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Claims Against the State of Kentucky

By PAUL OBERST* and THOMAS LEWIS**

Introduction

The Commonwealth of Kentucky is immune from suit in its own courts except as the legislature consents. This is a general proposition of law that has been accepted from the beginning of our history as a state. The first Constitution provided that the General Assembly should direct by law in what manner and in what courts the Commonwealth should be sued,¹ but in 161 years it has never done so.² As a result, when the Commonwealth breaches its contract with the citizen or injures him by the negligent operation of its motor vehicle he cannot bring suit against the government as if it were an individual or a corporation. The immunity exists because the Commonwealth is a sovereign, as every lawyer knows; his client, the injured citizen, seldom thinks that this makes much sense.

There are breaches in the wall of immunity. In the absence of any general waiver by the legislature of the Commonwealth's immunity, there have been four legal devices by which some injured persons have been able to obtain redress against the Commonwealth. They are:

- (1) The Judicial Suit against "Officers" and "Agencies"
- (2) The Judicial Suit for Compensation for Having Taken (Reverse Eminent Domain)
- (3) The Special Act of the Legislature
- (4) The Administrative Board of Claims

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¹ Ky. CONST. Art. VIII, Sec. 4 (1792). The provision in the Constitution of 1797 is almost identical. Ky. CONST. Art. VI, Sec. 6 (1797).

² "That such a law might be enacted general in its terms, and applicable to every controversy between the sovereign and subject, may be conceded. We understand such a law does exist in some of the States. But the General Assembly of this State has never exercised its right to pass such a law, although clothed by express constitutional authority to do so, it has persistently declined to exercise the authority, and enact such a law." *Commonwealth v. Haly*, 106 Ky. 716, 718, 51 S.W. 430 (1899). See also *Daniel's Adm'r. v. Hoofnel*, 287 Ky. 834, 155 S.W. 2d 469 (1941).

All four of these remedies exist today. They are partly overlapping and partly complementary, and taken together they constitute a considerable breach in the defense of governmental immunity. It is the purpose of these articles to examine the immunity doctrine and then consider each of the above remedies. An effort will be made to describe the availability and scope of each remedy and the procedural problems arising under it for the practical information of the bar. In addition some criticism of the cases and comparison of legislative and administrative procedures will be made in the interests of improving the administration of justice.

This first article deals with the origins and basis of the doctrine of commonwealth immunity and the use of suits against "officers" and "agencies" to circumvent that immunity. The second article, which will be published in the January issue, will deal with the use of "reverse eminent domain" suits to obtain damages against the Commonwealth for trespass to land. The third article, which will appear in the March issue, will deal with the use of special acts of the legislature and claims in the administrative Board of Claims to recover damages—chiefly in tort—against the Commonwealth. It is believed that the series will give a complete picture of the available remedies against the Commonwealth, such as they are, and in addition by their very inadequacy point to the need for developing a well-thought-out scheme of governmental responsibility in the Commonwealth.

The Legal Basis of the Immunity of the Commonwealth

The immunity of the state from suit is a well established concept of public law in the United States. The justification which was ordinarily given for it in the early cases was historical: since the King was not suable in the ordinary courts in England at the time of the Revolution, the sovereign states were therefore immune from suit in their own courts without their consent.³ It is probable that the real reason for the almost universal acceptance of this reasoning was the fear that the new and financially shaky state governments might be overwhelmed with judgments.⁴

³ Borchard, *Governmental Responsibility in Tort*, 36 YALE L. J. 1, 23 (1926).

⁴ Gellhorn and Schenck, *Tort Actions Against the Federal Government*, 47 COL. L. REV. 722 (1947).

The Kentucky courts did not have to work out the Commonwealth's immunity by the use of English judicial precedents. A ready basis for immunity was found in the provisions of the first and second Constitutions that "the legislature shall direct by law in what manner and in what courts, suits may be brought against the Commonwealth."⁵ Since the Constitution provided that the legislature should direct in what manner the Commonwealth could be sued, the court could hold that the Constitution by implication prohibited any suit without legislative direction.⁶ The word "shall" was treated as merely "directory," not mandatory, and the provision was not "self-executing."⁷ Subsequently, in the Constitutions of 1850 and 1890, the language of the provision for legislative direction of suits was changed from "shall" to "may," making the wording purely permissive.⁸ The Debates of the 1890 convention make it clear that the convention deliberately chose the permissive language so that the legislature would be left free to prefer Kentucky creditors over "these foreigners" at its absolute discretion.⁹

While the immunity rule has most often been referred to the provisions of the Constitution, the Court of Appeals has also recognized sovereign immunity as a part of the common law of the Commonwealth. Perhaps the strongest statement is in *Commonwealth v. Wilder*, where the court said: "This immunity came down to us as a part of the fundamental common law and is only indirectly contained in the Constitution."¹⁰

⁵ KY. CONST. Art. VIII, Sec. 4 (1792); KY. CONST. Art. VI, Sec. 6 (1797).

⁶ See *Divine v. Harvie*, 23 Ky. (7 T. B. Mon.) 439 (1828): "Although the constitution has declared that 'The General Assembly shall direct by law in what manner and in what courts suits may be brought against the Commonwealth', yet that body has never complied with that direction; but has hitherto kept in their own power the granting of justice to creditors of the State on petition. This voluntary grant of the State to individuals is the only judgment and execution to which the State is subject."

⁷ Cf. the very different treatment given the provision that property may not be taken without just compensation, which is the "self-executing" origin of the reverse eminent domain suits considered in the second article of this series.

⁸ KY. CONST. Art. VIII, Sec. 6 (1850); KY. CONST. Sec. 231 (1890).

⁹ IV DEBATES, CONSTITUTIONAL CONVENTION 1890, pp. 4700-4701. See Oberst, *The Board of Claims Act of 1950*, 39 Ky. L. J. 35, 36 (1950).

¹⁰ *Kentucky State Park Commission v. Wilder*, 260 Ky. 190, 192, 84 S.W. 2d 38, 39 (1935). See also *Zoeller v. State Board of Agriculture*, 163 Ky. 446, 173 S.W. 1143 (1915) which describes immunity of the state as "an elementary principle of law".

The "Practical" Reasons for Immunity

The Court of Appeals has tended to give the "practical" rather than the "historical" reason for the immunity when it discusses the basis of the rule. In *Divine v. Harvie*,¹¹ the earliest case involving the immunity of the Commonwealth, the court refused to allow the plaintiff to satisfy a judgment against his debtor by attaching funds which the state had appropriated to the debtor. The court pointed out that

Government, as a sovereign, may contract with whom she will, and the credit, which she gives by her obligation, may be, and frequently is, the only credit which her contractor possesses. If that credit can be directed to other debts, instead of supplies of the government, against the will of her contractors, injury to the government and disgrace to the officer may be the consequence. It would be a mortifying circumstance, to see a member of the legislature rendered unable to pay his sustenance, while attending on its session, because a creditor who never dealt on the credit of the fund should by injunction, detain his compensation, on which he obtained credit with his host.¹²

Where a "charitable" institution of the state was sued, the court denied liability with a neat blending of the doctrines of sovereign immunity and the diversion of charitable trust funds. *Williamson v. Louisville Industrial School of Reform*¹³ involved an institution which the court described as "an agency of the State . . . maintained by taxation and state aid," but the court placed its reliance on the trust fund theory, saying

If the funds of these institutions are to be diverted from their intended beneficent purposes by law suits and judgments for damages for negligent or malicious servants, their usefulness—indeed their existence—will soon be a thing of the past.¹⁴

As recently as 1930, in *Taylor v. Westerfield*,¹⁵ Judge Dietzman approved the exemption of the sovereign from liability as "sound and unobjectionable," and said that "if [taxes] could be

¹¹ 23 Ky. (7 T. B. Mon.) 439 (1823).

¹² *Id.* at 444.

¹³ 95 Ky. 251, 24 S.W. 1065 (1894).

¹⁴ *Id.* at 253, 24 S.W. at 1066.

¹⁵ 233 Ky. 619, 26 S.W. 2d 557 (1930).

diverted to the payment of damage claims the more important work of government . . . would be seriously impaired, if not totally destroyed.”¹⁶ One of the baldest statements of the “practical” reason behind the immunity rule appeared in the same case. Rejecting the line of cases extending the sovereign immunity to independent road contractors, Judge Dietzman remarked that those cases were based on a public policy that was in short just this:

In order for the public to get its work done as cheaply as possible, it is better for the individual to suffer the damage which may be caused him in the negligent prosecution of the work than that the public should be called upon to sustain it by having to pay a contractor more to get the work done in order that he may protect himself against loss by reason of such claims.¹⁷

A notion that it is better for an individual to bear an injury inflicted on him by the wrongdoing of the state than that the cost of government should increase a penny does not comport with present-day ideas of equal justice under law. In an era of \$70,000,000 budgets the picture of state institutions wrecked by a few tort claims seems to be a little overdrawn, and the threat that government might halt because a member of the legislature had been thrown out of his lodgings when his *per diem* was attached is even more unrealistic.¹⁸

Suits Against “Officers” and “Agencies”

Some relief against the immunity of the Commonwealth has been afforded by suits against state officers and agencies in the ordinary courts. In these cases the Commonwealth is not named as a party defendant, the officers or agencies being sued instead, although the interests of the state may be involved. The question of the *personal* liability of public officers for tort damages will not be considered in this series.¹⁹ Our present concern is the extent

¹⁶ *Id.* at 621, 26 S.W. 2d at 558.

