YALE
LAW JOURNAL

Vol. XXXVI NOVEMBER, 1926 No. 1

GOVERNMENTAL RESPONSIBILITY IN TORT, VI

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HISTORY AND THEORY

In the earlier articles of this series[1] an attempt was made to present a general view of the Anglo-American law in so far as it involves the right of the individual to obtain redress from the group—nation or state, county or city or administrative district —for injuries sustained by him through the defective operation of the public service or through the torts of officers.[2] While it was hardly possible altogether to avoid the discussion of underlying theory, the intention was to reserve for separate articles an examination of the several theories which have been advanced to deny or sustain the responsibility of the state or government in tort. It is not believed to be desirable to confine the discussion to theories evolved in England or the United States, which on the whole rest upon an ancient doctrine that consigns the issue to sterility. But the western world has much the same economic and social system, and its political conceptions have much in common. Profit can therefore be derived from an examination of the theories advanced in other countries,

[1] (1924) 34 YALE LAW JOURNAL, 1, 129, 229.

[2] The special reason for beginning with a discussion of positive law was to lay the foundation for federal legislation in the 69th Congress, commencing Dec. 7, 1925. Bills to make the federal government responsible for the negligence or wrongful acts or omissions of its officers or employees were introduced in both Houses by the respective chairmen of the Claims committees. The comprehensive House bill was passed June 10, 1926; a Senate bill, S. 1912, limited to a liability of $3000, to be recovered by a proceeding before the executive department responsible for the injury, passed the Senate March 15, 1926. The bills are now (November, 1926) in conference. See Borchard, *Governmental Responsibility in Tort—A Proposed Statutory Reform* (1925) 11 Am. B. A. J. 495, and H. R. No. 667, 69th Cong. 1st Sess.

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where the subject has greatly occupied the public mind, for or against the responsibility of the state or minor political group.

It was not until the nineteenth century that the subject seriously engaged the attention of legislators, courts and jurists. The demand for an assumption by the community of the losses occasioned to individuals by a defective operation of the governmental machine hardly arose before then, though the practice was not unknown. The explanation for the demand probably lies in the fact that the industrial revolution and the division of land promoted an ever-widening distribution of private property and recognition for the personal privileges of the individual, to which the political theories of the American and the French Revolution, spreading through the western world, had given the protection of a social and political philosophy. The absolutist theory of the irresponsible Prince had aroused the antagonism of the publicists and philosophers of the eighteenth century, who with the new orientations of natural law, had sought to restore the medieval cultural tradition of the responsible State and Government controlled by law. The "rights of man" and of his private property against the encroachment, misappropriation or abuse of government had become tenets of constitutional law, first formally expressed in the doctrines of eminent domain. The enlargement of state responsibility for other forms of encroachment on private rights was nevertheless hampered, in varying degree in different countries, by the seventeenth and early eighteenth century revival of the theory of divine right of kings and by the metaphysical doctrine of sovereignty, the alleged postulates of irresponsibility. The struggle between these opposing doctrines of individual claim to compensation for injuries by the group and group claim of sovereign immunity marks one of the most interesting developments in legal history. The struggle was tempered, though never terminated, by the introduction of the personal responsibility of officers, which, while theoretically sustainable, often affords only illusory redress to the injured individual. His demand for protection against administrative abuses was also met by numerous procedural devices, such an mandamus, certiorari and judicial safeguards of various kinds designed to nullify the wrongful act or correct the mistake without pecuniary compensation. Continental Europe had also been familiar since the time of the Roman Empire with the suability and responsibility of the State or feudal and territorial ruler acting in a fiscal or corporate capacity; and even in governmental functions, the insistent demand for justice to the individual from the group, marked as it was by an ever-widening range of activities by the group, finally succeeded, in the late nineteenth and early twentieth centuries, in overcoming those legal and political arguments which had made for the

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irresponsible sovereign. The movement was equally successful in republican France and monarchical Germany, and owes its triumph to the enlightenment of judges and of jurists courageously attacking and overthrowing antiquated shibboleths left in the way of legislatures and of courts. Only in democratic England and republican America do we find the absolutist metaphysics of divine right and sovereign immunity arrayed in the full regalia of their theological vestments, reincarnating for a twentieth century society the ancient credo of Bodin and Hobbes.

Before undertaking to present the various theories which have been advanced to support the divergent legal doctrines of governmental irresponsibility or responsibility, it seems useful to survey briefly the historical development of the theories of vicarious responsibility in general, and notably of corporate and community responsibility in tort. It will then be proper to enter more closely upon an examination of those doctrines which have served to exempt the State, in English and American law, from responsibility in tort, notably the maxims that the king can do no wrong and that the State is above the law. The latter postulate invites an examination of the history of political and legal theory as to the relation of the State to law in its various connotations, and of that other confusing abstraction employed to justify absolutism, known as sovereignty. Before the constitutional state had achieved its victory over the unlimited monarchy by creating the independence of the judiciary from the administration and judicial control over the governmental machine in its relations with the individual, an intellectual contest of centuries, paralleling the political, had been fought in Europe and America. All the more remarkable, then, is it that in England and America, where the political struggle for emancipation was so eminently successful, the legal struggle should have been denied complete success by the interposition of ambiguous maxims and historical anachronisms based on arbitrary postulates and outworn conceptions.

CORPORATE RESPONSIBILITY IN TORT

Roman Law. The Roman law provided but imperfect prototypes for the modern conceptions of the State, of sovereignty, of officers exercising State power, or of private individuals possessing privileges and immunities which the State may not constitutionally impair. Hence it is not difficult for those seeking to justify the irresponsible State to find authority in the Roman law. On the other hand, the Roman law embodying the only well-developed legal system known in continental Europe, it is natural that analogies should be sought in the Roman private law for such degree of group responsibility in

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tort as jurists and courts were able to introduce. It was found, even at a date when sufficient progress had been made to concede the application of the agency analogy to the relation between government and officer,[3] that the Roman law admitted only a limited liability of the principal for the acts of his agent. In the conclusion of legal transactions the strict Roman law did not admit the doctrine of representation, though exceptions were recognized. A principal could become liable on a contract concluded by his authorized agent providing the fact of the agency were disclosed. In the strict Roman law only the contracting party himself, the agent, could be sued; the praetor, however, permitted an action in addition against the principal. The principal's liability was theoretically vicarious for the act of another; modern law reverses this theory and considers the principal's liability primary and exclusive. Later, it is believed, even the agent's ostensible authority bound the principal, including liability for *dolus* (wilful wrong) or *culpa* (negligence) of the agent in the conclusion or performance of a contract within the scope of his ostensible authority.[4]

On the other hand, tort liability was based on fault only, an act of the will, and this could not well be vicarious even as to individual principals. Nevertheless, as in early English law, in certain exceptional cases the employer was held liable under the praetor's law for torts committed by servants within the scope of their employment, *e.g.* shipowners (*nautae*), innkeepers (*caupones*) and stable-keepers (*stabularii*). The tort of a slave made the master liable to a noxal action.[5]

A principal could be made liable for his own negligence in selecting or supervising a wrongdoing agent, *culpa in eligendo*

[3] 2 BRINZ, LEHRBUCH DER PANDEKTEN (Erlangen, 1860) 1118 makes as distinction between higher officials and minor employees, asserting that only the former are agents of the State, with power to represent it, whereas the latter are agents of the officials without power of representation. Loening finds this unsustainable. LOENING, DIE HAFTUNG DES STAATES AUS RECHTSWIDRIGEN HANDLUNGEN SEINER BEAMTEN (Frankfurt, 1879) 11. The Roman law did not concede that the officer was an agent or manager (*institor*). In the late Empire, the imperial officials were deemed personal agents of the Emperor, and only subsequently deemed State officials. 1 MITTEIS, RÖMISCHES PRIVATRECHT (Leipzig, 1908) 354 *et seq.*

[4] 2 WINDSCHEID, PANDEKTEN (Frankfurt, Kipp's 9th ed. 1906) § 482; P. F. VON WYSS, HAFTUNG FÜR FREMDE CULPA NACH RÖMISCHEN RECHT (Zurich, 1867) 1, 6.

[5] If the master did not pay, he could be compelled to surrender the slave. A *paterfamilias* in early Roman law had the same option with respect to the torts of his children. SOHM, THE INSTITUTES (Ledlie's transl. 2d ed. 1901) 435–440; W. W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN (Cambridge, 1921) 516, 529 *et seq.* There is some doubt whether communication of the agent's authority was indispensable. See also Radin, *Fundamental Concepts of the Roman Law* (1924) 13 CALIF. L. REV. 34, at 39.

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or *custodiendo*. If one was under a personal duty to perform an obligation and selected a substitute, the principal assumed responsibility for the substitute's negligence.[6] Public policy dictated the rule. The principal was also bound to return anything obtained through the wrongful act of his agent as unjust enrichment.

The corporation or juristic person, which in Roman law was invented largely to accommodate the conception of the public corporation, could only with difficulty be brought within the compass of these limited rules of legal responsibility. There is some authority for the view, strongly disputed, that the *populus Romanus*, the nearest earlier Roman conception to the State, could hardly be subject to the rules of private law, for it would thus be bound by its own laws.[7] But as the Emperor's power increased and that of the *populus* diminished, the Imperial treasury, the *fiscus*, was created, and the question lost importance, for the *fiscus*, the State in its property relations, could be sued.[8] In the *Corpus Juris*, the distinction between the Emperor and the State, between the Emperor's property and State property, is not very clear. Yet the State achieved a gradual evolution; Caesar's officers became State officers, and the *fiscus* acquired recognition as a legal entity for the ownership of State property. Municipalities, though of many types and having only a limited legal capacity, had to enter into contracts, had to have agents and had to assume a

[6] JHERING, DER SCHULDMOMENT IM RÖMISCHEN RECHT, reprinted in VERMISCHTE SCHRIFTEN JURISTISCHEN INHALTS (Leipzig, 1879) 204, 207. Equity justified these exceptions to the rule. WYSS, *op. cit. supra* note 4, at 1. Loening also mentions certain other exceptional cases of liability for the torts of third persons, the *paterfamilias'* responsibility for his family, the master for his slave and the responsibility of certain special officers such as tax-fermers for the acts of their subordinates and employees. LOENING, *op. cit. supra* note 3, at 10. The last analogy was employed by the jurists of the late Middle Ages to justify a community responsibility for the acts of officers. *Ibid.*

[7] 1 MOMMSEN, RÖMISCHES STAATSRECHT (Leipzig 1876) 162 and 227, and as cited by LOENING, *op. cit. supra* note 3, at 12. Pernice thinks that officers could bind the State legally. 1 MARCUS ANTISTIUS LABEO, DAS RÖMISCHES PRIVATRECHT (Halle, 1873) 264 *et seq.* BRINZ, *op. cit. supra* note 3, at 1081, citing also Göppert, denies Mommsen's earlier view that the State and community were not bound by any of the rules of private law. See also LOENING, *op. cit. supra* note 3, at 12, who finds little evidence to support Mommsen's view.

[8] 3 BETHMANN-HOLLWEG, DER RÖMISCHE CIVILPROZESS (Bonn, 1866) 78; MITTEIS, *op. cit. supra* note 3, at 364; BUCKLAND, *op. cit. supra* note 5, at 177. On the *Fiscus*, see also 2 J. B. MISPOULET, LES INSTITUTIONS POLITIQUES DES ROMAINS (Paris, 1883) 286; F. GUGLIELMO SAVAGNONE, LE TERRE DEL FISCO NELLO IMPERO ROMANO (Palermo, 1900) 3 *et seq;* OTTO RICHTER, DER REICHSFISKUS (Tubingen, 1908) 3; HATSCHEK, DIE RECHTLICHE STELLUNG DES FISCUS (Berlin, 1899); 1 OTTO MAYER, DEUTCHES VERWALTUNGSRECHT (München, 3d ed. 1924) 49 *et seq.*

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certain responsibility for the latters' contractual acts—usually concurrently with the agent.[9] A corporation could act only through representatives, who required a power of attorney delimiting their authority. These representatives were either "organs" or managers, whose powers are found in the law or the charter, or employees, who receive their powers from the organs or managers. The organs are thus empowered to grant substitute powers of attorney, and the latter will then, curiously for that era, represent the principal, the corporation.[10] The usual rule that representation by another in the declaration of one's will was inadmissible had to be varied in the case of corporations, for whom organs and employees exerted their personal will. Representation in the exercise of rights was, however, always recognized. The corporation, though deemed an artificial juristic person, independently of its members, was nevertheless deemed incapable of will or legal capacity; analogously to an infant or an incompetent person, its managers or representatives might be compared with guardians or trustees.

For wilful wrong or excess of authority by the agent he alone was liable in Roman law, except to the extent of the corporation's unjust enrichment. The private principal's responsibility for the acts of contracting agents was thus greatly limited in the case of public corporations. The powers of public officials rested as a rule not on contract but on law, and it was concluded that wilful wrong or negligence was always a personal act of the will, which could not be attributed to a corporation, more especially as corporate personality was deemed essentially a fiction.[11] In the case of official torts generally, it

[9] The Roman law distinguished contracts concluded by direct representation which made the city immediately liable and entitled, and those which, though concluded in the name of the city, could render the city liable only through the person of its representative. LOENING, *op. cit. supra* note 3, at 13.

[10] LOENING, *op. cit. supra* note 3, at 11. The Roman law theory of the corporation is to be found in numerous works, notably 3 GIERKE, DAS DEUTSCHE GENOSSENSCHAFTSRECHT (Berlin, 1881) 34 *et seq.*, 168–171; MITTEIS, *op. cit. supra* note 3, at 394 *et seq.*; H. BOVAY, ETUDE SUR LA RESPONSABILITÉ CIVILE DES PERSONNES MORALES A RAISON DES ACTES ILLICITES DE LEURS ORGANES (Lausanne, 1911) 1.

