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PENNOYER *v.* MCCONNAUGHEY.[1] SUPREME COURT OF THE UNITED STATES.

Suit Against a State.

A suit by a citizen of California to enjoin the persons constituting the board of land commissioners of the State of Oregon from selling certain swamp lands claimed by the plaintiff, as forfeited to the State for non-compliance with a condition of a former sale of the same lands by the State to the plaintiff's grantor, is not a suit against the State of Oregon within the meaning of the Eleventh Amendment of the Constitution of the United States; it appearing that the legislature under which the defendants claim the right to act is unconstitutional and void, because it impairs the obligation of the contract of the State with such grantor.

The cases reviewed, in which suits at law or in equity against officials of a State, brought without permission of the State, have been held to be either suits against the State, and, therefore, brought in violation of the Eleventh Amendment; or, on the other hand, suits against persons who hold office under the State for illegal acts done by them in performance of their duty as servants of the State, under color of an unconstitutional law of the State, and therefore not suits against the State, but against the officials as wrong-doers.

The Act of the Legislature of Oregon of February 16, 1887, declaring all certificates of sale of swamp or overflowed lands void on which 20 per cent. of the purchase price was not paid prior to January 17, 1879, and requiring the board of commissioners to cancel such certificates, impaired the contract made by the State with the defendant in error under the Act of October 26, 1870, so that Act and the Act of January 17, 1879, are construed by the Court, and was, therefore, violation of Article I, Section 10 of the Constitution of the United States.

STATEMENT OF THE CASE.

Appeal from the Circuit Court of the United States for the District of Oregon.

This was a suit in equity by the appellee, a citizen of California, against the appellants, who, by virtue of the

[1] Reported in 140 U. S. Reps., 1.

Constitution of Oregon, as Governor, Secretary of State and State Treasurer comprised the board of land commissioners of that State, to restrain and enjoin them from selling and conveying a large amount of land in that State to which the appellee asserted title.

There was a demurrer to the bill, on the ground that the suit was practically against the State, and was, therefore, prohibited by the Eleventh Amendment to the United States Constitution. The demurrer was overruled in the Circuit Court (see 43 Fed. Rep., pp. 339 and 196), and a decree entered perpetually enjoining the defendants from selling the lands in question. An appeal from the decree brought the case to the Supreme Court of the United States, where the decision of the Circuit Court was sustained.

SUIT AGAINST A STATE.

The exemption of a member of the Union from suit is, by the Eleventh Amendment to the Constitution of the United States, extended to all attempts of citizens of another State, or citizens or subjects of any foreign State, to fetch the State into or under the judicial power of any Federal Court in the land. The article is silent as to the suability of a State by its own citizens, yet such an action has been generally regarded as included in the two classes of suits forbidden by the Constitution: Poindexter *v.* Greenhow, 114 U. S., 270 (1884); Louisiana *v.* Jumel, 107 U. S., 711 (1882).

Alexander Hamilton (81st Federalist) treated the possibility of a State being sued in the United States Courts by one of her own citizens as too remote and chimerical for consideration. Yet as early as 1792 the United States Supreme Court entered judgment for a citizen against a State: Chisholm *v.* Georgia, 2 Dall., 419.

It might be said that this decision was the cause of the Eleventh Amendment, which was proposed in Congress in 1794, and ratified by the States in 1798. So great was the judicial revulsion produced by this Amendment that in one case stated the Court forthwith ordered struck from the docket all pending suits against a State, delivering, on the day succeeding the argument, a unanimous opinion that the Amendment, being constitutionally adopted, there could not be exercised any jurisdiction in any case, past or future, or then pending, in which a State was sued by a citizen of another State, or by the citizens or subjects of any foreign State: Hollingsworth *v.* Virginia, 3 Dall., 378, 382 (1798).

Another party plaintiff was suggested in a subsequent case—the government of the United States. A creation of the supreme power sued a State through its officer, and it was acknowledged that there was no provision in the Constitution preventing the United States from suing a State: Osborn *v.* The Bank, 9 Wheat., 738 (1824); U. S. *v.* Texas, 143 U. S., 621 (1891).

