Among the duties of governments, none is more imperative than that of fulfilling their obligations. But, as none can rightly be judge in his own cause, this duty cannot be carried out without some means of judicially ascertaining the obligation.

"Where there is a right there is a remedy," we are told; and while the rule may not be absolutely without exception, a right without a legal remedy for its violation stands on no very firm footing. The duty of the government to fulfil its obligations, therefore, necessarily includes that of providing adequate means for an impartial adjudication whether an obligation in a given case exists: *United States v. Klein*, 13 Wall. 128, 144.

Plain as this truth seems, it was a long time in receiving practical acknowledgment by the Federal government.

The exemption of the sovereign from suit in his own courts was a survival from a past state of things, without the slightest present reason for existence. "It is difficult," says our highest tribunal (*United States v. Lee*, 106 U. S. 196, 206), "to see on what solid foundation of principle the exemption from liability to suit rests." The maxim "the King can do no wrong" has been declared (*Langford v. United States*, 101 U. S. 341) to have no existence in this country "in reference to the government of the United States, or of the several States, or of any of their officers." Yet while the maxim has itself been repudiated, some of its most odious practical applications continued to be upheld and enforced, as indeed they are to a considerable extent to this day.

No neglect to provide for suits against the government can be charged against the framers of the Constitution. Prominent among the subjects enumerated for the exercise of the judicial power are "controversies to which the United States shall be

*Read at the World's Congress of Jurisprudence and Law Reform, at Chicago, August 7, 1893.

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a party” (Art. 3, § 2). It was never doubted that this embraced cases in which the United States were defendant as well as plaintiff. Yet for upwards of half a century the constitutional grant proved ineffective for lack of legislation providing a tribunal in which the suit could be brought.

Judge Story, writing in 1833, shows his usual ardor for a practical administration of justice which shall meet the ideal conception of right. “It has sometimes,” he says (Commentaries on the Constitution, § 1678), “been thought that this is a serious defect in the organization of the judicial department of the national government. It is not, however, an objection to the Constitution itself, but it lies, if at all, against Congress for not having provided (as it is clearly within their constitutional authority to do) an adequate remedy for all private grievances of this sort in the Courts of the United States.”

This failure of justice met with no remedy till 1855, when a court was created (by Act of 1855, Feb. 24, Ch. 122; 10 U. S. Statutes-at-Large, 612; Rev. Statutes, § 1049) “for the investigation of claims against the United States.” At first, however, the “Court of Claims” was a court only in name, its functions being merely recommendatory and advisory. In 1863, however, it received (by Act of 1863, March 3, Ch. 92; 12 U. S. Statutes-at-Large, 765) authority to render final judgments for or against the United States, and has since taken rank with those “tribunals inferior to the Supreme Court,” which Congress is empowered to “ordain and establish” (United States v. Klein, 13 Wall. 128, 145).

In 1887 concurrent jurisdiction of suits against the United States was vested in the District and Circuit Courts of the United States in a limited class of cases, “where the amount of the claim does not exceed $1000,” and in the Circuit Courts “where the amount of the claim exceeds $1000 and does not exceed $10,000” (by Act of 1887, March 3, Ch. 359 § 2; 1 Supp. Rev. Statutes U. S. 559), though comparatively few such suits are in practice instituted in these courts.

Three points are noticeable in this legislation:

1. The jurisdiction is limited to claims arising ex contractu. Claims arising from torts are expressly excluded (by § 1, of

2. The jurisdiction is limited to money demands, and does not embrace suits for specific performance or the restitution of property, real or personal: *United States v. Jones*, 131 U. S. 1. These, again, are sometimes made the subject of special reference in particular cases, (*Hot Springs Cases*, 92 U. S. 698; *Myers v. United States*, 24 C. Cls. 448), though as to land in the possession of the government, claimed by a private individual, an action of ejectment against the officer in possession is often an available remedy: *United States v. Lee*, 106 U. S. 196.

3. Interest is not allowed, unless the contract expressly stipulates for it: Rev. Statutes U. S. § 1091.

Turning now from claims against the Federal government to claims against the several States, we find the greatest diversity between the constitutions and statutes of different States. The whole subject is entirely within the control of the State, for the sovereign prerogative of exemption from suit without its own consent, except in a very limited class of cases in the Supreme Court, belongs to each State as fully as to the United States.

It is true that by the original Constitution of the United States a State might be sued by original process in the Supreme Court of the United States, by a citizen of any other State, or of a foreign nation.

This liability to suit was, however, taken away by the Eleventh Amendment, and the Supreme Court has recently expressed serious doubts whether the State was, by a correct construction of the Constitution, thus subject to suit, even
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before the adoption of the Amendment: *Hans v. Louisiana*, 134 U. S. 1.