[11] The father of the fiction theory of the corporation, according to Gierke, was Sinibald Fieschi, who in 1243 became Pope Innocent IV. Innocent had declared the fictitious person incapable of sin or tort: *Universitas non potest peccare universitas non potest delinquere.* This dictum was probably founded on a passage in the Digest, Dig. 4, 3, 15, s. 1. 3 GIERKE, *op. cit. supra* note 10, at 168, 279; also Maitland's translation of GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE (Cambridge, 1900) Introduction, xix. See also H. A. SMITH, THE LAW OF ASSOCIATIONS (Oxford, 1914) 59, 152; C. T. CARR, THE GENERAL PRINCIPLES OF THE LAW OF CORPORATIONS (Cambridge, 1905) c. XI. Savigny worked out the classic argument against

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was thus fairly easy to argue that inasmuch as responsibility rested on fault, and inasmuch as fault required an act of the will, of which corporations were incapable, torts made only the wrongdoing officer personally liable and not corporations.[12] While this rule was resented by many jurists as unjust, a protest which later brought about a recognition of liability of superior officers for the excesses of their subordinate appointees, it is astonishing for how many centuries the theory of fault resting on an alleged free will served to relieve corporations, public and private, of responsibility in tort. It easily developed into the well-known *ultra vires* doctrine, according to which the officer or agent was empowered to act only rightfully within the scope of the corporation's powers. He had no legal authority to commit torts. The moment he acted wrongfully he abused his office or agency and acted *ultra vires*, thus relieving the corporation of responsibility for his torts. Moreover, it is necessary to observe that in principle, though with many exceptions, the Roman law regarded only natural persons, not corporations, as the subject of legal relations, a conception which played a large part in delaying for centuries recognition for the rule that corporations could be charged with responsibility in tort.[13] The principle of fault as the basis of responsibility also served to fasten upon the continental law of state responsibility the classic distinction between liability for unlawful and for lawful acts—a distinction disavowed and rejected by many modern publicists and by some French cases—and also

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attributing the power to commit tort and hence tort responsibility, to corporations. 2 SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (Berlin, 1840) 310 *et seq*; HAFTER, DIE DELIKTS UND STRAFFÄHIGKEIT DER PERSONENVERBÄNDE (Berlin, 1903) 25 *et seq;* Maitland's translation, *supra* at xx; 2 CUQ, LES INSTITUTIONS JURIDIQUE DES ROMAINS (Paris, 1902) 176; A. BARCIA LOPEZ, LA TEORIA GENERAL DE LAS PERSONAS JURIDICAS Y EL PROBLEMA DE SU RESPONSABILIDAD CIVIL POR ACTOS ILICITOS (Buenos Aires, 1918) 221 *et seq.* The fiction theory of the corporation (*universitas*) in Roman law is by no means universally accepted. See SALEILLES, DE LA PERSONNALITÉ JURIDIQUE (Paris, 1910) Lect. V., 92 *et seq.* and other jurists cited and quoted in 1 LEON MICHOUD, LA THÉORIE DE LA PERSONNALITÉ MORALE. Paris, (Troboas', 2d ed. 1924) c. 1 and in BARCIA, *supra* at 230 *et seq.* Saleilles approaches the modern "real" or organ theory of GIERKE. GIERKE, DIE GENOSSENSCHAFTSTHEORIE UND DIE DEUTSCHE RECHTSPRECHUNG (Berlin, 1887) 603 *et seq;* E. FREUND, THE LEGAL NATURE OF CORPORATIONS (New York, 1896) 10, 13.

[12] N. MOMMSEN, ABRISS DES RÖMISCHEN STAATSRECHTS (Leipzig, 2d ed. 1907) 83, who adds that even the act of the king, if not in lawful (or rightful) representation of the people, is not deemed the act of the people. The officer was personally liable before the civil courts, just as any private tort-feasor. 1 MOMMSEN, RÖMISCHES STAATSRECHT, (Leipzig, 2d ed. 1876) 673–674.

[13] 3 GIERKE, *op. cit. supra* note 10, at 341; 2 SAVIGNY, *op. cit. supra* note 11, at 2; E. HAFTER, *op. cit. supra* note 11, at 6.

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served to bring about the application of rules of private law to the solution of the problem of governmental responsibility.

Middle Ages. The Middle Age continental conception of the legal relation between the group and the individual or officer seems to have been diametrically opposed to that of the Roman law. Whereas the Roman law regarded the organized group-unit (*universitas*)—not the *societas*, or partnership —as a corporation with a legal (perhaps fictitious) personality distinct from that of the individual members, the common folk-law of the Middle Ages regarded the group as not a separate entity but merely as the collectivity of the individual members, whether applied to State or Church, community or manor, guild or association. In Roman law the individual incurred no responsibility for the obligations of the group; in the common folk-law he did. He was also deemed one of a group, each member of which made the whole—all its members—liable. While the group might under circumstances escape this liability *in solido* by expelling the guilty member and surrendering him for punishment, failure to expel involved an assumption of liability.[14] Although cities sought with partial success to escape such joint responsibility for the acts of their citizens, the Germanic Middle Age conception that all the members of the group could be held liable for the fault or obligation of a single member prevailed.[15] "All for one and one for all" was both a legal

[14] 2 GIERKE (Berlin, 1873) *op. cit. supra* note 10, at 386, 522, 817 *et seq;* 3 *ibid.* 168–171. The Canonists denied corporate responsibility in tort, *ibid.* 343, but had to yield. The legists admitted it, *ibid.* 402. Practice in the sixteenth century on the continent admitted it, 4 *ibid.* 140. The criminalists denied it, 4 *ibid.* 97. See also GIERKE, GENOSSENSCHAFTSTHEORIE (1887) 743 *et seq;* HAFTER, *op. cit. supra* note 11, at 7–11.

This phenomenon of non-differentiation between group and individual responsibility goes back to primitive times. Early peoples attained ideals of fraternity and solidarity unknown to modern western nations. Within the group, communistic ideas prevailed; competition occurred between groups, not between individuals in the group. An injury to a member was an injury to the group; and the primitive group was responsible for the acts of its members. These ideas of group responsibility prevailed throughout considerable areas in the Middle Ages; with better organization in cities and the differentiation of societal agents from ordinary members, group responsibility became more narrowly confined to acts of societal agents. MAINE, ANCIENT LAW (New York, 3d Am. ed. 1873) 122; 1 GIERKE (Berlin, 1868, 1873) *op. cit. supra* note 10, at 18; 2 *ibid.* 386; GETTELL, HISTORY OF POLITICAL THOUGHT (New York, 1924) 32; KOHLER, PHILOSOPHY OF LAW (Boston, 1914) 268 *et seq.* The principle of group or tribal responsibility for acts of individuals was adopted in our treaties with the Indian tribes. See art. 4 of treaty with Cherokees, June 26, 1794, 7 Stat. 43; arts. 2 and 3 of treaty with Sacs, May 13, 1816, 7 Stat. 141; see Cherokee Nation v. Georgia, 5 Pet. 1, 16 (U. S. 1831).

[15] *Cf.* Russell v. Men of Devon, 2 T. R. 667 (K. B. 1788); and comment thereon in (1924) 34 YALE LAW JOURNAL, 1, 42—*Government Liability in Tort.* In this case lack of incorporation and the assumed necessity

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institution and a popular slogan. *A fortiori*, the group became liable *in solido* for the wrongful acts of an organ, agent or representative of the group. Their act not only made them liable personally, as in the Roman law, but their "will" was imputed to the group, which became capable of committing illegal acts and was bound to assume responsibility therefor—conceptions quite foreign to the Roman law.[16] In early Germanic law the conception of the master's responsibility for the torts of his serfs and domestics had been common; though when servants became free, surrender to the courts relieved the master.[17]

When the Roman law, resurrected through the revival of learning at the Italian universities, made its way into western Europe at the time of the so-called "Reception" (1495), these competing principles of group immunity and group responsibility necessarily contended for supremacy. Each has left traces. The conflict of scientific theories with the social views of the people produced interesting results. In the fourteenth century, the postglossators asserted that in principle a corporation could not be responsible for the torts of its representatives unless, in membership assembled, it commanded the tort; moreover, it could not commit an offense because it was not strictly a *persona*.[18] Yet the customs and views of the people

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of levying on the individual member induced the court to hold a county not liable. The continental city was from early days liable for the acts of its officers, and the property of individuals in case of need was levied upon. By the fourteenth century, cities seem to have thrown off responsibility for acts merely of private citizens. 2 GIERKE, *op. cit. supra* note 10, at 817–20.

[16] In times of public excitement, as in war, one occasionally finds traces of this atavistic medievalism, which seeks to hold the group responsible for acts of an individual member, or visits on an individual member penalties for the acts of the group or of other members. See, for example, article 297 of the Treaty of Versailles, which by confiscating private property of enemy investors, violated a century-old rule of international law. An element of collective responsibility is still found in international law. International law deems an injury to the citizen abroad as theoretically an injury to his State. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915) 351; see GIERKE, *op. cit. supra* note 14, at 771, note 3.

[17] 2 BRUNNE, DEUTSCHE RECHTSGESCHICHTE (Leipzig, 1892) § 93. WIGMORE, *Responsibility for Tortious Acts* (1894) 7 HARV. L. REV. 315, 330.

[18] See the quotations from Oldradus de Ponte and the celebrated Bartolus de Sassoferrate noted by LOENING, *op. cit. supra* note 3, at 34 and 3 Gierke, *op. cit. supra* note 10, at 402–405. See also the citations to Savigny, Vangerow, Wachter, Windscheid, Dernburg and other leading Romanists in Hafter, *op. cit. supra* note 11, at 7–11. Bartolus relied on two citations from the Digest, l. 16, par. 10, D. 48, 19, nos. 3 and 4: *"secundum fictionem juris universitas aliud quam homines universitatis"*; and *universitas proprie non potest delinquere, quia proprie non est persona; tamen hoc est fictum positum pro vero, sicut ponimus non juristae."* See 3 GIERKE, *op. cit. supra* note 10, at 234, 342, 402, 491, 656, 667, 678, 681, 738.

The change in view as to the corporation's power to commit torts came

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could not be finally suppressed by a legal theory, and theory therefore had to come to the aid of an established social conviction. From the theory that all the members could make the corporation liable came the view that the majority, or even its organs, its managers, if authorized to represent the corporate will, could do so. Bartolus supplied the argument that the representatives had to remain within corporate functions to bind the corporation and that the majority of the members at least had to adopt the resolution or ratify the act. The Roman *universitas* was drawn upon for analogies, though the it constituted only the totality of its members. It did not, however, absorb the individual and produce a reciprocal liability *in solido* as did the Germanic association. The corporation as a legal person having a so-called will, entity and a life completely independent of its members was still a conception of the future.

The legal relation between the individual and the group experienced marked changes from the fifteenth century on. The community is no longer liable for the individual, even when he purports to act in the name of the community. The employed and paid officer, however, may make the corporation or community liable in so far as a principal is liable for the acts of an agent, *i. e.* for negligence in selecting him (*culpa in eligendo*). The post glossators insisted upon the extreme *ultra vires* theory that the corporation could only be liable if it had expressly authorized the tort of the officer—a possibility finally admitted; if it had not, it could not be liable. This view colored the legal doctrine in France and Germany for a long period.[19]

Yet the customs and convictions of the people were not satisfied with this advance. From the fifteenth century on, therefore, analogies from the Roman law were sought to sustain the popular demand for group responsibility on a wider scale. Distinctions were made between acts within and acts outside the officer's functions or duties—not necessarily of his authority to act rightfully. If within his functions, then the *universitas*, the nearest Roman analogy, was deemed liable like the tax-fermer for his subordinate, the *paterfamilias* for his unemancipated son, the *exercitor* (principal) for the *institor* (manager), the *mensor* for his assistants, shipowners and innkeepers for their employees. The analogies were rather far-fetched,

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with the admission in the fifteenth century that the group was a *persona*, and thus capable of doing wrong. But responsibility for the unauthorized torts of agents was a matter of slow growth and was hardly admitted until the eighteenth century.

[19] MESTRE, LES PERSONNES MORALES ET LE PROBLÈME DE LEUR RESPONSABILITÉ PENALE (Paris, 1899) 109 *et seq;* 3 GIERKE, *op. cit. supra* note 10, at 234–236, 738.

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but they served the purpose of permitting the jurists to sustain a popular legal institution. If the officer acted outside the range of his functions, the corporation was not liable, only he alone.[20] This idea underlies the modern legal development in France and several of the other countries of continental Europe. The important point had been won that the acts of the officer within the scope of his office were deemed to be the acts of the corporation, of the community. But in the sixteenth century the feudal lords were strong, and the doctrine of sovereignty began to arise to strengthen their claims to territorial and legal supremacy. They were loath to assume so broad a responsibility for the acts of their official employees, and again the jurists came to the rescue with a sustaining theory. The officer was deemed analogous to the Roman tax-fermer's slave, for whose acts the fermer was liable only if he failed to surrender him, *noxae datio*.[21] Hence the territorial lord was deemed liable only when he failed to punish or expel the officer; in that event ratification by silence was presumed. This uncertain position prevailed until the end of the seventeenth century. The popular view, however, that the State, the city, the community and corporations, could be guilty of torts and even of certain crimes was not abandoned, especially as it was not uncommon to have communities fined or otherwise held liable by the highest courts.[22]

Still the jurists almost uniformly sought to limit the liability of corporations; only a few wrongful acts of organs or officers were deemed corporate acts—again a modified *ultra vires* doctrine. Indeed, down to the early nineteenth century, Romanists and criminalists insisted upon the theory that fault was personal and could not be ascribed to a corporation, though practice required the concession that statutes might exceptionally otherwise provide.[23] The Roman law analogies for the liability of the territorial lord or the community, and even the limitation of liability by *noxae datio* were abandoned, and the doctrines of fault of the employing lord or community were re-

[20] See the authorities cited in LOENING, *op. cit. supra* note 3, at 39 and H. A. Zachariae, *Ueber die Haftverbindlichkeit des Staats aus Rechtswidrigen Handlungen and Unterlassungen seiner Beamten* (1863) 19 ZEITSCHR. FUR DIE GESAMMTE STAATSWISSENSCHAFT 582, 584–590. WYSS, *op. cit. supra* note 4, at 57 *et seq.* See also HOBBES, LEVIATHAN (Everyman's Library ed.) 119. Bartolus had pointed out a distinction between corporate and non-corporate torts, and anticipated the modern distinction between the *power* and the *privilege* to commit torts. See GIERKE, *op. cit. supra* note 14, at 764, 769.