There are two lines of cases bearing upon the whole question in the reported decisions of the United States Supreme Court—one line which tends to restrict the rights of courts to act upon State officers for the enforcement of duties and obligations of the State toward private parties; another line, which tends to maintain such right and to enforce it somewhat broadly and fully. They are marked in general by the distinction of strict and liberal construction which has prevailed so extensively and steadily in our judicial and political history —a distinction which is natural and inevitable, arising from the trend of events and the constitution of the human mind.

Under the first line of cases—*i. e.*, those which delimit or restrict the boundaries of judicial process for the protection of abstract rights invoked on behalf of private claimants, two propositions may be laid down:

(1) That when positive affirmative relief is sought, by the enforcement, through judicial process, of a State's contracts, although the State's officers only are the defendants, the suit is in substance a suit against the State, and barred by the Eleventh Amendment.

(2) That when the relief sought goes to the extent of requiring the courts to virtually assume control and administration of a part of the executive functions of a State government, the suit is not only in substance against the State, but it calls for a usurpation by the Courts of the functions of the political sovereign: Louisiana *v.* Jumel, *supra;* Antoni *v.* Greenhow, 107 U. S., 769 (1882).

So, in the latter case, a mandamus against a State officer to compel him to receive in payment of taxes certain coupons, at first legal, then repudiated by the State, was refused. That decision immediately followed Louisiana *v.* Jumel in the order of time, and showed conclusively that there was no remedy against a State itself on account of an impairment of a contract, and that a suit to compel State officers to do acts which constitute a performance of its contract, is a suit against a State itself, and not tenable.

The question of the suability of a State really involves the construction and validity of State legislation. If the law under which a defendant assumes to act is void, then he does not represent the State. He is acting without the authority of law, without the authority of the State, and hence is as responsible for his acts as a private individual. If the legislation is valid he represents the State, and the suit, in substance and effect, is against the State, and forbidden: Hagood *v.* Southern, 117 U. S., 52 (1885).

While a State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted, and any law impairing the obligation of a contract under which such property or rights are held, is void and powerless to effect their enjoyment: Hans *v.* Louisiana, 134 U. S., 1 (1889).

The immunity from suit secured to the States is undoubtedly a part of the Constitution, of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument. That immunity, however, does not exempt a State from the operation

of the constitutional provision that no State shall pass a law impairing the obligation of a contract, etc. No remedy for a breach of its contract by a State, by way of damage or compensation, no affirmative relief, directed boldly against a State as a member of the Union, or by way of process to compel its performance, is open, in the courts of the United States, by a direct suit against the State itself, on the part of the injured party being a citizen of another State, or a citizen or subject of a foreign State. But it is equally true that whenever, in a controversy between parties to a suit, of which the Supreme Court of the United States has jurisdiction, the question arises upon the validity of a law by a State under and in comparison with the supreme law of the United States, the jurisdiction is not thereby ousted, but must be exercised to the rights of the litigants: Fletcher *v.* Beck, 6 Cranch., 87; Poindexter *v.* Greenhow, *supra;* New Jersey *v.* Wilson, 7 Cranch, 164; Wolf *v.* New Orleans, 103 U. S., 358 (1880); Green *v.* Biddle, 8 Wheat., 1.

And the construction given to a statute by the executive or administrative officers of a government charged with its execution is entitled to respectful consideration, and ought not to be lightly overruled: United States *v.* Moore; 95 U. S., 763; Scarlan *v.* Childs, 33 Wis., 666; Edwards *v.* Darby, 12 Wheat., 210; Westbrook *v.* Miller, 56 Mich., 151.

If Pennoyer *v.* McConnaughey were a suit to compel the specific performance of so much of that contract as remains unperformed by the State, that is, the execution by the defendants of a conveyance of the land to plaintiff, it would be a suit against the State, although not so named in the record. A decree for the plaintiff in such a case would require the defendants to do and perform an act which they could only do as the agents and representatives of the State, and, therefore, the court would be without jurisdiction. See remarks of DEADY, J., in 43 Fed. Rep., 341.