However this may be, there is no question that no State can now be sued in any court without its consent, either by its own citizens, or by those of other States, or of foreign nations. The only liability of a State to be sued in the Supreme Court is, by the United States (*United States v. Texas*, 143 U. S. 621), by a sister State (*Rhode Island v. Massachusetts*, 12 Pet. 657; *Florida v. Georgia*, 17 How. 478; *Alabama v. Georgia*, 23 How. 505; *Virginia v. West Virginia*, 11 Wall. 39; *Indiana v. Kentucky*, 136 U. S. 479; *Virginia v. Tennessee*, 148 U. S. 503), or by a foreign government.

The litigation, too, must be a *bona fide* one between these high parties, not a colorable attempt by the plaintiff State to enforce obligations owed by the defendant State to private citizens, and assigned by them merely for the purpose of suit: *New Hampshire v. Louisiana*, 108 U. S. 76. And if a State has by its Constitution or laws subjected itself to suit in its own courts it may at any time withdraw the right even as to pending cases: *Beers v. Arkansas*, 20 How. 527; *Railroad Co. v. Tennessee*, 101 U. S. 337; *Railroad Co. v. Alabama*, 101 U. S. 832.

While some of the State constitutions (as Indiana, Idaho, and Nevada,) expressly provide for the bringing of suits against the State, others on the contrary (as Alabama) as expressly forbid that the State shall ever be made a defendant in any suit at law or in equity. In a majority the antiquated rule prevails that no suit can be brought against the sovereign: *Schweitzer v. United States*, 21 C. Cls. 303, 307. In some a limited right of suit prevails, as in Minnesota, where the State, though in all general respects exempt from suit, may be made a defendant in any action affecting real estate with a view to a partition thereof.

Other States, however, make liberal provisions for the maintenance of suits against themselves.

In Massachusetts the Superior Court has by statute jurisdiction of all claims against the Commonwealth. This, however, is held to be limited to claims arising *ex contractu* and
not to extend to claims *ex delicto*: *Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28. Not because the statute limits the right of suit to claims arising on contract, but because in case of tort no liability whatever arises; so that the objection to the maintenance of an action upon tort against the State does not result from want of jurisdiction, but from absence of liability, a conclusion, as we shall see, curiously in opposition to that placed upon an Australian statute almost identical in terms with that of Massachusetts.

Virginia in this respect claims the rank of the pioneer State. "It has ever been the cherished policy of Virginia to allow to her citizens and others the largest liberty of suit against herself, and there has never been a moment since October, 1778, but two years and three months after she became an independent State, that all persons have not enjoyed this right by express statute": *Higginbotham's Executrix v. Commonwealth*, 25 Grattan, 637.

West Virginia has, in this respect, followed the traditions of the parent State and freely permits suits against herself: Code of West Virginia, Ch. 37, pp. 269, 270.

New York is among the most liberal of all the States. She has a Board of Claims which, notwithstanding its name, is in organization a strictly judicial tribunal having power to issue subpenas and to fine for contempt. Its practice is governed by rules similar to those in force in the Supreme Court of the State, and appeals regularly lie from its decisions to the Court of Appeals where the amount involved exceeds $5,000. Costs are not awarded, but, on the other hand, interest seems in practice to be regularly allowed: *Sayre v. State*, 128 N. Y. 622. While the jurisdiction of this Board, in general, extends only to claims arising *ex contractu*, yet negligence in the management of canals operated by the State is also recognized as a ground of liability: *Sipple v. State*, 99 N. Y. 284; *Bowen v. State*, 108 N. Y. 166; *Splitdorf v. State*, 108 N. Y. 205. In no other class of cases, however, can negligence on the part of the State or its officers be made a ground of State liability.

Other States having provisions for the maintenance of suits:
against themselves are North Carolina, Mississippi, South Dakota, Idaho and Nevada.

California, however, seems now to have taken the lead of all the States in the allowance of suit against herself. A recent statute enacted February 28, 1893, provides as follows: "All persons who have, or shall hereafter have, claims on contract or for negligence against the State not allowed by the State Board of Examiners, are hereby authorized, on the terms and conditions herein named to bring suit thereon against the State in any of the Courts of this State . . . of competent jurisdiction and prosecute the same to final judgment. The rules of practice in civil cases shall apply to such suits, except as herein otherwise provided." The statute further expressly provides for the allowance of interest on all claims from the time the obligation accrued.

Two points may be noticed in this legislation distinguishing it from that of the United States on the same subject.

1. The allowance of suits against the government for negligence. The law defining the jurisdiction of the Court of Claims of the United States, expressly excludes claims sounding in tort nor does any other State of the Union allow such suits except New York, and she only for negligence in the operation of canals.

