

A Proposed Act to Create an Ohio Court of Claims

INTRODUCTION

Possibly the most incongruous yet hardest survival from the monarchistic background of our democratic governmental structure has been the doctrine that the king can do no wrong, and that, consequently, the king can not be sued. The word "state" was early substituted for the word "king", but the fear that state liability might seriously interfere with the efficient functioning of the government resulted in a wholesale adoption of the doctrine by the respective states as well as by the Federal Government. Ohio has been more reluctant than most to shed her immunity from liability and from suit. On September 3, 1912, Article I, Section 16, was adopted, giving the legislature the power to provide the courts and manner in which suits against the state might be brought. The provision clearly is not self-executing¹ and the general assembly has not seen fit to implement it by providing means for a truly judicial determination of a claimant's rights against the state of Ohio.

The earliest system for the relief of those whom the state had injured or wronged was a pure adaptation of the monarchist procedure. There being no legal obligation to rectify the wrong, any compensation was patently a gratuity on the part of the legislature, rather than a recognition of the individual's rights. The flaws of the system are too obvious to require discussion. In addition to the complete failure to safeguard the individual's rights against the state, the legislature, as an elected political body whose primary function is the promulgation of general law, is poorly qualified to determine the rights of either the state or the individual in any given case.

Recognizing these defects, the legislature created the Sundry Claims Board,² a part-time establishment of elected and appointed state officials, who hear and decide claims against the state. On the basis of their decision, a recommendation is made to the legislature, which may or may not allow any or all of the claims at the next regular session. The functioning of the Sundry Claims Board is discussed at length elsewhere in this issue. The point here sought to be emphasized is that the final determination of the validity of a claim against the state still is reserved to the legislature.

¹ *Raudabaugh v. State*, 96 Ohio St. 513, 118 N.E. 102 (1917); *Palumbo v. Industrial Commission*, 140 Ohio St. 54, 42 N.E. 2d 766 (1942).

² OHIO GEN. CODE, §270-6 (1946).

The adjudication of rights under any particular set of facts is clearly a judicial function by nature. It is the purpose of the Court of Claims Act to establish in Ohio a judicial procedure whereby any claimant against the state is assured of an impartial hearing and a considered adjudication of his rights, and to provide a method for immediate satisfaction of an awarded judgment.

COURT OF CLAIMS ACT

An act to create a Court of Claims, to prescribe its jurisdiction, powers and duties, to limit the time within which actions and claims against the state of Ohio may be brought, to establish the procedure whereby awards granted are satisfied, and to repeal Sections 270-6 and 154-36 of the Ohio General Code.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF OHIO:

Short Title.

SECTION 1. The short title of this act is "Court of Claims Act."

Creation of court: qualification of judge.

SECTION 2. The court of claims is hereby established. It consists of one judge, who, at the time of his election, must be an attorney admitted to practice in the courts of Ohio for at least six years.³

Election of judge: term of office.

SECTION 3. The judge of the court of claims shall be elected every six years, beginning with the general election of 19__, to hold office for a term of six years commencing on the first day of January next following his election. In the event of a vacancy in the office, caused by resignation, death, illness or other disability, the Governor shall appoint, with the approval of the Senate, a like-qualified successor to serve until the next general election, at which time a judge shall be elected to serve the remainder of the unexpired term.

Compensation of judge.

SECTION 4. The judge shall receive an annual salary of \$9,000.00, payable monthly. The judge shall receive actual expenses not to

³The establishment of the court of claims by the legislature would seem clearly to fall within the constitutional power of the legislature under the provisions of Article IV, Section 1. In this regard, see *State v. Davis*, 119 Ohio St. 596, 165 N.E. 298 (1929). The qualifications for the judge of the court of claims correspond to those established by the legislature for the judges of the courts of common pleas. The court of claims, as established by this draft act, is of substantially equal stature with the court of common pleas, and, to that end, similar standards, practices and procedures are sought to be drawn between a claim brought before the court of claims and a civil action before the court of common pleas, wherever feasible.

exceed ten dollars per day during the court session when the court is sitting in a county other than the county in which the judge resides.

