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Sovereign Immunity of the States: The Doctrine and Some of Its Recent Developments

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NOTE

THE SOVEREIGN IMMUNITY OF THE STATES: THE DOCTRINE AND SOME OF ITS RECENT DEVELOPMENTS

"The rights of a citizen remain the same whether they collide with an individual or the government, and judicial tribunals were wisely established to correct such matters without the individual being relegated to the position of no other remedy except to appeal to a legislature."

The principle that the State cannot be sued by its citizens without its consent is well established in the United States, and immunity from suit has been extended to both the federal and state governments. In the nineteenth century, the citizen rarely came in contact with his government, and as a result the doctrine of governmental immunity received judicial adoption in this country almost without question. But the tremendous growth of government in the last half century has increased the likelihood of governmental infringement of personal rights. Thus it was inevitable that the doctrine of sovereign immunity would be considerably modified, and its application limited.

It is beyond the scope of this Note to cover all aspects of sovereign immunity. Much has been written concerning the immunity of federal officers, and attempts have been made to analyze the decisions of the Supreme Court. In addition, analysis has been made of the immunity of sub-state levels of government. Nor will there be an attempt made to traverse the huge field of governmental liability for torts of officers. The purpose of this Note is to examine the extent of modification of the immunity doctrine as evidenced by recent decisions involving the immunity of the states, their officers, and agencies, primarily in areas other than that of financial tort liability. The perspective needed for proper analysis of the decisions is obtained by a statement of the historical basis of sovereign immunity, as well as a summary of pertinent statutory provisions.

2. See Block, Suits Against Government Officers and the Sovereign Immunity Doctrine, 59 Harv. L. Rev. 1060 (1946), Davis, Sovereign Immunity In Suits Against Officers For Relief Other Than Damages, 40 Cornell L. Q. 3 (1954), Note, Sovereign Immunity and Specific Relief Against Federal Officers, 55 Colum. L. Rev. 73 (1955).
SOVEREIGN IMMUNITY OF STATES

PART I. HISTORICAL BASIS OF STATE IMMUNITY FROM SUIT

The origins of sovereign immunity from suit are found in the medieval concept of the divine right of kings, which in England was expressed in the ancient maxim, "The King can do no wrong." By the time of Blackstone, personification of sovereignty in the King had become so axiomatic that Blackstone could write, "The king, moreover, is not only incapable of doing wrong, but even of thinking wrong..." Blackstone explained the maxim, however, on the more practical ground of the impossibility of enforcing a judgment against the King. Blackstone implies that since there was no remedy against the King, it would be unjust that the King could commit a wrong, and as a result the law will not impute a wrong where there is no remedy.

Although notions of monarchy are inconsistent with our form of government, the English colonists had accepted as axiomatic the principle that the states were immune from legal action by their citizens. While the Constitution was before the states for ratification, objection was made that the clause providing that the judicial power of the United States should extend to controversies "between a State and citizens of another State," would subject the states to suit by their creditors. This was considered particularly obnoxious in view of the debts of the states to British subjects, which the states had no intention of paying. That the clause would authorize suits by citizens against the states was vigorously denied by Hamilton, Marshall, and Madison. Hamilton declaring, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT."

Despite the assurances of Hamilton, the United States Supreme Court at its first opportunity held that a state could be sued by a...
citizen of another state. The case involved an action in assumpsit brought by a citizen of South Carolina against the State of Georgia. The court decided the action was maintainable, two of the majority justices placing their decision squarely on the ground that any state by its nature was subject to suit. One justice dissented on the ground that at common law the sovereign could not be sued without its consent, and the common law had been accepted in this country. The decision resulted in a storm of protest among the states, and immediately a constitutional amendment was introduced in Congress which was quickly ratified and became the Eleventh Amendment to the Constitution. That amendment includes a provision that the judicial power shall not extend to any action against one of the states by citizens of another state.

In a later case the Supreme Court extended immunity to suits against the states by their own citizens, thus completely excluding from the jurisdiction of the federal courts actions against the state by citizens, where the states have not consented to the suit. Furthermore, the influence of national opinion evidenced in passage of the eleventh amendment, combined with wide acceptance of the principle of sovereign immunity as contained in the common law, led to adoption of state immunity as a jurisdictional limitation by early state court decisions.

For the most part, the early opinions adopted the doctrine of governmental immunity from suit without question. Judicial attempts to justify or examine the doctrine came only after the principle had been thoroughly established. While the maxim "The King can do no wrong" was early stated to have no application in

14. Chisholm v. Georgia, 2 U. S. (2 Dall.) *419 (1793) The decision was in effect overruled by passage of the Eleventh Amendment. Hans v. Louisiana, 134 U. S. 1, 11 (1890).
16. Id. at *435-50 (dissenting opinion)
17 See Cushman, Leading Constitutional Decisions 263 (9th ed. 1947) See also Note, 13 Minn. L. Rev. 135 (1929), for discussion of the effect of the amendment in suits against state officers.
18. Hans v. Louisiana, 134 U. S. 1 (1890)
19. Of course the federal judicial power extends to suits against a state by another state. U. S. Const. art. III, § 2, cl. 1, and includes jurisdiction of suits against a state by the United States. United States v. Texas, 143 U. S. 621, 643 (1892). Nor does the prosecution of a writ of error to review a judgment of a state court on Constitutional grounds prosecute a suit against the state within the prohibition of the Eleventh Amendment. Cohens v. Virginia, 19 U. S. (6 Wheat.) 264, 405-12 (1821)
21. See United States v. Lee, 106 U. S. 196, 207 (1882) Adoption of governmental immunity in this country has been explained as the result of "slavish adherence to precedent." See Watkins, The State As A Party Litigant 55 (45 Johns Hopkins Univ. Studies No. 1, 1927).
this country,22 at other times the element of indignity to a state in "hauling it into court" was stressed.23 However, it was not until 1907 that an attempt was made to justify the doctrine as a legal principle when Justice Holmes declared, "...[T]here can be no legal right as against the authority that makes the law on which the right depends."24 But the most recent justification is made in terms of the natural repugnancy of allowing an individual citizen to "stop the government in its tracks."25 Some writers have recognized that the public policy in favor of noninterference with the performance of governmental functions is an important factor to be considered, and should be balanced against the need for judicial protection of individual rights from illegal state action.26

Whatever the justification, or lack of it, it is a firmly established legal principle in this country that both the federal and state governments are immune from suits by citizens in the absence of consent, and four state constitutions expressly provide that the state may not be made a defendant in any suit at law or in equity.27

PART II. LEGISLATIVE MODIFICATION OF THE IMMUNITY DOCTRINE

Although the immunity principle is well established in this country, it is generally recognized that the sovereign has the legal right to consent to be sued,28 which, combined with recognition of a moral

22. See Langford v. United States, 101 U. S. 341, 342-43 (1879). Notwithstanding express denial of the applicability of the maxim in this country, Professor Borchard asserts the maxim is the real explanation of axiomatic acceptance of governmental immunity. See Borchard, Governmental Responsibility in Tort, 36 Yale L. J. 1, 39-40 (1926).
24. Kawananakoa v. Polyblank, 205 U. S. 349, 353 (1907). Although Justice Holmes refers to Hobbes, the similarity of his statement with that of Blackstone is striking. See note 7 supra. For an exhaustive refutation of both the logic and practicality of the statement see Borchard, Governmental Responsibility in Tort, 36 Yale L. J. 757, 1039 (1927).
26. See Block, Suits Against Government Officers And The Sovereign Immunity Doctrine, 59 Harv. L. Rev. 1060, 1062 (1946); Note, 55 Colum. L. Rev. 73, 81 (1955).
obligation to compensate for injurious government action,\textsuperscript{29} has resulted in a limited degree of legislative modification of the immunity rule. Thus the Federal Congress,\textsuperscript{30} and most state legislatures\textsuperscript{31} have recognized some responsibility for governmental action, although for the most part modification of immunity has been limited to claims for money damages. Even where the states have consented to suit, or provided means for monetary relief, it is generally recognized that the state may set the terms upon which relief may be granted,\textsuperscript{32} which in some instances has resulted in requirements so procedurally complicated as to limit the possibilities of obtaining really effective relief.\textsuperscript{33}

