

Tort Liability of Administrative Officers in New York

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Conclusion

Examination of witnesses is essential to the orderly and equitable administration of a bankrupt's estate. Not only is the information derived from the bankrupt necessary but also that which is obtained from other informed persons. This is recognized by the requirements in both sections discussed above. Under both, the persons involved are compelled under threat of contempt proceedings to appear and submit to interrogation.

But the bankrupt's testimony is privileged while that of the other witnesses is not. Such a discrimination is unwarranted and inequitable. All parties should be protected to the same degree. Particularly is the injustice reflected in the case of corporate representatives wherein the discrimination is based upon a superficial and invalid distinction. Since the terms of the statute do not admit of the necessary extension of immunity, it should be granted by legislative amendment.



TORT LIABILITY OF ADMINISTRATIVE OFFICERS IN NEW YORK

Introduction

“. . . [G]overnment means those innumerable officials who collect our taxes and grant us patents and inspect our drains. . . . They are fallible beings because they are human, and if they do wrong it is in truth no other derogation than the admission of their human fallibility. . . .”¹

The tremendous expansion in recent years of governmental activity and the concomitant increase in the number of public officers have emphasized the truth of the statement that few can avoid contact with administrative authorities.² Almost every phase of human endeavor involves, directly or indirectly, recourse to an administrative agency or dealings with a public official. These officials in the course of their duties are sometimes guilty of wrongs. It is when these wrongs proximately cause injury to third parties that the question arises with regard to the tort liability of administrative officers.

The tort liability of a public officer is materially distinct from that of a private citizen. Rarely does the latter have imposed upon

¹ Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447, 472 (1919).

² See Freund, *Historical Survey in THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* 17 (1923).

him the duty to act.³ If he chooses to act where he is under no legal obligation to do so, then, in most instances, if the act adversely affects the person or property of another, it will render him liable regardless of his good faith.⁴ Thus, unwarranted interference by a private individual is discouraged by requiring the actor to ". . . ascertain at his peril the facts and the law upon which the rightfulness of his interference depends."⁵

The administrative official, on the other hand, is under a duty to perform his functions and, when a private suit does not lie to compel such performance⁶ or to render him personally liable for non-action,⁷ he may nevertheless suffer the consequence of removal from office for his failure. The public officer is thus under a compulsion to act with respect to others whereas the private citizen enjoys, as it were, a privilege of selection with no culpability for non-action and, indeed, with an inducement not to act. This initial consideration is a prerequisite to a complete appreciation of the question involved for it illustrates the necessity for the application of different norms.⁸

At first blush, it would seem desirable to hold the public officer completely liable in order to indemnify individuals for the damages they suffer as the result of a wrongful administrative act,⁹ since such plenary liability might serve to curb the excesses of an overweening bureaucracy.¹⁰ Conversely, the best interests of public policy demand that responsible persons fill administrative positions, but such men will hesitate to accept these offices if to do so would entail heavy personal liability.¹¹ The problem, therefore, becomes one of adjusting the respective interests of the private individual and the officer in

³ See *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301, 302 (1928); *PROSSER, TORTS* 192 (1941); see *Zelenko v. Gimbel Bros., Inc.*, 158 Misc. 904, 287 N.Y. Supp. 134, 135 (Sup. Ct. 1935).

⁴ *Wallenstein v. Rosebaum*, 241 App. Div. 374, 272 N.Y. Supp. 346 (1st Dep't 1934); see *Johnston v. Bruckheimer*, 133 App. Div. 649, 652, 118 N.Y. Supp. 189, 191 (1st Dep't 1909).

⁵ *Jennings, Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 266 (1937).

⁶ See *Wilson v. Mayor of New York*, 1 Denio 595, 600 (N.Y. Sup. Ct. 1845) (mandamus does not lie to compel the performance of a discretionary act).

⁷ See *Smith v. Iowa City*, 213 Iowa 391, 239 N.W. 29, 31 (1931); *Stevens v. North States Motor, Inc.*, 161 Minn. 345, 201 N.W. 435, 436 (1925).

⁸ *But see Silva v. MacAuley*, 135 Cal. App. 249, 26 P.2d 887, 890 (1933), wherein the court states: "The civil liability of an officer committing a tort appears to be exactly the same as that of a civilian."

⁹ See *Jennings, supra* note 5, at 265.

¹⁰ See *Laski, The Responsibility of the State in England*, 32 HARV. L. REV. 447, 458 (1919); see *Florio v. Mayor of Jersey City*, 101 N.J.L. 535, 129 Atl. 470, 472 (1925).

