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**STATE IMMUNITY FROM TORT LIABILITY**

It is believed that the adage that "The King Can Do No Wrong" expounded in Blackstone's Commentaries<sup>1</sup> has not only been productive of much wrong in American jurisprudence, but that it has also been the source of considerable confusion in our courts.

The phrase is supposed to be the foundation upon which our doctrine of state immunity from suit in tort rests. This dogmatic statement, a leftover from the feudal system of 12th Century England, is hardly believed to be a proper basis on which to excuse a state<sup>2</sup> from its obligations. Should not a state be bound by the legal principles which it enunciates through its courts for the dealings of citizens, one with another? By what excuse can a state say, "If anyone else does it, it is a wrong; if I do it, it is not a wrong?"

The first ten amendments to the United States Constitution were passed to prevent arbitrary action by the state against individual rights. Certainly the state should be answerable for its torts in order to prevent arbitrary action. This comment will attempt to survey the doctrine with a view to finding a remedy for the injustices which this doctrine now protects.

State irresponsibility in tort in the United States has been justified on two grounds: (1) The common law doctrine adopted from England based upon the principle that the King could do no wrong, and (2) the theory best enumerated and clarified by Justice Holmes while a member of the Supreme Court<sup>3</sup> who said that a state is exempt from suit on the ground that there can be no legal right against the authority that makes the law on which that right depends.

The phrase "the king can do no wrong" rests upon a misconception of the original dictum. The maxim was originally understood not to mean that the king could not do wrong in the sense that he was incapable of doing a wrong, but that he was not privileged to do wrong.<sup>4</sup> The king was obligated to right any wrongs which he had done. The only unique thing about his wrongs was that the remedies, if redress were refused, were necessarily weak. The king was obliged to rectify a wrong; if he refused however, he could be punished by his

<sup>1</sup>Commentaries 239.

<sup>2</sup>State as used in this article means any organized group of society exercising governmental function.

<sup>3</sup>Kawananakoa v. Polyblank (1905) 205 U. S. 349, 27 Sup. Ct. 526.

<sup>4</sup>Borchard, *Government Liability in Tort*, 34 YALE L. J. 1 (1924-25).

religious superiors. If there ever was any factual basis for the doctrine, it was completely overthrown in the political field in 1215 with the signing of the *Magna Carta*. Therefore it appears that the early concept that the king was not privileged in his wrongs has been misinterpreted to lay down the very opposite proposition that the king is privileged in his wrongs. A prerogative which was created to protect and benefit the subject has been misconstrued to the subjects prejudice.

Early America had no difficulty with the problem. Fresh from a fight against state despotism and with the rights of man still foremost in their minds, the Supreme Court of the United States in 1793 had no trouble whatsoever in saying that a state was not immune from suit.<sup>6</sup> Justice Blair very ably put the thinking of the time in the following excerpt from his opinion in *Chisholm v. Georgia*:

“The principle is, that all human law must be prescribed by a superior: this principle I mean not now to examine: sufficient, at present, to say, that another principle, very different in its nature and operations, forms in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the consent of those whose obedience they require. The sovereign, when traced to his source, must be found in man. . . . A state I cheerfully admit is the noblest work of man: but man himself, free and honest is, I speak as to this world, the noblest work of God.”

Such thinking was short lived. In 1794, as a result of the *Chisholm* decision, the eleventh amendment to the Constitution was submitted by Congress, adopted in 1798, and has ever since been interpreted to give the state absolute immunity from suit.<sup>7</sup> The amendment was not motivated to maintain the state sovereignty from the degradation supposed to attend a compulsory appearance before a tribunal, but rather to protect the states from being forced to pay their legally contracted debts by a suit in federal court. That this was the motive was stated by none other than Chief Justice Marshall.<sup>8</sup>

Since 1794 there has been little, if any, progress on the part of the courts toward getting back on the right track. The courts have guarded the doctrine very zealously under some

<sup>6</sup>*Chisholm v. State of Georgia* (1793) 2 Dallas 419.

<sup>7</sup>*Id.*

<sup>8</sup>*Hans v. Louisiana* (1889) 134 U. S. 1, 10 Sup. Ct. 504; *Smith v. Reeves* (1900) 178 U. S. 436, 20 Sup. Ct. 919.