The extent of legislative relaxation of the immunity rule differs greatly from state to state as a result of variations in the applicable provisions of state constitutions. While the constitutions of 17 states\textsuperscript{34} are silent on the subject, 4 state constitutions expressly provide that the state shall not be made a defendant in any court of law or equity.\textsuperscript{35} The constitutions of 20 states provide that the state may be sued in such manner as the legislature may direct,\textsuperscript{36} but

\begin{footnotes}


\footnotetext{32} E.g., Beers v. Arkansas, 61 U. S. (20 How.) 527, 529 (1858) (dictum).

\footnotetext{33} For a classic example of the difficulty of obtaining a speedy remedy under state statutory provisions for monetary relief, see Georgia R. Co. v. Redwine, 342 U. S. 299, 302-303 (1952).

\footnotetext{34} Including Minnesota. "The exemption of the state from actions by its citizens is not based on any constitutional provision, but merely on grounds of public policy." St. Paul & Chicago Ry. v. Brown, 24 Minn. 517, 574 (1877).


\footnotetext{36} Ariz. Const. art. 4, pt. 2, § 18, Cal. Const. art. 20, § 6, Del. Const. art. 1, § 9; Fla. Const. art. 3, § 22, Ind. Const. art. 4, § 24, Iowa Const. art.
these provisions have been held not to be self-executing, and as a result immunity prevails unless the legislatures have provided statutory means of suing the state. While in general the remaining state constitutions recognize the legislative prerogative, the provisions vary in scope from provision for a court of claims subject only to jurisdictional limitation by the legislature, to requirement that claims be submitted to the state auditor before legislative consideration may be had.

Regardless of constitutional provisions, virtually all of the states have found means to insure governmental responsibility when desired, and disagreement lies only in the method to be used. The constitutional guarantee of a citizen's right to petition his government for redress of grievances became the first vehicle by which most state legislatures recognized moral responsibility for governmental action.


The constitutions of Idaho and North Carolina provide all claims shall be submitted to the state supreme court which shall recommend approval or disapproval by the legislature. Idaho Const. art. 5, § 10; N. C. Const. art. IV, § 9. However the Idaho Constitution also provides for an administrative claims board and the supreme court hears only claims rejected by that board. Idaho Const. art. 4, § 18; State ex rel. Hansen v. Parsons, 57 Idaho 775, 784-788, 69 P. 2d 784, 791-793 (1937).

The Constitutions of Montana, Nevada, and Utah provide for ex officio claims boards subject to legislative control. Mont. Const. art. VII, § 20; Nev. Const. art. V, § 107; Utah Const. art. VII, § 13. Yet the Nevada Constitution also permits legislative consent to suit in the courts. Nev. Const. art. IV, § 73. The constitution of Missouri provides only that the comptroller shall pre-approve all claims and certify them to the auditor. Mo. Const. art. 4, § 22.


40. U. S. Const. amend. I.

private bills, either adjudicating the claim in legislative committee and awarding a direct appropriation, or granting the particular claimant permission to sue the state in the regular courts. But the amount of time spent in consideration of private bills has detracted from legislative consideration of bills of a general public interest. As a result almost all state legislatures have utilized the administrative branch of government in claims adjustment, either allowing the department heads or a state financial officer to make routine payments, or, as has been done in twenty states, creating special administrative boards for the purpose.

Thus even where sovereign immunity is a bar to suit in the regular courts a claimant may either petition the legislature, or, in many states, present his claim to a special administrative agency. As compared with adjudication in the regular courts, the legislative and administrative methods impose definite disadvantages on the claimant. Frequently administrative decisions may be appealed to the legislature, which appeal results in duplication of work for which the legislature has created the administrative board. Furthermore, it imposes costly delay in awaiting determination by busy legislative committees, and there is the ever-present danger that political considerations may govern the decision.

42. However two state constitutions expressly forbid private bills, both as to individual appropriations and as to legislative consent to suit by a particular claimant. Ind. Const. art. 4, § 24, Ore. Const. art. IV, § 24. Two other states prohibit appropriation for claims by special act. Colo. Const. art. V, § 28, N. Y. Const. art. 3, § 19. See Note, 68 Harv. L. Rev. 506, 508-509 (1955).


45. E.g., Minn. Sess. Laws 1955, c. 878. Although many of the boards have jurisdiction over "all claims," the scope of jurisdictional grants range all the way from South Carolina's provision for claims for services or material furnished and tax refunds, to Minnesota's grant of power to hear all claims (with minor exceptions) which the state should "in equity and good conscience" pay. E.g., Neb. Rev. Stat. § 81-858 (1943) (all claims), Minn. Sess. Laws 1955, c. 878, § 11 (1), S. C. Code § 30-251 (1952). For a statement of the jurisdiction and membership of many of the boards see Minnesota Legislative Research Committee, Payment of Claims Against the State, Pub. No. 43 at 23-28 (1952).

46. See Minnesota Legislative Research Committee, op. cit. supra note 45, at 8-9.

47. Id. at 10. In one instance a legislator purportedly made a "slight charge" of one-third the amount of the claim in return for introducing the claimant's bill. The money was allegedly to be used to "buy new hats for members of the house claims committee." Report of The Subcommittee on Immunity of the State from Suit, Claims Against the State in Minnesota, 32 Minn. L. Rev. 539, 544 (1948).
vantage lies in the lack of legal training of most administrative officers and legislators, which has resulted in the application of a different kind of law where the state is a party, than is applied in suits against citizens.48

Problems involving property, contract, or tort principles are common law questions, and it is obvious that the judicial branch of government is by its very nature best qualified to deal with the problems involved.49 One state has recognized this fact by expressly providing that upon rejection of a claim by the legislature the claimant may appeal to the regular state courts.50 While no state has enacted legislation allowing the state to be sued in all cases and for all forms of relief, at least 21 states have enacted statutes waiving a part of the state's immunity from suit in the regular courts,51 and in at least 9 other states, decisions of administrative claims boards or officers may be appealed to the courts.52 The extent of consent to suit varies from mere provision for joining the state as defendant in cases where a municipality is foreclosing a tax lien,53 to New York's waiver of virtually all immunity.54 Moreover, stat-
utes waiving immunity are strictly construed as being in derogation of state sovereignty,\textsuperscript{55} and in the absence of an express provision to the contrary, consent is usually limited to non-tort claims for monetary relief.\textsuperscript{56}

It would seem that judicial expertise may frequently be obtained even in jurisdictions forbidding suits against the state in the regular courts, by submitting a given claim to the regular administrative claims board, and seeking "judicial review" of the administrative decision. Although the Minnesota statute expressly forbids either appeal or review by the courts of administrative claims board decisions,\textsuperscript{57} it would seem that, in states where the statute forbids only appeal\textsuperscript{58} or is silent on the question, the regular procedure for judicial review of administrative determinations might apply.\textsuperscript{60} Where no provision has been made, a few courts have stated that administrative claims determinations are subject to prerogative writs,\textsuperscript{69} and where funds had been appropriated, mandamus has been issued to compel allowance of a valid contract claim by a state claims board,\textsuperscript{61} even as against a defense on the ground of sovereign immunity.\textsuperscript{62} On the other hand, where the statutes expressly forbid appeal the courts have reached a different result. In a recent Pennsylvania case the claimant petitioned the court for a writ of mandamus directing the administrative board, which had disallowed the claim, to show cause why its decision should not be reversed and


\textsuperscript{56} Frequently statutes extend jurisdiction to all claims. E.g., Wash. Rev. Code § 4.92.010 (1951). Yet "claims" has been equated with actions for money. See Wiseman v. State, 98 N. H. 393, 396-397, 101 A. 2d 472, 475 (1953). Actions based in tort or demanding relief in equity are usually not considered "claims" within the statutory term. See, e.g., Trempealeau County v. State, 260 Wis. 602, 604-605, 51 N. W. 2d 499, 500 (1952).