[21] WYSS, *op. cit. supra* note 4, at 62, 65; LOENING, *op. cit. supra* note 3, at 40.

[22] 3 GIERKE, *op. cit. supra* note 10, at 343–350.

[23] See the views of Savigny and Feurbach set out in HAFTER, *op. cit. supra* note 11, at 26–28.

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vived. Opinion and practice differed as to what degree of fault was required—whether in selection (*culpa in eligendo*) or supervision (*culpa in custodiendo*) or whether fault of the principal was presumed from the fault of the agent. The mandate or agency theory, as a private law theory familiar to all Romanists, gained greater acceptance in explaining the relation between lord or group and the officer. Frequently, the extreme *ultra vires* doctrine was revived. Either this theory or the provable fault theory served generally to enable the lord or the group to escape liability. In the late eighteenth and nineteenth centuries the private law theory of agency, notably its Roman law limitations, was greatly weakened as the basis of the official relation. There arose instead vigorous supporters of the view that the relation between state or group and officer and between group, officer and individual was not one of private law, but of public law, which was to be governed by considerations, not of an inapplicable Roman law, but of modern social, political and legal theory.

The jurists of the school of natural law, with their emphasis upon the rights of the individual, were influential in sustaining the theory of corporate torts. They differed in their view of the degree and conditions of responsibility—whether non-voting members of the group were liable, how far the assembly could bind the members. Some, notably Bodin and Hobbes, believed that rules of corporate responsibility could not extend to sovereign groups or persons.[24] Nor were tort and crime, which historically bear close affinity in all legal systems, always distinguished —a failure which worked to the disadvantage of corporate tort responsibility. Indeed, many Romanists of the eighteenth century adopted the old view that the *universitas*, being incapable of a will—even at best one for rightful purposes only—was incapable of tort.[25] Against them stood the folk law and community practice, the natural law jurists who defended the individual's liberty against the group and even against the sovereign, and, in the nineteenth century, the school of jurists who conceived the corporation as having an independent existence, with a will of its own and legal capacity to commit torts, and thus responsible, not vicariously for the acts of third persons or even agents, but directly for its own acts performed by its organs. Statutes and courts, influenced by theory or

[24] 3 BODIN, DE REPUBLICA (1576) *c.* 7 (London, Knolles ed. 1606) 361 *et seq;* 4 GIERKE, *op. cit. supra* note 10, at 332 *et seq.* HOBBES, *op. cit. supra* note 20, at 121–124. This view was shared by others, *e.g.* Besold (1577–1638) quoted in 4 GIERKE 12. Grotius had no difficulty in attributing tort responsibility to corporations and sovereigns. 2 DE JURE BELLI AC PACIS (1625) *c.* 21 §§ 2–4, 7–8, 10 (London, Evats' ed. 1682).

[25] See the references to this group in GIERKE, *op. cit. supra* note 14, at 745, note 1; 3 GIERKE, *op. cit. supra* note 10, at 168.

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reflecting popular convictions, gradually, though often reluctantly, enlarged the scope of group responsibility in tort; practice and science supplied the supporting theories.[26]

English Common Law. In the common law down to modern times we also find the prevailing conception that liability was based on fault and that fault, like carelessness, was personal. It also appears that responsibility for the uncommanded torts of servants or agents came into the law only in comparatively recent times. Holdsworth mentions the early notion that a master was responsible for the wrongful acts of his slaves and a father for his children, much as in the Roman law.[27] But from the thirteenth and fourteenth centuries, when the earliest authentic records of the common law commence, down to the time of Lord Holt (1688) the servant did not apparently make the master liable unless the latter had commanded or ratified the tort, a principle which also extended to crimes.[28] Holdsworth mentions certain exceptions where liability was imposed on grounds of public policy—the liability for damage by fire from one's house; the liability of persons in public callings, because they undertake to show skill and competence, like innkeepers, carriers, surgeons, etc; the statutory liability of sheriffs and bailiffs for their subordinates; and certain exceptions under the law merchant and by custom.[29] The canon law, largely influenced by the civil law, seems to have been more friendly to vicarious liability than the common law.[30] For us, the interesting evidence is that there seems to have been greater willingness to recognize vicarious responsibility of the master in the case of a public service or calling, on the ground that he professed or undertook to exercise his calling competently and skillfully,[31] than in other types of cases. The de-

[26] See GIERKE, *op. cit. supra* note 14, at 750 *et seq.* and notes; LOENING, *op. cit. supra* note 3, at 40 *et seq;* ZACHARIAE, *op. cit. supra* note 20, at 590 *et seq.*

[27] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (London, 3d ed. 1922) 47.

[28] 3 HOLDSWORTH (3d ed. 1923) *op. cit. supra* note 27, at 371, n. 9; WIGMORE, *op. cit. supra* note 17, at 382 *et seq;* BATY, VICARIOUS LIABILITY (London, 1916) 12 *et seq.* Baty asserts that Wigmore's authorities from cases in the Year Books to show that the master was recognized as responsible down to the fifteenth century, are "not very convincing." Many of them are within the exceptions to the rule of non-responsibility mentioned by Holdsworth. But even Wigmore admits that by the sixteenth century civil liability for uncommanded wrongs had disappeared.

[29] 3 HOLDSWORTH, *op. cit. supra* note 27, at 385.

[30] SAINT GERMAIN, DOCTOR AND STUDENT (1761) c. xlii, p. 236 quoted by BATY, *op. cit. supra* note 28, at 15. Even the canon law, however, seems to have denied responsibility if the office was a public (State) function.

[31] In the case of Waltham v. Mulgar, 1 Moore, 776 (K. B. 1606) a shipowner was held not liable for the wrongful act of his crew in attacking, under letters of marque, a friendly vessel. Dodderidge believed that as this was a public matter, the owner was liable for the acts of his crew. Pop-

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parture from the traditional view began in 1709 when Lord Holt in *Hern v. Nichols*[32] decided that a merchant in England was responsible for fraud perpetrated by an agent abroad in selling certain goods. This case and Lord Holt have been severely criticized, partly on the ground that actually the wrong was a breach of contract, a breach of that confidence which third persons were justified in reposing in an agent held out to represent the principal. Yet Holt's decisions and *dicta* undoubtedly led to an enlargement of the principal's liability for the negligence of his servants,[33] naturally without express command. The responsibility was explained on the theory that the master had impliedly authorized the tort—a specious indulgence in judicial fiction which survived for practically a century. Commerce and social utility having justified the expediency of the rule, the efforts of the courts in the nineteenth century are confined mainly to working out its application, namely, in determining under what circumstances the wrongdoing employee or servant can be deemed to be acting within "the scope of his employment." [34] Certain aspects of this problem which affect official torts and the various theories on which the doctrine of *respondeat superior* is justified, will be reserved for later discussion.

Corporateness was a comparatively late development in English law. Early forms of group-life had no need for the conception, and collective and communal ownership and various forms of *communitas* existed without the notion.[35] Corporateness first seems to have attached to the English borough, probably without the aid of the Roman conception. The Roman or rather Italian theory developed by the postglossators proved useful to assure the group security in the holding of property in perpetuity and to protect the associates cloaked in the *persona* of the group-name, against crime and tort. Through the channel of the ecclesiastical law and through Bracton, Coke established the Italian conception of the *persona ficta*, a postulated concession from the State, as an institution of the common law.[36]

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ham, C. J. evidently considered it as private, and denied the owner's responsibility. BATY, *op. cit. supra* note 28, at 16, states that the case turned "upon the consideration of its public character."

[32] 1 Salk. 289.

[33] See Turberville v. Stampe, 2 Ld. Raym. 264 (1697) and other cases discussed by BATY, *op. cit. supra* note 28, at 21 *et seq.*

[34] See WIGMORE, *op. cit. supra* note 17, at 339 *et seq.*

[35] F. W. MAITLAND, DOMESDAY BOOK AND BEYOND (Cambridge, 1897) 356; 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (Cambridge, 1899) 494–5; CARR, *op. cit. supra* note 11, at 130 *et seq.*

[36] This development is traced by CARR, *op. cit. supra* note 11, at 155 *et seq.*

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There are several cases in the Year Books[37] in which trespass lay against a mayor and commonalty. Yet for the most part writers on the period between 1400 and 1800 maintain that corporations cannot be sued in tort.[38] The grounds for this immunity are those which had already been made familiar by the Roman lawyers—that a tort presumed a personal act of will of which the mindless corporation in its collective capacity is incapable; that for the representative of the corporation to commit a tort was obviously *ultra vires*, for it existed only for the rightful purposes of its charter. It was even denied that a corporation could have servants in the same sense as an individual. It seems that courts in the United States, in the early nineteenth century, first challenged these metaphysical arguments and gradually began to place the corporation in the same position as the individual with respect to tort responsibility.[39] After 1834 it became practically settled in England that a corporation could be held liable in tort, though the first cases involved questions of enrichment of the corporation by a tort.[40] The mindless corporation as a touchstone of debate was abandoned, for it led naturally to the conclusion that a corporation could not be liable even in contract. In fact the agency theory of vicarious liability was expanded in England beyond that prevailing in several countries of continental Europe; and concurrently there developed an ever-increasing degree of tort responsibility of corporations, not only in trespass and trover, but for other torts, including malicious prosecution, fraud and deceit, and libel.[41] There was no longer any doubt as to the

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[37] Quoted by 1 KYD, A TREATISE ON THE LAW OF CORPORATIONS (London, 1793) 223–225, and cited by Tilghman, J. in Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & R. 6, 17 (Pa. 1818).

[38] 1 BACON'S ABRIDGEMENT, s. V. Corp. E. 2, 5, 43 c (5th ed. 1786) 507, 509; KYD, *op. cit. supra* note 37, at 225.

[39] Chestnut Hill etc. Co. v. Rutter, *supra* note 37; First Baptist Church v. Schenectady R. R., 5 Barb. 79 (N. Y. Sup. Ct. 1848); N. Y. Tel. Co. v. Dryburg, 35 Pa. St. 298 (1860).

[40] Smith v. Birmingham Gas Co., 1 Ad. & E. 526 (K. B. 1834); Maund v. Monmouthshire Canal Co., 4 Man. & G. 452 (C. P. 1842). The distinction between trover and trespass appears to have been overlooked by Tindal, J. BATY, *op. cit, supra* note 28, at 65–66; SMITH, *op. cit. supra* note 11, at 59 *et seq.*

[41] Whitfield v. South-Eastern Ry., 27 L. J. Q. B. 229 (1858); Barwick v. Eng. Joint Stock Bk., L. R. 2 Ex. 259 (1867); see cases noted in BATY, *op. cit. supra* note 28, at 68 *et seq;* SMITH, *op. cit. supra* note 11, at 61 *et seq;* Laski, *The Personality of Associations* (1916) 29 HARV. L. REV. 404, 413; Laski, *The Basis of Vicarious Liability* (1916) 26 YALE LAW JOURNAL, 105, 123.

In England, the doctrine of *ultra vires* seems to have caused the courts more difficulty than has been the case in the United States. Distinctions seem still to be made in England between the chartered company and the registered statutory company. The former is more readily deemed capable

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application to them of the law of master and servant,[42] and in fact for deliberate acts of trespass as distinguished from negligence, there was less reluctance to hold the corporation than the individual employer. The fiction of "implied authority" seemed more easy of application to corporations.[43] The wide extension of corporate liability in tort has led naturally to a demand for the application of the same rules with respect to the unincorporated association, and it is highly probable that the early future will eradicate the important distinction deemed to rest upon the technicality of registration.[44]

It is thus apparent that in continental Europe, the *fiscus*—the State or other public entity in its corporate, as distinguished from its governmental, capacity and as an owner of property—was both suable and liable on doctrines derived from private law. Group responsibility for the torts of agents was greatly aided by the conception of the corporation, its supposed possession of "personality" and "will" and the application to it of the doctrines of direct responsibility for its organs and indirect responsibility for the torts of its agents. These conceptions became applicable to all public corporations from the State to the smallest organized township, in so far as non-governmental functions were involved. Responsibility in respect of "governmental" functions is a comparatively late development, still in progress, which owes its existence to the fact that certain

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of tort in *ultra vires* undertakings. The defense of *ultra vires* is only rarely permitted in the United States so far as the undertaking is concerned, though of course the officer or employee may act *ultra vires* his authority. Professors Warren and Harno suggest the conceptual distinction between capacity (power) and authority (privilege) to commit torts in *ultra vires* enterprises. The corporation seems to be more closely limited in matters of contract. The enlargement of tort responsibility seems in the interests of good public policy. See the valuable article of Professor Harno, *Privileges and Powers of a Corporation and the Doctrine of Ultra Vires* (1925) 35 YALE LAW JOURNAL, 13; SALMOND, LAW OF TORTS (London, 3d ed. 1912) 58–60; Warren, *Torts by Corporations in Ultra Vires Undertakings* (1925) 2 CAMBRIDGE L. J. 180 and the comment thereon by A. L. Goodhart, *Corporate Liability in Tort and the Doctrine of Ultra Vires* (1926) *ibid.* 350.

