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JUDICIAL INTERPRETATION OF THE ELEVENTH AMENDMENT

CHARLES S. HYNEMAN*

The first paragraph of article III, section 2, of the constitution of the United States reads as follows:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a state, or the citizens thereof, and foreign States, citizens or subjects.

This provision remained in full force until the adoption in 1798 of the eleventh amendment which reads as follows:

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.

This fundamental change in the federal constitution was precipitated by the decision of the United States Supreme Court in 1793 that the judicial power of the United States extended to a suit brought against one of the states of the Union by a citizen of another state. This suit, Chisholm v. Georgia,1 was the first litigation in which the Supreme Court was called upon to decide whether or not the constitution made a state liable to suit in the federal Supreme Court at the instance of an individual. The first suit to appear before the Supreme Court in the February term of 1791 was instituted by a firm of Dutch bankers, as creditors, against the state of Maryland2 but the attorney general

*See biographical note, p. 397.
1 (1793), 2 Dallas 419, 1 L. Ed. 440.
2 Vanstophorst v. Maryland (1791). The case is not reported by Dallas but is referred to by Charles Warren in his The Supreme Court in United
of Maryland answered to the plea without raising the question of jurisdiction. During the February term of 1792 the Federal Supreme Court heard the case of Indiana Company v. Virginia, a suit which aroused the ire of the Virginia legislature and caused a committee of that body to declare that "the State can not be made a defendant in the said [United States Supreme] Court at the suit of any individual or individuals," but again the question of jurisdiction was not raised as defense against the action. During the same session in which the court heard this suit against Virginia, one Oswald brought suit against the state of New York. The case remained before the court until 1793 when the court proclaimed "that any person having authority to appear for the State of New York is required to appear accordingly," and announced that if the state failed to appear by the first day of the next term or "show cause to the contrary" judgment would be entered by default against the said state. The reports do not indicate that New York attempted to avoid the judgment on the ground that the state could not be sued.

The great importance of Chisholm v. Georgia is due, then, to the fact that in the earlier suits instituted by individuals against members of the Union, the defendant state did not make defense on the ground that the federal court did not have jurisdiction to hear the suit. Chisholm v. Georgia first appeared before the Supreme Court in the fall of 1792. The facts appear to be as follows. A resident of Georgia left America prior to the Revolutionary war and removed to England. Before leaving Georgia he settled up a partnership account, taking bonds from his partners as a part of the amount due him. After the establishment of American independence the two partners who gave the bonds suffered confiscation of their property by the state of Georgia because of their enmity to the patriot cause. Chisholm, the executor of the one who left Georgia, and so the holder of the

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4 Justice Iredell in Chisholm v. Georgia, Supra., note 1, at 429, 1 L. Ed. at 444.
5 Warren, op. cit. I, 91-92. The case is not reported by Dallas.
6 Oswald v. New York (1792), 2 Dallas 401, 1 L. Ed. 433.
7 Supra, note 1.
8 The facts are not reported by Dallas but are given by Warren, op. cit. I, 93, note 1.
bonds given by the two partners, brought action in assumpsit to
force Georgia to pay the amount of the bonds on the ground
that they were given prior to the revolution and so established
a prior claim to the property confiscated by the state. Chisholm
was a citizen of South Carolina. Notice of the suit was served
on the governor and the attorney general of Georgia.

The state of Georgia refused to present a brief further than
to remonstrate that Georgia, being a state, could not be made
defendant to a suit brought by an individual in the federal
court. Edmund Randolph, then attorney general of the United
States in the cabinet of President Washington, argued the case
for the plaintiff. He addressed himself principally to the
question:

Can the State of Georgia, being one of the United States of America,
be made a party-defendant in any case, in the Supreme Court of the
United States, at the suit of a private citizen, even although he himself
is, and his testator was, a citizen of the State of South Carolina?

Randolph argued that the United States Supreme Court was
given jurisdiction over the suit in article III, section 2, of the
constitution, which reads: “The judicial power [of the United
States] shall extend to . . . controversies between a State
and citizens of another State,” and “In . . . those cases in
which a State shall be a party, the Supreme Court shall have
original jurisdiction.” The burden of Randolph’s argument was
to prove that, in the meaning of the constitution, the defendant
is a party to a suit as well as is the plaintiff, and that therefore
the constitution, in giving to the federal Supreme Court jurisdic-
tion over suits “in which a State shall be a party,” vested in that
body authority to hear cases in which the state is defendant as
well as those in which the state is plaintiff. This conclusion,
Randolph also declared, was supported by the spirit of the con-
stitution as well as by the letter.

