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SOVEREIGN IMMUNITY UNDER THE 1970 ILLINOIS CONSTITUTION — THE ABOLITION OF A FEUDAL NOTION

INTRODUCTION

The doctrine of sovereign immunity has traditionally been couched in terms of "The King can do no wrong"; and as this phrase would suggest, the doctrine clearly represents one of the most noteworthy vestiges of feudal notions. How it came to be applied in the United States has been described as "one of the mysteries of legal evolution,"[1] for the king is an entity foreign to our mode of government. Nevertheless, the doctrine is found in both the common law[2] and early Illinois constitutions,[3] as well as other state constitutions.[4] Despite its constitutional dimension, the doctrine has been uniformly denounced by legal scholars[5] and subjected to vigorous legislative and judicial attacks in recent years. In the wake of this turmoil, the doctrine has been reduced to the mere high-noon shadow of the giant it used to be. Thus, with hardly a murmur on its behalf, the people who ratified the Illinois Constitution of 1970 stripped the doctrine of its constitutional sanction with a single sentence:

> Except as the General Assembly may provide by law, sovereign immunity in this State is abolished.[6]

At the outset, one must recognize that sovereign immunity is not an absolute doctrine, for an unqualified assertion that the sovereign may not be sued is wholly inaccurate. The fact is, that under the common law the sovereign could be sued *with its consent,*[7] and there is no common law limitation on the power to give such consent.

Even though the doctrine is one of the most ancient rules

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[1] Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1 at 4 (1924).

[2] The common law of England was adopted in Illinois by an Act of Feb. 4, 1819, L.R. 425 [1819] which provides in relevant part:

> That the common law of England, all statutes or acts of the British Parliament, made in aid of the common law, prior to the fourth year of the reign of King James the First, . . . which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force, until repealed by legislative authority.

[3] ILL. CONST. art. IV, § 26 (1870); ILL. CONST. art. III, § 34 (1848).

[4] See REC. OF PROC., SIXTH ILL. CONST. CONV., *Committee Proposals*, Vol. VI at 679-87 (1967-70) which recognizes thirty-one state constitutions as containing a provision on sovereign immunity [hereinafter referred to as *Committee Proposals*].

[5] *E.g.*, Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1 (1924); Kionka, *The King Is Dead, Long Live the King: State Sovereign Immunity in Illinois*, 59 ILL. B.J. 660 (1971); Price and Smith, *Municipal Tort Liability: A Continuing Enigma*, 6 U. FLA. L. REV. 330 (1953); Comment, *Tort Claims Against the State of Illinois and Its Subdivisions*, 47 NW. U.L. REV. 914 (1953).

[6] ILL. CONST. art. XIII, § 4 (1970).

[7] Hatfield v. State, 1 Ill. Ct. Cl. 223 (1901).

established in the English courts, its passing will go unlamented. Although it is not repugnant to the terms of the United States Constitution,[8] the doctrine is, nevertheless, a glaring anachronism in this age which contemplates a remedy for every wrong and where the deep pocket is the purse of first resort. Before one can fully appreciate the ramifications of the new constitutional provision, it is necessary to consider the curious historical development of the doctrine which enjoyed steady expansion in its application and then a rapid decline.

EARLY COMMON LAW EXPANSION OF THE DOCTRINE OF SOVEREIGN IMMUNITY

In the early common law the doctrine of sovereign immunity was a concept apparently beyond challenge. As one justice stated:

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission . . . .[9]

An analysis of the doctrine illustrates that it sprouted from no lower source than the king, himself. Sovereign immunity must be considered to be an inevitable consequence of the king's absolute power, for there was no one of a higher ranking status to challenge his actions.[10] A prevalent belief in "divine right" contributed further impetus to the king's untouchable position and as a result, the doctrine became settled law at an early date. During its infancy, however, the doctrine was confined in its application to the sovereign, itself, and no lesser unit of government was awarded this privileged status.

The widespread extension of the doctrine of sovereign immunity to lesser units of government is regarded by most authorities as having its genesis in the early English case of *Russell v. Men of Devon.*[11] In *Russell,* a suit was initiated against what was, in effect, the entire population of an 18th century English county. In determining whether or not immunity should protect the county, the court was confronted with a problem having no clear precedent; for as a municipal corporation, the county possessed qualities characteristic of both the immune sovereign and the non-immune private corporation. In clothing the county with immunity, the court based its decision on purely pragmatic grounds. The recognition that county funds were severely limited and a genuine fear of a multitude of similar actions, dictated that such suits be prohibited.

