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THE DOCTRINE OF NON-SUABILITY OF THE STATE IN THE UNITED STATES

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PART I.

SUITS AGAINST THE STATE.

CHAPTER I.

The General Doctrine.

Its foundation.

The doctrine that the sovereign power may not be sued without its consent came to the United States as a part of the English law. In Continental jurisprudence it has a more limited scope than in English law. Ultimately, the doctrine goes back to the Roman law.

In England, at the time of the institution of royal courts, it would have been a strange proceeding for judges, acting for the king as his personal agents, to have attempted to hale him into court against his will. The principle of Roman law that "the will of the prince is law," though never adopted in England, influenced the judges to some extent, and served to give color to the immunity of the king. Later, the position of the courts became established, absolutism was definitely negatived by the rise of constitutional monarchy, and the king in his public capacity became differentiated from the king in his private capacity. The reason stated above then no longer applied to suits against him in his private character; and his immunity in this respect is simply a historical persistence.[1] The same reason continued, on the other hand, for the immunity of the crown as the personification of the English state. It

[1] For a tendency, however, to accord a similar immunity to the president of the United States, as a matter of public policy in the case of the chief executive, see Goodnow: *Admin. Law of the U. S.*, pp. 91, 435.

is the ground upon which Justice Miller rested the doctrine of the non-suability of the state: "It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists that the supreme power in every state, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself in those courts."[1] And it is this ground, namely, that a court, the agent of the state, cannot subject its creator to its jurisdiction, that is here adopted as the most obvious and sensible explanation.

Acceptance of this foundation of the doctrine does not prevent the recognition of other reasons in justification. The courts commonly dwell upon the public policy and practical utility of the exemption. Justice Gray expressed this view admirably: "The broader reason is that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury."[2]

Another view of the exemption, resting upon the eminent authority of Justice Holmes, is this: "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."[3] This afforded a basis for the extension of the exemption to the territory of Hawaii: "As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from which

[1] U. S. v. Lee, 106 U. S. 196.
[2] Briggs v. Light-boats, 11 Allen 157, 162.
[3] Kawanakoa v. Polybank, 205 U. S. 349.

persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course, it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow."

Now, this view of Justice Holmes was not necessary to the decision. The reason of public policy might well have been held to extend to a government exercising such broad powers as the territory of Hawaii. Or, the view might have been taken—which I think is the proper view of all local governments—that a territory stands, for its purposes, simply in the stead of the superior government, and is therefore entitled to the same immunity from suit, an immunity which the territory, not being made a mere municipal corporation, has not lost. Nor do I think that the view of Justice Holmes is sound. His statement that "a suit presupposes that the defendants are subject to the law invoked" is contrary to the position towards which he inclined in Missouri v. Illinois,[1] and which Justice Brewer adopted in Kansas v. Colorado,[2] that, in the main, there is no law governing the States in relation to each other, and that the supreme court must build up what Justice Brewer called an "interstate common law." Law is necessary for jurisdiction; but, having jurisdiction, it is the function of a court to administer justice, according to law if any law is applicable, but to administer justice at all events. If no law is applicable, the court should, in the language of Justice Holmes, "be governed by rules explicitly or implicitly recognized" in the relations of the parties. The state, in its relations to individuals, may be considered as acting with reference to the ordinary principles of law. Certain it is that the courts are constantly applying to cases between the state and individuals, with certain modifications, the ordinary principles of law. And this is true, not only in the matter of contracts, but even in such cases as "The Siren"[3]

[1] 200 U. S. 496.
[2] 206 U. S. 46.
[3] 7 Wall. 152.

and "The Davis,"[1] in which maritime liens were held to attach to property of the United States just as to property of individuals.

In international law.

The discussion thus far has related to the immunity of the state from suit in its own courts. The immunity in the courts of another state must, of course, rest upon a different basis. It is founded upon the international comity according to which, in the language of Chief Justice Marshall, "all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers,"[2] in favor of other sovereigns.

The extent of the exemption depends upon the point of view. Sir Robert Phillimore, in the case of "The Charkieh,"[3] stated the principle to be that the sovereign "is personally exempt from all process in a civil cause, and from any action which renders such service necessary." An admiralty proceeding in rem does not require such service. The exemption of property of a foreign sovereign from such an action he rested, therefore, not upon tne immunity from suit, but separately upon the same "object of international law" as sustains the personal immunity from suit—"to substitute negotiations between governments . . . for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state." He limited the exemption, accordingly, to cases where the res "can in any fair sense be said to be connected with the jus coronæ of the sovereign"; though he doubted but what, even in the case of a public war vessel, a proceeding in rem might be maintained where a maritime lien is given by the jus gentium. A similar view—that certain classes of property devoted to religious or public purposes are exempt from liens, but that where such a lien exists it may be en-

[1] 10 Wall. 15.
[2] "The Exchange," 7 Cranch 116.
[3] 2 L. J. Adm. 17.

forced in rem—is indicated in the opinion of Justice Story in U. S. v. Wilder.[1] Chief Justice Waite, also, in "The Fidelity,"[2] took the view that the exemption of public vessels from admiralty suits in rem arises not out of a want of power to sue the public owner, but out of a want of liability on the part of the vessel. All of these expressions, it may be said, are purely obiter.

The position of Sir Robert Phillimore was repudiated by the court of appeals in "The Parlement Belge,"[3] reversing his decision refusing exemption to a vessel, the public property of Belgium, used for the mails, and incidentally engaged in ordinary carrying trade. The court criticized his "intimation of an opinion, not yet conclusively formed, that proceedings in rem are a legal procedure solely against property, and not directly or indirectly against the owner of the property"; and regarded a libel in rem as an indirect way of impleading the owner, the result of admiralty necessity. "To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests." The same view of a libel in rem was taken by the judicial committee of the privy council in Young v. S. S. Scotia,[4] in which it was held that a lien for salvage could not be enforced against a ferry-boat, the property of the crown, destined for service in the operation of a government railway in Canada. "Where you are dealing with an action in rem for salvage, the particular form of procedure which is adopted in the seizure of the vessel is only one mode of impleading the owner." In "The Jassy,"[5] a vessel owned under similar conditions by the Roumanian government was held exempt. In Mason v. Intercolonial Railway of Canada,[6] the supreme court of Massachusetts

[1] 3 Sumner 308.
[2] 16 Blatchf. 569.
[3] 5 Prob. Div. 197.
[4] 89 L. T. 374.
[5] 75 L. J. (N.S.) P.D & Adm. Div. 93.
[6] 197 Mass. 349.

dismissed for want of jurisdiction a suit by trustee process for a tort against the Intercolonial Railway, unincorporated, the property of the crown.

The better view, then, of the principle governing the immunity of a state from suit in the courts of another state, is that no state will subject another state to its territorial jurisdiction; so that the immunity extends, not only to actions requiring personal process, but also to actions in rem against the property of the state.

CHAPTER II.

The Doctrine in the United States. Under the Federal Constitution.

In Chisholm v. Georgia,[1] some doubt was expressed as to the applicability of the doctrine of non-suability of the state to a republic. Justice Wilson limited the doctrine to autocratic sovereigns. In the United States, according to his view, the people are sovereign; they have not delegated all their powers to the State governments; hence these governments—or, regarded as artificial persons, the States—are not sovereign in this sense. This reasoning applies as much to the United States as to a State; though Justice Wilson did not expressly say that the United States is liable to suit. Doubtless, he would have found some ground of distinction. Chief Justice Jay adopted a somewhat different line of reasoning. Immunity from suit, he said, naturally attached to a feudal sovereign as the sole fountain of justice; but where the citizens are equal and are joint tenants of the sovereignty, there is no reason why one citizen may not sue the rest. He saw no more difficulty in a suit against the fifty thousand citizens of Delaware, than against the forty thousand of the city of Philadelphia. The liability of the United States to suit he doubted simply on the practical ground that the courts of the United States could not rely on the executive arm of the government in such case to support their proceedings and judgments.

Manifestly, these views are based on false political theories. And the doctrine of non-suability of the state was early established in American law. It was accepted by all in the discussions in convention over the clause in the constitution extending the judicial power of the United

[1] 2 Dall. 419.

States to "controversies between a State and the citizens of another State." It was no doubt clinched by the storm of protest raised by Chisholm v. Georgia. No State court has seriously questioned it. And in Cohens v. Virginia,[1] in which, according to Justice Miller, the general doctrine was first recognized by the supreme court, it was taken for granted.

A different question is whether, in our federal system, the United States and the States, respectively, are entitled to immunity from the jurisdiction of the courts of the other. The State courts have never denied the immunity of the United States. And, as might be expected, the supreme court will enforce this immunity, as in Stanley v. Schwalby,[2] by reversing the action of a State court.[3] This action is abundantly justified on the ground of the supremacy of the federal government, or of an implied principle of our federal system, as in the matter of exemption of federal and State governmental agencies, respectively, from taxation by the other.

The question of the liability of a State to suit in a court of the United States arose upon a construction of the provision of article III of the constitution, that "The judicial power of the United States shall extend . . . to controversies . . . between a State and citizens of another State." In August term, 1791, Alexander Chisholm, a citizen of South Carolina, brought action of assumpsit in the supreme court against the State of Georgia.[4] On July 11, 1792, the marshal for the district of Georgia made return of service on the governor and attorney general of Georgia. On August 11, Attorney General Randolph, counsel for plaintiff, moved: "That unless the State of Georgia shall, after reasonable previous notice of this motion, cause an appearance

[1] 6 Wheat. 382.

[2] 162 U. S. 255. In this case, the Texas court considered that the United States had waived its immunity. The supreme court held contra.

[3] See also Carr v. U. S., 98 U. S. 433.

[4] 2 Dallas 419. Similar cases brought about the same time—Van Stophorst v. Md., 2 Dall. 401, Oswald Admr. v. State of N. Y., 2 Dall. 401, 2 Dall. 415.

to be entered in behalf of the said State, on the fourth day of the next term, or shall then show cause to the contrary, judgment shall be entered against the said State, and a writ of enquiry of damages be awarded." But, to avoid every appearance of precipitancy, and to give the State time to deliberate on the measures she ought to adopt, on motion of Mr. Randolph it was ordered by the court that the consideration of the motion be postponed to the next term. Messrs. Ingersoll and Dallas presented a written remonstrance and petition on behalf of Georgia against the exercise of jurisdiction in the cause; but, in consequence of positive instructions, they declined taking any part in argument. The case was submitted on February 5, 1793, on the argument of Mr. Randolph alone. On February 18, the decision of the court was handed down on the great question whether a State might be involuntarily impleaded in a federal court. Four justices—John Jay, Chief Justice, of New York; John Blair, of Virginia; William Cushing, of Massachusetts; and James Wilson, of Pennsylvania—joined to hold the State liable. James Iredell, of North Carolina, alone dissented.

The main stand of the majority was upon the letter of the constitution. As Mr. Randolph argued, conceding, as he did, the sovereignty of the States, if the constitution provided for jurisdiction over them by the federal courts, that was simply one of many diminutions of sovereignty. On the other hand, the provision might be construed in the light of established principles, as the grant of judicial power has been construed in other respects.[1] The courts of the United States are courts of limited jurisdiction; and, if the judicial power had not been extended to cases in which a State should be a party, no jurisdiction could have been entertained in such cases even with the consent of the State.[2] The provision covering such cases might well be construed as conferring jurisdiction subject to the established doctrine

[1] Cherokee Nation v. Georgia, 5 Pet. 1. Wisconsin v. Pelican Ins. Co., 127 U. S. 265.

[2] Postal Tel. Co. v. Alabama, 155 U. S. 482.

that a state cannot be sued without its consent. Justice Iredell was strongly of opinion that the constitution was to be construed "as intending merely a transfer of jurisdiction from one tribunal to another." And this view was adopted by Justice Bradley, speaking for the court in Hans v. Louisiana.[1] "The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States. . . . The suability of a state without its consent was a thing unknown to the law."

Which construction was proper should have been determined upon two considerations: the spirit of the constitution, and the intention of those who adopted it. Justice Wilson and Attorney General Randolph, the master minds on their side, were strongly convinced of the necessity of allowing suits against the States in the courts of the United States on federal grounds—the maintenance of harmony, and the enforcement of constitutional limitations.[2] Naturally, with such political views, they held that the spirit of the constitution demanded a literal construction. Justice Iredell differed even upon the question of policy. The other consideration, the actual intention upon the particular point of those who adopted the constitution, was completely ignored. In the main, the provision seems to have been overlooked in the State conventions. But where its significance was appreciated, it was made the subject of violent attacks by the opponents of the constitution, attacks that were successfully met only by the solemn assurances of its friends—Hamilton, Madison, Marshall—that such an unheard of thing as a suit by an individual against a State was never contemplated. Certainly, it may be taken for granted

[1] 134 U. S. 1.

[2] Randolph had expressed similar views in the Virginia convention. Wilson was probably responsible for the provision in question.

For a collection of the historical facts upon the provision of the judiciary article, upon Chisholm v. Ga., and upon the adoption of the 11th amendment, see "The Eleventh Amendment", an address before the Virginia State Bar Assn., July 30, 1907, by A. Caperton Braxton.

that the constitution could never have been adopted if it had been understood to contain the doctrine of Chisholm v. Georgia. The action of the court was regarded as the imposition of personal political views. It was met by a storm of protest throughout the country, and the reversal of the action by the eleventh amendment.[1]

Justice Iredell, although expressing an opinion strongly against a literal construction of the constitution, restricted his decision to a narrower ground. He took the position that the constitutional grant of judicial power required legislation by congress to put it into effect; and that "whatever be the true construction of the constitution in this particular; whether it is to be construed as intending merely a transfer of jurisdiction from one tribunal to another, or as authorizing the legislature to provide laws for the decision of all possible controversies in which a State may be involved with an individual, without regard to any prior exemption; yet it is certain that the legislature has in fact proceeded upon the former supposition, and not upon the latter." The judiciary act conferred upon the courts of the United States the power to issue certain specified writs, and such other writs as should be necessary to the exercise of their jurisdiction, "agreeable to the principles and usages of law." But, Justice Iredell reasoned, this did not confer power to issue a writ against a State, because there was no mode applicable of proceeding against a State "agreeable to the principles and usages of law." None of the States made provision for such proceedings at the time of the judiciary act, even if such provision would have availed in this case. The only other possible source was the English law; and in a learned exposition of petition of right and of process in exchequer, Justice Iredell showed that these remedies against the crown were of an entirely different nature than the action in hand.

[1] In February term, 1794, judgment was entered for the plaintiff in Chisholm v. Georgia, and the writ of enquiry awarded. The writ, however, was never sued out and executed; so that the cause, with all similar causes, was swept from the records by the eleventh amendment, agreeably to the unanimous determination of the judges in Hollingsworth v. Va., February term, 1798.

This reasoning, it seems to me, is faulty. It would limit, in cases where a State is suable as of right, to forms of action where the state is not suable as of right. If a State is suable as of right, the ordinary forms of action ought to lie. Thus, Attorney General Randolph took it for granted that, if a State is liable to suit, assumpsit would lie. The majority justices did not discuss the question upon which Justice Iredell based his decision, except as to the matter upon whom service on the State should be served, upon which they agreed that the service in the case in hand was sufficient. Certainly, the supreme court has always held itself fully equipped, as to process, service, course upon failure to appear, judgment, to exercise its original jurisdiction in cases in which a State is a party.[1]

If the view be adopted that the constitutional provision extending the judicial power to suits between a State and the citizens of another State is to be construed in the light of established principles, the question remains whether the position of the States in the Union is such as to entitle them to the principle of exemption in a court of the United States. This question was not satisfactorily discussed in Chisholm v. Georgia. As already stated, those of the majority, in the main, whether accepting the sovereignty of the States or expressing no opinion thereupon, relied on the words of the constitution. Justice Wilson himself justified his grandiloquent pronouncement that "the question . . . may, perhaps, be ultimately resolved into one no less radical than this—do the people of the United States form a nation?" by no r[illegible] exposition of the position of a State in the Union. The theory of divided sovereignty accepted at the time of Chisholm v. Georgia would clearly sustain the exemption. Whether, accepting the present doctrine of the

[1] For rules of court governing cases in which a State is defendant, see Grayson v. Va., 3 Dall. 320.

For varying opinions as to whether the power to exercise the original jurisdiction conferred by the constitution is inherent in the supreme court, or whether it is derived from act of congress, see N. J. v. N. Y., 5 Pet. 284; R. I. v. Mass., 12 Pet. 657; Pa. v. Wheeling, etc. Bridge Co., 13 How. 518; Fla. v. Ga., 17 How. 478; Ky. v. Dennison, 24 How. 66. Also Wisc. v. Pelican Ins. Co., 127 U. S. 265.

unity of sovereignty in the United States, the exemption of a State may be supported upon an implied principle of our federal system of government, may be debated, in view of other federal reasons in favor of liability. Looking at the matter entirely apart from the constitutional provision, a State would, of course, be entitled to exemption upon the extension of the principle, as in Kawanakoa v. Polybank,[1] to any government that exercises general legislative powers. Whether, however, a principle of exemption based upon anything less than actual sovereignty should control the words of the constitution, seems doubtful.

From the above discussion, it will be seen that the court had a difficult case in Chisholm v. Georgia. The decision, whether right or wrong, that a State might be subjected to suit by a citizen of another State, was, however, overturned, and the question finally settled by the eleventh amendment, providing that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state."

Evidently, the idea never occurred to anyone at the time of the adoption of the eleventh amendment that a suit might be brought in a court of the United States against a State by its own citizen, under the grant of judicial power over "all cases in law and equity arising under the constitution or laws of the United States." And, from the time of the eleventh amendment, it was generally recognized that no individual could subject a State to suit. It is true that, in Cohens v. Virginia,[2] Chief Justice Marshall used language that seemed to indicate that the exemption did not extend to suits against a State by its own citizens; but this suggestion, which was later the main reliance of plaintiff in Hans v. Louisiana, was entirely unnecessary to the case. In Osborn v. Bank,[3] although the bank was a corporation of

[1] 205 U. S. 349.
[2] 6 Wheat. 264.
[3] 9 Wheat. 738.

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the United States, and therefore not within the terms of the eleventh amendment, the chief justice discussed the case upon the basis of the non-suability of the State. In United States v. Lee,[1] Justice Miller said: "It is obvious that, in our system of jurisprudence, the principle is as applicable to each of the States as it is to the United States." And Justice Gray declared in the same case: "The decision in Chisholm v. Georgia was based on a construction of the words of the constitution. . . . That construction was set aside by the eleventh amendment." In Poindexter v. Greenhow,[2] the court discussed all the cases upon the basis of non-suability of a State, although in the title case the parties were both citizens of Virginia. And in his dissenting opinion, concurred in by three other justices, Justice Bradley expressly took the ground that, although the eleventh amendment does not apply to suits against a State by its own citizens, it would be absurd to maintain such liability.

In Hans v. Louisiana,[3] the question came squarely before the supreme court, on appeal from a decision of the United States circuit court, dismissing a suit brought, on a federal ground, by a citizen of Louisiana against the State of Louisiana.[4] The court unanimously affirmed the decision below. Justice Bradley, speaking for the court, said: "Adhering to the mere letter, it might be so; and so, in fact, the court held in Chisholm v. Georgia; but looking at the subject as Hamilton did, and as Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right—as the people of the United States in their sovereign capacity subsequently decided." That the principle of immunity applied to the States, he seems not to have doubted; and the eleventh amendment he regarded as having established a rule of construction for one clause that ought to be applied also to other similar clauses.

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[1] 106 U. S. 196.
[2] 114 U. S. 270.
[3] 134 U. S. 1.
[4] Reaffirmed in North Carolina v. Temple, 134 U. S. 22.