Randolph won over all of the court but Justice Iredell, and
this justice decided against the jurisdiction of the court on the
ground that Congress had not yet made the provisions which it
must necessarily make before the court could entertain a suit
brought against a state by a citizen of another state.10 Justices
Blair, Wilson, and Cushing, and Chief Justice Jay gave opinions
seriatim in favor of jurisdiction in this particular case. Chief

9 Supra, note 1, at 420, 1 L. Ed. at 418.
10 James Brown Scott, Sovereign States and Suits before Arbitral
Tribunals and Courts of Justice (New York, 1925), 45, 126, 159-160, seems
to hold that Justice Iredell dissented on the ground that the Constitution
did not contemplate that a State might be sued by an individual.
Justice Jay was particularly cautious to point out that the decision in this case should not be taken as establishing that the court would accept jurisdiction over all suits instituted against a state.11

The soundness of the majority opinion in this case was sharply questioned in a decision of the same court almost a century later. Justice Bradley, in giving the decision of the court in *Hans v. Louisiana*,12 said:

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.

Certainly a suit brought against a state by a citizen of another state, as was the case in *Chisholm v. Georgia*, was unknown to the common law, as Justice Iredell took no little pains to point out in his dissenting opinion in that case.13 Justice Bradley's remarks in *Hans v. Louisiana* concerning the holding in *Chisholm v. Georgia* questioned so strongly the wisdom of that decision that Justice Harlan found it necessary to append a concurring opinion for the expressed purpose of protesting that the references to the earlier case were uncalled for.

The decision of the court in *Chisholm v. Georgia* was received with disapproval in almost all quarters of the United States.14 The people of Georgia were especially indignant, and on November 21, 1793, the lower House of the Georgia legislature passed a bill which provided that any federal marshall or any other person or persons who might try to execute an order of any federal court in favor of Alexander Chisholm "are hereby declared to be guilty of felony, and shall suffer death, without the benefit of clergy, by being hanged."15

On February 2, 1793, the day after the reading of the opinions in *Chisholm v. Georgia*, a resolution to amend the United States constitution so as to forbid such suits as that which had outraged Georgia was introduced in the federal House of Representatives. The proposed amendment was tabled but in January, 1794, there was introduced the resolution, which, after ratification by the necessary number of states became the eleventh amendment in 1798.16

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11 Supra, note 1, at 479, 1 L. Ed. at 466.
12 (1889), 134 U. S. 1, 15, 33 L. Ed. 842, 847.
13 Supra, note 1, at 437-49, 1 L. Ed. 448-53.
16 Warren, op. cit. I, 100-01.
During the period between the decision in *Chisholm v. Georgia* and the adoption of the eleventh amendment, however, suits were brought by individuals before the Supreme Court of the United States naming as defendants the states of South Carolina\(^{17}\) and Virginia.\(^{18}\) *Hollingsworth v. Virginia*\(^{19}\) was the first to be considered by the court after the amendment went into effect. In this case the court unanimously held that the eleventh amendment superseded all actions already begun against a state by citizens of another state or foreign state and dismissed all suits of that nature then pending.

The outcome of no small amount of litigation has turned upon the exact meaning of the eleventh amendment, and the forty-three words contained in that addition to the constitution have been elaborated by judicial interpretation into a small body of law. The examination of the present meaning of the amendment is the purpose of the body of this article.

I. Meaning of "suit in law or equity."\(^{20}\)

As early as 1809 the question arose in a circuit court as to whether or not the use of the expression "suit in law or equity" was intended to exclude from the federal courts all suits admiralty brought against a state by a citizen of another state. The court held that the amendment did not preclude a federal court from taking jurisdiction over such cases.\(^{21}\) In 1833 one Juan Madrazo, a citizen of Spain, attempted to support in the United States Supreme Court a suit against the state of Georgia on the ground that his action was in admiralty. The court, however, found that Madrazo's claim lay properly in law and not in admiralty.\(^{22}\) Not until 1920 did the question come fairly before the Supreme Court. In that year the court, reversing the decision of the lower court,\(^{23}\) held that the eleventh amendment barred suits in admiralty as well as those which were clearly in law or equity.\(^{24}\) The language of the court is significant—

It is true the Amendment speaks only of suits in law or equity; but this is because, as was pointed out in *Hans v. Louisiana*, 134 U. S. 1, the

\(^{17}\) *Huger v. South Carolina* (1797), 3 Dallas 339, 1 L. Ed. 627.

\(^{18}\) *Grayson v. Virginia* (1796), 3 Dallas 320, 1 L. Ed. 619; *Hollingsworth v. Virginia* (1798), 3 Dallas 378, 1 L. Ed. 644.

\(^{19}\) Supra, note 18.

\(^{20}\) Read the eleventh amendment.


\(^{22}\) *Ex parte Juan Madrazo* (1833), 7 Peters 627, 8 L. Ed. 808.

\(^{23}\) The Henry Koerber, Jr. (1920), 268 Fed. 561.