As thus extended, the doctrine was engrafted into the body of

[8] Beers v. Arkansas, 61 U.S. (20 How.) 527, 15 L. Ed. 991 (1858).
[9] *Id.* at 529, 15 L. Ed. at 992.
[10] I BLACKSTONE, COMMENTARIES 235, 241-2.
[11] 2 Term. Rep. 671, 100 Eng. Rep. 359 (1788).

law governing the states[12] through the adoption of the common law of England, and became a widely accepted principle. In fact, sovereign immunity became a matter of constitutional dimension in Illinois when the Constitution of 1870 paralleled this early common law posture by providing, "The state of Illinois shall never be made defendant in any court of law or equity."[13] Although some authorities argue that the extension of the doctrine in later cases was based upon a misinterpretation of *Russell*,[14] the fact remains that the common law of Illinois and other states is permeated with cases which have found *Russell* to be controlling.[15]

It is interesting to note that although *Russell* was overruled by the English courts in 1890,[16] counties retained their privileged status in Illinois. Furthermore, based upon the holding in *Russell*, Illinois courts extended immunity to towns in 1870[17] and to school districts in 1898.[18]

For a glorious moment it appeared as though the doctrine's application would eventually be extended to even the most remote governmental units, but the curtain was soon drawn on the golden age of sovereign immunity. As one author forecast:

> It seems, however, a prostitution of the concept of sovereign immunity to extend its scope in this way, for no one could seriously contend that local governmental units possess sovereign powers themselves.[19]

As the number of governmental units increased and the scope of governmental functions broadened, both the legislature and judiciary began to feel the dint of human pity, and a mutual campaign was commenced to avoid the full rigor of the doctrine.

THE LEGISLATIVE AND JUDICIAL REACTION IN ILLINOIS

As early as 1877, the legislature undertook to limit the application of the doctrine of sovereign immunity and extend liability to the state. In that year a commission was created whose duty was "to hear and determine all unadjusted claims of all persons against the State of Illinois . . . ."[20] The commission was to consist of one supreme court judge and two circuit court judges to be appointed by the Chief Justice of the Illinois Supreme

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[12] Note 2 *supra*.

[13] ILL. CONST. art. IV, § 26 (1870).

[14] F. James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 621 (1955).

[15] *E.g.*, Mower v. Leicester, 9 Mass. 247, 6 Am. Dec. 63 (1812); Commonwealth v. Springfield, 7 Mass. 9 (1810).

[16] Crisp v. Thomas, 63 L.T.N.S. 756 (1890) holding that a school district is liable in tort on the same basis as a private corporation.

[17] Waltham v. Kemper, 55 Ill. 346 (1870).

[18] Kinnare v. City of Chicago, 171 Ill. 332, 49 N.E. 536 (1898).

[19] Fuller and Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 at 439 (1941).

[20] Act of May 29, 1877, ch. 26a, §§ 1-8, [1877] Ill. Laws 30th Sess. 64.

Court. Ultimately, the judges were never appointed, since the chief justice speculated that no judge would be able to discharge his judicial responsibilities with the added burden of commission duties. Rather than abandon its purpose, however, the General Assembly created another forum in 1903 in which to entertain claims against the State of Illinois — the Court of Claims.[21] In this enactment the legislature provided that the judges of the Court of Claims were to be appointed by the governor. After seventy years of life, the 1903 enactment maintains its vitality with only minor modification.[22]

In addition to creating the Court of Claims, the General Assembly has expressed its dissatisfaction with the doctrine of sovereign immunity on a number of occasions by enacting statutes authorizing suit against various governmental subdivisions. For example, the State of Illinois and lesser governmental units were expressly brought within the purview of the Workman's Compensation and Occupational Disease Acts in 1913.[23] In 1945, liability was legislatively imposed upon cities and towns for wrongs committed in the destruction or removal of unsafe buildings.[24] In 1942, a similar liability was imposed for injuries sustained as a consequence of negligence in the operation of fire department vehicles.[25] Finally, in 1957, indemnification for the nonwilful misconduct of policemen was made the responsibility of cities[26] and the Chicago Park District.[27]

Even though the legislature was fully equipped with the tools necessary to implement its objective, the courts found a need to resort to artificial distinctions and legal fictions in order to limit the application of sovereign immunity. Whether liability was to attach to subdivisions of the state became a function of two variables.