¹¹ See *National Surety Co. v. Miller*, 155 Miss. 115, 124 So. 251, 253 (1929). The fact that the public has an interest in protecting the administrative officer is illustrated in *Cooper v. O'Connor*, 99 F.2d 135, 140 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1938).

light of the larger public interest that is always present in such cases.¹²

This article is primarily concerned with the attitude of the courts with respect to the tort liability of administrative officers of the State of New York. To illustrate the milieu in which the New York view presents itself, it will first be necessary to delineate the historical antecedents of the problem and then to evaluate briefly the positions adopted in other jurisdictions.

General Background

The concept that "the king can do no wrong" seems at first glance a quaint relic of medieval antiquity far removed from the contemporary American legal scene. It is therefore surprising to see courts alluding to this principle as the basis for the concept of sovereign immunity¹³ which renders the state immune from suit unless its permission is first obtained.¹⁴ Other courts, however, prefer to base immunity on the broad grounds of public policy.¹⁵

Closely related to the concept of sovereign immunity is the doctrine of attaching liability to public officials.¹⁶ The fact that an injured party lacks recourse against a sovereign on the principle of *respondeat superior*¹⁷ has undoubtedly influenced courts to adopt a more stringent attitude towards the administrative officer. This is illustrated in the case of *McCord v. High*,¹⁸ wherein it is stated that since the plaintiff, a private citizen, had no other remedy, then, upon the principles of justice, the action should lie against the public officer.¹⁹

In New York, the state has consented by statute to be sued, thus eliminating its protective cloak of immunity.²⁰ The Federal Government, to a limited extent, has also discarded its immunity.²¹

¹² See Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 265 (1937).

¹³ See *Holmes v. County of Erie*, 266 App. Div. 220, 221, 42 N.Y.S.2d 243, 245 (4th Dep't 1943), *aff'd mem.*, 291 N.Y. 798, 53 N.E.2d 369 (1944); *cf.* *Matter of Evans v. Berry*, 262 N.Y. 61, 68, 186 N.E. 203, 205 (1933).

¹⁴ See *Mills v. Stewart*, 76 Mont. 429, 247 Pac. 332 (1926); *Sandel v. State*, 126 S.C. 1, 119 S.E. 776 (1922).

¹⁵ "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). See also *Welch v. TVA*, 103 F.2d 95, 99 (6th Cir. 1939), *cert. denied*, 309 U.S. 688 (1940).

¹⁶ See *Plumbing Supply Co. v. Board of Education*, 32 S.D. 270, 142 N.W. 1131, 1132 (1913); see Jennings, *supra* note 12, at 263.

¹⁷ See *Elmore v. Fields*, 153 Ala. 345, 45 So. 66, 67 (1907); *Chapman v. State*, 104 Cal. 690, 38 Pac. 457, 458 (1894).

¹⁸ 24 Iowa (3 Stiles) 336 (1868).

¹⁹ *Id.* at 350 (concurring opinion).

²⁰ N.Y. Ct. CL. Acr § 8. A consideration of this statute appears subsequently in this article.

²¹ 62 STAT. 933, 982 (1948), 28 U.S.C. §§ 1346(b), 2671 *et seq.* (Supp.

The courts have found little difficulty in extending immunity to acts performed by executives,²² legislators,²³ and judges,²⁴ within the scope of their authority.²⁵ The earliest English cases, however, refused to extend this immunity to other public officers.²⁶ Chief Justice Holt, dissenting in *Ashby v. White*, went so far as to say that these persons should pay even greater damages than private citizens in order to deter other officers from perpetrating like offenses.²⁷ This attitude is rarely reflected in the more recent decisions.²⁸

Since these early English cases, several tests have been utilized to determine whether or not a particular administrative official is liable. Most courts demand that the plaintiff first exhaust his other remedies before he proceed against the officer.²⁹ Once this fact has been established, the courts seek next to ascertain whether the officer acted within the bounds of his jurisdiction.³⁰ No officer, of course, is absolved from liability for his private torts merely because he is an officer.³¹ The problem arises only where he performs, or purports to perform, his official functions. There is a presumption that the administrative officer has acted within the scope of his jurisdiction.³²

A distinction is sometimes drawn between acts performed without authority, which render the officer liable, and those which are merely in excess of authority.³³ The principle is easily stated but the distinction is often difficult to draw. As a result, this differentia-

1951). For a discussion of this statute, see DAVIS, ADMINISTRATIVE LAW 798 (1951).