\(^{24}\) *Ex parte New York, No. 1* (1920), 256 U. S. 490, 65 L. Ed. 1057.
Amendment was the outcome of a purpose to set aside the effect of the decision of this court in *Chisholm v. Georgia*, 2 Dall. 419, which happened to be a suit at law brought against the State by a citizen of another State, the decision turning upon the construction of that clause of § 2 of Art. III of the Constitution establishing the judicial power in cases in law and equity between a State and citizens of another State; from which it naturally came to pass that the language of the Amendment was particularly phrased so as to reverse the construction adopted in that case. In *Hans v. Louisiana*, supra (p. 15), the court demonstrated the impropriety of construing the Amendment so as to leave it open for citizens to sue their own State in the federal courts, and it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not.25

The words of the court in this case would seem to establish that the expression "any suit in law or equity" was intended to prevent all suits, in no matter what branch of jurisprudence. This reasoning would also seem to lead to the conclusion that the word "suits" is broad enough to cover the term "controversies" appearing in article III, section 2 of the constitution and so make it unnecessary to consider here the vexing question as to whether or not the words "cases" and "controversies" are used synonymously in that article.

II. Meaning of the words "commenced or prosecuted."27

The case of *Cohens v. Virginia*28 came to the United States Supreme Court on appeal from the decision of the highest Virginia court which sustained a conviction of Cohens for violation of a state law. The suit, being a criminal prosecution, was commenced in the first instance by the state of Virginia. Cohens appealed the case to the United States Supreme Court on a federal question. Virginia excepted to the jurisdiction of the federal court on the ground that the appearance of the case on Cohens' appeal marked it as a suit commenced by an individual against a state and so one barred by the eleventh amendment. Chief Justice Marshall, in delivering the decision of the court, did not point out that the suit, being a controversy between Virginia and one of its own citizens, was not covered by the

25 *Ib.* 497-98, 65 L. Ed. at 1061.
26 The Supreme Court seems only once to have discussed the meaning of the word "suit" as it appears in the eleventh amendment. In *Cohens v. Virginia* (1821), 6 Wheaton 264, 407, 5 L. Ed. 257, 292, Chief Justice Marshall defined "suit" as the prosecution or pursuit of some claim, demand or request.
27 Read the eleventh amendment.
28 *Supra*, note 26.
eleventh amendment. He handled the case just as if Cohens were not a citizen of Virginia and found the amendment inapplicable because the suit was not "commenced or prosecuted" by Cohens. In a case where a suit was instituted in first instance by the state, and appealed to the federal court by the defendant individual, the Chief Justice said, the suit could not be held to be "commenced or prosecuted" in the federal court by the individual. 20 That the act of appealing the case from state to federal court did not constitute the "commencing" of a new suit, there can be little question. The transfer of a case, on appeal, from the sovereignty of the state to the sovereignty of the federal government might at first seem to be equivalent to instituting a new proceeding. But, in fact, the jurisdiction of the state court is to an extent identical with the jurisdiction of the federal court; 30 and as early as 1789 Congress had provided in a statute that cases in the state courts might be appealed to the United States Supreme court if the highest state court had decided against the validity of a federal treaty or statute, or an authority exercised under the United States, or had decided in favor of the validity of a state statute which had been questioned on the ground that it was repugnant to the constitution, laws or treaties of the United States. 31 This would seem to indicate very clearly that an appeal from a state court to the federal court on the ground of a federal question was merely a continuation of the suit and not the "commencement" of a new action. The eleventh amendment reads, however, that the federal judicial power shall not extend to suits "prosecuted" against a state by a citizen of another state. Marshall's contention was that Cohens, being merely appellant in a cause instituted by a state, could not be said to be prosecuting the case. Little would be gained by discussing here the probable correctness or incorrectness of Marshall's interpretation of the word "prosecuted" for it is now established beyond any question that a state may be made defendant on appeal in an action which it began against an individual.

20 Supra, note 26, at 410, 412, 5 L. Ed. at 292, 293.
30 By virtue of Article VI, clause 2 of the Constitution of the United States.
31 Section 25 of An Act to Establish the Judicial Courts of the United States, approved Sept. 24, 1789. The Public Statutes at Large of the United States, edited by Richard Peters, I (Boston, 1850), 85-87. The constitutionality of the clause of the act which is set forth above was upheld by the Supreme Court in this same case of Cohens v. Virginia.
Marshall's decision in *Cohens v. Virginia* was very nicely supplemented almost eighty years later in *Smith v. Reeves* in which the Supreme Court held that where a state permits itself to be sued by an individual in its own courts any federal question there presented will be heard on appeal by the United States Supreme Court. In keeping with these two decisions is the holding of a federal circuit court that where a state institutes a suit against an individual of another state in its own courts, and the defendant obtains a removal to a federal court, a cross bill filed by the defendant is not a suit commenced or prosecuted against the state.

