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KENTUCKY BOARD OF CLAIMS

By JAMES R. RICHARDSON*

The 1946 session of the General Assembly of the Commonwealth of Kentucky passed Senate Bill 1161 entitled "An Act creating a Board of Claims." This act has now been indexed as Section 176.290-.380 of the Kentucky Revised Statutes.\(^2\) It is an act which is of timely interest to the legal profession of Kentucky and to all who use the state maintained highways of Kentucky, or who own property adjoining such highways.

The act sets up a Board of Claims composed of a judge or commissioner of the Court of Appeals, the Attorney General and the Commissioner of Finance. The Board is empowered to hear proof and compensate persons for personal injury or property damage resulting from negligence in the construction, reconstruction, maintenance and policing of highways by the Department of Highways. The jurisdiction of the Board is further limited to claims where the amount in controversy does not exceed the sum of One Thousand ($1,000.00) Dollars, exclusive of interest and costs.

The reason as to why it was necessary for an act of the legislature to permit individuals to sue the State finds its basis in the common law conception of immunity, whereby a state, by reason of its sovereignty, is immune from suit, and it cannot be sued without its consent in its own courts,\(^3\) the courts of a sister state,\(^4\) or, by an individual in the federal courts.\(^5\) The state's immunity from suit is given expression by section 231 of the constitution to which reference is made hereinafter.

Various foundations for the principle upon which this exemption of liability from suit is based have been given, the broader reason being that it would be inconsistent with the very idea of supreme executive power, and would encumber the performance of public duties.\(^6\)

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\(^1\) Ky. Acts 1946, c. 1189, Sec. 3(b).


\(^3\) Ky. State Park Com. v. Wilder, 260 Ky. 190, 84 S.W. 2d 38 (1935).


\(^6\) McClellan v. State, 35 Cal. App. 605, 170 Pac. 662(1918).
To say that the state is immune from suit is a broad statement and broadly speaking this is true. However, there are certain limitations on such immunity.

Section 13 of our constitution provides that no man's property shall be taken or applied to public use, without the consent of his representatives and without just compensation being previously made to him.

Section 242 which reserves the right of eminent domain to the state also provides for just compensation to the owner for property taken, injured or destroyed by those invested with the privilege of taking property for public use.

In *Lehman v. Williams et al.* the plaintiff relied on the above two sections of the constitution and, without securing permission, sued the Department of Highways through its commissioner for the alleged wrongful diversion of water onto his land during the construction and in the maintenance of a state highway adjacent to his land.

The court held that there was a taking or injuring of plaintiff's land within the meaning of sections 13 and 242 of the constitution.

In another very recent case the plaintiff had secured permission to sue the state by means of a resolution for damages to his land, due to a cut and fill being made adjacent to his land when the highway was reconstructed. He was forced to build a retaining wall to prevent rocks and dirt sliding onto his property. Although this suit was by permission, the court showed this was unnecessary when it said "There was a taking or injuring of appellee's property within the meaning of the constitution."

The cited cases are not a departure from previous decisions, but are supported by a long line of authority cited therein. From these decisions we may adduce the rule that, where private property is taken for public use, or where there is a trespass which amounts to such taking, the Commonwealth's immunity from suit is waived.

In considering such a piece of legislation, questions naturally arise as to the necessity for, or desirability of it, and

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7 301 Ky. 752, 193 S.W. 2d 159 (1946).
8 Commonwealth et al. v. Tate et al., 297 Ky. 826, 181 S.W. 2d 418 (1944).
the situation, if any, which it will relieve. The Department of Highways operates over three thousand (3000) pieces of equipment, from bulldozer to jeep, and maintains roads in the hundred and twenty counties of the state. Accidents involving damage to real property, personal property and personal injuries are inevitable. The writer knows from personal experience that these accidents are not few and that hardships often result due to the state not being amenable to suit in most instances as shown above.