²² See *Sutherland v. Governor*, 29 Mich. 320 (1874); see *Plumbing Supply Co. v. Board of Education*, 32 S.D. 270, 142 N.W. 1131, 1132 (1913).

²³ See *Pawloski v. Jenks*, 115 Mich. 275, 73 N.W. 238 (1897); *Amperse v. Winslow*, 75 Mich. 234, 42 N.W. 823 (1889).

²⁴ See *Bradley v. Fisher*, 13 Wall. 335 (U.S. 1871); *Randall v. Brigham*, 7 Wall. 523 (U.S. 1868).

²⁵ See *Bradley v. Fisher*, *supra* note 24 at 354; see PROSSER, TORTS 1078 (1941).

²⁶ See, e.g., *Mostyn v. Fabrigas*, 1 Cowp. 161, 98 Eng. Rep. 1021 (K.B. 1774).

²⁷ 2 Ld. Raym. 938, 956, 92 Eng. Rep. 126, 137 (K.B. 1703) (dissenting opinion).

²⁸ A comparatively recent case which reflects this strict early English view is *D'Aquila v. Anderson*, 153 Miss. 549, 120 So. 434, 436 (1929).

²⁹ *First Nat. Bank v. Weld County*, 264 U.S. 450 (1925); *Sweeney v. Young*, 82 N.H. 159, 131 Atl. 155 (1925); see Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 307 (1937).

³⁰ See *Stevens v. Black*, 212 Mich. 281, 180 N.W. 503 (1920); see *National Surety Co. v. Miller*, 155 Miss. 115, 124 So. 251, 253 (1929).

³¹ See PROSSER, TORTS 1075 (1941).

³² See *Cooper v. O'Connor*, 99 F.2d 135, 139 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1938); *Wilson v. Spencer*, 91 Neb. 169, 135 N.W. 546, 547 (1912).

³³ See *Kittler v. Kelsch*, 56 N.D. 227, 216 N.W. 898, 900 (1927); cf. *Bradley v. Fisher*, 13 Wall. 335, 351 (U.S. 1871); *Broom v. Douglass*, 175 Ala. 268, 57 So. 860, 864 (1912). The case of *Schneider v. Shepherd*, 192 Mich. 82, 158 N.W. 182 (1916), is one in which the administrative officer clearly went far beyond the scope of his authority.

tion has been adversely criticized.³⁴ Nevertheless, most courts continue to rely upon this distinction. Consequently, when the officer is charged with the obligation of passing upon the question of his own jurisdiction, and he errs, he is usually protected.³⁵

The question of jurisdiction has played a dominant part in the rise of a concept of strict liability termed the "jurisdictional facts" doctrine. This view found its first expression in the case of *Miller v. Horton*,³⁶ a Massachusetts decision written by Mr. Justice Holmes. In that case the defendant, a health officer, shot the plaintiff's horse in the belief that the horse was afflicted with glanders. The plaintiff contended that the horse had not been so infected. The court ruled that the statutory power given to the defendant only authorized him to kill horses with glanders and that, since the jury found as a fact that the horse had not been so affected, the defendant was liable for acting without jurisdiction. Mr. Justice Holmes sought to justify the severity of his conclusion on the ground that the plaintiff was not accorded the regular judicial safeguards of notice and hearing before his property was destroyed.³⁷ In essence, then, the "jurisdictional facts" doctrine predicates a rule of complete liability which precludes the defense of honest error. This law has been followed in other jurisdictions³⁸ but its rationale has been criticized as "sterile logic."³⁹

The question of jurisdiction also arises with reference to the liability of an administrative officer who acts in accord with a statute or ordinance subsequently declared unconstitutional. In strict logic a void statute can give no authority and any acts performed in pursuance thereof are without jurisdiction.⁴⁰ For this reason, the earlier cases rendered the administrative officer personally accountable for any such acts.⁴¹ There has been, however, a marked reversal of this earlier trend. More recent cases have held that public officers are not liable if their acts were performed in good faith prior to the judicial determination of the statute's unconstitutionality.⁴²

In addition to a consideration of the jurisdictional problem, courts have utilized other norms to determine the liability of administrative

³⁴ See *National Surety Co. v. Miller*, *supra* note 30, 124 So. at 254, wherein the court states: "We cannot grasp the conception that nonexistence can be less than nonexistence, or that there can be different kinds of nonexistence, or that that which is absent can be more absent."

