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The Suability of the State

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REVIEWS

THE SUABILITY OF THE STATE*

The literature of American administrative law slowly accumulates. While the book under review is confined neither to the western hemisphere nor to administration, it deals with the foundation of the administrative law of the United States and may be classified with that group of literature as well as any other.

The prospective reader should not be frightened by the title of the book for the content is by no means as formidable as the name it travels under. Many of the aspects of the state as a party litigant are not discussed. There is no attempt to deal with suits before international tribunals, or between the members of a federal state; nor is any attention given to the state as prosecutor of violators of the law, thus eliminating all questions of indictments, criminal procedure, etc. Furthermore, save for a chapter on the administrative law of France the book is confined almost exclusively to the law of England and the United States. Even in the chapter on the state before foreign courts scarcely a dozen continental decisions are cited and almost all of these are French. The study, thus, is restricted nearly, but not quite, to the suability of the state and of state officers in England and the United States.

Limited even so, the territory to be surveyed is still expansive enough. The author begins with a discussion of the early history of the non-suability of the king of England and attempts to explain the rise and persistency of the doctrine. The exceptions in modern English law to the rule are then pointed out, noting the occasions upon which immunity will be waived and the form in which such waiver is effected. Attention is next called to the position of the British state as a plaintiff in civil actions, this requiring less than seven pages. A chapter on "Suits against Officers: England" examines the rule that the king can do no wrong, inquires as to how far the command of a superior officer will relieve an official from responsibility before the courts; looks into the liability of the officer in respect to the contracts he makes in behalf of the state; and then calls attention to the special cases where "act of state" is plead, and where the rights of the official are covered by the public authorities protection act of 1893—a good sized bill for eleven pages.

**The State as a Party Litigant.* By Robert Dorsey Watkins. Series 45, No. 1, of Johns Hopkins University Studies in Historical and Political Science. The Johns Hopkins Press, Baltimore, 1927. Pages xvii, 211. Price, $2.00.

The scene now shifts to our own shore. A brief chapter describes how the practice of non-suability became implanted in American soil, to be followed by twelve pages of factual material deposited without much semblance of order under the title: "The United States before its Own Courts." The United States court of claims merits a chapter before the author proceeds to grapple ineffectively with what a former supreme court justice called the "vexing question" of how to determine when the state is actually the defendant in a case brought nominally against a state officer. After examining the responsibility of the American official in tort and contract we are given a look at the position of state property in admiralty courts; the responsibility of the state and officers in the administrative tribunals of France; and the immunity of the state from subjection to foreign courts. A chapter headed "Theories: Conclusion" brings the work to an end at the 207th page.

It may be that there are valuable lessons which can be set out only by a survey of the more obvious features of any given landscape. Conceding the point, it seems safe to say that such an effort ought to be predicated on at least two prior assurances, namely, that the workman has the technique essential to landscape portraiture, and that he knows what are the significant features which are to contribute to his product. The reviewer is not conceited enough to attempt to give Mr. Watkins a grade or mark on his work. It does seem fair, however, to say, that in some respects the panoramic view is left a bit indistinct. For instance the practice of presenting digests of court decisions without telling the reader how much of the law they fail to cover often leaves one in uncertainty as to what value to attach to them, knowing as one does that they by no means mark the limits of the law.

As to how thoroughly Mr. Watkins knows the law he is concerned with, the reviewer is not fit to judge. In respect to the suability of the state and officers in the United States, he appears to be a satisfactory guide. Mr. Watkins may yet live to see dispelled his belief that "hopeless confusion" enshrouds the cases turning on the question of whether or not a suit brought on the record against a state officer is actually against the state, though many will question the width and tangibility of the "broad line of demarkation" discerned by Mr. Justice Matthews in *Hagood v. Southern* (1885, 117 U. S. 52, 70, 29 L. Ed. 805, 811). The suggestion (p. 98) that the confusion is to an extent born of the fact that the courts have "frequently sought to do justice rather than to conform to abstract propositions of the law" may be a helpful one. The statement (p. 67) that a cross suit cannot be maintained against a state in the American courts seems hardly correct in view of a federal circuit decision to the contrary (*Port Royal & Atlantic Ry. v. South Carolina,* 1894, 60 Fed. 552). The author's remarks concerning the early history of state immunity in the United States undoubtedly

would bear revision. The statement on p. 55 that "for seventy years the doctrine of sovereign immunity was accepted without hesitation, except in one instance [*Chisholm v. Georgia,* which brought on the eleventh amendment]" seems a bit broad in view of the fact that in *Oswald v. New York* (1792, 2 Dallas 401, 1 L. Ed. 433; and 2 Dallas 415, 1 L. Ed. 438) the supreme court not only accepted jurisdiction but threatened to give a decision in default of appearance by the state. An 1824 decision (*Bank of the U. S. v. Planters' Bank of Georgia,* 9 Wheaton 904, 6 L. Ed. 244) is cited on p. 59 as proof that "at first the courts took the view that for a state to be considered a party, it must appear as such on the record; if it did not, then regardless of how much its interest was affected by the outcome, it would not be considered a party." An 1882 case is then cited to prove that "after nearly a hundred years, the doctrine was changed." But on p. 103 the author recognizes that in *Governor of Georgia v. Madrazo* (1 Peters 110, 7 L. Ed. 73), a decision made by the United States supreme court four years after the *Planters' Bank* case, the court denied jurisdiction on the ground that while the action appeared on the record to be against the governor, actually it was against the state. In considering (p. 99) *Osborn v. Bank of the U. S.* (1826, 9 Wheaton 738, 6 L. Ed. 204) as an "early example of the proposition that for a suit to be against a state, it must be against it in name," Mr. Watkins apparently attached no importance to Justice Marshall's reference in that opinion to "cases where jurisdiction depends on the party." It may be that the chief justice, in stating the rule that the state must appear on the record as defendant in order to oust jurisdiction, did not intend to limit it to cases in which federal jurisdiction came only from the nature of the parties and not from the nature of the question but that is the interpretation of his words which seems to offer most hope of a satisfactory reconciliation of the rule with the later case of *Governor of Georgia v. Madrazo* in which the chief justice did look beyond the record to identify the state as defendant.

As was to be expected, the author's principal conclusion is that the state should surrender its immunity from suit. It is interesting to note that he looks upon the legal fiction of state sovereignty as not merely a fancied or imagined but a real, corporeal obstacle to the end he urges. In as much as the concept of sovereignty has been bandied about for several generations as a sign and a charm to obviate the necessity of explaining pet theories and schemes, one wonders why Mr. Watkins did not dispose of it in the customary way by redefining the term, instead of trying to compromise with the currently popular concept. It is to be hoped that the next coquistador who sallies forth to slay the dragon of state immunity will place greater reliance upon an understanding of the psychological and economic foundations of legal and political institutions.

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