III. When is the suit one "against a state"?

The immunity from suit which the eleventh amendment offers to states has been clutched at by many a lawyer intent on delivering his client from the reaches of the federal courts. Consequently the reports contain a great number of cases in which the courts have found it necessary to find as to the validity of an exception to federal jurisdiction made on the ground that the suit was one commenced against a state. Upon some points the cases are in agreement.

1. Suits against political divisions of the state.

It seems to be well established that a suit against a political division of the state is not a suit against the state within the meaning of the eleventh amendment, and so not one forbidden by that amendment. Two United States Supreme Court decisions, *Mercer County v. Cowles*, and *Lincoln County v. Luning*, clearly established that a suit against a county is not one against a state. In the latter of these two decisions the court said:

> it may be observed that the records of this court for the last thirty years are full of suits against counties, and it would seem as though by general consent the jurisdiction of the Federal Courts in such suits had become established. But irrespective of the general acquiescence, the jurisdiction of the Circuit Courts is beyond question. The Eleventh Amendment limits the jurisdiction only as to suits against a State.

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32 (1899), 178 U. S. 486, 445, 44 L. Ed. 1140, 1145. This was reasserted in *Chandler v. Dix* (1903), 194 U. S. 590, 592, 48 L. ed. 1129, 1131.
33 *Port Royal & Atlantic Ry. v. South Carolina* (1894), 60 Fed. 552.
34 Read the eleventh amendment.
35 (1868), 7 Wallace 118, 19 L. Ed. 86.
36 (1889), 133 U. S. 529, 33 L. Ed. 766.
37 *Ib.* 530, 33 L. Ed. at 767.
The Supreme Court seems never to have been called upon to decide whether or not a proceeding against a city is forbidden by the eleventh amendment, but lower federal courts have held that the amendment had no reference to such suits. Undoubtedly the same would be held as to other municipal corporations.

2. Suits against territories.
There seems to be no case in which a court has decided that a territory is not a state within the meaning of the eleventh amendment. However, it has been held that a citizen of a territory can not bring into the federal courts a suit against a citizen of a state on the ground that the controversy is between citizens of different states, nor can a citizen of a territory be sued by a citizen of a state in the federal courts on that ground. In an early case, Chief Justice Marshall, holding that the act of Congress which provided for the removal of cases to the federal courts on the ground that the parties to the litigation were citizens of different states did not extend to a suit brought by a citizen of the District of Columbia against a citizen of a state, declared that the word “state” in article III, section 2 of the constitution contemplated only the “members of the American Confederation.” One may conclude from this statement of Marshall that a suit against a territory is not a suit against a state in the meaning of that same article, and consequently not a suit barred by the eleventh amendment, for it has been pointed out above that that amendment was added to the constitution only to withdraw a jurisdiction declared by the Supreme Court to have been vested by that article.

3. Suits against a corporation of which a state is a member.
In 1824 the United States Supreme Court was called upon to decide whether or not a suit brought against a corporation which was created by Georgia, and a part of the stock of which was owned by Georgia, was to such an extent a suit against the state as to be one forbidden by the eleventh amendment. The court held that the bank was “not the State of Georgia although

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38 Palatka Waterworks v. City of Palatka (1903), 127 Fed. 161; Camden Interstate Ry. v. City of Catlettsburg (1904), 129 Fed. 421.
40 Hepburn and Dundas v. Ellzey, supra, note 39, at 452, 2 L. Ed. at 335.
41 Supra at note 25.
the State holds an interest in it." Accordingly the suit was not against the state. The decision has been followed even where the state owned all of the stock in the corporation and where as many as two-thirds of the directors were appointed by the governor.

4. A suit against a state officer is not always a suit against a state.

One of the first defenses of a state official who finds himself hard pressed by a federal process is to urge that the proceeding is in reality an action against the state and so not within the competence of the federal court. It then falls to the court to find whether the state or the individual is the actual defendant. Chief Justice Marshall early laid it down as a rule for such cases that if the action appeared in the federal court on account of the diverse citizenship of the parties, and not because a federal question was involved, the court would not look beyond the record to discover the actual defendant. The words of the Chief Justice were:

It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends upon the party, it is the party named in the record. Consequently the eleventh amendment, which restrains the jurisdiction granted by the Constitution over suits, is, of necessity, limited to those suits in which a State is a party on the record.

