TORT CLAIMS AGAINST STATE GOVERNMENTS*

ROGER V. SHUMATE†

A tort may be defined as "a private or civil wrong or injury . . . a wrong independent of contract."¹ Similarly, a tort is said to be "any wrongful act (not involving breach of contract) for which a civil action will lie."² Thus, we may distinguish two classes of claims against the state—those growing out of tort, and those growing out of contract. This distinction must be kept in mind, since states frequently recognize different degrees of responsibility in these two classes of claims, and provide different means of settlement.

PROBLEM OF TORT CLAIMS

It is a truism to say that the functions of the state are increasing. The state now engages in a myriad of regulatory and service activities which were scarcely dreamed of at the time when the rules pertaining to the state's responsibility, or irresponsibility, were developing. This increase in function has inevitably brought the state into more frequent conflict with its citizens than ever before, and this, in turn, has necessitated a reconsideration of the state's responsibility to private individuals for damages to person or property which have been suffered at the hands of the state. In particular, it necessitates a reconsideration of tort claims against the state, since the state has, in general, been more reluctant to accept liability in cases growing out of tort than in those growing out of contract.

IMMUNITY OF SOVEREIGNTY FROM SUIT

There is an old and well-established principle in Anglo-American jurisprudence that the sovereign cannot be sued without his own consent.³ This principle is said to be derived from the ancient doctrine that "The King can do no wrong," and that he, as author of all law, cannot be held legally accountable for his acts. This doctrine would seem to reflect the actual practice in all of the early absolute or divine-right

* Adapted in part from the author's *Settlement of Claims Against the State*, Report No. 17, NEB. LEGIS. COUNCIL REP. No. 17 (1941).

† A.B., 1928, M.A., 1929, University of California; Ph.D., 1933, University of Minnesota. Associate Professor of Political Science, University of Nebraska, Director of Research, Nebraska Legislative Council. Formerly Instructor in Political Science, University of Cincinnati, University of Minnesota, University of Pittsburgh. Co-author of *AN INTRODUCTION TO WESTERN CIVILIZATION* (19); contributor to political science periodicals.

¹ 2 BOUVIER'S LAW DICTIONARY (Rawle's 3d revision, 1914) 3285-3287, quoted in ANDERSON, *AMERICAN GOVERNMENT* (1938) 351.

² WEBSTER'S NEW INTERN'L DICTIONARY (2d ed. unab. 1935) 2673.

³ Borchard, *State Liability*, 7 ENCYC. SOC. SCIENCES (1932) 338-342.

monarchies, but as a rationalized principle of law, it seems to stem from Roman jurisprudence.⁴ The English Common Law, independent of Roman influence in much of its development, embraced the doctrine in even more absolute form, Blackstone asserting that the doctrine of the King's legal infallibility is "a necessary and fundamental principle of the English Constitution."⁵

Originally, the immunity of the sovereign from legal process applied to the person of the King, since all acts of government were assumed to be his personal acts. As the King lost his personal sovereignty, however, the immunity passed to the government, which then became sovereign. The principles of the English Common Law are not automatically binding upon the United States, and the framers of the Federal Constitution could have authorized or forbidden suits against either the national government or the states, but they did neither. They were, naturally, familiar with the English practice, and do not seem to have entertained any doubt as to its correctness.

Various attempts have been made to sue the United States, relying upon the constitutional provision that the jurisdiction of the federal courts shall extend "to controversies to which the United States shall be a party."⁶ In every such case, however, the courts have held that this does not confer a right to sue, but merely determines where jurisdiction shall lie in cases in which immunity has been waived.⁷ Thus, the doctrine that the sovereign cannot be sued without his consent may be said to be as firmly embedded in the law of the United States as in that of England. The fact that Congress has established the United States Court of Claims, with jurisdiction over cases growing out of contracts, and that Congress frequently entertains claims growing out of tort, and makes appropriations therefor,⁸ in no way invalidates the general principle of immunity.

From the foregoing summary, it is clear that a sovereign state cannot be sued without its consent. Our "states," however, are not fully sovereign entities, since they are subject to the higher authority of the Federal Constitution and of the agencies of the National Government operating within the limits of the Constitution. Nevertheless, the states are still said to retain "That large residuum of sovereignty . . . not delegated to the United States."⁹ Thus, the state retains its immunity from suit without its consent, except insofar as that immunity was given up in the Federal Constitution.

PROVISIONS OF CONSTITUTION

The Constitution of the United States expressly extends the jurisdiction of the federal courts "to controversies to which the United States shall be a party; to con-

⁴ 3 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2d. ed., 1929) 1383.

⁵ *Ibid.* Countries of Continental Europe, which derived their legal systems more directly from Rome, have either abandoned the doctrine entirely or modified it almost beyond recognition.

⁶ U. S. CONST., ART. III, §2.

⁷ *U. S. v. Lee*, 106 U. S. 196 (1882); *U. S. ex rel. Goldberg v. Daniels*, 231 U. S. 218 (1913); *U. S. v. Michel*, 282 U. S. 656 (1931).

⁸ ANDERSON, *op. cit. supra* note 1, at 349-350; see Holtzoff, *The Handling of Tort Claims against the Federal Government*, *infra* p. 311.

⁹ *Ex parte Ayers*, 123 U. S. 443 (1887).

troversies between two or more states; between a state and citizens of another state; . . . and between a state, or citizens thereof, and foreign states, citizens, or subjects."¹⁰

There is some doubt as to how far the framers of the Constitution intended to go in making the states subject to suit in federal court without their consent. On one hand, it might be argued, as indeed it was argued, that the provision cited above subjected a state to such suits as the United States, another state, a foreign state, or a citizen of another state or of a foreign state, might care to bring. On the other hand, it might be contended, as was held in connection with suits against the United States, that this provision did not increase the liability of the states to suit at all, but merely decided the question of jurisdiction in cases in which the states waived their immunity.

