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# Federal Jurisdiction -- Suits Against a State

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a mechanically defective recording of a confession or admission. Its suggestions should prove valuable to courts which have not yet passed on the question:

"To insure the accused of the absolute protection of his rights to which he is entitled under the charitable policy of our criminal laws, and assuming that the voluntary character and the accuracy of the recording device has been established, we make the following suggestions as to trial procedure in the event an objection is interposed to the introduction of a recorded statement on the grounds that such statement is inaudible, or contains illegal, irrelevant, incompetent, or immaterial evidence.

"The trial court should first have the recording played or run off before it out of the presence of the jury, counsel being afforded the opportunity at this time of interposing appropriate objections. A transcription of the audible portions of the statement should of course be made at this time.

"If either of such defects infect the recording there can be doubt as to its admissibility.

"If the recording is inaudible in those portions likely to contain statements material to the issues, the recording should be rejected if it is the only evidence offered as to the statement.

"Since most recordings are in question and answer form, the question itself will shed light on the probable materiality of the answer.

"If the parties who were present when the recording was made are available and testify as to the statements made, the recording, even though inaudible, in parts, should be admitted as corroborative of the testimony of the witness or witnesses testifying to the statement. . . .

"If the recording contains illegal evidence it should be rejected unless such illegal portions can be erased from the tape, or kept from the jury by stopping and starting the playing instrument. This for the reason, as before stated, we doubt the effectiveness of oral instructions to eradicate the prejudicial effect of this type of evidence because of its inherent potency."<sup>24</sup>

WILLIAM E. ZIMTBAUM.

### Federal Jurisdiction—Suits Against a State

A recent case, *Lowes v. Manhattan City School District*,<sup>1</sup> presents some of the problems facing a federal court when it concludes the suit

<sup>24</sup> *Id.* at 73-74.

<sup>1</sup> 222 F. 2d 258 (9th Cir. 1955).

before it is one against a state. In the *Lowes* case plaintiff brought an action for damages in a federal district court of California, alleging that defendants had wrongfully taken possession of real property to which she was entitled, had wrongfully removed a building therefrom, and had converted certain personal property belonging to plaintiff. She assigned diversity of citizenship as grounds for jurisdiction.<sup>2</sup> Plaintiff was a resident of Alaska,<sup>3</sup> defendants were the named California school district and certain individuals. The district judge dismissed the complaint on his own motion for want of complete diversity, because a state is not a citizen for purposes of diversity jurisdiction, and the school district was a part of the government of the state. The district judge also held the complaint alleged no federal question.<sup>4</sup> On appeal the court of appeals affirmed as to diversity, because the action against the school district was in effect a suit against the state. But it reversed the district court on the matter of a federal question, finding that the alleged acts of the individual defendants constituted an invasion of plaintiff's rights under the Fourteenth Amendment.

At various times in the history of the federal court system at least three possible grounds have been presented for jurisdiction over suits against a state by a citizen of another state: (1) jurisdiction based on diversity of citizenship; (2) jurisdiction based on section 13 of the Judiciary Act of 1789;<sup>5</sup> and (3) jurisdiction based on a federal question.

The district court and the court of appeals correctly concluded in the *Lowes* case that a state is not a citizen within the meaning of the judiciary acts granting federal jurisdiction on the basis of diversity of citizenship.<sup>6</sup> The United States Supreme Court at an early date held that a

<sup>2</sup> 28 U. S. C. § 1332 (1952) provides that the district courts shall have original jurisdiction over all civil actions where the amount in controversy exceeds \$3,000 and is between citizens of different states.

<sup>3</sup> 28 U. S. C. § 1332 (b) *supra* note 2, provides that the word "State" shall include the Territories and the District of Columbia.

<sup>4</sup> 28 U. S. C. § 1331 (1952) provides that the district courts shall have original jurisdiction over all civil actions where the amount in controversy exceeds \$3,000 and arises under the Constitution, laws or treaties of the United States.

<sup>5</sup> ". . . the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states . . . in which latter case it shall have original but not exclusive jurisdiction." The Judiciary Act of 1789, § 13, 1 STAT. 80.

<sup>6</sup> *State Highway Commission v. Utah Const. Co.*, 278 U. S. 194 (1928); *Missouri, Kansas & Texas Ry. v. Hickman*, 183 U. S. 53 (1901); *Postal Telegraph Cable Co. v. United States*, 155 U. S. 482 (1894), (*sub. nom.*) *Postal Telegraph Cable Co. v. Alabama*; *Stone v. South Carolina*, 117 U. S. 430 (1886). See, generally, Annot., 147 A. L. R. 786 (1943).

