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THE BOARD OF CLAIMS ACT OF 1950

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Chapter 50 of the 1950 Acts[1] might easily be passed over as an insignificant amendment to the 1946 Act creating the Highway Board of Claims.[2] The pattern is the same and no drastic innovations appear, yet it is probable that the jurisdiction of the Board has been increased just enough to make it quite the most important agency in the claims picture in Kentucky It may not be going too far to say that for most practical purposes the 1950 Act takes Kentucky off the list of states which provide a legislative settlement and puts it among those states which have preferred an administrative settlement.

The problem of how to provide for claims against the Commonwealth has its origin, of course, in the common law doctrine of nonsuability of the sovereign.[3] The Kentucky Court of Appeals has seldom bothered to consider the soundness of the doctrine, or even to cite precedent for it. In *Divine* v *Harvie*,[4] one of the earliest Kentucky cases applying the rule, the Court said:

> "It seems to be conceded on all hands that the State cannot be made a party defendant, and is not suable in her own courts."[5]

In *Zoeller* v *State Board of Agriculture*,[6] the Court remarked, "It is an elementary principle of law that the State cannot be sued without its consent ",[7] and, as with all elementary principles of law, no citation of authority was necessary

"This immunity came down to us as a part of the fundamental common law," the Court said in *Commonwealth* v *Wilder*,[8] "and is only indirectly contained in the Constitution."

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[1] KY. REV. STAT. secs. 44.070-44.160 (Legislative Supp. 1950).

[2] KY. REV. STAT. secs. 176.290-176.380 (1948). For a discussion of the Act see Richardson, *Kentucky Board of Claims*, 35 KY. L. J. 295 (1947).

[3] For the most complete discussion of the origins and development of this doctrine see Borchard, *Government Liability* in Tort, 34 YALE L. J. 1, 129, 229 (1925); 36 YALE L. J. 1, 757, 1039 (1927); 28 COL. L. REV. 577, 784 (1928). See also SINGWALD, THE DOCTRINE OF NON-SUABILITY OF THE STATE IN THE UNITED STATES (1910); WATKINS, THE STATE AS PARTY LITIGANT (1927). Symposium on *Governmental Tort Liability*, 9 LAW AND CONTEMP. PROB. 180-370 (1941).

[4] 23 Ky. (7 T. B. Mon.) 439 (1828).

[5] *Id.* at 441.

[6] 163 Ky. 446, 173 S.W 1143 (1915).

[7] *Id.* at 449, 173 S.W at 1144.

[8] 260 Ky. 190, 192 ,84 S.W 2d 38, 39 (1935). The immunity as a matter of fact appears in the Constitution not at all, except as the grant of a dispensing power to the legislature implies the existence of the immunity.

In the face of this common law doctrine of State immunity to suit in the judicial courts, the Kentucky Constitution has from the beginning provided an escape valve for claims against the irresponsible state by making provision for legislation. This provision, Sec. 231 of the present Constitution, reads as follows:

> "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."

The wording of this provision of the Constitution of 1890 follows almost exactly the wording of the Constitutions of 1792, 1799 and 1850.[9] Although under these Constitutional provisions the legislature could enact a general claims statute, it has been the traditional policy of the Commonwealth to settle all claims against it by special joint resolution of the legislature granting permission to a specific person to sue the Commonwealth in a specific court on account of a specific claim usually for a sum not in excess of a specific amount. There have been dozens of such resolutions passed at every session. Not a few attacks have been made on the validity of the resolutions on appeal of cases brought under them to the Court of Appeals, but the procedure has been sustained against all objections.

It was early contended that the passage of such resolutions violated the Constitutional inhibition against passage of a special law where a general law could be made applicable,[10] but the Court of Appeals held in *Commonwealth* v *Haly*[11] that the joint resolution waiving the Commonwealth's immunity was "not a case where a general law can be made applicable within the meaning and spirit of the Constitution."[12] The real reasons seems to be the Court's judgment that the legislature would not be likely to "reverse the policy of a century and enact a general law,"[13] and "the suggestion is not to be tolerated that he is without a remedy"[14]

Examination of the Constitutional Debates of 1890 bears out the Court's estimate of the meaning of the Constitution. When the section was first proposed it was amended, on motion of L. T. Moore to read, "The General Assembly may, by *general* law, etc."[15] Moore denounced the special bills to permit suits against the Commonwealth

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[9] KY. CONST. Art. VIII, sec. 6 (1850) is identical except for a minor change in word order. KY. CONST. Art. VIII, sec. 4 (1797) and KY. CONST. Art. VI, sec. 6 (1799) use the word *shall* instead of *may*. Since there is no effective way to force a legislature to legislate in this instance, it would seem immaterial whether the provision is mandatory or directory.