\textsuperscript{57} Minn. Sess. Laws 1955, c. 878, § 3.


\textsuperscript{59} For discussion of the scope of judicial review of administrative action, see Davis, Administrative Law 812-928 (1951). See also Riesenfeld, Bauman, Maxwell, Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota, 33 Minn. L. Rev. 569, 685 (1949), 36 Minn. L. Rev. 435, 37 Minn. L. Rev. 1 (1952).

\textsuperscript{60} State \textit{ex rel.} McQueen v. Brandon, 244 Ala. 62, 65, 12 So. 2d 319, 321 (1943) (dictum), \textit{cf.} Madden v. Riley, 53 Cal. App. 2d 814, 821, 128 P. 2d 602, 606 (3d Dist. 1942). It has been held error for a lower court to sustain a demurrer in an action for mandamus to compel a claims board to hear a claim. Calhoun County v. Brandon, 237 Ala. 537, 187 So. 868 (1939).

\textsuperscript{61} State \textit{ex rel.} McDowell, Inc. v. Smith, 334 Mo. 653, 67 S. W. 2d 50 (1933).

\textsuperscript{62} U'Ren v. State Board of Control, 31 Cal. App. 6, 159 Pac. 615, (1st Dist. 1916).
award made to the claimant. The court denied the writ, stating that where appeal is expressly forbidden by statute, the scope of appellate review is limited to questions of regularity and jurisdiction and that claimant could not have the merits of his claim judicially reviewed in circumvention of the statute by means of a "veiled substitute for appeal." Yet the court added that where the statute is silent on the question of appeal, review by certiorari may be had in the "broadest sense."

Many states have replaced or supplemented the extraordinary remedies with general statutes providing for judicial review of administrative action. While, as yet, the question of the extent of judicial review of administrative claims board decisions permitted under these acts has not arisen, the Illinois court has held that a proceeding to review a determination of the Board of Revenue under that state's Administrative Review Act was not an encroachment on the state's constitutional provision for sovereign immunity. The court stated that since the purpose of the action was to review quasi-judicial determinations and was not an original action against the state, sovereign immunity did not apply. It would seem the same rationale might be applied to judicial review of administrative claims board decisions, and that judicial review may well be the means by which the courts could achieve additional modification of the doctrine of sovereign immunity, although as yet this method of modification has been little used.

Thus it appears that the trend in state legislative modification of sovereign immunity has been from legislative determination, to administrative adjudication, and more recently toward consent to suit in the regular courts. Modification has been gradual, however, and has been impeded by legislative reluctance to permit

64. Id. at 520-521, 55 A. 2d at 537.
65. Id. at 519, 55 A. 2d at 536. Yet the Tennessee court has held that certiorari does not lie to permit review of findings of fact made by administrative claims boards, basing its decision on the grounds of sovereign immunity. Quinton v. Board of Claims, 165 Tenn. 201, 54 S. W. 2d 953 (1932).
68. See Note, Administering Claims Against the State, 68 Harv. L. Rev. 506, 517 (1955).
69. A number of states have consented to suit in the regular courts only within the last five years. E.g., Minn. Sess. Laws 1955, c. 878, § 2; N. H. Sess. Laws 1953, c. 243.
money judgments to be enforced by the courts. As a result, in all states, regardless of the extent of modification of the immunity doctrine, the legislatures retain some power to pay or refuse to pay the judgments determined by the adjudicating authority. Yet in states which have waived immunity, experience has shown the financial burden is not excessive, and legislative appropriation in satisfaction of money judgments has become a matter of routine, with the legislatures rarely acting unfavorably upon any judgment.

PART III. JUDICIAL MODIFICATION OF THE IMMUNITY DOCTRINE

Although many of the hardships of the sovereign immunity principle have been relaxed by legislative provisions, amelioration of the inequities of sovereign immunity has not been confined to the legislatures. A doctrine so at odds with democratic principles was regarded with judicial disfavor in this country, and, once the desire to confine immunity was formulated, the judiciary soon found the means by which modification could be accomplished within existing legal principles. The rationale stemmed from a logical but completely conceptual application of the maxim, "The King can do no wrong." While in England personification of sovereignty in the person of the King may have been possible, attempts to adopt this reasoning in the United States resulted in the postulation of the abstract State as sovereign. Since the ideal State could only act by


71. In a few states awards up to a stipulated sum do not need legislative approval. E.g., Mass. Ann. Laws c. 12, § 3 A (1952) (up to $1000), N. C. Gen. Stat. § 143-291 (Supp. 1955) (up to $10,000)


73. See Minnesota Legislative Research Committee, Payment of Claims Against the State, Pub. No. 43 at 15 (1952), Shumate, Tort Claims Against State Governments, 9 Law & Contemp. Prob. 242, 261 (1942)

74. See Chisholm v. Georgia, 2 U. S. (2 Dall.) 419, 457 (1793). As recently stated in a dissent by Justice Carter of the California Supreme Court, "The entire doctrine of governmental immunity rests upon a rotten foundation, and professors, writers and liberal-minded judges are of the view that it should be placed in the judicial garbage can where it belongs." Talley v. Northern San Diego Hosp. Dist., 41 Cal. 2d 33, 43, 257 P. 2d 22, 28 (1953).

75. Use of monarchal notions of sovereignty in a democratic form of government has been termed a "mystery of legal evolution." Borchard, Government Liability In Tort, 34 Yale L. J. 1, 4 (1924). Moreover, the argument that the states of the Union are sovereign under the Constitution has been shown to have no logical basis. Willis, The Doctrine of Sovereignty Under the United States Constitution, 15 Va. L. Rev. 437, 456-457 (1929)
law, whatever the State did must be lawful. On this ground a distinction was drawn between the State and its government, which consisted of its officers, and since the State could not commit an illegal act, any such act was imputed to government officers. It logically followed that a suit against state officers was not necessarily a suit against the State.

Application of the theory, however, was difficult in particular cases, and the courts soon developed formalistic tests to determine whether a suit against a government officer was a suit against the State. At an early date Chief Justice Marshall decided the question could be resolved by looking at the record, if the State were not named as party defendant, it was not a suit against the State. While the artificiality of this test led to its abandonment, a few recent state court decisions indicate that the name of the party on the record will still influence the result. Most courts however do not rely on the record, but state the general test as being whether the suit, while nominally against an officer, would be "in substance" one against the State. Yet it is doubtful that this test is helpful in deciding particular cases, or that it is anything other than a restatement of the question it is supposed to answer.