<sup>9</sup>*Cohen v. Virginia* (1821) 6 Wheat 264.

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false feeling that to change it would go to the very roots of our governmental foundation.

Oddly enough, however, is the fact that countries of continental Europe, where the divine right of kings held greatest sway, have long since repudiated the concept and freely allow redress against the tortious conduct of the state through its legal agents when acting within the scope of their legal duties.<sup>9</sup>

Even in England, an individual injured tortiously by the state has a remedy in a petition of right.<sup>10</sup> Although not altogether satisfactory, it at least rests the obligation of determining wrongs in the courts rather than in the legislature. Therefore one might well be astonished to find such a despotic doctrine so deeply embedded in the jurisprudence of the United States where freedom and justice were first championed. Until recently, the only progress made by the federal government was in 1855 when the Court of Claims was established, but the legislation excepted tort claims from its jurisdiction. In 1922 the Court of Claims was allowed to hear certain tort claims up to \$1,000, but this relief was administrative only.<sup>11</sup>

A few states have, by legislative enactment, attempted some remedies for the defects, but the claimant, when attempting to pursue these remedies, has met with such literal construction on the part of courts that his action has turned out to be largely a waste of time.<sup>12</sup>

A few of the injustices done by the doctrine include the following cases: A Massachusetts health officer believed that a horse had glanders; he thereupon ordered it shot. Upon the verdict of a lay jury that he was mistaken, he found himself subjected to heavy damages without support or sympathy from the government or community that employed him.<sup>13</sup>

In *State v. Rathborne*,<sup>14</sup> a Montana farmer stood by and watched state owned elk and deer devour his much needed hay from 1931 to 1939 with no recourse whatsoever from the state for damages amounting to some \$20,000 over the nine year period. And then to add salt to his wounds, after long effort to have the State Fish and Game Commission remedy

<sup>9</sup>Borchard, *Governmental Responsibility in Tort*, 36 YALE L. J. 1 (1926-27).

<sup>10</sup>*id.*, p. 34.

<sup>11</sup>Borchard, *Governmental Responsibility in Tort—A Proposed Statutory Reform*, 11 A. B. A. JOURNAL 495 (1925).

<sup>12</sup>*Smith v. New York* (1920) 227 N. Y. 405, 125 N. E. 841; *Bourn v. Hart* (1892) 93 Cal. 321, 28 P. 951.

<sup>13</sup>*Miller v. Horton* (1891) 152 Mass. 540, 26 N. E. 100.

<sup>14</sup>(1940) 110 Mont. 225, 100 P. (2d) 86.

the situation without avail, he found himself subjected to a criminal prosecution by the Commission, when in defense of his property he shot one of the animals out of season.

In Oklahoma, a woman was injured in an auto accident caused by the negligence of certain officers of the State Highway Commission. The Legislature of Oklahoma authorized her to maintain an action against the state to determine liability and recover loss for the negligence of the officer. But the Supreme Court of Oklahoma denied the right, saying that this was a special law and such laws are unconstitutional and invalid where a general law could be made applicable.<sup>25</sup> The court reasoned that to do *justice* for this woman would not be *fair* to the many other people injured by the agents of the state who cannot recover because of the doctrine of state irresponsibility.

Likewise in California a legislative appropriation made to an employee of the state in payment of a claim for damages on account of personal injuries sustained by him in its service was held to be a gift within the meaning of a constitutional provision<sup>26</sup> prohibiting the legislature from making a gift of any public money.<sup>27</sup>

In New York, a court of claims was given jurisdiction "to hear and determine a private claim against the state" arising out of certain torts of its officers, the measure providing that "the state hereby consents, in all such claims, to have its liability determined." The court admitted that the state had waived its immunity against action, but it had not waived its substantive immunity for the torts of its officers. It said, "Immunity from action is one thing, immunity from the torts of its officers and agents is another."<sup>28</sup> Such a construction leaves the act as a nullity for no judgment could be obtained since the state can act only through its officers. It has been aptly said that one might conclude "that the act was calculated to

<sup>25</sup>Jack v. State (1937) 183 Okla. 375, 82 P. (2d) 1033.