Court of Claims Districts.

SECTION 5. There are hereby established three Court of Claims districts within the State of Ohio.

The first district is composed of the following counties: Allen, Athens, Belmont, Champaign, Clark, Coshocton, Crawford, Defiance, Delaware, Fairfield, Fayette, Franklin, Fulton, Gallia, Guernsey, Hancock, Hardin, Henry, Hocking, Jackson, Knox, Lawrence, Licking, Logan, Lucas, Madison, Marion, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Ottawa, Paulding, Perry, Pickaway, Pike, Putnam, Sandusky, Scioto, Seneca, Union, Vinton, Washington, Williams, Wood, Wyandot.

The second district is composed of the following counties: Ashland, Ashtabula, Carroll, Columbiana, Cuyahoga, Erie, Geauga, Harrison, Holmes, Huron, Jefferson, Lake, Lorain, Mahoning, Medina, Portage, Richland, Ross, Stark, Summit, Trumbull, Tuscarawas, Wayne.

The third district is composed of the following counties: Adams, Auglaize, Brown, Butler, Clermont, Clinton, Darke, Greene, Hamilton, Highland, Mercer, Miami, Montgomery, Preble, Shelby, Van Wert, and Warren.⁴

Court sessions.

SECTION 6. The court of claims shall hold at least three terms of court in each year. The first session shall commence on the first day of February and shall be held in the city of Columbus, in Franklin County, in the first court of claims district. The second session shall commence on the first day of May and shall be held in the city of Cleveland, in Cuyahoga County, in the second court of claims district. The third session shall commence on the first day of September and shall be held in the city of Cincinnati, in Hamilton County, in the third court of claims district.⁵

⁴The districts established by Section 5 are balanced by geographical area, population and incidence of claims, as supplied by the files of the Director of Finance of the State of Ohio in his capacity as a member of the Sundry Claims Board.

⁵The total number of claims heard annually by the Sundry Claims Board over the period 1944-1947 indicates that it is well within the limits of physical possibility for one court to hear and determine all the claims filed against the state. Obviously, the need for economy in government is a factor favoring the one-court system. The "circuit-riding" provision of Section 6, prescribing three terms of court at separated population centers of the state, has been devised to protect the interests of the claimant and the state, in that witnesses and evidence may be produced, and personal appearance assured, with a minimum of expense and inconvenience.

When he deems it necessary, the judge of the court of claims may hold a special session in any of the three districts. In such case, the judge shall issue an order for such special session to the clerk of court at least three weeks prior to the commencement of the special session. The clerk shall forthwith cause notice of the session to be published in newspapers of general circulation in all of the counties of the district in which the special session is to be held.⁶

Court of record; official seal.

SECTION 7. The court of claims is hereby made a court of record. The court is authorized to adopt an official seal, with suitable device and inscription. A description of the seal and an impression thereof shall be filed in the office of the secretary of state.

Clerk of court, appointment, removal.

SECTION 8. The judge of the court shall appoint a clerk of the court of claims, to hold office for a period not exceeding the term of office of the appointing judge. The court may at any time remove the clerk for failure in the performance of the duties of the office, or for any manner of incompetence.

Bond.

SECTION 9. Before entering upon his duties, the clerk of the court of claims shall give a bond to the state in the sum of ten thousand dollars, with two or more sureties approved by the court, conditioned on the faithful discharge of the duties of his office. The bond, with the approval of the court and the oath of office indorsed thereon, shall be deposited with the secretary of state.

Clerk of court, duties.

SECTION 10. The clerk of the court of claims shall prepare the docket, attend the sessions, record the orders, judgments and proceedings of the court of claims, and issue necessary process.

Clerk of court, compensation.

SECTION 11. The clerk of the court of claims shall receive an annual salary of \$3,600.00. When the court is in session in a county other than that in which he resides, he shall receive actual expenses not to exceed ten dollars per day.