Perhaps the State may have an abstract existence apart from its officers, yet it is obvious that the State cannot act except through its administrative officers and agencies. As a result, the principle that a judicial order operating against a state officer does not operate against the state, will in many cases amount to pure fiction. That the courts are not unaware of the practical effect of applying the fiction is illustrated by a recent Supreme Court decision. In refusing an injunction prohibiting a federal officer from breaching a contract the Court stated:

"In a suit against the officer to recover damages . . . The judg-
ment sought will not require action by the sovereign or disturb
the sovereign's property. The question becomes difficult
and the area of controversy is entered when the suit is not one
for damages but specific relief, i.e., the recovery of specific
property or monies, ejectment from land, or injunction either
directing or restraining the defendant officer's actions. In each
such case the question is directly posed as to whether, by ob-
taining relief against the officer, relief will not, in effect, be
obtained against the sovereign. For the sovereign can act only
through agents and, when an agent's actions are restrained, the
sovereign itself may, through him, be restrained.\(^8\)

While this statement is true enough, the decisions discussed in
the following sections indicate that specific relief against state
officers may frequently be obtained, and that judicial adoption of
the fiction has been one of the prime methods of limiting govern-
mental immunity from suit.

A. Action Against State Officers for Specific Relief,
The Affirmative-Negative Distinction

As might be expected, the fiction that an action seeking specific
relief against the official acts of state officers was not a suit against
the state itself was first used in resolving conflict between state
action and the Federal Constitution. Although the United States
Supreme Court has recognized that its decisions in this area are in
confusion,\(^3\) the Court early stated that an action to restrain en-
forcement of an unconstitutional statute by a state officer was not
a suit against the state.\(^4\) Even if the statute is constitutional on its
face, the courts have the power to enjoin unconstitutional acts of
state officers in its application.\(^6\) Moreover, the fiction has been
embodied in the rule that wherever an officer's acts conflict with
the Constitution, the officer is "stripped of his authority" and is

\(^8\) Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 687-
688 (1949).


In his dissent in the Larson case, Justice Frankfurter suggests an explana-
tion of the confusion, and attempts a comprehensive classification of past de-
cisions. The classification, however, has been severely criticized. See Davis,
Sovereign Immunity In Suits Against Officers For Relief Other Than

\(^4\) Osborn v. Bank of the United States, 22 U. S. (9 Wheat.) 738, 846-
858 (1824). Thus a state governor may be enjoined, Sterling v. Constantin,
287 U. S. 378, 393 (1932), and while the Court has refused to enjoin the
President, State of Mississippi v. Johnson, 71 U. S. (4 Wall.) 475 (1866),
the Court has sustained an injunction against a cabinet officer enforcing an
executive order of the President. Youngstown Sheet & Tube Co. v. Sawyer,
343 U. S. 579 (1952).

\(^5\) Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 390-391
(1894). The state courts have similar power. E.g., Federal Compress &
SOVEREIGN IMMUNITY OF STATES

1956 | 247

personally subject to suit. By use of similar reasoning, recent state court opinions indicate that even a state agency, or a whole administrative board may be “stripped of its authority” and enjoined from the enforcement of an unconstitutional statute. In addition, particular acts of state officers have been enjoined even where no statute was directly involved, on the ground that the officer is “stripped of his authority” where his acts are in conflict with the fourteenth amendment.

Yet where injunction of particular acts of state officers is sought under the fourteenth amendment, application of the rule that the officer is “stripped of his authority” results in an inconsistency. If the fiction is adopted, it would appear that the officer’s acts are not the acts of the state. As a result it would seem that the officer’s acts could not be a violation of the fourteenth amendment for that amendment has been held to apply only to state action. Although the Supreme Court in one case indicates that the fourteenth amendment does apply to the unauthorized acts of state officers if their office or position has made commission of the act possible, the verbal conflict remains, and the result is an anomaly in the law, in concept if not in practice.

While injunction of unconstitutional action by state officers is usually permitted, the extent to which other relief is available is limited by the technical prerequisites found in the available remedies. In addition a citizen seeking specific relief must overcome judicial refusal to compel affirmative action by state officers. Thus in a recent federal case, the court refused to compel an exercise of the power of eminent domain even though plaintiff alleged that his

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86. See Ex Parte Young, 209 U. S. 123, 159-60 (1908).
88. Georgia Public Service Comm’n v. Atlanta Gas Light Co., 205 Ga. 863, 55 S. E. 2d 618 (1949) (individual members of utility commission enjoined from enforcing a rate adjustment alleged to be in violation of the fourteenth amendment).
89. Ex Parte Virginia, 100 U. S. 339 (1879).
91. For further discussion of the problem see Note, 50 Harv. L. Rev. 956, 960-962 (1937).
92. For discussion of the procedural requirements peculiar to each of the extraordinary remedies, see Riesenfeld, Bauman, Maxwel, Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota, 33 Minn. L. Rev. 569, 685 (1949), 36 Minn. L. Rev. 435, 37 Minn. L. Rev. 1 (1952). In the state courts relief is seldom sought by means of injunction and most actions are brought by means of one of the extraordinary remedies. See Davis, Administrative Law § 219 (1951). While an action for a
property had been taken by state officers without prior just compensation in violation of the state constitution and without due process of law. The court based its refusal on the ground that to require an exercise of eminent domain would require an affirmative exercise of sovereign power by the state. The court also suggested that plaintiff's remedy was by injunction against further invasion of plaintiff's land by the officer until the state should bring eminent domain and condemn the land. The dissenting justice, however, voiced strong protest to the use of an artificial "affirmative-negative" distinction to defeat protection of the plaintiff's constitutional rights. While the state courts have usually recognized that an action seeking affirmative relief in a suit against state officers is prohibited by sovereign immunity, a few courts have issued writs of mandamus requiring the instigation of condemnation proceedings by state officers even though it would require affirmative action by the state. In answer to an objection on the ground of sovereign immunity, the Illinois court applied the fiction that the "state" does not violate the constitution, and if it is violated it is the act of the officer and relief may be granted against the officer without violating sovereign immunity. Nevertheless, where the plaintiff omits to plead unconstitutionality in seeking specific relief against state officers, the decisions discussed in the following sections indicate that the courts may or may not find the suit barred as being a suit against the state.

Actions involving title to land

In the absence of an express statutory consent to the adjudication of title disputes in the regular courts, the decisions are in declaratory judgment may impose fewer technicalities, one court has held a declaratory judgment action to be a suit against the state where a "proprietary" right of the state was involved. General Mut. Ins. Co. v. Coyle, 207 Misc. 362, 136 N. Y. S. 2d 43 (1954).

93. People of Colorado v. District Court, 207 F.2d 50 (10th Cir. 1953).
94. Id. at 57-58.
95. Id. at 59.


98. Many state legislatures have expressly consented to adjudication of title questions in the courts. E.g., Minn. Stat. § 582.13 (1953) as amended, Minn. Sess. Laws 1955, c. 332, § 1. Frequently the statutes provide that no judgment for money shall be given against the state under the provision. E.g., Utah Code Ann. § 78-11-9 (1953).
conflict as to whether an action against state officers or agencies to quiet title to land is an action against the state and barred by sovereign immunity. Although the Supreme Court early stated that a "mere suggestion of title in the state" does not forbid the court from taking jurisdiction and determining questions of title, one state court has held that where the state is named as party defendant, an action to quiet title is barred as an action against the state. Where action is brought against state officers or agencies, a few decisions have barred the actions on the ground that the relief sought against the officer or agency would interfere with state property. On the other hand, an action against a state agency has been allowed on the theory that no claim is asserted against the state or its land, but the plaintiff only seeks to retain that which is his own.

