may not exceed $1,500, nor personal injury or death claim, $4,000. S.C. CODE § 33-229 (1952).

persons contracting with the government with an agreement by the insurance carrier not to raise the defense of the state's immunity. Courts early developed their own method for getting around the immunity in the case of municipal governments by conception of a distinction between governmental and proprietary functions, the former giving no basis for suit and the latter giving it.

Despite rationale to the contrary, and on a basis of good public morals, any aggrieved person ought to have the same rights against government, state or national, whether in contract or tort, at law or in equity,[9] as he has against any private person. There is no room in a democracy for the theories of divine right of kings or that the state is above the law.[10] Nor is there adequate reason for American states to deny the protection of courts to their people in such cases when small nations and some countries that are not even democracies grant such rights.[11]

State Constitutional Provisions

Peculiarly enough, the constitutions of many states clearly indicate that their framers expected that the legislatures would provide means for court action against the states.[12] Tennessee's constitution, for ex-

9. Legislatures themselves are free to consider equity aspects of claims or to pay them if there are probable moral but no legal bases for them.
The Alabama Board of Adjustment may consider claims morally grounded even though not enforceable in the courts. ALA. CODE tit. 55, § 344 (1940); Lee v. Cunningham, 234 Ala. 639, 176 So. 477 (1937).
The Connecticut governor, upon recommendation of the attorney general, may authorize compromise of a disputed claim by determining the amount equitably due. CONN. GEN. STAT. § 103 (1949).
The Illinois Court of Claims may hear and determine tort claims where the claimant, but for the immunity, would be entitled to redress against the state "at law or in chancery." ILL. ANN. STAT. c. 37, § 439.8 (Supp. 1953).
An Indiana statute permits suit on a "money demand" arising "at law or in equity, out of contract, express or implied." IND. STAT. ANN. § 4-1501 (Burns 1933).
While West Virginia had a court of claims, its jurisdiction extended to "Claims and demands, liquidated and unliquidated, ex contractu and ex delicto . . . which the State as a sovereign commonwealth should in equity and good conscience discharge and pay." W. VA. CODE ANN. § 1147(8) (1949), *repealed*, W. Va. Laws 1953, c. 18.

10. Even the liberal Mr. Justice Holmes wrote, "[A] sovereign is exempt from suit . . . on the . . . ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353, 27 Sup. Ct. 526, 527, 51 L. Ed. 834 (1907). See *Claims against the State in Minnesota*, 32 MINN. L. REV. 539 (1948); note 1 *supra* (Borchard criticizes theories that "Feudal Lord cannot be sued in his own court" and "the king can do no wrong").

11. See note 1 *supra*.

12. ARIZ. CONST. Art. IV, pt. 2, § 18; CAL. CONST. Art. XX, § 6; DEL. CONST. Art. I, § 9; FLA. CONST. Art. III, § 22; IDAHO CONST. Art. V, § 10; IND. CONST. Art. IV, § 24; KY. CONST. § 231; LA. CONST. Art. III, § 35; NEB. CONST. Art. V, § 22; NEV. CONST. Art. IV, § 22; N.Y. CONST. Art. VI, § 23; N.C. CONST. Art. IV, § 9; N.D. CONST. Art. I, § 22; OHIO CONST. Art. I, § 16; ORE. CONST. Art. IV, § 24; PA. CONST. Art. I, § 11; S.D. CONST. Art. III, § 27; TENN. CONST. Art.

ample, specifically says that "suits may be brought against the State in such manner and in such courts as the Legislature may by law direct."[13] Yet the legislatures of a number of these states have insisted upon retaining control over determination of claims. Although the Tennessee Constitution authorized the legislature to provide for suit against the state, its legislature has expressly generally denied the power to the courts.[14] Kentucky permits suits by prior special legislative authorization as to each case. It has a general statute covering all such cases to the effect that the jury is not to be apprized of the resolution by the General Assembly authorizing the particular lawsuit.[15] It has been held in South Carolina, to show a contrary attitude, that a special act waiving immunity in a particular case violates the constitution of that state,[16] and the constitution of Indiana expressly provides against special legislation.[17]

The constitutions of Idaho and North Carolina give original jurisdiction over claims against the state to the supreme court.[18] They do not, however, provide a procedure, and none has been provided by legislation. Nor are supreme courts constituted well to try cases; they do not have juries, if a jury trial is in order. For that reason, the procedure in those jurisdictions is generaly to commence suit in the supreme court; after issue is joined ,the case is referred to a judge of a trial court if there is a fact dispute. He makes findings of fact and conclusions of law, and files them, along with a transcript of the testimony, where so directed, in the supreme court. There the parties are given opportunity for further argument.[19]

I, § 17; WASH. CONST. Art. II, § 25; WIS. CONST. Art. IV, § 27; WYO. CONST. Art. I, § 8.