First, if the governmental unit were classified as "quasi-municipal" as opposed to "municipal," the shroud of immunity was offered.[28] The rationale for such a classification is unclear. It has been suggested, however, that the distinction is grounded upon the practical reality that a "quasi-municipal" corporation has no "fund" from which to pay damages — a pragmatic con-

[21] Act of May 16, 1903, ch. 37 §§ 331-41, [1903] Ill. Laws 43rd Sess. 140.
[22] ILL. REV. STAT. ch. 37, § 439 (1972).
[23] Act of June 28, 1913, ch. 48, § 126, [1913] Ill. Laws 48th Sess. 335.
[24] Act of May 3, 1945, ch. 24, § 1-16, [1945] Ill. Laws 64th Sess. 464.
[25] Act of Aug. 15, 1941, ch. 24, § 1-13, [1941] Ill. Laws 62nd Sess. vol. 2, p. 19.
[26] Act of May 31, 1957, ch. 24, § 1-15.1, [1957] Ill. Laws 70th Sess. 338.
[27] Act of July 8, 1957, ch. 105, § 24A, [1957] Ill. Laws 70th Sess. 2010.
[28] *See* Barnett, *The Foundation of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1936).

sideration clearly reminiscent of *Russell v. Men of Devon.*[29]

Second, if the governmental unit were considered to be "municipal," immunity attached *only* if the activity which led to the suit were "governmental" and not merely "proprietary."[30] Although these words have not been given a precise judicial construction, a "governmental" activity can be defined as one which bears a relation to a public purpose and which is by nature for the public good. On the other hand, a "proprietary" function can be defined as one which could readily be fulfilled by a private corporation while having little or no relation to a public purpose. The basis for denying immunity to "proprietary" activities appears to be that there is no public need to have a municipal corporation perform such service, and therefore, the governmental unit should be held to that degree of responsibility which would attach to a private corporation. This seems to be particularly true when the municipal corporation is collecting revenue for its service.

Judicial Abrogation of the Doctrine of Sovereign Immunity

In view of the judiciary's extensive resort to legal fictions and artificial distinctions, it was generally believed that any major revision of the doctrine of sovereign immunity would have to be through the medium of the state legislature. As one author noted:

> The distinction between governmental and proprietary functions originated chiefly in a combination of misguided logic and misapplied precedent rather than in consideration of justice.[31]

Thus, there was additionally the feeling that while the judiciary had no specific intention to take an active role in revising the application of the doctrine, the intricate distinctions which developed from judicial decision left case law in a state which many thought could be definitively remedied only by legislative action.

Surprisingly, nationwide judicial abrogation began in 1957 when the Florida Supreme Court held that tort immunity is not available to any municipality, regardless of whether the activity is "governmental" or "proprietary."[32] Bolstered by the Florida decision, the Illinois courts soon cast off their self-inflicted shackles and overruled years of precedent on municipal immunity. In 1959 the Illinois Supreme Court handed down the celebrated decision of *Molitor v. Kaneland Community Unit Dist. No. 302.*[33]

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[29] See text at note 11.

[30] Bailey v. City of New York, 3 N.Y. 531 (1842) represents the first declaration of such a classification.

[31] Note 28 *supra.*

[32] Hargrove v. Cocoa Beach, 96 So. 2d 130 (1957); Annot., 60 A.L.R.2d 1193.

[33] 18 Ill. 2d 11, 163 N.E.2d 89 (1959) [hereafter referred to as *Molitor*].

Molitor held that a school district is liable for injuries proximately caused by the negligence of one of its employees during the course of his employment. Although only a school district was involved, the court's strong language indicated that the immunity of all subdivisions of the state was in jeopardy. Therefore, if immunity were to attach in the future, it would be only by virtue of specific legislative action. Fearful of the inevitable extension of *Molitor*, several special interest groups forced through protective legislation which prolonged their privileged status. Thus, counties,[34] the Chicago Park District,[35] forest preserve districts,[36] and school districts[37] were able to postpone their loss of tort immunity. In the wake of *Molitor*, however, the Illinois Supreme Court had little difficulty in attacking the constitutionality of these enactments.