<sup>26</sup>Montana Constitution has such a provision. Art. XIII Sec. I reads: "Neither the state nor any county, city, town, municipality, nor other subdivision of the state shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation or become a subscriber to, or ashareholder in any company or corporation, or a joint owner with any person, company or corporation, except to such ownership as may accrue to the state by operation or provision of law."

<sup>27</sup>*Supra*, note 12.

<sup>28</sup>*Supra*, note 12. New York statute has since been amended to make state "liable" for torts of its agents.

permit the claimant merely to amuse himself" by bringing an action.

In Idaho, the legislature voted to allow a claim for \$3,000 against the state for injuries sustained by an individual due to negligence of a state employee but the Idaho court rejected the claim saying any such act is retroactive legislation in violation of the state constitution.<sup>19</sup>

However, the Montana Supreme Court in *Mills v. Stewart*<sup>20</sup> held an enactment by the legislature authorizing a student at Montana State University to present his claim to the Board of Examiners for determination of damages to be paid to him up to \$7,500 to be constitutional. The student fell down an elevator shaft at one of the residence halls of the university which had not been properly safeguarded. Montana has constitutional prohibitions similar to those which were held to prevent the relief in both the Idaho and the California Cases.

In an attempt to find the proper solution for the problem, courts have entangled themselves in a maze of arbitrary classifications as far as liability for the torts of officers of municipal corporations, school districts, and counties are concerned. An attempt has been made to classify the functions of public corporations as being either governmental or proprietary; allowing suit when acting in its proprietary function and denying recovery when the court determines that the corporation is acting in a governmental capacity. Much confusion results. Montana is typical in its confusion of the subject. It has held that the maintenance of a fire department is proprietary, but the firemen while actually performing their duties as such are acting in a governmental capacity, and the city is not liable for torts committed by the firemen.<sup>21</sup>

Normally a county is protected from suit by the State immunity unless there is a specific statute allowing suit.<sup>22</sup> It is reasoned that the county is only a governmental subdivision of the State. In *Johnson v. City of Billings*,<sup>23</sup> however, the plaintiff was injured when her car collided with a truck being driven by an employee of Yellowstone County. The City of Billings and the county were working jointly building a drainage ditch for a highway. The Montana Supreme Court laid down the

<sup>19</sup>*State v. Parson* (1938) 58 Idaho 787, 80 P. (2d) 20.

<sup>20</sup>(1926) 76 Mont. 429, 247 P. 332, 47 A. L. R. 424.

<sup>21</sup>*State ex rel Kern v. Arnold* (1935) 100 Mont. 346, 49 P. (2d) 976, 100 A. L. R. 1071.

<sup>22</sup>*Johnson v. City of Billings* (1936) 101 Mont. 463, 54 P. (2d) 579.

<sup>23</sup>*id.* See Kline, *Liability of Counties for Negligent Acts and Omissions of Their Employees and Officers*, 3 MONT. L. REV. 128 (1942).

proposition that a county as well as a city may be engaged in functions which are proprietary, and when so engaged is liable for the torts committed by its agents. In so doing, they held the maintenance of a highway to be a proprietary function of the county.

In *Jacoby v. Chouteau County*,<sup>26</sup> it was held that a county in the operation of a ferry across the Missouri River was acting in its proprietary capacity. The court in the two cases based the ability to sue the county for tort upon a very broad interpretation of *Section 4444 of the 1935 Revised Codes of Montana*.<sup>27</sup>

That at best such distinctions are extremely arbitrary is shown by three Montana cases involving public operation of swimming pools and gymnasiums. In *Rhoades v. School District No. 9*,<sup>28</sup> the operation of a gymnasium by a school district was held to be a governmental function. Likewise in *Perkins v. Trask*<sup>27</sup> the court said that the maintenance of a swimming pool by a school district is governmental so that no action will lie for the death of a minor caused by the negligent operation of the pool. In *Felton v. Great Falls*,<sup>28</sup> however, it decided that the operation of a swimming pool by a city was proprietary. The court in the *Felton* case distinguished the *Perkins* and *Rhoades* cases by saying that the school districts were mere agents of the state and as such were not liable in tort for the negligence of their agents and employees. But *Section 1022 of the Revised Codes* contains a general provision that school districts may sue and be sued, which is identical with *Section 4444* as to counties.