It is evident that a determination of title is required in order to decide whether an action to quiet title brought against a state officer is an action involving state lands, or is simply an action in which plaintiff is seeking to retain that which is his own. Yet the courts pretend to adjudicate only the jurisdictional issue of sovereign immunity, without adjudicating title.

In a recent Alabama decision the plaintiff answered a bill to quiet title filed by the state, by alleging title in himself, and praying that his answer might be taken as a cross-bill. The court held that the state could not be sued without its consent and this would bar a cross-bill seeking affirmative relief against the state, just as it would bar an original bill. Noting, however, that plaintiff was required by statute to allege title in his answer to the state's complaint, the court stated, "In other words, instead of granting him relief on the cross-bill, relief is granted to him on his answer. . . ." While the court achieved a just result by judicial manipulation, it is doubtful that a distinction between "affirmative action on a cross-bill" and "relief on an answer" is realistic, and even more doubtful that the "affirmative-negative" distinction is at all helpful in dealing with land title actions against the state.

Where an action is brought to restrain a state officer from

103. State v. Gill, 259 Ala. 177, 66 So. 2d 141 (1953).
104. Id. at 183, 66 So. 2d at 145-146.
placing a cloud on title it has been held that sovereign immunity bars the action, on the ground that the state officer is exercising administrative authority in his determination of the state's right to place the cloud on title, and that a suit against an officer acting within his authority is a suit against the state. In one case, in which sovereign immunity was not raised, the court emphasized plaintiff's right to obtain relief after the cloud is placed, implying that to require plaintiff to proceed in that manner is likely to be less of a burden on the performance of governmental functions. Yet it is at least doubtful that public policy requires a distinction between preventive relief by injunction of the illegal acts of state officers, and remedial relief after the cloud is placed, especially if plaintiff must overcome sovereign immunity in seeking subsequent relief by way of an action for damages. As a result, judicial refusal to entertain an action to restrain a state officer from placing a cloud on title is to allow administrative officers to adjudicate questions of title to land and deny the plaintiff a remedy, solely on the ground of judicial respect for an exercise of sovereign discretion.

As a matter of policy there can be little doubt that courts are by their very nature more competent to adjudicate questions of title to land, and it is equally clear the courts have the power to entertain title actions against state officers. For example, one court has stated that if jurisdiction of actions to remove a cloud on title against the state is refused, the plaintiff is denied a remedy in violation of a constitutional provision of a remedy for every wrong. Moreover, other courts have held that illegal administrative action in placing a cloud on title is depriving an individual or property without due process of law, and that courts may entertain an action to cancel the cloud, regardless of sovereign immunity.

Specific relief against tortious acts by state officers

The Supreme Court has recently refused to enjoin merely tortious or "wrongful" official action by a federal officer, where the

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105. Giles v. Poole, 239 S. W. 2d 665 (1951) **appeal dismissed**, 151 Texas 224, 248 S. W. 2d 464 (1952).
106. See Banker v. Williams, 221 Ark. 110, 252 S. W. 2d 551 (1952), **cert. denied**, 345 U. S. 956 (1953).
107. See Giles v. Poole, 239 S. W. 2d 665 (1951), **appeal dismissed**, 151 Texas 224, 248 S. W. 2d 464 (1952).
108. See State ex rel. Comm'rs of Land Office v. Lewis, 197 Okla. 288, 290, 170 P. 2d 237, 239 (1946). The constitutional provisions guaranteeing a remedy for every wrong, found in most state constitutions, e.g., Minn. Const. art. I, § 8, are potentially a means by which sovereign immunity could be overcome. To date however, the clauses have not been relied upon, and are only mentioned in conjunction with other grounds for permitting suit.
officer has not exceeded his authority, recognizing that to enjoin a federal officer is frequently to enjoin the government itself.\textsuperscript{110} A few state courts, however, have granted injunction on the ground that an action based on the commission of torts by state officers is a suit against the officer, and not against the state.\textsuperscript{111}

No decisions have been found in which the "affirmative-negative" distinction has been applied in deciding whether specific relief against a state officer is available where the officer has committed only a common law tort.\textsuperscript{112} This is perhaps due to the fact that instances in which prohibitory injunction, if granted, would not provide desired specific relief are exceedingly rare. Moreover, the harshness of any refusal to grant affirmative specific relief from the tortious acts of state officers would be considerably modified by the constitutional requirement of just compensation for a taking of "property."\textsuperscript{113}

**Specific relief against breach of contract by state officers**

Although mandamus has been issued to require a state officer to perform a contract entered into on behalf of the state where there was a "clear ministerial duty" to perform,\textsuperscript{114} mandamus usually does not lie to enforce a wholly private contract right.\textsuperscript{115} Moreover, injunction of the breach of a contract by state officers has been refused on the ground that enjoining acts amounting to a breach would in effect coerce performance by the sovereign itself, in direct conflict with an expression of legislative policy.\textsuperscript{116}

The courts could apply the fiction that an officer breaching a contract is "stripped of his authority" by commission of a substantive wrong, and hold that an action against the officer seeking either injunction or mandamus is an action against the officer, not against

\textsuperscript{111} Shaw v. Salt Lake County, 119 Utah 50, 224 P. 2d 1037 (1950), Merrill v. Bishop, 69 Wyo. 45, 237 P. 2d 186 (1951). It has been held that when state officers exceed their authority in interfering with the rights of private property, they become trespassers and may be enjoined. See Joos v. Illinois National Guard, 257 Ill. 138, 100 N. E. 505 (1913); Goergen v. Dept. of Public Works, 123 Neb. 648, 243 N. W. 886 (1932).
\textsuperscript{112} Yet the Tenth Circuit has drawn a distinction between affirmative and negative relief against tortious acts which were a taking of property within the constitutional provision for just compensation before a taking of property. People of Colorado v. District Court, 207 F. 2d 50 (10th Cir. 1953).
\textsuperscript{113} See note 96 supra. See Oberst & Lewis, Claims Against the State of Kentucky—Reverse Eminent Domain, 42 Ky. L. J. 163 (1954).
\textsuperscript{114} Franklin DeKleine Co. v. Board of State Auditors, 289 Mich. 658, 287 N. W. 325 (1939).
\textsuperscript{115} See Edelman v. Boardman, 332 Pa. 85, 2 A. 2d 393 (1938).
\textsuperscript{116} Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139, 49 S. E. 2d 26 (1948), appeal dismissed, 335 U. S. 900 (1949).
the state. The paucity of recent decisions seeking specific relief against state officers in the area of contract is perhaps the result of wide statutory provision for recovery of contract damages against the state.\textsuperscript{117}

**Declaratory relief against illegal application of tax statutes**

Although one court has stated that enactment of the declaratory judgment act did not authorize a determination of liability against the sovereign outside of the consent statutes,\textsuperscript{118} adjudication of tax disputes in the regular courts is frequently obtained by way of an action seeking a declaration of non-liability against a state officer.\textsuperscript{119} Since no affirmative relief against the state is sought, the courts reason that a tax official illegally applying a tax statute is "stripped of his authority" and is not acting for the state.\textsuperscript{120} As a result the declaratory judgment action has become a convenient method of testing the legality of administrative action without running afoul of sovereign immunity. Outside the tax field, however, the remedy has been little used in obtaining specific relief against state officers.\textsuperscript{121}

**The need for specific relief against state officers**

To the extent that the "affirmative-negative" distinction prohibits the granting of specific relief against state officers, use of the distinction results, in many instances, in a delegation of the power to determine questions of substantive law and fact to administrative officers without any judicial review whatsoever. While the determination of some questions may be better made by administrative officers, use of the "affirmative-negative" distinction found in sovereign immunity problems can hardly lead to an intelligent separation of administrative questions from problems of substantive law which the courts are by experience more competent to adjudicate.