2. The allowance of interest. The Federal Court of Claims is expressly prohibited from allowing interest "on any claim up to the time of the rendition of judgment thereon," "unless upon a contract expressly stipulating for the payment of interest."

It is clear, therefore, that if the new law of California is destined to receive as liberal a construction as its terms seem to require, that State may be regarded as having now taken the first place in inviting judicial settlement of controversies to which she is herself the party defendant.

It may be stated, as a general, if not universal rule as to suits against the States of the Union, as it certainly is as to suits against the United States, that no execution can issue to carry out a judgment, but the judgment creditor must await an appropriation by the legislature. Except, however, in
special cases, involving very large amounts, or where the matter becomes the subject of political or partisan controversy, provision is regularly made in the ordinary course of business for the payment of judgments.

Passing now from our own Union to foreign nations the first inquiry is naturally as to the law of that country from which our own jurisprudence is derived. The remedy afforded by the law of England to the citizen having a demand against the sovereign is known as the petition of right; and of this Blackstone says:

"And, first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his Court of Chancery, where his chancellor will administer right as a matter of grace though not upon compulsion. And this is entirely consonant to what is laid down by the writers on natural law. 'A subject,' says Puffendorf, 'so long as he continues a subject, hath no way to oblige his prince to give him his due, when he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And if the prince gives the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity than upon the municipal laws.' For the end of such actions is not to compel the prince to observe the contract, but to persuade him" (1 Blackstone's Commentaries, 243.)

Some remarks, however, of the celebrated commentator in another part of his work (3 Blackstone's Commentaries, 256), seem to limit the scope of this remedy to claims for the recovery of specific property, real or personal, for he says that it "is of use, where the king is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition."

The petition of right, however, is a remedy apparently in such infrequent use that it is difficult to institute a comparison between its practical efficiency and that of a suit in the Court of Claims in this country.

Leave to proceed must always be obtained by fiat of the
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Crown, which is not grantable of right, and is sometimes refused.

It was even a doubtful question till recently, whether the Crown were suable by petition of right for breach of contract.

True, the "Petitions of Right Act, 1860," simplified the proceedings in such cases and assimilated them to those between subject and subject; but that act was not to "be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to remedy before the passing of this Act."

But in 1874, the Queen's Bench, upon great consideration, decided that such an action would lie for damages for breach of contract: Thomas v. The Queen, L. R. 10 Q. B. 31. The great difficulty, however, which the court found in settling this point, and the fact that the authorities leading to a conclusion favorable to the maintenance of the suit were "many of them antiquated and connected with forms of procedure with which no one now alive is familiar," show the infrequency of this remedy, in striking contrast with the constant occurrence of this kind of suits in the United States.

Facilities, too, are afforded the suitor in this country by way of calls upon the executive departments for information and papers (Rev. Statutes, U. S. § 1076) which are denied in England, where no rule can be made upon a department of the government for the production of papers desired by the suppliant in a petition of right: Thomas v. The Queen, L. R. 10 Q. B. 44.

General Schenck while American Minister at London, by direction of the State Department, made some inquiries regarding the prosecution of claims against Her Majesty's government, the result of which seems to have impressed him (Report of Hon. William Lawrence, House Report No. 134, 43rd Congress, 2nd sess. p. 191) with "the doubts and difficulties in the way of the prosecution of any such claim;"—an impression which appears to have some justification in the facts.

The rule that "the King can do no wrong" prevents the
maintenance of a petition of right or other direct remedy against the Crown for negligence of public officers or servants: *Viscount Canterbury v. Attorney-General*, 1 Phillips, 306.

But an effective remedy exists in cases of collision of a public with a private vessel, resulting in damage to the latter.

Here, as in admiralty a vessel is for many purposes personified and held responsible for damages inflicted by the negligence of her officers, a libel *in rem* is filed against the offending vessel. The court thereupon directs the register to write to the Lords of the Admiralty asking the entry of an appearance on behalf of the Crown which is generally given, and the proceedings are then conducted to decree as in other cases: *The Athol*, 1 W. Robinson, 382, cited and fully commented on in *The Siren*, 7 Wall. 152.

It is true that no warrant issues in these cases for the arrest of the vessel of the Crown, but the proceedings are strictly judicial; the suits are instituted and conducted on the hypothesis that claims against the offending vessel are created by the collision; and, while the vessels are not taken into custody, it is presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared.

So, too, where the construction and operation of public works is under the charge of Boards or Commissioners invested with the necessary powers by acts of Parliament, and error or neglect occurs, causing damage to individuals, the Commissioners or members of the Board are held liable, but the damages are paid out of the public funds in their hands: *Mersey Docks, Trustees v. Gibbs*, L. R., 1 H. L. (English & Irish Appeals) 93; *Addison on Torts*, Ch. 16, s. 14 § 1043. This, while in form resembling a suit against a municipal corporation, seems in substance to approach very closely to an action against the government.