[42] Citizen's Life Assurance Co. v. Brown [1904] A. C. 423, 426; CARR, *op. cit. supra* note 11, at 78 *et seq;* Laski, *The Personality of Associations, supra* note 41, at 414. Under the "real" theory of the corporation now adopted to a considerable extent in continental Europe, largely through the influence of Gierke, it is unnecessary to invoke the principle of vicarious liability through agents, for the corporation becomes directly liable through its organs. GIERKE, *op. cit. supra* note 14, at 788.

[43] BATY, *op. cit. supra* note 28, at 85, 87 *et seq.*, and cases there quoted and cited.

[44] W. A. Sturges, *Unincorporated Associations as Parties to Actions* (1924) 33 YALE LAW JOURNAL, 383; Laski, *The Personality of Associations, supra* note 41, at 416; Laski, *The Basis of Vicarious Liability, supra* note 41, at 125.

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jurists, notably Gierke and Duguit, have refused to admit any theoretical justification for a distinction between corporate and "governmental" acts of public officials. All this will be more fully discussed hereafter. At this point, it is interesting to observe that there has been little difficulty in applying these conceptions, in the United States and England, to municipal corporations and public corporations generally, other than the State and its unincorporated subdivisions. The alleged justifications for the exception of the Crown and State from these conceptions are unique to Anglo-American law, a sufficient reason to question their logical conclusiveness and their historical or theoretical bases. An historical examination will therefore be made of the grounds and arguments advanced in Anglo-American law for the doctrine of irresponsibility.

THE KING CAN DO NO WRONG

The immunity of the State in tort has been justified in the United States on one of two principal legal theories; the first, that the king—erroneously transformed into the State—can do no wrong,[45] a doctrine evidently deemed to have an immutable historical foundation; and the second, espoused primarily by Mr. Justice Holmes for the Supreme Court[46] that the State, the authority that makes the law, cannot be subject to law, and hence, it is argued, cannot be chargeable with or sued in tort. The second of these theories will be discussed hereafter. The first, that "the king can do no wrong" has apparently been accepted so generally as an axiom that it may occasion surprise to remark that the doctrine rests upon a serious misconception of the origin of the dictum.[47]

The middle ages, even in places remote from the influence of the Roman law, appear to have had a definite conception of private rights and a profound conviction that an impairment or violation thereof by public authority constituted a wrong for which redress must be accorded. The doctrine of acquired or vested rights was firmly established in medieval law, and was

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[45] Gibbons v. United States, 8 Wall. 269 (1869); Morgan v. United States, 14 Wall. 53 (1871); Langford v. United States, 101 U. S. 341 (1879); H. Barry, *The King Can Do No Wrong* (1925) 11 VA. L. REV. 349; J. H. Morgan, *Remedies Against the Crown*, introductory chapter to G. E. RODINSON, PUBLIC AUTHORITIES AND LEGAL LIABILITY (London, 1925) liv. Other legal theories, notably alleged public policy, will be considered hereafter.

[46] Kawananakoa v. Polyblank, 205 U. S. 349, 353, 27 Sup. Ct. 526, 527 (1907); The Western Maid, 257 U. S. 419, 433, 42 Sup. Ct. 159, 161 (1922).

[47] The early history of proceedings against the crown has been investigated and published in a notable monograph by LUDWIK EHRLICH, PROCEEDINGS AGAINST THE CROWN (1216–1377) (Oxford, 1921). For much of the historical material which follows the writer acknowledges his special indebtedness to the researches of Dr. Ehrlich.

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kept alive by the jurists of the school of natural law. From these conceptions in England, the king and his officials were by no means exempt; on the contrary, the individual was deemed as privileged in the enjoyment of his rights against the king as against any other person.[48] While many rights rested in grant, they were deemed vested, and could not be extinguished, even by the king, except by what would now be called due process of law. Magna Carta was designed to insure respect for the rights of the lord and vassal (subject) in his relations with the suzerain (king); and while many rules of law favored the king and were interpreted in his favor by the king's courts, it seems certain that the king's acts were judged according to law, and that the supposition that the king was above the law did not prevail in thirteenth century England. The infallible and irresponsible king was a conception of later days and was historically unjustified. It is true that a writ did not lie against the king, but methods, partly indirect, were found to restore the subject to the rights of which the acts of the king or his officials had deprived him. The king was often charged with committing wrong, notably wrongful disseisin.[49] The bulk of the complaints against the king's acts related to wrongs with respect to land, and the courts frequently issued writs restoring the *status quo ante*.[50]

The king had a dual position, personal and institutional. As the head of a great administrative machine, governmental, fiscal and judicial, his powers were enormous, and probably only the popular conviction that it was improper for him to withdraw himself from the domain of law led to his reliance upon legal arguments and not merely physical power to defend his acts. But that he could so rely and often did so is not hard to

[48] 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (Cambridge, 1905) 3–4; EHRLICH, *op. cit. supra* note 47, at 9 *et seq;* 2 HOLDSWORTH, *op. cit. supra* note 27, at 253 *et seq.*

[49] See the cases from BRACTON'S NOTE BOOK cited by EHRLICH, *op. cit. supra* note 47, at 14. Ehrlich remarks that the king as a disseisor had no more rights than any other disseisor and thus conveyed no valid title to a subsequent grantee. See MAGNA CARTA, c. 39, 52, 56, 57; W. S. MCKECHNIE, MAGNA CARTA (Glasgow, 2d ed. 1914) 375, 382, 448, 456, 457. The king's unlawful grant or order gave no protection; later the proceedings upon *scire facias* resulted in the annulment of letters patent to land which the king was not privileged to convey. It was only later that the theory developed that the king could not (was not privileged to) be a disseisor, which led to an unsound interpretation of the maxim that "the king can do no wrong." In modern times in England, the petition of right has long been recognized to lie against the Crown's wrongful disseisin, though in the United States that flagrant tort when committed on behalf of the State, is still unredressed, under the general immunity of the State in tort. Langford v. United States, *supra* note 45.

[50] See the numerous writs from the Close Rolls described by EHRLICH, *op. cit. supra* note 47, at 15 *et seq.*

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believe. The king's writ was prevented from becoming a tyrant's weapon largely by reason of the fact that it was issued under judicial control. Yet obviously it could not run against the king, the nominal if not factual issuing authority, to any greater extent than he chose. Punishment, the usual expiation for wrongs, could hardly be invoked against the king, and this probably accounts for the fact that damages, with their penal connotation, were not assessed against the king. Possibly, also, money then played a smaller part in life than it does today, so that we hear less of money damages in general. Writs for the restoration of rights in land were returnable in the exchequer, and to their issuance the king offered no objection. Yet it could not be said that he thereby submitted to the jurisdiction of his courts.[51] Nor could the king be punished or

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[51] Holdsworth states that neither the king nor a lord could be sued in his own courts. 3 HOLDSWORTH, *op. cit. supra* note 27, at 464–465; see also STAUNFORD, PREGOGATIVE (London, 1567) f. 25b. But, 3 CARLYLE, HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST (Edinburgh, 1909) c. 4, quotes from the CONSUETUDINES FEODORUM, the SACHSENSPIEGEL, LE CONSEIL DE PIERRE DE FONTAINES, the ETABLISSEMENTS DE ST. LOUIS, from Beaumanoir and from other feudal law book passages which show that in the twelfth and thirteenth centuries it was a common conception that the feudal lord could be impleaded in the lord's court and that appropriate measures were available to the vassal to enforce the judgment. See also K. WOLZENDORFF, STAATSRECHT UND NATURRECHT IN DER LEHRE VON WIDERSTANDSRECHT DES VOLKES GEGEN RECHTSWIDRIGE AUSÜBUNG DER STAATSGEWALT (Breslau, 1916) 6–23. In continental Europe, it was the common practice for both king and feudal lord to submit to the jurisdiction of the courts. LOENING, GERICHTE U VERWALTUNGSBEHÖRDEN IN BRANDENBURG-PREUSSEN (1894) 2 VERWALTUNGSARCHIV, 217, 437 and 3 *ibid.* 94 states that in central Europe the princes and lords could in theory after the twelfth century be sued before the *Reichshofsgericht*, but that in practice the procedure was so difficult that suits were not brought. The right of resistance to illegal royal acts was conceded to cities, 2 *ibid.* 217. See also following articles in this series. In the fifteenth century arbitration courts were established to try controversies against princes. 2 *ibid.* 221. The territorial or lord's courts were then not competent to try cases against the lord. But see 3 CARLYLE, *loc. cit.* After 1495, the imperial *Reichskammergericht* had jurisdiction of suits against territorial lords, but the procedure was extremely complicated. Suits against the king were possible before the *Reichshofrath* up to the time of Frederick William I of Prussia in the eighteenth century. LOENING, in 2 VERWALTUNGSARCHIV, 228, citing J. J. MOSER, MERKWÜRDIGE REICHSHOFKATHS CONCLUSA (1726). In the course of the seventeenth and early eighteenth centuries the power of the territorial rulers increased and the influence and power of the imperial supreme court vanished. Subjects in Brandenburg brought suit against the ruler before the council established by him. LOENING, in 2 VERWALTUNGSARCHIV, 233. Suits against rulers in that territory could not be brought before the ordinary courts during the sixteenth and seventeenth centuries, except in certain corporate (*fiscus*) matters. In the early eighteenth century, the jurisdiction of the courts was continually more limited, but administrative courts were created to deal with specific matters, like taxation. *Ibid.* 243. Yet in matters of

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distrained for refusing to obey his court's, *i. e.* his own, orders, a fact which explains why the barons sought to impose such a compulsory jurisdiction[52] and why the acts of the king's servants, unless the king waived his royal privilege, were free from judicial review.[53] When the king's acts were in question, recourse to him was necessary; hence, though the conception of wrong was clear, the ordinary suit against the king was hardly practicable. Yet he did not claim immunity for his acts or assert arbitrary power. At least down to 1276, a written petition for redress was not yet an established procedure, we are informed.[54] Bracton speaks of the *supplicatio*,[55] but its use is shrouded in doubt and by the time of Edward I, it seems that the *petitio* in the sense of petition and not of ordinary com-

property, under ordinance of 1713, the ordinary courts were competent in suits against the king of Prussia. Frederick the Great restored the jurisdiction of the ordinary courts over the king and withdrew jurisdiction from the administrative courts. Suits could freely be brought against the king under the Instruction of May 20, 1748. *Ibid.* 258. Subsequently, administrative courts were re-established. Whereas suits in corporate (*fiscus*) matters could still be brought, sometimes in the ordinary, sometimes in the administrative courts, suits against the king in "governmental" matters could no longer, under the decrees of 1804 and following years, be brought. *Ibid.* 456. An ordinance of 1808 restored the jurisdiction of the ordinary courts in all corporate (*fiscus*) matters. 3 *ibid.* 94. In the Rhine provinces, an ordinance of 1818 limits this jurisdiction, and under the influence of the French law recourse against police ordinances is denied. *Ibid.* 96. During the nineteenth century, until legislative reforms extended jurisdiction over "governmental" functions, the jurisdiction of the ordinary courts, with the exception of tax appeals, was practically limited to suits arising out of the corporate functions of king and State. *Ibid.* 99 *et seq.* Suits against the police for damages arising out of illegal police orders were permitted in administrative courts in 1840. *Ibid.* 131. But, as in France up to 1870, suits against officials depended upon administrative consent by the government. Toward the end of the century, far-reaching legislative reforms opened the way to judicial suit against the State to individuals injured by officers even in the performance of "governmental" functions. For the historical development in central Europe of the suability of king and State, see also O. BÄHR, DER RECHTSSTAAT (Cassel, 1864) 4, 18, 45, 111, and F. STEIN, GRENZEN UND BEZIEHUNGEN ZWISCHEN JUSTIZ UND VERWALTUNG (Tübingen, 1912) 6 *et seq.*

[52] Clause 49 of the Articles of the Barons was designed to effect this submission. MCKECHNIE, *op. cit. supra* note 49, at 492. See EHRLICH, *op. cit. supra* note 47, at 25 *et seq.*

[53] 2 BRACTON'S NOTE-BOOK, pl. 401 (London, Maitland's ed. 1887) 320, cited by EHRLICH, *op. cit. supra* note 47, at 25, note 1.

[54] EHRLICH, *op. cit. supra* note 47, at 28; W. S. Holdsworth, *The History of Remedies Against the Crown* (1922) 38 L. Q. REV. 141, 142 *et seq;* 9 HOLDSWORTH, *op. cit. supra* note 27, at 7 *et seq.*

[55] 1 BRACTON, DE LEGIBUS ET CONSUETUDINES ANGLIAE (London, Twiss' ed. 1878) fol. 5b, 171b, pp. 40–41; 3 *ibid.* 92–93; EHRLICH, *op. cit. supra* note 47, at 45; 1 POLLOCK & MAITLAND, *op. cit. supra* note 48, at 501; BRACTON'S NOTE-BOOK, *op. cit. supra* note 53, Case 1108 (1234); Holdsworth, *op. cit. supra* note 54, at 143; 9 HOLDSWORTH, *op. cit. supra* note 27, at 13.

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plaint had come into use. Yet it was possible to obtain relief against a sheriff and bailiff in the administrative court known as the exchequer,[56] unless the king interfered by assuming responsibility for the act, an interference operating analogously to the modern "act of state" doctrine and to the proceeding in continental countries by which the claim of act of administration serves to oust the jurisdiction of the ordinary law courts. Undue exactions by the exchequer seem also to have been triable by a writ from chancery addressed to the exchequer, issued, in the time of Edward I, on petition to the king and council.[57] While there was no difficulty about having wrongfully-taken land restored, and trying titles which rested upon alleged illegal grants, it was extremely difficult to get money restored or money compensation paid. Compensation in other form appears to have been freely made, as in land and public privileges or franchises of various kinds; and it also appears that set-off against or assignment of money due the exchequer by the claimant or by third persons was not infrequent.[58] Finally, applications to the king in council or in person were occasionally made and redress afforded.