A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assumption of his defense. He is bound to establish it. *Prima facie*, therefore, a naked authority from a State is void and unrecognizable in the Federal Courts: Bates *v.* Clark, 95 U. S., 204 (1877); Mitchell *v.* Harmony, 13 How., 115; Meigs *v.* McClung, 9 Cranch., 11; Wilcox *v.* Jackson, 13 Pet., 493; Brown *v.* Huger, 21 How., 305; Grisar *v.* McDowell, 6 Wall., 363; United States *v.* Lee, 106 U. S., 196.

The State is a political body; it can act only through agents, and can command only by laws. It is necessary for a defendant State officer, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent and a warrant for his act. If the law is in conflict with the Constitution of the United States it is no law, and the officer stands stripped of his authority and confessing a personal violation of a citizen's rights.

In the discussion of the question the distinction between the *government* of a State and the State itself is important, and should be observed. In common apprehension and speech they are usually re-

garded as identical, and as ordinarily the acts of the government are the acts of the State, because within the limits of its delegation of power the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person—intangible, invisible, immutable. *L'etat c'est moi*, is a personal application not pertinent to a member of our Union. The government is an agent, and within the sphere of its agency a perfect representative, but outside of that agency it is a lawless usurpation. The Constitution of the United States is the limit of the authority of the government, and both government and State are subject to the supremacy of the Constitution and of the laws made in pursuance thereof. That which is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name. The king can do no wrong. This distinction is essential to the idea of constitutional government.

"Of what avail," asks Mr. Justice MATTHEWS, in Poindexter *v.* Greenhow, *supra*, "are written constitutions whose bills of right for the security of individual liberty have been written too often with the blood of martyrs shed upon the battlefield and the scaffold if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect! And how else can these principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders who are the instruments of wrong when they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure and simple and naked, and of communism, which is its twin—the double progeny of the same evil birth."

So, when an individual defendant pleads a statute of a State which is in violation of the Constitution of the United States as his authority for taking or holding property to which a citizen asserts title, to say the enforcement of the supreme law of the land is to coerce the State, ignores the fundamental principle on which the Constitution rests, and practically reverses the positions of the State and United States laws. If the State sues its servant for neglect of duty and disobedience to its commands, he may defend successfully by putting in the judicial interpretation of the part of the law as given by the Supreme Court of the country. It is no objection to the remedy in such cases that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right, for the cases are numerous where the tax laws of a State, which in their general and

proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts under the Constitution, or because in some way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States: Chesapeake & Ohio R. R. *v.* Miller, 114 U. S., 176 (1884); State of Ohio *v.* Knoop, 16 How., 369 (1853); Bank *v.* Skelly, 1 Black., 436; Trust Co. *v.* Debolt, 16 How., 432 (1853); Bank *v.* Debolt, 18 How., 380 (1855); Woodruff *v.* Trapnell, 10 How., 190 (1850).

Suits against a State's officers are usually brought for the following causes: That the acts complained of prevent the proper exercise of a franchise secured to a citizen by certain unchangeable charter rights to avoid a multiplicity of suits; the want of adequate remedies at law—the usual averment to give a court of equity jurisdiction; to remove a cloud upon a title; or to protect a citizen from an attempted violation of an obligation of a contract: Tomlinson *v.* Branch, 15 Wall., 460 (1872); Pennoyer *v.* McConnaughy, 43 Fed. Rep., 339; *In re* Ayers, 123 U. S., 443 (1887); Allen *v.* Balt. & Ohio R. R., 114 U. S., 311; McGahey *v.* Virginia, 135 U. S., 662. The tests by which a suit is determined to be one against a State may be classified as follows:

(1) Whether a State is named as a party to the record.

(2) Whether the action is directly upon the contract.

(3) Whether the suit was brought to control the discretion of an executive officer of a State.

(4) Whether the suit was brought for the purpose of administering the funds actually in the public treasury.

(5) Whether it is an attempt to compel officers of the State to do acts which constitute a performance of its contracts by a State.

(6) Where the case is such that the State is a necessary party that the defendant may be protected from liability to it.