[10] KY. CONST. sec. 59, par. 29.

[11] 106 Ky. 716, 51 S.W 430 (1899).

[12] *Id.* at 720, 51 S.W at 431.

[13] *Id.* at 719, 51 S.W at 431.

[14] *Id.* at 720, 51 S.W at 430.

[15] IV DEBATES, CONSTITUTIONAL CONVENTION 1890, p. 4700.

as "about as vicious legislation as can be had," and urged insertion of the word "general" to prevent lobbying.[16] William Goebel insisted that the insertion of the word "general" was redundant in view of the broad inhibition against special legislation in section 59.[17] On further debate, however, Goebel apparently changed his mind. After Bullitt objected to the amendment as "taking away from the Commonwealth the sovereign power" and pointed out that it might someday prevent the Commonwealth from defaulting on its bonds when it wanted to, Goebel opposed the amendment as an undesirable change in the law The State might be sued by "these foreigners," said Bullitt; by everybody "whether he be a citizen of Kentucky or a citizen of Spain or Africa," added Goebel.[18] On motion to reconsider, the amendment was defeated. It would seem clear that the members of the Convention did intend to allow the legislature to make provision for suits against the State by special law—act or joint resolution—if only for the rather inhospitable reason that in disbursing the public moneys for claims, the legislature should be free to make some distinction between Kentuckians and foreigners.

Validity of the provisions limiting recovery which often appear in the claims resolutions has been sustained against contentions that they violate Section 54 of the Constitution,[19] and that the resolutions are "appropriation" acts requiring a majority vote within the meaning of Section 46 of the Constitution.[20] It has been said that the effect in general of a special act waiving immunity is to make the Commonwealth suable as a private individual[21] — the Commonwealth is extended the same rights and is confined to the same limitations.[22]

The only general act in any way limiting the claimant under a special resolution is KRS 411.160 which prohibits, for obvious reasons,

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[16] *Id.* at 4701.

[17] KY. CONST. sec. 59, par. 29.

[18] IV DEBATES, CONSTITUTIONAL CONVENTION 1890, p. 4701.

[19] KY. CONST. sec. 54: "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death or for injuries to person or property." *See* Com. v. Daniel, 266 Ky. 285, 98 S.W 2d 897 (1936) holding that the sovereign waiving immunity from suit may impose such restrictions as it sees fit. In Com. v. Bowman, 267 Ky. 50, 100 S.W 2d 801 (1936) the recovery given was only half the amount authorized in the resolution and the court refused to pass on the question of validity of the limitation since claimant had not been injured by it.

[20] KY. CONST. sec. 46: " any act or resolution for the appropriation of money as the creation of a debt shall, on its final passage, receive the votes of a majority of all the members elected to each house." In Com. v. Jackson, 68 Ky. 680 (1869) it was held that the resolution authorizing suit was not an "appropriation."

[21] Com. v. Hoover s Adm r., 274 Ky. 472, 118 S.W 2d 741 (1938); Com. v. Dever, 284 Ky. 150, 143 S.W 2d 1065 (1940).

[22] Com. v. Bowman, 267 Ky. 50, 100 S.W 2d 801 (1936).

the introduction into evidence of, or comment on, the resolution in the trial of a case.[23]

The Board of Claims

The 1946 Legislature created the first Highway Board of Claims with a jurisdiction to allow claims not in excess of $1,000 for personal injury or property damage due to negligence in the construction, reconstruction, maintenance and policing of highways by the Department of Highways.[24] Only one case decided by the Board under this statute has reached the Court of Appeals, *Shrader* v. *Commonwealth*.[25] That claim was for injury due to falling rock and the Board dismissed on the ground of no showing of negligence. On appeal the Court of Appeals affirmed the decision of the Franklin Circuit Court affirming the Board on the ground that there was no showing of fraud and the finding was supported by substantial, competent evidence. No question whatever was raised as to the validity of the Act or any of its provisions.

