New Jersey Vs. New York

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Appeal No. : 30 U.S. 284

Appellant : New Jersey

Respondent : New York

Judgement :

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New Jersey v. New York

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ORIGINAL

SYLLABUS

Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state, or in any suit in which the Supreme Court is to exercise the original jurisdiction conferred by the Constitution.

It has been settled, on great deliberation, that this Court may exercise its original jurisdiction in suits against a state under the authority conferred by the Constitution and existing acts of Congress. The rule respecting the process, the persons on whom it is to be served, and the time of service, is fixed. The course of the Court after due service of process has also been prescribed.

In a suit in this Court instituted by a state against another state of the Union, the service of the process of the court on the governor and attorney general of the state sixty days before the return day of the process, is a sufficient service.

At a very early period in our judicial history, suits were instituted in this Court against states, and the questions concerning its jurisdiction and mode of proceeding were necessarily considered.

After due service of the subpoena, the state which is complainant has a right to proceed *ex parte,* and if after the service of an order of the Court for the hearing of the case there shall not be an appearance, the Court will proceed to a final hearing.

No final decree or judgment having been given in this Court against a state, the question of proceeding to a final decree is not conclusively settled in this case until the cause shall come on to be heard in chief.

The cases of *Georgia v. Brailsford; Oswald v. New York; Chisholm v. Georgia; New York v. Connecticut; Grayson v. Virginia* cited as to the jurisdiction and modes of proceeding in suits in which a state is a party.

Mr. Wirt, for the complainant, stated that the subpoena had been regularly served upwards of two months, and there was no appearance on the part of the State of New York.

The seventeenth section of the Judiciary Act of 1789 authorizes the Court to make and establish all necessary rules for the conducting the business of the courts of the United States. This Court has such a power without the aid of that provision of the law.

The seventh rule of this Court, which was applicable to this matter, was made at August term, 1791. THE CHIEF JUSTICE, in answer to the motion of the Attorney General, informs him and the bar that this Court consider the practice of the Court of King's Bench and of Chancery in England as affording outlines for the practice of this Court, and that they will from

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time to time make such alterations therein as circumstances may render necessary. 1 Cond. viii.

In 1796, the tenth rule was adopted.

"Ordered that process of subpoena issuing out of this Court in any suit in equity shall be served on the defendant sixty days before the return day of the said process, and further that if the defendant on such service of the subpoena should not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte.* "

Ibid.

Construing these two rules together, they bring us in the case before the Court to that part of the English practice where the party may proceed to a hearing. There is no necessity for those proceedings here which are resorted to in England to compel an appearance.

Nor would the practice in England be proper in the case before the Court. The object of the bill is to quiet a title; it is a bill of peace. Here the rule considers the party, when served with process, in the same situation as if he had appeared.

The question is what is to be done when all the process to compel an appearance is exhausted; what is the next step? It is to take the bill *pro confesso;* but in England, formerly, by a standing rule in chancery, before this can be done, the party must have appeared.

Afterwards, to prevent the process of the court being eluded, the statute of 25 George II was enacted, by which it was provided that if no appearance was entered by one who had absconded, the court would make an order for an appearance, and if no appearance was entered, the bill should be taken *pro confesso.*

This statute regulated the practice in the courts of chancery of England in 1791, when the seventh rule of this Court was adopted. But this statute applied only to the case of a party absconding, and it was only to force an appearance. In the present case, as has been observed, we stand as if all the proceedings for such a purpose had been exhausted.

Different practices prevail in relation to such a case in the several states of the union. In New Jersey, the practice is to file the proofs in the cause and proceed to a hearing. This is not the course which is pursued in Virginia. As to the practice in England, cited 2 Pr.Wm. 556; Moseley 386; Har.

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Chancery Practice by Newland 156; 1 Grant's Chancery Practice 96.

Something is now to be done in this case, and it is for the Court to determine what that may be. If the Court desire it, it is fully competent to them to make any new rule relative to the future proceedings in the case.

In the Court of Chancery in England, the party could take a decree *pro confesso* and consider it as final. But this is not the wish of the complainant. It is desired that the proceedings should be carried on with the utmost respect to the other party, and the wish of the State of New Jersey is to have an examination of the case and a final decree after such an examination.