The 1965 case of *Harvey v. Clyde Park District*[38] represents the first constitutional challenge of these pressure-ridden enactments. In stripping away the immunity of park districts, the court held that there is no rational basis upon which to justify special treatment of a park district as opposed to any other governmental unit, and the statute was, therefore, unconstitutional.[39] The court stated:

> Many of the activities that frequently give rise to tort liability are common to all governmental units. The operation of automobiles is an obvious example . . . . [T]here is no reason why one who is injured by a park district truck should be barred from recovery, while one who is injured by a city or village truck is allowed to recover . . . .[40]

On similar reasoning, the court subsequently held that the statute granting immunity to counties also constituted special legislation.[41] It is now clear that for purposes of constitutionality, immunity granting statutes must be based upon the function of a governmental unit, and not be based simply upon an arbitrary classification of different governmental agencies which perform the same function.[42]

The proposition that the courts possess the power to judicially abrogate sovereign immunity has been one over which much controversy has arisen. On the one hand, there is the attitude expressed in the majority opinion of *Molitor:*

> Having found the doctrine to be unsound and unjust under present

[34] Act of Aug. 7, 1961, ch. 34, § 301.1, [1961] Ill. Laws 72nd Sess. 2846.
[35] Act of July 22, 1959, ch. 105, § 333.2a, [1959] Ill. Laws 71st Sess. 2020.
[36] Act of July 22, 1959, ch. 57½, § 3a, [1959] Ill. Laws 71st Sess. 1954.
[37] Act of July 22, 1959, ch. 122, §§ 821-31, [1959] Ill. Laws 71st Sess. 2060.
[38] 32 Ill. 2d 60, 203 N.E.2d 573 (1964).
[39] *See* Comment, *Maloney v. Elmhurst Park District: Park District Tort Immunity in Illinois — The Functional Dilemma*, 5 JOHN MAR. J. PRAC. & PROC. 368 (1972).
[40] 32 Ill. 2d at 65, 203 N.E.2d at 576.
[41] Hutchings v. Kraject, 34 Ill. 2d 379, 215 N.E.2d 274 (1966).
[42] Note 39 *supra.*

conditions, we consider that we have not only the power, but the duty, to abolish that immunity.[43]

On the other hand, there are those who fervently oppose what they consider to be judicial legislation. Accordingly, their conviction is that if immunity were to be abolished, the legislature is the proper body to do so.[44] It has been said:

> We do not, however, agree that an ancient doctrine firmly imbedded in that great body of Anglo-Saxon law which we inclusively refer to as the 'Common Law', and which became that law through early usage and custom, can be judicially abrogated any more than the courts are authorized to abolish statutory law because in their opinion the reason for the legislative enactment no longer justified the continuance of the law.[45]

The argument that *Molitor* represents an intrusion into a sphere of strict legislative concern appears to have the weight of tradition and reason behind it. At the time *Molitor* was decided, the common law of England was adopted by statute in Illinois, and was to be "considered as of full force *until repealed by legislative authority.*"[46] Since the common law of England encompassed the concept of sovereign immunity, the statute would seem to preclude judicial action, especially when the legislature acted on the doctrine in several instances. Regardless of the merits of either argument, judicial abrogation of sovereign immunity has become a commonplace occurrence in recent years.[47]

ILLINOIS CONSTITUTIONAL HISTORY OF SOVEREIGN IMMUNITY

In considering the constitutional development of the doctrine of sovereign immunity in Illinois, a clear trend is apparent which indicates a growing concern that the state be protected from suit. The Illinois Constitution of 1818 was silent on the matter of sovereign immunity. Apparently, the framers of the constitution recognized that the doctrine was firmly implanted in the common law and regarded this as adequate protection for the state. Of course, under the common law the sovereign was immune from suit, but there was no limitation on the state's power to give consent. Consequently, the state could be sued if the requisite consent were granted.