Many of the Colonies of England have extended the right of suit against the Crown, which is in effect a suit against the government of the Colony, far beyond the measure of redress granted by the jurisprudence of the mother country.
No more interesting example in this respect can be found than in the Island of Ceylon, for instance. In that island a very extensive practice of suing the Crown had sprung up and had been recognized in hundreds of decisions. It is thought to have been derived from the Roman-Dutch law in force in Ceylon prior to the British conquest in 1799. Whether such suits were, in fact, allowed by that law seems to be as a matter of legal history quite obscure.

The right was put on a firm basis, however, by a legislative ordinance of the Colony adopted in 1868 which, while not professing to originate the right of suit against the Crown, confers jurisdiction of such suits upon the District Courts of the Island in such specific terms as to amount to a recognition of the right. It was, therefore, sustained by the Privy Council as authority for the bringing of suits in that Colony against the Crown: 

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\text{Appu v. Queen’s Advocate; 9 App. Cas. 571.}
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The jurisdiction, however, extends there only to cases of contract.

We are accustomed to look to Australia for striking and successful experiments in law reform and we shall not be disappointed if we expect there to find an ample measure of justice accorded to the citizen having a demand against the government.

By a statute of New South Wales (39 Victoria, No. 38), entitled "An Act to enforce claims against the Colonial government and to give costs in Crown suits," it is provided that: "Any person having or deeming himself to have any claim or demand whatever against the government of this colony, may set forth the same in a petition to the Governor praying him to appoint a nominal defendant in the matter of such petition."

The Governor may then name a nominal defendant, but if he fails to do so within one month, the Colonial Treasurer shall be the nominal defendant.

"In any action or suit under this act all necessary judgments, decrees and orders may be given and made, and shall include every species of relief, whether by way of specific performance, or restitution of rights, for recovery of lands or chattels, or payment of money or damages."
The Colonial Treasurer is to pay all damages and costs awarded in such cases out of any moneys in his hands legally applicable thereto, "and in the event of such payment not being made within sixty days after demand execution may be had for the amount, and the same may be levied upon any property vested in the government of this Colony."

The Privy Council, upon the language of this statute, remarks: Farnell v. Boweman, 12 App. Cas. 645. Thus, unless the plain words are to be restricted for any good reason, a complete remedy is given to any person having or deeming himself to have any just claim or demand whatever against the government. These words are amply sufficient to include a claim for damages for a tort committed by the local government by their servants."

The reason is then given for the distinction between the Colonial law and that of England, as follows:

"It must be borne in mind that the local governments in the colonies, as pioneers of improvement, are frequently obliged to embark in undertakings, which in other countries are left to private enterprise, such for instance as the construction of railways, canals, and other works, for the construction of which it is necessary to employ many inferior officers and workmen. If therefore, the maxim that 'the King can do no wrong,' were applied to Colonial governments in the way now contended for by the appellants, it would work much greater hardship than it does in England."

To me the most remarkable feature of this legislation is not so much its broad abrogation of the rule that "the King can do no wrong," as its still bolder subjection of the government of the Colony to the issuance of an execution in case of non-payment of the judgment within sixty days.

In England and in this country alike, the "proceedings end with the recovery of the judgments. After they are obtained, it depends in England on the Parliament, and in this country on Congress, whether or not they shall be paid": United States v. O'Keefe, 11 Wall. 178.

The suitor even after obtaining his judgment must still approach the sovereign on bended knee, a "suppliant" as he
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is most appropriately termed in England, a "petitioner" in this country, with a humble prayer for payment of the sum judicially found due him. But the Australian suitor may of right demand prompt payment of his judgment and may seize the Colonial property in case of default with little more ceremony or delay than he would that of John Doe or Richard Roe.

In the Straits Settlements (Attorney-General v. Wemyss, 13 App. Cas. 192) and in New Zealand (The Queen v. Williams, 9 App. Cas. 418) suits against the Crown, both on contracts and torts, are freely permitted.

Turning now to our closest neighbor among the Queen's dominions we find that in Canada, suits against the Crown on contract are freely allowed: Humphrey v. The Queen, 20 Canada Sup. Ct. 591. And the government has been held liable for damages to water-works caused by the construction of a government dam: The Queen v. St. John Water Commissioners, 19 Canada Sup. Ct. 125.

A recent statute gives to the Court of Exchequer express jurisdiction of "every claim against the Crown arising out of any death or injury to the person or property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment."