¹⁷ *Id.* at 622, 26 S.W. 2d at 558.

¹⁸ So unrealistic that the legislature has expressly allowed garnishment and attachment of official salaries. See p. 89, *infra*.

¹⁹ It has been generally said that an officer who commits a tort is individually liable as if he were a private individual, but that is far from true. Not only do we find complete immunity of the judiciary, but even officers performing administrative functions have considerable immunity; e. g., an officer is not liable for

to which suits will lie against officers and agents to compel or enjoin official actions, including the payment of the state's money.

The first Kentucky case in which the immunity of the Commonwealth was considered was on its face a bill in equity against officers of the state. In *Divine v. Harvie*,²⁰ a creditor sought to subject to satisfaction of a judgment money appropriated to his debtor by the General Assembly. His creditor's bill ran, not against the Commonwealth as such, but against the Auditor and Treasurer. The court held that the bill could not be maintained against the state nor could it be sustained as a bill against the Auditor and Treasurer since there was no claim against them as individuals.

The court was careful to distinguish the case from the famous United States Supreme Court case of *Osborn v. Bank of the United States*,²¹ the leading case on immunity of the states.²² In that case the Supreme Court affirmed a decree ordering the Treasurer of the State of Ohio to pay back certain money illegally collected from the Bank²³ for an unconstitutional tax.²⁴ The Court rejected contentions of the State of Ohio that it had a direct interest in the controversy and that the suit was substantially one against the state. It observed that the state was not a party of

torts of his subordinates, *Ketterer's Adm'r v. State Bd. of Control*, 131 Ky. 287, 115 S.W. 200 (1909). Where the law imposes personal liability on the officer the result is rather unsatisfactory from the standpoint of the individual, the officer and the public. See GELLHORN, *ADMINISTRATIVE LAW—CASES AND COMMENTS* 297 (2d ed. 1947).

²⁰ 23 Ky. (7 T. B. Mon.) 439 (1828).

²¹ 22 U. S. 738 (1824).

²² The question in the *Osborn* case was immunity from suit in federal courts under the Eleventh Amendment rather than common law immunity generally, but little is made of this distinction in the cases.

²³ The state of Ohio had imposed a tax of \$100,000 on the bank. When the bank refused to pay, Osborn, the State Auditor, and Harper, his agent, collected the sum by force from specie in the vaults of the bank as the statute directed, and delivered the money to Curry, the State Treasurer. Curry was succeeded by Sullivan. In a suit by the bank, the Circuit Court issued a decree against all three officials, directing them to refrain from enforcing the Act and to restore the money to the bank. The State Treasurer refusing, he was committed for contempt and on a writ of sequestration commissioners of the Court took the keys of the Treasurer and entered the Treasury and removed \$98,000. I WARREN, *THE SUPREME COURT IN U. S. HISTORY* 529-530, 533-534 (rev. ed. 1928).

²⁴ The act was passed on Feb. 8, 1819, the tax to be levied Sept. 15, 1819. *McCulloch v. Maryland*, 17 U. S. 316 (1819) holding state taxes on the bank invalid was handed down March 6, 1819. See I WARREN, *THE SUPREME COURT IN U. S. HISTORY* 511, 528 (rev. ed. 1928).

record, and then treated the suit as one against an individual trespasser,²⁵ rather than against the state or its official.

If one compares the Kentucky garnishment case with the Ohio bank case, he might feel that Ohio had more real interest in the dispute over \$100,000 in taxes lodged in her treasury than the State of Kentucky had in the garnishment of a small sum of money held for payment to a contractor. But that would ignore the whole "principle" underlying the cases—the distinction between authorized acts and unauthorized acts, and between official action and unlawful trespass.

That this principle afforded, or could afford, any satisfactory basis for drawing a line between cases of suability and nonsuability is doubtful.²⁶ Certainly subsequent Kentucky cases which have attempted to perpetuate this distinction draw a rather uncertain line between permissible suits against officers and suits against officers which are forbidden because they are essentially attempts to evade the rule against nonsuability of the Commonwealth. The "rule" as formulated by Judge Carroll is as follows:

. . . a suit will lie against the agents of the State to compel them to do something the State authorizes them to do or restrain them from doing something that the State does not authorize them to do, when it is necessary to compel or restrain, as the case may be, to prevent injury or injustice to the complaining party.²⁷

²⁵ *Osborn v. Bank of the United States*, 22 U. S. 738, 868 (1824). The Court, in an opinion by Chief Justice Marshall, held that since the state of Ohio was not a party on the record, the suit was not one against the state "in the view of the Constitution." The Court having jurisdiction in a suit against the officers, the real question was said to be whether they had a real interest or were only nominal parties. The Court considered the case as one in which an individual was in possession of certain money of the bank, kept separate and apart in specific form. The money had been obtained by unlawful trespass, since "defendants could derive neither authority nor protection" from the unconstitutional statutes, and a decree was proper to prevent the irreparable injury which would occur if the defendants were allowed to mingle the specific funds with the money in the Treasury. Thus the action was treated as one between two citizens in which the state was attempting to intervene, and the intervention was denied because the state could show no legal interest. The unconstitutionality of this statute was used in two ways—to deprive the officer of the immunity arising from any official character of his acts and to deprive the state of any lawful interest in the controversy.

²⁶ The "principle" reminds one of the primitive efforts of the courts to control administrative authority over property by the use of actions for conversion and trespass. The question on this judicial review of administrative action was not one of "reasonableness" or "substantial evidence" but "did the horse in fact have glanders?" *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100 (1890).

²⁷ *Reliance Mfg. Co. v. Bd. of Prison Comm'rs*, 161 Ky. 135, 147, 170 S.W. 941, 946 (1914).

It is doubtful whether the "rule" is very helpful. Perhaps Judge Carroll was being more candid when he said:

Many cases have been written on this subject, and a number of the leading ones have been called to our attention by counsel as supporting their respective contentions. The line of suability and non-suability in many of these cases is very obscure, and it may be admitted that it is often difficult to make a substantial distinction between cases in which the right to sue has been allowed and cases in which it has been denied. Generally, however, the way is endeavored to be simplified by the facts of each particular case, and the distinctions as a rule turn on the construction given the facts.²⁸

Construing the facts of each particular case may "simplify the way" for the court in making its decision but it does not advance legal analysis very far. Despite Judge Carroll's warning of the difficulties of the task, it is hoped that something may be gained by attempting to classify the situations in which suits against officers have been permitted and those in which they have been dismissed as essentially suits against the state. Several lines of classification suggest themselves. The cases might be classified according to remedy: mandamus, prohibition, injunction, mandatory injunction, specific performance, damages, or equity action for restitution or reformation, all of which have been used. They might be classified according to the officer who is made defendant: auditor, treasurer, governor,²⁹ various state boards and commissions, county officials, municipal officials, school officials, all of whom have been sued. It is believed, however, that it will be more useful to classify the cases according to the substantive nature of the claim—i.e. whether it is a claim sounding in contract, tort, or quasi-contract. Among the advantages is the fact that it focuses attention on the problem of the scope of liability of the nonsuable state which is our purpose here and helps to distinguish all those cases of review of unconstitutional or unreasonable administrative action in enforcing

²⁸ *Id.* at 144, 170 S.W. at 944.

²⁹ In some states the governor is immune from suit, but the Court of Appeals has held that the governor of Kentucky is suable in a number of cases. *Cochran v. Beckham, Gov.*, 28 K. L. R. 370, 89 S.W. 262 (1905); *Traynor v. Beckham*, 25 K. L. R. 284, 74 S.W. 1105 (1903); and see *Gordon v. Morrow, Gov.*, 186 Ky. 713, 218 S.W. 258 (1920); *Haley v. Cochran*, 31 K. L. R. 505, 102 S.W. 852 (1907).

regulatory or tax statutes which are more properly part of the subject of ordinary administrative law—judicial review of administrative action.³⁰

Contract Obligations of the Commonwealth

The Commonwealth may enter into contractual relations by an express contract between the individual and officials acting for the state. In addition, purchase of materials and compensation of state employees for their services by salary and fees give rise to relationships similar to that of contract implied in fact.³¹ Some relief has been afforded in contract cases through the use of suits against officers to compel them to perform state contracts. The legal legerdemain by which this is accomplished is the theory that the state has not breached its contract; some officer is unlawfully failing to carry out duties and an action against him to compel him to act is not a suit against the state at all.³² An even more tenuous distinction between *creating* liability and *enforcing* liability was advanced in *Board of Councilmen v. State Highway Commission*.³³ There the court allowed an action for mandamus to compel the Commission to carry out a contract to maintain a street, saying:

It is to be observed that in cases of this kind a distinction is drawn between suits seeking to create or increase the liability of the state, and suits seeking to compel administrative officers to satisfy a liability *theretofore* created—one to establish a right and the other to satisfy a right already created under law.