Justice Harlan expressed his disapproval of the criticism of Chisholm v. Georgia. His opinion, it seems, however, was simply that literal construction was proper at that time, and not that the principle of immunity does not naturally apply to the States; for in United States v. Texas,[1] he said of Hans v. Louisiana: "That case, and others in this court relating to the suability of States, proceeded upon the broad ground that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." It may be said that the decision in Chisholm v. Georgia, in favor of literal construction of the constitution as it then stood, seems, also, to be approved by Chief Justice Marshall in Cohens v. Virginia, in marked inconsistency with his assurances in the Virginia convention. In New Hampshire v. Louisiana,[2] Chief Justice Waite used the fact that a direct remedy was given by the original constitution to citizens of one State against another State, as an argument against allowing the indirect remedy through the action of their State in their behalf.

In Smith v. Reeves,[3] the principle of Hans v. Louisiana was applied to exclude from the general right of a corporation of the United States to bring suits in the courts of the United States, suits against a State. In Governor of Georgia v. Madrazo,[4] Justice Johnson, dissenting, held, and Chief Justice Marshall noticed the objection without ruling upon it, that the eleventh amendment applies only to suits in law and equity, and that the immunity of a State does not extend to suits in admiralty. In view of the subsequent attitude of the court, in favor of the immunity of a State from all suits by individuals, this view may be regarded as wrong.

Some expressions in other cases seem to indicate a view that the exclusion of all suits by individuals against States was accomplished by the eleventh amendment, not by reversing a rule of construction so as to secure to the States their proper exemption, but directly by awarding such an

[1] 143 U. S. 621.
[2] 108 U. S. 76.
[3] 178 U. S. 436.
[4] 1 Pet. 110.

exemption. Thus, in South Dakota v. North Carolina,[1] Justice Brewer, speaking for the majority, said: "We are not unmindful of the fact that in Hans v. Louisiana . . . Mr. Justice Bradley . . . expressed his concurrence in the views announced by Mr. Justice Iredell, in the dissenting opinion in Chisholm v. Georgia; but such expression cannot be considered as a judgment of the court, for the point decided was that, construing the eleventh amendment according to its spirit rather than by the letter, a State was relieved from liability to suit at the instance of an individual, whether one of its own citizens or a citizen of a foreign State." And in the dissenting opinion of the four justices in the same case, Justice White said of the decision in Hans v. Louisiana: "It held that the effect of the eleventh amendment was to qualify, to the extent of its prohibitions, the whole grant of judicial power; and, therefore, although a suit by a citizen of a State against a State, to enforce assumed constitutional rights, was not within the letter of the amendment, it was within its spirit." Justice Peckham, also, in delivering the opinion of the court in Ex parte Young, said, in conceding that the eleventh amendment must be given its full and fair meaning: "It applies to a suit brought against a State by one of its own citizens, as well as to a suit brought by a citizen of another State. Hans v. Louisiana."[2]

In the main, however, the court has recognized the immunity from suits by individuals as a natural attribute of the States. As Justice Miller said, in United States v. Lee: "It is obvious that, in our system of jurisprudence, the principle is as applicable to each of the States as it is to the United States." Certainly, the States, though not sovereign in political theory, have in general been accorded the attributes of sovereignty, as—to use a term of Justice Holmes[3]—quasi-sovereign.

The constitution also provides that the judicial power of the United States shall extend to controversies between two

[1] 192 U. S. 286.
[2] 209 U. S. 123.
[3] Ga. v. Tenn. Copper Co., 206 U. S. 230.

or more States. The undoubted intent here would demand in any view that this provision should be held not to require the consent of a State sued.

The jurisdiction over "controversies between a State . . . and foreign states," also conferred by the constitution, the court has never been called upon to exercise; but, in view of the fact that the eleventh amendment left unchanged this part of the clause in the constitution, it may be assumed that this provision would likewise be held not to require the consent of a State sued.

A question not quite so simple was whether a State could be subjected to suit by the United States. Justice Peckham, in United States v. Michigan,[1] seemed to consider that such a suit might be entertained as "between States." So, also, Justice White, in South Dakota v. North Carolina.[2] But this view appears ill-founded. The jurisdiction must be sustained upon the clause extending the judicial power to "controversies to which the United States shall be a party."

In Florida v. Georgia,[3] Justices Campbell, Curtis, and McLean, dissenting, held that the United States could not sue a State; that "the constitution did not enlarge the liability of States to suits, but only provided tribunals to which suits might be brought to which they were already subject." Chief Justice Taney, speaking for the court, touched upon the question merely in arguing that if the United States could not become a party, there was all the more reason for allowing the attorney general to argue in behalf of the United States without making the United States a party. In United States v. North Carolina,[4] the supreme court decided a case brought by the United States against North Carolina, the State making no objection.

In United States v. Texas,[5] objection was made, and the question came squarely before the court for decision. Juris-

[1] 190 U. S. 379.
[2] 192 U. S. 286.
[3] 17 How. 478.
[4] 136 U. S. 211.
[5] 143 U. S. 621.

diction was upheld. Justice Harlan, delivering the opinion of the court, considered that, although "it is inherent in the nature of sovereignty not to be amenable to suit by an individual without its consent," "the question as to the suability of one government by another government rests upon wholly different grounds." This is, I think, an incorrect statement of the principle of non-suability of the State. The principle is not simply that sovereignty may not be sued by an individual, but that sovereignty is not subject to the jurisdiction of courts. The ruling in the case is abundantly justified, however, by weighty federal reasons, and by the fact that the States are subject to suit by one another.

The converse of this case—a suit by a State against the United States—has also arisen. The view of Justice Harlan that the principle of non-suability does not apply to suits by one government against another government would, of course, logically support such a case. Justice White, in South Dakota v. North Carolina,[1] argued upon the assumption that such a suit may be maintained. In Kansas v. United States,[2] however, the supreme court, without dissent, dismissed the case for want of jurisdiction, on two grounds: first, that the State had no substantial interest, and was simply acting for individuals; second, that a State may not sue the United States without its consent. Chief Justice Fuller, delivering the opinion of the court, said: "It does not follow that because a State may be sued without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids this conclusion." This holding was unnecessary to the decision, and, therefore, to some extent extra-judicial. Yet it is, no doubt, to be accepted as final. It may, perhaps, be justified upon the ground that the reasons for allowing such suits are less urgent than in the converse case, upon the supremacy of the federal government, and upon the position of the court as a part of the federal government.

[1] 192 U. S. 286.
[2] 204 U. S. 331.

CHAPTER III.

Principles of the Constitution of the United States Governing Suits Against States.

The eleventh amendment and suits between States.

In New Hampshire v. Louisiana and New York v. Louisiana,[1] the plaintiff States brought suit in the supreme court on bonds of the State of Louisiana assigned to them by their citizens for collection, the States acquiring no beneficial interest, but simply allowing the use of their names for the purpose of suit. There are two possible modes of viewing these cases: first, as actions in behalf of their citizens by the States in their sovereign capacity; second, simply as ordinary actions by holders of a bare legal title.

Chief Justice Waite, who delivered the opinion, conceded the right to act thus in behalf of citizens as a "well recognized incident of national sovereignty"; but argued that the means are by diplomatic negotiations, treaty, and war, and that, since the States do not possess these attributes of independent nations, they cannot so act. Such, it is true, are the means between independent nations. But, although the States have lost these means, it has been repeatedly held that the constitution substituted a judicial remedy for controversies of a justiciable nature. The force of Chief Justice Waite's further argument—that the grant in the constitution of a direct remedy by citizens of one State against another State impliedly negatived the indirect remedy, and that the taking away of the direct remedy by the eleventh amendment did not restore the indirect remedy—depends upon whether Chisholm v. Georgia be viewed as right or, as it is viewed in Hans v. Louisiana, as wrong.

Upon the other aspect of the case, it has been repeatedly

[1] 108 U. S. 76.

stated that jurisdiction was wanting because the plaintiff States had no real interest. But such a title is sufficient, on ordinary principles of law, to constitute the holder a real party to an action. The proper ground for the unanimous decision for dismissal is that the case was a palpable attempt to evade the eleventh amendment. As Justice White explained the case in South Dakota v. North Carolina:[1] "The case was decided, not upon the particular nature of the title of the bonds and coupons asserted by the States, since it was conceded that, but for the constitution, a title such as that propounded would have given rise to an adequate cause of action. The ruling of the court was that, as suits against a State upon the claims of private individuals were absolutely prohibited by the eleventh amendment, such character of claim could not be converted into a controversy between States, and thus be made justiciable, since to do so would destroy the prohibition which the eleventh amendment embodied."

Some years later, South Dakota brought suit in the supreme court on bonds of North Carolina that had been assigned to her outright as an absolute gift. One motive of the donor was doubtless to make North Carolina pay, even if he got no benefit. A more substantial motive was the prospect that, if the suit by South Dakota were successful, North Carolina would be inclined to make a settlement with other bondholders, of whom he remained one. The question was whether such a suit was prohibited by the spirit of the eleventh amendment. The case might with good reason have been decided either way; and it is not surprising that the decision upholding jurisdiction was carried by only five to four. On the one hand, was the fact of the substantial interest of the State, and the absence of interest of individuals. On the other hand, the federal policy that prompted the grant of jurisdiction over controversies between States hardly extends to such a suit. Moreover, to allow such suits certainly opens the way, at least, as in the case in hand, to evasions of the eleventh

[1] 192 U. S. 286.

amendment. Justice White, in the able dissenting opinion, said: "My mind cannot escape the conclusion that if, wherever an individual has a claim, whether in contract or tort, against a State, he may, by transferring it to another State, bring into play the judicial power of the United States to enforce such claim, then the prohibition contained in the eleventh amendment is a mere letter, without spirit and without force." He argued that the obligations of a State taken up by individuals are without sanction, other than the good faith and honor of the sovereign itself; and that, if acquired by another State, they remain subject to the same conditions.

A compromise was suggested by Mr. Carman F. Randolph, writing in the *Columbia Law Review:* "If a State of the Union becomes indebted in due course to the United States, or to another State (perhaps to a foreign state), it is liable to suit. And this is so if evidences of debt, originally in private hands, come into public treasuries in due course. But where a claim is acquired by a government only because a private claimant cannot secure its payment, a suit for its recovery should be dismissed as an attempt to evade the eleventh amendment."[1] Such a distinction, even if practicable, has no real foundation in principle. The jurisdiction over controversies between States might, however, perhaps with better reason, have been held to include only cases arising directly between States, and not cases arising merely from the acquisition of choses in action.

Consent of State and jurisdiction of federal courts.

The courts of the United States, being courts of limited jurisdiction, cannot, even by consent of the parties, exercise jurisdiction not conferred by the constitution.[2] If, therefore, the constitution has not extended the judicial power to cases in which a State is party, consent of a State can-

[1] "Notes on suits between States": *Col. L. Rev.*, II, 283.

[2] See Postal Tel. Co. v. Ala., 155 U. S. 482, in which the supreme court of its own motion raised an objection to jurisdiction. Also, Minn. v. Hitchcock, 185 U. S. 373.

not confer it. The constitution did extend the judicial power in certain cases over suits by individuals against States. This might have been construed as allowing suits only with the consent of the States sued. In Chisholm v. Georgia, however, literal construction was adopted. Now, if the eleventh amendment had simply reversed this construction, jurisdiction might still have been entertained with the consent of the States sued. But the eleventh amendment did not stop there; it provided that "The judicial power shall not be construed to extend to any suit in law or equity commenced or prosecuted against any of the United States by citizens of another State, or by citizens or subjects of a foreign state." The effect was just as if the judicial power had never been extended to such cases. It would seem clear, therefore, that consent of the States cannot confer jurisdiction.[1]

Of course, unless the immunity of the States from suits by individuals in cases not covered by the terms of the eleventh amendment be held to be due, not to the reversal of a rule of construction so as to uphold their natural immunity, but to a direct extension of immunity by the spirit of the eleventh amendment,[2] there is nothing to prevent jurisdiction with consent of the State in suits by individuals against States under clauses of the constitution not altered by the eleventh amendment.

Although the point is so clear, there is authority to the contrary in the supreme court reports. Justice Brewer, in Reagan v. Farmers' Loan and Trust Company,[3] said it might well be argued that "the limitation of the eleventh amendment simply creates a personal privilege which can at any time be waived by the State," although it was unnecessary to go so far in that case. In Smyth v. Ames,[4] Justice Harlan, in the opinion of the court, said of the objection that the suit was against the State: "This point

[1] See Wm. D. Guthrie: "The Eleventh Amendment": VIII *Col. L. Rev.*, 183.
[2] See above, p. 23.
[3] 154 U. S. 362.
[4] 169 U. S. 466.

is perhaps covered by the general assignments of error, but it was not discussed at the bar by the representatives of the State board. It would, therefore, be sufficient to say that these are cases of which, so far as the plaintiffs are concerned, the circuit court has jurisdiction," on the grounds both of diverse citizenship and of a federal question; although he went on to hold that the case was not a suit against the State. Now, if such a suit might be a suit against the State, it was manifestly the duty of the court, even on its own motion, to examine the question. Of course, if the view be taken of suits against public officers that, when jurisdiction is lacking, it is not because in effect suits against States, but because there is no real ground of action against the defendants, this criticism is not in point.[1] The same remark applies to Illinois Central Railroad Company v. Adams,[2] in which the court held that a motion to dismiss for lack of jurisdiction is not the proper method of objection on this ground. It does not, however, cover the argument of Justice Harlan in his dissenting opinion in Ex parte Young,[3] explaining away the Reagan and Smyth cases as forms of suits against themselves which the States had permitted. This position of Justice Harlan, involving the opinion that consent of a State may give jurisdiction of a case within the terms of the eleventh amendment, must, however, be viewed in the light of its argumentative purpose; it is contrary to his expressions in other cases, and, as to Smyth v. Ames, involves a distorted explanation of the case, and the contradiction of the unanimous opinion in Smith v. Reeves, written by himself, that a State may restrict its consent to be sued to its own courts.

A number of cases in which States have provided for suits against themselves have come up to the supreme court on writs of error from the highest State courts.[4] In all

[1] See below, Part II, Chap. VIII.
[2] 180 U. S. 28.
209 U. S. 123.
[4] Curran v. Arkansas, 15 How. 304; Beers v. Arkansas, 20 How. 527; M. & C. R.R. Co. v. Tenn., 101 U. S. 337; So. & North. Ala. R.R. Co. v. Ala., 101 U. S. 832; Hall v. Wisc., 103 U. S. 5.

such cases, it is taken for granted that the consent of the State has waived the question of jurisdiction. So far as I have been able to discover, however, none of these cases was brought by a citizen of another State; so that the eleventh amendment did not directly apply, and the attitude of the court was entirely proper. Justice Harlan, in General Oil Company v. Crain,[1] stated that "it was long ago settled that a writ of error to review the final judgment of a State court . . . is not a suit within the meaning of the eleventh amendment. Cohens v. Virginia, 6 Wheat. 264." Now, Cohens v. Virginia decided no such thing. It decided simply that a proceeding on writ of error is merely a continuation of the case below. In Cohens v. Virginia, the suit was brought not against the State, but by the State, so that the eleventh amendment could not apply; and the character of the suit was not changed by the writ of error. This very reasoning would bar from the federal courts a suit that is in its origin a suit against the State by a citizen of another State, just as much on writ of error as by original suit.

In Clark v. Barnard,[2] a railroad company gave to the State of Rhode Island a bond for $100,000, conditioned on completing a portion of road within a certain time. As security, the railroad company loaned $100,000 to the city of Boston, for which the latter gave its note to the treasurer of Rhode Island. The road becoming insolvent, after the time named in the bond, the receiver brought suit in the United States circuit court, on the ground of diverse citizenship, against the treasurer of Rhode Island and the city of Boston, alleging that the bond was invalid, for a decree ordering the treasurer to give back the note of the city of Boston, and enjoining him from receiving the money and the city from paying it over, and for the restoration of the money to the railroad. The treasurer demurred on the ground that it was in effect a suit against the State; but the demurrer was overruled. The court required the city of

[1] 209 U. S. 211.
[2] 108 U. S. 436.

Boston to pay the $100,000 into court, with leave to the State to prove any damages it might have sustained on account of the breach of the condition of the bond. The State then became a party claimant to the fund, "without prejudice to the demurrer of the treasurer." The State proved no damages, and the funds were awarded to the railroad. On appeal, the supreme court held the State entitled to the funds, on the ground that the bond became forfeited on breach of the condition, without proof of damages.

What is in point here is the ruling on the question of suit against the State. Justice Matthews, speaking for the court, said: "We are relieved, however, from its consideration, by the voluntary appearance of the State in intervening as a claimant of the funds in court. The immunity from suit belonging to a State, which is respected and protected by the constitution within the limits of the judicial power of the United States, is a personal privilege, which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction. . . . It became an actor as well as defendant."

Now, if the case could be regarded as a suit by the State, it would be all right. But the difficulty is that the State could not bring such a suit in the United States circuit court; for the circuit courts have no jursdiction of suits between a State and a citizen of another State, unless a federal question is involved.[1] On the other hand, if the court had jurisdiction of the original suit, the fact that the State became a party would not oust the jurisdiction once attached.[2] But the court expressly said that it was not necessary to decide whether the suit was obnoxious as a suit against the State, because the State was a voluntary party. Moreover, although the circuit court held the original suit was not in effect a suit against the State, it is very debatable whether the State was not an indispensable party. So that, strictly

[1] Postal Tel. Co. v. Ala., 155 U. S. 482.
[2] Phelps v. Oaks, 117 U. S. 236.

analyzed, the case may be regarded as holding squarely that consent of the State sued may confer jurisdiction in a case within the terms of the eleventh amendment. If this holding is to be explained away, it may, perhaps, best be done on the ground that the State became a party plaintiff, and that the court overlooked the objection to such a suit by the State.

Not quite so difficult to justify is Gunter v. Atlantic Coast Line Railroad Company.[1] In Humphrey v. Pegues,[2] had been sustained a decree of a United States circuit court, enjoining certain county treasurers of South Carolina from proceeding to collect a tax on a railroad company, declared unconstitutional as a violation of a contract exemption. Twenty-five years later, the State by law directed the attorney general to bring suit to recover taxes to be assessed for ten years back on railroad property that had been off the books. The suit of Gunter v. Atlantic Coast Line Railroad Company was brought as ancillary to Humphrey v. Pegues, to restrain suit under the act for taxes that had been declared unconstitutional in that case. The court avoided the necessity of deciding whether the new suit by itself was open to objection as a suit against the State, by holding that Humphrey v. Pegues was an action under a State law construed as providing therefor as a form of action against the State, and that, since the State was a party bound by the decision in that case, the present action, even if a suit against the State, was a proper proceeding to enforce that decision.

That the court was of opinion that consent of a State may waive the limitations of the eleventh amendment is evident from the statement in the opinion of the court, written by Justice White, of the "elementary propositions"; that "In view of the prohibitions of the eleventh amendment . . . , a State, without its consent, may not be sued by an individual in a circuit court of the United States," and that "Although a State may not be sued without its consent,

[1] 200 U. S. 273.
[2] 16 Wall. 244.

such immunity is a privilege which may be waived." This decision may, however, readily be sustained on other ground: to wit, that Humphrey v. Pegues in its inception was clearly a proper suit against the county treasurers as individuals, and that, when the defense in accordance with the State law made it also a form of action against the State, this development did not devest the jurisdiction that had already attached.[1]

In view of the peculiar circumstances of Clark v. Barnard and of Gunter v. Atlantic Coast Line Railroad Company, the question may fairly be regarded as not finally settled. It is so clear on principle that consent of a State cannot remove the limitations of the eleventh amendment, that, if the question is squarely presented and argued, the court may yet so hold.

Restriction of consent to State courts.

In Smith v. Reeves,[2] it was held, as an exception to the general principle that where a suit may be maintained in a State court the State cannot prevent resort to the federal courts if the requisites for federal jurisdiction are present, that a State, in allowing suits against itself, may limit such suits to its own courts, to the exclusion of the federal courts.[3] This decision is well based on the ground that a remedy by an individual against a State is purely a matter of grace, subject to such conditions as the State may choose to impose.

