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INJUNCTIONS TO RESTRAIN DIVORCE ACTIONS IN OTHER STATES.

The New Jersey courts in the recent case of *Von Bernuth v. Von Bernuth*, 73 Alt., 1049, has again held that an injunction will issue on motion of petitioner for divorce to restrain defendant from prosecuting an action for separation in New York.

The petitioner filed her petition for a divorce in the New Jersey court against the defendant. The defendant was then residing in New York, but by appearance through counsel, the court acquired jurisdiction over him. Finally he filed a cross petition for an absolute divorce against the petitioner. Prior to this last proceeding the defendant brought an action for separation in the New York courts against the petitioner on the same grounds. Petitioner applied to the New Jersey court for an injunction restraining the defendant from prosecuting the New York action because, (1) the New Jersey courts having first obtained jurisdiction of the parties were entitled to a determination of the issue, and (2) the New York action was vexatious to the petitioner.

Could the court of New Jersey enjoin the defendant from prosecuting the action in New York? The petitioner, if the in-

junction did not issue would have been compelled to defend two suits for substantially the same cause of action—desertion.

The doubt which early existed as to the power of English Chancery courts to grant injunctions restraining those over whom the courts had jurisdiction from *doing,* or compelling them by specific performance, *to do* certain acts in foreign jurisdictions has long since been removed. In *Penn v. Lord Baltimore,* 1 Ves. Sen., 444, specific performance of an agreement concerning the boundary of a North American province was decreed. The equitable maxim, *Aequitas agit in personam,* was the basis of the court's decision.

The case of *Lord Portarlington v. Soulby,* 3 M. & K., 104, decided in 1834, outlined the English rule so clearly that there is no doubt as to the power of those courts in proper cases to restrain an individual from prosecuting an action in a foreign court. This was a motion to restrain the defendant from suing in Ireland. It was contended that the English courts could not so interfere with the Irish courts. But the opinion of the court did not rest on such a ground. Courts had compelled parties within their jurisdiction to convey property situated abroad, to bring home goods from abroad. Why not forbid one from performing certain acts abroad?

Treatises on injunctions agree that courts may exercise this power. *Story's Equity Jurisprudence,* Sect. 899, says: "But although the courts of another, they have undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon these parties and direct them, by injunction, to proceed no further in such suits."

The *Amer. & Eng. Ency. of Law,* Vol. X, p. 908, states that by a clear weight of authority in England and America, equity, having jurisdiction of the parties, will enjoin them from instituting actions in other states and countries, where the facts justify it. 22 Cyc. 813, states the rule in substantially the same manner. See also *Pomeroy's Equity Jurisprudence,* Vol. III, p. 395, note 1.

Some English decisions hold contrary to the above doctrine. The court *In re Boyse,* 15 Ch. Div., 591, refused to restrain a

foreign creditor from proceeding in a foreign court against an administrator, holding that it had no authority to interfere with a foreign creditor, resident abroad, for suing in the courts of his own country.

In *Moor v. Anglo-Italian Bank,* 10 Ch. Div., 681, the court refused to grant an injunction against an encumbrancer on immovable property situated in a foreign country, who had instituted legal proceedings in that country for the purpose of enforcing his rights.

In *In re Chapman,* 15 Eq. 75, the court refused to restrain foreign creditors from continuing actions brought in New York courts, although a receiver to the debtor had been appointed.

There are some decisions in this country contrary to this policy. *Carroll v. Farmers & Mechanics Bk.,* Harring (Mich.) 197, refused to follow this rule on the ground that if one state granted such an injunction the other might retaliate in like manner. This position cannot be maintained. The injunction is not directed against the foreign court, but to the parties to the suit.

In *Williams v. Ayrault,* 31 Bar., 364, an injunction was refused because the action in the court of a sister state had been *commenced* and *was pending.*

The most frequently cited decision adverse to the majority doctrine is *Mead v. Merritt,* 2 Paige 402. The court would not restrain proceedings which *had been previously commenced in the courts of another state* because of the danger of retaliatory measures being resorted to by the other state.

As to whether our courts recognize this doctrine, perhaps it would suffice to refer to the leading case of *Cole v. Cunningham,* 133 U. S. 107, where Fuller, C. J., rendering the opinion conceded this power to courts of equity of the different states. It was contended that the doctrine contravened the "full faith and credit" clause of the United States Constitution, but the contention was overruled on the ground that if equity courts of one state, in accordance with the established rules of equity, could control persons within their jurisdiction from the prosecution of suits in another, the Constitution could not be said to prescribe any different rule.