In the instant case, according to the allegation of the petition, the liability of the Commonwealth was created by the contract. It is now a matter of enforcing the contract.³⁴

³⁰ There is no clear-cut line between the subject of claims against the state and scope of judicial review of administrative action, and sometimes it gets down to two ways of looking at the same thing. Cf. footnote 26 *supra*: When a health officer is sued for conversion for summary destruction of property it may be regarded as a suit against an officer or as a form of judicial review of administrative action. Judicial review of administrative action is usually concerned with the control of administrative discretion—but claims against the state may be, too.

³¹ A third situation which may arise—a quasi-contract claim for goods or services rendered in the absence of any contract, express or implied in fact—is considered under the head of restitution, *infra* p. 79.

³² *Baldwin v. Comm'rs of Sinking Fund*, 74 Ky. 417 (1875).

³³ 236 Ky. 253, 32 S.W. 2d 1008 (1930).

³⁴ *Id.* at 260, 32 S.W. 2d at 1011.

Mandamus against the officer is not the only remedy. In *Reliance Mfg. Co. v. Board of Prison Commrs.*,³⁵ the court sustained the right of a contractor to an injunction against the Prison Board which had refused to renew a contract according to its terms, and in *Baldwin v. Commrs. of the Sinking Fund*,³⁶ specific performance was granted to compel the Commissioners to carry out a contract of sale and deliver specific stock held by them.

In none of these cases, of course, was there a judgment for damages for breach of contract, payable out of the State Treasury, and the fictitious distinction between suits against officers and suits against the state could be maintained. Even the fiction broke down in the second *Frankfort Councilmen* case. The action was originally a mandamus action to compel the Highway Commission to carry out a contract to construct a street, but after the city had constructed the disputed street itself the action was amended to a claim for the sum of \$50,000 for that portion of the cost which the Highway Commission had agreed to bear. The trial court dismissed, but the Court of Appeals reversed, saying the action was not a suit for damages but was brought to compel state officers to perform a ministerial duty required by statute.³⁷ On remand the trial court entered a judgment requiring the Highway Commission to pay \$50,000, which was affirmed by the Court of Appeals.³⁸ Judge Dietzman in a dissenting opinion argued that the judgment did not enforce the contract but awarded damages for the breach.³⁹

If the individual and officials acting for the state get into a dispute over the state's duty to pay money on such an obligation, the initial remedy is the administrative one of resort to the finance officers of the state. The individual may submit his claim as a statement of indebtedness on the proper form and if the Department of Finance finds it correct it will issue a warrant.⁴⁰ Where there is a disputed claim against the state or any budget unit

³⁵ 161 Ky. 135, 170 S.W. 941 (1914).

³⁶ 74 Ky. 417 (1875).

³⁷ *Bd. of Councilmen of City of Frankfort v. State Highway Comm.*, 236 Ky. 253, 32 S.W. 2d 1008 (1930).

³⁸ *State Highway Comm. v. Bd. of Councilmen of the City of Frankfort*, 245 Ky. 799, 54 S.W. 2d 315 (1932). The decision was 4-3, with Dietzman, Thomas and Rees dissenting.

³⁹ *Id.* at 817, 54 S.W. 2d at 324. Judge Dietzman pointed out that the street which the city built was not the street that the Highway Dept. had contracted to build—nor was it in fact anything like it.

⁴⁰ KY. REV. STAT. 45.210.

thereof, the Department of Finance is authorized to compromise, with the approval of the Attorney-General.⁴¹ If no compromise can be reached which is satisfactory to the claimant, he is then faced with the rule that no action may be maintained against the Commonwealth without its consent. He may, however, bring suit in the form of an action against the accounting officers of the Commonwealth to compel them to issue a warrant to pay the claim.⁴² This is not an action against the Commonwealth for "damages" authorized by the General Assembly, but is a suit against an officer to compel him to perform an official duty to satisfy a money obligation of the state.⁴³ The chief problem for the claimant here has been to make out a case of "plain duty" of the officer to perform a "ministerial act," instead of to exercise discretion. In the only case⁴⁴ found in which the claimant sought to compel payment for goods furnished the state, the amount of the claim had been fixed by the Secretary of State pursuant to statute. Since the Auditor's duty was merely ministerial, mandamus was allowed.⁴⁵

Mandamus to compel payment of officers' salaries and fees has been more common. In the leading case of *Page v. Hardin*,⁴⁶ the court allowed a mandamus against the Auditor to compel payment of claimant's salary, saying that the Auditor had no discretion to issue or not issue a warrant to pay an official salary. The only question is who is the lawful officer, which is a matter of law and a proper question for the judicial branch.⁴⁷ Of course,

⁴¹ KY. REV. STAT. 45.220.

⁴² Prior to 1934, the Auditor had the duty of drawing warrants to satisfy claims (G. S. Ch. 15, Art. 1, Sec. 1; Carroll's K. S. 304). In 1934 the claims function was transferred to the Department of Finance, Ky. Acts 1936 (1st. ex. sess.), Ch. 1; KY. REV. STAT. 42.030, 44.010.

⁴³ Cf. *Hager, Auditor v. Sidebottom*, 130 Ky. 687, 691, 113 S.W. 870, 871 (1908), where the court said: "The suit is practically one against the State. The Auditor was defending for the State."

⁴⁴ *Lindsey v. Auditor*, 66 Ky. 231 (1867).

⁴⁵ The Auditor's duty must be equated to the duty of the Dept. of Finance. The Auditor's duty under the current legislation is post-audit. KY. REV. STAT. 43.010 et seq.

⁴⁶ *Page, Second Auditor v. Hardin*, 47 Ky. 648 (1848).

⁴⁷ *Id.* at 654. An exceptional case of an unliquidated salary claim was *Gordon v. Morrow*, 186 Ky. 713, 218 S.W. 258 (1920), where the claimant had been employed as a special attorney to collect inheritance taxes. The amount due in attorney's fees was unascertained and the court said that mandamus could not lie to compel payment of an undetermined "fair" fee. While denying relief by mandamus, the opinion of the court suggested an ingenious alternative: the discharged attorney should move the trial court to refuse to allow substitution of another lawyer as state tax attorney of record until the state had paid his claim for attorney's fees.

other legal questions have arisen in salary cases, but they have also been disposed of as "matters of law" for the court.⁴⁸ Even where approval of the Governor was a condition of payment, his approval was said to be a ministerial act.⁴⁹ In *Reeves v. Talbot*,⁵⁰ the court held that the Commissioner had discretion to reject a request for travel authorization, subject to review for abuse of discretion. It found that he had not abused his discretion in rejecting the request but ordered him to issue his warrant because his refusal had been based on a misconstruction of law. This case makes it clear that mandamus will lie to compel officers to carry out more than their "plain duty."

Where the legislature has appropriated no funds or the funds upon which the claim is made have been exhausted, it would seem that the Auditor could certainly have no "plain duty" to pay the claim,⁵¹ whatever the equitable considerations might be. In *Hager v. Shuck*,⁵² the court denied a salary claim in excess of the departmental appropriation, saying that the Auditor cannot be compelled to pay a claim unless the legislature had expressly appropriated the money.

Two interesting cases have thrown some doubt even on this rule, however. In *Talbot v. Burke*,⁵³ the court granted mandamus for expenses of the County Assessor where the legislature had authorized the expense but had failed to provide funds "through error." In *Miller Comm'r. of Finance v. Quertermous*,⁵⁴ the legislature had failed to appropriate sufficient funds for the support of the state welfare institutions. The Commissioner of Welfare filed a suit for mandamus to compel the approval of warrants for necessary expenses and payment out of the General Fund. The

⁴⁸ *Smith v. Coulter, Auditor*, 118 Ky. 74, 23 K. L. R. 2384, 67 S.W. 1 (1902) (de jure officer until replaced); *Buechele v. Petty, Sheriff*, 265 Ky. 321, 96 S.W. 2d 1010 (1936) (interpretation of Const. Sec. 161).

⁴⁹ *Cochran v. Beckham, Gov.*, 28 K. L. R. 370, 89 S.W. 262 (1905).

⁵⁰ 289 Ky. 581, 159 S.W. 2d 52 (1941).

⁵¹ He would have a plain duty not to pay the claim under Ky. CONST. Sec. 230 ("No money shall be drawn from the State Treasury, except in pursuance of appropriations made by law. . . .") and Ky. REV. STAT. 45.220 (" . . . The Department of Finance shall not certify any claim to the State Treasurer until it is satisfied that there is, in the appropriation to the budget unit against which the claim is chargeable, a sufficient amount to pay the claim . . .").