Bracton, to whom we owe much of our knowledge of the law of this period, is not altogether clear in his description of royal privileges and responsibilities.[59] Bracton, although he pictured the king as the vicar of God *in temporalibus*, and thus laid a

[56] 1 POLLOCK & MAITLAND, *op. cit. supra* note 48, at 192. The exchequer issued the writ; it could try only wrongful acts of officials subordinate to the exchequer, like sheriffs and bailiffs.

[57] 1 POLLOCK & MAITLAND, *op. cit. supra note* 48, at 192. It seems unnecessary to discuss the various writs in detail. Writs granted by the king often began with "*monstravcrit nobis.*" Vinogradoff discusses these writs in VILLAINAGE IN ENGLAND (1892) 103–104; see 1 POLLOCK & MAITLAND, *op. cit. supra* note 48, at 195 *et seq.* Writs from chancery naturally gave rise to jurisdictional conflicts.

[58] EHRLICH, *op. cit. supra* note 47, at 32.

[59] This is explained by the fact that conflicting theories, legal and political, kept the practice in a state of flux. Subjection to law contended for mastery with the claim of royal prerogative. 1 POLLOCK & MAITLAND, *op. cit. supra* note 48, at 526. Vinogradoff in a learned article on *The Text of Bracton* (1885) 1 L. Q. REV. 189, 199 points out the differences in some of the Bracton manuscripts and in discussing f. 34 remarks that two of the versions of f. 34 sustain diverse theories. The one, written evidently by Bracton, admits that only God and the law are above the king and if he breaks the law, only God can correct him. In the other, the king's peers are recognized as his superiors when they act as the body of his court, and they are expected to keep the king within the bounds of the law. The conflict of theory is probably also illustrated by Bracton's assertion that the king's power extends only as far as the law grants; yet, he adds, *quod principi placuit, legis habet vigorem*, which Bracton seems not to consider inconsistent. 2 BRACTON, *op. cit. supra* note 55, fol. 107, at 172–173. For a discussion of this supposed maxim of Roman law, see the subsequent articles of this series.

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legal foundation for the claim of divine right, nevertheless regards the king as distinctly subject to law which gave him his position.[60] If he should abuse his legal privileges and rely upon physical power to enforce his desires, he was not a servant of God but of the devil.[61] Probably a modern Austinian would point out that this described only a moral obligation and not a legal duty, yet he would only thereby circumscribe narrowly the conception of law and would not explain that breach of the obligation and the flouting of popular convictions would probably disclose more violent sanctions than any mere departure from a statutory requirement or judicially enforceable duty. The maxim that the king can do no wrong[62] was understood by Bracton not in the sense that he was incapable of doing wrong, but that he was not *privileged* to do wrong. His acts in violation of law, by a standard which applied equally to everybody else, were regarded not as lawful acts but as *injuriae,* wrongs; his obligation to right the wrong or afford redress was not deemed different from that of a private person.[63] Yet the remedies, in the nature of things, could not be the same, though the analytical jurist who would thereupon conclude that the obligation was not legally recognizable would probably misinterpret both the practice and the popular conviction. If restoration was possible, this was expected and usually secured; but the punishment of the ordinary wrongdoer could hardly be applied to the king, or by analogy, the penal equivalent of an amercement in damages. If the king refused to redress a wrong, a possibility not readily accepted, the remedies were necessarily weak. Bracton, as already observed, speaks of the *supplicatio* to the king and in Edward I we have the formal *petitio.* If he still refused, Bracton charges him with a breach

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[60] *Rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem.* 1 BRACTON, *op. cit. supra* note 55, fol. 5b at 38–39. This view that the law makes the king, not the king, the law, plays a part in the history of jurisprudence. It involves some ambiguity in the term "law." See subsequent articles of this series.

[61] 1 BRACTON, *op. cit. supra* note 55, fol. 5b, 107b, at 40–41; 2 *ibid.* 174–175; EHRLICH, *op. cit. supra* note 47, at 40.

[62] Bracton uses the sentence: *Nihil enim aliud potest rex in terris . . . nisi id solum quod de jure potest.* 2 BRACTON, *op. cit. supra* note 55, fol. 107a, at 172–173. The king's violations of private rights were spoken of as if anybody else had committed them. See the numerous quotations from Bracton, in support of this statement, printed by EHRLICH, *op. cit. supra* note 47, at 42, note 2.

[63] 6 BRACTON, *op. cit. supra* note 55, fol. 382b, at 18–21; EHRLICH, *op. cit. supra* note 47, at 43. But, as in real actions, the defendant could not vouch the king to warranty unless by way of exception; since no writ lay against the king, he could only pray aid of the king. Y. B. 21 & 22 Edw. I (Rolls Series) 287 (1293); see 1 POLLOCK & MAITLAND, *op. cit. supra* note 48, at 501, citing BRACTON'S NOTE-BOOK, Case 1183.

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of his mission and states that he ought to be punished, not of course by any organized tribunal within the kingdom, but by his religious superiors, possibly the pope or council.[64] This was not an innocuous threat in those days. Bracton also evidently sustained the privilege of popular resistance to outrageous abuse, on the theory that the king's debauch carried with it the doom of the people.[65] There is even an intimation in Bracton, notwithstanding his belief that the king's judges were his own delegates, that another body, the curia, the earls and the barons, who had claimed the right to exert compulsion upon the king,[66] might in case of gross abuse, judge the legality of his acts.

It is thus fairly certain that the subsequently proclaimed conception of an infallible and irresponsible sovereign, himself above the law because he makes it, finds no authority in the kingship of Henry III or in Bracton's commentaries on medieval English law.

Edward I, the so-called English Justinian, introduced a regular course of procedure for bringing claims against the king. This is identified with the institution of the petition, the origin of which is ascribed to Edward's experience of foreign practices, notably that adopted at the court of the pope in Rome.[67] It seems certain that the idea that the king was deemed subject to and not above the law, that he was not privileged to do wrong, and that his or his officials' interference with vested rights had to be made good and remedied, were prevalent legal conceptions of the period. The main interest then lies in an examination of the procedure by which relief was afforded the injured individual.

There is a well-known passage in the Year-Books which records the introduction of the new procedure by petition, though it is probably inaccurate in assuming that the king could theretofore be sued by writ.[68] This seems never to have been the

[64] 1 BRACTON, *op. cit. supra* note 55, fol. 5b, 171b, also 6a, at 38–39; *ibid.* 40–41; 3 *ibid.* 92–93; EHRLICH, *op. cit. supra* note 47, at 46. *Satis sufficiat ei ad poenam quod dominum expectat ultorem. Nemo quidem de factis (suis, regis) praesumat disputare, multo fortius contra factum suum venire.* (fol. 5b, 6a). This vengeance of the Lord was evidently deemed a most serious sanction.

[65] 2 BRACTON, *op. cit. supra* note 55, fol. 107b, at 174–175. On the doctrine of resistance to abuse, sanctioned throughout the middle ages, see K. WOLZENDORFF, *op. cit. supra* note 51, at 23 *et seq.* and the subsequent articles of this series.

[66] Provisions of Oxford, 43 Hen. III (1258); 2 W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND (Oxford, 4th ed. 1896) 78 *et seq;* MAGNA CARTA, c. 61; MCKECHNIE, *op. cit. supra* note 49, at 465.

[67] See the inference, based on historical data, of EHRLICH, *op. cit. supra* note 47, at 95.

[68] Passeley, 1307, in the course of an argument before the Court of

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case. The fact that relief had to be sought in the method prescribed, usually extended only after endorsement of *fiat justitia* or *soit fait droit* or *facent droit as parties*, does not, it is believed, militate against the popular conception that these claims were based on law and that the obligations they evoked were legal and not merely moral in nature. While it is true that justice often functioned slowly and inadequately, particularly in the collection of money claims, and while it was difficult to invoke judicial action if the king defiantly refused to meet an obligation—not a common case—still an assumption by Austinians that the relief was not legal but gracious is based on their exceedingly narrow definition of the term "law." An equally justifiable and broader definition of the term "law" would embrace a regular course of action by societal agents, predictable and sanctioned by popular conviction, departure from which was rare and admittedly evidence of bad faith. The precedents established were apparently as much respected as are the precedents, for example, of the United States Court of Claims, the decisions of which cannot be enforced except as Congress sees fit to make appropriations. But the regularity with which this is done establishes the practice, it is believed, as legal, and not merely ethical or moral; and the rules laid down, as rules of law.

So, it is believed, we may characterize the regular form of proceedings against the king for the redress of wrongs adopted by Edward I and his advisers. To be sure, the king had certain prerogatives, continually growing in importance, which placed him in some respects outside the customs and laws of the realm applying to other persons. The exceptional way of suing him was one of these. Costs did not lie against him,[69] and time did not run against him. These privileges were deemed justified on the ground of public utility. In disseisin, he paid no damages and he could, of course, not be punished. But he did not profess to escape ordinary legal obligations. For excessive revenue collections, writs were sued out of chancery addressed to the barons of the exchequer. Although disseisin by the king is no longer mentioned, we have writs ordering escheators, sheriffs, etc. to remove the king's hands from lands

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Common Pleas said: "In old times every writ, whether of right or of the possession, lay well against the king, and nothing is now changed except that one must now sue against him by bill where formerly one sued by writ." Y. B. 33–35 Edw. I (London, Rolls Series 1879) 470–471; 1 POLLOCK & MAITLAND, *op. cit. supra* note 48, at 501, 516 *et seq;* 3 HOLDSWORTH *op. cit. supra* note 27, at 465.

[69] 3 Bl. Comm. *400; G. S. ROBERTSON, CIVIL PROCEEDINGS BY AND AGAINST THE CROWN (London, 1908) 397, 613. Under the Petition of Right Act, 1860, § 12, cost lie against the crown. (1860) 23 & 24 Vict. c. 34 § 12; ROBERTSON, *supra* at 398, 616.

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not rightfully held by him.[70] There were a variety of writs, to deliver (*liberes*) to restore (*restituas*), not to meddle further (*te de cetero non intermittas*), to cause to have seisin (*habere facias seisinam*) designed to serve special purposes.[71] They all evidence the doctrine that the king was not privileged to do wrong.

If the ordinary procedure for securing justice proved ineffective, extraordinary or exceptional remedies were provided. If local officials or the exchequer failed to return or make offset or assignment for excess revenues collected, redress would have to be sought in chancery. This relief might be obtained without or with application to the king in council.[72] Applications to the king and council were made verbally or in writing. Hence the origin of the petition. The king might on his own initiative direct the chancery to issue a writ for an investigation or inquisition by the proper department or officer. The petitions were presented at the meetings of the parliaments and were appropriately endorsed; toward the end of Edward's reign, in the early part of the fourteenth century, it seems that the forms of petition became fairly rigid.[73] The practice developed, by ordinance, of submitting petitions directly to the exchequer, if the complaint affected that branch, or to the chancellor, and the king was to be disturbed only if the petition could not be dealt with by those officers without the aid of the king and council. In fact, all the petitions had to follow the prescribed channel. Petitions were divided into those of grace and of right, the latter believed to involve a claim founded upon the violation of some legal right. The king was thus regarded as subject to the rules of law, notwithstanding the exceptional nature of the proceeding for redress. Receivers of petitions were appointed, according to four geographical areas, Scotland, Gascony, Ireland and Guernsey.[74] Their duty it was, with the aid of the chancellor and the treasurer, to act as an examining committee and to answer such petitions as they could. Special committees might also be appointed when the regular commit-

[70] 3 Bl. Comm. *257. Petitions of right were usually brought for some grievance which would have been the subject of a real action if brought against a private person. HOLDSWORTH, *The History of Remedies Against the Crown* (1922) 38 L. Q. REV. 142; 9 HOLDSWORTH, *op. cit. supra* note 27, at 7.

[71] See illustrations of these writs in EHRLICH, *op. cit. supra* note 47, at 62.

[72] 2 FLETA, SEU COMMENTARIUS JURIS ANGLICANI (London, Selden ed. 1647) 74.

[73] See the various forms of words used in petitions, EHRLICH, *op. cit. supra* note 47, at 84.

[74] MAITLAND, MEMORANDA DE PARLIAMENTO (Rolls Series, 1305) 3–4, cited by EHRLICH, *op. cit. supra* note 47, at 100; 1 *Rotuli Parliamentorum, ut et petitiones, et placita in parliamento tempore* R. I, v. 1, No. 5 (6 Edw. I, 1278).

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tees were overburdened. They would reserve for parliament and the king and council only such petitions as could not be acted upon by the committees or the departments, to whom by endorsement the petition was usually referred for investigation and decision. The receivers were often members of the king's council. In later reigns, masters in chancery and justices and exchequer remembrancers were among the members of examining committees or triers, as they were later called. The king and council might also refer petitions to be tried by departments or officials having special knowledge or jurisdiction of the subject matter.[75]

The responsibility of officials for injuries inflicted by them was gradually asserted, in the case of minor officials, by waiver of the king's privilege to cover them with his royal protection; if he did assume responsibility, as in the case of superior officials, the relief by petition was alone available to the injured subject.

In the reigns of Edward II and Edward III no great change in underlying notions occurred. But political conditions effected institutional modifications. With the growth of the idea of national consciousness, of "the commonalty of the realm of England,"[76] there came also the institutionalization of the kingship and an enlargement of its privileges and prerogatives. While it was still true that the king was not privileged to do wrong, and more detailed procedure was provided for bringing into issue and determination allegations of wrongdoing perpetrated in the king's name, there is also to be noted a greater exercise of power by the king, both in the exchequer, in chancery and in parliament, to prevent any encroachment beyond that which he sanctioned. There was still the notion, analogous to that of Bracton's day, that his subjects, now bound by their oath to the crown rather than to the person of the king, were under a duty in case of abuse to bring him back to the exercise of his proper powers, a notion which cost Edward II his life. The king's oath involved a constitutional limitation. Yet, contrary to present-day views, the king's illegal order protected his officials from suit,[77] a rule thus involving the king's assumption of responsibility, but inconsistent with any notion of sovereign immunity. He might waive his royal privilege and thus subject his officers to suit, yet only before such courts as he designated, either the exchequer or special courts. It might have been preferable to continue to regard official acts as royal

[75] The different methods of disposition of petitions are discussed by EHRLICH, *op. cit. supra* note 47, at 101 *et seq.*

[76] 2 *Rotuli Parliamentorum* 128, No. 9 (15 Edw. III, 1341).