The 1950 Act[26] increased the jurisdictional amount of the Board of Claims to claims where the amount in controversy does not exceed $5,000,[27] and claims may now arise out of "negligence on the part of the Commonwealth, any of its departments or agencies, or any of its agents or employees while acting within the scope of their employment by the Commonwealth or any of its departments or agencies."[28] It is probable that the increase in the jurisdictional amount will be the more important of the two provisions. Taking at random the seventy-seven joint resolutions passed by the 1940 Legislature and applying the provisions of the Board of Claims Acts to them it was found that only eighteen fell within the Board's jurisdiction under the 1946 Act, while an additional twenty-five claims are within the jurisdiction under the 1950 Act. All but six of the forty-three cases were highway department negligence claims. Nineteen of them fell within the

[23] The average juryman s reaction to the limitation in a claims resolution—that the legislature had "appropriated" up to that amount for damages and hence the jury should not interfere—is ofttimes unfortunately matched by the feeling on the part of some legislators that the question of liability and damages will be taken care of by the jury and that the legislature s function is to speed any and all claims bills on their way in the amount requested by the legislator who introduced them. The introducing legislator is apt to be generous in drafting the claim, since he supposes it won't cost the State any more if he claims $1,000 than when he claims $500 and it does make his constitutent realize how able (and willing) his representative is.

[24] KY. REV. STAT. secs. 176.290-176.380 (1948).

[25] 309 Ky. 553, 218 S.W 2d 406 (1949).

[26] KY. REV. STAT. secs. 44.070-44.160 (Legislative Supp. 1950).

[27] KY. REV. STAT. sec. 44.070 (2) (Legislative Supp. 1950).

[28] KY. REV. STAT. sec. 44.070 (1) (Legislative Supp. 1950).

$1,000-$5,000 range, and, interestingly enough, $5,000 was the maximum amount allowed on any claim by the 1940 Legislature.

There may well be a gradual increase in claims allowable because of subsection one, however. State agencies other than the Highway Department also act negligently, and their employees are not infrequently involved in highway accidents. They can injure claimants in other ways, and although these injuries are sometimes remedied in the course of ordinary accounting procedures, there may be a tendency under the new act to force such claimants before the Board. Since the claims are limited by the act to negligence situations there may also be a tendency to distort all sorts of injuries into negligence cases. For instance, Chapter 265 of the Acts of 1940 allowed a suit against the State for injuries suffered by an inmate of the reform school.[29] Even if the facts had made out a case of assault and battery, it could easily be pleaded as the neglect of the supervisory officials and brought within the jurisdiction of the Board.

One question that the Board may have to face under its enlarged jurisdiction is the effect of KRS 44.120, which limits awards to negligence which "would entitle claimant to a judgment in an action at law if the state were amenable to such action."[30] Suppose a charity patient in a state hospital is injured through neglect of one of the employees. Is the State liable because its immunity has been waived, or can it be contended that the State in operating a hospital for eleemosynary purposes is still free from liability to a patient on analogy to immunity of charitable institutions (ignoring the reason for the immunity)? Suppose a case in which the patient is an inmate of the State penitentiary Or suppose a prison inmate is injured while working in one of the prison shops. Or suppose a case in which the State s agents injure a citizen in the performance of some "governmental function" so that a municipal corporation would have been immune under similar facts. Is the State immune from liability on an analogy to the municipal corporation under the terms of KRS 44.120, or is the liability of private corporations the proper analogy? It might seem that the plain meaning of the statute is the interpretation allowing recovery, but often courts find the argument that the legislature actually intended to subject the state to the liability from which the courts had previously protected it so absolutely incredible

[29] KY. ACTS 1940, Chap. 265 (House Resolution 80). It declared that the inmate s injuries were "brought about" by the "wrongful acts, gross negligence, and carelessness" of the State. The actual events giving rise to the action do not appear.