Whether this statute extends the application of the maxim respondeat superior in its full measure to the acts of the officers and servants of the Crown or Colonial government is perhaps as yet unsettled: The Queen v. Martin, 20 Canada Sup. Ct. 240. The language of the statute is certainly more far-reaching than that of New South Wales, which has certainly accomplished this result, and it would seem therefore that our northern neighbor has fairly come up to the position, which neither England nor this country has as yet been willing to adopt, that the government cannot assume the powers and privileges of an owner of property without also being subjected to the responsibilities incident to such ownership.

In following the law of England and of the countries which are or have been her colonies and have derived their juris-
prudence from her, we can have no difficulty in ascertaining whether the remedy given by the law against the sovereign in case of an alleged breach of contract, or any other claim, is of a judicial character or is a mere administrative process of accounting. The distinction between a judicial court and an executive department is too sharply drawn in Common Law countries to render it possible to confound one with the other. In France and other Civil Law countries, the administrative law is something so different from the ordinary civil law that it is not always easy to say whether the remedy allowed against the government is what we should consider a judicial remedy or is an administrative process similar to the proceedings before the Auditors and Comptrollers of the Treasury Department of the United States.

France has her administrative tribunals in which alone controversies pertaining to administration are to be adjudged; and while these tribunals partake of the nature of courts they are also perhaps to some extent governed by an official spirit, so that suits in them might not in all respects be regarded in English law as the equivalent of a judicial remedy: *Dicey, Law of the Constitution,* 307. To what extent the remedy afforded by the laws of France to those having claims against the government is a practical, speedy and efficient one as compared with the petition of right in England, a suit against the Crown in her colonies, or a suit in the Court of Claims in this country, it is impossible for a foreigner to say.

The distinction between administrative law and the ordinary civil law of the land became sharply marked in France at the time of the Revolution. The National Convention at that time decreed an annulment of all proceedings and judgments which had taken place in the judicial tribunals against the members of the administrative corps and committees, on claims for property seized, or arising out of revolutionary taxes, or out of any other acts of administration, and imposed upon these tribunals repeated prohibitions against taking cognizance of any acts of administration of whatever character.

Forcible grounds are assigned by writers on administrative law for this separation of administrative from civil tri-
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bunals, some of which are as follows: *Cotelle, Droit Administratif*, 283, 284.

1. That matters of controversy pertaining to administration can be best judged by magistrates having exact knowledge and full experience in such matters and that the order to be followed in public works, and the details of accountability would frequently be of a character foreign to the knowledge of an ordinary judge.

2. That such cases could be more promptly expeditied by the administrative authority, which has at hand all the elements of litigation, all the officers, engineers, bureaus, agents, &c., and in this way the proceedings would be as much more rapid as they are more certain and complete than those of the ordinary tribunals.

3. That the result in the doctrines of the administrative authority will be a unity of views, a harmony of principles which it would be impossible to obtain from ordinary judges.

The rules of law applied to claims against the government are not in France always the same as those which would be applied to cases between individuals. Thus in suits between individuals on contracts, gains prevented are as legitimate elements of recovery as are losses incurred and the same rule is applied in this country to suits against the government. But in France losses incurred are alone considered as a proper measure of recovery; and profits of which a contractor has been deprived by a breach of contract on the part of the government do not appear to be allowed: *Dicey, Law of the Constitution*, citing *Vivien, Études Administratives*, I, pp. 140-142.

In one respect the government of France must be regarded as having placed itself upon a very high plane of justice to its citizens. This is in its dealings with war claims.

Immediately after the Franco-Prussian War the National Assembly passed laws for the indemnification of all persons who had suffered losses during the German Invasion. These laws were "designed to cause the whole nation to aid in making good the material damages of all kinds caused by the war."
In the administration of this law "the most liberal spirit presided over the application of the principle of indemnification. No distinction was made on account of the causes of the damages. All persons who had suffered material losses in consequence of the war were allowed to present their claims, whether for war contributions, fines, or anything of the kind." "It may be said that there is no kind of damage resulting from war for which relief has not been granted, if not in full, at least in a certain measure, and that without respect of persons. Foreigners, Germans as well as others, were allowed to receive a share of the indemnities granted, whether these had been appropriated to the reparation of losses resulting from the war, properly so called, or to that of losses caused by the insurrection of the commune." "France has always taken the most liberal standpoint in granting indemnities after civil wars": Letter of the Duke Decazes to Minister Washburne, House Report No. 134, 43d Cong., 2d Sess., pp. 75, 76.

Mr. Hoffinan, then acting as Minister at Paris, in transmitting information on this subject, well says: "A captious spirit might suggest that this was intended as a hint to us to do likewise" (Id. p. 74).

Other countries in which the Civil Law prevails have their systems of administrative law, and in one form or another make ample provision for the adjustment of all demands of private individuals against the government: Id. passim: Dicey, Law of the Constitution, 303; Brown v. United States, 5 C. Cls. 571; Lobsiger v. United States, 5 C. Cls. 687; Molina v. United States, 9 C. Cls. 269.