Shorthand reporter; other appointments.

SECTION 12. The judge of the court of claims may appoint a shorthand reporter at a salary not to exceed \$2,400.00 annually, and may remove him from his appointment for incompetency or failure in the performance of duties assigned him by the court. It is the

⁶ This special term provision is similar to that provided for the courts of Ohio by the Ohio General Code.

duty of the shorthand reporter, under the direction of the court, to prepare the decisions of the court for publication.

The judge may further appoint, from time to time, such clerical assistants as are necessary to the proper and efficient functioning of the court.

Attorney General to represent state.

SECTION 13. The attorney general shall represent the state of Ohio in all proceedings before the court of claims.

Waiver of immunity from suit, and from liability.

SECTION 14. The state of Ohio hereby waives its immunity from suit and from liability, and consents to have its liability determined in accordance with the same rules of law applicable in actions against individuals and corporations in the common pleas court of this state. The waiver and consent defined in this section, however, are limited to claims brought in accordance with the provisions of this act and in the court of claims.⁷

The defense of inapplicability of the doctrine of *respondet superior* is expressly waived for actions brought before the court of claims.⁸

This section does not repeal or otherwise modify any provision of the Workmen's Compensation Law.⁹

Jurisdiction of the court of claims; limitations.

SECTION 15. The court of claims has jurisdiction:

(1) To hear and determine the claim of any person, corpora-

⁷ This waiver of immunity is within the power granted the legislature by Article I, Section 16 of the Ohio Constitution. The wording of the provision itself has been substantially carried over from the parallel section of the New York Court of Claims Act of 1939. The limitation imposed on the waiver of immunity in the last sentence of the paragraph precludes the possibility of suit against the state in any other court than the court of claims.

The New York court held that the waiver of immunity by the state dispenses with the legal irresponsibility theretofore enjoyed by the subdivisions of the state. *Barnardine v. City of New York*, 294 N.Y. 261, 62 N.E. 2d 604 (1945). Although the language of Section 14 of the draft act is more restricted than the comparable section in the New York Act, Ohio courts might reach the same conclusion. In view of such a possibility, a statute should be enacted making notice a prerequisite to suit.

⁸ The experience of the state of Illinois, under whose act this defense was not, at first, specifically waived indicates that, even in the face of what would seem a clear intent to the contrary, the judiciary has refused to recognize the existence of vicarious liability on the part of the state. It is believed that the first paragraph of Section 14 of the draft act refutes such an interpretation, but the express waiver has been included as a precautionary measure.

⁹ This paragraph has also been devised for the sole purpose of precluding judicial mis-interpretation.

tion or municipality against the state for the wrongful appropriation of any real or personal property or any interest therein; for the breach of any contract, express or implied; or for the torts of officers, agents or employees of the state while acting as such, including claims for damages resulting from the negligent operation of a motor vehicle.¹⁰

(2) To hear and determine any claim arising out of the same transaction in favor of the state against the claimant or against the assignor of the claimant.¹¹

(3) To render judgment in favor of the state or the claimant for any sum payable by or to the claimant.

The court of claims is hereby granted all the powers necessary to carry out properly the jurisdiction granted and the duties imposed by this act.

The court of claims has no jurisdiction:

(1) To hear a claim arising as a result of a discretionary act of an officer, agent or employee of the state.¹²

(2) To entertain prayers for relief in the nature of injunctions

¹⁰Section 15, implementing Article I, Section 16 of the Ohio Constitution, expresses in intentionally broad terms the grant of jurisdiction to the court of claims. Subsequent paragraphs of the same section prescribe carefully the limitations of that jurisdiction, confining it to the precise field within which the court is to function. After a study of the acts of sister states, the New York Act of 1939 was again selected as a partial model. Section 15, as it is now constituted, efficiently covers the selected fields of jurisdiction with a marked reduction from the more verbose and scattered sections of the New York and Illinois acts, and, at the same time, avoids the most ambiguous phrases of more curtly expressed sections of other states' acts, of which the Michigan Court of Claims Act is an example. Basing a conclusion on the experience of sister states in the field, it is believed that the section should be remarkably free from the narrowing effect of judicial interpretation. It is with regard to the possibility of judicial exclusion that there was specifically included in the jurisdictional grant the provision concerning claims arising from the state's operation of motor vehicles. Such claims were excluded, in the absence of a like section, by the Michigan court.