This rule was interpreted by Justice Swayne in Davis v. Gray to apply to suits pleading a federal question as well as to those

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42 Bank of the U. S. v. Planters' Bank of Georgia (1824), 9 Wheaton 904, 907, 6 L. Ed. 244.
43 Bank of Kentucky v. Wister (1829), 2 Peters 318, 7 L. Ed. 437.
45 Osborn v. Bank of the U. S. (1836), 9 Wheaton 738, 857, 6 L. Ed. 204, 232. This rule may fairly be called a dictum since in the case at hand jurisdiction lay in the federal court not because of diverse citizenship of the parties, but because a federal question was involved. The rule was followed without comment by a circuit court in 1851, and furnished ground for the decision that an action in assumpsit brought against a captain of marines to recover for rations and supplies furnished him for his official needs while in actual command of forces, was not a suit against the federal government. Tyler v. Walker (1851), Fed. Case No. 14, 311a.
46 (1870), 16 Wallace 203, 220, 21 L. Ed. 447, 453. It might be contended that Justice Swayne did not intend to put this construction upon Justice Marshall's rule, but Justice Matthews seemed to think that that was his intention. Ex parte Ayres (1887), 123 U. S. 443, 488, 31 L. Ed. 216, 223.
claiming federal jurisdiction on ground of diverse citizenship. So also Justice Matthews, delivering the opinion of the Supreme Court in *Ex parte Ayers*,\(^{47}\) seemed to construe the rule. If Justice Marshall intended to prescribe that in no case will the federal court look beyond the record to ascertain the actual defendant, he himself abandoned the rule.\(^ {48}\)

What seems a fairly safe guide for the court in determining whether a suit is in fact against a state or against an individual was laid down in 1799 by Justice Washington in the case of *Fowler v. Lindsey*.\(^ {49}\) There the Supreme Court was called upon to decide whether a litigation over certain lands was not in fact a controversy between the states of New York and Connecticut, although the record contained the names of only private citizens of the two states. The Justice declared that a case, to belong "to the jurisdiction of the Supreme Court on the account of the interest that a State has in the controversy, must be a case in which a State is either nominally or substantially the party."

Many cases might be cited in which the court has found that although the state did not appear as a party on the record it must nevertheless be held to be the real defendant.\(^ {50}\) But these same cases indicate that an official of the state who finds himself haled before the federal court can not escape justice on a flimsy pretense that the process is directed against the state and so barred by the eleventh amendment. The interest of the state in the cause must be real and substantial.\(^ {51}\) And the court

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\(^{47}\) *Supra*, note 46, *loc. cit.*

\(^{48}\) *Governor of Georgia v. Juan Madrazo* (1828), 1 Peters 110, 7 L. Ed. 73. An extended but not exhaustive search through the reports has failed to reveal any cases in which the court did look back of the record to find the defendant to a suit brought in the federal court on the ground of diversity of citizenship.

\(^{49}\) (1799), 3 Dallas 411, 412, 1 L. Ed. 658, 659. Worthy of consideration, too, is the suggestion of the court in *South Carolina v. Wesley* (1894), 155 U. S. 542, 545, 39 L. Ed. 254, 255, that if the state does not voluntarily declare itself a defendant in a case in which it is interested but not nominally the defendant, the court must hold that the state is not in fact the defendant. *Cf. U. S. v. Lee* (1882), 106 U. S. 196, 197, 27. L. Ed. 171, 173.

\(^{50}\) A few of the cases in which states were declared to be the real defendants, although not appearing as such on the record are: *Hagood v. Southern* (1885), 117 U. S. 52, 29 L. Ed. 805; *Ex parte Ayres*, *supra*, note 46; *Fitts v. McGhee* (1898), 172 U. S. 516, 43 L. Ed. 535; *Smith v. Reeves*, *supra*, note 32; *Chandler v. Dix*, *supra*, note 32.

\(^{51}\) The considerations determining whether or not a suit brought nominally against an officer of a state is necessarily a suit against the state
is not to refuse to hear the suit until there is a legal certainty that it has no jurisdiction.\textsuperscript{52}

IV. Citizens of another state or citizens or subjects of any foreign state.\textsuperscript{53}

1. \textit{Corporations are citizens.}

The courts seem never to have stated specifically that a corporation is, within the meaning of the eleventh amendment, a citizen of the state which created it. However, in \textit{Marshall v. Baltimore and Ohio R. R.}\textsuperscript{54} the federal Supreme Court found that a corporation is a citizen of the state from which it received its charter within the meaning of the provision, in article III, section 2 of the constitution, that the jurisdiction of the federal courts shall extend to controversies between citizens of different states. In \textit{Pennsylvania v. Quicksilver Mining Co.}\textsuperscript{55} the court assumed, relying upon \textit{Marshall v. Baltimore and Ohio} for authority, that a corporation was barred by the eleventh amendment from bringing suit in the federal courts against a state other than the one which created it. In \textit{Smith v. Reeves}\textsuperscript{56} the court went a step farther and held that a corporation created, not by a state but by Congress, was barred by the eleventh amendment from suing a state in the federal courts. The court reasoned that the amendment could not have intended to relieve a state from suits instituted by individuals and corporations of other states and yet leave it liable to suit at the hand of a corporation holding a charter from the federal government.\textsuperscript{57} The court did not go so far as to say that the corporation was a citizen of a state within the meaning of the eleventh amendment; it merely said that that amendment barred the corporation from suing a state in the federal courts.