⁵² 120 Ky. 547, 87 S.W. 300 (1905).

⁵³ 287 Ky. 187, 152 S.W. 2d 586 (1941).

⁵⁴ 304 Ky. 733, 202 S.W. 2d 389 (1947). See also *Ross v. Gross*, 300 Ky. 337, 188 S.W. 2d 475 (1945), a refund case, where the court refused to pass on the question of whether claims for necessary state expenditures could be paid out of the General Fund without an appropriation.

court granted the mandamus and compelled the Commissioner of Finance to pay out funds, unauthorized and unappropriated, on the grounds of "inexorable necessity coupled with inescapable responsibility."⁵⁵ The court disposed of the constitutional prohibition against withdrawal of funds without legislative appropriation by saying that the legislature did not necessarily have exclusive control and it was merely intended as a "safer and more expedient" means to an end. Where the legislature fails, the court will step in. This thought, projected further (which it will not be), could provide a basis for satisfying all claimants.

In any event, these cases open up a vista of judicial review of the administrative action of accounting officers which is not restricted to concepts of "plain duty." Perhaps the day is approaching when the court will direct compromise or payment of claims by the Department of Finance if it feels it should be paid in the exercise of sound judgment.

In summary, it appears that when the state has breached a contract, although no action can be maintained against the Commonwealth for damages for the breach, it is often possible to obtain relief by suing state officers for specific relief, including the payment of money. Relief will depend on whether the court will enter a decree controlling the "unauthorized acts" of an officer or compelling his performance of some "clear legal duty." Thus the attention of the court in breach of contract cases is artificially focused on questions of lack of authority and want of discretion instead of on the supposedly fundamental principles of whether the state is being sued or not and whether the treasury is being threatened. The operation of the state government can in fact be considerably affected and the treasury can be depleted if the court can be persuaded that a case of "unauthorized act" or "clear legal duty" is made out. In the long run, it is submitted, the interests of the state as well as those dealing with it would be better served if it were free to contract and respond in damages for the breach to the same extent as individuals. Certainly it was a far more serious interference with the operation of the state government for a court to grant specific performance of a con-

⁵⁵ *Id.* at 735, 202 S.W. 2d 391.

tract to work prisoners than it would have been for it to have given judgment for money damages for the breach.⁵⁶

Tort Claims

The Commonwealth and its agencies are clearly immune from any action for damages based on tort.⁵⁷ In addition to the general rule of immunity from suit there is an additional hurdle in the concept that the Commonwealth is also immune from liability for tort. Two reasons are given: one that there can be no liability for injuries inflicted in the performance of "governmental functions"⁵⁸ (on an analogy to municipal corporations law); the other, that it would divert a trust fund⁵⁹ (on an analogy to immunity of charitable institutions). Of course, the officer may be personally liable for damages, but the suit to control the acts of state officers, sometimes helpful in contract matters, cannot afford relief against most tortious conduct. The deed is done and there is no "pre-existing liability," or "plain duty" to pay which can afford the basis for mandamus against an accounting officer.

There is one situation, however, in which a suit against an officer can afford relief from what is essentially a Commonwealth tort, and that is the injunction against nuisance.⁶⁰ Even though the action controlled was official action on behalf of the Commonwealth, the court will take the view that the suit is against the individual officer only. The Commonwealth does not ex-

⁵⁶ See *Reliance Mfg. Co. v. Bd. of Prison Comm'rs*, 161 Ky. 135, 170 S.W. 941 (1914).

⁵⁷ Recovery was denied in *Williamson v. L'ville Industrial School of Reform*, 95 Ky. 251, 24 S.W. 1065 (1894) (inmate beaten by another inmate); *Leavell v. Western Kentucky Asylum for the Insane*, 122 Ky. 213, 91 S.W. 671 (1906) (injury by lunatic employee negligently employed in laundry); *Ketterer's Adm'r v. State Board of Control*, 131 Ky. 287, 115 S.W. 200 (1909) (insane inmate beaten to death by employees); *Zoeller v. State Board of Agriculture*, 163 Ky. 446, 173 S.W. 1143 (1915) (child trampled by mounted musician at state fair); *Norwood v. Ky. Confederate Home*, 172 Ky. 300, 189 S.W. 225 (1916) (sewage dumped into plaintiff's creek).

⁵⁸ *Zoeller v. State Bd. of Agriculture*, 163 Ky. 446, 173 S.W. 1143 (1915).

⁵⁹ *Williamson v. Louisville Industrial School of Reform*, 95 Ky. 251, 24 S.W. 1065 (1894); *Leavell v. Western Ky. Asylum for the Insane*, 122 Ky. 213, 91 S.W. 671 (1906); *Ketterer's Adm'r v. State Board of Control*, 131 Ky. 287, 115 S.W. 200 (1909).

⁶⁰ *Herr v. Cent. Ky. Lunatic Asylum*, 97 Ky. 458, 30 S.W. 971 (1895) (sewage); *Anderson v. State Highway Commission*, 252 Ky. 696, 68 S.W. 2d 5 (1934) (flooding).

pressly authorize its officers to commit nuisances; the tortious conduct is "unauthorized" conduct and can be enjoined.⁶¹

While there can be no action against the Commonwealth to recover damages for the interference if the nuisance is only temporary,⁶² if it is permanent it may also amount to a "taking" of property for which a constitutional suit against the Commonwealth will lie. So many special questions arise in connection with suits for taking that they are treated in a separate article, which will appear in the January issue of the Law Journal.

Restitution

The Court of Appeals has said rather broadly that "claims against the treasury do not arise by implication".⁶³ The usual pattern of budget, appropriation, warrant and mandamus does not allow much place for the enforcement of claims for goods and services involving some fraud, mistake, illegality or duress. Mandamus will not issue unless there is a "plain duty" to pay a claim, and there is no plain duty of the state finance officers to pay claims on equitable considerations. Doubtless such claims are sometimes paid in the exercise of administrative discretion, but if approval is withheld by the finance officers, there is little chance of judicial relief. When a suit for mandamus is brought, the issue is one of "authority", "legality" or "discretion", and questions of duty of the state to make restitution are not reached.⁶⁴

The crux of the problem is often the safeguarding of the appropriation power. No money can be drawn from the treasury except in pursuance of appropriations and appropriations can be made only by the General Assembly.⁶⁵ Where no appropriation has been made or an appropriation has been exhausted there can

⁶¹ Anderson v. State Highway Comm., 252 Ky. 696, 699, 68 S.W. 2d 5 (1934). The same reasoning is used in holding officers personally liable while exempting the state.

⁶² Norwood v. Ky. Confederate Home, 172 Ky. 300, 189 S.W. 225 (1916).

⁶³ Hager v. Sidebottom, 130 Ky. 687, 113 S.W. 870 (1908).

⁶⁴ Cf. MECHEM, THE LAW OF PUBLIC OFFICES AND OFFICERS 556 (1890), "It is a necessary conclusion from the principles already stated that the public . . . can be bound by the acts and contracts of its officers and agents only when such officer or agent has acted strictly within the scope of his authority as created, conferred and defined by law, and that it is not bound where such officer or agent has transcended or exceeded his lawful and legitimate powers."

⁶⁵ KY. CONST. Sec. 230; KY. REV. STAT. 41.110, 45.020.

be no plain duty to pay.⁶⁶ Similarly, where some condition imposed by statute has not been complied with, no duty to pay arises.⁶⁷ A number of exceptions have been made to these rules in cases in which the court has spelled out a duty to pay in the absence of any specific appropriation because of a continuing appropriation, legislative oversight, or "inexorable necessity".⁶⁸

The only cases found in which the Commonwealth was forced to make restitution for services rendered under mistake or duress were counterclaims. In *Commonwealth v. Barker*⁶⁹ the Commonwealth sought to recover from the defendant attorney certain fees illegally paid for collection of back taxes. The defendant's counterclaim for the value of his services was allowed, the court saying:

Certainly it will not be contended that the appellee was not in honor and good conscience entitled to be remunerated for his valuable services; and if the question here involved was between individuals nobody would have the slightest doubt of the right of the appellee, as a matter of law, to be remunerated for his services. The Commonwealth cannot be permitted to allow one to go on year after year, laying out his money for its benefit, and giving his whole time and services for its advantage, and, after paying him for such services, then, after a long period of time, to recover it from him as money paid under a mistake of law, and leave him without any sort of recourse.⁷⁰

It is submitted that it would not be an extraordinary extension of the theory of these cases if the court directed payment of claims against the state for restitution in proper cases.

Where the claim is for the return of money paid the state

⁶⁶ *Hager v. Shuck*, 120 Ky. 547, 87 S.W. 300 (1905); *Petty, Sheriff v. Coleman, Auditor*, 242 Ky. 187, 45 S.W. 2d 1041 (1932).