If use of the fiction that an officer violating substantive law is "stripped of his authority" is justified where injunction is sought,\textsuperscript{122} see note 140 infra.

\textsuperscript{117} See note 140 infra.

\textsuperscript{118} Hoyt v. Board of Civil Service Comm’rs, 21 Cal. 2d 399, 403, 132 P. 2d 804, 806 (1942).


\textsuperscript{120} Douglass v. Koontz, 137 W. Va. 345, 71 S. E. 2d 319 (1952), Berlowitz v. Roach, 252 Wis. 61, 30 N. W. 2d 256 (1947).

\textsuperscript{121} In New York, a declaratory judgment action is a suit against the state if a proprietary right of the state is involved. General Mutual Ins. Co. v. Coyle, 207 Misc. 362, ... 136 N. Y. S. 2d 43 (1954); see Lucas v. Banfield, 180 Ore. 437, 177 P. 2d 244 (1947) (declaration of abutting landowner’s rights of access to highway refused).
it would seem that a suit to compel affirmative action by state officers is equally justified, for in many instances enjoining activity by state officers and agencies will, in effect, coerce the sovereign to act affirmatively. For example, a distinction between a judicial order compelling the instigation of condemnation proceedings and one granting an injunction until condemnation is brought, would seem in reality to be a matter of form, not substance, especially where the state has invested considerable funds in the activity enjoined. As a result, judicial hesitancy to grant affirmative relief against acts of state officers or agencies may frequently be overcome by the simple expedient of wording a complaint in negative terms.

In spite of the "affirmative-negative" distinction, there can be little doubt that a judicial order either enjoining or compelling action by state officers will frequently amount to judicial coercion of the state. Where the individual can be compensated in money, judicial hesitancy to grant specific relief seems more justified. In many states, however, sovereign immunity bars an action against either the officer or the state for money damages. Judicial refusal to grant specific relief against state officers committing an illegal act or a substantive wrong frequently results, therefore, in leaving the injured citizen without any remedy whatsoever, other than an appeal to the legislature.

In most instances the state has the power and means to reach a desired goal in conformity with substantive law. For instance, the state has the power of eminent domain, and, like citizens, should have the option of breaching its contracts and responding in money damages. In many instances therefore, a grant of specific relief against state officers is not to "stop the government in its tracks" permanently, but only to require that the desired goal be obtained in a legal manner. If the government does not have the legal power to reach a desired goal sought by a state officer in the commission of a substantive wrong, and refuses to compensate for injurious governmental action, it is at least doubtful that sovereign immunity should protect state officers in reaching the goal in an illegal manner.

B. Actions Involving State Funds: The Financial Myth

If a citizen could obtain monetary compensation for injurious state action, a grant of specific relief to "stop the government" in its tracks might seem less justified. Yet where a judgment against a state officer would subject the state to liability, it will be seen that most courts have held the suit is one against the state and barred by sovereign immunity.
Suits against state officers for return of illegally collected funds

That the courts are hesitant to award money judgments where the state is involved is illustrated by cases in which it is sought to recover illegally collected funds, or tax monies assessed and collected under a statute subsequently declared unconstitutional. In a recent case the plaintiff brought suit against the Iowa Dairy Commissioner seeking a declaration that the statute under which taxes had been assessed and collected from plaintiff was unconstitutional, and for a writ of mandamus to compel repayment of the taxes. The court held that the action was a suit against the state because it was an attempt to compel the state to perform its implied promise to return the taxes by suing the state treasurer. Other courts, however, have reached a different result even where no allegation of unconstitutionality was made, holding that since the court had jurisdiction for declaratory purposes, it also had jurisdiction to order a refund of illegally collected taxes by way of incidental relief.

Where suit is brought against a state officer solely for recovery of monies, however, the courts usually find the suit barred by sovereign immunity. The presumption is made that the officer has surrendered all funds to the state treasury, and since any refund would necessarily be made from the treasury it would diminish public funds. It might equally be asserted that no public funds are diminished, because illegally collected taxes could never become "public" funds even when placed in the treasury. In this instance, however, the presumption that the funds have been paid over into the treasury overcomes the fiction that the officer acting illegally is "stripped of his authority" and personally liable for the amount of the collected taxes.

There can be little doubt that judicial refusal to apply the fiction that the officer is "stripped of his authority" in these cases is based

122. Yoerg v. Iowa Dairy Industry Comm'n, 244 Iowa 1377, 60 N. W. 2d 566 (1953). Nor may such refund be obtained through suit in the federal courts. Kennecott Copper Corp. v. State Tax Comm'n, 327 U. S. 573 (1946)

123. Horn v. Dunn Brothers, Inc., 79 So. 2d 11 (Ala. 1955), American Life & Acc. Ins. Co. v. Jones, 152 Ohio St. 287, 89 N. E. 2d 301 (1949) In answering an objection that the decree would affect state funds, the Alabama court observed that the state treasury would suffer no more than it would have had the defendant officer performed his duty originally, and the Ohio court noted recovery was not from the treasury, but from departmental funds. Ibid.


125. See, e.g., Manufacturers Trust Co. v. Corsi, 186 Misc. 577 579, 61 N. Y. S. 2d 769, 770 (1946)
on a desire to protect state officers from being held personally liable for the performance of state functions in which they have no personal interest. Noting that the officer was innocent of wrongdoing, the Missouri court recently stated, "It is more in accord with justice that the many persons paying the use tax should suffer the loss . . . of an inconsiderable sum, than that the officials who perform their duty in collecting and remitting the tax to the state should be compelled to pay the aggregate sum collected after the law is held unconstitutional." Thus sovereign immunity has forced the courts into a dilemma in which they must either protect the officer from personal liability at the expense of the citizen, or compensate the citizen at the expense of the officer. Refusal to compel the state itself to refund illegally collected monies can only be justified on the basis that the state may collect money unconstitutionally, and is protected from responsibility on the ground it "can do no wrong."

Reverse eminent domain

While actions for refund of illegally collected funds are frequently barred by sovereign immunity, the courts are not always as hesitant to impose liability on the state where the state or its officers violate constitutional principles. The constitutional requirement of just compensation made prior to the taking of property, has been used to justify award of money judgments against the state even where sovereign immunity is expressly raised in defense. Applying what has been aptly termed the "reverse eminent domain" theory, some courts reason that the constitutional provisions are self-executing, and where state officers take, injure, or destroy private property for public use without just compensation made prior to the taking, governmental immunity is waived without legislative consent, and the property owner may institute a suit for money damages against the state.

127. E.g., "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." Minn. Const. art. 1, § 13.

In State v. Stanley, 188 Minn. 390, 247 N. W. 509 (1933), the Minnesota court held that sovereign immunity could not defeat the constitutional requirement for compensation, and plaintiff could intervene in a condemnation proceeding. And in 1943, the court affirmed an order of the lower court appointing appraisers to determine the amount of damages due an intervening
The award of money damages in these cases would seem subject to the same objections as are made to money judgments for recovery of taxes collected in violation of the Constitution that the court has no means by which to enforce the judgment, and to award money judgments against the state would impose an undue burden on the performance of governmental functions. Yet no reason has been advanced why sovereign immunity forbids the recovery of tax monies in the state treasury collected under an unconstitutional statute, but does not forbid the award of compensation out of the treasury where property has been taken in violation of the constitution.