[77] Brooke, LA GRAUNDE ABRIDGMENT (London, 1576) tit. Faux Imprisonment 9; EHRLICH, *op. cit. supra* note 47, at 129, 200.

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acts, and accord the injured subject relief against the crown, a practice which would have been more efficient and more just to all parties concerned. The development in England, however, was the other way—through the distortion of historical maxims and theories—to relieve the king from responsibility for official acts and make the official personally responsible before what might be called administrative courts, a practice common to much of continental Europe down to the present time, and then before the ordinary courts.

In the fourteenth century there was as yet no notion that the king was not responsible for wrongs done his subjects or that he was infallible. On the contrary, the possibility of his doing wrong was freely admitted and an elaborate procedure devised by which the injured subject could invoke relief. The fact that this method of relief was often cumbersome, that it required the king's permission and was surrounded by various safeguards against undue royal burden, does not detract, it is believed, from its essentially legal nature. While it is true that the petition might be refused, thus giving it the color of a supplication for grace, the fact seems to be that petitions were not rejected or dismissed except for strictly legal reasons. Custom had enjoined upon the king the rule of law that a petition founded upon the violation of what practice had developed and characterized as a legal or vested right, should not go unredressed. It would seem that a definition of law which denominates such claims as legal does not offend good usage, though the Austinians may find it lacking in objective enforceability. So would they the decisions of the United States Court of Claims or of the French Conseil d'Etat.

A proclamation made in the parliament of 1341 announced that every one who felt aggrieved by the king or his ministers or by others should institute a petition and he would have his remedy.[78] In a few cases the king's illegal act was deemed void, and the new idea developed that illegal royal writs might be disobeyed.[79] Yet on the whole this was exceptional, and for the most part his illegal acts were voidable only, in the methods he prescribed. The limitations upon responsibility and burden were naturally construed in his favor, not only because the justices were appointed by him but because of the growth of the prerogative.[80] But the prerogative itself was deemed to be in the interests of the realm and people.

[78] 2 *Rotuli Parliamentorum* 127, No. 5 (15 Edw. III, 1341); EHRLICH, *op. cit. supra* note 47, at 128.

[79] 1 *Rotuli Parliamentorum* 285, No. 32 (5 Edw. II, 1312); Ordinance of 1311, cited by EHRLICH, *op. cit. supra* note 47, at 128–129, 131.

[80] Dr. Ehrlich cites the rule that the king was always to be considered a *bonae fidae* possessor and hence never a disseisor. This led in 1485 to the conclusion of the justices and sergeants in chancery that "the King

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Claims against the king had become common, and a clear distinction was recognized between petitions by way of grace and petitions by way of right, that is, founded upon the violation of a vested right of the subject.[81] The procedure of the exchequer and of the chancery was regulated in great detail; both became courts trying cases in regular course. The more limited jurisdiction was that of the exchequer; if they refused to "do right," application for a writ would lie to the chancery. The chancery remained the office for ordinary grievances;[82] one applied for a writ, which the chancery in its discretion might issue, or else require the applicant to institute a petition to the king. The writ was usually issued where the claim involved a question of land titles and after issue joined, might be sent to the king's bench for trial. Damages, however, could not be awarded by the chancery. A king's attorney safeguarded the king's interests. By ordinances, particularly one of 1349, the jurisdiction of the chancery was greatly enlarged,[83] so that many complaints formerly directed to the king by petition could now be brought in chancery. This greatly limited the number of petitions and the relative importance of the petition practice.

The practice on petitions as inaugurated by Edward I remained in principle unchanged. Under the ordinance of 1349, petitions could be brought both inside and outside of the parliaments. In the case of petitions outside parliament, it was provided that the chancellor and the keeper of the privy seal should receive and examine them and send to the king, with their ad-

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could not be said to have committed a 'tort.'" EHRLICH, *op. cit. supra* note 47, at 139 citing Y. B. I Edw. V, p. 8, note 13. Theretofore it had been argued that the king could commit a tort just like any other person. Y. B. 35 Hen. VI, 61. The various meanings attached to the limitation *coram rege terminari debet placitum quod ipsum tangit* are described at length by EHRLICH, *op. cit. supra* note 47, at 150 *et seq.* A description of the many advantages enjoyed by the king and not by the claimant on petition of right, advantages which made the proceeding both cumbersome and difficult, will be found in Holdsworth, *op. cit. supra* note 70, at 156–158. Hence the growth of other remedies like traverse and the *monstrance de droit. Ibid.* 160–161.

[81] In 1330, the king and council removed all the sheriffs of England and agreed to appoint judges to inquire into and determine cases of abuse of power by sheriffs, coroners, constables, bailiffs, hundreders and other officers, since the accession of Edward II. 2 *Rotuli Parliamentorum* 60, No. 2 (4 Edw. III, 1330); EHRLICH, *op. cit. supra* note 47, at 158. See *infra* note 84 as to the growing cleavage between a petition for grace and a petition of right. On the conception of vested right, see J. Walter Jones, *Acquired and Guaranteed Rights*, CAMBRIDGE LEGAL ESSAYS (Cambridge, 1926) 223.

[82] There was a standing formula endorsed on many parliamentary petitions: "Let every one who feels aggrieved come to the chancery and right will be done to him." EHRLICH, *op. cit. supra* note 47, at 170.

[83] EHRLICH, *op. cit. supra* note 47, at 174, citing 3 Rymer, Foedera (London, 1703) 181; Calendar of Close Rolls, 22 Edw. III, 615.

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vice, only those which they could not expedite *rege inconsulta*. The petition would then come back with the king's endorsement of his desires in the matter. Petitions of right, as distinguished from those of grace, might complain against private parties, such as judges, juries, etc. or against the king or his officials, seeking restitution of real property, damages, allowances or an equivalent.[84] The procedure on private petitions in parliament somewhat modified certain of the details established by Edward I,[85] notably with respect to the method of receiving and trying petitions for redress. Auditors appointed by parliament either decided the case or routed it to the proper department or sent it to the king or to the council for report to the king. Petitions, if not rejected, would be disposed of either (1) by decision, before the council or before the parliament; (2) by a hypothetical decision of the auditors, council or king, and the chancery or exchequer or designated official directed to determine the truth of the allegation; (3) by an adjournment to let courts or officials supply necessary evidence; or (4) by transmission to the courts, king's bench, chancery or exchequer or to a designated official or commission, with an order to "do right."

Mention should also be made of two statutes of 1360 and 1362 which, in certain proceedings approximating real actions, enabled the subject to recover land wrongfully seized or held by the king more speedily than by the dilatory petition of right. These statutes enabled the subject to traverse the king's alleged title, acquired or held by office found or, by confession and avoidance, to show his own right—the origin of the remedy of *monstrans de droit*.[86] Many of the special advantages enjoyed by the king in the procedure on petition of right were not claimable in traverse or *monstrans de droit*. These remedies were,

[84] Y. B. 24 Edw. III, f. 24, *Residuum de termino paschal*, 42; EHRLICH, *op. cit. supra* note 47, at 118–123, 186. Ehrlich points out at page 187, note 15, that the distinction between the petition of grace and the petition of right is clear and that one had nothing to do with the other. See Holdsworth, *op. cit. supra* note 70, at 148, who says that the distinction had not clearly emerged much before the end of the fifteenth century. At page 233 he expresses the opinion that the petition of right had never been completely differentiated from other petitions "of grace," and thus explains its flexibility. *Cf.* W. CLODE, PETITION OF RIGHT (London, 1887) 16–17; 2 ANSON, LAW AND CUSTOM OF THE CONSTITUTION (Oxford, 3d ed. 1897) 300.

[85] EHRLICH, *op. cit. supra* note 47 at 189, note 6.

[86] STAUNFORD, *op. cit. supra* note 51, at 60 *et seq.* 70 b, 71 a; see The Sadlers' Case, 76 Eng. Rep. 1012 (1583); Lord Somers in The Bankers Case, 14 State Trials 77–79 (1692); Holdsworth, *op. cit. supra* note 70, at 158–161, 161–164; 9 HOLDSWORTH, *op. cit. supra* note 27, at 24 *et seq.* The remedy of *monstrans de droit* was further extended by an Act of (1543) 2 & 3 Edw. VI, c. 8. See The Sadlers' Case, *supra*. Like the real actions generally, these special proceedings tended to drop out of use in the seventeenth and eighteenth centuries.

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therefore, availed of by claimants whenever possible.[87] In the sixteenth and seventeenth centuries, they all but superseded the petition of right, which is mentioned only rarely;[88] but as these remedies were very special and as the petition of right was a general remedy flexible in application, the eighteenth and nineteenth centuries witnessed a vigorous revival of the petition of right.

It appears also that the petition of right, whose distinctive character it was that the law applicable was the same as that applied in litigation between subjects, did not extend to ordinary breaches of contract in England until 1874. But this was largely because alternative remedies were provided and because the law of contract had not yet been worked out fully. For omission to pay an annuity, regarded as a proceeding to recover an incorporeal thing, a petition lay;[89] also for compensation for failure to warrant the title of the king's grantee, for the grant of a rent, or to recover a franchise. In the case of ordinary money claims, a petition for a writ of *liberate* ordering the exchequer to pay or to hear the claim—a remedy used until 1844—was more expeditious than the usual petition of right.[90] Nor had the modern distinctions between tort and contract been adequately developed. So that while the equivalent of so-called real actions or cases involving the law of property constituted the principal subject-matter of the petition of right, it was by no means so limited, when the grievances redressed, in the light of modern legal classification, are considered. Injuries to property, as in trespass on land by digging trenches,[91] were thus not considered in 1843 and 1864 precedents for the assertion that a petition of right lay for a tort.[92] In fact we are assured by Holdsworth that by the end of the fifteenth century it was coming to be recognized that the king could not be sued for a tort and also, contrary to the earlier law, that the king's officer or agent was alone liable—a rule which in the sixteenth

[87] 3 Bl. Comm. *260.

[88] 3 COKE, INSTITUTES* 216 mentions a petition of right in 1583. Holdsworth says that there appear to be no instances of petitions in the reports of the seventeenth century. Holdsworth, *op. cit. supra* note 70, at 163.

[89] Case in 18 Edw. I cited by Lord Somers in The Bankers Case, *supra* note 86, at 82. Holdsworth, *op. cit. supra* note 70, at 152, 155; 9 HOLDSWORTH, *op cit. supra* note 27, at 18, 21.

[90] CLODE, *op. cit. supra* note 84, at 20–22; Holdsworth, *op. cit. supra* note 70, at 155; 9 Holdsworth, *op. cit. supra* note 27, at 21.

[91] Robert de Clifton's Case, 1 *Rotuli Parliamentorum* 416, No. 3 (18 Edw. II, 1325); Gerveis de Clifton's Case, Y. B. 22 Edw. III, Pasch. pl. 12 (1349) discussed by EHRLICH, *op. cit. supra* note 47, at 123–126, 264.

[92] Viscount Canterbury v. The Queen, 12 L. J. Ch. (n. s.) 281 (1843); Tobin v. The Queen, 16 C. B. N. S. 309 (1864) where Clifton's case was explained as a misuser or wrongful assertion of an easement which had caused damage, *i.e.* the subject of what might have been a real action.

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century developed into the modern theory that the king could do no wrong, in the sense that he was incapable of doing wrong.[93] Certainly such a notion was directly contrary to the cultural tradition and constituted a perversion of older views of the king's responsibility. It is probably to be associated with the growth of the prerogative, the strengthening of the kingship, the ideas of divine right and of the absolute sovereign.

Just when the transition in meaning occurred it is hard to say. Possibly it was during the Tudor despotism when much nonsense[94] about the immaculate king of trancendental prerogatives and goodness was purveyed. Then came the effort to idealize these characteristics and to create in one and the same person a conceptual king of superhuman gifts and privileges and a natural man. This dual personality, further confused by Coke's erection of the crown into a corporation sole and by the reinvigorated dogma of divine right, has resulted in that amazing array of contradictions associated with the British state, in which the institutional and the personal are now united, now disunited, so that British lawyers find it difficult to distinguish or visualize such conceptions as state, crown, government, or public.[95] At all events, the personification of the English governing authority and power, though tempered in practice by many devices such as ministerial responsibility and judicial independence, has kept alive and fruitful the theological and legal creed associated with kings who do not die, who are never under age, who do no wrong and who think no wrong.

Coke remarked that "it is a maxim of the law that the king can do no wrong." [96] Blackstone derived the maxim from the

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[93] 3 HOLDSWORTH, *op. cit. supra* note 27, at 311; Y. B. 1 Hen. VII, Mich. pl. 5 per Hussey, C. J. Holdsworth, *op. cit. supra* note 70, at 154; 9 HOLDSWORTH, *op. cit. supra* note 27, at 20. But the tort of disseisin or dispossession could always be redressed by petition of right, whether the land was in the hands of the king or of a grantee. Staunford, *op. cit. supra* note 51, f. 74 b. So a petition lay for a chattel interest in land (Brooke, *op. cit. supra* note 77, tit. *Peticion*, pl. 2) and probably for chattels personal. Staunford, *supra* at f. 75 b, 76 a; *contra*, Hussey, C. J. in Y. B. 1 Hen. VII, Mich. pl. 3, cited by Holdsworth, *op. cit. supra* note 70, at 154; 9 HOLDSWORTH, *op. cit. supra* note 27, at 20.