In neither the *Johnson* case nor the *Jacoby* case did the Court make any distinction between counties and cities, but rather rested its decision on the fact that *Section 4444* allowed the county to be sued when acting in its proprietary capacity. The *Felton* case seems to indicate by way of explanation of the *Perkins* and *Rhoades* cases that school districts can act in no other capacity than governmental. It is not the purpose of this comment to attempt to resolve the apparent conflict in these cases. They are merely inserted here to illustrate the confusion believed to be fairly typical in our American courts because of a superficial classification based upon the faulty concept of state immunity.

The doctrine has caused more confusion in determining

<sup>26</sup>(1941) 112 Mont. 70, 112 P. (2d) 1068.

<sup>27</sup>R.C.M. 1935 §4444: "Enumeration of Powers: It (a county) has power 1. to sue and be sued. . . ."

<sup>28</sup>(1943) 115 Mont. 353, 142 P. (2d) 890.

<sup>27</sup>(1933) 95 Mont. 1, 23 P. (2d) 982.

<sup>28</sup>(1946) ..... Mont. ...., 169 P. (2d) 229.

when a suit is actually one against the state. In *Heiser v. Severy*<sup>29</sup> the plaintiff brought an action for claim and delivery against the members of the State Fish and Game Commission alleging wrongful seizure of his gun by a deputy game warden, who was acting under instructions from the commission, and with the intent to confiscate the gun. The plaintiff asked for return of the gun and damages amounting to \$50 to be collected from a special fund set up for the Fish and Game Commission. The seizure purported to have been authorized by an act of the legislature.<sup>30</sup> But the plaintiff claimed that the suit was against the officers acting under an unconstitutional act, and as such, was not a suit against the state. The defendants claimed that a suit against the officers in their official capacity constituted a suit against the state and could not be maintained. The Supreme Court, unable to see how the damages could be satisfied, held the suit to be one against the state, but on rehearing indicated that the officers might be sued as individuals.<sup>31</sup> The great weight of authority has recognized that a suit for recovery of the possession of property from an individual assertedly holding such property as an officer of the state does not constitute an action against the sovereign, so as to require its consent to be sued.<sup>32</sup>

On the question of when a suit against a public officer is actually a suit against the state, we find the courts indulging in arbitrary distinctions, which prove highly unsatisfactory to any of the litigants. Some courts have argued along the line previously stated by Justice Holmes that there can be no legal right against an authority upon which the enforcement of that right depends. The logical conclusions of this statement have not been followed in practice because from such a statement one would conclude that no legal right existed when the state was the defending party to a suit. That there is such a legal right is inherent in the fact that the state may consent to be sued. If no legal right exists, as Mr. Holmes asserted, consent to be sued would give rise to no liability.

If no legal right exists it becomes hard to explain how payment of liability insurance for certain public officers out of

<sup>29</sup>(1945) ..... Mont. ...., 158 P. (2d) 501, 160 A. L. R. 319.

<sup>30</sup>R.C.M. 1935, §3659.

<sup>31</sup>Heiser subsequent to this decision commenced an action against the commission in their individual capacity for recovery of the same shotgun and damages, the action was terminated by a judgment of dismissal in view of the fact that the defendants returned the shotgun and paid the plaintiff \$100 demanded in settlement.

<sup>32</sup>Two of the justices dissented as to replevin but concurred as to the right to collect damages.

general state funds could be a public purpose,<sup>35</sup> or how a city can expend money to defend an assault suit against a member of its police force when it was not in any way liable for the tortious acts of the policeman and did not assume any liability by spending public money to defend him.<sup>36</sup>

Therefore, it appears that what Mr. Holmes called "logical and practical"<sup>37</sup> is quite as fallacious as is Blackstone's approach to the subject.