It is therefore proposed that the Court direct a rule to be entered that the bill be taken *pro confesso,* unless the party against whom it is filed appear and answer before the rules day in August next, and if it does not, that the cause be set down for a final hearing at the next term of this Court on such proofs as the

complainants may exhibit.

MR. JUSTICE BALDWIN suggested that it might be proper to argue certain questions arising in this case in open court, such as what was the proper duty of the Court in the case? What was the practice in England? And whether this Court had power to proceed in suits between states without an act of Congress having directed the mode of proceeding? He did not propose this as a matter personal to himself, but as a member of the Court.

Mr. Wirt said that the jurisdiction which was to be exercised was given by the Constitution, and the seventeenth section of the act of Congress authorized the Court to establish such rules as to the manner in which the power should be executed. There are cases in which the court have taken this jurisdiction. The case of *Chisholm v. Georgia,* 2 Dall. 219; 2 Condens. 635; *Grayson v. Virginia,* 3 Dall. 320; 1 Condens. 141.

When the subpoena was asked for at last term of this Court, 28 U. S. 3 Pet. 461, the case of *Chisholm v. Georgia* was then particularly referred to, and it was considered that although

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the amendment to the Constitution has taken away the jurisdiction of this Court in suits brought by individuals against a state, it has left it jurisdiction in suits between states, in the situation in which it stood originally. The Court, in awarding the process of subpoena, had reference to these cases.

If an elaborate argument of the questions which the case presents is desired, time is asked to prepare for it, and sufficient time to give notice to the Attorney General of the State of New Jersey to attend and assist in the argument.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This is a bill filed by the State of New Jersey against the State of New York for the purpose of ascertaining and settling the boundary between the two states.

The Constitution of the United States declares that "The judicial power shall extend to controversies between two or more states." It also declares that

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction."

Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state or in any suit in which the Supreme Court is to exercise the original jurisdiction conferred by the Constitution.

The act to establish the judicial courts of the United States, section thirteen, enacts

"That 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 or aliens, in which latter case it shall have original but not exclusive jurisdiction."

It also enacts, section fourteen,

"That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias,* habeas corpus, and all other writs not specially provided by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law."

By the seventeenth section it is enacted

"That all the said courts of the United States shall have power . . . to make and establish all necessary rules for the ordinary conducting business in the

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said courts, provided such rules are not repugnant to the laws of the United States."

"An act to regulate processes in the courts of the United States" was passed at the same session with the Judicial Act, and was depending before Congress at the

same time. It enacts "All writs and processes issuing from a supreme or a circuit court shall bear teste," &c.; This act was rendered perpetual in 1792. The first section of the act of 1792 repeats the provision respecting writs and processes, issuing from the supreme or a circuit court. The second continues the form of writs, &c.;, and the forms and modes of proceeding in suits at common law prescribed in the original acts, and in those of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States, subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same.

At a very early period in our judicial history, suits were instituted in this Court against states, and the questions concerning its jurisdiction and mode of proceeding were necessarily considered.

So early as August, 1792, an injunction was awarded at the prayer of the State of Georgia to stay a sum of money recovered by Brailsford, a British subject, which was claimed by Georgia under her acts of confiscation. This was an exercise of the original jurisdiction of the Court, and no doubt of its propriety was ever expressed.

In February, 1793, the case of *Oswald v. New York* came on. This was a suit at common law. The state not appearing on the return of the process, proclamation was made, and the following order entered by the Court. "Unless the state appear by the first day of the next term or show cause to the contrary, judgment will be entered by default against the said state."

At the same term, the case of *Chisholm's Executors v. Georgia* came on and was argued for the plaintiffs by the then Attorney General, Mr. Randolph. The judges delivered their opinions *seriatim,* and those opinions bear ample testimony to the profound consideration they had bestowed on every question arising in the case. Mr. Chief Justice Jay, Mr. Justice Cushing Mr. Justice Wilson, and Mr. Justice Blair decided in favor of the jurisdiction of the Court, and that the process served on the governor and attorney general of the state was sufficient. Mr. Justice Iredell thought an act of Congress necessary to enable the Court to exercise its jurisdiction.

After directing the declaration to be filed and copies of it to be served on the Governor and Attorney General of the State of Georgia, the Court ordered

"that unless the said state shall either in due form appear or show cause to the contrary in this Court by the 1st day of the next term, judgment by default shall be entered against the said state."