[94] See Maitland's characterization of Plowden's reverential metaphors as "metaphysiological nonsense." 3 MAITLAND, COLLECTED PAPERS (1911) 249.

[95] *Ibid.* 244 *et seq;* Laski, *The Responsibility of the State in England* (1919) 32 HARV. L. REV. 447; LUCAS, THE CORPORATE NATURE OF ENGLISH SOVEREIGNTY (London, 1911) 59 *et seq.*

[96] 1 COKE, INSTITUTES *73, 2 *ibid.* *187, *207, *681. So 1 HALE, PLEAS OF THE CROWN (Dublin, 1778) 43, shows that although the law controls the king's act sufficiently to determine that it may be "unlawful," nevertheless the king cannot be sued nor does it afford protection to the unlawfully commanded officer. "It is regularly true, that the law presumes the King will do no wrong, neither indeed can do any wrong; and therefore, if the King command an unlawful act to be done, the offense of the

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royal prerogative which he defines as "that special preeminence which the King hath over and above all other persons, and out of the course of the common law, in right of his royal dignity," and from the attribution of "absolute perfection" with which the law clothed the sovereign.[97] Hence his infallibility. But it is probable that this was only a result of his then admitted non-suability. Bacon concludes that there is no remedy because there is no right.[98] Blackstone furnishes a more analytical reason when he says that the evidence of legal "right" is found in the existence of a legal remedy, and the law presumes no injury where it has provided no remedy.[99] This is the orthodox Austinian test of a legal right and of the existence of "legal" relations; while observing that it is not the only acceptable definition of law and that it is exceedingly narrow in its conception, it may nevertheless be accepted *ex hypothesi* as a characterization of the concept "legal" and "law." It is followed by all the Austinians and by Mr. Justice Holmes in his view[1] that there can be no "tort" by the state when there is no remedy against the state. This has been compared to the argument that there can be no disease for which medical science has no cure.

The continental jurists, who on the whole have not been willing to permit these sterile concepts to defeat what seemed to them elementary demands of justice and who did not permit themselves to be fettered by feudal fictions of the prerogative—which is said, ironically, to have been created for the benefit of the people and may not be exerted to their prejudice[2]—have

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instrument is not thereby indemnified; for, though the King is not under the coercive power of the law, yet in many cases his commands are under the directive power of the law, which consequently makes the act itself invalid, if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law." Hale cites 1 STAUNFORD, PLEAS OF THE CROWN (London 1560) 102 b. See also 2 COKE, *op. cit. supra* at *186.

[97] 1 BL. COMM. *239, *241, *245. Yet Blackstone at the same time notes the more historically correct view of the king's legal position when he adds: Conversely, the king's prerogative "extends not to do any injury; it is created for the benefit of the people, and therefore can not be exerted to their prejudice." 1 *ibid.* 246; 3 *ibid.* 255. See also PLOWDEN, COMMENTARIES (London, 1779) 246: "for the King cannot do any wrong, nor will his prerogative be any warrant to him to do an injury to another." See also *ibid.* 487.

[98] BACON, ABRIDGEMENT (Dublin, 1786) tit. *Actions* (B).

[99] BLACKSTONE, *op. cit. supra* note 97, at *246, note 2. There is no "suit or action," "because no court can have jurisdiction over him, for all jurisdiction implies superiority of power" and he "owes no kind of subjection" to potentate or any other authority. *Ibid.* *241–2.

[1] The Western Maid, *supra* note 46, at 433, 42 Sup. Ct. at 161.

[2] Nichols v. Nichols, Plowden, 477, 487 (C. B. 1576). The argument that the prerogative cannot be exerted to the prejudice of the subject, because created for his benefit, is characterized in ALLEN, THE RISE AND

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very readily admitted that the State, the organized group, can commit injuries, and have therefore approved recoveries against the State, permitted by courts and enlarged by legislation, without indulgence in metaphysical speculations and antiquated anachronisms. Blackstone speaks of the sovereign as incapable of thinking wrong, or meaning to do an improper act, and therefore, of authorizing a "wrong" [3]—conceptions unknown to Bracton's time. Nor is there any adequate explanation for the easy transition of the personal prerogative of the king to the "sovereign" and later to the "crown." Even more extraordinary is its extension to the American state or people, which have hardly laid claim to the enjoyment of the royal prerogative. Writers on the prerogative emphasize its personal character, and Chitty remarks[4] that "the inviolability of the King is essential to the existence of his powers as supreme magistrate; and therefore his person is sacred." Out of his alleged incapability of acting "unlawfully or improperly," combined with his non-suability, Chitty derived "the legal apothegm that the King can do no wrong."

It must be admitted that for centuries the petition of right

GROWTH OF THE ROYAL PREROGATIVE IN ENGLAND (London, 1849) 32, as equivalent to the assertion that "an army which has been raised in defence of the liberties of a country, cannot be used for their destruction."

[3] 2 BLACKSTONE, *op. cit. supra* note 97, at 246. Some of the later cases go beyond Blackstone in this deductive reasoning. For example, in Lord Canterbury v. The Queen, 12 L. J. Ch. 281 (1843), it is argued that it is admitted that for personal negligence of the sovereign a suit cannot be maintained. If the master is liable for the acts of a servant on the theory *qui facit per alium facit per se* this cannot apply to the sovereign, who cannot be required to answer for his personal acts. If such responsibility is based on the master's misconduct in selecting or retaining a careless servant, that likewise could not apply to the sovereign, to whom negligence or misconduct cannot be imputed. Thus, any theory of *respondeat superior* seems inapplicable to the sovereign, by judicial fiat. So in Tobin v. The Queen, 16 C. B. N. S. 310 (1846): "That which the Sovereign does personally, the law presumes will not be wrong; that which the Sovereign does by command to his servants cannot be a wrong in the Sovereign, because if the command be unlawful it is in law no command," on which ground it seems to the court quite proper to hold the luckless servant personally responsible. The reasoning in Feather v. The Queen, 6 B. & S. 257 (1865) is equally sententious: "For from the maxim that the King can do no wrong it follows, as a necessary consequence, that the King cannot allow wrong to be done; for to authorize a wrong to be done is to do a wrong; and as the wrongful act done becomes in law the act of those who authorize it to be done, it follows that the petition of right which complains of a tortious or wrongful act by the Crown or by servants of the Crown discloses no right to redress, for as in law no such wrong can be done no such right can arise . . ." It is surprising that this *petitio principii* should have been accepted as a legal explanation as late as the nineteenth century.

[4] CHITTY, THE LAW OF THE PREROGATIVE OF THE CROWN (London, 1820) 5; Allen, *op. cit. supra* note 2, at 25, 31.

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lay for a disseisin by the king to recover a chattel wrongfully taken by the crown,[5] and for numerous other torts. In fact the modern rule as now applied is, as Holdsworth points out, a direct result of a misconception of the modern basis of the employer's liability for the torts of his servant.

The transition from medieval to modern law occurred in the sixteenth and early seventeenth centuries. It was after the Restoration, 1661, that the modern relations between law and equity developed; that the incidents of tenure, the many real actions and the technical rules of land law became obsolete, and that the law of contract, with the growth of commerce, assumes a new importance. The relief of the subject against the crown was necessarily affected by these developments and, as the idea still prevailed that the subject was entitled to the same redress against the crown as he had against a fellow-subject, new fields of application for such relief were readily developed.[6]

In 1668, equitable relief was granted the subject against the crown in the broadened Court of Exchequer.[7] This became a precedent for equitable relief in any court having jurisdiction, without a petition of right, although it is now often granted under the Petition of Right Act, 1860.[8] *The Bankers' Case* (1692)[9] also led to important developments. The bankers, who had been ruined by the failure of Charles II to repay loans, presented a petition to the barons of the Exchequer for payment. The petition was held proper by the Court of Exchequer. This was reversed by Lord Somers who held that a petition of right should have been brought, but the House of Lords reinstated the decision of the Court of Exchequer, so that the creditor of the crown has alternative remedies, a writ of *liberate* under the old practice, petition to the exchequer for relief, a petition of right, and possibly *monstrance de droit.*

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[5] Y. B. 34 Hen. VI, pl. 18 (1463) per Danby, J. FITZHERBERT, ABRIDGEMENT (London, 1577) tit. *Peticion,* pl. 8; Holdsworth, *op. cit. supra* note 70, at 155, note 1.

[6] For this development, see Holdsworth, *op. cit. supra* note 70, at 280; 9 HOLDSWORTH, *op. cit. supra* note 27, at 29.

[7] Pawlett v. The Attorney General, Hardres, 465 (Ex. 1668); Holdsworth, *op. cit. supra* note 70, at 281; 9 HOLDSWORTH, *op. cit. supra* note 27, at 31. See also Reeve v. The Attorney General, 2 Atkyns *223 (Ch. 1741). That Exchequer was deemed the only court which could give relief against the king, see 3 BLACKSTONE, *op. cit. supra* note 97, at *428.

[8] CLODE, *op. cit. supra* note 84, at 146 *et seq;* Holdsworth, *op. cit. supra* note 70, at 282; 9 HOLDSWORTH, *op. cit. supra* note 27, at 31.

[9] *Supra,* note 86. The exhaustive decision of the House of Lords is analyzed at length by Holdsworth, *op. cit. supra* note 70, at 283 *et seq;* 9 HOLDSWORTH, *op. cit. supra* note 27, at 32 *et seq.,* for the various views expressed led to the development of the law of the petition of right in the nineteenth century.

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The increasing activity of the State, and reforms in fiscal administration, with the resultant obsolescence of the suit for a writ of *liberate*[10] or a petition to the exchequer, made it necessary in the nineteenth century to devise modernized methods for enforcing claims against the State. The Petition of Right Act, 1860, revised the existing procedure while leaving the theory and principle unaffected; yet the circumstances under which the petition properly lay were left to the courts to declare.[11] Several judges emphasized that the petition should provide a remedy in all cases where the subject would have a remedy were the defendant a private individual.[12] *The Bankers' Case* had indicated that the petition of right would lie for breach of contract; and while this was assumed in numerous cases in the eighteenth and nineteenth centuries, it was not squarely held until the case of *Thomas v. The Queen* (1874).[13] It lay from time immemorial for the recovery of property, real and personal, a class of cases, as such, still generally classified in the United States as torts. Holdsworth maintains that there is ample authority, medieval and modern, for its extension to the recovery of compensation or damages for conversion.[14]

In view of the fact that the crown is expected to accord a remedy, through the procedure by petition of right, whenever a private defendant would be held liable at common law or equity,[15] it seems unfortunate that a historical misconception should have led to a departure from this principle in matters of tort. The maxim "The king can do no wrong," was perverted from its historical meaning that he was not privileged to do wrong into the modern meaning that he was incapable of doing wrong. But even in this respect there was much inconsistency.

[10] CLODE, *op. cit. supra* note 84, at 125.

[11] The development of the practice and the arguments for the liberal and restrictive theory and the intermediate theory finally adopted by the courts is set out in Holdsworth, *op. cit. supra* note 70, at 290 *et seq;* 9 HOLDSWORTH, *op. cit. supra* note 27, at 39 *et seq.*

[12] Parke, B., in Baron de Bode v. The Queen, 13 Q. B. 364, 387 (1843); Lord Denman, same case, 8 Q. B. 208, 237 (1845); Cockburn, C. J. in Feather v. The Queen, *supra* note 3.

[13] L. R. 10 Q. B. 31 (1874), where the earlier cases are mentioned (p. 43). CLODE, *op. cit. supra* note 84, at 120 *et seq.* maintains that Blackburn, J. was not justified in relying upon the views of Lord Holt and Lord Somers for the decision in Thomas v. The Queen.

[14] Holdsworth, *op. cit. supra* note 70, at 293, citing Y. B. *supra* note 5; STAUNFORD, *op. cit. supra* note 96, at 75b, 76a. Trover as late as 1776 was practically an action for the recovery of property. Hambly v. Trott, 1 Cowp. 372, 374 (K. B. 1776). In Feather v. The Queen, *supra* note 3, at 294, Cockburn, C. J. remarked that "the only cases in which the petition of right" lay are "where the lands or goods or money of the subject have found their way into the possession of the Crown" and "restitution" or "compensation in money" in lieu of restitution, is sought.

[15] See Cockburn, C. J. in Feather v. The Queen, *supra* note 3, at 295.

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To this day, wrongful injuries to or takings of property, of the type formerly redressed through real actions, are deemed proper subjects for a petition of right, though manifestly torts with respect to property. Nor is it clear why "wrong" should have been translated into "tort"; certainly breach of contract and the wrongful seizure of property are as much wrongs as any pure tort. No such conceptions prevailed on the continent, where they were more troubled by the technical difficulty, founded on old legal theories, of making a corporation liable in tort, and in determining the distinction between corporate and governmental acts. Nor did the English courts rely upon Hobbes and Bodin, as does the United States Supreme Court, to assert that the king or crown, as the maker of the law, was above the law, manifestly untrue in England and no less untrue of the Executive in the United States. Nor is the king any longer the State, as Louis XIV claimed.