13. TENN. CONST. Art. I, § 17.

14. TENN. CODE ANN. § 8634 (Williams 1934). Tennessee does have a Board of Claims consisting of the Commissioner of Highways and Public Works, Commissioner of Finance and Taxation, State Treasurer, Comptroller of the Treasury, Secretary of State, Attorney General and Reporter. TENN. CODE ANN. § 1034.26 (Williams Supp. 1952). The jurisdiction of the board, so far as the purposes of this article are concerned, is generally limited to the handling of claims for damage or injury resulting from negligence in construction and maintenance of state highways or operation of machinery or equipment with relation to it. TENN. CODE ANN. § 3252.1 (Williams 1934); Tenn. Acts 1951, c. 268, § 2A.

15. KY. REV. STAT. ANN. § 411.160 (Baldwin Cum. Supp. 1953).

16. Sirrine v. State, 132 S.C. 244, 128 S.E. 172 (1925).

17. IND. CONST. Art. IV, § 24.

18. IDAHO CONST. Art. V, § 10; N.C. CONST. Art. IV, § 9. The Idaho Constitution also constitutes the Governor, Secretary of State and Attorney General a board to examine claims (IDAHO CONST. Art. IV, § 18); and the administrative determination of a claim by this board is a prerequisite before the supreme court will assume jurisdiction. Pyke v. Steunenberg, 5 Idaho 614, 51 Pac. 614 (1897). North Carolina also now authorizes its Industrial Commission to consider tort claims not in excess of $8,000. N.C. GEN STAT. §§ 143-291-143-300 (1952).

19. "[T]he Supreme Court, as a rule, will consider only such claims as present serious questions of law and will not take the burden of passing upon 'any and all claims that a party may prefer,' . . . although in proper cases the

Decisions under such constitutional provisions are advisory only. They are reviewed by the legislature at its next session. The merit of this procedure is that a claimant can at least obtain a determination of his claim according to rules of law, and that it is generally improbable that the legislature will not make an appropriation in conformity with the court's decisions.

Legislative appropriation is necessary in any event, whether decision be my administrative body or by court and whether the determination be advisory or conclusive.[20] In no state is a judgment in a tort or contract action a lien against the property of the government. The judgment creditor may not levy execution.[21] Should the decision be by a court having power to enter judgment against the state, it is collectible only as the legislature makes money available either for the specific judgment or for the general purpose.

Some state constitutions forbid waiver of the state's immunity.[22] Illinois, as one of these states, displays an interesting anachronism. Its constitution provides that the state "shall never be made defendant in any court of law or equity." The legislature of that state, however, created what it calls a court of claims. This is not a constitutional court in the ordinary sense, but might be regarded as a legislative or advisory court. It tries claims against the state, whether legal or equitable, in tort or in contract, which the state, as a sovereign "should in equity and good conscience, discharge and pay."[23] Because of the

court may order that issues of fact be tried in the Superior Court. . . ." Cohoon v. State, 201 N.C. 312, 160 S.E. 183 (1931).

In Bledsoe v. State, 64 N.C. 392 (1870), plaintiff, "director in the Lunatic Asylum," entered into a contract with its superintendent to deliver pine wood at $20 per cord in 1863. At the trial, he asked for $5 per cord in then current currency. The supreme court was concerned about the prevailing value of money. "Now at that time confederate money was twenty for one coin: if therefore he had received confederate money according to his contract he would have realized but one dollar in coin. Yet he charges five . . . we recommend . . . interest from the end of the war . . . when the plaintiff presented his claim to the General Assembly. And we do not recommend interest after that time; because, if the plaintiff had presented a fair and reasonable claim, we are to suppose that it would have been allowed. The subsequent delay is by his own folly. And, for the same reason, we allow him no costs, but order that he pay the costs of this suit." *Id.* at 394-98. Said the distinguished court concerning its procedure, "We first referred the facts to the clerk, but his report was unsatisfactory; and we then ordered issues to be tried in a Superior Court by a jury, but we are not satisfied either with the rulings of his Honor, or with the verdict of the jury. And, therefore, we state the facts generally, as they appear to us. . . . The clerk will be allowed $5." *Ibid.*

20. "It is a fundamental principle of our form of government that the Legislature, which is the appropriating branch, has sole power to authorize the payment of claims against the Commonwealth." George A. Fuller Company v. Commonwealth, 303 Mass. 216, 21 N.E.2d 529, 531 (1939). See Garcia v. Bursom, 10 N.M. 43, 61 Pac. 207 (1900).