While the courts have virtually abolished the defense of sovereign immunity in the field of eminent domain, the plaintiff in many states still has the burden of bringing his suit within the technical requirements of a "taking" within the meaning of the constitutional provisions. The state is not liable in tort, and as a result some courts reason that a "taking" within the meaning of the constitution can not result from an act of negligence. On the other hand, it has been held that damages to adjacent land were a "taking" even though negligently inflicted.

Suits against state officers for damages in tort

While it is almost universally held that the state is not subject to suit in tort in the absence of statutory consent, the problem of whether a suit against a state officer seeking damages in tort is a suit against the state itself, is a problem subject to so many diverse considerations that the reader is referred elsewhere for exhaustive treatment of this problem. Yet one aspect of judicial limitation


131. For example the Virginia court reasons that the constitutional provision applies only to lawful acts, and has no application to the tortious acts of state officers. Eriksen v. Anderson, 195 Va. 655, 79 S. E. 597 (1954) One court suggested the provision applies only where the "taking" is intentional. See Angelle v. State, 212 La. 1069, 34 So 2d 321, 323 (1948), cf. Nelson v. Wilson, 239 Minn. 164, 58 N. W 2d 330 (1953).

of statutes consenting to suit against the state for tort damages may be mentioned in passing, as illustrative of a judicial attitude which often recurs in sovereign immunity decisions.

Although only a few states have expressly consented to suit in tort, even in some of those states the statutory waiver has been greatly limited by judicial creation of a two-fold immunity; immunity from suit and immunity from liability. As a result, even though a state has expressly waived its "immunity from suit," a few courts frequently deny relief under the judicial concept of "immunity from liability." The result is judicial frustration of legislative desire to abolish sovereign immunity in tort.

The distinction between "immunity from suit" and "immunity from liability" can only be justified by saying the state has consented to suit, but has not consented to suit. Although the distinction has received complete ridicule, the concept of "immunity from liability" remains wholly a matter of judicial creation in direct conflict with expressions of legislative desire. As a result, one legislature has recently enacted a statute expressly waiving its "immunity from liability" thereby preparing the ground for effective consent to suit without judicial frustration of the waiver.

Suits against the state for damages in contract

The "immunity from liability" concept has fortunately not been


137. "It should not lightly be presumed by this Court that the supreme legislative power of the State by enacting this statute intended merely to engage in the futile, if not foolish, business of rehearsing the sovereign State of South Carolina in the role of the mother of the nursery tale who sent her small boy to the river to bathe, with the admonition that he should hang his 'clothes on a hickory limb, but not go near the water.'" Sirrine v. State, 132 S. C. 241, 246, 128 S. E. 172, 174 (1925). See also St. Julian v. State, 82 So. 2d 85, 87 (La. App. 1955); Westerson v. State, 207 Minn. 412, 416, 291 N. W. 900, 902 (1940).

as frequently applied in construing the statutes by which over half of the states have consented to suit in contract. Where the states have consented to suit in contract, the courts see no difficulty in taking jurisdiction of actions against the state even though they theoretically have no better means of enforcing payment of a money judgment in contract than they do in tort. In the usual case however, appropriation of funds is made in the statute conferring power on the officer to enter a contract on behalf of the state, and many states statutorily provide no state officer may contract on behalf of the state unless a prior appropriation has been made. Where funds were appropriated, and the officer acted within his authority in entering the contract on behalf of the state, one court has awarded judgment against the state for contract damages even where there had been no statutory consent to suit. In the absence of an appropriation however, monetary relief has been refused on the ground it would diminish funds in the treasury and necessarily involve interests of the state within the protection of sovereign immunity.

Where the officer has exceeded his statutory authority to contract, the state is not liable, even where it has consented to suit. Liability for fraud may be imposed on the officer where he has acted maliciously or in bad faith, although where the officer's authority was exceeded, the court may refuse to award additional compensation.


Most of the remaining states have provision for presentation of contract claims to administrative boards.


142. State Highway Department v. Dawson, 126 Colo. 490, 253 P. 2d 593 (1952). The court emphasized the fact that there was an available fund from which relief could be granted.

143. See Harrison v. Wyoming Liquor Commission, 63 Wyo. 13, 31, 177 P. 2d 397, 402 (1947). Moreover, in a case where legislative appropriation was made for an amount less than that claimed by the plaintiff, one court refused to award additional compensation. See Gallena v. Scott, 11 N. J. 231, 94 A. 2d 312 (1953).

144. Persons dealing with public officers are charged with "notice" of the limits of the officer's authority to contract. See Williams Oil Co. v. State, 108 Misc. 907, 909, 100 N. Y. S. 2d 42, 44 (Ct. Cl. 1950), State v. Ragland Clinic-Hospital, 238 Texas 393, 397, 159 S. W. 2d 105, 107 (1942).

acts had been in good faith, the Minnesota court early extended
sovereign immunity to the officer on the ground of the difficulty the
state would have in obtaining officers to contract on its behalf,
were they to run the risk of personal liability on contracts in which
they had no personal interest. 146

Counterclaim against the state for damages

Where action is instigated by the state, and a counter-claim is
made for money damages arising out of the same transaction, the
courts are in direct conflict as to whether the counterclaim is a suit
against the state within the immunity rule. 147 Generally where the
amount of the counterclaim is less than that claimed by the state,
and is only pleaded by way of recoupment or in defense to the state’s
action, the courts give judgment on the counterclaim, 148 but where
the counterclaim exceeds the amount sought by the state, most
courts find the counterclaim barred by sovereign immunity. 149 At
least one court has allowed a counterclaim in excess of the amount
claimed by the state, reasoning that when the state instituted the
suit, it waived its immunity from all valid defenses, and that the
constitutional provision against withdrawal of funds from the state
treasury would not be violated for the state agency bringing the
suit had departmental funds available from which recovery might
be allowed. 150

There can be little justification for applying sovereign im-
munity to bar a counterclaim asserted in defense to an action
started by the state, unless the courts condone the use of a different
type of procedure to determine the law when the state is a party to
litigation than is used in suits between ordinary citizens.

146. As early as 1860 the Minnesota court stated, “When .. . there
is no want of good faith, a party contracts with such an officer with his eyes
open, and has no one to blame if it should afterwards appear that the officer
had not the authority which it was supposed he had. Were the rule otherwise,
few persons of responsibility would be found willing to serve the public.. .”
Sanborn v. Neal, 4 Minn. (Gill.) *83, *92 (1860).
147. Compare State v. F. W Fitch Co., 236 Iowa 208, 17 N. W 2d 380
(1945), with State v. Ruthbell Coal Co., 133 W Va. 319, 56 S. E. 2d 549
(1949).
148. State ex rel. Comm’rs of Land Office v. Sparks, 208 Okla. 150, 253
P. 2d 1070 (1953) (defensive plea), Commonwealth v. Berks County, 364
Pa. 447, 72 A. 2d 129 (1950) (recoupment). See also State v. Bucholz, 169
Minn. 226, 210 N. W 1006 (1926) (recoupment).
149. State Road Comm’n v. Ball, 138 W Va. 319, 56 S. E. 2d 549
(1949).
This case was limited to situations where separate departmental funds are
available in State Road Comm’n v. Ball, supra note 149.
The money fiction

Thus in modern times, the doctrine of sovereign immunity will usually bar an action seeking a money judgment against the state, or its officers, in the absence of statutory consent. In justification the courts have usually relied on one of three policy considerations, that to impose liability on a state officer for acts done in good faith on behalf of the state would be unjust, that the courts have no power to enforce money judgments against the state and hence to assume jurisdiction of an action seeking a money judgment would be frivolous, or that to impose liability on state funds at the suit of an individual would create too great a burden on the performance of governmental functions.