³⁵ See *Bates v. Kitchel*, 160 Mich. 402, 125 N.W. 684 (1910); see *Sweeney v. Young*, 82 N.H. 159, 131 Atl. 155, 157 (1925).

³⁶ 152 Mass. 540, 26 N.E. 100 (1891).

³⁷ *Id.* at 102.

³⁸ See *Lowe v. Conroy*, 120 Wis. 151, 97 N.W. 942 (1904); *Pearson v. Zehr*, 138 Ill. 48, 29 N.E. 854 (1891).

³⁹ See DAVIS, *ADMINISTRATIVE LAW* 805 (1951).

⁴⁰ See Note, 6 *COL. L. REV.* 586 (1906).

⁴¹ See *Sumner v. Beeler*, 50 Ind. 341 (1875); *Ely v. Thompson*, 10 Ky. (3 A.K. Marsh.) 70 (1820).

⁴² See *Schloss & Kahn v. McIntyre*, 147 Ala. 557, 41 So. 11 (1906); *Anheuser-Busch Brewing Ass'n v. Hammond*, 93 Iowa 520, 61 N.W. 1052 (1895); *Brooks v. Mangan*, 86 Mich. 576, 49 N.W. 633 (1891).

officers. Perhaps the standard most frequently applied is the distinction between acts judicial or quasi judicial⁴³ in nature and those deemed ministerial.⁴⁴ The distinction was first drawn by those courts which sought to extend to officers exercising quasi judicial functions the immunity from suit granted to judges themselves.⁴⁵ To the extent that the administrative officer was charged with the task of making determinations which called for an exercise of his discretion, the courts were inclined to extend judicial immunity to those acts he performed in the course of his duties.⁴⁶ Initially, full immunity was granted.⁴⁷ Later this immunity was limited to those instances wherein the officer acted in good faith.⁴⁸

Ministerial officers, on the other hand, are generally held liable for their wrongful acts,⁴⁹ although ordinarily such officers cannot be adjudged liable for nonfeasance.⁵⁰ When the officer fails to do an act which he is required to do, the courts sometimes treat this as a breach of a duty owing to the public in general and not to the plaintiff as an individual and, consequently, deny the plaintiff relief.⁵¹ Similarly, if the act is done by the ministerial official pursuant to an order valid on its face, no liability attaches.⁵² When, however, an officer is charged with duties entailing both quasi judicial and ministerial

⁴³ The term "quasi judicial" is considered synonymous with discretionary. See *State ex rel. Robertson v. Farmers' State Bank*, 162 Tenn. 499, 39 S.W.2d 281, 282 (1931). It does not necessarily import the presence of the traditional safeguards of notice and hearing. See Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 277 (1937).

⁴⁴ See *Fidelity & Casualty Co. v. Brightman*, 53 F.2d 161, 165 (8th Cir. 1931); *First Nat. Bank v. Filer*, 107 Fla. 526, 145 So. 204, 207 (1933); *People to Use of Munson v. Bartels*, 138 Ill. 322, 27 N.E. 1091, 1092 (1891); *Stevens v. North States Motor, Inc.*, 161 Minn. 345, 201 N.W. 435, 436 (1925).

⁴⁵ See *Stewart v. Case*, 53 Minn. 62, 54 N.W. 938 (1893); *Steele v. Dunham*, 26 Wis. 393, 397 (1870).

⁴⁶ See *National Surety Co. v. Miller*, 155 Miss. 115, 124 So. 251, 253 (1929); *Daniels v. Hathaway*, 65 Vt. 247, 26 Atl. 970, 973 (1893).

⁴⁷ See note 45 *supra*.

⁴⁸ See *Keifer v. Smith*, 103 Neb. 675, 173 N.W. 685 (1919); *State ex rel. Robertson v. Farmers' State Bank*, 162 Tenn. 499, 39 S.W.2d 281 (1931); see *Fidelity & Casualty Co. v. Brightman*, *supra* note 44 at 165; *Daniels v. Hathaway*, *supra* note 46, 26 Atl. at 973.

⁴⁹ See *Clark v. Kelly*, 101 W. Va. 650, 133 S.E. 365 (1926); see *Ham v. Los Angeles County*, 46 Cal. App. 148, 189 Pac. 462, 468 (1920); *First Nat. Bank v. Filer*, 107 Fla. 526, 145 So. 204, 207 (1933).