[30] This section is identical with KY. REV. STAT. sec. 176.340 (1948).

that they give the narrowest possible interpretation to statutes waiving the State's immunity [31]

One further question might be raised as to the jurisdiction of the Board. KRS Sec. 44.160 states that the Act shall not be construed to deprive any person whose claim amounts to more than $5,000 from suing in the courts. Does that mean that this act does deprive persons whose claims amount to *less* than $5,000 from suing in the courts where they had a right of action save for passage of this act?[32] Such might be the implication although there are no express words making the jurisdiction of the Board exclusive. What is the effect of the Act on the right of the citizen to obtain a joint resolution entitling him to sue the Commonwealth for less than $5,000? It would seem clear that in principle the Legislature cannot by an ordinary act estop future legislatures from enacting appropriate legislation. Has it exercised its power to determine the jurisdiction of the courts and by passing a general act brought constitutional considerations into play and made special acts improper in cases involving claims for less than $5,000?

Organization of the Board

Under both the 1946 Act and the 1950 Act the membership of the Board of Claims is composed of three persons: the AttorneyGeneral and the Commissioner of Finance *ex officio* and a judge or commissioner of the Court of Appeals appointed by the Chief Justice.[33] The personnel is thus partly from the executive branch and party from the judicial branch, while its function is to supplement the work of the legislative branch in allowing claims. To find a suitable position for the board within the frame-work of the traditional doctrine of separation of powers is simple: it is an administrative board exercising "quasi-judicial" powers. To find a place on such a board for a judge of the Court of Appeals is not so simple. It would seem to be an instance in which the legislature has conferred administrative, non-judicial duties on the judicial branch.[34] On the other hand, if the

[31] *See, e.g.,* Manion v. State Highway Dept. 303 Mich. 1, 5 N.W 2d 527 (1942). *Cert. denied* 11/9/42, 317 U.S. 677, 63 S. St. 159, 87 L. ed. 543.

[32] There are some cases in which no joint resolution is necessary to enable claimant to sue the state because of the court's having made at least partly self-executing the inhibitions of KY. CONST. sec. 13 (prohibiting the taking of property for public use without just compensation). *See, e.g.,* Ky. State Park Comm. v. Wilder, 256 Ky. 313, 76 S.W 2d 4 (1934). See also Richardson, *Kentucky Board of Claims,* 35 KY. L. J. 295, 296 (1947) and cases cited.

[33] KY. REV. STAT. sec. 44.070 (1) (Legislative Supp. 1950), formerly KY. REV. STAT. sec. 176.290 (1948).

[34] KY. CONST. sec. 27 "The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments and each of them shall be confined to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

personnel of the Board were purely judicial—the statute being otherwise unchanged—it could no doubt be construed as a true judicial court exercising a proper judicial function and perfectly acceptable under the separation of powers doctrine[35] — although perhaps not lawful in Kentucky because of the inhibitions of Section 135 of the Constitution.[36]

Doctrinal objections aside, some practical objections might be made to the mingling of judicial and executive officers on the Board of Claims. One of the most difficult problems facing such a Board is that of insuring something like equal justice under law Its field is *terra incognita* and its only precedents are political logrolling in the legislature. If the Board were staffed entirely with judges they might be able to establish some sort of coherent substantive law for the Board. With changing administrative personnel, however, experience in other states would indicate that there is great danger that the adjudication will be partly by ear—and that to the ground. The choice of the Attorney-General and the Commissioner of Finance as members of the Board is open to another objection if the experience of other states which have tried the administrative practice offers any criterion. The Attorney-General and the Commissioner are important administrative officers of the Commonwealth, already holding full-time jobs and overburdened with work. There has been an almost irresistible tendency in other states for administrative officers who have had claims duties imposed upon them by the legislature to delegate these duties, as the years go by, to various members of their staffs and to give only nominal attention to the Claims Board. It also seems slightly at odds with our concepts of disinterested adjudication to have the Attorney-General sit in adjudication on a case which one of his assistants is defending,[37] although there are ample administrative precedents for this practice.