21. George A. Fuller Company v. Commonwealth, 303 Mass. 216, 21 N.E.2d 529 (1939).

22. ALA. CONST. Art. I, § 14; ARK. CONST. Art. V, § 20; ILL. CONST. Art. IV, § 26; W. VA. CONST. Art. VI, § 35.

23. "The court of claims is a statutory body not provided for in the con-

restrictive language of the Illinois constitution, the decisions of the court are advisory only; but the writer of this article has not been able to learn of any case where the General Assembly of the state has not followed the determinations of the court and paid according to its recommendations. Under the court of claims law in Illinois it is provided that any judge of the court may sit at any place within the state to take evidence. No provision is made in the law for appeal. Approximately one hundred cases are handled by the court each year.

The nature of the make-up of this Illinois court is such that other types of work are submitted to it from time to time by the legislature. Up to 1951, it had jurisdiction over claims of state government employees arising under the Workmen's Compensation and Occupational Diseases acts. Since July of that year, these cases have been handled by the Industrial Commission of Illinois. The 1953 legislature appropriated $150,000 to the court for the purpose of settling claims against the state arising out of the activities of the Illinois Coal Products Commission.

Administrative Handling of Claims

Hearing and determination of claims by legislative committees sounds in politics and suggests a lack of protection to the people according to rules of law. Progress in legislation in this field starts with departures from the strictly legislative allowance of claims and works toward the right to sue the state by the usual process. It moves into recommendations to the legislature by an administrative arrangement and on toward final determination by the courts.

Some state constitutions provide an administrative procedure. By the constitutions of Idaho,[24] Montana,[25] Nevada,[26] and Utah,[27] the governor, secretary of state and attorney general constitute a board of examiners to examine all such claims before they are submitted to the legislature. The Nebraska constitution provides for administrative adjustment to be made by the state auditor and approved by the secretary of state; but an aggrieved person may appeal from their ruling to the district court.[28] In the Michigan constitution, there is a provision forbidding the legislature to audit or allow claims.[29] That constitution constitutes the secretary of state, state auditor and land office commissioner a board for adjusting them.[30] The size of claims

stitution, and its action can have no effect upon the power of the legislature to pay claims against the state." Fergus v. Russel, 277 Ill. 20, 115 N.E. 166, 167 (1917).

24. IDAHO CONST. Art. IV, § 18.
25. MONT. CONST. Art. VII, § 20.
26. NEV. CONST. Art. V, § 21.
27. UTAH CONST. Art. VII, § 13.
28. NEB. CONST. Art. VIII, § 9.
29. MICH. CONST. Art. V, § 34.
30. MICH. CONST. Art. VI, § 20.

to be submitted to the board has been limited by statute, however. The Michigan legislature created a court of claims in 1939 and left the constitutionally-constituted administrative board to handle only smaller claims under $100.[31] The judges of the court are regularly constituted circuit judges designated by the presiding circuit judge of the state. Appeal from its decisions is to the supreme court.

A recent Minnesota statute[32] illustrates a first desirable move in that state away from determination of claims solely by a legislative committee. It permits suit against the state on an express contract, but does not yet permit it in implied contract regardless of the otherwise legal or moral factors involved.[33] Then it establishes a state claims commission of five members for hearing of tort claims.[34] The commissioners are appointed by the legislature, and their terms expire at the close of the next legislature. The commission is to allow only claims which but for its general immunity from suit could be pressed against the state. There is no appeal from its decisions to any court. Nor does the commission's award impose liability unless the legislature has first made an appropriation subject to the commission's determination. Usual rules of evidence are not imposed, and the commission is free to consider "any information that will assist it in determining the factual basis of the claim." The statute in Minnesota contains, as does the Federal Tort Claims Act, some exceptions to the cases the commission may consider. One expects these exceptions, even though not favorably impressed generally as to their necessity.