⁵⁰ *Stevens v. North States Motor, Inc.*, 161 Minn. 345, 201 N.W. 435 (1925) (ministerial officers' immunity limited in nonfeasance cases); *Bolland v. Gihlstorff*, 134 Minn. 41, 158 N.W. 725 (1916). But see *First Nat. Bank v. Filer*, *supra* note 49, 145 So. at 207; *Rising v. Dickinson*, 18 N.D. 478, 121 N.W. 616, 617 (1909).

⁵¹ See *Stevens v. North States Motor, Inc.*, *supra* note 50; see *Hipp v. Farrell*, 173 N.C. 167, 91 S.E. 831, 833 (1917).

⁵² *Henke v. McCord*, 55 Iowa 378, 7 N.W. 623 (1880); *Underwood v. Robinson*, 106 Mass. 296 (1871).

acts, his liability is determined on the basis of the nature of the act performed.⁵³

The New York Position

As a prerequisite to relief in New York, the plaintiff must show the breach of a duty owing to him as an individual; evidence of a breach of an obligation owing to the public at large will not suffice.⁵⁴

The New York courts do not extend immunity for acts performed by officers without authority. Thus, in *Butler v. Potter*,⁵⁵ the court stated that acts judicial in nature performed without authority are *coram non judge* and afford no immunity for the judicial officer involved. The fact that the tortious act is quasi judicial in nature does not render the officer immune from suit.⁵⁶ If a discretionary power, for example, were delegated to three school trustees, and two of the trustees acted without the knowledge and concurrence of the third, the act would be without jurisdiction and the trustees would be liable.⁵⁷

The "jurisdictional facts" doctrine received a strong measure of support in New York with the decision of *People ex rel. Copcutt v. Board of Health*.⁵⁸ The question came before the Court of Appeals on a writ of certiorari to review the determination of a board of health which had adjudged as nuisances certain dams owned by the relator. The decision was rendered, significantly enough, two years after *Miller v. Horton*,⁵⁹ in which Mr. Justice Holmes enunciated the concept of strict liability. The court, in the *Copcutt* case, said that the administrative agency acquired jurisdiction to act by virtue of the fact that there was an actual nuisance, and it strongly intimated that the administrative officers would otherwise have acted at their peril.⁶⁰ The reason for this is clearly manifested in the statement that ". . . no other view of the law would give adequate protection to private rights."⁶¹ Here the court was concerned with a sufficient defense of those rights especially in view of the fact that the injured parties were not given the opportunity to be heard before they were deprived of their property.⁶²

⁵³ See *Brown v. Nelson*, 50 N.D. 589, 197 N.W. 223 (1924); *Logan City v. Allen*, 86 Utah 375, 44 P.2d 1085 (1935); see *People to Use of Munson v. Bartels*, 138 Ill. 322, 27 N.E. 1091, 1092 (1891).

⁵⁴ *Walker v. Broderick*, 141 Misc. 391, 252 N.Y. Supp. 559 (Sup. Ct. 1931).

⁵⁵ 17 Johns. 145, 146 (N.Y. Sup. Ct. 1819).

⁵⁶ See *Goetcheus v. Matthewson*, 61 N.Y. 420, 425 (1875); cf. *Butler v. Potter*, *supra* note 55.

⁵⁷ See *Stephenson v. Hall*, 14 Barb. 222, 231 (N.Y. Sup. Ct. 1852).

⁵⁸ 140 N.Y. 1, 35 N.E. 320 (1893).

⁵⁹ 152 Mass. 540, 26 N.E. 100 (1891).

⁶⁰ *People ex rel. Copcutt v. Board of Health*, *supra* note 58 at 8, 35 N.E. at 322.

⁶¹ *Ibid.*

⁶² See *Jennings, Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 281 (1937).

There has been, in New York, a paucity of decisions with respect to the liability of an administrative officer acting pursuant to an unconstitutional statute or ordinance. One of the first cases to deal with this problem was *Waterloo Water Manufacturing Co. v. Shanahan* which held the officer liable on the theory that he was acting without jurisdiction.⁶³ A contrary decision was reached in *Dexter v. Alfred*⁶⁴ where it was held that the fact that the officer acted pursuant to such a statute would be either a partial or a complete defense. Since it has also been held that a public officer is liable for not acting in accord with a statute which he erroneously believed was unconstitutional,⁶⁵ it would hardly seem just to place an officer in a position whereby he would be compelled to determine correctly the constitutionality of a particular statute in order to avoid personal liability.