The jurisdiction of the court of claims has not been made exclusive. It is believed advisable to allow a reasonable test-period before denying recourse to the legislature in all cases.

¹¹Jurisdiction of claims in favor of the state has been expressly limited to those claims arising out of the same transaction. This prevents the court's infringement upon fields in which it should exercise no power, such as tax claims, and the like.

¹²The provision excluding from the jurisdiction of the court claims arising as a result of a discretionary act of a state officer has been adopted substantially from the Federal Tort Claims Act. This section and the subsequent section, which specifically denies the court the power to hear prayers for injunctive relief, afford the state the necessary protection from interference with governmental processes.

or restraining orders against the state in the exercise of its governmental functions.¹³

Practice and procedure, court rules.

SECTION 16. Practice and procedure in the court of claims is governed by the statutes now and hereafter prescribed for practice before the common pleas courts of this state. The court of claims may prescribe rules consistent with the constitution and laws of the state for the regulation of its practice.¹⁴

Power to compel attendance of witnesses.

SECTION 17. The court of claims is empowered to compel the attendance of witnesses, require the production of books, papers, records and documents, and any other evidence, and to punish for contempt of a lawful order of the court by fine or imprisonment, or both.

The judge and the clerk of the court of claims are authorized to administer oaths and to take acknowledgments of instruments in writing.

Trial by court without jury; new trial.

SECTION 18. The cause shall be heard by the judge of the court of claims without a jury. The court may grant a new trial upon the same terms and under the same conditions and for the same reasons as now or may hereafter prevail in the courts of common pleas of this state.¹⁵

Time for filing claim or notice of intention to file claim.

SECTION 19. No claim shall be maintained against the state unless the claimant has filed with the clerk of the court of claims either a claim or a notice of intention to file a claim within the following periods:

(1) If the claim is for recovery of damages for injuries to person or property, resulting from the tort of an officer, agent or employee of the state, the filing must take place within 90 days of the accrual of the cause.

(2) If the claim is for wrongful death, resulting from the tort of an officer, agent or employee of the state, the filing must take

¹³ See note 12 *supra*.

¹⁴ While, as previously stated, the court of claims has been established on a theory of substantive equality with the court of common pleas, it is recognized that the court of claims will require the plenary power to prescribe its own court rules granted by Section 16.

¹⁵ In the determination of the validity of claims against the state, it is strongly suspected that the findings of the jury would be more strongly influenced by considerations outside the presented evidence. There is here no right to a jury, since the right to sue the state is wholly dependent on legislative permission.

place within 60 days of the appointment of the executor or administrator of the decedent's estate.

(3) In all other cases, the filing must take place within one year after the claim is due and payable.

A claimant who fails to file a claim or notice of intention to file a claim within the time limits provided in the foregoing subdivisions, may nevertheless, in the discretion of the court, be permitted to file such claim at any time within two years after the accrual of the claim, if the claimant has shown, to the satisfaction of the court, that there was a reasonable excuse for the failure to file within the limits provided, that the state had actual knowledge of the essential facts constituting the claim, and that the state has not been substantially prejudiced by the failure of the claimant to file within the time limits provided.¹⁶

Limitation of claims.

SECTION 20. Every claim against the state, cognizable by the court of claims, and not otherwise sooner barred by law, is forever barred from prosecution unless it is filed with the clerk of the court as provided in this act within two years after it accrues.

Contents of claim, of notice of intention to file claim.

SECTION 21. Claims submitted and filed with the clerk of the court of claims will be in all respects in the form of petitions in civil actions.