Perhaps it would be as well that smaller claims be handled administratively by departments themselves with some precautions. This is permitted without resort to even a commission under the Federal Tort Claims Act as to claims not exceeding $1,000.[35] In fact, money had been available to some federal departments for some time prior to that Act for administrative handling of smaller claims.[36] The Federal Government does have a large quantity of such small claims, and it is realized that the importance of this method of handling small

31. MICH. STAT. ANN. § 27.3548(8) (Supp. 1951). From its inception to January 7, 1954, the court had handled 474 cases. The larger portion of the claims has involved the Highway Department, Department of Revenue, and the Liquor Control Commission. The statute forbids more than one of the judges to sit in Lansing, Michigan, at any time.
The defense of governmental function is abolished in Michigan in cases involving negligent operation of state-owned motor vehicles. *Id.* § 27.3548(14).
32. MINN. STAT. ANN. § 3.42 (West Supp. 1953).
33. See Anderson, *Tort and Implied Contract Liability of The Federal Government*, 30 MINN. L. REV. 133 (1946).
34. The committee is headed at this time by a former member of the claims committee of Congress.
35. 28 U.S.C.A. § 2672 (1950).
36. *E.g.*, Departments of the Army and of the Navy.

claims is not so acute with states as in the national scheme of things. Where this method would be pursued, standard forms would be used for the purpose. Proof is largely by affidavit. This procedure reduces petty litigation. It permits handling of a claim even by mail. It puts responsibility on the department or agency involved to promote safety and maintain good public relations, and it keeps the department or agency informed as to the cost of its operations.

Whether claims are considered by commission or by the courts, the added burden to the attorney general of the state is not to be disregarded. Enlarging his services for the public protection is hardly an evil, however. The Attorney General of the United States was not deterred by it, and he actively encouraged Congress in its adoption of the Tort Claims Act. Having to create a separate board or commission or a separate court to hear claims does mean a substantial added expense to the state. These factors are usual for states to consider. In any event, the United States has long had a Court of Claims.[37] The concept of at least some court in which claims against the government may be sued upon is not new.

Suits Against the States

Today suit is allowed rather generally with varying limitations in eighteen states.[38] Original jurisdiction is in the supreme court in three of them.[39] Three others have separate courts of claims.[40]

A state court of claims was created in West Virginia in 1941 for

37. 28 U.S.C.A. §§ 1491 *et seq.* (1950).

38. ARIZ. CODE ANN. §§ 27-101 *et seq.* (1939) (on contract and tort); CAL. GOVT. CODE §§ 16040-54 (1945) (on express contract and tort); CONN. GEN. STAT. §§ 7781, 8297 (1949) (for damage or injury from negligent operation of state-owned vehicle); IDAHO CONST. Art. V, § 10 (original jurisdiction in supreme court); ILL. ANN. STAT. c. 37, §§ 439.9-439.23 (Supp. 1953) (suit in court of claims on contract or tort, legal or equitable); IND. ANN. STAT. §§ 4-1501-4-1507 (Burns Supp. 1953) (in superior court of Marion County sitting as a court of claims on money demands arising in law or equity on express or implied contracts); MASS. ANN. LAWS c. 231, §§ 74-75, and c. 258, § 1-4A (1933) (on all claims at law or in equity); MICH. STAT. ANN. §§ 27.2543 and 27.3548(8) (Supp. 1951) (in court of claims, in contract and tort); MINN. STAT. ANN. § 3.42 (West Supp. 1953) (in contract); MISS. CODE ANN. §§ 4387-4389 (1942) (on a liquidated claim which state auditor is empowered, but refuses, to allow); NEB. CONST. Art. VIII, § 9 (all claims fitting into constitutional description, with those on contract, express or implied, sued in Lancaster County); N.Y. CONST. Art. VI, § 23, N.Y. COURT OF CLAIMS ACT (in court of claims on contract, express or implied, or tort); N.C. CONST. Art. IV, § 9 (in supreme court); N.D. REV. CODE §§ 32-1202-32-1204 (1943) (respecting title to property or on contract); S.D. CODE § 33.0604 (1939) (complaint filed in supreme court, referred to senior circuit judge in any county sitting as commissioner of claims, on contract and tort); VA. CODE § 8-752 (1950) (on claims disallowed by comptroller); WASH. REV. CODE § 4.92-010 (1915) (in superior court of Thurston County on any claim); WIS. STAT. § 285.01 (1949) (suit allowed after legislature denies claim).