Alexander Hamilton, in urging the ratification of the Constitution touched upon this troublesome question, and tried to allay the fears of the states by assuring them that immunity from suit without its consent "is inherent in the nature of sovereignty," and by denying that the proposed constitution would divest the states of this immunity.¹¹ It is notable, too, that James Madison, foremost among the framers, and John Marshall, foremost among the early interpreters, as members of the Virginia convention which ratified the Constitution, both expressed the conviction that a state could not, under the terms of the Constitution, be sued in federal court by a citizen of another state without the consent of the defendant state.¹²

Despite these assurances, the Supreme Court of the United States held, in 1793, that a state might, without its consent, be made defendant in a suit brought by a citizen of another state,¹³ though Mr. Justice Iredell dissented vigorously, arguing that the federal courts, under the constitutional provision relied upon, could take jurisdiction over cases involving a state only where the state appeared as plaintiff, or where it had consented to appear as defendant.¹⁴ While the Court did not speak directly upon these points at the time, it may be reasoned from this decision that the state was then subject to suit in federal court, without its consent, by the United States, a sister state, a foreign state, or by citizens of a sister state or of a foreign state.

THE ELEVENTH AMENDMENT

The views of Hamilton, Madison, Marshall, and Justice Iredell seem to have been more nearly in accordance with the prevailing views in the several states than were the views of the majority of the Court in *Chisholm v. Georgia*, for Congress soon thereafter proposed the Eleventh Amendment,¹⁵ which provided that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." Many years later, the

¹⁰ Art. III, §2.

¹² 3 ELLIOT'S DEBATES (2d ed., 1836) 533, 555.

¹⁴ WILLOUGHBY, *op. cit. supra* note 4, at 1383.

¹⁵ Proposed March 5, 1794, declared adopted Jan. 8, 1798.

¹¹ 2 THE FEDERALIST, LXXXI (Bourne's ed. 1901).

¹³ *Chisholm v. Georgia*, 2 Dall. 419 (U. S. 1793).

Supreme Court expressed the opinion that the decision in *Chisholm v. Georgia* was erroneous,¹⁶ but this was, of course, in the nature of *dictum*.

The language of the Eleventh Amendment seems fairly clear and concise, but the Court has encountered quite as much difficulty in interpreting its provisions as it has in interpreting the provisions of the original Constitution.¹⁷ A casual reading of the Amendment would suggest that the prohibition against suits by citizens of other states and foreign states is an absolute one. In practice, however, the prohibition is by no means absolute.

Despite the provision that "the judicial power of the United States shall not be construed to extend to" suits begun by citizens of another state or of a foreign nation, it is still held that a state may be sued in such cases, provided that the defendant state voluntarily submits to the jurisdiction of the court.¹⁸ Thus, the effect of the Amendment, in this respect, was not to deprive the federal courts of jurisdiction, but rather to protect (or restore?) the right of the state to be immune from suit *without its consent*.

Not only may a state be sued in federal court by a citizen of another state provided the defendant state gives its consent, but that consent may be implied, as well as express. If, for example, a state permits itself to be sued in its own courts by a citizen of another state, and the federal question is raised, the federal courts may hear the case on appeal, the assumption being that the state has consented to suit.¹⁹ Likewise, if a state itself institutes suit against one of its own citizens or a citizen of another state, and an appeal is taken, the state may be made defendant in error, on the assumption that appeal is an appropriate remedy for the defendant, and that the state, in bringing the original action, has consented to such suit.²⁰ When the United States institutes suit against a private citizen, it waives its immunity so far as to allow the presentation of set-offs or counter-claims.²¹ Thus, it is presumed that counter-claims may be brought against the state in like cases.

When a state is made defendant in federal court, and the court properly takes jurisdiction, that jurisdiction is complete. Costs may be assessed against the state just as in the case of a private litigant. The court, speaking on this point, observed that "though sovereign in many respects, the State, when a party to litigation in this court, loses some of its character as such."²²

Suits against the state in connection with its corporate or proprietary functions present a slightly different problem from those brought in connection with activities which are "governmental" in the older sense. Thus, when a state conducts a business directly, such as a state-operated liquor store, the state retains its immunity.²³ On

¹⁶ *Hans v. Louisiana*, 134 U. S. 1 (1890).

¹⁷ See Hyneman, *Judicial Interpretation of the Eleventh Amendment* (1927) 2 IND. L. J. 371.

¹⁸ *Clay v. Barnard*, 108 U. S. 436 (1882); *Gunter v. Atlantic R. R.*, 200 U. S. 273 (1905).

¹⁹ See Hyneman, *loc. cit. supra* note 17; *Smith v. Reeves*, 178 U. S. 436 (1899).

²⁰ *Cohens v. Virginia*, 6 Wheat. 264 (U. S. 1821).

²¹ *Siren v. U. S.*, 7 Wall. 152 (U. S. 1868).

²² *Fairmont Creamery Co. v. Minnesota*, 275 U. S. 70 (1927).

²³ *Murray v. Wilson Distilling Co.*, 213 U. S. 151 (1908).

the other hand, a corporation chartered by the state may be sued, even though the corporation be owned in part,²⁴ or even in its entirety,²⁵ by the state.

So far, our treatment suggests that the Supreme Court, in its interpretation, has narrowed the application of the Eleventh Amendment, in that it is held to permit suits under certain circumstances, despite the apparently absolute prohibition against such suits. If the court has narrowed the meaning of the Amendment in some directions, however, it has broadened it, or at least refused to narrow it, in others.

The Eleventh Amendment expressly forbade the taking of jurisdiction in "suits in law and equity," saying nothing about admiralty proceedings, but the prohibition has been construed to include admiralty proceedings.²⁶ Furthermore, the Amendment makes no reference to suits brought by citizens of the defendant state, but again, by interpretation, it is held to include suits so instituted.²⁷ The Court has also refused jurisdiction in suits of the latter character on the ground that the constitutional provision giving the federal courts jurisdiction over suits to which a state shall be a party did not *extend* jurisdiction, but only *distributed* such jurisdiction as was otherwise conferred, and held it to be an elementary principle that a state cannot be sued by a private citizen without its own consent.²⁸

The last question to be settled with respect to the suability of a state in the federal courts related to suits brought by foreign states. The Constitution, it will be recalled, gives the federal courts jurisdiction over controversies "between a state and . . . foreign states," and the Eleventh Amendment makes no reference to such suits. It was held, however, in 1933, that a foreign state may not sue a state in federal court without the consent of the defendant state.²⁹ The Court did not rely specifically upon the Eleventh Amendment, but referred to it and the interpretation thereof, and observed that a foreign state occupied the same position, with respect to suits, as a citizen of the defendant state or of a sister state.