The American courts have tried to compensate for the short-comings of state irresponsibility by allowing suit against the public officer in an individual capacity. They reason that if personal liability attends the officer in the carrying out of his official duty, he will be more attentive to his duties because the proper functioning of his office becomes to him a personal responsibility. In actual practice the very opposite is more likely to result. This undue burden tends to keep good men from going into public service. Only the financially irresponsible can afford to risk the personal liability connected with public office, and the remedy to the injured citizens in such a case is altogether illusory. Small pay with large risk induces a fear to enforce the law.<sup>38</sup>

Even this substitute has been categorized by the courts so that emphasis is not placed upon ordinary tort principles, but rather upon technical rules of official sanction and discretion. If the official duty is public, no private redress is available, the only remedy being public prosecution.<sup>37</sup> If the act of the official involves discretion or is quasi-judicial, no civil liability attaches as long as the official acts within the scope of his authority, regardless of the presence of negligence or error.<sup>38</sup> Only when the official acts are purely ministerial is the official liable to individuals for misfeasance or nonfeasance in the exercise of his office.<sup>39</sup>

Claimants against the state are in the end left to the caprice of the legislature. The legislature is not a judicial body. The settling of tort claims is a proper judicial function. To allow one to pursue his remedy in the legislature would ap-

<sup>35</sup>People v. Standard Ace Ins. Co. (1941) 42 C. A. (2d) 409, 108 P. (2d) 923.

<sup>36</sup>Nampa v. Kibler (1941) 62 Idaho 511, 113 P. (2d) 411.

<sup>37</sup>Supra, note 3.

<sup>38</sup>Supra, note 11.

<sup>39</sup>Worden v. Witt (1895) 4 Idaho 40, 39 P. 1114; Northwest Steel Co. v. School Dist. (1915) 76 Oregon 321, 148 P. 1134.

<sup>38</sup>Supra, note 29.

<sup>38</sup>Smith v. Zimmer (1912) 45 Mont. 282, 125 P. 420.

pear to breach one of the fundamental concepts of our form of government—the separation of powers. True the legislature controls the purse strings, but that fact should give it no license to determine tort liability. The legislature is a policy making body. It is not a body to determine the individual's rights arising from some particular injury. The legislature has no guide to determine liability as has the courts but rather it is influenced by the lobbying and vote-getting power of the claimant. One's claim is not determined by legal principles of negligence, proximate cause, and damages. Rather, it may be determined by the political affiliation of the claimant, or his political influence. Even when legislatures pass enabling legislation, courts often construe it so narrowly as to lead to abortive results.<sup>40</sup>

To uphold the doctrine in a democratic government is indefensible. The system of government created in this country has no counterpart of the king as does England where the doctrine arose. There was no necessity whatsoever for transplanting that part of the common law into American jurisprudence. Probably the outstanding reason for the preservation of the antiquated doctrine was to allow the several states to hedge on their legally contracted debts.<sup>41</sup>

A state which cannot stand upon the principles for which it was created when dealing with those from whence its power is derived is not on the strongest foundation. If principles are just, the state should subject itself to the same principles as it seeks to administer. The state is but an instrumentality of the people. The Supreme Court of Montana recognized that the state is not sovereign.<sup>42</sup> Government is not sovereignty. Government is the machinery or expedient for expressing the will of the sovereign power.<sup>43</sup> The sovereignty of the United States consists of the powers existing in the people as a whole and the persons to whom they have delegated it, and not as a separate personal entity, and as such it does not possess the personal privileges of the Sovereign of England.<sup>44</sup>

The scope and fields of government are forever extending. In 1938, besides the ten administrative departments represented in the United States cabinet, there were 142 separate federal bureaus and agencies embracing all types of industries

<sup>40</sup>*Supra*, note 15, 19.

<sup>41</sup>Guthrie, *The Eleventh Amendment*, 8 COL. L. REV. 183 (1908).

<sup>42</sup>*State v. Dixon* (1923) 66 Mont. 76, 213 P. 227.

<sup>43</sup>*Bisbee v. Cochise County* (1933) 52 Ariz. 1, 78 P. (2d) 982.

<sup>44</sup>*Filbin Corp. v. U. S.* 226 F. 911.

and fields of endeavor.<sup>45</sup> Since that time the number has substantially increased. The same is true of state commissions, boards, and agencies. New ones are being created with each new session of the legislature, and old ones only rarely are terminated. Decisions of the courts have overwhelmingly clothed these agencies with the state's immunity from suit. Many of such agencies are acting in a purely corporate capacity. The problem is progressively more acute.