In February term, 1794, judgment was rendered for the plaintiff, and a writ of inquiry was awarded, but the Eleventh Amendment to the Constitution prevented its execution.

Grayson v. Virginia, 3 Dall. 320, 1 Pet. Cond. 141, was a bill in equity. The subpoena having been returned executed, the plaintiff moved for a *distringas* to compel the appearance of the state. The Court postponed its decision on the motion in consequence of a doubt whether the remedy to compel the appearance of the state should be furnished by the Court itself or by the legislature. At a subsequent term, the Court, "after a particular examination of its power," determined that though

"the general rule prescribed the adoption of that practice which is founded on the custom and usage of courts of admiralty and equity, . . . still it was thought that we are also authorized to make such deviations as are necessary to adapt the process and rules of the Court to the peculiar circumstances of this country, subject to the interposition, alteration, and control of the legislature. We have

therefore agreed to make the following general orders."

"1. Ordered, that when process at common law or in equity shall issue against a state, the same shall be served upon the governor or chief executive magistrate, and the attorney general of such state. "

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"2. Ordered that process of subpoena issuing out of this Court in any suit in equity shall be served on the defendant sixty days before the return day of the said process, and further that if the defendant, on such service of the subpoena, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte.* "

3 U. S. 3 Dall. 320; 1 Pet. Cond. 141.

In *Huger v. South Carolina,* the service of the subpoena having been proved, the Court determined that the complainant was at liberty to proceed *ex parte.* He accordingly moved for and obtained commissions to take the examination of witnesses in several of the states.

Fowler v. Lindsey and *Fowler v. Miller,* 3 U. S. 3 Dall. 411, 1 Cond. 189, were ejectments depending in the circuit court for the District of Connecticut for lands over which both New York and Connecticut claimed jurisdiction. A rule to show cause why these suits should not be removed into the Supreme Court by certiorari was discharged, because a state was neither nominally nor substantially a party. No doubt was entertained of the propriety of exercising original jurisdiction had a state been a party on the record.

In consequence of the rejection of this motion for a certiorari, the State of New York, in August term, 1799, filed a bill against the State of Connecticut, 4 U. S. 4 Dall. 1, 1 Pet. Cond. 203, which contained an historical account of the title of New York to the soil and jurisdiction of the tract of land in dispute; set forth an agreement of 28 November, 1783, between the two states on the subject, and prayed a discovery, relief, and injunction to stay the proceedings in the ejectments

depending in the Circuit Court of Connecticut. The injunction was, on argument, refused because the State of New York was not a party to the ejectments nor interested in their decision.

It has then been settled by our predecessors on great deliberation that this Court may exercise its original jurisdiction in suits against a state under the authority conferred by the Constitution and existing acts of Congress. The rule respecting the process, the persons on whom it is to be served, and the time of service are fixed. The course of the Court on the failure

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of the state to appear, after the due service of process has been also prescribed.

In this case, the subpoena has been served as is required by the rule. The complainant according to the practice of the Court, and according to the general order made in the case of *Grayson v. Virginia,* has a right to proceed *ex parte,* and the Court will make an order to that effect, that the cause may be prepared for a final hearing. If upon being served with a copy of such order, the defendant shall still fail to appear or to show cause to the contrary, this Court will, as soon thereafter as the cause shall be prepared by the complainant, proceed to a final hearing and decision thereof. But inasmuch as no final decree has been pronounced or judgment rendered in any suit heretofore instituted in this Court against a state, the question of proceeding to a final decree will be considered as not conclusively settled, until the cause shall come on to be heard in chief.

MR. JUSTICE BALDWIN did not concur in the opinion of the Court directing the order made in this cause.

The subpoena in this cause having been returned executed sixty days before the return day thereof, and the defendant having failed to appear, it is, on motion of the complainant, decreed and ordered that the complainant be at liberty to proceed *ex parte,* and it is further decreed and ordered that unless the defendant, being served with a copy of this decree sixty days before the ensuing August term of this Court, shall appear on the second day of the next January term thereof and

answer the bill of the complainant, this Court will proceed to hear the cause on the part of the complainant and to decree on the matter of the said bill.