⁶⁷ *Wilson v. Bradley, Gov.*, 105 Ky. 52, 48 S.W. 166 (1898) (fees and expenses of returning fugitive will not be paid where foreign state refused to honor warrant of extradition); *Hager v. Sidebottom*, 130 Ky. 687, 113 S.W. 870 (1908) (reward "earned" by plaintiff was void, since Governor had not exercised the discretion in offering it.).

⁶⁸ For a case of continuing appropriation, see *Shannon, Auditor v. Dean*, 279 Ky. 279, 130 S.W. 2d 812 (1939); failure to provide funds through error, *Talbott, Com'r of Finance v. Burke, Tax Collector*, 287 Ky. 187, 152 S.W. 2d 586 (1941); "inexorable necessity" dispensing with need for legislative appropriation, *Miller, Com'r of Finance v. Quertermous*, 304 Ky. 733, 202 S.W. 2d 389 (1947).

⁶⁹ 126 Ky. 200, 103 S.W. 303, 31 K. L. R. 648 (1907).

⁷⁰ *Id.* at 207, 103 S.W. at 305. See also *Comm. v. Todd*, 72 Ky. 708 (1873) (impairment of value of prison-keeper's contract). For a special act allowing restitution see *Comm. v. Lyon*, 24 K. L. R. 1747, 72 S.W. 323 (1903).

for taxes, fees and deposits, the issue is free from any troublesome questions of spending authority, and restitution principles have developed more readily. Of course, the Commonwealth's immunity from suit is a problem even here.⁷¹ It could be argued, on an analogy to the contracts and torts cases, that the officer collecting money not due under the law collected it as an individual and not on behalf of the state,⁷² but such a theory has seldom been needed in Kentucky.

The legislature nearly a century ago made provision for administrative refund of taxes overpaid. An act of March 9, 1854, provided that

When it shall appear to the auditor of public accounts, that money has been paid into the public treasury for taxes, when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. . . .⁷³

The only provisos were that the application had to be made within two years of the time the taxes were paid and that no other taxes were due from the taxpayer. No provision was made for judicial action, and no distinction was made between voluntary and involuntary payments. Although the statute might have been interpreted as conferring a discretionary duty on the Auditor the court held that the Auditor had a "plain duty" under the statute to refund taxes not due and that a writ of mandamus would issue to compel the Auditor to make a refund.⁷⁴ The suit was not against the state, but was a suit against an officer to compel him to perform a legal duty. Judicial enforcement was subject to judicially imposed limitations, however. Where the over-payment was a result of overassessment, it was held the

⁷¹ The Restatement of Restitution Sec. 75 deals with restitution of void taxes and assessments paid without mistake of fact, but Comment b warns that "it is not within the scope of the restatement of this Subject to state the conditions under which a State permits suits against itself". In case of mistake of fact (Sec. 19h) or mistake of law (Sec. 45), there is the same problem.

⁷² See *Ill. Life Ins. Co. v. Prewitt*, *infra* p. 87, where the court treated deposited securities as being in the custody of the officer rather than the state and *Ross v. Gross*, 300 Ky. 337, 188 S.W. 2d 475 (1945) where certain fees and receipts were ordered to be refunded to the county officers because "the payment into the State Treasury did not vest the state with title thereto or a right to its custody".

⁷³ Ky. Acts, 1854, Ch. 848.

⁷⁴ The first case found was *Bank of Commerce of L'ville v. Stone, Aud.*, 108 Ky. 427, 56 S.W. 683 (1900).

Auditor could not be compelled to make a refund because he had no authority to correct an assessment.⁷⁵ An equitable limitation was engrafted onto the statute by the court so that no suit could be maintained for taxes "voluntarily" paid.⁷⁶ Taxes were said to be paid "involuntarily" only where failure to pay could result in distraint of property,⁷⁷ or where a corporation could not function until the tax was paid.⁷⁸ In *Greene v. Taylor*, the court construed the statute as requiring repayment regardless of whether the payment was voluntary or involuntary, provided it was made under mistake,⁷⁹ thus substituting one branch of restitution for another.

In *Craig v. Sec. Prod. & Ref. Co.*⁸⁰ the court expressly overruled the earlier cases and interpreted the statute as directing the return of all money paid into the treasury as taxes by taxpayers through mistake, inadvertence, misapprehension of the law, or under void or unenforceable statutes, whether payment was voluntary or not. Said Judge Sampson:

We can think of no reason why the state should not be required to live up to the same moral standards demanded of individuals and repay money received by it through mistake or inadvertence. Any other rule is unconscionable and bad in morals if not actually dishonest. The state should not,

⁷⁵ *German Security Bank v. Coulter, Auditor, Louisville City Nat'l Bank v. Coulter, Auditor*, 112 Ky. 577, 66 S.W. 425 (1902); *Couty v. Bosworth, Aud.*, 160 Ky. 312, 169 S.W. 742 (1914); *Greene v. E. H. Taylor & Sons*, 184 Ky. 739, 212 S.W. 925 (1919) (dictum); *Craig, Aud. v. Security Prod. & Ref. Co.*, 189 Ky. 565, 225 S.W. 729 (1920) (dictum).

⁷⁶ *German Sec. Bank v. Coulter, Aud.*, 112 Ky. 577, 66 S.W. 425 (1902); *Louisville Gas & Elec. Co. v. Bosworth, Aud.*, 169 Ky. 824, 185 S.W. 125 (1916).

⁷⁷ *German Sec. Bank v. Coulter, supra* note 68; *Greene v. E. H. Taylor & Sons*, 184 Ky. 739, 212 S.W. 925 (1919). The reason for turning recovery on whether the taxes paid were collectible by distraint or only by suit was given by the court in *Greene v. Taylor* as follows: ". . . if the taxes can be collected only by suit, and the taxpayer thus has an opportunity for a day in court, but instead of resisting the payment, pays it, the payment is voluntary, and the one, paying, cannot recover it." *Greene v. Taylor, supra* at p. 745.

⁷⁸ *Louisville Gas & Elec. v. Bosworth, supra*, note 68.

⁷⁹ The court derived the requirement of mistake from the "well-established doctrine as applying to transactions of individuals" and a reference to mistaken payment in the proviso. Said the court: ". . . although the statute does not, in terms, make necessary the existence of a mistake or compulsion to enable the taxpayer to reclaim the money, there must exist, in favor of the claimant, some equitable ground upon which to entitle him to call into his service, the powers and processes of the courts. If one, with a knowledge of the fact, that he did not owe the tax, should voluntarily pay it into the treasury, upon what could he base a right to ask a court, of equity, to exercise its powers and processes to compel a return of it to him?" *Green v. Taylor and Sons*, 184 Ky. 739, 744, 212 S.W. 925, 927 (1919).

⁸⁰ 189 Ky. 565, 225 S.W. 729 (1920). See also *Craig, Auditor v. Frankfort Dist. Co.*, 189 Ky. 616, 225 S.W. 731 (1920).

merely because it has the power to declare the law, take to itself money rightfully and in good conscience belonging to its citizens and taxpayers without just return.⁸¹

A few years later, in *Coleman, Aud. v. Inland Gas Co.*⁸² the court reversed itself once more and denied refund of an unconstitutional tax on the ground that payment was "voluntary". The majority opinion, by Judge Logan, dismissed the rule of the *Craig* case with the observation that it "sounds well and carries a high moral tone," but is in conflict with the ancient common law principle that money voluntarily paid as taxes cannot be recovered back although no tax was due. The conflict between the majority and minority was so acute that some quotation from each is justified. Said Judge Logan:

. . . state governments have been slow indeed to open the doors of their treasuries and allow money to pass therefrom after it has once found lodgment within the governmental vaults. This is as it should be. The state is the sovereign, and its affairs must be conducted for the best interest and welfare of the people. That calls for the expenditure of large sums of money for governmental affairs, and such sums of money can be obtained only through taxation. The state should determine the amount which it will spend by the probable income which it will receive. When the income is collected it is allocated to different funds. The state uses the fund nearly always during the current year. It has been universally held, unless a contrary conclusion was forced by an iron clad statute, that no taxpayer should have

⁸¹ 189 Ky. 565, 568, 225 S.W. 729, 731 (1920).