The 79th Congress of the United States realizing the injustices of the present system and desiring to clear the congressional halls of private claim seekers who only serve to hamper speedy legislative processes, passed as a part of its *Reorganization Act*, the *Federal Tort Claims Act*. It is a big step in the right direction as far as the Federal government is concerned.<sup>46</sup>

Under the act, claims for less than \$1000 may be submitted to the federal agency involved in the action. If payment is accepted, the government liability is discharged. If the claimant is not satisfied, however, he may pursue his remedy in the courts.

Claims involving more than \$1000 must be prosecuted in the Federal District Court for the area where the event took place. Actions and procedure are regulated by the *Federal Procedure Act of 1934*.<sup>47</sup> The local federal attorney is to be named as defendant along with the United States. Trial will be without jury, and appeal may be had to the circuit court of appeals, and ultimately to the Court of Claims. The Attorney General is authorized to compromise any claim after institution of suit with the approval of the court where the suit is pending. A statute of limitations of one year bars all claims. Certain types of claims which already have an adequate remedy are excepted.<sup>48</sup> Payment of a claim relieves the employee or officer from liability. Attorney fees are limited to 10% on claims before agencies and 20% on claims pursued in the courts. Costs exclusive of Attorney fees may be recovered in the judgment.

Although the act will need much interpretation by court decision, it appears to be quite adequate in its scope.

The big obstacle to overcome, now, is the immunity claimed

<sup>45</sup>*Congressional Record*—House Apr. 6, 1938 pp. 6364-65.

<sup>46</sup>U. S. Code Cong. Service (1946) p. 807.

<sup>47</sup>48 STAT. 1064.

<sup>48</sup>Section 421 of the act.

by the several states. The Montana Court in *Coldwater v. State Highway Commission*<sup>40</sup> recognized the problem but stated:

"There is perhaps merit in appellant's contention that the rule of immunity of the sovereign from liability to the individual is outmoded, harsh, and unjust. Nevertheless it is firmly established under the common law and beyond the power of this court to repudiate. Should the people see fit they have the power, through the legislature, to consent that the state may be sued, and to determine under what circumstances the state and its agencies shall become answerable to the individual. If reform in this respect is desirable, it is a matter for the legislature, not for the courts."

In *Johnson v. Billings*<sup>41</sup> however, the court very aptly said: "Precedent not supported by logic or reason, or where the reason for the rule has ceased to exist, should be discarded as being both unjust and dangerous; a menace to good government. The tendency blindly to follow case law, regardless of existing reason places courts in the category of men who continue to follow the calf track so graphically described in Sam Waller Foss' poem."<sup>42</sup>

The theory of state immunity was developed by court decision. It is therefore submitted that it might be overthrown by court decision, thus freeing us from this oppressive doctrine to which we are now shackled by stare decisis.

Probably a sounder approach, however, would be that suggested in the *Coldwater* case, namely reform through legislative action. It is submitted that a statute patterned after the federal act with due consideration for municipal, county and state liability, and with appropriate exceptions should hold a high place on the current legislative calendar for the State of Montana and the several states.

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<sup>40</sup>(1945) .... Mont. ...., 162 P. (2d) 772.

<sup>41</sup>*Supra*, note 22.

<sup>42</sup>Poem cited in dissenting opinion of Justice Scott in *Van Kleeck v. Ramer* (1916) 62 Colo. 4, 156 P. 1108, who said:

"I may be permitted to suggest for the consideration of the court and judges who feel impelled to sacrifice their sense of reason and justice upon the Alter of the Golden Calf of precedent, the quaint philosophy of Sam Walter Foss, in the following lines:

One day through the primeval wood  
A calf walked home, as good calves should;  
But left a trail all bent askew,  
A crooked trail, as all calves do.

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Since then, three hundred years have fled,  
And, I infer, the calf is dead.  
But still he left behind this trail,  
And thereby hangs my moral tale.

The trail was taken up next day  
By a lone dog that passed that way;  
And then a wise bell-wether sheep  
Pursued the trail o'er hill and glade,  
Through those old woods a path was made,

And many men wound in and out,  
And bent and turned and dodged about,  
And uttered words of righteous wrath,  
Because 'twas such a crooked path;

But still they followed—do not laugh—  
The first migrations of that calf,  
And through this winding woodway stalked  
Because he wobbled when he walked.