The Illinois Constitution of 1848 marked the first inclusion of the doctrine in an Illinois constitution by providing that "The General Assembly shall direct, by law, in what manner suits may be brought against the State."[48] One must understand that a

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[43] 18 Ill. 2d at 25, 163 N.E.2d at 96.
[44] Kilbourn v. Seattle, 43 Wash. 2d 373, 261 P.2d 407 (1953).
[45] Maffei v. Kemmerer, 80 Wyo. 33 at 55, 338 P.2d 808 at 816 (1959).
[46] ILL. REV. STAT. ch. 28, ¶ 1 (1959) (emphasis added).
[47] W. PROSSER, LAW OF TORTS, 985 n.50 (4th ed. 1971), states that seventeen states have abrogated municipal immunity.
[48] ILL. CONST. art. III, § 34 (1848).

state constitution operates as a limitation on the power of the legislature, and does not constitute a grant of power. Thus, state legislatures possess all powers except those specifically withheld. In strict legal theory, the provision of the 1848 Constitution had no effect on existing law, for there was no such limitation on the General Assembly. The legislature, therefore, already possessed the power to determine how and when suits could be brought against the state. The 1848 provision is significant only in that it illustrates the growing concern with sovereign immunity, for though the State of Illinois was clothed in sovereign immunity with all the finality that the common law could muster, the voters of Illinois insisted that the protection be reinforced with constitutional dignity. In passing, it is interesting to note that the General Assembly enacted no legislation on the matter pursuant to the 1848 Constitution.

The proposed Constitution of 1862 retained the basic theme of the prior constitution, but it additionally specified the manner in which suits could be brought against the state. It provided for circuit court jurisdiction with a right to appeal to the Illinois Supreme Court.[49] This constitution, however, was never ratified by the people.

The Illinois Constitution of 1870 substantially changed an individual's rights against the state by providing, "The State of Illinois shall never be made defendant in any court of law or equity."[50] It has been demonstrated that prior to the Constitution of 1870, an individual could sue the state if consent were granted, and full resort to the state's judicial machinery remained a possibility if permitted by requisite legislative action. The 1870 Constitution, however, created an express limitation on the legislature, prohibiting the enactment of any statute granting consent to sue the state. Thus, there was no avenue by which the legislature could sanction the use of the courts for suits against the state.

Absent a careful analysis, the wording of the 1870 provision is easily misleading. Although the constitution effectively precluded any *suit* against the state, it did not prohibit the legislature from granting consent to *liability*. In fact, the drafters of the constitution clearly contemplated the entertainment of claims against the state, although the manner in which the claims were to be entertained was somewhat unorthodox. The Committee on the Legislature Department to the 1870 Constitutional

[49] *See* G. BRADEN & R. COHN, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS (1969).

[50] ILL. CONST. art. IV, § 26 (1870).

Convention initially proposed the following with regard to sovereign immunity:

> The State of Illinois shall never be made defendant in any court of law or equity; but the General Assembly may provide, in any case that they may deem it advisable, for commissioners or arbitrators to investigate and report any claims against the State, subject to review of the General Assembly; and the General Assembly shall provide means for the payment of all just claims against the State.[51]

A motion to strike all words after the word "equity" was subsequently passed on the theory that the language was unnecessary, since the legislature already possessed the power attempted to be conferred.

The records of the proposed Constitution of 1922 contain no discussion on the subject of sovereign immunity. Although this constitution was never ratified, the conspicuous absence of any proposed revision suggests that the drafters of the proposed constitution were satisfied with the status quo as provided by the 1870 Constitution. Hence, for a period of one hundred years, the state remained absolutely immune from suit.

THE ILLINOIS CONSTITUTION OF 1970

After considering the historical development of the doctrine of sovereign immunity, the Committee on General Government to the Illinois Constitutional Convention of 1970 determined that public interest would best be served by eliminating the doctrine from the new constitution.[52] In support of their conclusion, the committee contended that the provision on sovereign immunity in the 1870 Constitution did not achieve any valuable purpose, but rather it merely constituted a procedural hindrance to justice. The committee stated:

> It [section 26 of article IV of the 1870 Constitution] does not, for all practical purposes, create sovereign immunity for the State. Rather, it merely acts as a limitation on the power of the General Assembly to establish procedures for the processing of claims against the State.[53]

The committee further noted:

> For the past 25 years, the liability of the state under the Court of Claims Act has been almost as broad as the liability of private individuals and entities. Thus, the present provision certainly does not have the effect of limiting the State's liability or of limiting the number or type of claims which the State will be obliged to pay.[54]

Having determined that the doctrine of sovereign immunity should be excluded from the proposed Constitution of 1970, the

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[51] DEBATES AND PROCEEDINGS OF THE ILLINOIS CONSTITUTIONAL CONVENTION OF 1870, 960 (1869-70).

[52] *Committee Proposals*, vol. VI at 673.

[53] *Id.* at 673.