Heretofore one who suffered damages due to the negligence of a Highway Department employee was subject to the pleasure of the General Assembly, which meets once in two years, in passing a resolution granting permission to sue. Section 231 of the Kentucky Constitution provides that "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."

Let us consider a practical situation under the procedure followed before the Board of Claims came into existence. Suppose you are operating a motor vehicle on a state maintained road when struck by a state truck, which is clearly at fault, causing several hundred dollars damage. The Department of Highways would like to settle, as is often the case, but its hands are tied. Section 230 of the Kentucky Constitution provides that "No money shall be drawn from the State Treasury, except in pursuance of appropriations made by law." You would then bear your own loss until the state legislature meets in January, 1948, at which time you would prevail upon your representative to introduce in your behalf a resolution to sue and hope for its passage.

At the 1946 session of the General Assembly, 185 resolutions were introduced. Of this number approximately 150 authorized suits against the various state agencies; 58 were claims against the Department of Highways and 16 of them became law. The odds were not in favor of the claimant.

In these days of wide travel many out-of-state motorists use our highways and our files reveal that they are at times involved in accidents with highway equipment. Where the damage is small, they stand their own losses rather than attempt

*Legislative Digest, Vol. 32, No. 48.
to follow the tedious and, in their cases, impractical procedure of securing the passage of a resolution. As will be shown, such persons are not without redress under the rules of procedure as promulgated by the new Board of Claims.

These resolutions are mentioned primarily for the bearing they have on the individual’s right to sue which is of immediate concern. However, the resolutions themselves raise two questions which are of more than passing interest. Firstly, in Commonwealth v. Daniel it was held that a resolution permitting a motorist, who collided with a Department of Highways’ truck, to sue for any amount not exceeding $6,000.00, was not violative of the constitutional provision prohibiting the General Assembly from limiting the amount to be recovered from injury to person or property. The court said that the sovereign, waiving its immunity from suit, can impose such limitations as it sees fit. Secondly, in the case of Carr v. Jefferson County it was held that the General Assembly lacked authority to pass a resolution permitting an individual to sue a county for the tort of one of its servants. It was agreed that, as the county was an arm of the Commonwealth, it came within the provisions of section 231 of the Kentucky Constitution. The court did not rebut this, but held that the resolution offends section 59 of our constitution which prohibits the passage of local or special acts.

The question may well be put as to why a resolution to sue the state is not a special act. The court perhaps reached the correct conclusion, which should be applicable to suits against counties as well, but its method in reaching the conclusion does not seem sound to the writer. The court reasoned as follows:

"In Commonwealth v. Haly this court, in replying to an argument that a joint resolution of the General Assembly authorizing an individual to sue the state contravenes section 59 of the constitution and, therefore, was special legislation, and such authority could be given only by a general law, stated this had been the policy of the General Assembly for a century and we would not overturn it." The Haly case was decided in 1899, so, in the instant case, it was set forth that, as the policy was now

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10266 Ky. 285, 98 S.W. 2d 987 (1936).
Ky. Const., Sec. 54.
275 Ky. 685, 122 S.W. 2d 482 (1938).
106 Ky. 716, 51 S.W. 430 (1899).
one hundred and fifty years old, the court did not feel justified in overturning it.

Other jurisdictions have found different, and probably sounder, reasons for permitting such resolutions in the fact of constitutional prohibitions against special and local laws, "Generally constitutional provisions against special and local laws do not prohibit a statute from granting a single individual the right to sue the state on a right which he previously possesses, for mere authority to assert a right is not a special favor or advantage productive of inequality such as is condemned by the constitution." 4

It can readily be seen that the Board of Claims will reduce the number of resolutions before the General Assembly. This is a costly procedure, taking up much valuable time of legislators who have a very limited time to give to other and more weighty matters. This waiver of immunity constitutes a wide departure from former procedure and tradition for this state. It is by no means an innovation. Many states, including New York, Massachusetts, Illinois, West Virginia, Indiana, Ohio and Tennessee have Claims Boards of a similar nature.