The notice of intention to file claim shall be written, and shall contain specific information as to the nature of the claim, the items of damages or injuries claimed to have been sustained, the time and place where the claim arose, and the total sum claimed due from the state.

Notice to Attorney General.

SECTION 22. Each claim or notice of intention to file claim, filed in accordance with the provisions of this act, will be filed in duplicate. The clerk of court shall retain the original claim, or notice

¹⁶ Recognizing that it may be impractical, or that it may indeed work a hardship on the claimant, to require that an actual claim be filed within the time-limits prescribed, it has been provided that a notice of intention to file a claim may be submitted. This system, it is believed, relieves the claimant of the hardship involved, and, at the same time, adequately protects the best interests of the state, making it possible for the latter to assemble the necessary facts on which to defend.

Section 20, following, is a special statute of limitations. The time-limit has been more or less arbitrarily selected, but is believed to be reasonable under the circumstances, and considering the general nature of the action. There is no conflict with other, general, statutes of limitation of the Ohio General Code, since, as indicated earlier, the right to sue is entirely governed by the extent of legislative permission.

of intention to file claim. The copy in each instance will be served within five days of the date of receipt by the clerk on the attorney general of Ohio, as representative of the state.¹⁷

Satisfaction of judgments against the state.

SECTION 23. If judgment is rendered for the claimant in an action before the court of claims, and the period provided by law for all proceedings for review has expired, or if the judgment has been affirmed or modified, the clerk of court, upon request of any party in interest, shall certify the original or modified judgment to the auditor of state. A judgment so certified shall be accorded the same force and effect as a requisition on the auditor of state by a department or agency of the state, and shall be paid in the same manner as an operating expense of the Department of Finance as provided by Section 27 of this Act.¹⁸

Appeal from the court of claims.

SECTION 24. Appeal lies from the court of claims to the court of appeals in all respects as if the court of claims were one of the common pleas courts of this state. The procedure for the taking of appeals to the court of appeals is governed by the statutes governing the taking of appeals from the common pleas courts.¹⁹

Venue.

SECTION 25. Claims against the state shall be brought before the court sitting in the district wherein the incidents from which the claim arose occurred.

Satisfaction of judgment against the state an operating expense.

SECTION 26. The satisfaction of a judgment of the court of claims by the payment to the claimant of the sum adjudged due is an operating expense of the state within the meaning of Section 249-1 of the General Code.²⁰

Estimate of expenditures to be included in budget.

SECTION 27. The director of each department or agency of the state shall, at the time of preparation of his estimate of necessary

¹⁷ In line with the general policy of paralleling ordinary civil action procedures, the notice to the attorney general corresponds to service on the defendant in an ordinary civil action.

¹⁸ This system for satisfaction of an awarded judgment accomplishes one of the material objectives of the draft act, the immediate payment of a valid claim.

¹⁹ Again it is sought to achieve uniformity with the courts of common pleas. Here the process is necessarily qualified by the fact that there is no right to a jury in the court of claims.

²⁰ This section permits satisfaction of judgments against the state from the general fund of the state in the event that funds appropriated be exhausted.

funds for the biennial budget as required by law, submit to the Director of the Department of Finance an estimate of funds necessary for the satisfaction of judgments against the state arising from and out of the functioning of that particular department. The Director of the Department of Finance shall include the aggregate of these estimates in making the budgetary estimates of his department and the aggregate amount shall be included as an operating expense of his department in the consideration of appropriations to that department by the legislature. The Director of the Department of Finance shall keep a record by departments of the number and total amount of claims paid as a result of causes of action arising in each of the Departments of the state.

Repeal of Sections 270-6 and 154-36 of the General Code.

SECTION 28. Sections 270-6 and 154-36 of the General Code, which provide for the establishment of the Sundry Claims Board and the transfer of certain of its duties to the Department of Finance, are hereby repealed.

The Sundry Claims Board shall hear all claims filed with it prior to the effective date of this act.

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