[54] *Id.*

committee considered three methods by which to effectuate the exclusion.

The first alternative was to delete section 26 of article IV and leave the constitution silent on the matter of sovereign immunity. The question arose, however, as to whether such action would be interpreted as constituting an absolute waiver of immunity by the state, and thereby affirmatively create a right to sue the state in its own courts. Rather than risk an unintended result through litigation, the committee stated, "[I]t would seem preferable to resolve this doubt in the Constitution itself."[55] Accordingly, this approach to the problem was promptly discarded.

The second alternative contemplated by the committee was to retain the basic language of the 1870 Constitution, and expressly remove the procedural limitation on the legislature by adding an additional clause. It was, therefore, proposed that the provision in question read:

> The State of Illinois shall never be made defendant in any court of law or equity, *except as provided by the General Assembly.*[56]

The committee contended that the advantage of such a provision was that the terminology was familiar and that the words, themselves, have developed a clear meaning over one hundred years of judicial construction. The uncertainties which inevitably accompany new language would thereby be minimized.

The problem with the above phraseology is that it would have perpetuated the basic inequities of the 1870 provision, for the existing law would remain essentially unaltered. Thus, with regard to subdivisions of the state, the legislature would still be required to specifically *limit* liability where desirable; whereas the state would remain immune except in those instances where the legislature chose to expressly *impose* liability. In the words of the committee, "[I]t is appropriate for the new Constitution to provide a uniform rule of liability for all levels of government."[57]

With the above considerations in mind, the committee proposed a third alternative which was destined to be in all vital respects the present immunity provision in the Illinois Constitution of 1970.[58] In its final form, section 4 of article XIII reads:

> Except as the General Assembly may provide by law, sovereign immunity in this State is abolished.

Under this provision the state has effectively been relegated to

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[55] *Id.* at 676.
[56] *Id.* (emphasis added).
[57] *Id.* at 677.
[58] *Id.* at 678. The precise wording of the proposal was as follows:
Except as the General Assembly may otherwise provide, the sovereign

the same status as its governmental subdivisions since *Molitor* was handed down. The state is no longer immune per se, but must look to legislative sanction for its immunity.

In drafting this proposal the committee took full cognizance of a very practical problem. An attempt to establish the same effect could have been made by undertaking to *create liability* for the state, rather than simply *abolish immunity*. In the committee's words:

> There is no word which would encompass all possible types of liability, and the use of words such as 'wrongs,' 'tort,' 'contract,' etc., in a clause creating liability could be interpreted as limiting the types of rights which could be enforced.[59]

The wording of section 4 of article XIII, therefore, eliminates a potential misinterpretation as to the scope of possible liability.

The intention of the committee was to establish a provision which would be flexible, rather than one which would bind the legislature to a designated course of action.[60] To this end the committee was entirely successful; for after the ratification of the 1970 Constitution, the General Assembly had before it a number of legislative alternatives from which to choose. Among them was the opportunity to create a uniform system of liability by modifying the Tort Immunity Act[61] so as to bring the State of Illinois within its purview. A thorough discussion of the Tort Immunity Act is beyond the scope of this comment,[62] but it is sufficient to note that the Illinois act is among the most liberal of such acts, and provides that all governmental subdivisions of the state may be sued for the tortious conduct of employees, subject to special procedures and express exemptions.

The General Assembly could have also amended the Court of Claims Act so as to make it the exclusive remedy against the state, and thereby preserve the status of the law prior to the 1970 Constitution. In any event, the committee was cognizant of the potential chaos which could have resulted from hasty legislative action. Rather than risk this problem, a two year moratorium was, therefore, created in the Transition Schedule of the Illinois Constitution of 1970,[63] in order to grant the legislature ample

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immunity of the State and all other units of government is abolished. Thus, the only distinction between this provision and the one actually ratified, is that the new constitution does not expressly include lower units of government. These units, however, had previously lost their immunity with the decision in *Molitor*.

[59] *Id.* at 678.

[60] *Id.* at 679.

[61] ILL. REV. STAT. ch. 85, § 1-101 *et seq.* (1972).

[62] *See generally* Kionka, and Norton, *Tort Liability of Local Governments and Their Employees in Illinois: Current Status and Recent Developments*, 58 ILL. B.J. 620 (1970); Latturner, *Governmental Tort Immunity in Illinois*, 55 ILL. B.J. 28 (1966); Comment, *The Trend Toward Elimination of Governmental Immunity in Illinois*, 9 DEPAUL L. REV. 39 (1959).