⁸² 231 Ky. 637, 21 S.W. 2d 1030 (1929). The opinion specifically overruled the *Craig* cases and "if there is any other case holding that taxes voluntarily paid may be recovered back under the provisions of Sec. 162 Ky. Stats., it is unsound and will not be followed". *Id.* at 644. One of the more amusing sidelights in the *Inland Gas* case was the use by Judge Clay and Judge Logan of *stare decisis* and the canons of statutory construction. Judge Clay argued that the law should not change with the personnel of the court. Judge Logan retorted that "if the doctrine of *stare decisis* has any place in jurisprudence it should have been applied when the attack was made on the long line of cases prior to 1920." Judge Logan argued that reenactment of the 1854 refund statute as interpreted fixed its meaning. Judge Clay said (at p. 647): "The statute plainly provides for the refunding of taxes *when no such taxes were in fact due.*' There is not a proviso, or a sentence, or a clause, or a phrase, or a word, or a syllable, or even a punctuation mark that in any way qualifies or limits the effect of the language used. Instances may arise where a statute is so unintelligible that words must be inserted to give it effect, but that rule does not apply where there is no doubt as to the meaning of the statute. Here the language is direct, certain, clear, explicit, unequivocal, and unmistakable in meaning. I doubt if there can be found among the statutes of Kentucky, or the statutes of any other state, or the statutes of the United States, a statute whose meaning is as clear as the one under consideration."

the right to disrupt the government by demanding a refund of his money whether paid legally or otherwise, unless the sovereign was made to know at the time the money was paid that the taxpayer would insist that the money should be refunded to him.⁸³

Judges Clay and Willis dissented from the majority in the following rather picturesque language:

A gentleman will not retain money that does not belong to him. The statute was enacted to enable the Commonwealth to be a gentleman. Because of the great number of constitutional and legal restrictions, it is not often that such an opportunity comes to the Commonwealth, and the statute should not be construed so as to drag it down from that high estate. Feeling that he should contribute his share to the support of the government, and believing that the government will do the fair and honorable thing in case the taxes are declared to be illegal, a good citizen usually pays his taxes promptly and voluntarily. For this he is penalized by a construction that does violence to the statute, while the taxpayer whose voice of protest rings loudest in the corridors of the courthouse or state capitol is made the sole object of the law's tender solicitude.⁸⁴

As to the purported hardship on the Commonwealth, Judge Clay noted

The alleged hardship is wholly chimerical and without foundation in fact. It is a matter of common knowledge that taxes paid involuntarily or under protest are never set aside in a special fund to await the decision of their legality. On the contrary, they are distributed by the state just as taxes paid voluntarily and without protest. Hence the situation of the state is precisely the same, whether the taxes are protested or not. That being true, there is no ground for the distinction and therefore no reason for disregarding the statute.⁸⁵

Two years later in *Coleman, State Aud. v. Consolidated Realty Co.*,⁸⁶ the court overruled the *Inland Gas* case to the extent that it held that payment of the mortgage tax was voluntary and al-

⁸³ *Id.* at 640, 21 S.W. 2d at 1031.

⁸⁴ *Id.* at 649, 21 S.W. 2d at 1035.

⁸⁵ *Id.* at 647, 21 S.W. 2d at 1034.

⁸⁶ 239 Ky. 788, 40 S.W. 2d 387 (1931). Dietzman was the sole dissenter. Judge Logan had left the court only a few months before the opinion was handed down.

lowed recovery of the tax. Apparently left untouched, however, was the underlying rule of the *Inland Gas* case that if the payment of a tax is not in some sense involuntary it cannot be recovered.

In 1938 the legislature intervened to allow some relief to the cheerful taxpayer. The act reorganizing the Department of Revenue authorized the Department to refund tax payments not due or overpaid, regardless of whether the payment was made voluntarily or involuntarily, but the act expressly excepted ad valorem taxes and taxes not due because the statute was held unconstitutional.⁸⁷ In the 1942 codification of the statutes the refund provisions of the 1938 act were codified as KRS 134.580. The exceptions were codified as KRS 134.590, and a specific proviso was added that refund should be made only when the ad valorem or unconstitutional taxes were paid involuntarily.⁸⁸

The 1938 legislation also made some changes in refund procedure. Formerly, refunds could be enforced by mandamus against the Auditor or Department of Finance. The 1938 statute conferred the duty of making refunds upon the Department of Revenue. Since all Department of Revenue rulings are reviewable only under special statutory proceedings,⁸⁹ the taxpayer denied a refund by the Department must now petition the Kentucky Tax Commission for a refund within fifteen days and upon its final decision has fifteen days in which to appeal to the Franklin Circuit Court. This remedy is exclusive and ousts the mandamus remedy where refund from the Department of Revenue is sought.⁹⁰

Not all tax refunds are made by the Department of Revenue. Under the Unemployment Compensation Act the Commission has authority to refund contributions erroneously collected.⁹¹ At first, the Commission interpreted this as referring only to compulsory contributions and refused to return voluntary contributions made

⁸⁷ Ky. Acts, 1938 (1st Ex. Sess.), Ch. 4, Sec. 6. Taxpayers who paid unconstitutional taxes were remitted to Ky. Stats. 162.

⁸⁸ The Reviser's note to 134.590 states that the refund provision has been limited to *involuntary* payment to comply with judicial construction. Thus the word Judge Clay could not find anywhere in the Act of 1854 was finally written in by the legislature eighty-eight years afterwards.

⁸⁹ See KY. REV. STAT. 131.125 which makes all rulings of the Department of Revenue reviewable under the provisions of KY. REV. STAT. 131.110 and 131.120.

⁹⁰ KY. REV. STAT. 131.110.

⁹¹ KY. REV. STAT. 341.330.

conditionally to reduce the contribution rate. When a taxpayer brought an action for mandamus, the Court of Appeals, affirming a judgment in favor of the taxpayer, said:

The statute did not extend any right or authority to the Commonwealth or its bureau to deal unreasonably or unfairly or unjustly with the taxpayers. . . . It is not believed that the legislature intended that the Commonwealth and its commission could keep a citizen's money when freely and voluntarily made conditionally, while they must refund compulsory collections erroneously exacted.⁹²

In *Barnes v. Stearns*,⁹³ where the contribution was unconditional but made under mistake of fact, the court also allowed the refund. While distinguishing the *Inland Gas* case⁹⁴ on the narrow ground that it involved general revenue and was not binding in a case involving the insurance fund, the court's opinion ended with a strong statement from *Great Atlantic and Pacific Tea Company v. Lexington*:

Money paid without consideration and which in law, honor, or good conscience was not payable ought in law, honor and good conscience to be recoverable, and that rule applicable to transactions between individuals should be generally made applicable to municipalities and other governments. Only very compelling reasons of public policy relieve the state and its subdivisions from being required to live up to the same moral standards demanded of individuals and to repay taxes collected without authority of a valid law. Even those reasons are being continually attacked as insufficient.⁹⁵

Still another type of refund claim arises out of payment of fees. Although "fair dealing" would seem to require the Commonwealth to return fees, as well as taxes, paid through mistake or under duress, recovery was denied in the only case found. In *Commonwealth v. Ray*,⁹⁶ the plaintiff asserted that the Master Commissioner of Jefferson County had wrongfully collected illegal fees to the extent of \$112,603.51 in 2700 sales of real estate and

⁹² *Barnes, Dir. v. Levy Bros.*, 295 Ky. 794, 798, 175 S.W. 2d 495, 497 (1943).

⁹³ 295 Ky. 812, 175 S.W. 2d 498 (1943).

⁹⁴ See note 74, *supra*.

⁹⁵ 295 Ky. 812, 817, 175 S.W. 2d 498, 500 (1943). *Great Atlantic and Pacific Tea Co. v. Lexington*, 256 Ky. 595, 76 S.W. 2d 894 (1934) dealt with refund of a municipal license tax paid by mistake or under a "constructive" fraud.

⁹⁶ 275 Ky. 758, 122 S.W. 2d 750 (1938).

asked that the sum be declared a trust fund in the hands of the Auditor for the benefit of those who had contributed. The action was dismissed on special demurrer and the Court of Appeals affirmed. Among the reasons given⁹⁷ was the absence of any statute allowing the recoupment of illegally assessed fees.

Two cases were found involving refund of deposits. In *Tate v. Salmon*⁹⁸ the plaintiff, suing in behalf of the policy-holders of an insolvent insurance company, sought to recover \$100,000 worth of securities deposited with the State Treasurer to secure the policies. The Court of Appeals held that the suit against the State Treasurer was really a suit against the Commonwealth. In *Illinois Life Ins. Co. v. Prewitt*,⁹⁹ the company, having withdrawn from the state and reinsured all its risks, sought mandamus to compel the return of its securities on deposit with the State Treasurer. This time the court held that the action to recover the deposit was not an action against the state, but was against an officer who was a mere custodian and the state had no interest. The court did not even allude to *Tate v. Salmon*, although it was cited in the Attorney General's brief. The difference in result is not wholly whimsical. A court willing to return a deposit to the depositor might quail before the task of distributing it among the policy-holders, but the result should not be made to depend upon a non-existent distinction between a suit against the Commonwealth and a suit against an officer.

Finally a claim for refund may arise from an overpayment made by an officer in settlement of his accounts with the state. In *Commissioners of the Sinking Fund v. Theobald*,¹⁰⁰ a prison-keeper brought an action for restitution for over-payment against the Commissioners. The suit was dismissed on the ground that an agent is not liable for a fund after paying it over to his principal. The court suggested that Theobald's right of reclamation lay against the state, if anywhere.¹⁰¹

⁹⁷ The court also held that a representative suit could not be maintained, that the judgment of the court approving the fees was *res judicata*, and that proper venue was Jefferson County, if anywhere.