Perhaps it is unnecessary to add that the Eleventh Amendment has never been interpreted to mean that a state cannot be sued by the United States or by a sister state. The right to maintain such suits is felt to be a necessary accompaniment of the relationships existing in our federal system. Therefore, it is held that a state may be sued, in federal court, without its consent, by either the United States,³⁰ or a sister state.³¹ In the case of suit by a sister state, however, the state must be the *bona fide* party in interest, the court having refused jurisdiction where certain citizens transferred their claims to a state in order to permit suit while the private citizens remained, in fact, the parties in interest.³²

²⁴ Bank of U. S. v. The Planters' Bank of Georgia, 9 Wheat. 904 (U. S. 1824).

²⁵ Bank of Kentucky v. Wister, 2 Pet. 318 (U. S. 1829); Briscoe v. Bank of Kentucky, 11 Pet. 257 (U. S. 1837).

²⁶ *Ex parte* New York, 256 U. S. 490 (1921).

²⁷ Hans v. Louisiana, 134 U. S. 1 (1890).

²⁸ Duhne v. New Jersey, 251 U. S. 311 (1920).

²⁹ Monaco v. Mississippi, 292 U. S. 313 (1933).

³⁰ U. S. v. North Carolina, 136 U. S. 211 (1890); U. S. v. Texas, 143 U. S. 621 (1892).

³¹ South Dakota v. North Carolina, 192 U. S. 286 (1904).

³² New Hampshire v. Louisiana, 108 U. S. 76 (1883).

"THE RULE OF LAW"

The virtual immunity of the state from suit in tort suggests that the citizen is, practically speaking, at the mercy of the state and its agents. This, however, is wholly contrary to the assumptions of our legal philosophy. There is a maxim of the Common Law to the effect that "There is no wrong without a remedy."³³ This would seem to mean that, wherever the Common Law prevails, the citizen has a legal means of maintaining his rights, even against the sovereign. The difficulty here lies in the fact that this maxim refers only to acts that are recognized by law as being wrongs, and sometimes the law recognizes no wrong in acts performed by government, whereas the same act, if performed by a private individual, would give rise to legal remedies. Furthermore, even in the case of acknowledged wrongs, the fault is often attributed to the *agent* of the government, as an individual, rather than to the government as such.

One of the oldest efforts to give the citizen redress for wrongs inflicted by agents of government is found in the application of "the rule of law" which makes public officials personally liable to suit for unauthorized property damage, false arrest, abuse of power, or other unlawful acts.³⁴ The only valid defense which the official may offer is that he acted within the scope of the authority conferred upon him by law, and the law relied upon must be constitutional, or he may still be held liable.³⁵ Therefore, if a citizen feels himself aggrieved by his government, he may secure damages, or at least attempt to do so, by suing the officer or agent of government responsible for inflicting the alleged injury. The idea that the state, as an entity apart from the individual officer or officers, can or should be held legally accountable to its citizens for torts is of more recent development, and has received only partial acceptance.

MORAL OBLIGATION OF A STATE

The obligation of a state to give redress for wrongs inflicted upon its people may be said to be moral as well as legal. Legal systems, of course, grow out of moral concepts, and all societies make some effort to translate their moral judgments into law. Nevertheless, we often find an appreciable difference between what is required or sanctioned by law, and what people feel ought to be done or permitted as a simple matter of justice or morality.

The principle that a state cannot be sued without its own consent persists, not so much because of the tradition of royal infallibility as because of the cold fact that government makes the law, and it can, therefore, fix its own legal responsibility, or lack of it, as it can fix the duties and responsibilities of its citizens. Nevertheless, American political thought long ago repudiated the doctrine that government can act with impunity in dealing with its citizens.

³³ BROOM'S LEGAL MAXIMS (10th ed., 1939) 118-136.

³⁴ See White, INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION (1939) 580.

³⁵ Note, *Limitations on the Doctrine of Governmental Immunity from Suit* (1941) 41 COL. L. REV. 1236.

It is now recognized that a state or its agents may act arbitrarily and unjustly, to the detriment of its citizens. Furthermore, the necessary acts of the state, even when performed in good faith and in accordance with the general welfare, may give rise to injuries to persons and property. Finally, it is generally conceded that when citizens suffer at the hands of government, either in their persons or in their goods, some recompense should be made. It is well founded in morals or ethics, if not in law, that wrongs inflicted by government should be redressed, as well as those inflicted by individuals.

Students of government are coming more and more to realize that the "rule of law" which makes the individual officer responsible for acts done in line of duty does not guarantee redress in case of wrong. This rule, no doubt, has provided a valuable check upon the arrogance and irresponsibility of government officials, but in practice, reliance upon it has often amounted to a denial of justice, either to the aggrieved person or to the officer himself.⁸⁶

When an officer is sued for acts performed in connection with his work, he is usually held not to be liable unless it can be shown that he acted arbitrarily, negligently, in excess of his authority, or in violation of the law.⁸⁷ Aside from the difficulty of proving arbitrary or negligent action, it is obvious that compensable injuries may be sustained when there has been no arbitrariness or negligence on the part of officials, hence, the rule affords no redress in such cases. On the other hand, if the officer is held liable for acts performed in good faith and to the best of his ability, or under instructions from his superiors, he, rather than the claimant, is the victim of the rule.

Aside from the difficulty of establishing the liability of the officer involved, and the possibility of doing an injustice to the officer himself, the "rule of law" has another serious defect. This arises from the fact that the officer being sued is often "judgment proof." That is to say, the aggrieved citizen may establish the liability of the officer to the satisfaction of the court, and secure judgment for damages, but if the officer has no money with which to pay, and no property against which the judgment can be levied, no effective redress has been given.

The state may disavow legal responsibility for the acts of its agents, but it may be observed that the state will not permit private corporations to do so. In general, a private corporation will be held liable not only for the negligent acts of its officers or agents, but for all acts in tort, authorized by the corporation, or which are done in pursuance of any general or special authority to act in its behalf on the subject to which they relate, or which the corporation has subsequently ratified.⁸⁸ It is often argued that the state should accept the same liability for the acts of its agents that it requires of private corporations within its jurisdiction.

There can be little doubt that the feeling has grown that the state should not hold itself above the law in dealing with its citizens. On the contrary, it is widely believed

⁸⁶ Borchard, *loc. cit. supra* note 3.

⁸⁸ *Id.*, §66.