[35] Note the difference between the problem of the Board of Claims under the separation of powers doctrine and the classic problem of the first U.S. Court of Claims under the same doctrine. The first U.S. Court of Claims was held not to be a judicial body because of the lack of finality in its decisions, they being subject to both administrative and legislative review. Gordon v. U.S., 117 U.S. 697 (1965). After Congress repealed the offending section, the Court of Claims was recognized as exercising a judicial function. United States v. Jones, 119 U.S. 477, 7 Sup. Ct. 283, 30 L. ed. 462 (1886). Decisions of the Board of Claims are absolutely "final" except as they are subject to a purely judicial review.

[36] KY. CONST. sec. 135: "No Courts, save those provided for in this Constitution shall be established." This section did not prevent the establishment of numerous quasi-judicial bodies such as the Workmen s Compensation Commission (see Greene v. Caldwell, 170 Ky. 571, 186 S.W 648 [1916]) and the assessment boards (see McCracken Fiscal Ct. v. McFadden, 275 Ky. 819, 122 S.W 2d 761 [1938])—but then no judge of the Court of Appeals has been designated to sit on these bodies, which is the problem here.

[37] KY. REV. STAT. sec. 44.090 (Legislative Supp. 1950).

Having the two *ex officio* members on the Board does have the advantage from the standpoint of the State that the Board's decisions and policies are more apt to harmonize with the administration s policies. In addition, there are no additional salaries to pay, since the Act provides the members of the Board shall receive no additional compensation. The members may be recompensed for reasonable expenses and they may employ additional clerical and other help, however, and the Act makes *all* costs incident to the operating of the Board payable out of the State Road Fund. In view of the restrictive provisions of Section 230 of the Constitution,[38] as amended, one may question the payment of the entire expenses of the Board of Claims out of the Road Fund when the Board's jurisdiction is extended to include claims arising out of all state activities.

Procedure

The new act follows the old in providing for regular January, May and September sessions with such special sessions as may be necessary Powers of the Board to establish its own rules and to subpoena witnesses and administer oaths are continued.[39] The statute of limitations continues to be one year with a new saving clause covering claims arising after January 1, 1948.[40] This section not only provides for an initial two and one-half year retrospective period, but also revives a few claims barred under the limitations provision of the old act.[41] A claim which accrued on January 2, 1948 was barred on January 2, 1949 under the old act, but is revived and may be sued on any time before June 15, 1951, under the new act. Awards made by the Board against the Highway Department are payable from the Road Fund on warrant drawn by the Commissioner of Finance as under the 1946 Act, and the new act makes further provision for awards against other departments and agencies of the State.[42] Awards of the court against the State are normally almost self-executing, but the 1950 Act, like its predecessor, provides for enforcement by the Franklin Circuit Court.[43] The section might be useful in recovering costs against an unsuccesful

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[38] KY. CONST. sec. 230: "No money derived from excise or license taxations relating to gasoline (etc.) shall be expended for other than the cost of administration, statutory refunds and adjustments, payment of highway obligations, costs for construction, reconstruction, rights-of-way, maintenance and repair of public highways and bridges, and expense of enforcing state traffic and motor vehicle law."

[39] KY. REV. STAT. sec. 44.080 (Legislative Supp. 1950).

[40] KY. REV. STAT. sec. 44.110 (Legislative Supp. 1950).

[41] KY. REV. STAT. sec. 176.330 (1948).

[42] KY. REV. STAT. sec. 44.100 (Legislative Supp. 1950).

[43] KY. REV. STAT. sec. 44.130 (Legislative Supp. 1950).

claimant or in helping to settle the doubts of a Commissioner of Finance reluctant to pay a dubious claim without a court order as distinguished from a mere administrative award.

The new act also contains provisions of the old act for a statutory appeal to the Franklin Circuit Court and thence to the Court of Appeals.[44] The appeal is on the record, no new evidence being allowed except on the question of fraud or misconduct of some person in the Board hearing. The scope of review is limited to whether or not the Board acted without or in excess of its powers; the award or judgment was procured by fraud; the award or judgment was not in conformity to provisions of the Board of Claims Act; and whether the findings of fact support the award or judgment. The latter provision allows the court to set aside the award only if it is not supported by substantial, probative evidence.[45]

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[44] KY. REV. STAT. sec. 44.140 (Legislative Supp. 1950).
[45] See Shrader v. Comm., 309 Ky. 553, 218 S.W 2d 406 (1949).