Probably the explanation for the English solecism, perhaps destined soon to disappear by legislation, is that a tortious act of the king personally had never been sued for, and that the reason for making the employer liable for the acts of the servant, *qui facit per alium facit per se*, was not deemed applicable to the king. His servants, after the seventeenth century, could be personally sued in tort. For some reason it was said that the king could not authorize a tort, though it was obvious that he and his ministers often did, notably by illegal orders. The law, however, presumed that the king had not authorized a wrong and that the officer had personally willed it—two fictions resulting in injustice with respect to all parties concerned, State, officer and victim. The rule of *respondeat superior* in employers' liability has been justified in the course of the nineteenth century on numerous grounds—(a) imputation of liability resting on employer's assumed authority, in acting through an agent, to commit the tort; (b) liability due to enhanced range of activity achieved through agents—the risk of the enterprise; (c) employer's responsibility for the selection and supervision of competent employees; and (d) an enlightened view of public policy in the distribution of burdens and losses. In the nineteenth century the first and the third grounds were most commonly advanced in justification of the employer's liability, and both these were held inapplicable to the sovereign.[16]

[16] Lord Canterbury v. The Queen, *supra* note 3, by Lord Lyndhurst, who argued that as the sovereign could not be made responsible for his personal torts, he could not be responsible for those of his agents on the theory *qui facit per alium facit per se*. Nor could misconduct or negligence in selecting or retaining a careless servant be attributed to the sovereign. See also Tobin v. The Queen, *supra* note 3, at 310; Feather v. The Queen, *supra* note 3, at 295; Holdsworth, *op. cit. supra* note 70, at 294; Morgan, Introduction to ROBINSON, *op. cit. supra* note 45, at xxii.

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Had the modern view of the basis of employer's liability prevailed when these cases arose to mould the law, possibly a different result would have been reached. At all events none of the grounds advanced for the sovereign immunity, historical or theoretical, can today command serious respect or be regarded as convincing. This is partly acknowledged by the enlargement of the scope of the petition of right in many colonies so as to cover tort cases[17] and by a recent decision in the House of Lords holding that a petition of right would lie to enforce a statutory duty to pay compensation arising out of implied contract.[18] Holdsworth properly points the inquiry: if it lies for a statutory duty, why not for a duty imposed by common law?[19] He adds: "To hold that the Crown is liable for the torts of its servants, on the same principle as an ordinary employer, would infringe the maxim that the King can do no wrong as much and as little as to hold the Crown liable for a disseisin or a nuisance or an encroachment on the subject's property."

The fact is that the unitary character of the sovereign in England, the refusal since Coke's time to see in the king a dual personality, personal and political and the refusal to regard the crown as a corporation, have brought innumerable anomalies in the law governing remedies against the crown. The imputation to the State in England of the infallibility of the personal king, though without warrant in history or logic, can possibly be explained on the evolutionary ground that the king did once dispense justice in person and chose his own servants. Even this shadow of justification for an archaic rule is inapplicable in the United States, where it nevertheless flourishes and finds occasional support.[20] Hardly a modern publicist or

[17] Farnell v. Bowman, 12 App. Cas. 643, at 649 (P. C. 1887). In Australia by section 56 of the Judiciary Act the crown is liable in tort for wrongful acts of officers, like an ordinary employer. Baume v. Commonwealth, 4 Comm. L. R. 97 (1906); Strachan v. Commonwealth, 4 Comm. L. R. 455 (1906). See also Senate bill 1912, 69th Cong., 1st Sess., passed by the House June 10, 1926.

[18] Atty. Gen. v. De Keyser's Royal Hotel [1920] A. C. 508. L. SCOTT, and L. A. HILDESLEY, THE CASE OF REQUISITION (Oxford, 1920) 114 *et seq.*

[19] Holdsworth, *op. cit. supra* note 70, at 295; 9 HOLDSWORTH, *op. cit. supra* note 27, at 44. An increasing number of statutes in England and America, either by authorizing suits against government departments or officers or by permitting suits against the State in specific cases, evidences the growing conviction that the State's responsibility for the torts of its agents should no longer be evaded. See Ministry of Transport Act (1919) 9 & 10 Geo. V, c. 50, § 26. For limited United States federal statutes, see *infra* note 27.

[20] See 1 BURGESS, POLITICAL SCIENCE AND CONSTITUTIONAL LAW (Boston, 1891) 57, who says, "we must hold to the principle that the state can do no wrong." The argument runs: The "State is the King," (l'Etat c'est moi) therefore the State is not responsible for the torts of its employees, for to impute liability in tort to the State would be to impute tort to the

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student of the subject can now be found, however, who does not agree with Maitland's well-known observation: ". . . . it is a wholesome sight to see 'the Crown' sued and answering for its torts." [21]

Inasmuch as the English king was a personal ruler and the fountain of justice it was perhaps not unnatural that he should be regarded as exempt from the jurisdiction of any court, except in the manner and to the extent that he consented to submit. It is said that this rule, which constituted a part of the common law, was introduced into the United States after American independence, notwithstanding that the sovereign here has from the beginning been separated from the government and that the latter has been deemed merely the agent of the sovereign. But in the early days of the nation the Supreme Court in *Chisholm v. Georgia*[22] concluded that the doctrine of State immunity from suit was characteristic of autocracy and inconsistent with popular sovereignty. The eleventh amendment, however, though confined to the federal courts, restored the ancient doctrine to full effect, and the courts, since *Cohens v. Virginia*,[23] have accepted it as immutable, regardless of its historical origin in an autocratic conception of a personal sovereign, of the diametrically opposed democratic theory of the American commonwealth and of the fact that a great part of the rest of the civilized world has denied its validity. Indeed it is regarded by our courts as a matter of simple logic, expressed as follows by Mr. Justice Holmes, an extreme Austinian:

"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." [24] And, comes the logical conclusion, as he is exempt from suit, therefore he can do no wrong. "The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort." [25]

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the King who "can do no wrong." See Morgan, Introduction to ROBINSON, *op. cit. supra* note 45, at LIV. See also Senator King in CONG. REC. March 15, 1926. p. 5389, and letter of Attorney General Sargent, in CONG. REC. March 16, 1926, p. 5488.

[21] 3 MAITLAND, COLLECTED PAPERS (Cambridge, 1911) 263. See also Morgan, Introduction to ROBINSON, *op. cit. supra* note 45, at lxxxiii.

[22] 2 Dall. 419 (U. S. 1793).

[23] 6 Wheat. 264, 382 (U. S. 1821).

[24] Kawananakoa v. Polyblank, *supra* note 46, at 353. See the historical attack upon this theory by John M. Zane, *A Legal Heresy* (1919) 13 ILL. L. REV. 431. See also subsequent articles of this series.

[25] The Western Maid, *supra* note 46, at 433. Justice Holmes adds: "Legal obligations that exist but cannot be enforced are ghosts that are

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The substitution of popular for kingly sovereignty has thus effected no change in the theory of suability or responsibility, and notwithstanding the difference between State and government, principal and agent, and the supposed control of the "rule of law" and constitutional limitations, the sovereignty of the people becomes in practical operation the sovereignty of the government.[26] Nor was the petition of right to the Executive applicable in the United States, because historically the Executive is not the sovereign. The injured individual, in principle and, in many states of the United States, in practice, is thus left, apart from his often useless right of action against a subordinate officer, to his privilege to petition the legislature, the residuary of the public power, for relief. In the federal government, his helplessness has been tempered by several statutes, such as the act establishing the Court of Claims, by which the federal Congress permitted suit in contract, and by recent Acts permitting suits in admiralty for tort without limitation of liability, and permitting general claims in tort up to $1000 to be heard by the executive departments.[27] These measures and their legal effect have been discussed in a previous article. Though a comprehensive tort bill passed the House of Representatives, June 10, 1926, in principle it still remains true that the federal government and practically all the states, deny responsibility for the torts of their officers and employees. Our present interest is to examine the theories sustaining this conclusion, and at this point, the effect of the theory that the king can do no wrong.

It is not open to doubt that notwithstanding the denial by numerous courts that the maxim, "the king can do no wrong," has any application to the United States, it has nevertheless furnished the real explanation why exemption of the government, state and federal, from liability in tort has become an

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seen in the law but that are elusive to the grasp." See criticism of the Western Maid decision in (1922) 31 YALE LAW JOURNAL, 879.

[26] See Laski, *The Theory of Popular Sovereignty* (1919) 17 MICH. L. REV. 201, reprinted in FOUNDATIONS OF SOVEREIGNTY (New York, 1921) 209.

[27] Act of Feb. 24, 1855, 10 Stat. 612, amended March 3, 1863, 12 Stat. 765. For the debates on the 1855 Act, see 30 Congressional Globe, Dec. 21, 1854, at 105–114. Act of December 28, 1922, c. 17, 42 Stat. 1066; Act of Oct. 6, 1917, 40 Stat. 389; Act of March 29, 1918, 40 Stat. 499; Act of August 24, 1912, 37 Stat. 569, at 586; Act of Oct. 6, 1917, 40 Stat. 345, at 364; Act of March 4, 1921, 41 Stat. 1436; Act of June 16, 1921, 42 Stat. 29, at 63; Act of June 7, 1924, c. 291, 43 Stat. 477, at 483; Veterans Act of June 7, 1924, 43 Stat. 607; Act of May 28, 1924, 43 Stat. 182, at 199; Act of June 7, 1924, 43 Stat. 477, at 492; Patent Infringement Act of June 25, 1910, 36 Stat. 851; Merchant Marine Act of Sept. 7, 1916, c. 458, 39 Stat. 742; Act of March 9, 1920, 41 Stat. 525; Act of March 3, 1925 Public No. 546, 68th Cong.; Act of March 21, 1918, 40 Stat. 451.

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apparent axiom of American law. It has already been shown[28] that even when the state legislature has by statute permitted suits against the state in its courts and even where it has admitted its responsibility for "legal" claims, this admission has been construed to exclude responsibility in tort—either on historical grounds, on grounds of public policy, a "policy imposed by necessity," or on the more juristic ground that the doctrine of *respondeat superior* does not apply to the relation between the State and its employee or officer.[29]

When Congress established the Court of Claims in 1855, it omitted from the jurisdiction conferred upon that court all reference to tort claims.[30] In the Tucker Act of 1887[31] claims "sounding in tort" were expressly excluded from the jurisdiction of the Court of Claims. In *Gibbons v. United States,* Justice Miller for the Supreme Court was so impressed with the sacredness of the immunity in tort, that he boldly, though quite erroneously, asserted: "No Government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents." [32]

Mention has already been made of the construction of the Acts conferring jurisdiction on the Court of Claims in "implied contract," by which that term, with minor exceptions,[33] has been most narrowly construed, with a consequent enlargement of the conception of "tort." [34] In the case of *Langford v. United States,*[35] where government officers had taken control of plaintiff's land for public purposes, the government denying the plaintiff's title, the Supreme Court deemed itself without jurisdiction on the ground of tort, though if the government had ad-

[28] 34 YALE LAW JOURNAL, 9.

[29] *Ibid.* 11 *et seq.* and Clodfelter v. State, 86 N. C. 51 (1882); Lewis v. State, 96 N. Y. 71 (1884); Gibbons v. United States, *supra* note 45, at 274; Langford v. United States, *supra* note 45; STORY, AGENCY (9th ed. 1882) § 319. But see Mills v. Stewart, 247 Pac. 332 (Mont. 1926). Yet with respect to officers of municipal corporations engaged in corporate functions, there is no hesitation to admit that they are agents of the community. Borchard, *Government Liability in Tort* (1924) 34 YALE LAW JOURNAL, 129, at 133.

[30] Act of Feb. 24, 1855, 10 Stat. 612, as amended March 3, 1863, 12 Stat. 765.

[31] Act of March 3, 1887, 24 Stat. 505.

[32] Gibbons v. United States, *supra* note 45, at 274. Attorney General Sargent appears to have been equally badly advised as to the practice of foreign governments when he wrote, in answer to a committee inquiry: "This principle (immunity in tort) is fundamental in the system of any government or sovereignty." Cong. Rec. March 16, 1926, p. 5488. The principle of governmental responsibility has been adopted in the German Constitution of 1919, article 131.

[33] Johnson's Case, 4 Ct. Cl. 248 (1868); McKeever's Case, 14 Ct. Cl. 396 (1878).

[34] 34 YALE LAW JOURNAL, 30.

[35] *Supra* note 45.

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mitted the plaintiff's title, an implied contract to pay compensation would have been apparent.[36] In the Langford case, Justice Miller denied the propriety of the English maxim, though he seems to have applied it to the federal government. He said: "We do not understand that in reference to the Government of the United States, or of the several states, or of any of their officers, the English maxim has any existence in this country." He observed naively, that "we have no King to whom it could be applied;" that the President bears a nearer resemblance to the limited monarch, and is the only *individual* to whom it could possibly have any relation, and that it cannot apply to him because the Constitution admits that he may do wrong. He adds that the English maxim does not declare that the *government*, or those who administer it, may not do wrong, and then says, that in the Langford case, "the Government or the officers who seize such property, are guilty of a tort, if it be in fact private property." As Justice Miller thus admits that the government, through its agents, can commit a "tort," a legal conclusion denied on Austinian grounds by Mr. Justice Holmes, his refusal to admit the Court's jurisdiction is placed entirely on the statutory ground exempting the government from suit in tort, and not on the common law ground of substantive immunity of the sovereign.[37] The reason for the refusal to admit tort responsibility, he explained "on a policy imposed by necessity," which he evidently believed "applicable to all Governments." In the case of *United States v. Lee*[38] in which federal officers took possession of private property under a disputed title, the title was examined and the property restored on a subterfuge that the real parties to the case were the mistaken officers and not the government. Had Langford sued for the recovery of his property instead of for a money indemnity, possibly a similar subterfuge might have been devised to help him.

It thus seems that the English maxim is so thoroughly entrenched in the common law which was taken over by the United States, that notwithstanding our admitted difference from the political organization and theory of government which gave it birth, it is nevertheless adopted in the United States in its pristine vigor either with new explanations or without any further justification than the antiquity of the legal result.

[36] United States v. Great Falls Mfg. Co., 112 U. S. 645, 5 Sup. Ct. 306 (1884).

[37] ". . . the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the government who did or commanded them, Congress did not intend to subject the government to the results of a suit. . . ." Langford v. United States, *supra*, note 45, at 345.

[38] 106 U. S. 196, 1 Sup. Ct. 240 (1882).

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