Claims of aliens against governments are often settled through the agency of mixed International Commissions. While such Commissions are admirable instrumentalities for the settlement of great national controversies, like the Behring Sea question, they are not very satisfactory tribunals for the adjudication of private claims.

The ideas of International Law prevailing in one Commission may be totally different from those governing another. Their expenses are large,—sometimes disproportionately so to the amount of business transacted.
And in more than one instance the defendant government has made charges of fraud, and demanded whether with justice this is not the place to inquire a re-examination of so much of the proceedings as adversely affected her: 22 U. S. Statutes-at-Large, 643; 27 Id. 409, 410. With the adoption by every country of a complete system of remedial justice, in whose due execution foreign governments and their citizens could have confidence, the necessity for these temporary and exceptional tribunals would disappear; and there would be no more occasion for diplomatic intervention in the settlement of claims against foreign governments, than in that of claims against private citizens of a foreign nation.

This brief review of the law and practice of different countries in the settlement of claims against governments naturally suggests some reflections looking to the improvement of our own policy in this respect. In the very forefront of any such suggestions, I would put the idea of an absolute exclusion of all dealing on the part of the legislative authority with special cases.

Congress, under the Constitution, is organized with reference to the great subjects of national legislation. It has every facility for full inquiry, thorough debate, and right decision on those topics. But it is not a court and has not the organization or the machinery, even if it had the time or the temper, for the adjudication of private rights.

The limits of a session are far too brief for the full consideration of the important measures of general public interest affecting the finance, the commerce, the public health, and the diplomatic relations of the country and the other great interests confided to the charge of Congress. That a national legislature pressed with such public duties should undertake, in addition, to pass upon the justice of private claims ranging from millions in amount down to such demands as for the value of a horse or a hundred cords of wood, is such an absurdity as to be almost incredible were it not unhappily a matter of daily experience during the sessions of Congress. No other legislature in the world attempts such a thing. Not one in ten of the claims reported to the House of Represen-
tatives by its Committees are ever considered by that body, those which are being usually called up by unanimous consent or under a motion to suspend the rules.

Nor is this condition of things more regretted by any than by conscientious members of the House themselves. A member of the Committee on claims or war claims will for a whole session devote himself with praiseworthy attention to duty and painstaking care to the examination of claims coming before his Committee. He will probably find little difficulty in getting his recommendations adopted by his Committee, and by them reported to the House. When, however, he sees week after week, and month after month, pass by, and his carefully digested reports completely ignored, or even if called up for unanimous consent, defeated by a hasty, passionate, or unintelligent objection, he may well grow discouraged, and become so disgusted with the whole system as to be unwilling to continue the work of Sisyphus, rolling the stone up the hill only to see it roll down again. Under such disheartening circumstances the only wonder is that the work of these Committees is so well and thoroughly done as it generally is.

Nor is the evil much remedied by the passage of such laws as those of 1883 and 1885, (1883, March 3, ch. 116; 1885, Jan. 20, ch. 25; I Supp. Rev. Statutes U. S. 403, 471; and the similar provisions of 1887, March 3, ch. 359, §§ 12, 14; 1 Supp. Rev. Statutes U. S. 561, 562) conferring upon the Court of Claims a jurisdiction of an "ancillary" or "advisory" character (In re Sanborn, 148 U. S. 222, 226) under which the Court finds facts and conclusions of law or both, and merely reports them for further action. Such laws put the cart before the horse. Instead of defining with precision the liability of the United States, they provide for a litigation, which determines nothing and is binding upon no one. They are unjust to the claimants in inviting them into the courts to establish their claims without affording the slightest security for the attainment of any substantial result in case of their success in the litigation. They are equally unjust to the government in not securing it against the re-assertion of claims
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judicially held to be unjust. Allowed claims amounting to many thousands of dollars are still awaiting action in Congress, as after being reported they stand in no better legal position than before, though doubtless—and most justly—with a great moral advantage. Even the facts found have been subjected to re-examination, although the whole organization of Congress makes it impossible that it should with any hope of success turn itself into a tribunal for the adjudication of disputed questions of fact, and although even the Supreme Court has refused to look beyond the facts found by the Court of Claims. "The findings of the Court of Claims furnish the facts we are to consider and we cannot look beyond them. For the purpose of this case they import absolute verity and conclude both parties:"

Desmare v. United States, 93 U. S. 610.

The true field for the exertion of the powers of Congress on the subject of private claims should be found in defining the liability of the government and the jurisdiction of the court or courts which should adjudicate upon special cases. This is a field for statesmanship worthy of the ablest minds in either House of the national legislature. Its proper exercise would remit to the courts for absolute and final decision all claims or demands of whatever character against the United States.