Counties and municipal corporations are treated as citizens of their states for purposes of diversity jurisdiction. *Lincoln County v. Luning*, 133 U. S. 530 (1890); *Pearl River County v. Wyatt Lumber Co.*, 270 Fed. 26 (5th Cir. 1921); *Port of Seattle v. Oregon & Wash. Ry.*, 255 U. S. 236 (1921); see *Board of Levee Commissioners of Orleans Levee District v. Huse*, 17 F. 2d 785 (E. D. La. 1927).

state cannot in the nature of things be a citizen of itself.<sup>7</sup> Therefore a suit between a state and a citizen of another state is not a suit between citizens of different states, and, on this ground, the courts have no jurisdiction.<sup>8</sup> It is not necessary for the state to be a formal party to constitute a suit against the state.<sup>9</sup> For example, in suits against state officials or agencies, the state may nevertheless be the real party in interest,<sup>10</sup> such suits are held to be in effect against the state,<sup>11</sup> and therefore there is no diversity of citizenship. It was on this point that it was held there was no diversity in the *Lowes* case.

In the celebrated case of *Chisholm v. Georgia*,<sup>12</sup> the Supreme Court held that the federal court had jurisdiction over a civil suit against the state of Georgia by a citizen of South Carolina, brought under section 13 of the Judiciary Act of 1789. Adverse reaction of the states to this exercise of jurisdiction culminated in the adoption of the Eleventh Amendment.<sup>13</sup> Its provisions effectively bar any action<sup>14</sup> against<sup>15</sup> a state by a citizen of another state,<sup>16</sup> except in those cases where the state has waived its immunity.<sup>17</sup> It was said in *Osborn v. Bank*,<sup>18</sup> that

<sup>7</sup> *Stone v. South Carolina*, *supra* note 6, at 430.

<sup>8</sup> See note 6, *supra*.

<sup>9</sup> *Pacific Fruit & Lumber Produce Co. v. Oregon Liquor Control Commission*, 41 F. Supp. 175 (D. Ore. 1941); cf. *Ex parte Nebraska*, 209 U. S. 436 (1908).

<sup>10</sup> *State Highway Commission v. Utah Const. Co.*, 278 U. S. 194 (1928); *Missouri, Kansas and Texas Ry. v. Hickman*, 183 U. S. 53 (1901); *Chicago, R. I. & P. Ry. v. Long*, 181 F. 2d 295 (8th Cir. 1950); *State Highway Commission v. Kansas City Bridge Co.*, 81 F. 2d 689 (8th Cir. 1936).

<sup>11</sup> See note 10 *supra*. Of course it does not always follow that in a particular suit the state is in fact the real party in interest. Where the suit is against an officer in his individual capacity, e.g., *Porter v. Beha*, 12 F. 2d 513, 517 (2d Cir. 1926); *Weiland v. Pioneer Irr. Co.*, 239 Fed. 519 (8th Cir. 1916), *aff'd*, 259 U. S. 498 (1922); (*compare with California ex rel. McColgan v. Bruce*, 129 F. 2d 421 (9th Cir. 1942) and *Craig v. Southern Natural Gas Co.*, 125 F. 2d 66 (5th Cir. 1942)); or is against an agency, which because of its powers, e.g. *Hunkin-Conkey Const. Co. v. Pennsylvania Turnpike Commission*, 34 F. Supp. 26 (M. D. Penn. 1940); may be recognized as a separate entity, the requisite citizenship may be found, and jurisdiction taken. See *Missouri, Kansas & Texas Ry. v. Hickman*, 183 U. S. 53 (1901); *Missouri v. Homesteaders Life Ass'n.*, 90 F. 2d 543 (8th Cir. 1937); *Louisiana Highway Commission v. Farnsworth*, 74 F. 2d 910 (5th Cir. 1935); *Porter v. Beha*, 12 F. 2d 513 (2d Cir. 1926); *Barton v. Delaware River Joint Toll Bridge Commission*, 120 F. Supp. 337 (D. N. J. 1954).

<sup>12</sup> 2 U. S. (2 Dall.) 419 (1793).

<sup>13</sup> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U. S. CONST. amend. XI.

<sup>14</sup> By construction, the Eleventh Amendment also precludes suits in admiralty against a state. *In re State of New York*, 256 U. S. 490 (1921).

<sup>15</sup> The Eleventh Amendment does not prohibit suits by states against citizens of the same or another state. *Southern Pacific Ry. v. California*, 118 U. S. 109 (1886).