⁹⁸ 79 Ky. 540 (1881).

⁹⁹ 123 Ky. 36, 93 S.W. 430 (1906).

¹⁰⁰ 56 Ky. 459 (1856).

¹⁰¹ In the absence of any statute authorizing refund in such cases could suit against the state be maintained? See *Commonwealth v. Ray*, note 96 *supra*.

Real Property Actions

Where real property is involved, the courts have been less willing to utilize the state immunity doctrine to cut off private claims. This illustrated by the extent to which the court went in *Commissioners of the Sinking Fund v. Northern Bank of Kentucky*¹⁰² to find that a suit to enforce a mortgage against the state was really a suit against the officers. The state had taken over a railroad under a mortgage and sold it to a new company in exchange for its bonds and stock, deposited with the Commissioners of the Sinking Fund. The Bank sued the Commonwealth and the Commissioners to assert a lien under a prior mortgage. The court held that the suit was not substantially against the Commonwealth but was merely against certain officers to compel them to apply properly certain funds that did not equitably belong to the state at all.¹⁰³ Solicitude for the owner of real property may also help explain the origin of the constitutional suit for a taking which will be discussed in the January issue.

There are limits to the state's suability even in property matters, however. In *Ky. State Park Comm. v. Wilder*,¹⁰⁴ the plaintiff, claiming an interest in the tract, brought suit against the State Park Commission to compel a sale of Cumberland Falls State Park and a division of the proceeds. The court dismissed the action as a suit against the Commonwealth, but subsequently sustained an action for damages on the "taking" theory.¹⁰⁵

Miscellaneous Claims

Garnishment

The first suit against the Commonwealth, *Divine v. Harvie*,¹⁰⁶ was a bill by one Harvie against the Auditor and Treasurer to attempt a garnishment of the claim of one Divine against the Commonwealth for services. The lower court ordered the Auditor

¹⁰² 58 Ky. 174 (1858).

¹⁰³ "The question therefore is, not whether the court had power to appropriate part of the sinking fund for any other purpose than that to which it had been devoted by law but whether the fund in contest does actually constitute a part of the sinking fund." Cf. *Comm. of Sinking Fund v. Theobald*, 56 Ky. 459 (1856), where recovery of money paid into the Sinking Fund was denied. The court made a distinction between money paid over into the treasury and stocks held in the Sinking Fund, but see *Ross v. Gross*, note 54, *supra*.

¹⁰⁴ 256 Ky. 313, 76 S.W. 2d 4 (1934).

¹⁰⁵ 260 Ky. 190, 84 S.W. 2d 38 (1935).

¹⁰⁶ 23 Ky. 439 (1823).

to draw a warrant in favor of Harvie instead of Divine, and the Treasurer to pay the warrant, but the Court of Appeals reversed, stressing the "great evils" that would arise if the state could be made garnishee. Suits to attach official salaries and fees and funds due state contractors have been equally unsuccessful.¹⁰⁷ Although the situation seems to be one where the Auditor could easily be treated as stakeholder of a fund in which the state has no interest, the court has refused to take this position, probably because of the imagined "great evils," although the rule has sometimes been justified on technical grounds.¹⁰⁸

In 1936 the legislature intervened to provide for attachment or garnishment of salaries and sums due state employees.¹⁰⁹ A 1942 amendment, aimed at highway contractors, allowed attachment of "any sums due any person from the Commonwealth."¹¹⁰ Service of process upon the Commissioner of Finance and the State Treasurer was required.

Counterclaims

Where the state has sued a citizen, there is always the possibility that he may in turn have a claim against the state. If he is allowed to assert a counterclaim, the state is made suable to that extent and the majority rule in the United States refuses to allow a set-off or counterclaim.¹¹¹ The Kentucky court has apparently felt that it would be too unjust to deny the citizen the right to use a claim in his defense, and has held that where the state sues a citizen it waives its immunity to that extent. The counterclaim may be used only defensively, however, and if it exceeds the sum sued for by the state, the defendant is not entitled to a judgment over.¹¹²

¹⁰⁷ Tracy and Loyd v. Hornbuckle, 71 Ky. 336 (1876) (teacher's salary); Rodman v. Musselman, 75 Ky. 354 (1876) (salary of city marshal); Dodd v. Burnett, 172 Ky. 89, 188 S.W. 884 (1916) (fees); B. B. Wilson v. Van Diver, 230 Ky. 27, 18 S.W. 2d 308 (1929) (contractor's funds); Miracle v. Hopkins, 260 Ky. 712, 86 S.W. 2d 681 (1935) (official fees).

¹⁰⁸ In Divine v. Harvie, the court said that a debtor's claim on the state was not a "chase in action" subject to attachment strictly speaking because the state could not be sued.

¹⁰⁹ Ky. Acts, 1936, c. 23. Carroll's K. S., 1936, Sec. 1701b. Amended by Ky. Acts, 1940, c. 92.

¹¹⁰ Ky. Acts, 1942, c. 102; KY. REV. STAT. 427.130.

¹¹¹ 49 AM. JUR. 297.

¹¹² Comm. v. Todd, 72 Ky. 708 (1873); Comm. v. Owensboro & N. R. Co., 81 Ky. 572, 5 K.L.R. 650 (1884); Comm. v. Barker, 126 Ky. 200, 103 S.W. 303 (1907). Where the counterclaim was based on fraudulent representations by one

Suits Against State Agencies, Commissions, Departments, and Subdivisions

What is "the Commonwealth" for purposes of the immunity rule? Does it include the agencies of the state and subdivisions such as counties? Where the Commonwealth organized and incorporated a bank and owned all the stock, the Supreme Court held that the state had divested itself of its immunity and a suit against the bank was not a suit against the state.¹¹³ At the other extreme, most departments and commissions are mere unincorporated subdivisions of the state and suit against them is a suit against the Commonwealth itself.¹¹⁴ In an intermediate position are a number of independent boards and agencies of the state, some of them created by the legislature as bodies corporate and often with express power to sue and be sued.

Whether a suit in contract against any of these independent boards and agencies would now be considered a suit against the Commonwealth is not clear from the cases. The answer may depend on how the court "construes the facts". In *Gross v. Kentucky Board of Managers of the World's Columbian Exposition*¹¹⁵ the plaintiff sued the Board for breach of contract and recovered damages. The statute creating the Board gave it power to contract, but did not make it a body corporate with power to sue and be sued. After the Board withdrew its entire appropriation and deposited it in its own name, the legislature passed a resolution stating the Commonwealth would not be responsible for any liability the Board might incur in excess of the appropriation. The court held that the Board was a "quasi-corporation" and a judgment for damages against it was not an unlawful judgment against the state, saying:

It is true that this board has been called in an opinion by the court an "agency of State". It was an agency of the State, but it was also vested with corporate powers, and in

member of a three-member board, the counterclaim was dismissed. *Albin Co. v. Commonwealth*, 128 Ky. 295, 108 S.W. 299 (1908). It is doubtful whether any counterclaim sounding in tort would lie because of the immunity not only from suit, but also from liability.

¹¹³ *Bank of the Commonwealth of Kentucky v. Wister*, 27 U. S. (2 Pet.) 318, 7 L. ed. 437 (1829).

¹¹⁴ *B. B. Wilson Co. v. Van Diver et al.*, 230 Ky. 27, 18 S.W. 2d 308 (1929); *Ky. State Park Comm. v. Wilder*, 256 Ky. 313, 76 S.W. 2d 4 (1934).

¹¹⁵ 105 Ky. 840, 49 S.W. 458 (1899).

its corporate capacity may be sued for its corporate acts, just as any other corporation.¹¹⁶

The decision was relied upon by the federal court in *Bramwell Brush and Wire Co. v. State Board of Charities*¹¹⁷ as establishing a general rule that state boards in Kentucky could be quasi-corporations with power to sue without specific authorization, and that they would be recognized as entities distinct from the Commonwealth for purposes of suit. Dicta have been found in later cases which support and repudiate the interpretation. In discussing sovereign immunity generally the court has said:

It is very true that in the *Gross* case considerable importance appears to have been attached by the Court to the fact that the board was a *quasi* corporation, authorized to sue and be sued, but this circumstance we do not regard as of controlling importance. If a corporate agency of the state can be sued, there is no reason why any other agency of the State cannot be sued. The right to sue cannot rest alone upon the circumstance that the agent has been created a corporation by the State. The real question is, is the suit against the State, or is it against an agency of the State to compel the agency to do something that the State authorized it to do or to restrain it from doing something that the State did not authorize it to do?¹¹⁸

When the *Gross* case is analyzed in the light of the above observation, doubts are raised as to whether the judgment for damages was allowed because the Board was a quasi-corporation or because the judgment could be treated as an instance of a suit against officers to direct payment of a fund or to prevent unauthorized acts. The dissenting opinion in the *Gross* case makes it clear that the judges who decided the case believed that the suability of quasi-corporations was quite a different problem from the suability of officers, and the issue was whether the Board was a corporation.