[63] ILL. CONST. TRANSITION SCHEDULE, § 1(e) (1970).

time to fully study the situation, and wisely choose among a multitude of possible actions.

LEGISLATIVE ACTION PURSUANT TO THE ILLINOIS CONSTITUTION OF 1970

Undoubtedly, there are many who would wish that the Tort Immunity Act be extended so as to include the State of Illinois. Clearly, this was the desire of the committee when it stated:

> Illinois has a well-constructed statute which limits the liability of local governments and provides certain procedural rules for suits against them . . . . By removing this constitutional limitation, the General Assembly would be given the opportunity to provide a uniform system for the adjudication of claims against all levels of Illinois government.[64]

Regardless of the merits of this position, the General Assembly has chosen to perpetuate the status of the law prior to the 1970 Constitution, for it passed an enactment, effective January 1, 1972, making the Court of Claims Act the exclusive remedy against the state.[65] To date, the legislature has taken no further action on this matter. It seems certain, however, that the General Assembly may soon be forced to pursue alternative actions, for the constitutionality of the Court of Claims under the 1970 Constitution is presently in question.

Since the Illinois Supreme Court's decision in *Molitor*, wherein the court abrogated the immunity of school districts, a disparity has existed between the liability of the state and that of its subdivisions. The Court of Claims Act, which is the exclusive remedy against the state, is a more limited remedy than that available against other governmental entities; for the Act imposes an absolute ceiling on recovery,[66] impliedly denies the right to a jury, and provides no method for judicial review.[67] In 1969 both the immunity provision of the 1870 Constitution and the Court of Claims Act were constitutionally challenged in the case of *Edelen v. Hogsett*.[68] In *Edelen* the plaintiff contended

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[64] *Committee Proposals*, vol. VI at 675.

[65] ILL. REV. STAT. ch. 127, § 801 (1972).

[66] ILL. REV. STAT. ch. 37, § 439.8c-d (1972) provides in relevant part: The court shall have exclusive jurisdiction to hear and determine the following matters . . . . All claims against the State for time unjustly served in prisons . . . . [T]he court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than $15,000; for imprisonment of 14 years or less but over 5 years, not more than $30,000; for imprisonment of over 14 years, not more than $35,000 . . . . [A]n award for damages in a case sounding in tort shall not exceed the sum of $100,000.

[67] *Id.* at § 439.17 provides:
Any final determination against the claimant on any claim prosecuted as provided in this Act shall forever bar any further claim in the court arising out of the rejected claim.

[68] 44 Ill. 2d 215, 254 N.E.2d 435 (1969) [hereinafter referred to as *Edelen*].

that he was denied equal protection of the laws under both the United States[69] and Illinois[70] constitutions. The court held that the constitutionality of the Court of Claims Act cannot be attacked merely on the ground that suits against the state must be brought in a separate forum. To be declared unconstitutional, it must be shown that the classification which distinguishes the state does not rest on "substantial differences in kind, situation, or circumstance."[71] Since the classification of the state as a separate entity is rationally based, a separate forum is constitutionally permissible.[72]

The court, however, refused to entertain the question of the constitutionality of the Court of Claims Act. Since the plaintiff in *Edelen* did not seek any relief under the Act, the court held that he had no standing to sue. Subsequently, the constitutionality of the Act was raised in the case of *Manos v. State of Illinois*.[73] Here, too, the court refused to rule on the question since the plaintiff did not establish standing.

It would appear that had the question been entertained in either of these cases, the Act would have been upheld. Under the Illinois Constitution of 1870, the state was *constitutionally* immune from suit, but not from liability. Thus, the fact that the Court of Claims Act provides a limited remedy against the state could not be considered a violation of equal protection of the laws, for any procedural limitation would be constitutionally sanctioned. Under the Constitution of 1970, however, such a statement cannot be made, for the state is no longer immune per se from suit. In effect the state has waived its immunity, and one must now question whether the General Assembly may provide liberal rules of recovery against subdivisions of the state, and still maintain strict rules of recovery against the state. Since such a classification is permissible only if it is not "arbitrary, capricious, or unreasonable,"[74] the problem resolves itself to:

1. Can there be a rational basis upon which to justify separate rules of recovery when the state and its subdivisions are performing the same function? and
2. Are contrary results in similar cases likely to follow solely because of differing rules governing procedures and limitations

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[69] U.S. CONST. amend. XIV.