This forest path became a lane,  
That bent and turned and turned again;  
This crooked lane became a road,  
Where many a poor horse, with his load,

Toiled on, beneath the burning sun,  
And traveled some three miles in one.  
And thus a century and a half  
They trod the footsteps of that calf.

The years passed on with swift feet,  
The road became a village street,  
And this, before men were aware,  
A city's crowded thoroughfare.

And soon the central street was this  
Of a renowned metropolis.  
And men two centuries and a half  
Trod the footsteps of that calf.

Each day a hundred thousand route  
Followed the zigzag calf about;  
And o'er his crooked journey went  
The traffic of a continent.

A hundred thousand men were led  
By one calf near three centuries dead.  
They followed still his crooked way,  
And lost one hundred years a day;

For thus such reverence is lent  
To well-established precedent.  
A moral lesson this might teach,  
Were I ordained and called to preach.

For men are prone to go it blind  
Along the calf-paths of the mind,  
And toll away from sun to sun  
To do what other men have done.

They follow in the beaten track,  
And out and in, and forth and back,

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And still their devious course pursue  
To keep the path that others do.

But how the wise old wood-gods laugh,  
Who saw the first primeval calf!  
Ah! many things this tale might teach;  
But I am not ordained to preach.

### THE APPLICATION OF THE UNIFORM DECLARATORY JUDGMENTS ACT IN MONTANA

In 1922 the Uniform Declaratory Judgments Act<sup>1</sup> was drafted by the Commissioners on Uniform State Laws. Although several states had adopted a declaratory act of this nature prior to this time, the majority have since adopted the Uniform Act as drafted by the Commissioners. Up to March 1943, the Federal Government<sup>2</sup> and all but eight states<sup>3</sup> had adopted declaratory judgments acts with more than three thousand cases having been adjudicated under the provisions of such acts. According to an eminent authority<sup>4</sup> on the subject, more declaratory judgments were rendered in the seven year period from 1934 to 1941 than in the time prior to 1934, indicating the increasing awareness by bench and bar of its value as a judicial remedy.

Montana in 1935 became the twenty-first state to adopt the Uniform Act<sup>5</sup> but since its enactment the Montana Supreme Court has only considered eleven cases<sup>6</sup> which asked for or involved declaratory judgments. Whether these eleven cases represent the total need for declaratory judgments can, of course, only be a matter of conjecture, but when compared with the extensive use made of it in other jurisdictions it would seem that members of the bar have not taken full advantage of the Act.

<sup>1</sup>See Uniform Laws Annotated No. 9 (1940) Cumulative Annual Pocket Part p. 70.

<sup>2</sup>48 STAT. 955 (1934), 28 U.S.C. §400 (1940).

<sup>3</sup>Arkansas, Delaware, Georgia, Illinois, Iowa, Louisiana, Mississippi, Oklahoma.

<sup>4</sup>BORCHARD, DECLARATORY JUDGMENTS (2nd ed. 1941) p. vii.

<sup>5</sup>R.C.M. 1935 §9835.1-9835.16.

<sup>6</sup>Toole County Irrigation Dist. v. State (1937) 104 Mont. 420, 67 P. (2d) 989; Tongue River and Yellowstone River Irrigation Dist. v. Hyslop et al. (1939) 109 Mont. 190, 96 P. (2d) 273; Mulholland v. Ayers et al (1940) 109 Mont. 558, 99 P. (2d) 234; Blackford v. Judith Basin County (1940) 109 Mont. 578, 98 P. (2d) 872; State ex rel. Butte Brewing Co. v. District Court (1940) 110 Mont. 250, 100 P. (2d) 932; Vantura v. Mont. Liquor Control Board (1942) 113 Mont. 265, 124 P. (2d) 569; Gullickson v. Mitchell (1942) 113 Mont. 359, 126 P. (2d) 1106; Pollard v. Mont. Liquor Control Board (1942) 114 Mont. 220, 131 P. (2d) 974; Bottomly, Atty. Gen. v. Meagher County (1943) 114 Mont. 220, 133 P. (2d) 770; State ex rel. Davidson v. Ford, Gov. (1943) 115 Mont. 165, 141 P. (2d) 373; Carey, State Treas. v. McFatrige et al. (1943) 115 Mont. 278, 142 P. (2d) 229.