2. \textit{A state can not lend its name to individuals.}

The constitution, as originally adopted, extended the judicial power to controversies between states\textsuperscript{58} and this jurisdiction

\textsuperscript{52} \textit{Barry v. Edmunds} (1885), 116 U. S. 550, 559, 29 L. Ed. 729, 732.
\textsuperscript{53} See the eleventh amendment.
\textsuperscript{54} (1853), 16 Howard 314, 14 L. Ed. 953.
\textsuperscript{55} (1870), 10 Wallace 553, 19 L. Ed. 998.
\textsuperscript{56} \textit{Supra}, note 32.
\textsuperscript{57} \textit{Ib.} 449, 44 L. Ed. at 1146.
\textsuperscript{58} Article III, section 2.
was, of course, not destroyed by the eleventh amendment. The willingness of the Supreme Court to adjudicate disputes between states is not, however, to furnish an artifice whereby an individual can utilize those channels to obtain redress of his own grievance against a state. In the cases of New Hampshire and New York v. Louisiana, the United States Supreme Court held that the suits were in legal effect commenced by and prosecuted by the citizens and not by the states whose names appeared as plaintiffs in each case, that in each case the state and the attorney general of the state were only nominal actors in the proceedings. Jurisdiction was therefore denied as being forbidden by the eleventh amendment. In South Dakota v. North Carolina, however, the court decided that a gift of bonds to the state of South Dakota was bona fide, and that a suit brought by that state against North Carolina to recover for the bonds was a controversy between states. The case arose out of the refusal of the state of North Carolina to redeem certain of its bonds held by one Simon Schafer, a citizen of New York. In March, 1901, the state of South Dakota passed a statute requiring the attorney general to take necessary proceedings to protect the right or title of the state in all gifts made to the state. In September of the same year Schafer presented South Dakota with some of his North Carolina bonds. In accordance with the law of March, 1901, the attorney general of South Dakota brought action in the United States Supreme Court and obtained judgment for the value of the bonds. Four judges dissented from the decision, however, believing that Schafer was the actual complainant.

In a recent suit against the state of Minnesota, North Dakota alleged that the use of certain drainage ditches by that state was causing the overflow of the Bois de Sioux River upon land in North Dakota. Therefore North Dakota sought (1) an injunction to compel the state of Minnesota to discontinue the use of the ditches, and (2) damages to compensate North Dakota land owners for injuries caused by the overflow. The Supreme Court held that the suit for injunction was a controversy between states, and granted the relief sought. The prayer for damages to be awarded to individuals was held, however,

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60 Rhode Island v. Massachusetts (1838), 12 Peters 657, 731, 9 L. Ed. 1233, 1263. See also Cohens v. Virginia, supra, note 26, at 406, 5 L. Ed. at 291.
60 (1882), 108 U. S. 76, 27 L. Ed. 656.
61 (1903), 192 U. S. 286, 48 L. Ed. 448.
to be not a controversy between states but one between citizens of North Dakota and the state of Minnesota. The court refused either to award damages to the injured land owners, or to award damages to the state of South Dakota to be turned over to individual claimants.

3. The eleventh amendment has no reference to suits between a state and its own citizens.

In 1870 Pennsylvania instituted a suit against the Quicksilver Mining Company, bringing its action in the federal court on the ground that the defendants were a California corporation. The Supreme Court decided that in fact the defendants were a Pennsylvania corporation and refused to hear the suit, on the ground that the United States constitution did not extend the federal judicial power to cases or controversies between a state and its own citizens. The dispute between the parties arose under no federal law, the sole ground for getting the case into the federal court being that it was a suit between a state and a citizen of a different state. *Hans v. Louisiana* presented a finer question, a citizen of Louisiana attempting to sue that state on a federal question. The plaintiff argued that the federal court must hear the case, regardless of the character of the parties, inasmuch as the suit was one arising under the constitution and laws of the United States. The Supreme Court rejected the argument. The constitution, it said, did not contemplate giving to the federal court jurisdiction over suits of any nature, brought against a state contrary to its will by one of its own citizens. It seems safe to conclude that the eleventh amendment could not have affected the jurisdiction of the federal courts over suits which were not subject to the federal jurisdiction previous to that amendment.