In the same case, however, it was stated by Justice Harlan, in the opinion of the court, that the right of the State is "subject always to the condition, arising out of the supremacy of the constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State, in any action brought against

[1] Phelps v. Oaks, 117 U. S. 236.
[2] 178 U. S. 436.
[3] Under the view urged in the last section, a suit against a State within the prohibition of the eleventh amendment is without the jurisdiction of the federal courts, even with the consent of the State.

it with its consent, may be reviewed or reexamined, as prescribed by the act of congress, if it denies to the plaintiff any right, title, privilege, or immunity secured to him and specially claimed under the constitution or laws of the United States." Justice Holmes, also, in Chandler v. Dix,[1] said: "Of course, a taxpayer denied rights secured to him by the constitution and laws of the United States, and specially set up by him, could bring the case here by writ of error from the highest court of the State." The point has not, however, been decided. With due respect for the dicta of the learned justices, I can see no reason whatever why, if the grant of a remedy against itself is a matter of grace on the part of the State, it may not exclude the jurisdiction of the supreme court just as well as of the circuit courts of the United States.

Withdrawal of consent and impairment of the obligation of contracts.

In Memphis and Charleston Railroad Company v. Tennessee,[2] the principle that an impairment of the remedy is an unconstitutional impairment of the obligation of the contract was invoked against the State. The supreme court held, however, that, since the remedy withdrawn had conferred on the State court no power to execute the judgment, which remained dependent on an appropriation by the legislature, it was not such an effective judicial remedy as to come within the principle.[3]

In the earlier case of Beers v. Arkansas,[4] it had been held that a general law allowing suits against the State did not become part of a contract. And this was necessarily the view of the four justices concurring in the opinion written by Justice Matthews in Antoni v. Greenhow,[5] and of the four dissenting justices in Poindexter v. Greenhow,[6] where

[1] 194 U. S. 590.
[2] 101 U. S. 337.
[3] Reaffirmed in So. & No. Ala. R.R. Co. v. Ala., 101 U. S. 832.
[4] 20 How. 527.
[5] 107 U. S. 769.
[6] 114 U. S. 270.

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the remedy was judicially effective.[1] This position is justified on the ground that the remedy given is purely a matter of grace.

It is different, however, where an effective remedy is in terms made part of a contract. Suppose, for instance, a State issued bonds containing a mortgage of certain property,[2] and granting to the bondholders the right to sue for the enforcement of the mortgage. It would seem clear that the withdrawal of this right would be an unconstitutional impairment of the obligation of the contract, and that a federal court having jurisdiction ought to disregard the withdrawal and enforce the remedy. Yet, in Antoni v. Greenhow, it was evidently the opinion of Justice Matthews and the three justices concurring with him, that a State may withdraw a remedy against itself, even if it impairs the obligation of a contract. It was squarely stated by Justice Matthews in Ex parte Ayers.[3] Such is, also, the logic of the decision in Louisiana v. Jumel.[4] In my view, this is clearly wrong.

[1] The decisions in these cases did not involve a denial of this position.
[2] As in South Dakota v. N. Car., 192 U. S. 286.
[3] 123 U. S. 443.
[4] 107 U. S. 711. See Part II, p. 71.

CHAPTER IV.

Scope of the Doctrine of Non-suability—Forms of Action.

Actions that are suits against the state.

The principle of immunity is not limited to any particular forms of action. It extends to actions in rem, as, for example, to enforce a lien against property of the state,[1] or foreign attachment against such property,[2] as well as to actions in personam. It prevents the attachment of funds in the hands of officers of the United States, due as wages to seamen, by creditors of the seamen.[3]

In the case of admiralty proceedings in rem, it is true, there has been some disposition to regard the exemption of government property as due, not to the immunity of the government from suit, but to the exemption from liens of certain classes of property of a public or religious character, and to restrict the exemption of government property to what is used for a public governmental purpose. This question, however, has been sufficiently discussed above;[4] where is set out the better view that an admiralty proceeding in rem is simply a form of suit against the owner of the res.

In "The Davis,"[5] the principle of exemption of all property of the government was recognized without exception. The court was, however, led astray by United States v. Wilder,[6] and by placing a false emphasis on the fact of possession. In United States v. Wilder, the United States

[1] The great leading case is Briggs v. Light-boats, 11 Allen 157.
[2] Nathan v. Va., 1 Dall. 77. (Common Pleas, Phila. Co., Pa.)
[3] Buchanan v. Alexander, 4 How. 20.
[4] P. 13.
[5] 10 Wall. 15.
[6] 3 Sumner 308.

brought suit in trover for certain clothing, property of the United States, which was being held by a carrier for a lien for general average. Justice Story held that, where it was necessary for the United States to bring suit to recover the goods, the carrier might assert against the United States his right to retain the goods for the lien. In "The Davis," a cargo of cotton belonging to the United States became liable to a lien for salvage. It remained in the possession of the carrier, and was libelled along with the ship by the salvors. The supreme court held that the exemption of government property exists only where it would be necessary to take the property out of the possession of agents of the government, and that, since "The United States, without any violation of law by the marshal, was reduced to the necessity of becoming claimant and actor in the court to assert her claim to the cotton," under these circumstances, "it was the duty of the court to enforce the lien of the libellants for the salvage, before it restored the cotton to the custody of the officers of the government."

Now, the decision in United States v. Wilder, that one in possession of property of the government may assert his rights with respect thereto, was clearly correct. But one mode of asserting such rights, namely, by suit, is precluded by the immunity of the state from suit. Whether the government has possession or not certainly does not make the action more or less a suit against the state. In Young v. Steamship Scotia,[1] the judicial committee of the privy council flatly said, although obiter, that "the question of possession is immaterial." The decision, but not the opinion delivered by Justice Miller, in The Davis, may be sustained on the ground that the United States did not merely object to the libel, but became an active claimant of the goods; and that its claim was subject to the liens of other parties.[2]

The immunity of the state precludes not only suits directly against the state, but also suits, otherwise well brought between proper parties, towards which the state stands in such

[1] 89 L. T. 374.
[2] See below, p. 42.

a relation as to be an indispensable party. There is a class of parties, called necessary parties, who ordinarily must be joined to a suit, but who, if to join them would defeat jurisdiction, may be dispensed with. Such is the position of joint makers of a promissory note. On the other hand, there are "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience."[1] These are indispensable parties, without whom the court will not proceed with the case.

In Cunningham v. Macon and Brunswick Railroad Company,[2] it was held that where the State was the holder of the legal title under a deed of trust to secure it on its endorsement of the bonds of a railroad company, it was an indispensable party to a suit against the railroad company to foreclose the mortgage of one issue of bonds.

In Christian v. Atlantic and North Carolina Railroad Company,[3] a bill was brought against a railroad company to have certain shares of stock owned by the State, and dividends thereon, applied to State bonds issued in aid of the railroad, for which the State had pledged the stock. The bill was dismissed on the ground that the State was an indispensable party.[4]

A state may be a party to a suit not only in its own name, but also under other forms. Thus, in Smith v. Reeves,[5] the State had allowed suit against itself in the form of an action against the State treasurer. In Gunter v. Atlantic Coast

[1] Shield v. Barrow, 17 How. 130; quoted in Cunningham v. M. & B. R.R. CO. The doctrine of parties is best developed in the class of cases in which jurisdiction of the federal courts is dependent on diverse citizenship.

[2] 109 U. S. 446.

[3] 133 U. S. 233.

[4] In Case v. Terrell, 11 Wall. 199, also, although the ground of dismissal was stated to be simply that the only substantial relief was against the United States, with respect to the decree against enforcement of the priority of the United States in the distribution of assets, the United States was in the position of indispensable party.

[5] 178 U. S. 436.

Line Railroad Company,[1] it was held that Humphrey v. Pegues[2] was a form of action the State had allowed against itself. And, in Minnesota v. Hitchcock,[3] jurisdiction of a suit against the secretary of the interior was sustained on the ground that it was a suit against the United States with its consent.

The court seems to have overlooked this obvious fact in Missouri, Kansas and Texas Railroad Company v. Missouri Railroad and Warehouse Commission.[4] In that case, a petition for removal to the federal court, on the ground of diverse citizenship, of an action brought under a statute by the State railroad and warehouse commissioners for an injunction to compel obedience to an order, was denied by the State court on the ground that it was a suit by the State; the decision was reversed on writ of error by the supreme court. The court was evidently under the influence of Justice Brewer's queer idea that the governmental interest of a state in the enforcement of its laws is not such an interest as to make it a party to a suit.[5] This idea was evolved to meet a conceived necessity of explaining a case like Reagan v. Farmers Loan and Trust Company, to enjoin suits to enforce rates, as not a suit against the State. But the proper explanation of such a case is not that the State has not sufficient interest to be a party,[6] but that, despite such interest, the agents of a State may be restrained from violating constitutional rights.[7] The idea of Justice Brewer is negatived by the everyday fact of criminal proceedings by the state to enforce its laws, and especially by such cases as In Re Debs,[8] in which the state brings suit in equity to enforce its governmental rights and

[1] 200 U. S. 273.
[2] 16 Wall. 244.
[3] 185 U. S. 373.
[4] 183 U. S. 53.
[5] Previously expressed by him in Reagan v. Farmers L. & T. Co., 154 U. S. 362.
[6] For in Gunter v. Atl. Coast Line R.R. Co., 200 U. S. 273, the court held that the State was a party to a similar case—Humphrey v. Pegues, 16 Wall. 244.
[7] Part II, Chaps. V, VI.
[8] 158 U. S. 564.

duties. In the very case in hand, Justice Brewer recognized that such a case as Ferguson v. Ross,[1] in which suit to recover a penalty was brought, as provided by law, in the name of a State shore inspector, was a suit by the State. His distinction is that in a suit to recover a penalty, the judgment inures to the benefit of the State, whereas in a suit to enforce an order, the State has no pecuniary interest, but only the shippers. The idea that the penalty recovered is the interest that sustains a prosecution by the state becomes absurd when the penalty is not money, but imprisonment. The only proper question in the case in hand was whether the suit was a form of action by the State; and that was concluded by the decision of the State courts. The supreme court was led into this error by the fact that the apparent parties were the same as they would have been in a suit against the commissioners to restrain the enforcement of an order, and that such a suit would not be a suit against the State.

Actions that are not suits against the state.

It was early settled that the fact that the state is a stockholder, even the sole stockholder, in a corporation, does not relieve the corporation from suit.[2] The corporation is a personality of private law, distinct from its stockholders.

It is equally well settled that, when the state brings suit, the defendant may carry the case up by appeal or on writ of error. Such proceeding is but a continuation of the case, and does not convert it into a suit against the state.[3]

More important, as affecting the immunity from suit, is the doctrine that, when the state comes into court to enforce a right, its recovery is subject to the rights of others in the subject matter of the suit. Thus, in United States v. Wilder,[4] an action of trover for property of the United States was barred by the right of defendant to retain it for a lien for general average. The principle has its widest scope in

[1] 38 Fed. 161.
[2] Bank of U. S. v. Planters' Bank of Ga., 9 Wheat. 904.
[3] See the great case of Cohens v. Va., 6 Wheat. 264.
[4] 3 Sumner 308.

cases in admiralty, where, when the res is brought within the jurisdiction of the court, all claims are presentable. In "The Siren,"[1] the vessel, on libel by the United States, had been condemned as prize of war, and the proceeds deposited with the assistant treasurer of the United States, subject to the order of the court. It was held that the funds were liable to a claim for a lien against the vessel growing out of a collision while being brought into port for condemnation.[2]

The same principle applies to the right of set-off and counterclaim by defendants to suits brought by the state. The extent of this right varies, of course, with the rules governing the procedure of the court. The right of set-off is statutory; and the state may limit the right of set-off against itself to cases in which certain conditions have been complied with, as, for instance, that the claim shall have been previously presented and allowed.[3] The general principle is that the right of set-off or counter-claim against the state extends to any claim, legal or equitable, that operates by way of direct defense to the suit;[4] but does not warrant a separate claim, or a demand for original and independent relief, since that would be in effect a suit against the state.[5] It is well settled that a judgment cannot be entered against the state for a balance on a set-off.[6] Nor can a judgment be entered against the state for costs.[7]

In United States v. McLemore,[8] it was held that, although a circuit court of the United States, sitting as a court of law, may direct credits to be given on a judgment in favor of the United States, and consequently may examine the grounds on which such an entry is claimed, and may direct

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7 Wall. 152.
See also "The St. Jago de Cuba," 9 Wheat. 409; and "The Davis," 10 Wall. 15.
[3] U. S. v. Eckford's Extrs., 6 Wall. 484.
[4] U. S. v. McDaniel, 7 Pet. 1; U. S. v. Ringgold, 8 Pet. 150; Gratiot v. U. S., 15 Pet. 336.
Pres. & Direc. etc. v. Ark., 20 How. 530.
Reeside v. Walker, 11 How. 272; U. S. v. Eckford's Extrs.
U. S. v. McLemore, 4 How. 286 (cases cited).
4 How. 286.

the execution to be stayed until such an investigation shall be made, it cannot entertain a bill on its equity side to enjoin the United States from proceeding upon such judgment, since that is a suit against the United States. In Hill v. United States,[1] the doctrine is reaffirmed that execution upon a judgment in favor of the United States may not be enjoined. In Bouldin v. State,[2] on the contrary, it was held that such a suit to restrain execution, upon the ground that the bond on which the judgment was obtained was executed without consideration, is not a suit against the State, but simply setting up a defense that might have been availed of in the original suit.[3]

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[1] 9 How. 386.

[2] 21 Ark. 84.

[3] In the United States, it is agreed, consent to suit against the state can be given only by the legislature; the executive does not possess the prerogative of the crown in this respect. U. S. v. Lee, 106 U. S. 196; Stanley v. Schwalby, 162 U. S. 255; Case v. Terrell, 11 Wall. 199; Carr v. U. S., 98 U. S. 433.

In case of consent, the state has full control over the proceedings. De Groot v. U. S., 5 Wall. 419; Beers v. Arkansas, 20 How. 527. Possible exception as to the substantive law—see U. S. v. Klein, 13 Wall. 128.

PART II.

SUITS AGAINST PUBLIC OFFICERS.

CHAPTER I.

The Principle of Liability in Tort.

The first part of this study has dealt with the doctrine of non-suability of the state, and the extent to which it applies to the States of the United States. In the last chapter, has been set out the scope of the doctrine—what forms of action are suits against the state, and what proceedings, though affording judicial remedy against the state, are not within the prohibition. In this second part, will be considered suits against public officers, in relation to the immunity of the state from suit.

It was early settled in English law that, although the crown may not be sued for torts done by public officers, the actors themselves may be held liable, and that it is no defense to set up an unlawful authority from the crown. An act of parliament is, of course, always lawful authority. But where a statute may be held unconstitutional, as in the United States, it furnishes no better defense than the unlawful order of a higher executive officer.

The lack of valid defense in an unlawful authority from the crown has been rested upon the maxim that "the king can do no wrong." To authorize a wrong, it is said, is to do a wrong; hence, in the eye of the law, the alleged authority cannot exist. This maxim must mean one of two things. First, that whatever the king does is right; with the necessary corollary that whatever the king authorizes is right. Practically, this was, no doubt, for a time in large measure true; and the king's servants acting as judges made no pretense of exercising jurisdiction over the king's servants

acting for him in other ways. But the doctrine of absolution was soon definitely negatived. Second, that no wrong will be imputed to the king. In this view, it is a senseless fiction. A more rational explanation is that, although the king may do wrong, he is protected by his immunity from suit. If he does wrong through an agent, the agent is liable, although the king is not.

The state, of course, can act only through agents. The agent, in committing a tort, may be regarded either as not acting for the state, in which view the agent alone would be liable, or as acting, although unlawfully, for the state, in which view both principal and agent would be liable, although the principal would be protected by the immunity of the state from suit. In either view, the liability of the agent results from the fact that his act is in itself unlawful, and does not rest upon lawful state authority. Such authority cannot exist if forbidden by a higher authority. Thus, a statute cannot afford lawful authority if contrary to the constitution.

CHAPTER II.

Injunction Against Tort.

In the great case of Osborn v. Bank of United States,[1] was presented the question whether a public officer, about to commit a tort under a statute alleged to be unconstitutional, may be enjoined therefrom if equitable ground exists. An act of Ohio imposed a tax of $50,000 a year on each branch of the Bank of the United States situate in Ohio, and instructed the State auditor to issue his warrant for distraint therefor in case of failure to pay. The bank brought suit in the United States circuit court to enjoin the auditor from proceeding to collect the tax, upon the ground that it was unconstitutional—as it was, in fact, held in this case. The part of the decision of the supreme court in point here is the affirmance of the decree granting this injunction.

The remedy of injunction against public officers had been used in England, though very sparingly.[2] Chief Justice Marshall, however, as usual, cited no precedents.

One contention of appellants was that, admitting that in an action for damages the statute would be no justification if found unconstitutional, but that the State officers must be treated as individual trespassers, yet there existed no ground for equitable relief. Chief Justice Marshall answered thus: "The appellants treat the declaration of Osborn, the auditor, that he should execute the law, as the light and frivolous threats of an individual that he would commit an ordinary trespass. But surely this is not the point of view in which the application for an injunction is to be considered. The legislature of Ohio had passed a law for the avowed purpose of expelling the bank from the State; and had made it the duty of the auditor to execute it as a minis-

[1] 9 Wheat. 738.
[2] Goodnow: *Admin. Law of the U. S.*, p. 420 et seq.

terial officer. He had declared that he would perform this duty. The law, if executed, would unquestionably effect its object, and would deprive the bank of its chartered privileges so far as they were to be exercised in the State. . . . It was to be expected that a person continuing to hold an office would perform a duty enjoined by his government, which was completely within his power. This duty was to be repeated until the bank should abandon the exercise of its chartered rights."[1] That is, it was decided, in determining whether equitable grounds exist, it will be presumed that an officer will perform a duty laid upon him by statute, and the nature of the threatened tort will be determined by the statute under color of which he is about to act.

The main argument of appellants was, as stated by Chief Justice Marshall, as follows: "The bill is brought, it is said, for the purpose of protecting the bank in the exercise of a franchise granted by a law of the United States, which franchise the State of Ohio asserts a right to invade, and is about to invade. It prays the aid of the court to restrain the officers of the State from executing the law. It is, then, a controversy between the bank and the State of Ohio. The interest of the State is direct and immediate, not consequential. The process of the court, though not directed against the State by name, acts directly upon it, by restraining its officers. The process, therefore, is substantially, though not in form, against the State, and the court ought not to proceed without making the State a party. If this cannot be done, the court cannot take jurisdiction of the cause."[2]

Opinions in similar cases have often put the ruling that the suits were not against the State upon the ground that an officer, when acting under an unconstitutional statute, is not acting for the State, and the State has no interest. But it requires the exercise of jurisdiction to find the statute unconstitutional; and if it is found valid, then it follows, upon this view, that the court has exercised jurisdiction over a suit against the State. Anyhow, the State clearly has an

[1] P. 839.
[2] P. 846.

interest in determining whether the statute under which its officers are acting is unconstitutional. This is proved by the fact that the State may join as party defendant in such a case.[1] Chief Justice Marshall did not deny the interest of the State: "The full force of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the State in the suit, as brought, is admitted; and, had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the State was before the court."[2] "But," he said, "if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from judicial process, it would be subversive of the best established principles to say that the law could not afford the same remedies against an agent employed in doing the wrong, which they would afford against him could his principal be joined in the suit." The action against the officers was upheld on the ground of the personal and separate liability of an agent for his tort, though done for a principal. "It being admitted, then, that the agent is not privileged by his connection with his principal, that he is responsible for his own act to the full extent of the injury, why should not the preventive power of the court also be applied to him?"