The Supreme Court of the United States has repeatedly, since Osborn *v.* The Bank, and Davis *v.* Gray (16 Wall., 203), overruled the *dictum* in those cases, that "the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against the State, is of necessity limited to those suits in which a State is a party on the record. This announcement has been frequently disregarded, and is now no longer the law: Decatur *v.* Paulding, 14 Pet., 497; Woodruff *v.* Trapnell, 10 How., 190; Curran *v.* Arkansas, 15 How., 304; Litchfield *v.* Register, 9 Wall., 575; Secretary *v.* McGarrahan, 9 Id., 298.

In Osborn *v.* The Bank of the United States, the interest of the State was direct and immediate, not consequential. The process of the Court, though not directed against the State by name, acted directly upon it by restraining its officers. "A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to the cases where the Government is in the exercise of its best-established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law void in itself because repugnant to the Constitution, may arrest the execution of any law in the United States,

It maintains that if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer without the sanction even of its own courts, and that the individual, although he perceives the approaching danger, can obtain no protection from the judicial department of the Government. Do the provisions of the American Constitution respecting controversies to which a State may be a party extend, on a fair construction of that instrument, to cases in which the State is not a party on the record?"

Chief Justice MARSHALL (p. 351) answered that question in the negative, adding that no English case could be adduced where any person has been considered as a party who was not made so on the record. In Davis *v.* Gray, decided in 1872, these principles were re-affirmed, and no distinction was made between the governor of a State and officers of lower grades. As parties in such a suit they are upon an equality: Whitman *v.* The Governor, 5 Ohio St., 528.

In a case where the action was not in the name of a State, but was brought against the governor in its behalf, it was said by Chief Justice MARSHALL again that that official was sued not by his name, but by his title. The demand upon him was not made personally, but officially. "In such a case where the chief magistrate is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record." Thus modifying somewhat his former views: Georgia *v.* Brailsford, 2 Dall., 402; see, also, *Ex parte* Juan Madrazzo, 7 Pet., 627; Kentucky *v.* Dennison, 24 How., 66, 98; Mississippi *v.* Johnson, 4 Wall., 475.

So the question whether a suit is within the prohibition is not always determined by reference to the nominal parties on the record, and the Court will look behind it. The provision is to be broadly applied in furtherance of its intention, and not to be evaded by technical and trivial subtleties: New York *v.* Louisiana, 108 U. S., 76 (1882); Cunningham *v.* R. R., 109 Id., 446; Kaukauna Co. *v.* Green Bay, &c., Canal, 142 U. S., 269 (1891).

It is not possible for one State to evade the prohibition of the Eleventh Amendment by assuming the claims of a citizen against another State when no interest of its own is concerned. Under the Constitution as originally construed, a citizen of one State could sue another State in the courts of the United States for himself, and obtain the same relief the State could get for him if it should sue. "Certainly, when he can sue for himself there is no necessity for power to sue in his behalf, and we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case. Therefore, the special remedy granted to the citizen himself must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievance, except such as the delinquent State saw fit itself to grant. In other words, the giving of the direct remedy to the citizen himself was equivalent to taking away any indirect remedy he might otherwise have claimed through the intervention of his State upon any principle

of the law of nations." It follows that when the Eleventh Amendment took away the special remedy at the instance of the harassed States there was no other left. Nothing was added to the Constitution by what was then done, and no power taken away by the grant of the special remedy was restored by the Amendment: New York *v.* Louisiana (*supra*).

In this case there was upon the face of the record nominally a controversy between two States, but upon an examination of the pleadings it appeared that one State was suing not for its own interest, but on behalf of certain individual citizens thereof.

Its own citizens are upon the same plane as are those of another State. The Eleventh Amendment does not in terms prohibit such suits; "but the evident reason of this is that the judicial power was not granted to the United States by the original Constitution in such cases; hence, as it was not granted, it was not deemed necessary to prohibit it. It was evidently supposed that the control of all litigation against a State by its own citizens was in its own power, among that mass of rights which was reserved to the States and the people. It would be very strange to say that, although a State cannot, in any case, be sued by a citizen of another State since the adoption of the Eleventh Amendment, yet in a case arising under the Laws and Constitution of the United States it may be sued by its own citizens:" Dissenting opinion in Virginia Coupon Cases, 114 U. S., 337 (1884),