The New York courts have accepted the division of acts of public officers into the traditional quasi judicial and ministerial classifications.⁶⁶ A ministerial officer, unlike those of other jurisdictions,⁶⁷ is held liable for both misfeasance and nonfeasance.⁶⁸ However, with respect to the performance of functions quasi judicial in nature, a study of the cases involved graphically points up the fact that the law in this area is vague and unsettled.

One of the earliest cases to consider this question was *Seaman v. Patten* which involved an official exercising discretionary powers. The court held that such officer could not be adjudicated liable without evidence showing ". . . bad faith, corruption, malice or some misbehavior, or abuse of power."⁶⁹ Two subsequent decisions adopted a completely different attitude. In each of these cases, the court explicitly stated that, once an administrative officer is charged with a duty quasi judicial or discretionary in nature, he is completely immune from suit for any act performed pursuant to such duty irrespective of the motivation that inspired the act.⁷⁰ The only limitation imposed is that the act not transcend the authority vested in the officer.⁷¹

This divergence of opinion is evinced through the ensuing cases that have been litigated in the courts of this state. There has been

⁶³ 58 Hun 50, 11 N.Y. Supp. 829 (Sup. Ct. 1890), *rev'd on other grounds*, 128 N.Y. 345, 28 N.E. 358 (1891).

⁶⁴ 64 Hun 636, 19 N.Y. Supp. 770 (Sup. Ct. 1892).

⁶⁵ *Clark v. Miller*, 54 N.Y. 528 (1874).

⁶⁶ See *Clark v. Miller*, *supra* note 65; *Rochester White Lead Co. v. Rochester*, 3 N.Y. 463 (1850); *Weaver v. Devendorf*, 3 Denio 117 (N.Y. Sup. Ct. 1846).

⁶⁷ See note 50 *supra*.

⁶⁸ See *Wright v. Shanahan*, 149 N.Y. 495, 502, 44 N.E. 74, 75 (1896); *Tompkins v. Sands*, 8 Wend. 462, 468 (N.Y. Sup. Ct. 1832).

⁶⁹ 2 Caines 312, 317 (N.Y. Sup. Ct. 1805).

⁷⁰ See *Rochester White Lead Co. v. Rochester*, *supra* note 66 at 466; *Weaver v. Devendorf*, *supra* note 66 at 120.

⁷¹ See *Weaver v. Devendorf*, 3 Denio 117 (N.Y. Sup. Ct. 1846).

support for the position of complete immunity⁷² and that of limited immunity.⁷³ One of the more recent cases to touch upon the issue, the lower court decision in *Segal v. Jackson*,⁷⁴ quoted from *East River Gas-Light Co. v. Donnelly*⁷⁵ which stated that the administrative officer exercising quasi judicial functions was completely immune from suit. It is interesting to note that the statement as it appeared in the latter case was that "... the well-settled rule of law [is] that no public officer is responsible in a civil suit for a judicial determination, however erroneous or wrong it may be, or however malicious even the motive which produced it."⁷⁶ In quoting this section, the court in the *Segal* case omitted the last phrase⁷⁷ which in effect enunciates the rule of complete immunity. It would be idle to indulge in conjecture as to the purpose motivating the omission but it is a significant manifestation of the unsettled state of the law to date.

Another interesting case in this area is *Crayton v. Larabee*.⁷⁸ The defendant, a health officer, was authorized by statute to quarantine whenever he deemed such action necessary.⁷⁹ The plaintiff instituted this suit to recover damages for his allegedly wrongful detention. The Court of Appeals, in reversing a judgment for the plaintiff, held that the defendant was immune from liability since he had acted reasonably. The court reasoned that the statute involved clearly empowered the defendant to act in accord with the results of a reasonable investigation.⁸⁰ It did not seek to propound a general rule to resolve the problem of the administrative officer's tort liability.

Court of Claims Act

The nexus between the concept of sovereign immunity and the tort liability of public officers has been discussed elsewhere in this article. The basis of the concept of sovereign immunity in New York has been deemed to be a survival of the maxim that "the king can do no wrong."⁸¹ As a result of this immunity, the state was not liable for the torts of its agents.⁸² However, the history of this ques-

⁷² See *Van Deventer v. Long Island City*, 139 N.Y. 133, 137, 34 N.E. 774, 775 (1893); *East River Gas-Light Co. v. Donnelly*, 93 N.Y. 557, 559 (1883).