The doctrine of Osborn v. Bank has not since been questioned. In Dodge v. Woolsey,[3] a similar case, the objection of suit against the State was not raised. And, in Poindexter v. Greenhow,[4] Justice Matthews, speaking for the court, said of enjoining the collection by State officers of unconstitutional taxes: "The practice has become common, and is well settled on uncontrovertible principles of equity procedure."[5] Certainly, if Osborn v. Bank had been decided

[1] In Gunter v. Atl. C. L. R.R. Co., 200 U. S. 273, the State was held to have become a party to the original suit.
[2] P. 846.
[3] 18 How. 331.
[4] 114 U. S. 270.
[5] The four dissenting justices did not deny this, but considered

differently, constitutional limitations would have been dead letters. The doctrine that a public officer may be restrained, in a proper case in equity, from committing a tort under color of an unlawful authority, has, so far as I know, never been denied by a State court. Objection was made in Osborn v. Bank, probably, not so much in denial of this general doctrine, but from a failure to appreciate fully that the constitution of the United States operates upon State enactments just as a State constitution operates upon State statutes. It was a period of general protest against the growing national supremacy over the States.

The decision in Osborn v. Bank was clearly right. To enjoin state officials does affect the state more closely than to hold them liable in damages. The state cannot itself act, as can the king; and, if every agent is restrained, the state cannot act at all. But this intrinsic limitation of the state should not affect the remedy against its agents. The principle is that every person is liable for his own torts, even though acting as agent. If a public officer would be liable in damages for an act, there is no reason why, if equitable grounds exist, he should not be enjoined from the act.

The only case in which the supreme court has departed from this doctrine is Belknap v. Schild.[1] In that case, a

that, the taxes being valid, the right to have the coupons received therefor was merely a right of set-off, and that any suit to restrain the collection of the taxes was in effect a suit to compel the State to fulfil the contract to receive the coupons for taxes. Later, in McGahey v. Va., 135 U. S. 662, Justice Bradley, who delivered the dissenting opinion in Poindexter v. Greenhow, admitted that the view of the majority was probably correct—that the tender of the coupons worked a defeasance of the taxes, so that the collection of them thereafter was a tort, just as if they were unconstitutional in the first place. Congress, in the exercise of its control over remedies in the federal courts, has provided that the remedy of injunction shall not be used to restrain the collection of unconstitutional federal taxes. Of course, congress cannot remove the liability of the officers, but it seems it can control the remedy, to the extent at least of confining the injured party to his remedy at law. State legislation cannot, of course, affect the power of the federal courts in the administration of their regular equitable remedies. In re Tyler, 149 U. S. 164.

[1] 161 U. S. 10.

bill in equity was brought by the owner of a patent against officers of the United States, in charge for the United States of a caisson gate, the property of the United States, made in infringement of the patent, and used in a drydock at a navy-yard of the United States. The court recognized that the officers would be liable in damages; but held that no injunction could issue, since that would prevent the use by the United States of its own property, in its possession.[1]

Justice Gray, delivering the opinion of the court, said: "The United States, then, had both the title and the possession of the property. The United States could not hold or use it except through officers and agents. Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction, and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession." This argument, except for the fact that title here was undisputed, is exactly the same as in Justice Gray's dissenting opinion in United States v. Lee,[2] and the case can only be explained as enforcing his opinion there. It is true he distinguished United States v. Lee on the ground that title to the land was disputed in that case. But surely the United States has as direct an interest in property which it holds by a disputed title as by an undisputed title. The cases Justice Gray cited as holding that "no injunction can be issued against officers of a State to restrain or control the use of property in the possession of the State or money in its treasury"—Louisiana v. Jumel and Elliot v. Wiltz,[3] Cunningham v. Macon and Brunswick Railroad Company,[4] Hagood v. Southern[5]—were cases of an entirely

[1] Justice Bradley had strongly intimated a similar view in James v. Campbell, 104 U. S. 356, although the case had been decided upon the ground that the patent was invalid. This dictum was not mentioned in Belknap v. Schild.

[2] 106 U. S. 196.

[3] 107 U. S. 711.

[4] 109 U. S. 446.

[5] 117 U. S. 52.

different nature. They were suits to obtain property of the State; not one of them was to prevent a tort. They clearly support the decision, in Belknap v. Schild, that no decree for the destruction of the property of the United States used in infringement of the patent could be rendered in a suit against the officers. Just as clearly, they are not in point upon the question of the injunction.

It seems strange that Belknap v. Schild should have been so decided after United States v. Lee. In the latter case, ejectment was upheld against officers of the United States, in possession of land claimed by the United States, on which the United States had valuable improvements used in the public service. The case held squarely that a public officer may be held liable for a tort, and that the court will inquire into the defense—in that case depending on the title of the United States. The direct interest of the United States did not prevent relief. In Belknap v. Schild, the suit was to prevent a tort; the validity of the defense depended on whether the caisson gate was an infringement of the patent. The fact that property of the United States was used in committing the tort should not have prevented relief. This is established by such a case as Ex parte Young,[1] in which public officers were enjoined from acts not possible to them as individuals, but consisting in using their official positions to violate constitutional rights. That the United States could use its property only through agents was no ground for denying relief against the torts of its agents, any more than in United States v. Lee.

Justices Harlan and Field dissented in Belknap v. Schild. Justice Peckham took no part in the decision. In the next similar case, Dashiell v. Grosvenor,[2] the question was evaded by holding that there was no infringement. In International Postal Supply Co. v. Bruce,[3] Belknap v. Schild was reaffirmed, and an injunction denied to restrain the postmaster at Syracuse from using, in infringement of

[1] 209 U. S. 123.
[2] 162 U. S. 425.
[3] 194 U. S. 601.

a patent, stamping-machines, hired by the United States postoffice for a term of years. Justice Harlan again dissented, and Justice Peckham concurred in the dissent.

In a State case, Hopkins v. Clemson Agricultural College,[1] the court denied relief, in a suit against the trustees of the Clemson Agricultural College, incorporated, an agent of the State, against a dike erected on the college grounds so as to cause the water to overflow the lands of plaintiff as it would not naturally do. The court put the decision on the ground that the State was an indispensable party to a suit to affect the dike, its property, on its property. But any effective relief in this caes would have required a decree for the destruction of the dike, which, of course, could not be rendered in a suit against the agent of the State. In Salem Flouring Mills Co. v. Lord,[2] State officers were enjoined from using more water from a stream than the State was entitled to under a contract by which it acquired the right to use a certain amount. The court said that the decree could not affect the property of the State. But, since the decree enjoined the use of any appliance capable of taking more water than proper, and such an appliance owned by the State was being used therefor, it seems to have enjoined the use of property of the State. The remark of the court must be limited, therefore, to mean that the property of the State could not be directly acted upon, that is, removed, altered, or destroyed.

The decision in Belknap v. Schild seems unfortunate. As Justice Harlan pointed out, it permits any patent capable of use in the public service to be used by the government at will, thus nullifying, to that extent, the constitutional inhibition against taking private property for public use without just compensation. It operates to deny preventive relief against a wrong in any case in which property of the state is used in committing the wrong. In my view, the decision is fundamentally wrong.

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[1] 77 S. C. 12.
[2] 42 Ore. 82.

CHAPTER III.

Suits to Recover Property in the Possession of Public Officers.

Also growing out of the separate liability of an agent in tort, is the right to sue a public officer for the recovery of property alleged to be tortiously held by him. The direct interest of the state in such a case, in which the defense is claim of title in the state, is evident. But Osborn v. Bank had established that, where a right of action exists against a public officer, it is not barred by the fact that it directly affects the state.

In Osborn v. Bank, Chief Justice Marshall said that he could perceive no line of distinction, where a public officer was guilty of a trespass under color of an unconstitutional tax, between an action for damages and an action of detinue for recovery of specific articles taken in collection of the tax. Poindexter v. Greenhow[1] was an action of detinue.

The case of Governor of Georgia v. Madrazo[2] was as follows. In 1817, a cargo of slaves belonging to Madrazo was seized by a privateer, and sold to Bowen by decree of a court not recognized as competent by the United States. While being transported through the Floridas, the slaves were brought within the limits of the State of Georgia, and were seized by a revenue officer under an act of congress annuling the title of any importer of slaves. As provided by the act, the slaves were turned over to the governor of the State. Part of them were sold by him, and the money deposited in the State treasury. Madrazo, claiming that the slaves were his, and that he was not responsible for their importation into Georgia, brought a libel in the United States district court against the governor of Georgia for

[1] 114 U. S. 270.
[2] 1 Pet. 110.

the slaves remaining in his possession and for the proceeds from the sale of the rest. Chief Justice Marshall plainly regarded the action as a form of suit against the State; and, since the libel was to reach moneys in the treasury, of which the governor had not even possession, it is probable that the service on him was intended as servcie on the State, on the theory, as adopted by Justice Johnson in his dissenting opinion, that the eleventh amendment does not apply to suits in admiralty. But even if the governor could be considered as a defendant in his personal character, Chief Justice Marshall said, no case was made out against him personally. The slaves had come into his possession in perfectly lawful manner. The action, therefore, was not against him for wrongful possession, but rather in the nature of a suit to enforce an equitable claim to the slaves. Since the governor had no personal interest in the slaves, the claim was not against him. Consequently, the right of action was not against him.

In United States v. Peters,[1] was involved the validity of a decree of a United States district court. Certain Americans, Olmstead et al., captured by the British during the war of revolution, rose and captured the vessel on which they were put to service. While on the way to port, the vessel was taken in charge by a ship-of-war of the State of Pennsy'vania. The court of admiralty of Pennsylvania, in condemning the vessel as prize of war, decreed only one-fourth to Olmstead et al., and the rest to the State. On appeal, the court of appeals for prize cases, set up by the continental congress, decreed all to Olmstead et al. The Pennsylvania court refused to accept the decree, on the ground that it involved a review of facts found by a jury, and decreed sale and distribution. The marshal, despite an injunction from the court of appeals, turned over the share of Pennsylvania to Rittenhouse, the State treasurer, who gave a bond of indemnity therefor to the judge of the admiralty court. Rittenhouse, and, on his death, his executrices, held the funds separate, refusing to deliver them

[1] 5 Cranch 115.

to the State until released from the bond to the admiralty judge. In 1803, the United States district court, in a suit in admiralty by the successors to the rights of Olmstead et al. against the executrices of Rittenhouse, decreed that the funds be delivered up to the libellants. It was strongly urged that the decree was invalid on account of the claim of the State. But Chief Justice Marshall said: "The State cannot be made a defendant to a suit brought by an individual, but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not necessarily a defendant. . . . It can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their examining the validity of the title."

Justice Gray, in United States v. Lee, limited United States v. Peters by the fact that the funds were in the possession of the libellees in their private capacity. "The chief justice," he said, "carefully avoided expressing an opinion upon a case in which the money sued for was in the possession of the State." It is true Chief Justice Marshall did advert to the fact that the funds were held in a private capacity. And he also said in the course of the opinion: "If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of the fact would have presented a case on which it is unnecessary to give an opinion." It is difficult to understand just what the chief justice meant by this. But, in view of the fact that he plainly said that the State could not acquire title, on account of the decree of the court of appeals, and declared, "the full right was immediately invested in the claimants, who might rightfully pursue it into whosesoever hands it might come," the statement of Justice Gray finds little support. There seems, indeed, no distinction in principle between a case of wrongful possession by a public officer of property claimed by the state, and

wrongful possession in a private capacity of like property. The basis of the action in either case is the wrongful possession by the person sued; the defense in either case depends upon the title of the state.

If actions at law may be maintained for the recovery of property wrongfully in the possession of public officers, then it naturally follows that, if equitable grounds exist, equitable relief may be had in such cases. In Osborn v. Bank, if the original injunction against the collection of the tax was proper, then of course the decree for restitution was simply an enforcement of the original decree. But Chief Justice Marshall also held that, even if the original injunction was improper, the injunction upon the amended bill, enjoining the officers from disposing of the funds, and decreeing restitution, was sustainable. The equitable ground was that, if the funds were disposed of, they would be irretrievably lost to the plaintiffs, because the State could not be sued.

Chief Justice Waite, in Louisiana v. Jumel,[1] explained away the decree for restitution in Osborn v. Bank thus: "Under the state of facts, the order for its return involved no question of power to interfere with what was actually in the treasury. . . . The money was kept out of the treasury, because if it got in it would be irretrievably lost to the bank, since the State could not be sued to recover it back." But the funds had actually been covered into the treasury, where they were kept separate by the treasurer; the decree ordered the treasurer to restore them. The explanation by Justice Miller, in Cunningham v. Macon and Brunswick Railroad Company,[2] is better: "a preliminary injunction of the court, forbidding the State officer from placing the money of the bank, which he had seized, in the treasury of the State, having been disregarded, the final decree corrected the violation, by requiring the restoration of the money thus removed." Certainly, there is no reason why property may not be recovered, on the ground of wrongful

[1] 107 U. S. 711.
[2] 109 U. S. 446.

possession, if held by the treasurer in the treasury of the State, just as if held by any other officer of the State. Of course, if the money had not been kept separate, but had become mingled with the other moneys in the treasury, it would probably have been no longer traceable on the ground of wrongful possession. So that Chief Justice Waite was right in saying that "no one pretended that if the money had been actually paid into the treasury, and had become mixed with the other money there, it could have been got back from the State by a suit against the officers."[1] In such case, probably the only right of action, aside from suits for damages against the officers, would have been on an implied contract against the beneficiary of the money. Such right of action would be against the State, and not, of course, against the treasurer. As Chief Justice Waite continued: "Certainly no one would ever suppose that by a proceeding against the officers alone, they could be held as trustees for the bank, and required to set apart from the moneys in the treasury an amount equal to that which had been improperly put there, and hold it for the discharge of the liability which the State incurred by reason of the unlawful exaction."

The need which Chief Justice Waite seems to have felt, in Louisiana v. Jumel, of explaining Osborn v. Bank as not taking money out of the treasury, was not real. Louisiana v. Jumel was an entirely different case. The action was not based on the wrongful possession of property belonging to the plaintiffs, but was to recover money which the State owed to the plaintiffs. Plainly, when the State is bound to individuals for money, either by contract or trust, the right of action is against the State alone, and not against the officers in possession of the money. And this is so, whether the money or other property is in the treasury, in the possession of the treasurer, or is in the hands of other officers, entirely separate from the treasury, as in the case of Murray

[1] For similar opinion, see Mich. State Bank v. Hammond, 1 Doug. (Mich.) 527.

v. Wilson Distilling Company.[1] The same is true of the attempt to enforce a lien against property of the State. The right of action is against the State, not against the officers in possession.[2]

A case in a State court, Lowry v. Thompson,[3] is difficult to reconcile. A contract had been made with the land commissioner for the sale of a piece of land to the State of South Carolina. The title deed was placed in the hands of a third party, to be delivered to the land commissioner upon payment of the balance of the purchase money. The land commissioner wrongfully obtained possession of the deed. The officer of land commissioner was later abolished, and the effects of the office and the State lands were put into the custody of the secretary of state, under the commissioners of the sinking fund. Suit for the recovery of the deed was brought against the commissioners of the sinking fund, the secretary of state not being made a party, because holding under the commissioners. The court, by two to one, held that the suit could not be maintained, on the ground that the State was an indispensable party to a suit to recover property in its possession. The court urged, it is true, the point that the law provided for control of the commissioners over the secretary of state so far only as he had custody of property of the State. But it is fairly clear from the opinion that the same ruling would have been made in a similar suit against the secretary of state. If so, the decision seems clearly wrong; because the action was for the recovery of property in the wrongful possession of the officers sued.

The great case of United States v. Lee[4] will be given a full exposition, not because it added to the principle set out in this chapter, but because of the careful study and able presentation, both in the opinion of Justice Miller for the five majority justices, and in the opinion of Justice Gray for the four dissenting justices. The case was a suit in

[1] 213 U. S. 151.
[2] Christian v. A. & N. C. R.R. Co., 133 U. S. 233.
[3] 25 S. C. 416.
[4] 106 U. S. 196.

ejectment against Kaufman and Strong, officers of the United States, in charge of the Arlington estate, the estate of General Robert E. Lee, which had been bid in by the United States at tax sale, and was being used for a soldiers' cemetery, fort and arsenal. The allegation was that the tax sale, and, therefore, the title of the United States, was invalid, as was, in fact, decided in this case. The main question was whether the suit was barred by the interest of the United States in the property. The answer depended upon: (1) precedent; (2) principle, (3) public policy.

"The English authorities, from the earliest to the latest times, show," declared Justice Gray, "that no action can be maintained to recover the title or possession of land held by the crown by its officers or agents, and leave no doubt that in a case like the one before us, the proceedings would be stayed at the suggestion of the attorney general in behalf of the crown." Justice Miller passed by the English authorities, saying that little weight could be given them for two reasons: the existence of an effective remedy by petition of right in England; and the great reverence for the crown, which would make the disturbance of the possession of the crown a shocking matter.

Justice Miller then proceeded to the precedents in the supreme court itself. He relied strongly on the language of Chief Justice Marshall in United States v. Peters, that "it certainly can never be alleged that a mere suggestion of title in a State to property in the possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion and examining the validity of the title"; and on the decision in Osborn v. Bank, with the repetition of this statement from United Sttaes v. Peters.

Justice Gray did not succeed satisfactorily in his attempt to explain away these cases.[1] To offset them, he cited "The Exchange."[2] It is true that in that case the court declined to examine the validity of the title set up in de-

[1] See above, p. 56.
[2] 7 Cranch 116.

fense. But that was a libel of a war-vessel in the regular service of the emperor of France, which had come into our waters on a friendly visit. Under these circumstances, comity required that the judiciary should not interfere with the vessel. The case was not mentioned by Justice Miller; nor, it seems, has it been considered in point in other cases of suits involving property claimed by the state.

Then there were the four previous cases like United States v. Lee. One of them, Meigs v. McClung,[1] came up between United States v. Peters and Osborn v. Bank. Of this case, Justice Gray said: "the full statement of their position, in the bill of exceptions, . . . shows that the fact that they so held was not set up in defense, except as supplemental to the position that the legal title was in the United States, and it does not appear to have been mentioned in argument. No objection to the exercise of jurisdiction was made by the defendants or by the United States, or noticed by the court. That the court understood the United States to desire a decision upon the merits is further apparent from Chief Justice Marshall's summary towards the close of the opinion: 'The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it by violence without compensation.' Had the decision covered the question of jurisdiction, the Chief Justice would hardly have omitted to refer to it in Osborn v. Bank." This last suggestion is without any weight; for, in Osborn v. Bank, Chief Justice Marshall made no resort to precedent, not even to United States v. Peters. The statement, moreover, that the interest of the United States was set up only as part of the defense of title in the United States, is clearly incorrect. It is true that the point was not argued in the supreme court, nor mentioned in the opinion. But, as pointed out by Justice Miller, the bill of exceptions clearly set out the interest of the United States as a separate ground of defense.

In the three similar cases—Wilcox v. Jackson,[2] Brown

[1] 9 Cranch 11.
[2] 13 Peters 498.

v. Huger,[1] Grisar v. McDowell[2]—arising after Osborn v. Bank, the objection was not raised. Justice Miller regarded this as evidence that the principle was considered as fully established. Justice Gray explained them on the ground that the United States was willing that the court should decide. "The view," he declared, "on which this court appears to have constantly acted, which reconciles all its decisions and is in accord with the English authorities, is this: the objection to the exercise of jurisdiction over the sovereign or his property, in an action in which he is not a party to the record, is in the nature of a personal objection, which, if not suggested by the sovereign, may be presumed not to be intended to be insisted upon." Now, the immunity from suit is a personal privilege, which may be waived. But certainly the court ought not presume a waiver, and require an active insistence upon the privilege, in a suit against individuals, to which the sovereign is not even a party. It ought rather, if facts appear that show the suit to be in violation of the immunity of the sovereign, dismiss the case unless a waiver of the immunity is shown. This is confirmed by the consideration that the law officers of the United States have no power to consent to a suit against the United States;[3] yet this view of Justice Gray would make the allowance of suits, in effect against the United States, depend upon whether these law officers might or might not object. Anyway, this view of Justice Gray does not affect the decisions in United States v. Peters and Osborn v. Bank.