<sup>16</sup> The doctrine of sovereign immunity bars suits in the federal courts against states by citizens of the same state. *Hans v. Louisiana*, 134 U. S. 1 (1901).

<sup>17</sup> *Clark v. Barnard*, 108 U. S. 436 (1882); *Gunter v. Atlantic Coastline Ry.*, 200 U. S. 273 (1905). It was said that whenever a citizen of another state could go into a state court in an action against a state, a citizen of another state could go into a federal court in a similar action. *Reagan v. Farmers' Loan and Trust*

the Eleventh Amendment prohibited only those suits wherein the state was a formal party to the record.<sup>19</sup> However, this restricted rule was later modified to include within the operation of the Eleventh Amendment actions wherein the state was not a formal party but was the real party in interest, against whom relief was sought.<sup>20</sup>

Although the Eleventh Amendment was adopted primarily to preclude jurisdiction over suits of the *Chisholm v. Georgia* class, it is not so limited. The Eleventh Amendment also prohibits suits against a state by a citizen of another state where the plaintiff bases his claim for relief on a federal question.<sup>21</sup> This is the result even though plaintiff asserts a violation by the state of his constitutional rights.<sup>22</sup> Since the Eleventh Amendment applies to suits where the state is the real party in interest, it prohibits suits against state agencies or officers acting in their official capacity where a judgment for the plaintiff would operate against or would require affirmative action by the state, even though the state was not a formal party to the record.<sup>23</sup>

In the *Lowes* case the court of appeals did not recognize an Eleventh Amendment problem. The explanation lies, perhaps, in the fact that on the issue of a federal question the court was addressing itself to the question of possible liability of the individual defendants. The Eleventh Amendment has been construed not to apply to suits against state officials who have acted or threaten to act under color of an unconstitutional statute,<sup>24</sup> or who have acted or threatened to act unconstitu-

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Co., 154 U. S. 362, 391 (1893). But now the rule is clearly otherwise; a state may limit suits against itself to actions in its own courts. *Kennecott Copper Corp. v. State Tax Commission*, 327 U. S. 573 (1946); *Ford Motor Co. v. Department of Treasury*, 323 U. S. 459, 465 (1945); *Great Northern Life Ins. Co. v. Read*, 322 U. S. 47, 54 (1944).

<sup>19</sup> 22 U. S. (9 Wheat.) 738 (1824).

<sup>20</sup> *Id.* at 857.

<sup>21</sup> "As to what is deemed to be a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record . . . has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceedings as it appears from the entire record." *In re State of New York*, 256 U. S. 490, 500 (1921); *In re Ayers*, 123 U. S. 443 (1887).

<sup>22</sup> *Kennecott Copper Corp. v. Tax Commission*, 327 U. S. 573 (1946).

<sup>23</sup> *Missouri v. Fiske*, 290 U. S. 18, 26 (1933); *Pacific Fruit & Produce Co. v. Oregon Liquor Control Commission*, 21 F. Supp. 822 (D. C. Ore. 1941). *cf.* *Hans v. Louisiana*, 134 U. S. 1, 10 (1901).

<sup>24</sup> "Accordingly it is well settled that a suit against officers of a state, to compel them to do acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself." *Pennoyer v. McConaughy*, 140 U. S. 1, 9 (1891). An action is against the state not only when it will be required to specifically perform its contracts, but will be required to make pecuniary satisfaction for any liability. *Smith v. Reeves*, 178 U. S. 436 (1900).

<sup>25</sup> *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559 (1917), *Truax v. Raich*, 239 U. S. 33 (1915); *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146 (1910), *Prentiss v. Atlantic Coastline Ry.*, 211 U. S. 201 (1908); *Ex parte Young*, 209 U. S. 123 (1908); *Pennoyer v. McConaughy*, 140 U. S. 1 (1891).

tionally under a constitutional statute.<sup>25</sup> The theory of these cases is that such suits are not against state officers in their official capacity, but rather are suits against such persons for their individual wrongs.<sup>26</sup> An action of this type is not against the state,<sup>27</sup> and therefore a federal court has jurisdiction to grant either legal<sup>28</sup> or equitable<sup>29</sup> relief.

In the light of the foregoing, if the court of appeals was correct in finding that the suit against the school district was in effect a suit against the state, and therefore there was no diversity of citizenship, must not a suit against the school district for its alleged violation of plaintiff's constitutional rights also be a suit against the state? It is submitted that the answer to this question is in the affirmative. If this be so, then it seems logical to conclude, absent a showing of waiver by the state of its immunity, that the court was without jurisdiction over the subject matter on the basis of a federal question because of the prohibitions of the Eleventh Amendment. This would appear to be the result so long as the school district remained a party, even though the court might validly determine that the district court otherwise could exercise jurisdiction over the wrongs committed by the individual defendants.