⁷³ See *Williams v. Weaver*, 75 N.Y. 30, 34 (1878), *aff'd*, 100 U.S. 547 (1879); *Teall v. Felton*, 1 N.Y. 537, 547 (1848), *aff'd*, 12 How. 284 (U.S. 1851).

⁷⁴ 183 Misc. 460, 48 N.Y.S.2d 877 (Sup. Ct. 1944).

⁷⁵ 93 N.Y. 557 (1883).

⁷⁶ *Id.* at 559.

⁷⁷ *Segal v. Jackson*, *supra* note 74 at 463, 49 N.Y.S.2d at 879.

⁷⁸ 220 N.Y. 493, 116 N.E. 355 (1917).

⁷⁹ *Id.* at 503, 116 N.E. at 358.

⁸⁰ *Ibid.*

⁸¹ See *Holmes v. County of Erie*, 266 App. Div. 220, 221, 42 N.Y.S.2d 243, 245 (4th Dep't 1943), *aff'd mem.*, 291 N.Y. 798, 53 N.E.2d 369 (1944).

⁸² *Smith v. New York*, 227 N.Y. 405, 125 N.E. 841 (1920); see *Litchfield v. Bond*, 186 N.Y. 66, 83, 78 N.E. 719, 721 (1906).

tion revealed a growing tendency to allow suit against the state⁸³ which culminated in the enactment of the Court of Claims Act in 1929⁸⁴ whereby the state consented to suit against itself upon the principle of *respondeat superior*.⁸⁵ The statute has been termed ". . . a recognition and acknowledgment of a moral duty demanded by the principles of equity and justice."⁸⁶

This statute, since it is in derogation of the principle of sovereign immunity, has been strictly construed.⁸⁷ The assumption of liability by the state has not relieved the administrative officer of any personal liability for his tortious conduct.⁸⁸ Whereas suit against the officer as an individual may be brought in any court of competent jurisdiction,⁸⁹ the state must be sued in a special court created for that purpose.

An individual about to commence a suit in tort against the state must file a claim, or a notice of intention to file claim, within ninety days subsequent to the accrual of his cause of action.⁹⁰ The harshness of this section is born of necessity so as to forestall raids on the public till by the unscrupulous with fraudulent claims, the staleness of which renders them difficult to disprove.⁹¹ Thus it is easy to see that those who fail to qualify under the provisions of this section are remitted to their cause of action against the public officer as an individual where the only period of limitation is the customary one for a tort action.⁹²

Conclusion

The foregoing discussion reveals the unsettled condition of the law in New York with reference to the tort liability of administra-

⁸³ See 1936 LEG. DOC. NO. 65(Q), REPORT, N.Y. LAW REVISION COMMISSION 953 (1936).

⁸⁴ Laws of N.Y. 1929, c. 467. This statute is presently N.Y. CT. CL. ACT § 8 (formerly § 12-a).

⁸⁵ See *Jackson v. New York*, 261 N.Y. 134, 138, 184 N.E. 735, 736 (1933); *Naramore v. New York*, 285 N.Y. 80, 84, 32 N.E.2d 800, 802 (1941).

⁸⁶ See *Jackson v. New York*, *supra* note 85.

⁸⁷ See *Breen v. Mortgage Comm'n*, 285 N.Y. 425, 431, 35 N.E.2d 25, 27 (1941).

⁸⁸ *Rhynders v. Greene*, 255 App. Div. 401, 8 N.Y.S.2d 143 (3d Dep't 1938); see *Columbia Machine Works v. Long Island R.R.*, 267 App. Div. 582, 585, 47 N.Y.S.2d 383, 386 (1st Dep't 1944). Pursuant to the Federal Tort Claims Act a judgment in an action against the United States constitutes a complete bar to any action against the officer whose act or omission gave rise to the claim. 62 STAT. 984 (1948), 28 U.S.C. § 2676 (Supp. 1951).

⁸⁹ See *Breen v. Mortgage Comm'n*, *supra* note 87 at 429, 35 N.E.2d at 27.

⁹⁰ N.Y. CT. CL. ACT § 10 (courts may relax these rules in certain cases).

⁹¹ See 1936 LEG. DOC. NO. 65(Q), REPORT, N.Y. LAW REVISION COMMISSION 975 (1936).

⁹² N.Y. CIV. PRAC. ACT § 49.

tive officers. The problem is not one easy of solution because of the many conflicting interests involved. Any proffered suggestion must concern itself with the rights of the injured citizen, with the interest of the public in the zealous and fearless administration of governmental functions, and with a proper regard for the requirements of due process.