Two recent opinions did furnish him some support. In "The Davis,"[4] the opinion placed a false emphasis on whether property is in the possession of public officers or not.[5] And in Carr v. United States,[6] Justice Bradley, delivering the opinion of the court, expressed the opinion

[1] 21 How. 305.
[2] 6 Wall. 363.
[3] See Part I, p. 44, note.
[4] 10 Wall. 15.
[5] See above, p. 38.
[6] 98 U. S. 433.

that cases like United States v. Lee are barred by the interest of the United States. But, as pointed out by Justice Miller, this was purely obiter. No doubt it was these two opinions that encouraged the vigorous obejction to the action in United States v. Lee. On the whole, however, the summary of the cases by Justice Miller was well justified: "This examination of the cases in the court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it; and that in many others, where the record shows that the case as tried below actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though, if it had been a good defense, it would have avoided the necessity of a long inquiry into the plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that, during all this period, the court has held the principle to be unsound, and in the class of cases like the present . . . , it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well considered decisions."

The argument upon principle was strongly stated by Justice Gray for his side: "The sovereign is not liable to be sued in any judicial tribunal without its consent. The sovereign cannot hold property except by agents. To maintain an action for the recovery of possession of property held by the sovereign through its agents, not claiming any title or right in themselves, but only as the representatives of the sovereign and in its behalf, is to maintain an action to recover possession of the property against the sovereign; and to invade such possession of the agents, is to invade the possession of the sovereign, and to violate the fundamental maxim that the sovereign cannot be sued." "To maintain

this action, independently of any legislation by congress, is to declare that the exemption of the United States from being impleaded without their consent does not embrace lands held by a disputed title."

Justice Miller, in answer to this argument, pointed out that here was upon its face an ordinary action against individuals for the wrongful possession of the plaintiffs' land. The defendants set up in defense an authority; but if that authority was not lawful, it was no authority at all. The objection to the action was, he said, inconsistent with the fifth amendment: "If this constitutional provision is a sufficient authority for the courts to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law, and devoted to public uses without just compensation." Certainly, as already pointed out, the fact that the United States can act only through agents should not bar an otherwise proper action against the agents. Moreover, the fact that the officers claimed no personal interest in the land did not, of course, render them less liable for their wrongful possession. It is true that in such cases the court will, if possible to join the parties beneficially interested, require this to be done. But if it cannot be done, the court will enforce the right of action against the agent, to which the principal is not an indispensable party.

Justice Gray also urged the objection of public policy. "It is essential to the common defense and general welfare," he declared, "that the sovereign should not, without its consent, be dispossessed, by judicial process, of forts, arsenals, military posts and ships of war, necessary to guard the national existence against insurrection and invasion; of custom houses and revenue cutters, employed in the collection of the revenue; or of light-houses and light-ships." In answer, Justice Miller pointed out that the United States, as decided in Carr v. United States,[1] is not bound by deci-

[1] 98 U. S. 433.

sions against its officers, and may itself bring an action to have its rights determined; or, if satisfied that its title has been shown to be invalid, may secure the property by purchase or by condemnation. Anyway, he said, any evils that might result would be small indeed compared to the alternative evil of allowing private property to be taken without due process of law, and denying recovery upon a mere claim of title in the state.

The decision in United States v. Lee has never since been questioned. It was reaffirmed, without dissent, in Tindal v. Wesley,[1] a similar action against State officers.[2] In Stanley v. Schwalby,[3] Justice Gray, delivering the opinion of the court, considered that the judgment below was directly against the United States, because "in an action of trespass to try title, under the laws of Texas, a judgment for the plaintiff is not restricted to the possession, but may be (as it was in this case) for title also." Of course, there is no ground of action against the officers to determine title, because they claim no title. In Chandler v. Dix,[4] where the State had the same relation to the land that the United States had in United States v. Lee, the court sustained a decree dismissing a bill to set aside the title of the State, brought against officers merely in possession without claim of title in themselves. In case of a lien upon property, also, the right of action is against those claiming title to the property; there is no ground of action against officers merely in possession—as was held in Cunningham v. Macon and Brunswick Railroad Company.[5]

A strong State case, broadly applying the principle set out in this chapter, is Michigan State Bank v. Hammond.[6] The State received an assignment of property, on condition of saving the assignee harmless against certain liabilities.

[1] 167 U. S. 204.
[2] U. S. v. Lee was also followed in an interesting recent case in Maryland—Weyler v. Gibson, 110 Md. 636.
[3] 162 U. S. 255.
[4] 194 U. S. 590.
[5] 109 U. S. 446.
[6] 1 Doug. (Mich.) 527.

The property was put in charge of certain State officers for disposal, and for payment of the proceeds into the treasury. The State failed to save harmless the assignee, who thereupon brought a bill in equity against the State officers to have the property applied. The court held that title had reverted to the assignee on breach of the condition subsequent, so that he might have sued for the property in ejectment, trover, or money had and received. Equity would not decree a forfeiture, but would grant relief to the extent of applying the property to fulfil the obligation of the State to pay the liabilities of the assignee.

The broad principle, then, governing suits against public officers for property claimed by the state, is this: the action may be maintained whenever grounded upon alleged wrongful possession of property of the plaintiff. The fact that the defense depends upon the title of the state does not bar the action. The direct interest of the state is not denied; the state may, if it choose, join as party defendant. But the interest of the state does not bar the separate right of action against the officer. The propriety of the suit against the officer depends not upon the interest of the state, but upon the nature of the action.

CHAPTER IV.

Mandamus and Analogous Remedy in Equity.

"It has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other."[1] Or, in the language of Justice Miller: "in this class of cases, where it shall be found necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree or by an injunction, compel the performance of the appropriate duty, or enjoin the officer from doing that which is inconsistent with that duty and with the plaintiff's rights in the premises." A study of what constitutes "a plain official remedy," such as to open this class of remedies against the officer, is not the purpose here. The examination here is limited to the relation of this class of cases to the immunity of the state from suit.

In performing the duty imposed upon him, the officer acts for the state. The act may be simply the exercise of a governmental function, which the state is under no obligation to perform; or, it may constitute the performance of an obligation of the state to the individual, for which, if the state were suable, he could hold the state. But the right to sue the officer does not arise from the obligation of the state. For instance, the fact that the state is bound by contract to pay certain money to individuals, as in Louis-

[1] Justice Bradley, in Board of Liq. v. McComb, 92 U. S. 531.

iana v. Jumel, would not in itself give rise to a right of action against the officer in possession of the money to compel him by mandamus to pay it over.[1] In Pitcock v. State,[2] the superintendent and financial agent of the Arkansas State penitentiary had made a contract, duly approved by the board of commissioners, to supply a manufacturing company with convict labor. An action against the officers to restrain the withdrawal of convicts, and to compel the furnishing of more according to the contract, was held to be in effect a suit against the State, because the obligation of the contract was upon the State, not upon the officers. One of the judges, Wood, took the view that, although the board had discretion in making the contract, yet, when made, they were bound to execute it, just as much as though the legislature had made the contract and ordered the board to carry it out. And it would seem that, where an officer has authority to make a contract, and to execute it in the course of his official functions, a mandate to execute it may properly be implied. At any rate, however, the right of action against the officer arises, not out of the obligation of the state, but out of the new legal relation between him and the individual when a plain official duty is imposed upon him, in the performance of which the individual has a personal interest. Such being the principle, there is no reason why the liability of the officer should be affected by the fact that the act also constitutes the performance of a contract by the state. In Rolston v. Crittenden,[3] suit to compel action by the governor of Missouri was held not to be a suit against the State, although the act constituted the performance of a contract by the State.

When such a right of action, by mandamus or injunction, exists against an officer, "if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the

[1] Nor may a trust resting upon the state be enforced by a suit against officers—Cunningham v. R.R. Co., 109 U. S. 446.
[2] 121 S. W. (Ark. 1909) 742.
[3] 120 U. S. 390.

writ."[1] Woodruff v. Trapnall[2] was an action of mandamus to compel the attorney general of the State of Arkansas to accept, in payment of a judgment, notes of the State bank, which the State had promised to receive for all debts due the State; which law had, however, since been repealed. The supreme court held the repealing act unconstitutional, and reversed the judgment of the State court denying the mandamus. No objection was made that the suit was in effect against the State.

In Board of Liquidation v. McComb,[3] objection was made. The State of Louisiana provided for an issue of $15,000,000 of consolidated bonds to take over its existing indebtedness, at the rate of sixty cents on the dollar, the new bonds to be secured by a certain tax and by other special provisions. The duty of making the exchange was imposed on a board of liquidation, composed of the governor and other State officers. The act provided that the power of the judiciary, by means of mandamus, injunction, and criminal proceedings, should be exerted to compel the carrying out of the provisions of the act. Most of the creditors accepted the offer of the State. A later act provided that a claim of the Louisiana Levee Company against the State might be exchanged at par for consolidated bonds. This suit was by holders of such bonds to restrain the board from issuing the bonds for the claim in full. The supreme court held that it was part of the consideration of the contract with the bondholders that the new bonds should be issued only at sixty cents on the dollar; that, therefore, the act providing for exchange at par was unconstitutional, and could afford no justification to the board for the non-performance or violation of its plain official duty under the original act.

Louisiana v. Jumel[4] arose over the same issue of bonds. The act authorizing the issue provided for a certain tax to pay the interest, and the surplus to buy up the principal:

[1] Justice Bradley, in Bd. of Liq. v. McComb.
[2] 10 How. 190.
[3] 92 U. S. 531.
[4] 107 U. S. 711.

"The interest tax aforesaid shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest; and the said appropriation shall be a continuing annual appropriation during the same period; and this levy shall authorize and make it the duty of the auditor and treasurer and the said board respectively, to collect said tax annually and pay said interest and redeem said bonds until the same shall be fully discharged." And a constitutional amendment, sanctioning the issue, provided: "to secure such levy, collection and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected, each and every year, until the said bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the State to the holders of said bonds, . . . and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the treasury."

In 1880, a new constitution was adopted which provided, in what was called the "debt ordinance," that the coupons falling due January 1, 1880, should be remitted, and the interest taxes collected to meet said coupons transferred to defray the expenses of the State government, and for a large reduction of interest on subsequent coupons, and the discontinuance of the special tax. Holders of consolidated bonds brought suit in the United States circuit court against the auditor and treasurer, and other officers composing the board of liquidation, "that the defendants and each of them may be adjudged to replace and re-instate to the credit of said interest fund any money or funds that may have been diverted therefrom, . . . and that said defendants and each of them may be peremptorily enjoined and restrained from recognizing as valid against your orators, article 208 of the constitution of Louisiana, and the debt ordinance." At the same time, an action of mandamus was begun in the State court, and removed to the United

States circuit court, against the same officers, to compel them to apply all moneys levied and fixed by the act of 1874 to the purposes of that act, and to proceed to collect the tax fixed and levied by the act of 1874, and apply the moneys thereby realized to the purposes of the act. The two cases were decided together by the supreme court. The court did not deny that the promises and pledges of the funding act and constitution of 1874 were part of the contract of the State, and that the constitution of 1880 and the debt ordinance, so far as in violation, were unconstitutional. But it held that the suits were in effect against the State, and could not be maintained.

Chief Justice Waite delivered the opinion of the court. A large part of the opinion was devoted to showing that the officers concerned were not made trustees for the bondholders in respect to the collection of the tax and the disbursement of the proceeds, but that the money came into the treasury and was disbursed just like other taxes. Board of Liquidation v. McComb he explained upon the ground that "the board held the new issue of bonds in trust, and everyone who gave up his old obligations and accepted the new in settlement became a beneficiary under the trust, and might act accordingly." This explanation shows that the chief justice did not properly appreciate the nature of the relief asked in that case and in the present case. If there was any trust in that case, it was in the State, and of course not enforceable as such in an action against the officers. There was no pretense of any absolute vesting of the bonds in the board in trust; and the relief was not granted upon that ground. So, in the present case, the action against the officers was not based on any idea of a trust in them. Yet the whole opinion is colored with the idea that this was an attempt to compel, through the officers, the performance of the obligations of the State. Properly viewed, the action was based, not on the obligation of the State, but on the "plain official duty" imposed on the officers.

Were the duties imposed on the officers by the funding

act and constitutional amendment of 1874, considered apart from the later enactments, such as to be judicially enforceable against them as such? Chief Justice Waite laid stress on the extensive nature of the relief asked: "The relators do not occupy the position of creditors of the State demanding payment from an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty. . . . But the simple question presented is whether a single bondholder or a committee of bondholders can, by the judicial writ of mandamus, compel the executive officers of the State to perform generally their several duties under the law. . . . Our attention has been called to no case in the State courts of Louisiana in which such general relief has been afforded. . . . The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding to which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction, and the judiciary set in its place." And, in Cunningham v. Macon and Brunswick Railroad Company,[1] Justice Miller explained Louisiana v. Jumel upon the ground that, in this class of cases, the duty of the officer must be "a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government," and that Board of Liquidation v. McComb was as far as the court was willing to go in this direction. The reason for the judgment in Louisiana v. Jumel he declared to be that "there was no jurisdiction in the circuit court, either by mandamus at law or by a decree in chancery, to take charge of the treasury of the State, and, seizing the hands of the auditor and

[1] 109 U. S. 446.

treasurer, to make distribution of the funds found in the treasury in the manner in which the court might think just."

It is certainly true that the jurisprudence of the supreme court has tended to limit the remedy of mandamus to specific, ministerial acts, not requiring the exercise of judgment; whereas the State courts have shown a tendency to broaden the remedy to all acts that are mandatory, not left to the discretion of the officers. For instance, Justice Field took it for granted that mandamus will lie against the treasurer to compel payment of appropriations for salaries; and such is the general ruling in the State courts. But, although Chief Justice Waite impliedly recognized that a creditor of the State may compel the performance of "that specific duty" by "an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over," it was held, in United States v. Guthrie,[1] that mandamus will not lie to compel the secretary of the treasury of the United States to pay an appropriation for a salary in the regular course of his duties. In that case, it is true, the officer had been removed, illegally as alleged, by the president; and the occurrence of Justice Curtis was upon the ground that title to the office must be settled first; and Justices Campbell and Grier also concurred specially, though not expressing their grounds. But, as Justice McLean contended in his vigorous dissenting opinion, if the duty was ministerial, the illegal removal by the president would not alter the case. And the opinion of the court seems to be based on the broad ground that the judiciary will not interfere with the administration of the executive departments.

On the other hand, Justices Field and Harlan, dissenting in Louisiana v. Jumel, considered that "if the new constitution had never been adopted, there could be no question as to the power of the State court to require that the moneys collected should be applied to the payment of the interest." Undeniably, there were definite funds in the treasury, which it was the plain duty of the officers to apply to a definite

[1] 17 How. 284.

purpose—the payment of the coupons due January 1, 1880. Justice Harlan said: "It is apparently urged, as an obstacle in the way of relief, that plaintiffs do not seek to have the proceeds of these taxes applied specially to the payment of their claims, but ask such orders as will enable all holders of consolidated bonds to participate in the distribution of the moneys raised under the statute and constitution of 1874. . . . If the relief asked cannot be given for the benefit of all holders of consolidated bonds, there would seem to be no difficulty in restricting payments to such as are actually before the court. . . . It is, however, proper to say that, notwithstanding the criticisms made by the court upon the nature and extent of the relief asked, I do not feel authorized to infer from its opinion that relief would be given to the parties before it, had they asked payment of their coupons only." Any idea that individual bondholders could not obtain relief because the acts complained of did not concern them only, but were in the general administration of an act, is, of course, refuted by Board of Liquidation v. McComb. And the distinction between duties specially imposed upon officers, and duties in the regular exercise of their offices, has been finally disposed of by Ex parte Young.[1]

The relief here should have been granted if sustainable upon the jurisprudence of Louisiana.[2] Chief Justice Waite said: "Our attention has been called to no case in the state courts of Louisiana in which such general relief has been afforded." And, indeed, in State ex rel. Hart v. Burke,[3] in a case exactly like the present action for mandamus, relief was denied. But that decision was clearly put, not upon the extensive nature of the relief asked, but upon the repealing State constitution and debt ordinance. Justice Field said: "'There can be no doubt that, but for the debt ordiance . . . , a mandamus or other compulsory process could

[1] 209 U. S. 123.

[2] That is, apart from the question, which was not decided, whether the power of the United States circuit court to issue mandamus as an original writ was secured by the removal from the State court.

[3] 33 La. Ann. 498.

have been issued by the courts of Louisiana to compel officers of the State . . . to execute the provisions of the act of 1874 and of the constitutional amendment of that year." And Justice Harlan said of State ex rel. Hart v. Burke: "It is, I think, clear that, but for the debt ordinance, the court would have sustained the writ in that case." That he did not misinterpret that case, he said, was clear from the subsequent case of State ex rel. Newman v. Burke,[1] in which was granted a mandamus against the treasurer, auditor, and fiscal agent to compel the execution of their duties under the debt ordinance, by the transfer on the books of the money collected for taxes for the payment of the coupons due January 1, 1880, to the general fund, and for the payment of warrants on the general funds held by the relator.

If the action were otherwise maintainable, what was the effect of the debt ordinance? In State ex rel. Hart v. Burke, it was said: "We are aware of no principle which excepts the relation of states to their constituted official agents from the general rule of revocability which applies to all other mandates." And in Louisiana v. Jumel: "As against everything except the outstanding bonds and coupons, the constitution is the fundamental law of the State, and it is only invalid so far as it impairs the obligation of the contract." Does this mean that, although the debt ordinance was invalid as violating the pledge of the State to collect the tax and pay the coupons, yet, so far as it altered the duties of the particular officers, it was valid? If so, it is directly contrary to the opinion in Board of Liquidation v. McComb. Certainly, it would seem that it was part of the contract that the tax should be collected and the proceeds paid as provided in the original act; and it will be assumed here that the termination of the duties of the officers was unconstitutional.[2]

[1] 35 La. Ann. 185.

[2] Of course, if the office were abolished, even if the law abolishing it were held unconstitutional the court could grant no relief, since it could not keep the office filled—that is political.

The decision in State ex rel. Hart v. Burke was placed upon this ground: that the court had no power to declare a provision of the State constitution unconstitutional, except in a case over which it had jurisdiction; that a suit to enforce the performance of any contract or obligation of the State against its will was a suit against the State, over which the court had no jurisdiction; that, although a State statute contrary to the State constitution might be held not to express the will of the State, yet a provision of the State constitution might not—"The effect of the federal constitution is not to deprive the State of the power of volition, but simply to restrain the operation and execution of her will, so far, and so far only, as it conflicts with that instrument." This involves the constitutional heresy that the operation of the federal constitution upon a State enactment is different from the operation of a State constitution upon a State statute. Yet the opinion of Chief Justice Waite is full of the same idea: "The question, then, is whether the contract can be enforced, notwithstanding the constitution, by coercing the agents and instrumentalities of the State, whose authority has been withdrawn in violation of the contract, without having the State itself in its political capacity a party to the proceedings. The relief asked will require the officers against whom the process goes to act contrary to the positive orders of the supreme political power of the State, whose creatures they are and to which they are ultimately responsible in law for what they do." Such language justified the vehement protest of the dissenting justices, who regarded the decision as placed upon that ground.[1]

An explanation less gross may be found in views presented in opinions in other cases. Justice Matthews, with whom agreed three other justices, in Antoni v. Greenhow,[2] based his concurrence on the ground that "a suit to compel

[1] Chief Justice Waite did, in fact, in Rolston v. Crittenden, 120 U. S. 390, squarely explain Louisiana v. Jumel on the ground that "There the effort was to compel a State officer to do what a statute prohibited him from doing."