In *Massie v. Watts,* 6 Ch., 148, Marshall, C. J., said: "The court is of the opinion that in a case of fraud or trust, or of con-

tract, the jurisdiction of a court of chancery is sustainable wherever the person can be found, although lands not within the jurisdiction of that court may be affected by the decree."

The rule as laid down in *Williams v. Ayrault, supra,* was later, in *Vail v. Knapp,* 49 Bar., 299, overruled, where it was held that although an action had been commenced in a foreign court, the courts in a proper case, to prevent oppression or fraud, should act. No rule of comity forbade it. This doctrine was followed in *Claflin & Co. v. Hamlin,* 62 How. Prac. (N. Y.), 284; in *Allegany & K. R. Co. v. Weidenfeld et al.,* 25 N. Y. Supp. 71; and in *Dehon v. Foster,* 4 Allen, 545.

Harris v. Pullman, 84 Ill. 20, held that it was inconsistent with interstate harmony to attempt to control by injunction suits *already commenced in another state,* but New York and Massachusetts courts say that "extreme delicacy" should not deter the court from acting in proper cases. In all such actions the complainant must show that the suit sought to be restrained is brought in bad faith, or for the purpose of vexing the party seeking the injunction.

Such an injunction has issued to restrain divorce proceedings in the following cases:

In *Forest v. Forest,* 2 Edm. Sel. Cas. (N. Y.), 180, where both parties resided in New York and one of them attempted to carry on divorce proceedings in another state. In *Kittle v. Kittle,* 8 Daly (N. Y.) 72, where defendant of an action pending in New York commenced an action in Connecticut, intending to bring it to trial there, before the wife could go to trial in New York—she being unable to defend in Connecticut because of her lack of funds. In *Kempson v. Kempson,* 58 N. J. E. 94, and in *Huettinger v. Huettinger,* (N. J. Ch.) 43 Alt. 574, both being cases where mere prentended domiciles were alleged for the purpose of supporting the suits.

In *Dehon v. Foster, supra,* the court in restraining a Massachusetts citizen from attaching property in Pennsylvania as against a Massachusetts debtor so as to prevent it from coming into the hands of the assignee appointed by the Massachusetts court, says, through Bigelow, C. J.: "An act which is unlawful and contrary to equity gains no sanction or validity by the mere form or manner in which it is done. It is none the less a violation of our

laws because it is effected through the instrumentality of a process which is lawful in a foreign tribunal. By interposing to prevent it, we do not interfere with the jurisdiction of courts in other states, or control the operation of foreign laws. We only assert and enforce our own authority over persons within our jurisdiction to prevent them from making use of means by which they seek to countervail and escape the operation of our own laws, in derogation of the rights and to the wrong and injury of our own citizens."

DILIGENCE AND PRUDENCE AS AN ELEMENT OF GOOD FAITH.

By its decision in the case of *First National Bank of Birmingham, Alabama v. Gilbert & Clay,* 49 So. Rep., 513, the Supreme Court of the State of Louisiana accepts and adopts a common law doctrine as laid down by an Illinois court which seems to be too broad and too general a statement to stand as the accepted rule of law.

The question involved the payment of money by an authorized agent and the measure of caution called for by the party to whom it was paid. As the transaction took place in one state, though one party lived in and the action arose in another state, the law of the former state was applicable.

One Chisholm, a teller in the plaintiff bank, entered into a series of speculations with the defendant partnership, holding himself out to be the agent of an undisclosed principal who desired to keep out of the transactions. In the course of the speculations, Chisholm paid over, in various sums, the amount of $100,000.00. These amounts he paid while on duty as teller and through checks of his supposed principal which he handled in the ordinary course of business. The defendants, after dealing with Chisholm for some time, demanded to know his principal and upon his refusal to disclose him, closed out his account. At no time during the transactions did they make any effort to find out his authority as agent, or to assure themselves of the relations between Chisholm and his reputed principal. The money paid out was that of the plaintiff bank which alleges that the defendants, from the facts and conditions of the case, should have known that the undisclosed principal was a fictitious party and that Chisholm had been speculating for himself with the

funds of the bank. The bank sued, alleging that the facts of the case should have put the defendants on notice to inquire into Chisholm's authority and that failure to do so, under all the circumstances, was unexcusable and the partnership was therefore bound to refund the money. The Supreme Court of Louisiana, in affirming the decision of the lower court, adopted *in toto* the text of the Illinois case of *Merchants Loan & Trust Co. v. Lawson,* 90 Ill. Ap., 18, and held that money transferred to an honest taker and received in the due course of business and without knowledge of the felony, is held by good title against the one from whom it is stolen and that *bad faith alone will defeat the right of the taker: "Mere ground of suspicion or knowledge of the circumstances which would create suspicion in the mind of a prudent man or gross negligence on the part of the taker will not defeat his title. Bad faith alone will not; the test is honesty and good faith, not diligence."*