4. Are citizens of a territory "citizens of another State?"

It appears that no court has found it necessary to decide whether or not the eleventh amendment is to serve as a bar to suits brought against a state by a citizen of a territory. It was pointed out above that the clause in article III, section 2 of the

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63 Pennsylvania v. Quicksilver Mining Co., supra, note 55.
64 Supra, note 12.
65 It was here that Justice Bradley made the statement quoted above (p. 5), to the effect that the constitution did not intend to vest in the federal courts jurisdiction over any suits which were unknown to the common law.

In *North Carolina v. Temple* (1889), 134 U. S. 22, 33 L. Ed. 849, the court reached the same conclusion as in this case.
constitution, "between citizens of different States," was not broad enough to cover suits between citizens of a state and citizens of a territory. It might be reasoned from analogy that the phrase "citizens of another State" appearing in the eleventh amendment is likewise too narrow to include citizens of a territory. On the other hand, if the phrase is broad enough to bar suits instituted by corporations created by the federal government it might well give immunity from suits in which a citizen of a territory is plaintiff. It is submitted that when occasion arises, the courts will probably refuse to hear an action which seeks to make a state a defendant at the suit of a citizen of a territory.

V. A state may waive the immunity given it by the eleventh amendment.

It has been shown above that the Supreme Court has interpreted the eleventh amendment to permit that court to hear upon appeal any federal question involved in a suit begun in a state court against a state by a citizen of another state. The jurisdiction of the federal judiciary over suits between states and citizens of other states was appreciably widened in 1882 by the decision of the same court in Clark v. Barnard that if a state voluntarily submits to the jurisdiction of the court, the federal courts will entertain in first instance a suit brought against it by a citizen of another state. It is not clear just what branch or agent of the government has authority to waive the state's immunity from suit. In Nicholl v. United States the Supreme Court declared—

Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute.

A year later the court expressly stated that the consent of the United States to be sued by an individual could be given only by an "act of Congress expressly authorizing it" and that the power to give this consent did not exist "in any officer of the government." In the case of United States v. Lee decided a short time before Clark v. Barnard, the court seemed to infer that only the state legislature could give consent to the suit. A federal district court holding seems to clearly establish this

67 (1868), 7 Wallace 122, 126, 19 L. Ed. 125, 127.
68 The Davis (1869), 10 Wallace 15, 19, 20, 19 L. Ed. 875, 877.
69 Supra, note 49.
yet it seems unwise to rely upon this as a rule. If the attorney should appear before the federal court and make defense on the merits of the case, in a suit brought nominally against a state by a citizen of another state, the court probably would hear the action without inquiring by what authority the attorney general subjected the state to the suit. Again, it may happen that the attorney general is the defendant on the record to a suit which is really directed against the state. Undoubtedly the failure of the attorney general, or some other representative of the state, to make exception to the jurisdiction of the court on the ground that the suit is against the state will conclude the court that it should hear the case. Yet the actual giving of consent to the suit in this case would not have been embodied in a statute at all.

While a state which has waived the immunity given it in the eleventh amendment may undoubtedly retract its concession and refuse to be sued in the federal courts by citizens of other states, its action for that purpose can not withdraw from the federal court jurisdiction over a suit which was already in the process of adjudication before the retracting step was taken. The state may name conditions which must be met before it will

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71 See note 50 for cases which were brought nominally against officials but which were found to be actually suits against the state.
72 This conclusion seems amply justified by *South Carolina v. Wesley*, *supra*, note 49, at 545, 39 L. Ed. at 255. For cases somewhat analogous to this hypothetical situation, see *First National Bank of Charlotte v. Morgan* (1889), 132 U. S. 141, 33 L. Ed. 232, in which the voluntary appearance of the bank waived the immunity from suit which had been granted it by a federal statute; and *Stoner v. Rice* (1889), 121 Ind. 51, 6 L. R. A. 387, in which acceptance of suit by an auditor precluded him from later objecting to the jurisdiction of the court on the ground that the suit was against the state. Of interest in this connection, also, are *Interstate Construction Co. v. Regents of the University of Idaho* (1912), 199 Fed. 509; *St. Louis & San Francisco R. R. v. McBride* (1891), 141 U. S. 127, 35 L. Ed. 659; and *Texas & Pacific R. R. v. Cox* (1891), 145 U. S. 593, 36 L. Ed. 829.

There remains the possibility, of course, that the court, after hearing the facts and the argument in such a case as that imagined, may conclude that the state is vitally concerned in the suit and dismiss the action on the ground that since the state is not named as a defendant, the bill is improperly drawn. It was on that ground that the supreme court dismissed the action in *Christian v. Atlantic & North Carolina R. R.* (1889), 133 U. S. 233, 33 L. Ed. 589.