[2] 107 U. S. 769.

the officers of a State to do the acts which constitute a performance of its contract by the State, is a suit against the State itself," maintainable only so long as the State allows it. And this view was adopted by Justice Bradley, speaking for the four dissenting justices, in Poindexter v. Greenhow.[1]

Another statement of much the same position is that by Justice Lamar in Pennoyer v. McConnaughy.[2] He divided cases against State officers into two classes: "The first class is where the suit is brought against the officers of the State as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contract. . . . The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State." In other words, an officer may not be judicially controlled when, in acting, he will be acting for the State; but, in acting under color of an unconstitutional authority, he is not acting for the State, and is liable to suit.

Both these views—of Justice Matthews and of Justice Lamar—are out of harmony with the opinion in Board of Liquidation v. McComb—that "it has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; . . . if the officer plead the authority of an unconstitutional law . . . , it will not prevent the issuing of the writ." Justice Bradley, who wrote this opinion, did not mention it in Poindexter v. Greenhow, but seemed inclined to class the case with Davis v. Gray as a case of "State aggression on the rights of individuals,"[3]

[1] 114 U. S. 270.
[2] 140 U. S. 1. The same idea was more or less worked out by Justice Matthews in Ex parte Ayers, 123 U. S. 443.
[3] See below, p. 88.

adding that "these cases approach nearer to suits against a State than any others which have received the sanction of this court." But the principle stated in the McComb case has been restated with approval many times, and has never been challenged. Justice Matthews did not mention the case in Antoni v. Greenhow or in Hagood v. Southern.[1] In Ex parte Ayers, he simply said, quoting from the McComb case, without any attempt to harmonize, that the view stated by him did not "forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest." Justice Lamar evidently did not know just what to do with the case, as appears from the irrelevant way he inserted it. After pointing out his second class of cases, "where a suit is brought against defendants who, claiming to act as officers of the State and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of plaintiff acquired under a contract with the State," he continued: "Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not within the meaning of the eleventh amendment, an action against the State," citing, among other cases, the McComb case.

Aside from the inconsistency with the McComb case, which a formal approval of the doctrine in that case of course does not cure, the whole position is based upon the idea, the error of which was pointed out at the beginning of the chapter, that the nature of the action of mandamus is changed by the fact that the "plain official duty" to be performed is an act "which constitutes a performance of

[1] 117 U. S. 52.

its contract by the state."[1] A state may, of course, provide for such action against officers as a form of action against itself. But the fact that the state extends the remedy where it would not exist by ordinary practice does not necessarily make it a form of action against the state. That should be determined by the nature and purpose of the remedy. In Louisiana v. Jumel, for instance, it seems clear that the remedy was given not as a means of compelling the State to live up to its obligations—there was no idea that the State would do otherwise,—but as a means given by the State to the creditors of compellnig the proper exercise of their duties by the State officers. At any rate, where the remedy is not by special grant, but simply the result of the imposition of such duties as by the general law of the state are enforceable by mandamus, there is not the slightest ground for regarding the action as a suit against the state. If the action is maintainable, upon the jurisprudence which governs the case, as a suit against the officers as such, any further distinction is arbitrary and out of place.[2]

The only ground, then, consistent with sound constitutional principle, upon which Louisiana v. Jumel may be based is that upon which Justice Miller rested it in his analysis of the cases in Cunningham v. Macon and Brunswick Railroad Company—namely, that the nature of the relief was beyond the scope of mandamus. And that was probably wrong upon the jurisprudence of Louisiana, which should have governed.

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[1] It involves, also, two propositions which have been opposed in other parts of this paper: that consent of a State may give jurisdiction in cases coming within the prohibition of the eleventh amendment (see Part I, p. 29); and that withdrawal of a remedy against the State, though made part of a contract, is not unconstitutional (see Part I, p. 36).

[2] In Antoni v. Greenhow—approved by Justice Lamar in Pennoyer v. McConnaughy,—Justice Matthews and the three justices who agreed with him even held to be a suit against the State, mandamus to compel the "purely ministerial duty" of receiving coupons for taxes, thus running squarely counter to the McComb case. In Antoni v. Greenhow, the remedy to compel acceptance of the coupons existed, not by special grant, but simply, as the State court had held, under the general law as to mandamus.

The decision seems unfortunate in its whole bearing. It prevents a State from offering to creditors an inviolable guarantee of the fulfilment of its contract. Moreover, it is impossible to determine its real scope—where the line between it and Board of Liquidation v. McComb is to be drawn. Louisiana v. Jumel has, however, been squarely reaffirmed in Hagood v. Southern,[1] Justices Field and Harlan still dissenting, and again in Louisiana v. Steele.[2]

[1] 117 U. S. 52.

[2] 134 U. S. 230. In Neganab v. Hitchcock, 202 U. S. 473, also, in which it was held, very properly, that the action against the secretary of the interior could not be maintained to enforce the execution of a trust resting on the United States, the court passed over the question whether the action might be maintained to compel the execution of the act of 1889 as a plain official duty—"whether the courts would have power to control the action of the secretary of the interior in this matter, or whether the power and authority so to do is purely political." The relief asked was, however, clearly beyond the scope of judicial enforcement upon the jurisprudence of the courts of the United States. A decision in a State court, in line with Louisiana v. Jumel, is Board of Public Works v. Gantt, 76 Va. 455, decided by three judges against two. Contra, State v. Cardoza, 8 S. C. 71.

CHAPTER V.

Extension of the Principle of Equitable Relief Against Wrongful Acts.

In Chapter II was set out the principle of Osborn v. Bank—that a public officer may be enjoined, if equitable grounds exist, from committing a tort under color of an unconstitutional authority. The supreme court, as it was composed through the time of the Virginia coupon cases, was not inclined to extend the principle beyond acts for which the officers would be liable in tort.[1] Justice Miller, in his analysis of the cases in Cunningham v. Macon and Brunswick Railroad Company, plainly had no thought of extending the principle. He balked at Davis v. Gray. He did not include it in his second class of cases—"where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted upon the orders of the government"; but put it where it did not belong, in the third class[2]—where a plain official duty is imposed upon an officer, which he is about to violate. His doubt of the correctness of that decision is manifest in his comment upon it: "it is clear that, in enjoining the governor of the State in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further." That Justice Matthews shared this doubt is indicated by his failure to comment on the decision in his exhaustive opinion in Ex parte Ayers. He stated the principle governing cases of injuries by public officers thus: "The action has been sustained only in those instances where the act complained of,

[1] The composition was practically the same through the great line of cases from U. S. v. Lee, 106 U. S. 196, to Ex parte Ayers, 123 U. S. 443.

[2] The class of cases treated in Chapter IV.

considered apart from the official authority alleged as justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character."

Davis v. Gray[1] stood, however, decided. In that case, the State of Texas had made land grants in aid of a railroad company; the legal title was not yet conveyed. A later statute declared the grant forfeited, and opened the land to patent by the governor and land commissioner. The receiver of the railroad brought a bill in the United States court to enjoin these officers from "interference with or infringement of the land grant." The court held the later statute unconstitutional, and granted the relief on the equitable ground of preventing such a cloud on the title of the company, and of avoiding the great trouble and expense of actions against the individuals who might receive patents under the unconstitutional statute.[2]

Justice Swayne, who delivered the opinion of the court, said that Osborn v. Bank decided three things: "(1) A circuit court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the constitution or a statute of the United States, when such execution will violate the rights of the plaintiff. (2) Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers in all respects as if the State were a party to the record." The statement that "the court may proceed to decree

[1] 16 Wall. 203.

[2] Justice Davis, with whom agreed Chief Justice Chase, dissented on the ground that the suit was in effect against the State. The position of the Chief Justice was consistent with his opinion in Miss. v. Johnson, 4 Wall. 475, in which he placed the decision on the ground that the executive should not be interfered with in the execution of statutes, although alleged to be unconstitutional. It may be said that this opinion was entirely disregarded in Ga. v. Stanton, 6 Wall. 50, in which Justice Nelson put the decision on the ground that the rights for which the State claimed protection were purely political.

against the officers in all respects as if the State were a party to the record," taken by itself, is of course too sweeping. It was criticized in both the majority and minority opinions in United States v. Lee. But limited, as it seems to have been intended, to the class of cases mentioned in (1), it probably is not erroneous. The principle stated in (1) has become fully established. Osborn v. Bank is not, however, authority for it. It is true that in that case, in addition to the decree for restitution, the decree of the circuit court against the execution of the unconstitutional statute levying the tax was sustained.[1] But the only mode threatened of executing that statute was by distraint for the taxes under the warrant of the State auditor. So that Justice Matthews was justified in saying: "There is nothing, therefore, in the judgment in that cause as finally defined, which extends its authority beyond the prevention and restraint of the specific act done in pursuance of the unconstitutional statute of Ohio, and in violation of the act of congress chartering the bank, which consisted of the unlawful seizure and detention of its property."

Davis v. Gray clearly went beyond the principle propounded by Justice Matthews in Ex parte Ayers. The acts of the officers complained of—the issue of patents in the name of the State for land within the land grant of the railroad—were not wrongs as "the personal acts of the individual defendants," "considered apart from the official authority alleged as justification," but only as actions in their official capicity. If actions against public officers were to be limited, the distinction of Justice Matthews was clear and reasonable. But does not the principle, although not the authority of Osborn v. Bank extend further? The injury in that case would have been a tort on the part of any individual, apart from any official character. But even there the ground for equitable relief rested on the nature of the act in the light of the "official authority alleged as

[1] See 1 *Harv. L. Rev.* 223—D. H. Chamberlain, for this part of the case, adduced by counsel in argument in the Virginia coupon cases.

justification."[1] An officer is separately liable for an injury. The fact that the injury is such as he could not inflict as an individual, but only by the exercise of his office, should not affect the case. The principle logically extends to any violation of a right of person or property under color of an unconstitutional authority.

Any chance that the conservative tendency of the court might prevail was defeated by the fact that the next case, Pennoyer v. McConnaughy,[2] was on all fours with Davis v. Gray.[3] Justice Lamar propounded a broad principle to determine whether suits against pubilc officers are suits against the State: "where the suit is brought against the officers of the State, as representing the State's action and liability"—that is, where, in performing the acts sought to be controlled, the officers will be acting for the State,—the suit is in effect against the State; but "where a suit is brought against defendants who, claiming to act as officers of the State and under the authority of an unconstitutional statute"—in which case they are not acting for the State,—"commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State," the suit is not against the State. Justice Lamar, in this opinion, pushed the distinction between affirmative relief as not available, and preventive relief as available, entirely too far. But, so far as regards the class of cases now under consideration, the criterion he stated is a proper one: it sustains the principle of relief against injuries in its full scope. Even if his view be accepted, however, that, in acting under an unconstitutional statute, officers are not acting for the State, it does not give the reason why a suit against the officers is not a suit against the State. For the statute cannot be held unconstitutional except in the exercise of jurisdiction; and if the statute be found valid, in which case the officer is acting for the State, then, in his view, the court has exercised jurisdiction in a suit against the State.

[1] See above, p. 48.

[2] 140 U. S. 1.

[3] Another similar case is Preston v. Walsh, 10 Fed. 315. See also State Bd. of Land Com. v. Carpenter, 16 Col. App. 436.

The proper ground for the action against the officers is that a wrongful act is alleged against them, and that the court has jurisdiction to inquire into the authority they set up in justification.

A case that at first sight appears contrary to Davis v. Gray is Oregon v. Hitchcock.[1] Congress had granted to the State of Oregon swamp lands on public domain within the State. Later, an act of congress provided for the transfer by the Indians on a reservation of their right of occupancy to the United States, and for allotting and patenting the land in severalty to the Indians. The State claimed that the grant to it included swamp lands within the reservation, which vested upon the extinction of the Indian right of occupancy; and brought suit to restrain the secretary of the interior and the commissioner of the general land office from allotting and patenting under the act any swamp lands. Now, such a grant of swamp lands was not complete until identification. Hence the lands were still within the administration of the land department; and one ground for dismissal was the settled policy of the court not to interfere in the administration of the public lands, but to require all claims to be presented before the land department until final action there.[2]

But the court also held the suit to be in effect against the United States. Justice Brewer quoted from his opinion in Minnesota v. Hitchcock:[3] "Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to devest the government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in effect it will operate, and the officers have no pecuniary interest in the matter."

[1] 202 U. S. 60.
[2] Mich. Land & Lumber Co., v. Rust 168 U. S. 589; Brown v. Hitchcock, 173 U. S. 473; Humbird v. Avery, 195 U. S. 480.
[3] 185 U. S. 373.

Now, this was a good reason for holding, in Minnesota v. Hitchcock, that the suit could be a form of action provided against the United States with the consent of the United States. But this did not prevent a similar action from being maintainable as a suit against the officers, in the absence of consent of the United States. The language of Justice Brewer is just as applicable to Davis v. Gray, upon which the argument of counsel was based. The State claimed a vested jus in rem in the lands, and sought to restrain the violation thereof by the officers. It is true the contention of the State was wrong; but that could be determined only in the exercise of jurisdiction. The opinion neither in Minnesota v. Hitchcock nor in Oregon v. Hitchcock mentioned Davis v. Gray. It is fair to assume that the court had no intention of impairing the principle of that case.[1]

In Budd v. Houston,[2] the principle was extended to grant corrective relief. A suit was sustained against the recorder of mortgages, tax collector, and recorder of conveyances, to remove a cloud on title caused by the registry of a void assessment by the recorder of mortgages, by the illegal tax sale to the State, and by the threatened registry of the title of the State, and to review these illegal tax proceedings and acts of the several officers. The case, to use a phrase of Justice Miller, "goes to the verge of sound doctrine." A bill to quiet title as against a disputed title in the State may not, of course, be maintained against the officers. But specific acts of officers which have caused a cloud on title may, perhaps, be corrected, just as well as they might have been restrained.

In the matter of taxation, the principle warrants the

[1] In Noble v. Union Riv. Logging R. R. Co., 147 U. S. 165, was sustained a decree enjoining the secretary of the interior and the commissioner of the general land office from executing an order revoking the approval of the company's maps for a right of way over the public land, and from molesting the company in the enjoyment of said right of way, which was held to have vested upon the approval by the secretary of the interior of the right of way selected under a grant by congress.

[2] 36 La. Ann. 959.

restraint, not only of the actual collection of an unconstitutional tax, but also of the proceedings leading thereto. In Re Tyler,[1] the court enjoined the levy for a tax alleged to have been over-assessed, as well as the collection thereof. In Fargo v. Hart,[2] the auditor of Indiana was restrained from certifying to the auditors of the several counties an assessment on a railroad, which constituted an unconstitutional interference with interstate commerce. These acts, of course, were not possible to the defendants as private individuals, but only in their offiical capacity. They were, however, part of the proceedings in a threatened wrong, and as such enjoinable.

The great field for application of the principle has been in the matter of rate regulation by the States. To enforce upon a railroad rates that are unconstitutional is a wrong. And all manner of means of enforcing such rates have been enjoined—the publication of the rates, the hearing of complaints for violation of them, the bringing of suits to enforce them.[3]

It must not be supposed, however, that every act of an officer under color of an unconstitutional authority may be enjoined. The act must be such as to involve the separate liability of the officer. But the remedy for a breach of contract or violation of a trust is only against the party contractant or the trustee, not against the agent. So that, if the act is only a breach of a contract or trust of the state, there is no right of action against the officer.[4] Thus, in Louisiana v. Jumel, the diversion of the moneys pledged for the coupons was a violation of a right of plaintiffs only so far as it was a breach of contract of the State. In Neganab v. Hitchcock,[5] the acts sought to be restrained violated rights of plaintiffs only as breaches of the trust resting upon the United States. The fact that the act constitutes a breach of contract or of trust on the part of the state

[1] 149 U. S. 164.
[2] 193 U. S. 490.
[3] This means—by suits—is reserved for special treatment in Chap. VI.
[4] See Justice Matthews, in Ex parte Ayers, 123 U. S. 443.
[5] 202 U. S. 473.

does not, of course, exclude liability on the part of the officer. But there must be something more to involve such liability; there must be a violation of a jus in rem. The right of action against the officer is based upon this ground: an act that is a wrong in itself, unless made lawful. For instance, the enforcement of rates upon a railroad is an unlawful interference with the railroad, unless made lawful; and if the rates are confiscatory, they cannot be made lawful. That what prevents the act from being made lawful is the fact that it constitutes an unconstitutional breach of contract on the part of the State, does not affect the case. The collection of a tax, for instance, is an unlawful interference with property rights, unless the tax is lawful. It may be prevented from being lawful by reason of a contract exemption granted by the State.

The distinction is well illustrated in the case of Pitcock v. State.[1] The superintendent and financial agent of the Arkansas State penitentiary, in the exercise of their powers, and with the approval of the board of commissioners, made a contract in the name of the State to supply a certain manufacturing company with convict labor. Suit was brought to restrain the withdrawal of the convicts in violation of the contract, and to compel the furnishing of more to make up the amount of labor under the contract. A restraining order was granted; and on violation thereof, judgment for contempt. The judgment was reversed by the court above on the ground that "a withdrawal of the convicts from the premises of plaintiffs was not a taking of or a trespass upon the latter's property. It was only a refusal to perform the alleged contract which plaintiffs seek to restrain." That is, the withdrawal was not a wrong in itself unless supported by lawful authority, but was only a breach of the contract of the State.

Board of Liquidation v. McComb has been classed with Davis v. Gray.[2] And probably it may be based on the same

[1] 121 S. W. (Ark. 1909) 742.

[2] By Justice Bradley, it seems, in Poindexter v. Greenhow. And by Judge Billings in Chaffraix v. Bd., 11 Fed. 638. For the ground of the decision in the McComb case, see Chap. IV.

principle. For in the McComb case the plaintiffs were holders of consolidated bonds; and the action might be regarded as to restrain "the board from injuriously affecting their value, by issuing similar bonds to parties not entitled thereto." The threatened acts were not only breaches of contract, but violations of property rights. Similarly, where a State grants an exclusive franchise, the grantee acquires not merely a contract right, but a jus in rem, which he may protect against infringement by individuals or by public officers in the name of the State.

To conclude, then, the principle of Osborn v. Bank has been extended in Davis v. Gray and the subsequent cases. The broad principle is this: public officers may be restrained whenever, under color of unconstitutional authority, they are proceeding to violate rights in rem.[1]

[1] That the official position of the officers sued is taken into account appears strongly in the ruling that the successors in office of the officers enjoined are privies to the decree. Prout v. Starr, 188 U. S. 537; Gunter v. Atl. Coast Line R. R. Co., 200 U. S. 273. The successor in office may not be substituted, however, pending hearing on appeal or writ of error. Warner Valley Stock Co. v. Smith, 165 U. S. 28. See also Chandler v. Dix, 194 U. S. 590.

CHAPTER VI.

Ex Parte Young.

One means of enforcing laws is by suits—criminal, or by way of mandamus or injunction. In Ex parte Young,[1] the question was squarely presented whether the law officers of a State may be restrained from bringing suits in the name of the State for the enforcement of a statute fixing railroad rates, alleged to be confiscatory, and therefore unconstitutional.[2]

To clear the discussion, several points may be quickly disposed of. In the first place, no regard will be given to the suggestion[3] that the scope of the eleventh amendment might be limited in relation to the later fourteenth amendment. It has not been used in any decision;[4] and there seems not the slightest ground for it. Nor will the view of Justice Brewer be further noticed—that the interest of the state in the enforcement of its laws is only a governmental interest, and that such an interest is not sufficient to constitute the state party to a suit.[5] Moreover, the fallacy in the idea[6] that the suit is not against the State because the officer is not acting for the State if the law is unconstitutional, has been exposed. As pointed out, the State has

[1] 209 U. S. 123.

[2] Another ground of unconstitutionality was the fact that the penalties were so enormous as to show a design to scare the railroads from testing the constitutionality of the rates. This, of course, was only an additional ground of unconstitutionality, and would not make the suit against the officers any less a suit against the State.