Those having claims well founded within the principles defined would obtain the substantial fruit of their litigation in a full judgment in their favor. Those whose claims clearly lay outside of the field of relief defined by the law, would upon proper advice of counsel be saved the expense and trouble of bringing their cases before the courts. On the other hand, those whose claims were sufficiently doubtful to warrant a submission to the courts, and who are there denied relief, would be out of court forever.

Congress would thus be relieved of the constantly increasing pressure of appeals by defeated suitors to reverse the judgments of the courts against them, while on the other hand the defeated suitor would himself go about his business, instead of haunting the doors of Congress for years and years to go to
his grave in penury and anguish, as has been the fate of many a claimant before Congress, weary and sore with that deferred hope that makes the heart sick.

Nor can it be urged that the task of defining the liability of the government is one of insuperable difficulty. Doubtless there are difficulties in questions of governmental liability, owing to the peculiarity of the various branches of the administrative machinery of the government, but after all, the underlying principles do not radically differ from those governing the transactions of private parties.

Again and again have matters which were thought to be proper subjects for special legislative action been brought within the scope of general law and always with the greatest advantage to both the government and the citizen.

Acts of attainder were at one time defended on the ground that the ordinary criminal law might not be sufficient to reach the case of some grave public offenders, and that the power should be reserved to the legislature to enact special measures of punishment: Macaulay, History of England (Harpers' edition), Vol. 5, p. 199. Special divorce laws were once regarded as within the legitimate sphere of legislative activity: Maynard v. Hill, 125 U. S. 190. But in both cases a sound philosophy amply supported by experience has brought the subject within the domain of general law, and special cases of these classes have long since been banished from the halls of parliament and legislature, and each case is dealt with by courts acting under general statutes and in accordance with established precedents.

That claims against the government should be equally brought within the scope of general legislation, and that all arbitrary, special and exceptional measures of relief should be entirely done away with, must be, I think, to anyone who attentively pursues the proceedings of Congress on this subject, a truism so forcible as only needing to be stated to command assent.

With the liability of the government defined in advance by laws equally applicable to all, and with an impartial tribunal meting out equal justice to every suitor irrespective of political
influence or personal solicitation, no citizen can have any just ground of complaint. Hardships will indeed occur, but hardships are inseparable from every system of human justice. Better, far better, were it that occasional instances of that kind should happen, than that the time and attention of the national legislature should be in such large measure occupied, as it is now, in the consideration of purely private and personal interests to the necessary neglect of the vastly greater public duties committed to its charge.

Some suggestions may not be out of place as to what new legislation on claims should include.

Our laws touching suits against the government on contract give the citizen ordinarily the same measure of redress that he would have were he suing a private defendant. A singular exception to this rule is the prohibition against the allowance of interest, except where expressly stipulated for by name. But in cases where the payment of a specific sum at a definite time is agreed upon, the damage arising from the delay in payment constitutes a grievance as actual as the non-payment of the principal sum. The redress for this grievance given by the ordinary law of the land is the allowance of legal interest.

There seems to be no good reason outside of legal tradition why the government should not pay damages for the detention of money where it has failed to pay a certain liquidated sum on a stipulated date. Certainly the government-contractor who has been sorely pressed and perhaps ruined by himself having to borrow at interest to replace in his business the amount which the government should long ago have paid him will derive small comfort from being told in the language of our horn-books that "to know an injury and to redress it are inseparable in the royal breast," or as it is often expressed in this country that "the government is always ready and willing to pay its debts;" and that therefore the theory of the law—wide enough in this instance from the actual fact—is that if he had only demanded the payment of his debt, he would have secured it.

The absolute exclusion from the jurisdiction of the courts
of all claims sounding in tort, works great hardship in a country where the government is the owner and manager of so much property, and is conducting such vast public improvements in connection, particularly, with rivers and harbors. It is derived from the maxim of the law of England that "the King can do no wrong," a maxim which forbids the application of the rule, *respondeat superior* to the sovereign power, although even in that country as we have seen this application of the maxim is treated as a mere local rule of English law and as inapplicable to many of her Colonies.

Attorney-General Cushing in a profound opinion rendered in 1855 draws a wide distinction between the classes of government officers for whose acts the government should or should not be held responsible.