⁸⁷ 1 COOLEY ON TORTS (4th ed. 1932) 385 *et seq.*

that the state should, as a matter of justice, acknowledge responsibility for damages inflicted, and should establish some regular means by which the citizen can present his claim and have it considered by competent and impartial arbitrators. This is not to say, of course, that every claim against the state should be allowed, any more than that every claim in private litigation should be allowed, but that some regular procedure for determining the validity of claims should be provided.

It is in response to this feeling that the state is morally obligated to recognize liability that many states have made provisions for being sued, but the moral obligation of states extends beyond their present recognition of legal responsibility. This is evidenced by the fact that most state legislatures, at every session, entertain scores of claims for damages, beyond those claims which may be presented in the courts in the form of suit, and a considerable number of these claims is allowed. Where a state does not permit suit, the legislature usually entertains the claims, nevertheless. Where suit is permitted, but restricted to particular types of claims, the legislature will ordinarily consider claims which cannot be presented in court.

In brief, whether the state allows itself to be sued or not, its people hold it to be morally obligated to compensate persons who have suffered at its hands. The crucial question is not so much one of legal liability to suit. Rather, it is one as to the method by which the citizen's claim can be adjudicated with the least inconvenience and the greatest equity, both to himself and to the public. In general, three different methods of adjudication are found—legislative, administrative, and judicial. Thus, the choice of methods is largely a choice between branches of government.

LEGISLATIVE ADJUDICATION

There is an ancient principle of Anglo-American government, embodied in our federal constitution and many of our state constitutions, which guarantees to the people the right to petition the government for the redress of grievances.³⁹ The legislature, in democratic countries, has always been regarded, in a special sense, as the guardian of the people's rights. Therefore, when citizens exercise their right of petition, the petition is usually addressed to the legislature. Under the circumstances, it was only natural that, when a citizen felt himself aggrieved by his state government, and found that he was not permitted to bring suit in the courts, he petitioned the legislature for redress. The legislature thus became the first agency for adjudicating claims against the state, and even today it remains the most important agency of adjudication. In states which do not permit suit, and which have not set up special claims commissions, the legislature is the only body through which redress can be secured. Furthermore, where permission to sue is given, it usually does not cover all cases, and cases arising outside the jurisdiction of the courts will normally be presented to the legislature. Finally, even where suit is brought against the state, the litigant may, in some instances, still take his claim to the legislature if he fails to secure satisfaction in the courts.

³⁹ See First Amendment, U. S. CONST.

Most state legislatures receive scores, or even hundreds, of claims at each session. For example, the Legislature of Nebraska, at its 1939 session, received 255 claims, totaling \$218,878.93, and in 1941, 98 claims, amounting to \$127,966.25, were presented.⁴⁰ As a result of the great volume of business, the legislatures have adopted a regular procedure for dealing with these claims. Normally, there is a committee on claims, or one with some similar title, charged with hearing claims. The committee reports its findings to the legislature, in the form of a bill, listing each claim which has been approved, together with the amount allowed. This bill, if approved by the legislature and signed by the governor, becomes an appropriation authorizing the payment of the amount specified to each claimant.

The legislature is often reluctant to authorize suit against the state, because of the feeling that this would amount to "surrendering the state's sovereignty," and because of the further belief that the legislature is the proper agency for hearing petitions for redress. Because of the relationship existing between the legislature and the people, it is probably true that the right of petition must be retained, and that the citizen must have the ultimate right to present his case to the legislature if all other means of securing redress have failed. Nevertheless, it is generally conceded that, as a regular method of adjudicating claims against the state, the legislative system is unsatisfactory.

One of the complaints against legislative adjudication of claims arises from the infrequency of legislative sessions. Normally, a state legislature will not be in session more than three or four months out of each biennium. Therefore, a litigant with a just and pressing claim may have to wait nearly two years before receiving a hearing. In some cases, a delay of two years may amount to a substantial denial of justice, regardless of the final disposition made by the legislature.

A second objection to legislative adjudication arises from the nature of the problem itself. Determining the rights of a claimant requires the extended hearing of evidence and weighing of testimony, in which legal training and experience would be useful, if not indispensable. This would seem, then, to partake of the judicial rather than the legislative function. The legislative committee will not, ordinarily, have the same facilities as a court for gathering evidence, and its members may not have the judicial training and temperament required. Furthermore, since the committee ordinarily meets only one or two afternoons a week, and since the members are always pressed by other legislative matters, it is not always possible to give adequate consideration to the scores of claims presented.⁴¹

Perhaps the final argument against legislative settlement of claims is based upon the fear that the legislature will be unduly influenced by political or personal considerations. The critics allege that a member of the legislature will sometimes press the claim of one of his constituents out of friendship, or for the purpose of securing good will. Since other members may be pressing similar claims for their constituents,

⁴⁰ Summarized from the records of the Legislative Committee on Claims and Deficiencies.

⁴¹ In 1939, the committee in Nebraska devoted an average of twelve minutes to each claim. In 1941, the average was twenty minutes.

there may be some tendency toward "logrolling" among the members, with the result that the claims are adjudicated by interested parties rather than by impartial judges.

To these criticisms, it may be answered that the judicial process is sometimes even slower than the legislative, that determining justice is not always a matter of legal training or technical judicial procedure, and that legislators are not necessarily more partisan than other public officials. Certainly it is not clear that a legislative committee is less competent or more biased than a jury would be, especially a jury composed of friends and neighbors of the claimant. It is not meant to suggest, however, that the legislature should attempt to judge, in the first instance, the great bulk of claims against the state. On the contrary, it may be cogently argued that other and better techniques are available.

ADMINISTRATIVE ADJUDICATION

Administrative adjudication assumes the establishment of a board or commission, as a part of the administrative organization of the state, with power to hear and determine claims. Such agencies may be provided for in the state constitution, but are usually established by statute.

All the claims commissions now functioning are *ex officio* bodies, but there is nothing to prevent a state from setting up a special or *ad hoc* commission, if it wished, composed of full- or part-time members, appointed or elected, to hear claims against the state and nothing else. An indication of the titles, composition, and functions of these agencies follows.