It is submitted that this view is one which is too broad and which extends the common law doctrine to such a limit that if accepted, it would increase the risk in ordinary business transactions and lower business morality in the interests of a doubtful commercial expediency. No rules of agency, no tests of good faith and no established lines of decisions can sustain this view as adopted by the Louisiana courts.

It is an accepted principle of law and of morals, *that wilful ignorance is equivalent to actual knowledge* and he who abstains from inquiry when inquiry ought to be made cannot be heard to say so and rely upon his ignorance. *Mackey v. Fullerton,* 7 Colo. 556; *Whitebread v. Boulroes,* 1 You. Coll. Ex-Reportr 303. And surely one who deals with an agent whose acts or supposed authority imply a doubt to that authority, is put to inquiry and discovery at his peril. 31 Cyc. 1322, says: "Every person therefore who undertakes to deal with an alleged agent is put upon inquiry and must discover at his peril that such pretended agent has authority and that it is in its nature and extent sufficient to permit him to do the proposed act and that its sources can be traced to the will of the alleged principal." The decisions make this even stronger, holding that *anything that arouses a suspicion obligates an inquiry and the law presumes that whatever the inquiry would disclose, is known.* See *Rochester & C. T. Ry. Co. v. Paviour,* 164 N. Y., 281; *Hennebery v. Moise,* 56

Ill., 394; *Hamlin v. Pettibone,* Fed. Cas. No. 5, 595; *Williamson v. Brown,* 15 N. Y. App. Cas., 354. Also see *Anderson v. Kissam,* 35 Fed. Rep., 799, which said: "When the transaction is such as should arouse suspicion of the agent's authority to represent his principal, it is the duty of those who deal with him in a representative character to apply to his principal for information."

Should the facts here have aroused suspicion in the minds of the defendants? Were they such that it were incumbent upon the defendants to use diligence and make *bona fide* efforts to ascertain whether Chisholm had the proper authority to pay over such funds for his undisclosed principal, or were the defendants justified in receiving the money in silence and because there was no actual bad faith assume there was no need to make any active inquiry?

It can hardly be doubted that the rule as laid down in the case under discussion is insufficient. Chisholm held himself out to be the agent of his undisclosed principal to carry out these speculations. *He offered no proof of his agency.* It cannot be disputed that there is no more settled rule in law that that *relations of agency cannot be proved by the mere declarations of the party claiming to be an agent where the fact of agency is at issue.* This has been unanimously held. See *Hullanphy Savings Bank v. Schott,* 135 Ill. 655; *Salmon Falls Bank v. Leyser,* 116 Mo. 51; *Proctor v. Tows,* 115 Ill. 138; *Marvin v. Wilbur,* 52 N. Y. 270; *Gifford v. Landrine,* 37 N. J. Eq. 127; also see *Meechem on Agency,* Sect. 70. This fact alone, the *uncorroborated statement of Chisholm of his authority as agent, should have warned the defendants* of the necessity of making further inquiry and of ascertaining the extent of his authority.

Did Chisholm, by paying the amounts lost in the speculation during his business hours as paying teller and by making such payments over his teller's window, disarm any suspicion on the part of Gilbert and Clay? *Hoer v. Miller,* 75 Pac. (Kans.) 76, says: "The fact that the cashier is personally interested in such a transaction is sufficient to put his creditor upon inquiry as to the actual extent of his, the cashier's authority." If Chisholm made these payments during his business hours but as a private individual and not as a cashier, which fact is claimed by the defendants, the fact that he was interested in them personally again put the defendants upon inquiry. Suppose these payments were