39. IDAHO CONST. Art. V, § 10; N.C. CONST. Art. IV, § 9; S.D. CODE § 33.0604 (1939).

40. Illinois, Michigan and New York.

consideration of both tort and contract cases.[41] In 1953, however, that state back-tracked, and transferred the duties of the court to the attorney general.[42] He holds hearings in his office in Charleston. He takes testimony; affidavits may not be submitted as proof of any claim.[43] The attorney general may lean over to be fair. The still important question remains whether the West Virginia procedure is calculated to give confidence to the public that it will result in justice to the claimant as well as the state. It is difficult to conceive that the public will not question the integrity of a procedure wherein the determination of a claimant's rights is to be made by the attorney or agent of the government against which the claim is to be made.

New York, to the contrary, has strengthened its court of claims and given to it an added deserved prestige. Historically, it had been found that the legislative method of passing upon private claims had led to abuses, more particularly with relation to construction projects.[44] The constitution of New York was accordingly amended in 1874 to forbid the legislature to audit any private claim.[45] The legislature thereupon constituted certain public officers as a Board of Audit to perform the service.[46] In 1883, that board was abolished and the Board of Claims created in its stead.[47] In 1897, it was supplanted by a "court of claims" with increased jurisdiction.[48] It became a "board" again in 1911,[49] and revived as the "court" of claims in 1915.[50] Thus its status from "board" to "court" and back to "board" again occurred over the years as new political powers assumed control in the legislature, the change being a means for a new administration to oust the appointees of the old.[51] Efforts to make the court a genuinely judicial one bore fruit, however. In January of 1950, it was made a constitutional court.[52]

41. W. VA. CODE ANN. § 1147(8) (1949).
42. W. VA. CODE ANN. §§ 1143-1147(21) (Supp. 1953).
43. Rules of Attorney General, pursuant to statute delegating to him the function of hearing claims.
44. *The Court of Claims of the State of New York* (a pamphlet argument for constitutional provision for the court).
45. N.Y. CONST. Art. III, § 19.
46. N.Y. Laws 1876, c. 442.
47. N.Y. Laws 1883, c. 205.
48. N.Y. Laws 1897, c. 36.
49. N.Y. Laws 1911, c. 856.
50. N.Y. Laws 1915, c. 1 and c. 100.
51. "During a period of many years it has been the practice whenever a change of administration has occurred to legislate out of office either the Court of Claims or the Board of Claims, and to substitute therefor either a Board of Claims or a Court of Claims, as the case might require. This practice has not been conducive in all cases to the best interests of the State. Such practice should be impossible." Published letter of Nov. 23, 1921, from Merton E. Lewis, former attorney general of New York.
52. N.Y. CONST. Art. VI, § 23. The constitutional provision is for a court of six judges, with power in the legislature to increase the number. The court is one of record. It appoints its own clerk. It has jurisdiction to hear and determine "claims against the state or by the state against the claimant or

An administrative board is sometimes provided which may entertain the same claims which the courts themselves are given jurisdiction to consider. It would usually be expected in such case that the board would be a means for more summary handling of claims for the worthwhile purpose of discouraging litigation. Where such an administrative agency is provided, the more acceptable procedure would require a claimant to exhaust administrative processes before resorting to the courts.[53]

Court trial, in cases against the state, is generally by the court without a jury, as it is under the Federal Tort Claims Act, although this is not universally so.[54] This clearly indicates some feeling that judges are apt to be more conservative in their allowances than juries might be. By like token, the precaution is perhaps in order, for the protection of both the state and the state's attorney, that, if settlement is permissible under the statute, it should require court approval.[55]

Rules as to venue, in cases other than those against the state, developed generally with relation to convenience of the parties and witnesses and means of establishing proof. There is a temptation on the part of legislatures to provide that the county in which the capitol is situated shall be the forum for litigation against the state. If personal appearance before a board or court is requisite to recovery, this can be more burden to some claimants than consideration by a legislative committee might be. Such a committee need not require personal appearance. Smaller claims especially might never be pressed if provision is not made for a convenient place and method for proving them. The nature of the administrative body or court to consider these claims is apt to affect the place for trial or hearing. The Minnesota statute does provide that the regular meeting place

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between conflicting claimants as the legislature may provide."

Even before this constitutional change, it was held that the court was one of law and not just an auditing board. Provision for trial without a jury did not deprive one of a constitutional right to jury trial for the reason given that the claimant could have sued the state employee personally, if a tort action, in the supreme court of New York. "[H]owever, he made his election to pursue his remedy in the Court of Claims and is, therefore, bound by it." Jones v. Young, 257 App. Div. 563, 14 N.Y.S.2d 84, 88 (3d Dep't 1939).