73 See *Beers v. Arkansas* (1858), 20 Howard 527, 15 L. Ed. 991.
74 *Gunter v. Atlantic Coast Line* (1905), 200 U. S. 273, 50 L. Ed. 477.
permit itself to be sued in the federal courts,\textsuperscript{75} and the federal courts will hear, of course, only those suits to which the state has indicated a willingness to consent. It is a rule in state courts that statutes giving the state's consent to be sued will be very narrowly construed.\textsuperscript{76} The federal courts also seem to be cautious about deciding that a state has given its consent to be sued in the federal courts\textsuperscript{77} but it is clear that consent to be sued can be found where it is not expressly stated.\textsuperscript{78} The decision of the highest state court that the state has waived its immunity from suit will conclude the federal court\textsuperscript{79} and a decision of the state court that the state has not consented to the suit will bear some weight with the federal court.\textsuperscript{80}

The creation of a state agency or institution and making it liable to suit without clearly designating that it is not to be sued in the federal courts has been construed to waive the immunity given in the eleventh amendment.\textsuperscript{81} However, it is established now that a state may permit itself to be sued in its own courts by its own citizens or by citizens of other states, and yet retain its immunity from similar suit in the federal courts. For a time after 1893 it appeared that this was not the case, and the confusion doubtless arose out of the following statement by Justice Brewer in Reagan v. Farmers' Loan and Trust Co.\textsuperscript{82}

For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the federal courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights with its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be main-

\textsuperscript{75}Beers v. Arkansas, supra, note 73. The state, in this case, had given consent to be used in its own courts but it is not clear that it had consented to be sued in the federal courts. See also U. S. v. Lee, supra, note 49.

\textsuperscript{76}Westinghouse Electric & Mfg. Co. v. Chambers (California Supreme Court, 1915), 145 Pac. 1025; Mississippi v. Joiner (1852), 23 Miss. 500; Raymond v. State (1877), 54 Miss. 562, 28 Am. Rep. 382.

\textsuperscript{77}A good example is Lankford v. Platte Iron Works (1914), 235 U. S. 461, 59 L. Ed. 316.

\textsuperscript{78}Phoenix Lumber Co. v. Regents of the University of Idaho (1908), 197 Fed. 425; Gunter v. Atlantic Coast Line, supra, note 74; Smith v. Rackliffe (1893), 87 Fed. 964.

\textsuperscript{79}Interstate Construction Co. v. Regents of the University of Idaho, supra, note 72.

\textsuperscript{80}Lankford v. Platte Iron Works, supra, note 77.

\textsuperscript{81}Gunter v. Atlantic Coast Line, supra, note 74; Interstate Construction Co. v. Regents of the University of Idaho, supra, note 72; R. R. Commission of Louisiana v. Texas & Pacific Ry. (1906), 144 Fed. 68.

\textsuperscript{82}(1893), 154 U. S. 362, 391, 38 L. Ed. 1014, 1021.
tained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the federal courts.

Six years after this decision a federal court gave a quotation from the above expression as authority for a decision that the consent of a state to be sued in its own courts gave citizens of other states a right to bring similar suits in the federal courts. In *Smith v. Rackliffe*, however, a federal district judge found that the opening of its own courts by a state to suits against itself did not necessarily imply that the state was willing to be sued in the federal courts. This decision was upheld on appeal to the Supreme Court, appearing there as *Smith v. Reeves*, and has twice since been reaffirmed by that body.

**SUMMARY**

One paragraph will serve to recapitulate the principal points which have been established to date in the interpretation of the eleventh amendment.

1. The amendment is a restraint, not only upon suits in law or equity but also upon suits in admiralty.
2. When a state brings an action against an individual, it can not later invoke the eleventh amendment to prevent the hearing of an appeal or a cross-bill filed by the defendant.
3. The amendment applies only to suits against the forty-eight states and offers no immunity from suit to political divisions of a state, nor to a corporation in which a state is the sole stockholder, nor, if one may reason from analogy, to territories. Neither does it relieve from suit the officers of a state, but where a federal question is involved in a suit brought nominally against a state official the court is open to evidence intended to show that the state is a necessary defendant.
4. The amendment applies to suits instituted against a state by corporations of another state or by corporations of federal creation, as well as to suits introduced by individuals of other states, and the court will look back of the record to discover the real plaintiff even though one of the forty-eight states appear

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83 *Dinsmore v. Southern Express Co.* (1899), 92 Fed. 714. Similar holding in *Reinhart v. McDonald* (1896), 76 Fed. 403, which was reversed in *Smith v. Rackliffe*, supra, note 78.
84 Supra, note 78.
85 Supra, note 32.
as nominal plaintiff. But the amendment has no reference to suits brought against a state by one of its own citizens.

5. A state may waive the immunity given to it in the eleventh amendment and permit itself to be sued on such conditions as it may name; and the intention of a state to permit itself to be sued can sometimes be discovered where it is not expressly given.