made, as claimed, on what were thought to be *bona fide* checks and paid out by the teller in the scope of his duty as such. He was then acting in two capacities, as agent for the bank and for his undisclosed principal, and this fact once more put the defendant on notice. "Upon the proof that the transaction was known to the claimant to be an individual one and not with the bank, the burden is cast upon the claimant to establish that the act of the cashier thus done for his own individual benefit was authorized or ratified. *The test of the transaction is whether it is done with the bank and its business or with the cashier and in his business.*" *Campbell v. Manufacturer's National Bank,* 51 Atl., 497; *Moore v. Bank,* 111 U. S., 156; *Rochester & Charlotte Turnpike Ry Co. v. Paviour, supra; Williams v. Dorr,* 135 Pa. St. 445. Also "By putting an officer at the window to do its business, *a bank publishes to the world that he is there to do its business and not his business, that he has no power or authority to do any act outside the legitimate prosecution of the corporate enterprise.*" *Hier v. Miller,* 75 Pac. Rep., 76. From the opinions of the above cited cases, it is apparent that the payments by the teller should not have been taken as private acts. Even considered private acts, in the light of all the facts known to the defendant, the acts constituted notice that the defendants were apparently accepting money from one to whom it did not belong. This would cast upon the defendants the duty of inquiring into the matter far enough to see whether the facts were in accord with the appearances. If they were not, then they knew they could not honestly take the checks paid to them by Chisholm.

It cannot be doubted that in view of all the facts and the rulings applicable to them, the defendants had numerous and forcible suspicions that Chisholm was acting under a doubtful authority and any consistency with good faith and honesty demanded an inquiry into his authority.

It cannot be believed that the law as laid down by the Illinois court and in this case adopted by the Louisiana court is the true and accepted doctrine which is consistent with principles of fairness, law or morality. A nearer and more just rule is that which is laid down by *Rochester v. Paviour, supra,* and adopted by the weight of authority with a few isolated exceptions and which is the fairer and broader doctrine, *i. e., that one who suspects or ought to suspect, is bound to inquire, and the law presumes that he knows whatever inquiry would disclose.* Good faith alone is

not enough; good faith and honesty demand diligence and care and this combination is necessary, under the circumstances of this case, to put the defendants in the position of a *bona fide* holder with good title as against the one from whom it was stolen.

ACTION AGAINST STATE OFFICERS AN ACTION AGAINST THE STATE.

On January 14, 1909, the Arkansas Brick & Manufacturing Company, a corporation, instituted suit in the Pulaski Chancery Court against appellants, J. A. Pitcock, superintendent of the Arkansas State Penitentiary and the Governor of the State, Secretary of State, Attorney-general, Auditor of State, and State Commissioner of Mines and Agriculture, composing the Board of Commissioners of the Arkansas State Penitentiary, to restrain them from violating an alleged contract which had been entered into between them and the plaintiff for the furnishing to the latter of the labor of state convicts.

The prayer of the complaint was, that a temporary restraining order be made, restraining the defendants, and each of them, from taking any action looking to the withdrawal of the convicts, and requiring said Board of Penitentiary Commissioners to carry out the terms of the agreement; that upon final hearing a decree be entered as above prayed, and that said order of the board directing the superintendent to take away from plaintiff the convicts, and refusing to carry out its agreement be declared null and void.

It is alleged also, that the contract, as amended, which has been the subject of litigation in the case of *McConnell v. Arkansas Brick & Manufacturing Co., supra,* has been adjudged by the Pulaski Chancery Court and by the Supreme Court, on appeal, to be valid.

Upon filing the complaint, a temporary restraining injunction was issued and actual notice of such injunction conveyed to the appellant, Pitcock, but he acted in compliance with the resolutions of the Board of Penitentiary Commissioners, regardless of notice of issuance of the injunction. The question came to the Supreme Court of Arkansas on *certiorari* to review the lower court's judgment adjudging petitioner guilty of contempt of court.

Omitting all the points decided except what we deem the most important one, and the one upon which the decision in this case

turned, viz.: Whether or not a suit against state officers is a suit against the state, and therefore prohibited by the Eleventh Amendment to the Federal Constitution, unless the state gives its consent, we quote from the opinion of Mr. Justice Lamar in *Pennoyer v. McConnaughy*, 140 U. S. 1: "It is well settled that no action can be maintained in any Federal Court by citizens of one of the states against a state, without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that no state shall pass any law impairing the obligation of contracts. This immunity of suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a state to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself." The cases on the subject divide themselves into two respective classes, viz.:

1. Where a suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *In re Ayres*, 123 U. S., 443; *Louisiana v. Jumel*, 107 U. S., 711; *Antoni v. Greenhow*, 107 U. S., 769; *Hagood v. Southern*, 117 U. S., 52.

2. A suit brought to recover money or property in the hands of defendants unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case, where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not within the meaning of the Eleventh Amendment of the Constitution, an action against the state. *Osborn v. Bank of U. S.*, 22 U. S., 738; *Davis v. Gray*, 83 U. S., 203; *Allen v. B. & O. Ry. Co.*, 114 U. S., 311; *La. Board of Liquidation v. McComb*, 92 U. S., 531; *Poindexter v. Greenhow*, 114 U. S., 270.