[70] ILL. CONST. art. IV, § 22 (1870). The corresponding provision under the Illinois Constitution of 1970 is article 1, section 2 which will undoubtedly be interpreted to encompass the same principles as in the old provision.

[71] 44 Ill. 2d at 221, 254 N.E.2d at 439.

[72] In *Edelen* the court stated:

> The General Assembly obviously sought to provide for the expeditious centralized handling of the numerous claims against the State.

Thus, the classification clearly has a rational base.

[73] 10 Ill. App. 3d 30, 293 N.E.2d 716 (1973).

[74] 44 Ill. 2d at 221, 254 N.E.2d at 439.

> in claims against the state as opposed to those against its governmental subdivisions?[75]

If there *be* no rational basis upon which to justify separate rules of recovery, and/or contrary results in similar cases *are* likely to follow solely because of differing rules governing procedures and limitations, it may well be that the Act will be held to be unconstitutional when subjected to judicial scrutiny under the new constitution.

The most obvious constitutional difficulty involves the dollar ceiling on recovery. In this regard the committee noted:

> It is difficult to imagine any interest of the state sufficient to justify such a limit, where there is no ceiling on judgments against local governmental entities with smaller financial resources.[76]

Additionally, the committee questioned whether there can be a rational basis upon which to deny a right to a jury or fail to provide a means of appeal to claimants against the state.[77]

In forecasting the future judicial posture, the committee stated:

> [T]here is a substantial likelihood that the $25,000 limitation on the Court of Claims awards is unconstitutional, but only a reasonable possibility that the Court of Claims procedures themselves are invalid.[78]

Subsequent to the committee's report, the legislature increased the maximum award to the sum of $100,000,[79] and it now appears less likely that the Act will be declared unconstitutional in what is obviously its most arbitrary aspect — the dollar limit.

CONCLUSION

The doctrine of sovereign immunity has been and continues to be a necessary doctrine in the body of Anglo-American law, for no one would suggest that the sovereign should be held liable for all of its acts. To impose liability for judicial errors, failure to enact laws, delay in the delivery of the mail, and the like would create an intolerable situation. But the extent to which the doctrine should be applied must be related to the needs of our society. Thus, when the financial condition of the state and its subdivisions was clearly unsteady, there was a genuine need for extensive immunity; but when the scope of governmental functions increased dramatically and the possibility of governmental bankruptcy diminished, the scales of equity were substantially tipped in favor of public recovery.

Such was the feeling for at least two decades prior to the Illinois Constitutional Convention of 1970. Although the 1870

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[75] *Committee Proposals*, vol. VI at 664.
[76] *Id.* at 668.
[77] *Id.*
[78] *Id.* at 671-2.
[79] ILL. REV. STAT. ch. 37, § 439.8d (1972).

Constitution expressly prohibited suits against the state, both the legislature and judiciary commenced an attack on the doctrine of sovereign immunity in order to confine its application to a narrow and more equitable scope. But their action constituted only a prelude to the culmination of abolition efforts — The Illinois Constitution of 1970. Section 4 of article XIII was the result of detailed study and careful consideration of the problem. It is a provision which not only reflects public demands, but also establishes a system sufficiently flexible to be responsive to changing times. The procedural limitation which was once imposed upon the General Assembly is no longer a barrier to change, for the 1970 Constitution places the state on an equal level with its governmental subdivisions. Therefore, if the State of Illinois is to ascend to a level of immunity above that of its governmental subdivisions, it can arrive at that high place only by legislative escort.

The Committee on General Government to the Constitutional Convention of 1970 stated:

> In Illinois we now have the anomalous situation that local governments — which have more limited resources and less risk-spreading ability than the State — may be sued in our courts, whereas claims against the State are restricted to a more limited, informal and uncertain remedy in the Court of Claims.[80]

With the ratification of the 1970 Constitution, the General Assembly was provided with the opportunity to create a uniform system of immunity. It appears, however, that the legislature is determined to follow faded blueprints drawn in 1903, for the General Assembly has retained the Court of Claims as the exclusive remedy against the state. Thus, despite a constitutional invitation for remedial action, the legislature has decided to perpetuate an anomaly.

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[80] *Committee Proposals*, vol. VI at 675.