Ohio has a Sundry Claims Board,⁴² consisting of the State Auditor, Attorney General, Chairman of the Senate Finance Committee, and Chairman of the House Finance Committee. The Board is authorized "to receive original papers representing claims against the state of Ohio for the payment of which no monies have been appropriated." All such claims are investigated by the Board, which approves, limits, or disapproves them. A copy of the Board's award or decision is filed with the Chairman of the House Finance Committee, and another with the Director of the Department of Finance, to be included in the state budget estimates. Payment cannot be made without legislative appropriation.

Prior to 1939, Michigan had a State Administrative Board,⁴³ consisting of the Governor, Secretary of State, Treasurer, Attorney General, State Highway Commissioner, and Superintendent of Public Instruction, with power to hear claims against the state.⁴⁴ The Board's jurisdiction extended to: (1) Emergency claims, such as those arising from repair of state buildings because of fire; (2) Claims of state employees for injuries; (3) Claims arising from acts or omissions of state employees or institutions; (4) Claims arising from negligent highway construction; (5) Claims of national guardsmen; and (6) Claims of dependents of members of the state police

⁴² OHIO CODE (Throckmorton, 1936), §270-6.

⁴³ The Board was replaced by a court of claims in 1939.

⁴⁴ MICH. COMP. LAWS (1929), §§201-238.

force. All claims, if allowed, were certified to the Auditor General, who then drew a warrant upon the State Treasurer for payment.

Tennessee, since 1931, has had a Board of Claims, consisting of the Commissioner of Administration, Commissioner of Highways and Public Works, Secretary of State, State Treasurer, and Attorney General.⁴⁵ The Board has power to "investigate, hear proof if necessary, and compensate from the general highway fund persons for damages sustained to either person or property as a result of negligence in the maintenance and/or construction of state highways and/or in the operation of the machinery or equipment of the state highway department of the state while engaged in the construction or maintenance of state highways." The jurisdiction of the Board also extends to injuries resulting from the negligence of state police officers, and to injuries sustained in line of duty by employees of the Department of Highways and Public Works, and by members of the state highway patrol.

Nevada, Montana, Idaho, and Utah have constitutional provisions for state boards of examiners, consisting, in each case, of the Governor, Secretary of State, and Attorney General.⁴⁶ These boards act in part as state auditing boards, and in part as boards of claims. All claims and vouchers are submitted to the board, as to the state auditor in other states, and must be approved thereby before a warrant can be drawn. In case of claims for which no appropriation has been made, the board may approve or disapprove, but they must be presented to the legislature for final action.

The use of a claims board or commission does not preclude the use of other methods of settlement. In the first place, the jurisdiction of the commission is usually limited, and claims not within its jurisdiction must be presented either to the legislature or to the courts, if presented at all. Furthermore, the decision of the claims commission is not always final. Frequently, they are subject to appeal either to the legislature, or the courts, or both. Even when awards are made, it is usually true that payment cannot be made until the legislature has made an appropriation for that purpose. Where the claims commission has jurisdiction, however, it is generally true that the courts will not entertain an action until the commission has heard and rejected the claim.

A claims commission does not have the status of a court, though it may perform a judicial or at least a quasi-judicial function. It does not enjoy the powers of the legislature with respect to granting claims, though it may relieve the legislature of some of the burdens which it formerly bore. The award of the commission is neither a judgment which can be executed, nor an appropriation of money, but is, legally, little more than a recommendation to the legislature to appropriate certain sums for the allowance of claims which the commission believes to be valid.

The advantages of an administrative agency, such as a claims commission, are obvious. It relieves the legislature of an onerous burden and frees it for more weighty considerations. It provides a permanent or continuing body for the hearing of claims, thus facilitating greater deliberation and the development of better techniques for

⁴⁵ TENN. CODE (Michie, 1938) §§343 (54), 3046 (1), 3251.

⁴⁶ Summarized from the constitutions of these states and from correspondence with state officers.

investigating and determining the validity of claims. At the same time, since the commission is normally composed of *ex officio* members who receive no extra compensation, the cost of administration is relatively small. On the other hand, if the commission can do no more than submit its recommendation to the legislature, settlement must still await the next legislative session. Furthermore, many students of administration entertain serious doubts as to the efficacy of an *ex officio* board.⁴⁷ Since the members are chosen to other offices, without regard to their fitness for hearing claims, and since their other offices usually absorb most of their time and attention, there is no definite assurance that claims will receive any more careful or competent consideration from the commission than they would receive from a legislative committee.

JUDICIAL SETTLEMENT

Judicial settlement of claims against the state assumes that the state has, at least for some causes and under some circumstances, waived its immunity from suit. In this case, the claimant brings suit against the state just as he would against a private individual. It goes without saying that when private suits against the state are permitted, they must be brought, ordinarily, in the courts of the defendant state. A state may, as has been shown, give its consent to being sued in federal courts, but only in rare cases, or under special circumstances, is such consent given. Theoretically, a state could permit itself to be sued in the courts of another state, but the likelihood of its doing so is exceedingly small. Furthermore, a state court accepting jurisdiction over suit against another state would be without means of enforcing its decision.⁴⁸

The state may, in its own constitution, attempt to determine whether or not suit will be permitted, and if so, under what conditions, as when the constitution of Illinois stipulates that the state "shall never be made defendant in any court of law or equity."⁴⁹ More frequently, however, the constitution is either silent on the subject, or confines itself to a general statement of principle, leaving to the state legislature the power to determine whether or not the state can be sued, and if so, for what causes, and in which courts. An example of the latter practice is found in the Nebraska Constitution, in the provision that "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought."⁵⁰

There are four states⁵¹ which have constitutional prohibitions against suit. One of these, however (Illinois), has created a court of claims which does, in effect, hear suits against the state, and another (Arkansas) has established a claims commission. The remaining forty-four states are about equally divided between those which have, by statute, provided some regular method of bringing suit, and those which have not. Some of those which have made no regular provision may, by special act,

⁴⁷ MacDONALD, *AMERICAN STATE GOVERNMENT AND ADMINISTRATION* (rev. ed. 1940) 322. "One of the most ineffective devices yet conceived for the performance of administrative duties is the *ex officio* board."

⁴⁸ *Rhode Island v. Massachusetts*, 12 Pet. 657 (U. S. 1838).

⁴⁹ Art. IV, §26.

⁵⁰ Art. V, §22.

⁵¹ Ala., Ark., Ill., and W. Va.

consent to suit in particular cases, but this type of legislation is forbidden by several state constitutions.