A suit was brought in the Circuit Court of the United States for this, by a stockholder of a Cleveland bank and a citizen of Connecticut as well, against that bank, its managing directors, and Dodge, tax collector of the county in which the bank was situated. The bill alleged that Dodge had levied upon property of the bank to make a collection of tax which, by the Constitution of Ohio, the bank was bound to pay; that in this respect the Constitution, then recently adopted, impaired the obligation of the contract of the State with the bank as contained in its charter. As the law then stood, there was no means by which the bank, being a citizen of the same State with Dodge, could bring into a court of the United States the right which it asserted under the Constitution to be relieved of the tax in question, except by a writ of error from a State Court to the National Supreme Court: Dodge *v.* Woolsey, 18 How., 331.

In a subsequent similar attempt, the Supreme Court dismissed the complainant's bill on the ground that the parties thereto had been improperly or collusively joined for the purpose of creating a case of which that court would take cognizance: Hawes *v.* Oakland, 104 U. S., 450 (1881).

It certainly 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 looking into the suggestions and examining the validity of the title: U. S. *v.* Peters, 5 Cranch., 115. Neither will the Court decide an abstract question presented to it in a bill in equity, with the avowed object of obtaining a judicial declaration that such and such statutes are unconstitutional when the complainant does not aver that he is about to be, or has been, in-

jured by their enforcement: Williams *v.* Hagood, 98 U. S., 72 (1878); Hagood *v.* Southern, 117 U. S., 52 (1885).

Justice BRADLEY, in his dissenting opinion in the Virginia Coupon Cases (*supra*), says that in all cases previous the State had attempted to do some unconstitutional act injurious to the party, or some act which it had entered into a contract not to do, and redress was sought against such aggressive acts. None of them exhibit the case of a State declining to pay a debt or to perform an obligation, and the party seeking to enforce its performance by judicial process (p. 336). "They are attempts to coerce a State by a judicial process, and it is useless to attempt to deceive ourselves by an adroit use of words or by a train of metaphysical reasoning. We do not remember that it is anywhere contended that the State can be sued by its own citizens against its own law, merely because the Eleventh Amendment does not in terms extend to that case." Where the things required by the decree to be done by a State officer are the very things which, when done or performed, constitute a performance of the alleged contract by the State, the suit is essentially against the State: Hagood *v.* Southern (*supra*).

The converse of this proposition must be equally true because it is contained in it; that is, a bill the object of which is by injunction indirectly to compel the specific performance of the contract, by forbidding all those acts which constitute breaches of the contract, must also necessarily be a suit against a State: *In re* Ayers (*supra*).

Although a defendant is a State officer, if a suit is to compel him to do what a statute requires, or to restrain him from doing what a statute directs, when such statute is seen to be unconstitutional, there can be no objection to it on account of the official character of defendant: Ralston *v.* Fund Comm., 120 U. S., 390.

Undoubtedly a State can be sued without its own consent: Curran *v.* Arkansas *et al.*, 15 How., 304; Clark *v.* Barnard, 108 U. S., 436, but it can repeal a law at any time giving a citizen permission to bring suit against it, and such a law is not a contract with the terms of the Constitution. As the permission is entirely voluntary on the part of the sovereign, it follows that it may prescribe the terms on which it consents to be sued, and may withdraw its consent whenever it may suppose that justice to the public requires it: Beers *et al. v.* Arkansas, 20 How., 527; R. R. *v.* Tennessee, 101 U. S., 337; R. R. *v.* Alabama, 101 U. S , 832; Louisiana *v.* Jumel, 107 Id., 711.

Neither will the Court interfere with a discretionary act of a State official as distinguished from one purely ministerial, nor will it command the withdrawal of money from the treasury: U. S. *ex rel.* Goodrich *v.* Guthrie, 17 How., 284 (1850); Litchfield *v.* Richards, 9 Wall., 575.

In a recent case the words "shall not be continued," in the Amendment, were adroitly used as an authoritative interpretation of the original Constitution, and a direct and plain mandate forbidding any judicial construction of the Amendment in favor of entertaining any suits against a State: *In re* Ayers, 123 U. S., 442.

It forbade, contended the peti-