One other factor in the *Gross* case should be mentioned: the

¹¹⁶ *Id.* at 845, 49 S.W. 459.

¹¹⁷ 279 Fed. 440 (1922). The suit was dismissed on its merits, when the contract proved to be ultra vires. 286 Fed. 737 (1927), *affirmed* 288 Fed. 1018 (CCA 6th, 1923). The Supreme Court on writ of error dismissed for want of jurisdiction. 265 U. S. 567 (1923) (diversity case, not arising under laws of United States, and could be decided on local law).

¹¹⁸ *Reliance Mfg. Co. v. Bd. of Prison Comm'rs.*, 161 Ky. 135, 146-147, 170 S.W. 941, 945 (1914).

distinction made by the court between corporations created to discharge a "governmental" function and corporations, such as the World's Fair Board, created to discharge a "business" function.¹¹⁹ If the *Gross* case is to be understood as allowing suit only against state agencies exercising non-governmental functions, its importance diminishes with the increasing tendency to broaden the meaning of "governmental functions" to include all activities the state may lawfully carry on.¹²⁰

Dicta in *State Park Comm. v. Wilder*¹²¹ also tend to support the view that the corporate form of a state agency does not affect its immunity. The State Park Commission had purchased a tract of land for a park, taking title in the name of the Commonwealth. The plaintiff claiming an interest sued the Commission and the Commonwealth for partition. The suit was dismissed as one substantially against the Commonwealth even though the Commission was a corporate body with power to sue and be sued.

One case since the *Gross* case has been found in which the fact that the agency involved was corporate in form with the usual corporate powers appeared to be the determining factor. *Commonwealth ex rel. Department of Public Welfare v. Polsgrove, County Judge*,¹²² was an original proceeding in the Court of Appeals in which the Commonwealth, on relation of the Department, sought a writ to prevent the Franklin County Judge from entertaining suits by paroled convicts who were attempting to recover money due them under a statute upon parole. The sums sought were too small to allow an appeal from the county court if the judge erroneously allowed the actions. Counsel for the Commonwealth contended the suits were against the state and could not legally be maintained. The court, after finding the Department of Public Welfare to be a body politic and corporate,

¹¹⁹ *Gross v. Kentucky Board of Managers of the World's Columbia Exposition*, 105 Ky. 840, 845, 49 S.W. 458, 459 (1899): "The board was not created to discharge any governmental function. The erection of a headquarters building and the running of a restaurant were matters of business, in which this board stood on the same plane as others engaged in like undertakings."

¹²⁰ An agency performs governmental functions if taxes can be levied for its support and property owned by it is exempt from taxation. *Zoeller v. State Board of Agriculture*, 163 Ky. 446, 450, 173 S.W. 1143 (1915). The court said that if the corporation was not exercising a governmental function it would be liable even for the torts of its officers and agents.

¹²¹ 256 Ky. 313, 76 S.W. 2d 4 (1934).

¹²² 250 Ky. 124, 61 S.W. 2d 1076 (1933).

with power to sue and be sued, contract and be contracted with, answered:

We therefore conclude that this ground, upon which counsel insist that respondent [County Judge] is proceeding out of his jurisdiction is unfounded.¹²³

The Court of Appeals thus authorized suits seeking judgments for the amounts due the parolees, although it went on to say that execution could not issue on the judgments—some other remedy would have to be used to enforce the judgments. In this case the factor of corporate form of the agency alone seemed to be enough for the court. It was implied in the opinion that if the action had been on a contract instead of under a mandatory statute, even less trouble would have been encountered in holding the agency amenable to suit.

One reason for the lack of any substantial number of cases involving contracts with agencies may be the change in fiscal procedures. Even if an agency is a body corporate with power to sue and be sued, most of its funds are appropriated and expended under the general state budget and finance system. It is believed that most contracts for agency supplies and services are actually contracts with the Commonwealth. Contract disputes would be with the Department of Finance. The distinction between a contract with an agency and a contract with the Commonwealth is of little importance today. On the other hand, some state agencies do administer private funds and the suit for breach of contract against the agency should not be overlooked when the possible remedies are canvassed.

Where tortious conduct is involved there is clearly no difference between the immunity of the Commonwealth and the immunity of one of its boards or agencies. It was early decided that even where the legislature had established an institution as a body corporate with power to sue and be sued, the institution was not liable in damages for torts of its employees.¹²⁴ The grant

¹²³ *Id.* at 127, 61 S.W. 2d 1077.

¹²⁴ *Williamson v. Louisville Industrial School of Reform*, 95 Ky. 251, 24 S.W. 1065 (1894); *Leavell v. Western Kentucky Asylum for the Insane*, 122 Ky. 213, 91 S.W. 671 (1906). In *Hauns v. Central Ky. Lunatic Asylum*, 103 Ky. 562, 45 S.W. 890 (1898), judgment was for \$5000 damages for a nuisance, but the case has been explained as one of a "taking." *Norwood v. Ky. Confederate Home*, 172 Ky. 300, 189 S.W. 225 (1916).

of specific authority to sue and be sued "must be taken in a qualified sense," the court said.¹²⁵ The immunity was sometimes described as resulting from the rule against diversion of trust funds,¹²⁶ or because the institution was exercising a "governmental function,"¹²⁷ but no cases were found in which tort liability was imposed on a state institution on the ground that its function was nongovernmental. At one time the court distinguished between suable state institutions and the state itself for purposes of suits for "taking" or for injunction against nuisance,¹²⁸ but it was soon established that these suits could be maintained regardless of the official character of the defendant.¹²⁹

A final word might be said about the political subdivisions of the state. Counties are not regarded as municipal corporations, but are mere branches of the state and share its sovereign immunity.¹³⁰ School boards, like municipal corporations, can sue and be sued, but are immune from liability for tort when engaged in a governmental function.¹³¹ The liability of municipal corporations and school boards is, of course, a complicated problem in itself and is outside the scope of this series.

Conclusion

The State of Kentucky, by constitutional provision and common law, is immune from suit without the consent of the legislature. Of the practical exceptions to this theoretical principle one of the most unruly is the suit against the officer. It has been utilized in cases involving contracts to secure specific performance and even damages. Where the contract damages are liquidated, mandamus against the Department of Finance often affords a remedy. Where the Commonwealth's agents are guilty of trespass

¹²⁵ Leavell v. Western Ky. Asylum for the Insane, *supra*, note 124.

¹²⁶ Williamson v. Louisville Industrial School of Reform, *supra*, note 124.
Leavell v. Western Ky. Asylum for the Insane, *supra* note 124.

¹²⁷ Zoeller v. State Board of Agriculture, 163 Ky. 446, 173 S.W. 1143 (1915). This roundabout basis for immunity comes from municipal corporations law. It would have been more direct merely to assert the nonsuability of state agencies in denying recovery.

¹²⁸ Hauns v. Central Ky. Lunatic Asylum, 103 Ky. 562, 45 S.W. 890 (1898).
Herr v. Central Ky. Lunatic Asylum, 97 Ky. 458, 30 S.W. 971 (1895).

¹²⁹ Anderson v. State Highway Comm., 252 Ky. 696, 68 S.W. 2d 5 (1934).

¹³⁰ Downing v. Mason Co., 87 Ky. 208, 8 S.W. 264 (1888); Forsythe v. Pendleton Co., 205 Ky. 770, 266 S.W. 639 (1924).

¹³¹ Wallace v. Laurel Co. Bd. of Educ., 287 Ky. 454, 153 S.W. 2d 915 (1941).

or nuisance, suits for injunction against nuisance and for damages for a taking may be maintained, and if taxes are paid under mistake or duress mandamus to compel restitution is available. In addition, it may be possible to obtain judgments against state agencies on the ground that they are independent entities.

The over-all picture of Commonwealth liability via the suit against officers is one of uncertainty. Liability often turns on considerations of legal act v. illegal act, creation of liability v. enforcement of liability, or plain duty v. discretionary act, which make the outcome fortuitous at best. No good reason appears why funds in one officer's hand can be taken, while those in another officer's hand cannot; why an injunction can be had against nuisance, but no damages may be awarded unless it amounts to a taking; or why refund of taxes paid voluntarily may be enforced, but refund of fees paid involuntarily or under mistake may not be. There seems to be a great need for a complete revolution in this field, legislative or judicial, in order to create some sensible pattern of state liability.

One general observation that might be made is that the Court of Appeals of Kentucky has gone much farther than the highest courts of some of the other states to make the best of a bad situation. It has repeatedly recognized the fundamental injustice of the immunity of the Commonwealth from suit, and has been most ingenious in allowing suits against officers and agencies to repair wrongs inflicted on the individual by the government of the state. This is particularly true in the wide scope it has given to the writ of mandamus against the fiscal officers of the state.

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