[3] By Justice Shiras, in Prout v. Starr, 188 U. S. 537.

[4] Justice Peckham, in Ex parte Young, assumed that the eleventh amendment retained full effect; although he honored the contrary suggestion so far as to say of the fourteenth amendment: "but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier amendment."

[5] This view has been sufficiently disposed of in Part I, p. 42.

[6] Stated even by Justice Peckham in Ex parte Young.

an interest in whether the acts of its officers are lawful; and, anyhow, the question of constitutionality can be decided only in the exercise of jurisdiction, so that, if the law is found constitutional, the court will have exercised jurisdiction over a suit against the State. On the other hand, as has been several times stated, the fact that the state can act only through agents does not make a suit against the agents a suit against the state. Also, the fact that the officers have no personal interest in the controversy makes no difference.

The question whether, supposing the suit to be otherwise well brought, grounds for equitable relief exist, is incidental. It will be accepted here that the maxim that "equity has no jurisdiction to enjoin criminal proceedings" means only that in general no equitable grounds exist; but where there are special equitable grounds, the maxim does not apply. In such a matter as the fixing of rates, where penalties are provided for each violation, clearly there are equitable grounds. "The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all, and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community, as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained."[1] On the other hand, where the enforcement is to be simply by application for mandamus or mandatory injunction to compel obedience, it would seem just as clear that the remedy by defense to such suit is adequate. If, however, criminal proceedings are enjoined, it may be proper to enjoin also any other action in which the same issues would be involved.[2]

[1] Justice Harlan, in Smyth v. Ames, 169 U. S. 466, 518. Justice Peckham, in Ex parte Young, also stated strongly the equitable grounds.

[2] In Ex parte Young, where the only suit that the attorney gen-

In the earlier rate cases, where the enforcement of rates was entrusted to railroad commissions, no special point was made of the restraint of suits in actions to enjoin generally the enforcement of rates by the commissions. In Prout v. Starr, Justice Shiras took the view that, the court having jurisdiction to enjoin the board of transportation from enforcing the rates, the injunction properly extended to enjoin suits to enforce such rates, on the ground that such suits would be an attempt by a party to the suit in the federal court to impair the jurisdiction of the federal court, by bringing suit involving the same questions in the State courts. "It is true," he declared, "that the defendant was included in the bill as attorney general of the State, but that was because he was one of the board of transportation, which was directed to enforce the provisions of the act. The bill did not seek to interfere with the acts of the attorney general in prosecuting offenders against the valid criminal laws of the State, but its object is to prevent him from collecting penalties that had accrued under the provisions of a statute judicially determined to be void." Justice Peckham, in Ex parte Young, stated the same view: "When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a federal court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction to the exclusion of all other courts, until its duty is finally performed." This view of enjoining such suits, namely, that it is incidental to the exercise of jurisdiction, and necessary to make the jurisdiction of the federal court effective, avoids conflict with section 720 of the revised statutes, forbidding the

eral, Young, could bring, was by formal action in the name of the State for mandamus, criminal proceedings by the prosecuting attorneys of the State were also enjoined. Anyhow, the question of equitable ground probably did not arise in that case, since the case did not come up on appeal in the injunction suit, but on petition for habeas corpus upon sentence for contempt for violation of the injunction.

granting of a writ by any court of the United States to stay proceedings in any court of a State.[1]

Even where the suits are to be brought in the name of the commission, however, I think that this doctrine of perfecting jurisdiction, by enjoining parties to the action from bringing other suits involving the same question, does not properly apply. The suits, though in the name of the commission, are merely forms of action by the State.[2] But, the State not being a party to the original suit, suits by the State cannot be enjoined; and the fact that the act has been declared unconstitutional does not make the suit to enforce it any less a suit by the State, any more than in any other case the suit is any less a suit by the plaintiff because his ground of action is not well-founded.[3] The point is still clearer where the suits are to be brought in the name of the State by the attorney general, who, although a member of the commission, brings the suit not in that capacity, but in his entirely distinct capacity as attorney general. At any rate, whatever view be taken of the cases where the officer has other connection with the enforcement of the rates, the doctrine of incidental jurisdiction certainly has no place where, as in the suit from which Ex parte Young arose, the suits are to be brought by the law officers of the State, who have no relation whatever to the enforcement of rates, except to bring suit in the name of the State.

The enjoining of suits in the name of the State to enforce rates can properly be sustained, then, only upon the ground that such suits are simply part of the proceedings to violate the rights of the plaintiff under color of an authority alleged to be unconstitutional. That is, such suits may be,

[1] The doctrine of Dietzsch v. Huidekoper, 103 U. S. 494.

[2] See Part I, p. 41.

[3] No special point was made of the enjoining of suits, in such actions to enjoin enforcement by commissions, so recently as McNeill v. So. Pac. Ry. Co., 202 U. S. 543, and Miss. R. R. Com. v. Ill. Cent. R. R. Co., 203 U. S. 335. In the latter case, the order of the commission was enforceable only by application to court for a mandamus or mandatory injunction; so that there was no ground for equitable relief. This point, however, seems not to have been raised.

by their connection, in themselves wrongful acts, from which the agents of the State may be restrained just as they may from other wrongful acts. Justice Brown first gave expression to this idea, in Davis and Farnum Manufacturing Company v. Los Angeles:[1] "It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding." It was adopted in Ex parte Young. Justice Peckham said, with respect to the Reagan and Smyth cases: "In those cases, the only wrong or injury or trespass involved was the threatened commencement of suits to enforce the statute as to rates. . . . The threat to commence those suits under such circumstances was, therefore, necessarily held to be equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer."

Is this a proper view of such suits, as equivalent to any other threatened act, part of the execution of an unconstitutional statute? Or is a suit to be regarded simply as a resort to judicial determination whether the statute is to be enforced? There were precedents—some to comfort, some to plague the court.[2]

The main reliance of Justice Peckham, in the opinion of the court, was upon Reagan v. Farmers' Loan and Trust

[1] 189 U. S. 207.

[2] The point decided in Ex parte Young—whether suits in the name of the State by law officers having no other relation to the statutes in question might be enjoined—was raised in two earlier cases, but avoided by basing the decisions on other grounds. In Cotting v. Godard, 183 U. S. 79, the objection on this score was not raised by the attorney general at the proper stage of the case; and the court took this as an opportunity not to decide the case, but to dismiss as to the attorney general, without prejudice to a new suit. In Gunter v. Atl. Coast Line R. R. Co., 200 U. S. 273, a bill to restrain suit by the attorney general to recover back taxes was sustained as ancillary to a previous action, involving the validity of the same taxes, to which the State had been a party.

Company[1] and Smyth v. Ames.[2] It is true that in both those cases the attorney general was a member of the railroad commission; and that no special point was made as to the enjoining of suits in the general injunction against enforcement of the rates. However, if such suits be regarded as part of the execution of the unconstitutional rates, Justice Peckham was clearly right in holding that it makes no difference whether the officer has a special relation to the statute, or whether his duties are simply in the regular exercise of his office. "The being specially charged with the duty to enforce the statute is sufficiently apparent when such duty exists under the general authority of some law, even though such authority is not to be found in the particular act. It might exist by reason of the general duties of the officer to enforce it as a law of the State." Justice Harlan himself, in his dissenting opinion, abandoned the distinction in Fitts v. McGhee,[3] between being specially charged or not with the enforcement of a statute. In fact, as Justice Peckham pointed out, in Smyth v. Ames "There was no special provision in the statute as to rates, making it the duty of the attorney general to enforce it, but, under his general powers, he had authority to ask for a mandamus to enforce such or any other law."

Justice Harlan now sought to explain away the Reagan and Smyth cases as suits against the States with their consent.[4] Justice Brewer, in the Reagan case, did call attention to the fact that the State law provided for actions against the commission in any court of competent jurisdiction in Travis County, and that "the United States circuit court might be considered as coming within that description." And the case has been referred to since as decided upon that ground.[5] The real ground of the decision, however, was

[1] 154 U. S. 362.
[2] 169 U. S. 466.
[3] 172 U. S. 516.
[4] This, of course, involves the view, which is opposed in Part I, p. 29, that consent of a State may confer jurisdiction on the federal courts in cases coming within the prohibition of the eleventh amendment.
[5] D. & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 218; Barney v. N. Y., 193 U. S. 430.

clearly that the suit was not a suit against the State. Justice Harlan's explanation of Smyth v. Ames is very weak. It involves a direct conflict with the decision in Smith v. Reeves,[1] in which he himself delivered the opinion, that, in giving its consent, a State may limit suits against itself to its own courts.

The cases that gave trouble were Ex parte Ayers[2] and Fitts v. McGhee.[3] The Ayers case was as follows. It having been held, in Poindexter v. Greenhow, that, when a taxpayer had tendered coupons which the State had contracted to receive for taxes, any attempt to collect the tax thereafter was an unlawful trespass, a State statute was passed, providing for suit in the name of the State for the recovery of the taxes in such cases, and imposing onerous conditions on the proof of tender, which it was alleged were unconstitutional.[4] A bill was brought by holders of coupons against the attorney general and various commonwealth attorneys to restrain such suits. If the case had come up simply on appeal from the circuit court, it might have been decided on other grounds, and never have risen to vex the court. For the plaintiffs were not taxpayers who had tendered coupons, and were, therefore, probably not in a position to bring the suit.[5] It would seem, also, that the remedy by defense at law was adequate, and that, therefore, there was no ground for equitable relief. However, these questions did not arise; for the case came up on petition for habeas corpus, upon sentence for contempt for violation of the temporary restraining order of the circuit court. The court held that the suit below was in effect a suit against the State.

Justice Peckham stated Ex parte Ayers thus: "A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by

[1] 178 U. S. 436.
[2] 123 U. S. 443.
[3] 172 U. S. 516.
[4] So held, later, in McGahey v. Va., 135 U. S. 662.
[5] See Marye v. Parsons, decided in connection with Poindexter v. Greenhow.

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directing those officers to do acts which constituted such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State." And again: "But the injunction asked for . . . was to restrain the State officers from commencing suits under the act of May 11, 1887 (alleged to be unconstitutional), in the name of the State, and brought to recover taxes for its use, on the ground that, if such suits were commenced, they would be a breach of a contract with the State." This is all the explanation of Ex parte Ayers; and it is manifestly no explanation at all. The suit did not attempt to compel the State officers to do anything. The fact that the alleged unconstitutional acts sought to be restrained would have been a breach of the contract of the State made no difference, if the commencement of suits under the circumstances was equivalent to a trespass like that in Poindexter v. Greenhow. The opinion in Ex parte Ayers went squarely on the ground that the mere bringing of an action in the name of the State could not be charged against the officers as an individual wrong: "It follows, therefore, in the present case, that the personal act of the petitioners sought to be restrained by the order of the circuit court, reduced to the mere bringing an action in the name of and for the State against taxpayers, who, although they may have tendered tax receivable coupons, are charged as delinquent, cannot be alleged against them as an unconstitutional act in violation of any legal or contract rights of such taxpayers."[1]

Justice Peckham also said: "The injunction was declared illegal because the suit itself could not be entertained, as it was one against the State to enforce its alleged contract. It was said, however, that, if the court had power to entertain such a suit, it would have power to grant the restraining order preventing the commencement of suits. It was not stated that the suit or the injunction was necessarily confined to a case of threatened direct trespass upon or injury to prop-

[1] For a fuller exposition of the views of Justice Matthews, see above, Chap. V.

erty." This is sophistical. Certainly, if the suit could be entertained, the injunction could be granted. But whether the suit could be entertained, depended upon whether the suits in question might be enjoined. It is true, if the State were a party, other grounds for enjoining the suits might exist. Any equitable ground would suffice. For instance, if the State were about to bring suit upon a chose in action, to which an equitable defense existed, the suit might be enjoined if the State could be made a party, and the agents of the State incidentally included in the injunction. But, of course, this ground would not suffice, if the State could not be made a party, for an injunction against the agents. For such a separate right of action against the agents, other grounds must exist; the acts threatened must be violations of rights in rem. And the question in Ex parte Ayers was: could the threatened suits be regarded as equivalent to trespasses like that in Poindexter v. Greenhow? It was answered in the negative. It may be said, however, that the decision was made under a general tendency to limit suits against public officers to cases "where the acts complained of, considered apart from the official authority alleged as justification, and as the personal acts of the individual defendants, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character"; a tendency which has not prevailed.[1]

Even more directly in point was Fitts v. McGhee. A statute of Alabama, 1895, fixed the rates of toll that might

[1] See above, Chap. V. The decision, though not the opinion, in Ex parte Ayers may, perhaps, be explained on the ground that, the taxes themselves being perfectly valid, the State had the right to demand them as often as it pleased, subject to the right of the taxpayers to make tender of the coupons; that the suits were only a form of demand; and that this lawful form of demand was not made unlawful in itself by the imposition of unconstitutional conditions on the proof of tender. (If the taxes were unconstitutional, it would seem that there was no right even to demand them.) Consequently, that there was no unlawful act threatened. This would not, of course, be strictly a question of jurisdiction. But relief from sentence for contempt has been extended beyond the lack of jurisdiction in the strict sense.

be charged for crossing a certain bridge, under a penalty of $20 for each violation, to be recovered by the persons overcharged. The receivers of the railroad company owning the bridge, alleging that the rates were so low as to be unconstitutional, brought suit to restrain the attorney general from instituting any proceedings, by mandamus or otherwise, to compel the observance and obedience of the act fixing the rates of toll, or for the forfeiture of the franchise of the railroad company in and to the bridge for failure to obey the act. Also, against a certain named individual and all persons whatsoever, to restrain from instituting suits for penalties, and from procuring the institution of any suit by the State officers. Before final hearing, an amendment to the bill recited that numerous indictments against the agents of the company were being brought under a law of the State making it a misdemeanor to charge unreasonable rates; and the injunction was extended to restrain the State solicitor for the judicial district within which the bridge was located from prosecuting criminal proceedings against anyone for violation of the alleged unconstitutional statute fixing rates. The supreme court, on appeal, held the suit to be in effect against the State.

Justice Peckham explained the case away on the ground that the act under which the indictments were brought "was not claimed to be unconstitutional, and the indictments found under it were not necessarily connected with the alleged unconstitutional act fixing the tolls," and that the penalties for disobeying the latter act, by demanding and receiving higher tolls, "were to be collected by the persons paying them," no officer of the State having "any official connection with the recovery of such penalties." This entirely overlooks the relation of the attorney general to the alleged unconstitutional act—the proceedings by mandamus or otherwise that might be instituted by him. Besides, there was no suggestion of such a distinction in the opinion in Fitts v. McGhee. The indictments under the act against unreasonable tolls seem to have been regarded as used to

enforce the act fixing the tolls.[1] The decision was based squarely on Ex parte Ayers. True, it was said that "neither of the State officers named had any special relation to the particular statute alleged to be unconstitutional." But this did not mean that the officers had no direct relation to the statute; it meant that their relation was only in the ordinary exercise of their offices, and not, as in other cases which had to be distinguished, by virtue of any special connection.[2] The ground of the decision is clearly shown by this quotation: "There is a wide difference between a suit against individuals holding official position under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State, merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceeding in the courts of the State."[3]

So far as precedents were concerned, then, there was, on the one hand, the principle announced in the Ayers and Fitts cases, a principle which had never been questioned. On the other hand, there was the logic of the decisions in the Reagan and Smyth cases. Clearly, the court, in Ex parte Young, was not compelled by precedent. In deciding as it did, it was no doubt influenced by the fact that the principle of Fitts v. McGhee was being abused by State rate legislation imposing such enormous penalties for violation as practically to coerce submission without a test of the constitutionality of the rates. Evidently, the enforcement of rates by such proceedings would work just as serious an injury to constitutional rights as any direct trespass to accomplish the same result. Necessity seemed to require the decision. Justice Harlan showed that there was no

[1] The case was cited to this effect in D. & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 217.

[2] As already stated, this distinction was shown to be groundless by Justice Peckham.

[3] Justice Harlem, who had delivered the opinion of the unanimous court in Fitts v. McGhee, said of Justice Peckham's explanation: "The Fitts case is not overruled, but is, I fear, frittered away or put out of sight by unwarranted distinctions."

such necessity in the case at hand, at least. The bill in the suit below had been brought by stockholders of the railroad companies concerned, to enjoin the railroads from obedience to the rates prescribed, as well as to enjoin the State officers from enforcement of the act. So that, at the time the attorney general committed his contempt, the railroad company was acting under order of the federal court, and was, therefore, protected by this defense against any action that might be brought in the State courts, as was held in Hunter v. Wood.[1] Such a situation would arise, however, only under the operation of the equity rule which enables stockholders, in certain circumstances, to enjoin the corporation from obeying an unconstitutional law to the injury of the corporation.[2]

Accepting the view that suits to enforce an unconstitutional statute may be equivalent to a trespass, there remain other objections. There is, in the first place, section 720 of the revised statutes,[3] forbidding the granting of a writ by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. Strangely, this statute, though much relied upon in Gunter v. Atlantic Coast Line Railroad Company, was not discussed in either opinion in Ex parte Young. Yet it seems to offer an insuperable bar. Its prohibition extends, of course, not merely to writs addressed directly to State courts, but also to writs to enjoin parties from instituting proceedings in State courts. It is limited, to be true, by the doctrine of Dietzsch v. Huidekoper, that a federal court may enjoin such proceedings where necessary to the effective exercise of its own jurisdiction. Under this doctrine, a party to a suit in a federal court may be enjoined from bringing in the State courts suits involving the same question between the same parties. In the Gunter case, for example, the State having been a party to the original suit,

[1] 209 U. S. 205.

[2] State decisions contrary to Ex parte Young are R. R. Com. v. T. & A. R. R. Co., 24 Fla. 417; State v. So. Ry. Co., 145 N. C. 495.

[3] U. S. Comp. Stat. 1901, p. 581.

in which a certain tax was held unconstitutional, it was held that section 720 did not bar an ancillary suit to enjoin the agents of the State from suing in the name of the State for the same taxes.

In Ex parte Young, Justice Peckham said: "The question that arises is whether there is a remedy that the parties interested may resort to, by going into a federal court of equity, in a case involving a violation of the federal constitution, and obtaining a judicial investigation of the problem, and, pending its solution, obtain freedom from suits, civil or criminal, by a temporary injunction, and, if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings." Now, if enjoining the suits in such a case could be thus regarded as incidental to the action against the officers, there would, of course, as in the Gunter case, be no need of holding such suits to be equivalent to a trespass. But it is utterly improper to regard them so in a case like Ex parte Young, where the only relation of the officers to the statute was, as law officers of the State, to bring formal suits in the name of the State. There was no right of action against the officers to test the constitutionality of the statute, as incidental to which suits by the officers with the same object might be enjoined. The only right of action against the officers was to restrain the suits as equivalent to a trespass; and the only bearing of the question of constitutionality of the statute was with respect to whether the officers had lawful authority for their otherwise wrongful acts. The prohibition in section 720 is, of course, purely statutory; and whether it properly applied or not does not affect the main principle of the case.

Another ground of objection, strongly urged by Justice Harlan, is that to shut out a State from appearing in its own courts, by enjoining all its officers, is contrary to our federal form of government. Justice Peckham admitted: "It is proper to add that the right to enjoin an individual, even though a State official, from commencing suits under

circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a State court would be a violation of the whole scheme of our government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account." Justice Harlan answered: "If an order of the federal court forbidding a State court or its grand jury from attempting to enforce a State enactment would be a violation of the whole scheme of our government, it is difficult to see why an order of that court, forbidding the chief law officer and all the district attorneys of a State to represent it in the courts, in a particular case, and, practically, in that way closing the doors of the State courts against the State, would not also be inconsistent with the whole scheme of our government, and, therefore, beyond the power of the court to make." It may be said, however, that, even if Justice Harlan's argument be fully accepted, limitations growing out of our federal form of government seem to yield before exigencies sufficiently strong.[1]

From the foregoing exposition, it is plain that Ex parte Young was a very difficult case. The court succeeded in agreeing, however, with only one dissent: and the decision, made upon the fullest consideration, may doubtless be accepted as final. Its immediate effect upon rate regulation will probably be good; it will check the tendency back to the unsatisfactory method of regulation directly by the legislature, in order to avoid, under the principle of Fitts v. McGhee, the control of the federal courts.[2] In its full

[1] For example, S. C. v. U. S., 199 U. S. 437.