As indicated above, a state may consent to suit in either one of two ways: (1) By general act, authorizing suit in all cases falling within some general category or categories; and (2) by *spécial* act, accepting suit in a particular case designated in the act. As examples of the latter practice, the Texas legislature in a single session waived immunity in sixty-five instances,⁵² and the Kentucky legislature in seventy-four.⁵³

The state, in consenting to be sued, may designate the court in which the suit is to be brought. In the designation of courts to take jurisdiction, at least four distinct practices can be found. They are as follows: (1) Suit may be brought in the district court, or other general trial court, in the county or district in which the claim is alleged to have arisen; (2) Suits on claims arising anywhere in the state may be brought in the district court of the county in which the state capital is located; (3) The state may create a special tribunal, known as a court of claims, to hear all suits against the state; and (4) Some special court other than a court of claims may be empowered to hear certain types of claims against the state. As an example of the last named category, the Workmen's Compensation Court in Nebraska has jurisdiction over claims against the state by state employees, for injuries received in line of duty.⁵⁴

Of those states which permit suits, whether by general or special acts, all but three use their regular courts or some of them, *i.e.*, either the general trial court in the county in which the claim arose, or the similar court in the county in which the capital is situated. The procedure in these suits is usually the same as in suits between private individuals in similar cases, with the same provisions for use of juries, and for appeals, and with the same rules of evidence. Special procedure may, however, be established if desired.

The three states which do not use their regular courts for hearing suits against the state are Illinois, Michigan, and New York,^{54a} all of which have established special courts of claims for this purpose. The establishment of a court of claims in Illinois is especially interesting in light of the provision for the State Constitution, previously referred to, that "The State of Illinois shall never be made defendant in any court of law or equity."⁵⁵ The establishment of a court of claims is possible here only on the theory that it is not a "court of law or equity," but is, in reality, only an advisory body, and that its awards are to be regarded as recommendations to the legislature to appropriate money for the settlement of claims rather than as enforceable judgments.

The establishment of a court of claims indicates a clear and direct recognition on the part of the state that private claims are entitled to consideration. It is not surprising, therefore, that the tendency is to give these courts rather broad powers, some-

⁵² Nutting, *Legislative Practice Regarding Tort Claims Against the State* (1939) 4 Mo. L. REV. 1, n. 62.

⁵³ *Ibid.*

⁵⁴ NEB. COMP. STAT. (1929) §48-102; Neb. Laws Extr. Sess. 1940, Bill 4, p. 53.

^{54a} See MacDonald, *The Administration of a Tort Liability Law in New York*, *infra* pp. 262, 265.

⁵⁵ Art. IV, §26.

times allowing suits against the state in almost every type of claim that might give rise to suit against private individuals. In Illinois, for example, the court of claims is empowered to act on "all claims and demands, legal and equitable, liquidated and unliquidated, *ex contractu* and *ex delicto*, which the state as a sovereign commonwealth should in equity and good conscience, discharge and pay."⁵⁶ In Michigan, the court has jurisdiction "to hear and determine all claims and demands, liquidated and unliquidated, *ex contractu* and *ex delicto* against the state and any of its departments, commissions, boards, institutions, arms or agencies."⁵⁷ The jurisdiction of the New York court extends to all cases arising from the management of canals, defects in state highways, appropriation by the state of private lands, the elimination of grade crossings, erroneous payment of taxes, contractual relationships with the state, and cases of tort of state officers and employees insofar as they would give rise to actions against private individuals or corporations.⁵⁸

THE PRACTICE IN A TYPICAL STATE

Where suit is permitted in the regular tribunals, the jurisdiction conferred is usually rather narrow, frequently being restricted to cases arising out of contract, and/or cases arising out of defects in the highways, and the appropriation of land, but quite generally excluding ordinary acts of tort. Furthermore, where permission to sue is given in seemingly broad statutory terms, the courts ordinarily place a narrow construction upon the right to sue, or at least upon the state's liability for damages. Considerable diversity of practice is found among the several states, but a single typical state may be used for illustrative purposes.

The Constitution of Nebraska contains two provisions which have been used as a basis for maintaining suit. The first of these clauses, which apparently anticipates that suits will be entertained, stipulates that "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought."⁵⁹ The second clause, which makes no direct reference to suits, merely states the general principle that "The property of no person shall be taken or damaged for public use without just compensation therefor."⁶⁰

Although the constitution seems to anticipate that suit will be permitted, the State Supreme Court has held that the first provision cited above is not self-executing, hence no suit can be brought in consequence thereof, unless there has been implementing action by the Legislature.⁶¹ Not only is legislative consent required for suit, but that consent must be given in a general statute, uniform in its application. For example, an effort of the State Senate, in 1929, to authorize suit in a case of tort was held invalid on the ground that a resolution of one house could not establish liability where none already existed.⁶² Again, the Legislature, by statute, sought to

⁵⁶ Ill. Laws 1917, p. 325, §6.

⁵⁷ Mich. Laws 1939, c. 135, §8.

⁵⁸ N. Y. Laws 1939, c. 860, art. II, §9.

⁵⁹ Art. V, §22.

⁶⁰ Art. I, §21.

⁶¹ *Shear v. State*, 117 Neb. 865, 223 N. W. 130 (1929); *Kent v. State*, 118 Neb. 501, 225 N. W. 672 (1929); *Cox v. State*, 134 Neb. 751, 279 N. W. 482 (1938).

⁶² *Kent v. State*, *supra* note 61.

waive immunity and establish state liability in the case of a particular litigant, but this was held to be special legislation of a type forbidden by the state constitution.⁶³

The Legislature, acting under its specific constitutional grant of authority, has, by general law, provided for suit in certain types of cases, vesting jurisdiction in the district courts over the following: (1) All claims against the state which have been presented to the Auditor of Public Accounts and have been rejected by him, in whole or in part; (2) all claims or petitions for relief presented to the legislature and which may be referred by the legislature to the courts for adjudication; (3) all set-offs or counter-claims of the state against persons making claims against the state; and (4) all cases involving real estate in which the state has an interest, wherein any party desires to have the interest of the state determined.⁶⁴