In the case of *In re Ayres, supra*, Mr. Justice Matthews says: "A bill, the object of which is by injunction, indirectly to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must

also neessarily, be a suit against the state. In such a case, though the state be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the state. Also, where the contract is between the individual and the state; and any action founded upon it against defendants, who are officers of the state, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the state, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the state, is, in substance, a suit against the state itself, and equally within the prohibition of the Constitution."

Pomeroy, in his work on *Equitable Jurisprudence,* Vol. IV, Sec. 1341, says: "As a general proposition wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit."

In the cases of *La. V. Jumel, Antoni v. Greenhow* and *Hagood v. Southern, supra,* practically the same expression is given to the principle. *Hagood v. Southern* was a suit against the Comptroller General and certain treasurers, but the state was given leave to come in as defendant if it so desired; still it was held that the state was the real defendant. In the case of *N. H. v. La.,* 108 U. S. 76, and *N. Y. v. La.,* 108 U. S. 76, there was upon the face of the record nominally a controversy between the states which, according to the terms of the Constitution, was subject to the judicial power of the United States.

On examination of the cases as stated in the pleadings, it appeared that the state, in each case, which was plaintiff, was suing, not for its own use and interest, but for the use and on behalf of certain individual citizens thereof who had transferred their claims to the state for the purposes of suit. And it was accordingly held that the court would look behind and through the nominal parties on the record to ascertain who were the real parties to the suit.

Of the second class of cases, the strongest and the one referred to the most, is that of *Osborn v. Bank of U. S., supra,* in the

opinion of which Chief Justice Marshall stated that, "in all cases where jurisdiction depends on the party, it is the party named in the record," and that "the Eleventh Amendment is limited to those suits in which a state is a party to the record."

Pennoyer v. McConnaughy, supra, held, that where a statute declared void and of no effect all contracts made under a former valid statute and state commissioners were held for acts done under the latter statute, they cannot say that the suit is one against the state within the meaning of the Eleventh Amendment, and this holding is cited by many cases in Class 2 to support their view. This holding is untenable, as will be seen on examination of that case, for this, with the majority of cases, holds merely that "a state officer will be restrained from executing an *unconstitutional* statute of the state when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him." This same proposition is established in *Osborn v. Bank of U. S., supra.* Practically this same principle is the ground for the issuance of injunctions in the cases of *Davis v. Gray, supra; La. Board of Liquidation v. McComb, supra; Allen v. B. & O. Ry., supra,* and also for the decision in *Hans v. Louisiana,* 134 U. S. 1.

On reviewing the cases in both classes we find the two lines of decisions apparently in conflict but with the exception of the different views taken by the courts as to the parties on the record being the parties in interest, they do not disaffirm the same propositions.

Quoting from the Supreme Court of the United States, in the case of *Poindexter v. Greenhow, supra*: "A defendant sued as a wrongdoer who seeks to substitute the state in his place, or to justify by 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 assertion of his defense, but is bound to establish it; and as a state is a political body, which can act only through agents and command only by laws, in order to complete his defense, he must produce a valid law of the state which constitutes his commission, as its agent and a warrant for his act." We agree with the rule as laid down in the opinion given by Mr. Justice Lamar above quoted, and think, too, that this is the majority rule.

The statement of Chief Justice Marshall in *Osborn v. Bank of U. S., supra,* has been qualified, and now it is a settled doctrine of the United States Court that the question whether a suit is within the Eleventh Amendment is not always determined by reference to the nominal parties on the record, as the court will look behind and through same to ascertain who are the real parties to the suit.

It is established also that actions against officers of the United States are actions against the United States. *Minn. v. Hitchcock,* 185 U. S. 373; *Belknap v. Schild,* 161 U. S. 10, and in a recent case, *Murray v. Wilson Distilling Co.,* 214 U. S. 151. The only distinction found in these cases is that where a suit is against an officer to prevent him from doing an *unlawful* act to the injury of the complaining party, such as the taking of or trespass upon property belonging to the latter, the former cannot shield himself behind the fact that he is an officer of the state; and also where the officer refuses to perform a purely ministerial act, the doing of which is imposed upon him by statute. In either of such cases, a suit against such an officer is not a suit against the state.

The conclusion is: That a suit to restrain a state board from violating a contract is a suit against the state, within the prohibition of the Constitution.