As in the case of resolutions there is a constitutional provision which could conceivably affect the legality of the Kentucky Board of Claims. Section 135 of the Kentucky Constitution is as follows: "No courts, save those provided for in this constitution shall be established."

The Kentucky constitution provides for the Court of Appeals, the various Circuit Courts, County Courts and Police Courts. The question is then whether or not this Board of Claims is a new court and consequently repugnant to the constitution. The word "Court" has been avoided in the act setting up the agency for hearing claims. Naturally use of the word "Board" will not take the agency out of the category of courts, if it is, in fact, a court.

It is extremely doubtful that objections to the legality of the Board of Claims will be raised, as it will undoubtedly be generally recognized as a constructive adjunct to our system of jurisprudence. Aside from what is thought to be desirable aspects of the act, should this question arise as regards disburse-

4 59 C.J. Sec. 458, p. 303.
ments from the State Treasury by the Board, it is believed that
an affirmative answer to the Board's constitutionality is found
in the case of Greene v. Caldwell et al. Here the Workmen's
Compensation Board of Kentucky was attacked on various con-
stitutional grounds, one of which was that the Board was a new
Court in contravention of Section 135 of the Kentucky
Constitution.

In meeting this latter objection, the Court said in effect
that the parties voluntarily put themselves before the Board;
that the Board's decision was appealable; that, as a matter of
fact, it was merely an agency created by the Legislature for the
purpose of assisting the courts in preliminary findings of fact;
and that the Board merely acts as a board of arbitration from
whose decision they may appeal to the courts if dissatisfied.
The above seems fully applicable to the Board of Claims itself,
when one considers the act creating it.

The Board of Claims, as previously stated, consists of three
members, and by law holds regular meetings on the second Tues-
day in May, November and January. These meetings are held
in the auditorium of the New State Office Building in Frank-
fort. Claims must be presented to the Board by filing a petition
within one year from the time it first occurred, provided that
claims arising between January 1, 1945, and June 19, 1946, must
be presented to the Board prior to second Tuesday in January,
1947.

The Board at its regular meetings calls the docket and sets
claims for hearing or enters order of award where judgment is
confessed. The Board is considered as in continuous session to
enter orders and awards by agreement of the parties. The Board
has appointed a referee, and may appoint special referees, to
hear proof either in person or by deposition. Orders of the
Board are enforceable by filing an authenticated copy of the
award with the clerk of the Franklin Circuit Court. Appeals
may be taken to the Franklin Circuit Court, where the amount
in controversy, exclusive of interest and costs, is over $50.00.
Appeals may be taken from the Circuit Court to the Court of
Appeals where made reviewable by the Civil Code of Practice.
Copies of Rules of Practice and Procedure may be had by writ-
ing the clerk of The Board.

15 170 Ky. 571, 186 S.W. 648 (1916).
At this writing there have been seventeen (17) claims filed before the Board ranging in amounts from $200.00 to $1000.00. They involve both property damage and personal injury from alleged negligence, such as motor vehicle collisions, burning of hay on lands adjoining the right of way, and rocks falling onto the highway from the right of way.

It is believed not unlikely that this act will prove its worth to the point that some future session of the General Assembly will widen its scope to include all branches of the state government. That this comment is not out of line with the present trend is shown by the fact that our Federal Government may now be sued by an individual for a negligent or wrongful act or omission of any employee acting within the scope of and course of his employment. This law is part of the Legislative Reorganization Act of 1946 and is known as the "Federal Tort Claim Act."16

An interesting part of this new act is that, where claims do not exceed $1000.00, the agency involved is authorized to negotiate and make settlements. In cases where the amount in controversy exceeds $1000.00, the Claim must be filed in Federal District Court with service on the United States Attorney.

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16 Public Law 601, Title IV.