The distinction between acts without jurisdiction and those in excess of jurisdiction has been drawn in order to provide a certain amount of immunity for an officer who mistakenly goes beyond the scope of his authority. The difficulty involved, however, is in determining whether an act is in either one or the other category. As a result, the mere statement of the distinction is of little value in ascertaining whether or not liability should attach in a given factual situation. When the public officer has clearly transcended the bounds of his authority, he should be held liable. Immunity should only be extended to those acts which the officer is authorized to perform. Thus, if the statute directs that notice and hearing be accorded to the interested parties before a determination is made, the administrative officer must comply with the statutory requirement. If the officer should fail to comply with conditions precedent established by the governing statute, no immunity should extend to his acts, since he acted without jurisdiction.⁹³

There are instances when the necessity for immediate action compels the administrative officer to act with respect to the person and property of others without the regular judicial safeguards. Thus, where a health officer is faced with the threat of a spreading plague, it is imperative that steps be quickly taken without notice and hearing, for example, in the imposition of a quarantine. If such officer errs, should he be held personally liable? If he were not granted immunity for reasonable acts which he performs in such moments of crisis, he would fulfill his function hesitatingly and the whole community might suffer as a result. On the other hand, the private citizen should be reimbursed for any losses he incurred which were in actuality unnecessary. The practical solution would be to grant the immunity to the public officer and to have the state respond in damages for any losses which a private citizen unnecessarily suffers.

It has been indicated that the extent of the liability of an officer acting pursuant to an unconstitutional statute is unsettled in this state. An officer should not be forced to determine the constitutionality of a particular law. When the official acts in accord with a statute prior to the judicial declaration of its unconstitutionality, full immunity should be given to the officer. The state itself should answer for any damages in these instances.

The necessity for extending a measure of immunity to officers exercising quasi judicial functions becomes apparent once the nature of the resultant acts is considered. These actions are the effect of the discretion of the officers performing them. The officers here are charged with the duty of making decisions either of law or of facts.

⁹³ Cf. *Stevens v. Black*, 212 Mich. 281, 180 N.W. 503 (1920); see *Rock v. Carney*, 216 Mich. 280, 185 N.W. 798 (1921).

Since it is in the best interest of the public that they exercise their functions zealously and fearlessly, they should not be unduly hampered or intimidated by the threat of legal action should they err. The next question concerns the amount of immunity that should be extended. It is submitted that a test of reasonableness should be applied. In determining whether a public officer is to be held personally liable, the jury should decide whether the officer acted reasonably. The concept of reasonableness assumes that the officer has acted in good faith and that there was substantial evidence warranting the course of action pursued. To adequately protect the private citizen, the burden of proof should be on the officer to establish the reasonableness of his act.

The suggestions made above do not amount to a panacea. The many facets of every legal problem preclude the possibility of pat solutions satisfactory to all interested parties. It is hoped, however, that they will recommend themselves as a workable method of approach to the problem of the tort liability of administrative officers.



THE RELIGIOUS PROTECTION CLAUSES IN NEW YORK'S CHILDREN'S COURT ACTS

At the turn of the century, a group of citizens in Illinois impressed upon the legislature of that state the need for a court for children.¹ This legal and sociological development rapidly extended to other states, so that today, a scant half-century later, most states have separate courts for children.² The idea was born of necessity. Prior to that time, children who committed offenses were placed on equal footing with adults,³ and were subjected to the same penalties as more mature criminals. Since, however, criminal jurisprudence includes the concept of rehabilitation,⁴ and since impressionable children should be trained, guided and protected, special treatment and consideration for such children is entirely warranted.

¹ See Neary, *Selecting Clients for the Juvenile Court*, YEARBOOK, NAT. PROBATION ASS'N 209 (1936). Children, however, were tried in a separate session of the criminal court as early as 1863 in Massachusetts. 6 N.Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE 659 (1938). There are indications that sentences imposed upon children during the colonial period were not actually carried out. KAHN, A COURT FOR CHILDREN 17 (1953); TEETERS AND REINEMANN, THE CHALLENGE OF DELINQUENCY 69 (1950).

² See 6 N.Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE, *op. cit. supra* note 1; NEARY, *op. cit. supra* note 1.

³ See TEETERS AND REINEMANN, *op. cit. supra* note 1, at 70.

⁴ See ROONEY, LAWLESSNESS, LAW AND SANCTION 40 *et seq.* (1937); SNYDER, CRIMINAL JUSTICE 23 (1953).