[2] Another State plan of confining the determination of the legality of rates, in the first instance, to the State courts, by making the fixing of the rates a judicial act, was frustrated in Prentis v. Atl. C. L. R. R. Co., 211 U. S. 210.

scope, the decision is startling. Whether a new departure in principle or not, the case certainly marks a radical expansion in the practical control of the federal courts over State activities. It enables a federal court to enjoin criminal prosecutions under any State law alleged to be unconstitutional, provided only equitable grounds exist. It has already led to a strong movement to regulate strictly the exercise of this power by the federal courts.[1]

[1] Congressional Record, 60th Congress, 1st session, p. 133. President's message, December 3, 1907. Meeting of attorneys-general of States, September and October, 1907.

CHAPTER VII.

Federal Question—When Involved in Suits Against State Officers.

A right of action against public officers exists, as appears from the foregoing chapters, whenever they threaten acts that violate rights in rem. These acts, otherwise unlawful, are lawful if done under valid authority of the State. Whenever the validity of the authority set up depends upon the constitution of the United States, a federal question is involved.

In Ex parte Young, Attorney General, now Governor, Hadley of Missouri, of counsel for petitioner, stated the following dilemma: "If the act sought to be enjoined is not the State's act, the fourteenth amendment is not involved. If the act sought to be enjoined is the State's act, then the eleventh amendment interposes to deny jurisdiction."[1] Now, in the first place, it is not necessary, to avoid conflict with the eleventh amendment, to regard the act of the officer as not the act of the State. If the act is wrongful, an action lies against the officer, whether his act is the act of the State or not. Moreover, it is not necessary, to involve the fourteenth amendment, that the act of the officer under an unconstitutional statute be regarded as the act of the State. It is true the prohibitions of the fourteenth amendment apply only to State action. But, whether the acts of the officer be regarded as the acts of the State or not, the fourteenth amendment is involved whenever the State authority set up is alleged to be in violation of the amendment. If the act be regarded as not the act of the State if unconstitutional, then the question is whether it is prevented from being the act of the State by the fourteenth amendment.

[1] Quoted from an article by Hadley: "The Eleventh Amendment": 66 Cent. Law Jour., 71, 75.

To involve a question under the fourteenth amendment, then, there must be a State authority set up, alleged to be in violation of the amendment. What constitutes a State authority in this sense? One view might be that State authority is involved whenever action is taken by virtue of official position under the State. On the other hand, it might be held that State authority is in question only when the action has valid authorization so far as State law is concerned. The latter view is not followed throughout, at any rate. For action of officers under a State statute will always be tested under the fourteenth amendment, even if the statute is alleged to violate also the State constitution. In other words, although prohibited by higher State authority, the statute is sufficiently State authority to invoke the test of the fourteenth amendment.

This leads to a consideration of Barney v. City of New York.[1] In that case, there was no diverse citizenship, so that jurisdiction depended entirely upon the existence of a federal question. A bill was brought in the United States circuit court to enjoin the city of New York, the board of rapid transit commissioners, and certain contractors from proceeding with the construction of a tunnel under Park Avenue, adjacent to the premises of plaintiff, "until the easements appurtenant thereto shall have been acquired according to law and due compensation made therefor"; it being alleged that the tunnel was being constructed nearer his premises than provided in the plan adopted in compliance with the requirements of the State law in case of such a construction. That is, the threatened act was alleged to be illegal under the State law, and at the same time to "deprive of property without due process of law," by taking easements without compensation.[2] The court upon its own motion dismissed the bill for want of jurisdiction. The supreme court affirmed the decision, on the ground that the act, being illegal under State law, was not

[1] 193 U. S. 430.

[2] The fourteenth amendment applies, of course, to the action of local governments, as well as of other State agencies.

State action, so that the fourteenth amendment did not apply.

The opinion of the court, by Chief Justice Fuller, is far from convincing. The case mainly relied upon is Virginia v. Rives,[1] in which was denied the right to remove a criminal action to the federal court, under a statute providing for such removal in case of "denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States," upon the allegation that the officer charged with the selection of jurors would discriminate against negroes in the selection. Now, the officer had no authority under the State law to make such a discrimination; and the supreme court simply held that, under these circumstances, there was not sufficient ground to presume that the petitioner could not enforce his rights in the judicial tribunals of the State—that to raise such a presumption, there must be a State statute, which, if enforced, would violate such rights. The court expressly said that the act of congress was not as broad as the fourteenth amendment. A like discrimination, under the same State law, was held, in Ex parte Virginia,[2] to be sufficiently State action to be punishable under the power to enforce the fourteenth amendment. Justice Strong said: "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."[3]

The other cases cited by Chief Justice Fuller for the

[1] 100 U. S. 313.
[2] 100 U. S. 339.
[3] Chief Justice Fuller's explanation of Ex parte Virginia as "a case in which what was regarded as the final judgment of a State court was under consideration," is most astonishing; for it was expressly held in that case that it was not an attempt to punish State judicial action.

"principle that it is for the State courts to remedy acts of State officers done without the authority of or contrary to State law—" Missouri v. Dockery[1] and the Civil Rights Cases—[2] furnish no better support. The Civil Rights cases are not in point at all, no action of State officers being involved. And Missouri v. Dockery was decided expressly on the ground that the acts in question were within State competence without violation of any federal limitation; so that whether they were authorized by State law or not raised no federal question.[3]

The decision in Barney v. New York may be sustained only upon the view that, where a higher State authority prohibits, no State authority exists to be tested under the fourteenth amendment. But this is certainly contrary to the practice of testing a State statute under the fourteenth amendment, although the statute is also in violation of the State constitution. And it seems more reasonable to hold that, whenever action is taken "by virtue of public position under a State government," it is sufficient to raise the question whether such action is prohibited by the fourteenth amendment, although it may also be contrary to State law.

The case of General Oil Company v. Crain[4] may best be considered here. A bill was brought in a Tennessee court to enjoin the State oil inspector from collecting inspection fees on oil brought to Memphis from Ohio, already sold for shipment into other States, but car-loads put into tanks in Memphis for subdivision for distribution; it being alleged that the oil was exempt from State control as interstate

[1] 191 U. S. 165.
[2] 109 U. S. 3.
[3] The act of an officer in the exercise of his authority under a statute is, of course, just as much the act of the State as if specifically directed by statute; for instance, the fixing of rates by a commission, as in Reagen v. Farmers L. & T. Co. See also Fargo v. Hart, 193 U. S. 490; Gen. Oil Co. v. Crain, 209 U. S. 211. The opinion in La. v. Texas, 176 U. S. 1, seems contrary. In Arbuckle v. Blackburn, 191 U. S. 405, no federal question was involved, because the act of the officer was simply a finding of fact under a State law admitted to be valid.
[4] 209 U. S. 211.

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commerce. The State court dismissed the bill for lack of jurisdiction, upon a construction of a State law of 1873, prohibiting suits against the State "or any officer acting by the authority of the State, with a view to reach the State, its treasury, funds, or property." In a previous case, the State court of Tennessee had sustained a suit against officers of the State acting under a statute alleged to be unconstitutional, on the ground that, when acting under an unconstitutional statute, officers are not acting for the State. In the present case, however, the inspection law was not alleged to be void on its face, but only on the ground that the oil upon which defendant was about to impose inspection fees was in law affected with interstate commerce. To enter into the inquiry involved in this contention, the court said, it would be necessary first to determine whether the oil in the tanks was in fact and in law a part of interstate commerce; and this the court had no jurisdiction to do, because of the law of 1873.

Now, the State court was clearly wrong; for there was nothing more to prevent an inquiry whether the commerce clause applied to the oil in question upon action of a State officer under a State statute, than upon a statute itself. But the question was, upon writ of error to the supreme court, whether any federal question was involved, the ruling of the State court having been entirely upon the ground of lack of jurisdiction under the State law. The court held there was, because the State court had "refused to consider that which might bring the oil under the protection of the constitution of the United States." "It being, then, the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court. R. R. Co. v. Alsbrook."[1]

This is no argument at all, for, manifestly, any dismissal for lack of jurisdiction of a suit for violation of a con-

[1] 146 U. S. 279.

stitutional right by a State statute, even if the suit were directly against the State, would give effect to the statute. Railroad Company v. Alsbrook is not in point. In that case the State court ruled upon the federal question. Justice McKenna reviewed the cases in which it had been held that a decision by the State court upon its own jurisdiction is final, and then dismissed them with the remark that "in none of these cases was the same question presented as here," without any real attempt to distinguish them. The only proper ground for the decision would seem to be that a remedy of right existed against the officer for violation of a constitutional right, and that a State statute or decision denying this remedy, even upon the ground of lack of jurisdiction, was itself unconstitutional.[1]

[1] The ruling of the State court was affirmed on the ground that the inspection tax in question was not unconstitutional. Justice Harlan concurred in the judgment on the ground that the decision of the State court as to its own jurisdiction was final. Justice Holmes concurred specially.

CHAPTER VIII.

The Relation of the State to Suits Against its Officers.

In suits against public officers directly affecting the state—for instance, where the defense in an action of ejectment against officers depends upon title of the state,—the state may, without becoming a party, by formal suggestion by its law officer, bring its rights before the court.[1] This special privilege extends even to participation in argument.[2] Whether, in such a case, in which the state has not submitted itself to the jurisdiction of the court, it may prosecute in its own name a writ of error from a ruling, has not been squarely decided by the supreme court;[3] although the opinion in South Carolina v. Wesley inclines strongly against the right.

The basic problem remains to be considered: is a suit against public officers ever a suit against the state?[4]

In Osborn v. Bank, Chief Justice Marshall said: "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the eleventh amendment, which restrains the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. . . . The State not being a party on the record, and the court having jurisdiction over

[1] U. S. v. Lee, 106 U. S. 196; Stanley v. Schwalby, 162 U. S. 255; Belknap v. Schild, 161 U. S. 10.

[2] Fla. v. Ga., 17 How. 478.

[3] It was not necessary to decide the point in U. S. v. Lee, because the same questions were raised in the bill of exceptions of the individual defendants. And in S. C. v. Wesley, 155 U. S. 542, the exceptions below had not been properly taken nor brought up.

[4] Apart, of course, from where the state has provided therefor as a form of action against itself. See Part I, p. 40.

those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants—whether they are to be considered as having a real interest, or as being only nominal parties." This was held settled doctrine as late as Davis v. Gray.[1]

Even in Davis v. Gray, however, two justices, dissenting, held the suit against the officers to be in effect against the State. In Carr v. United States,[2] Justice Bradley showed strongly his opinion that suits against public officers, like that in United States v. Lee, are suits against the United States. And, in United States v. Lee, the four dissenting justices held the suit to be in effect against the United States. In Louisiana v. Jumel, the suit against officers was held to be against the State. In Cunningham v. Macon and Brunswick Railroad Company, the suit was dismissed because the State was an indispensable party. So that, by the time of Poindexter v. Greenhow,[3] the court was in a position to say, as a matter of course: "It is also true that the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record." Since then, it

Justice Harlan, dissenting, in Ex parte Ayers, stood squarely upon it.

Justice Matthews said that the language of Chief Justice Marshall "conveys the intimation that, where the defendants, who are sued as officers of the State, have not a real, but merely a nominal interest in the controversy, the State appearing to be the real defendant, and therefore an indispensable party, if the jurisdiction does not fail for want of power over the parties, it does fail, as to the nominal defendants, for want of a suitable subject-matter." But Chief Justice Marshall expressly said that "the question is not one of jurisdiction."

Justice Matthews sought to support his interpretation by the opinion of Chief Justice Marshall in Ga. v. Madrazo. 1 Pet. 110. But in that case the chief justice merely considered that the suit against the governor as governor might suffice as a suit against the State; as it seems to have been intended, on the theory that the eleventh amendment does not apply to suits in admiralty. Since the suit was brought in this aspect, it could hardly be regarded as against the governor personally. If it could, however, the reason for dismissal was stated by Chief Justice Marshall to be that no case was made out against him.

[2] 98 U. S. 433.

[3] 114 U. S. 270.

has been "the settled doctrine of the court that the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record, as the court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit."[1]

Two cases mainly impelled the court to this doctrine that the court will look behind the parties to the record—Cunningham v. Macon and Brunswick Railroad Company[2] and New Hampshire v. Louisiana.[3] The Cunningham case was a suit to foreclose a mortgage upon a railroad, to which the State held the legal title under a deed of trust. It was held that the State was an indispensable party to the suit, and, therefore, that the suit could not be maintained. Indispensable parties are "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience."[4] In other words, a court will not exercise jurisdiction in a case where it cannot do substantial justice without the presence of other parties—that is, where any judgment it might render between the parties to the record would be subject in such manner to the rights of persons not parties that the judgment would not be complete. The relation of indispensable party can exist, then, only where the party to the record and the indispensable party both have an interest in the same subject-matter of the suit, so related that one cannot be disposed of properly without the other. Now, manifestly, there is no such relation between the state and its officers. They have no personal interest in the subject-matter of suits against them as officers; the suits are never based on any such interest. Hence the doctrine of indispensable party has no place.

[1] Justice Lamar, in Pennoyer v. McConnaughy.
[2] 109 U. S. 446.
[3] 108 U. S. 76.
[4] See Part I, p. 39.

In New Hampshire v. Louisiana, suit was brought by the State of New Hampshire on bonds of Louisiana assigned to it for collection by its citizens, who retained the beneficial interest. The court held that the real parties to the suit were the citizens of New Hampshire, and therefore dismissed the suit as against a State by citizens of another State. This is the case always mainly relied upon for the doctrine that the court will look behind the nominal parties to the real parties in interest. The point involved was, however, entirely different from that in a suit against public officers. In New Hampshire v. Louisiana, the State represented its citizens, so that they might be said to be not only the real parties in interest, but the real parties to the suit. In a suit against public officers, on the other hand, there is no pretence that the officers represent the state in the suit; so that it cannot be said that the state is a real party to the suit. The doctrine of nominal party and real party, therefore, likewise has no place.

What may be true is that the only real ground of action in the case is against the state. But the fact that there is no real ground of action against the officers, and that there is a real ground of action against the state, does not make a suit against the officers a suit against the state. Chief Justice Marshall was clearly right in holding that the question is not whether the suit is against the state, but whether there is a real ground of action against the officers. This is conclusively proved by comparing the two cases of United States v. Lee and Chandler v. Dix. The interest of the state in the subject-matter of the suit was precisely similar in the two cases; the judgment against the officers in neither case, of course, would bind the state: yet in the one case the suit was upheld, because there was a real ground of action against the officers themselves, and in the other dismissed, because there was no such ground of action. It may have been observed that, throughout this study, the question of whether suits against public officers may be maintained has been determined, not upon the interest of the state, but

upon the question whether there is a real ground of action against the officers.

As a mater of fact, although the doctrine that the court will look behind the record to determine whether the state is the real party has been constantly announced, the cases rather harmonize with the other view. Generally, of course, it makes no practical difference whether the decision is put upon the ground that the suit is against the state, or that there is no ground of action against the officers. But sometimes it is material whether the question is one of jurisdiction. If the question is whether the suit is against the state, then, clearly, it is one of jurisdiction. In this view, if the case upon the record may be a suit against the state, then it is the duty of the court, even upon its own motion, to inquire into the question of jurisdiction.[1] Yet the court certainly has not taken this attitude. In Smyth v. Ames, Justice Harlan, delivering the opinion of the court, said of the objection that the suit was against the State: "This point is, perhaps, covered by the general assignments of error, but it was not discussed at the bar by the representatives of the State board. It would, therefore, be sufficient to say that these are cases of which, so far as the plaintiffs are concerned, the circuit court has jurisdiction," on the grounds both of diverse citizenship and of a federal question. And in Illinois Central R. R. Co. v. Adams,[2] it was squarely held that the question was not one of jurisdiction, and that it was error in the court below to decide it upon a motion to dismiss for want of jurisdiction.[3]

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[1] Postal Tel. Co. v. Ala., 155 U. S. 482; Minn. v. Hitchcock, 185 U. S. 373.

The only case in which this has been done, so far as I know, in a suit against public officers, is Lowry v. Thompson, 25 S. C. 416.

[2] 180 U. S. 28.

[3] Cotting v. Godard, 183 U. S. 79, and Prout v. Starr, 188 U. S. 537, bear out the same view.

In Minn. v. Hitchcock, in a suit by a State against the secretary of the interior, the court did inquire into the question of jurisdiction upon its own motion. But there it was held that the suit was a form of action against itself provided by the United States; and it was necessary to inquire whether the court had jurisdiction of such a case.

On the other hand, are the cases in which a petition for habeas corpus has been entertained, upon a sentence for contempt for violation of an injunction against public officers.[1] In Ex parte Ayers, the petitioner was released on the ground that the court below had no jurisdiction, because the suit was against the State. And Justice Harlan dissented on the ground that the question of jurisdiction was the only one involved, and that was determined by the parties to the record. None of the other questions involved in the main suit, he said, was to be considered, not even "whether an officer ought to be enjoined from merely bringing a suit in behalf of the public, the suit itself not necessarily, or before judgment therein, involving an invasion of the property rights of the defendant therein." But the courts have not generally limited the inquiry in such cases to the question of jurisdiction in its strict sense. And where the objection to the suit below is not to the merits of the ground of action as made out, but that no real ground of action is made out against the officers, it would seem sufficient to justify a release, although not strictly a question of jurisdiction. In Ex parte Young, although the question was stated to be whether the suit below was in violation of the eleventh amendment, the actual basis of discussion through the whole opinion was whether there was a real ground of action against the attorney general. The inquiry was even made, as vital to the case, whether the attorney general had any actual duties in the enforcement of the statute. Surely this was not a question of jurisdiction, and could not affect the question whether the suit was against the State.

No court of justice, certainly, will suffer an attempt to enforce a right of action against one person in a suit against another. For instance, in a suit for the destruction of property used in infringement of a patent, if it appears that the party sued has no interest, but that the property belongs to another, the court certainly will not proceed, even though

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[1] Ex parte Ayers and Ex parte Young.

the party sued make no objection, because to do so would be contrary to the first principles of justice.[1] Whether this be regarded as a question of jurisdiction, however, is, after all, comparatively unimportant here. What is essential is that suits against public officers be considered from the right point of view. Whatever error appears in the cases has resulted from taking the interest of the state as a criterion.[2] The proper inquiry in every case should be not what is the interest of the state, but whether there is a real ground of action against the officers.[3]

This basis of determination, it is true, is purely legal. In fact, though not in legal theory, the state is bound by decisions against its officers such as in United States v. Lee and in Ex parte Young. Practically, the rights of the state are determined in such cases. The doctrine of immunity of the state from suit might have been given a liberal construction. The eleventh amendment might have been held to exclude any suit that actually directly binds the State. But this construction was conclusively rejected in Osborn v. Bank. If it had been adopted, constitutional limitations would have been dead letters. Given Osborn v. Bank, the only logical principle of construction is to follow consistently legal theory, according to which public officers may be sued whenever there is a separate ground of action against them.

[1] This, as I understand it, is different from the doctrine of indispensable party. That doctrine applies, not where an attempt is made to determine the rights of persons not parties, but where no satisfactory or effective judgment can be rendered between the parties, if those rights remain undetermined.

[2] As in Louisiana v. Jumel (see above, p. 69); and especially in Belknap v. Schild (see above, p. 50).

[3] Where a real ground of action exists, a suit against public officers as such is never of such a nature that an effective remedy cannot be given between the parties to the record without other parties.

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