The first of these provisions suggests that the state may be sued in almost any kind of case. Apparently, all the claimant need do is present his claim to the auditor and, if it is not allowed in full, he may bring suit in the district court. This is construed, however, not to make the state liable for such claims, but merely to indicate the resting place of jurisdiction to hear cases in which the legislature has otherwise accepted suit and provided for liability.⁶⁵ The court reads this provision in conjunction with another one which says that "The state may be sued in the district court of the county where the capital is situate, in any matter founded on or growing out of a contract, express or implied, originally authorized or subsequently ratified by the legislature, or founded upon any law of the state."⁶⁶ Thus, the court finds that the authorization to sue on "all claims" does not include claims in tort, but only those founded in contract. To the layman, this may appear to be an unwarranted restriction of the meaning of words, but it seems to be in accordance with the interpretation placed upon similar statutes in other states.⁶⁷

From this summary it is evident that, while there is no doubt that the Nebraska Legislature can waive the state's immunity from suit if it wishes to do so, the presumption is against liability unless the waiver is in clear and unmistakable terms. There appears to be one exception to the rule of narrow construction, however. The paragraph in the state constitution, previously referred to, which forbids the taking or damaging of property for public use without compensation, does not provide any method of bringing suit, and has not been directly implemented by statute. Yet, in a case involving damage to land caused by the erection of a temporary bridge on a state highway, the state supreme court held that the constitutional provision alone was sufficient to entitle the property owner to maintain suit and to recover damages.⁶⁸

In general, the state of Nebraska does not permit itself to be sued at all in cases growing out of personal injury, but there is one notable exception to this rule. The state has established a special tribunal, known as the Workmen's Compensation Court, which exists primarily for the purpose of hearing claims of employees in private industry for injuries sustained in connection with their work. This court has,

⁶³ Cox v. State, *supra* note 61.

⁶⁵ Shear v. State, *supra* note 61.

⁶⁷ See Nutting, *loc. cit.* *supra* note 52.

⁶⁴ NEB. COMP. STAT. (Supp. 1941) §27-319.

⁶⁶ NEB. COMP. STAT. (1929), §27-324.

⁶⁸ Gledhill v. State, 123 Neb. 726, 243 N. W. 909 (1932).

however, been given jurisdiction over claims against the state, brought by employees of the state, for injuries received in line of duty.⁶⁹

As shown above suit may not, as a general rule, be brought against the state for ordinary acts of tort. If, however, the state invokes the jurisdiction of its courts, it thereby lays aside its sovereignty, and must accept the court's decision, whether favorable or otherwise.⁷⁰ In other words, if the state sues an individual, the defendant may, as a part of his defense, bring a counter-claim, and the state is assumed to have consented to the counter-suit.⁷¹

From this summary of constitutional and statutory provisions, with the judicial interpretations thereof, the rules with respect to suits against the state in Nebraska may be stated as follows: (1) The state may be sued in the district court of Lancaster county (where the capital is situated) for claims growing out of contract; (2) the state may be sued in the district court of the county in which damage occurs for claims growing out of the taking or damaging of property by the state for public good; (3) the state may be sued in the Workmen's Compensation Court for injuries sustained by state employees in line of duty; and (4) the state may not be sued in any court for personal injuries (except to state employees), for damages to property other than specified in No. 2 above, or for claims for tax refunds, license refunds, refunds of deposits, or for goods and services rendered the state in absence of contract.

Judgment against the state is not self-executing as in the case of judgment against private individuals or corporations. The legislature, however, has sought to make judgment against the state effective, by providing that such judgment shall be certified to the Auditor of Public Accounts, who is required to pay the same from any special fund or appropriation applicable thereto, and if none has been provided, to make payment from any appropriation made to the department or institution on whose account the claim arose, *provided* that a certificate of the Auditor of Public Accounts, or the chief officer of the department or institution concerned, to the effect that the current appropriation is not sufficient to permit payment without causing great public inconvenience shall act as a stay of execution of such judgment until the adjournment of the next regular session of the legislature.⁷² In practice, judgments are usually paid without question, but the legislature could, presumably, earmark its appropriations in such a manner as to preclude payment.

JUDICIAL SETTLEMENT EVALUATED

The arguments in favor of judicial settlement of claims against the state are obvious from the discussion of legislative and administrative settlement. The adjudication of claims for damages, it is asserted, is a judicial function, and courts may be assumed to be better equipped than other agencies for determining the rights of the contesting parties. If the state accepts liability for its acts at all, it would seem only

⁶⁹ NEB. COMP. STAT. (1929), §48-102; Neb. Laws Extr. Sess. 1940, Bill 4, p. 53.

⁷⁰ *State v. Kennedy*, 60 Neb. 300, 83 N. W. 87 (1900).

⁷¹ *Ibid.*

⁷² NEB. COMP. STAT. (1929), §27-329.

logical to allow the courts to determine this liability, as they determine the liability of private individuals and corporations for similar acts. On the other hand, it is frequently objected that it would be unwise for the state to "surrender its sovereignty" since this would lead to a great mass of litigation, with hundreds of ungrounded suits being brought. Experience and reflection, however, do not indicate that these fears are particularly well founded.

It should be obvious that the state, in permitting itself to be sued, does not really surrender its sovereignty, any more than it does by permitting the presentation of claims to the legislature or to an administrative board or commission, or any more than the National Government surrenders its sovereignty by permitting suits on contracts in the Court of Claims. In the first place, permission to sue is a voluntary grant, and may be withdrawn at will. In the second place, when suit is brought against the state, the court acts primarily as an advisory body to the legislature, which can always have the last word, if it wishes to do so. Judgment against the state is not self-executing, since payment cannot ordinarily be made except in accordance with legislative appropriations. Judgment adverse to the plaintiff does not necessarily forbid the granting of relief by the legislature, and judgment against the state does not legally compel the legislature to appropriate funds for payment.

In emphasizing the advisory functions of the court, it should, of course, be borne in mind that the tendency is to regard the judgment of the court as binding, and to pay such judgments as a matter of course. Sometimes appropriations are made in advance to cover judgments against the state. Again, where no such provision is made, it is sometimes stipulated that payment shall be made out of existing appropriations for the activity which gave rise to the claim. Finally, where neither of these provisions exists, it is usual for the legislature to appropriate, as a matter of course, the funds necessary to pay judgments rendered against the state by its courts. It is also common for the legislature to refuse to grant relief except in cases passed upon favorably by the courts, if the claim is one over which the courts have jurisdiction.