"In the transaction of public affairs there are two classes of officers, one employed in the collection of the revenue and the care of the public property, who represent the proprietary interest of the government, and another class who are the agents of society itself, and are appointed by the government only in its relation or capacity of *parens patriae*. For the acts of the former, the government holds itself responsible in many cases, because their acts are performed for the immediate interest of the government. But for the acts of the latter, no government holds itself pecuniarily responsible. It provides means to make them personally responsible, or to punish them for malfeasance in office, and in so doing it does all which the people have by their constitution and laws required of the government:" *7 Opinions of Attorneys-General*, 227. (See also the able reports of Senator Pike on the *Case of John Williams*, Sen. Rep. 825, 49th Cong. 1st Sess., and of Senator Hoar on the *Case of the Steamer I. N. Bunton*, Sen. Rep. 2692, 50th Cong. 2d Sess., both holding the same view).

And in the same line, Judge Cooley, evidently repudiating the application of the royal maxim to our government, says: "Even the State or general government may be guilty of individual wrongs, for while each is a sovereign it is a corporation also, and as such is capable of doing wrongful acts. The difficulty here is with the remedy, not with the right." No
sovereign is subject to suits, except with his own consent. But either this consent is given by a general law, or some tribunal is established with power to hear all just claims; or, if neither of these is done, the tort remains, and it is always to be presumed that the legislative authority will make the proper provision for redress when its attention is directed to the injury: "Cooley on Torts, 122.

It is time that our government should take rank with those progressive countries which have banished the idea, worthy only of a despot, that governments may enjoy all the advantages and privileges connected with the ownership of property, while at the same time they evade the responsibilities inseparably inherent in such ownership.

A government can, no more than a private individual, with justice repudiate "the great principle of the common law which is equally the teaching of Christian morality, so to use one's property as not to injure others."

The citizen injured by the mismanagement of government property, whether by the collision of his vessel with a public vessel of the United States or with the pier of a dam constructed and operated under the river and harbor appropriation acts; by the falling of an unprotected floor in a government building; by the breaking of an elevator, or in any of the other ways in which property may be so used as to cause damage to others, should have a legal right of redress against the government causing the injury, and should not be remitted to the exercise of mere legislative favor and discretion.

I have not here undertaken to discuss the various special classes of claims, many of them arising out of peculiar circumstances not likely again to occur, such as the French Spoliation Claims, war claims for stores and supplies, or Indian Depredation Claims. A discussion of the principles governing each of these separate classes of claims would require a more extended treatment than could be bestowed in the limits of this paper. Besides, many of them have received treatment in judicial decisions, such as those of the Court of Claims (per Davis, J.) on the French Spoliation Claims, (21 C. Cls. 340, 22 C. Cls. 1,) or Congressional reports, in a manner so able
and exhaustive that I should despair of being able to add anything of value.

As to all of them, however, the general rule should apply, that the liability of the government should in every instance be strictly defined in advance, and a court or courts be invested with full power to adjudicate finally upon every claim presented, leaving the result if favorable to the claimant a binding adjudication of liability upon the United States, and if unfavorable an equally binding and decisive bar to all further claim. In no instance should the legislature be invested with the adjudication of special and particular cases, any more than it should be charged with the re-examination of decisions of the the courts in suits between private parties.

As to the character of the courts in which suits against the government should be allowed, there is no denying the force of the grounds assigned by French writers in favor of a special tribunal or set of tribunals dealing exclusively with questions pertaining to governmental liability. The circumstances are largely foreign in their character to cases coming before ordinary courts of law; the elements of litigation are far more accessible to a special tribunal than they are to the ordinary courts; and a harmony and unity of views results from a separation of the jurisdiction from that of the ordinary courts which it would be hard to expect from numerous courts, sitting at different places and under different influences, passing upon the liability of the government. The courts, however, passing upon such questions should be a portion of the regular judiciary of the country, irremovable and independent of official influence.

Our Court of Claims in this respect offers perhaps a happy medium between the separate semi-official tribunals of France; and the English practice under which suits against the Crown are brought before the same courts which deal with cases between one citizen and another.

As steps proper for the completion of a system of remedial justice in case of citizens having demands against the government, I should name the following:

1. A right of suit against the government (preferably in
one special tribunal or set of tribunals) extending to all cases arising under the Constitution, or under any act of Congress or regulation of an executive department, or under any contract express or implied, and also over all claims arising out of torts committed through the mismanagement of property owned or operated by the government.

2. In all cases whether of contract or of tort, a strict definition by legislative authority of the liability of the government, with jurisdiction on the part of the court or courts to enter a final judgment in every case whether in favor of the claimant or the government.

3. The allowance of interest, not only where it is expressly stipulated for, but where it is fairly impliable from the nature of the transaction, as in case of a failure to pay a liquidated sum of money falling due at an appointed time.

4. The exclusion of all special or exceptional relief to any claimant on the part of the legislative authority.

In any legislation on this topic, the controlling idea should be the removal of the rights of the citizen against his government from the sphere of arbitrary power, political partisanship or personal favoritism, into the domain of general law.

George A. King.

Washington, D. C., 1893.