53. Under the California statutes, for instance, there is a State Board of Control which has power to consider claims administratively. Suit against the state may be had only after the board has disallowed the claim.

In Idaho, the supreme court decided, as a sound rule of administrative law and of constitutional construction, not to consider claims until passed upon by the Board of Examiners. Pyke v. Steunenberg, 5 Idaho 614, 51 Pac. 614 (1897).

54. Kentucky legislature waives immunity by special acts, but has a general rule covering all such cases restricting information to be made available to the juries. Ky. Laws 1948, c. 167.

The United States Court of Claims proceeds without a jury and this may constitute a considered precedent in most states that waive immunity.

55. This procedure is incorporated in FTCA. 28 U.S.C.A. § 2677 (1950).

of the claims commission shall be at the state capitol.[56] But that statute also provides that the commission, its size notwithstanding, may hold meetings at any county seat. Similarly, the courts of claims in Illinois and Michigan have provided by rule for holding sessions elsewhere than at the capitol. In the jurisdictions where suits are commenced in the supreme courts, they can be referred for trial at places which convenience for the claimant as well as the government may dictate. Where an already-existing trial court is to try the claim, this problem need not exist.

Venue, if suit is in a trial court, should probably be in the district where the plaintiff lives or the cause of action arises or in the county of the capitol, subject to change of venue in conformity with usual rules. That does suggest expense to the public in moving members of attorney general offices about the state to try cases. That is, unless state's attorneys in the various counties are under some direction from the state attorney general and responsible to him to handle civil as well as criminal litigation. One can only look to what ought to be as answer to this problem where it may arise, and recognize the necessity of better state legal department organization in an increasingly organized society.

Conclusion—Recommendations

There is nothing in the absence of constitutional provision, that could legally preclude the legislature from considering claims which some persons might not choose to present to a commission or court; or from allowing such claims even though the administrative body or the court might first deny it. One of the purposes of providing for administrative or court determination, though, is to relieve legislatures from these generally private problems so that they can tend to broader problems of government. The better view, then, would be that the statute should contain a self-disciplinary provision precluding consideration of any such claims by the legislature except as it may provide for payment of them.[57] Appeals by the state or by claimants whose claims have been rejected should be only to a judicial body. From a trial court, appeal should be only to the highest court of the state. If the decision is made by a board or commission, that administrative body should have the benefit of a correct determination according to rules of law if it is in error; and appeal from that body should not be allowed to go on to what so many regard as a political, in contradistinction to a judicial, body.[58] The legislature

56. MINN. STAT. ANN. § 3.47 (West Supp. 1953).
57. Congress made a similar provision with respect to FTCA. 60 STAT. c. 753, § 131 (1946).
58. Minnesota, to the contrary, provides: "A determination by the commis-

will certainly choose to watch the handling of claims and satisfy itself that the system of court determination is such as commands its confidence. Essentially, however, its function should be to appropriate for determinations made according to rules of law just as any private person who is a judgment debtor finds it necessary to do.

In a larger sense, we are concerned here with the desirability of removing an immunity or veil behind which government in the United States has been prone to hide but which has no logical place in a democracy.[59] There is no sound reason why the activities of government should not be conducted according to the same standards of morality or fair dealing to which private persons are expected to conform. Protection to injured persons against negligent or perverse governmental conduct should be a matter of right. As for the field of contracts, government, having given its word and expecting to bind the contracting party, cannot with grace complain that the contractor seeks to enforce that very promise against the government in court. Our concern in any controversy between the state and a private person should be, not with what the power of the respective litigating parties may be, but with who is right. If one will accept this as the correct approach, then it makes no difference whether the government involved is that of the United States or of an individual state or whether the defendant is the government or a private person.

This problem is not so important when the functions of government are few. But as those functions increase in the scheme of social and economic development, protections to the public may well be overlooked. Thus, now we simply look back for what has lagged behind the progress although pretty much created by it; and we tuck in the tag ends.

The writer suggests that the day has come for all government, whether national or state, to waive its immunity from suit against it in tort or in contract, whether express or implied, in law or equity.

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sion is not subject to appeal to, or review by any court. . . ." MINN. STAT. ANN. § 3.44 (West Supp. 1953).

59. "It is certainly not in accord with American democracy to permit the state to take private property by other than legal means and then to defend itself by a plea of nonsuability." Benson v. Bentley, 216 Minn. 146, 160, 12 N.W.2d 347, 355 (1943).