First, in all actions seeking money judgments against the state, the courts could apply the fiction that an officer violating substantive law is "stripped of his authority" and personally liable. The result of applying the fiction would be to permit recovery by the individual citizen, at the personal expense of the officer. The result of refusing to apply the fiction is to deny the individual a remedy, and protect states officers from personal liability by the use of sovereign immunity. For the most part, the courts have resolved the question by extending sovereign immunity to the illegal acts of state officers on the ground the state would incur considerable difficulty in obtaining officers to conduct state business were they required to assume personal liability for acts done on behalf of the state.

Second, the courts frequently refuse jurisdiction of actions seeking money judgments against the state on the ground they have no means of enforcing the judgment. If means to enforce the judgment be deemed essential, the courts do in many instances have the means by which money judgments may be enforced against the state. Of course judicial process such as garnishment of funds in state depositories\textsuperscript{151} or levy and execution on state lands\textsuperscript{152} has not been allowed. Yet the basic difficulty in enforcing money judgments is the constitutional provision found in most states prohibiting withdrawal of funds from the state treasury except by legislative appropriation.\textsuperscript{153} However these provisions do not prescribe any particu-

\textsuperscript{153} E.g., Minn. Const. art. 9, § 9, art. 4, § 12. The state of Michigan has overcome the appropriation problem by enactment of a continuing appropriation of funds from the state treasury, to the extent of judgments awarded by the court of claims. Mich. Comp. Laws § 3.491 (1952).
lar form for the legislative appropriation and the courts frequently find the requisite appropriation in the constitution itself, or in the statutory law of the state. For example, one court has granted mandamus to compel issuance of a warrant on the treasurer in payment of a money judgment on the ground that the eminent domain statute enacted in pursuance of the constitutional provision requiring just compensation for the taking of lands, constituted an appropriation of funds within the requirement of legislative appropriation. Moreover, annual legislative budgets usually include an appropriation to state agencies for operating expenses, and one court has held that an award from departmental funds did not violate the constitutional requirement of a legislative appropriation. In addition, bookkeeping adjustments have been ordered by the courts, which in many instances will accomplish the same result as an award of money compensation. Yet where no appropriation is found, the courts frequently do not have the power to coerce the payment of money judgments by the state.

Even where judgment cannot be enforced, there is no inherent reason, other than notions of judicial dignity, why inability to enforce a judgment should bar adjudication of substantive legal questions in the regular courts. If a citizen defendant in an ordinary action for a money judgment were to assert as a defense the court's inability to enforce a judgment because of defendant's lack of funds, the assertion would certainly not forestall the court from taking jurisdiction, determining the amount of liability, and awarding judgment on the merits even though the court would have no means of enforcing the judgment. Where the state has consented to suit, the courts assume jurisdiction even though they have no better means of enforcing a judgment for money damages under a consent statute than elsewhere. Where the defense of a lack of appropriation of funds was raised in an action under a consent statute, the Minnesota court ruled that the fact the method of payment is in legisla-
tive discretion did not bar jurisdiction to establish liability and determine the amount thereof.\(^5\)

Thus it would seem that refusal to take jurisdiction of actions seeking money judgments against the state is in reality a policy consideration, since lack of means to enforce a judgment need not bar jurisdiction as a matter of necessity. While at times the courts have suggested that an award of a money judgment against the state would impose an undue burden on the performance of governmental functions, the courts have not hesitated directly to “burden” performance of governmental functions by compelling or restraining a transfer of funds within the state treasury at the instance of taxpayers seeking governmental conformity with the constitution.\(^1\)

Implicit in the notion of “burden” on the state, however, is the assumption that resolving the jurisdictional issue of sovereign immunity against the state will always result in a determination of a money judgment against the state. To the extent that the cases do impose financial obligation on the state, perhaps the best potential solution of the “burden” concept lies in the field of insurance. The state of Idaho has provided for the securing of liability insurance by the state and by all of its officers and agencies, and has statutorily consented to suit to the extent of the insurance.\(^2\)

While there may be legitimate policy considerations behind judicial respect for the performance of governmental functions, to decide an action against a state officer is a suit against the state and barred by sovereign immunity solely on the ground that the plaintiff seeks a money judgment, can hardly lead to the development of any consistent application of policy. At the very least, it would seem that judicial protection of a citizen’s constitutional guarantees should not be denied regardless of whether monetary or any other form of relief is sought.

### Part IV Conclusion

Although the harshness of the sovereign immunity concept has been considerably modified by both legislatures and courts, the concept still permits governmental irresponsibility in many instances. The modern trend in legislative modification is seemingly toward

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159. See, e.g., Mead v. Eagerton, 255 Ala. 66, 50 So. 2d 253 (1951).

adjudication of actions against the state in the regular courts, but with precise limitations on the methods by which satisfaction of money judgments may be obtained. For the most part, the legislatures have been concerned solely with actions seeking money judgments against the state, perhaps assuming other rights will be effectively protected by the courts.

Frequently the courts have overcome sovereign immunity in actions seeking specific relief, by use of the fiction that an officer committing a substantive wrong is "stripped of his authority" and personally subject to the consequences of his acts. Use of the fiction, however, has been frequently limited by judicial refusal to grant relief where the relief sought against state officers would require "affirmative" action. Although the opinions are written in terms of the "affirmative-negative" distinction, the results of the cases indicate that in many instances the distinction may be overcome by the simple expedient of wording a complaint in the negative terms of injunction.

Because of a supposed lack of power to enforce a money judgment against the state, the courts have frequently denied actions seeking such relief on the grounds of sovereign immunity. Yet it would seem that the courts do not in fact need the power to enforce a money judgment in order to take jurisdiction of the actions and adjudicate liability, if any. Thus judicial refusal to entertain actions seeking money judgments against the state would seem to be frequently based on an assumption that the legislature will not honor its legal obligations. Yet in every instance found, the legislatures have appropriated funds in satisfaction of money judgments awarded against the state without any hesitancy whatsoever, and appropriation has usually become a matter of routine. The confusion resulting from use of the fictions and distinctions peculiar to the sovereign immunity concept has resulted in many instances in the determination by administrative officials of questions of substantive law such as the quieting of title to land, without any judicial review whatsoever. Because of the "undue burden" concept, the courts have been forced to rely mostly on the specific remedies, rather than permitting the performance of governmental functions unhampered by judicial interference, subject to just compensation for any injury done.

161. Yet in State v. Bentley, 216 Minn. 146, 151, 12 N. W. 2d 347, 353 (1943), the court expressly refused judicially to assume that the legislature would ignore the constitutional requirement of providing payment for the taking of lands for the public use.

162. See note 73 supra.
While further imroads on sovereign immunity are limited by constitutional provisions in four states, in the remaining states the legislatures and the courts both have the power and means by which to abolish sovereign immunity. The experience of states which have consented to suit indicates that abolishment of sovereign immunity does not result in an uncontrollable flood of litigation. As a result it is doubtful that the outdated and archaic concept of sovereign immunity contributes anything of value to the administration of justice between the states and their citizens in the twentieth century.