To avoid this complication in the *Lowes* type case, it is suggested that the better analytical approach to the problem is the method adopted by the United States Court of Appeals for the Fourth Circuit in *O'Neil v. Early*.<sup>30</sup> In that case the court, before ruling on diversity of citizenship or a federal question, first determined whether the suit was one prohibited by the Eleventh Amendment; that is, whether the suit was

<sup>25</sup> "Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual." *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362, 399 (1894). See also, *Sterling v. Constantine*, 287 U. S. 378 (1932); *Louisville & N. Ry. v. Greene*, 244 U. S. 522 (1917). *But see* *Barney v. City of New York*, 193 U. S. 430 (1904), where it was held that when the action of the state official was contrary to law, and therefore unauthorized, it was not action of the state within the meaning of the Fourteenth Amendment, and therefore, on that ground, there was no federal question. *But see*, also, *Isseks, Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials*, 40 HARV. L. REV. 969 (1927), where the author discusses the *Barney* Case and its apparent subsequent repudiation.

<sup>26</sup> See *Ex parte Young*, 209 U. S. 123 (1908).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Scott v. Donald*, 165 U. S. 58 (1897). See *McCartney v. West Virginia*, 156 F. 2d 739 (4th Cir. 1946).

<sup>29</sup> *Louisville & N. Ry. v. Greene*, 244 U. S. 522 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559 (1917); *Truax v. Raich*, 239 U. S. 33 (1915); *Prentis v. Atlantic Coastline Ry.*, 211 U. S. 201 (1908); *Ex parte Young*, 209 U. S. 123 (1908); *McNeill v. Southern Ry.*, 202 U. S. 543 (1906); *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362 (1894); *Pennyroy v. McConaughy*, 140 U. S. 1 (1891).

<sup>30</sup> 208 F. 2d 286 (4th Cir. 1953). Plaintiff, a resident of the District of Columbia, brought an action against a Virginia county superintendent of schools and a county school board for damages for wrongful discharge from her job as school teacher.

against the state, and, if so, whether the state had waived its immunity. Upon finding that the suit was against the state and that the state had not waived its immunity, the court dismissed the suit. It was unnecessary to rule on the question of diversity or federal question jurisdiction. In cases where the Eleventh Amendment has been waived by the state, jurisdiction can never be based on diversity of citizenship, but jurisdiction may be exercised on grounds of a federal question provided the complaint properly alleges that the suit arises under the United States Constitution, a federal statute or treaty.

If the court of appeals in the *Loves* case was correct in holding there was liability on the part of certain individual parties because of their violation of plaintiff's constitutional rights, then it is submitted that the school district should have been dismissed as a party.<sup>31</sup> In that event the Eleventh Amendment would be no obstruction to the district court's jurisdiction. However, so long as the school district remained a party, it would seem that the court would have no jurisdiction on any grounds.

LOWRY M. BETTS.

#### Real Property—Recordation of Federal Condemnation Judgments in the County of the Condemned Land

The recent federal case of *United States v. Norman Lumber Co.*<sup>1</sup> has presented to attorneys still another obstacle to overcome in the long road of searching titles. This was an action brought by the federal government to determine title to certain lands and to recover the value of timber removed therefrom. In federal condemnation proceedings<sup>2</sup> in 1936 certain lands in Montgomery County, North Carolina were condemned. One Bruton and his heirs, the owners of the property here in question, were made parties to those proceedings. The judgment was docketed and cross-indexed in the office of the clerk of the United States district court, and docketed, indexed and cross-indexed in the office of the Clerk of Superior Court of Montgomery County, North Carolina, but in the latter the names of the Bruton heirs did not appear. The judgment was not registered in the office of the Register of Deeds of Montgomery County, although the judgment by its terms required that this be done. In 1951 the Bruton heirs executed a timber deed to the Norman Lumber Company who then began to remove the timber from the property in suit.

<sup>31</sup> See *McCartney v. West Virginia*, 156 F. 2d 739 (4th Cir. 1946).

<sup>1</sup> *United States v. Norman Lumber Co.*, 127 F. Supp. 518 (M. D. N. C. 1955), *aff'd*, 223 F. 2d 868 (4th Cir. 1955).

<sup>2</sup> *United States v.* 1053.2 acres of land in Montgomery County, North Carolina. [As cited in the District Court opinion, 127 F. Supp. 518 (M. D. N. C. 1955).]