It is to be expected that the awards of the court will, with rare exceptions, be honored, since the principal purpose of permitting suit is to establish some regular means of doing justice to the litigants, and, at the same time, to relieve the legislature of the necessity of passing upon every claim presented. Therefore, unless the claimants are required to use the courts, where jurisdiction is given, and unless the legislature follows in the main the decision of the court, the purpose of authorizing suits is, at best, only partially achieved. Nevertheless, the position and authority of the legislature are such that it can, if it wishes, have the last word in the determination of claims.

It is true that granting blanket permission to sue the state, and designating courts to hear such suits, may have the immediate effect of encouraging frivolous suits, and may result in some unjust awards being made. There is no evidence, however, that the claims presented to the courts will be any more frivolous than those now pre-

sent to the legislature, or that the courts will make more unjust awards against the state than the legislature would make.

During the ten-year period from 1928 to 1937, the New York Court of Claims disposed of 6,070 claims, totaling \$85,507,393.71. Of this number, 3,071 claims were dismissed altogether, and the awards in the remaining 2,999 claims totaled only \$15,165,207.50, or slightly less than eighteen per cent of the total amount claimed.⁷³ The legislature of Nebraska, during its last two sessions, considered 353 claims, amounting to \$346,845.18. Of this number, 110 were dismissed entirely, and the awards in the remaining 243 cases amounted to \$112,836.46, or slightly more than thirty-two per cent of the total claimed.⁷⁴ It would appear that the discrepancy between the number of claims presented in New York and those presented in Nebraska is greater than the differences in population and state functions would warrant. At the same time, it is apparent that the awards made by the legislature in Nebraska are considerably greater in proportion to the amount claimed than is true of the Court of Claims in New York.

If the state permits itself to be sued, the question remains as to whether jurisdiction should be vested in the regular courts or in a court of claims. The answer would seem to depend in part, if not primarily, upon the volume of litigation to be expected. In a small or sparsely settled agricultural state, in which there are relatively few claims, they may be handled satisfactorily in the regular courts. If, on the other hand, the state is made defendant in a large number of controversies, as is almost certain in states like New York, Pennsylvania, Ohio, Illinois, etc., it would seem to be desirable to create a special tribunal, not only in order to relieve the regular courts of what may become a very burdensome type of litigation, but also to develop a degree of expertness in handling claims which can come only with specialization.

SUMMARY AND CONCLUSIONS

It would be impossible, in a brief general treatment, to consider every aspect of the immunity of the sovereign from suit, to review all the border-line cases with respect to the suability of the state in federal courts, and to describe all the variations of practice among the forty-eight states in the settlement of tort claims. It is possible, nevertheless, from our cursory review, to discern some of the most salient facts which relate to these problems.

Despite the changing relationships between the citizen and his government, and the consequent changes in theory relating to governmental responsibility, the immunity of the sovereign from suit without his consent is still firmly entrenched as a legal principle. Our states or commonwealths are not completely sovereign, however, since they may be sued in federal court, without their consent, by the United States and by their sister states.

⁷³ BARRETT, *THE COURT OF CLAIMS OF THE STATE OF NEW YORK, ITS HISTORY, STRUCTURE, AND WORK*.

⁷⁴ Summarized from the records of the Committee on Claims and Deficiencies and from legislative appropriations.

A state may not be sued in federal court, without its consent, by its own citizens, by a foreign state, or by citizens of sister states or of foreign states. They may, the Eleventh Amendment notwithstanding, consent to be sued by these parties, and their consent may be implied as well as express. Furthermore, state owned corporations do not enjoy the same immunity as their owners do.

For all practical purposes, the state is immune from suit by private individuals, whether citizens of the defendant state, of other states, or foreign nations. The state, nevertheless, recognizes that it cannot act with impunity, particularly in its dealings with its own citizens. Therefore, the state usually makes some regular provision for hearing and determining, by its own governmental agencies, the claims of its citizens.

The methods by which the states adjudicate the claims of their citizens may be classified as follows: (1) The legislature may hear the claims directly, appropriating money to pay such claims as appear to be just; (2) either the constitution or the legislature may provide for a board of claims, or a claims commission, to hear claims and transmit its decisions or recommendations to the legislature for final action thereon; (3) the legislature may, by special action, waive the state's immunity from suit in particular cases, where such action seems advisable though this is forbidden in many state constitutions; and (4) the legislature may, by general act, waive the state's immunity in certain types of cases, and designate the court or courts in which the suits may be brought.

Where the state permits suit, jurisdiction may be vested in one or more of the following courts: (1) The general trial court in the county or district in which the claim arises; (2) the general trial court in the county in which the state capital is located; (3) a court of claims created for the exclusive purpose of hearing claims against the state; and (4) some special tribunal other than a court of claims, such as a workmen's compensation court.

States which permit suit do not, as a rule, permit suit on all claims, but limit the right to particular types of cases. In general, the states are more prone to permit suits in cases growing out of contracts than they are in cases arising in tort. Where suit in tort is permitted, it is a common practice to restrict the right to cases involving property damage, to the exclusion of cases involving injuries to person. In general, the states which have courts of claims make more liberal provisions for suit than those which rely upon their regular courts.

Provisions for suit in state constitutions are usually held not to be self-executing, but require implementing action by the legislature to make them effective, and legislative acts permitting suits are usually construed narrowly by the courts. A mere grant of permission to *sue* is often ineffective, by reason of the judicial holding that granting permission to sue does not necessarily create *liability for damage*. Where permission to sue is given in general terms, apparently applying to all claims, the term "all claims" may be interpreted to include only claims in contract, excluding those in tort.

Awards to claimants by claims commissions, and judgments against the state by state courts, cannot, as a rule, be enforced directly though there are some exceptions. In general, the legal status of such awards is merely that of recommendations to the legislature to appropriate money to satisfy the respective claims. Thus, the state legislature is usually in position to have the last word in the settlement of claims if it wishes to do so. In practice, however, the awards of the claims commissions and of the courts are usually paid without being seriously questioned.

Legally, the rule still holds that a state cannot be sued by a private individual, without its consent, no matter what the state or its agents may do. In practice, the rule is breaking down at many points, and is almost universally condemned by students of government. In a democratic society, a state is inevitably held to some degree of responsibility for injury to person and property, despite all legal principles and fictions to the contrary. Much remains to be done, however, in providing for effective responsibility and establishing regular equitable means of securing redress.