# My Life Story in Brief

by

# Montreville J. Brown

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# Foreword

by

Douglas A. Hedin
Editor, MLHP

The family of Montreville Jay Brown can trace its roots in the law to the 1870s. His grandfather, John Harrison Brown, was a district court judge in the Twelfth Judicial District from 1875 to death on January 21, 1890.[1] His father, Calvin Luther Brown, served as a district court judge in the Sixteenth Judicial District from 1887 to 1899, when he was appointed to the Minnesota Supreme Court. He became Chief Justice in 1913 and served until death on September 23, 1923. Montreville J. Brown was the third generation of this prominent "family in the law."

He was born and raised in Morris, Minnesota, attended the University of Minnesota where he was a star athlete, graduated the Law School of the University in 1909, and began practicing law in Bemidji with former District Court Judge Marshall Spooner. He became involved in community affairs, and served on the school board for years. In 1918 he was appointed Assistant Attorney General by General Clifford L. Hilton and moved to Minneapolis, later to St. Paul. He served on Hilton's staff until 1923 when he resigned to join Moore, Oppenheimer, Peterson & Dickson, a St. Paul law firm. He remained with "the Oppenheimer firm," as it is known to the bar, until death on June 4, 1971, at age eighty six.

[1] See "Judge John Harrison Brown (1824-1890)" (MLHP, 2013-2017).

1967 was the fiftieth anniversary of the graduation of the Bemidji High School Class of 1917. To celebrate, living members of the class were asked for accounts of their family history and activities since graduation. Brown, who as school board president had handed diplomas to the graduates, was also asked for a personal statement. In response he submitted his "life story in brief." It is posted here under that title.

Given its origins, it is not surprising that it lacks the colorful anecdotes, stories and acknowledgments of individuals who influenced him that usually punctuate a memoir. In fact he wrote more about his father in a self sketch published in 1935 than in this one. But he chose this account of his life, albeit brief, to preserve in the papers he donated to the Minnesota Historical Society, part of the family records, which include his father's.

Aware of his audience, he is modest about his accomplishments. He writes that he handled two cases in the United States Supreme Court. They were rare "original proceedings" in that Court, meaning they started and ended there, which may be why he listed them.[2] But he also appeared in *Bothwell v. Buckbee-Mears Co*., 166 Minn. 285, 207 N.W. 724, *later proceeding*, 169 Minn. 516, 211 N.W. 478 (Minn. 1926), *affirmed* 275 U. S. 274 (1927). In the Supreme Court's opinion in that case, written by Justice Brandeis, William Oppenheimer is listed as lead counsel, Brown as "second chair," which may be why he omitted it.

He was a member of the State Securities Commission during most of the time he served as Assistant Attorney General. He became an expert on the state securities laws, popularly known as the "Blue-Sky Law," which he analyzed in two articles in the *Minnesota Law Review*. The second article, published in May 1923, was cited by the Minnesota Supreme Court in *State v. Hofacre*, 206 Minn. 167, 175, 288 N.W. 13, 17 (1939), which arose when the district court certified to the Court the question of whether a certain transaction was a "sale of a security as defined by our blue sky law." Holding that it was, Justice Julius Olson cited Brown's article in unusually complementary terms:

> In addition to the cases there cited, the following are helpful:

[2] Under Article III, §2, of the U.S. Constitution, the Supreme Court has "original jurisdiction" over a select category of cases, which include disputes between states. That means a state may bring its dispute with another state initially and directly in the Supreme Court. It need not first file in a federal district court, then appeal to a circuit court of appeals, and finally seek review by the Supreme Court.

> [case cites omitted]. . . Particularly helpful is "A Review of the Cases on 'Blue Sky' Legislation," written by Montreville J. Brown while assistant attorney general of this state, found in 7 Minn. L. Rev. *et seq*. The cases on "Securities Covered by Law" are reviewed at p. 438, *et seq*.

The decisions of the United States Supreme Court and the South Dakota Supreme Court in cases in which Brown represented the prevailing parties are posted in the Appendix. His personal profiles in two state histories to which he subscribed are posted as well. The first appeared in Henry A. Castle's *Minnesota: Its History and Biography* published in 1915, the second in Theodore Christianson's *Minnesota: The Land of Sky-tinted Waters* published in 1935. At the time of the first, he had practiced in Bemidji for six years, and was thirty-one years old. By the time of the second he was a partner in one of the state's elite firms, a successful appellate lawyer and member of several fraternal organizations and prestigious social clubs. The profiles are noteworthy for how much they reveal of his admiration for his father and how little of himself. On April 28, 1972, the Ramsey County Bar Association held its annual memorial services for deceased members of the bar. Its tribute to Brown concludes this article.

The Appendix lacks a bibliography of the writings of Brown and a list of the 84 appellate cases in which he represented a party. Someday, perhaps, this information will be added to the Appendix.

## Acknowledgments

Both photographs are added by the MLHP. The one on page 4 is from the Digital Collection Services of the Minnesota Historical Society, and that on page 9 is from *the Proceedings of the Grand Lodge of Ancient Free and Accepted Masons of Minnesota at the Eighty-First Annual Communication* held at Saint Paul, January 17-18, 1934.

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For other memoirs and autobiographies of Minnesota lawyers and judges see the "Memoirs" category in the archives of the MLHP.

1933

# My Life Story in Brief

by

## Montreville Brown

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Submitted at the request of Mr. Herbert Warfield of Bemidji, Minnesota, a member of the Bemidji High School graduating class of 1911, I having been at the time President of the Bemidji School Boards with the responibility of handing the graduates their diplomas. Mr. Warield contacted all living members of the class requesting aid in the celebration of the 50th Annivrsary of the graduation thereof, asking for statements as to family history, and activities since graduation. I was asked, as indicated, to do the same thing as to myself, in view of the fact that I was head of the Bemidji School Board at the time of such graduation

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Life story in brief of Montreville J. Brown, member of the Bemidji School Board who presided at the graduating exercises of the Class of 1917, fifty long years ago.

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I was born at Morris, Minnesota, June 13, 1884, the son of Calvin L. and Annette (Marlow) Brown. My grandfather, John H. Brown, moved from Goshen, New Hampshire, taking his family with him of course, to Shakopee, Minnesota, in 1855 where he practiced law and published a newspaper. He remained there until 1871 when he took his family to Willmar, Minnesota. He practiced law at Willmar until he was appointed District Judge of the Twelfth Judicial District in 1875 He held that position until he passed away in 1890.

My father was reared under the parental roof, attending the schools provided for the youth at that time. His father, John H., was his instructor in the law. In due course and in 1876, having shown himself qualified to practice law in the opinion of the lawyers appointed by his father to examine him, he was admitted to the Bar by his father on motion of those lawyers. He opened an office in Willmar and remained there some eighteen months and then located at Morris, Minnesota. He opened an office there for the practice of law and practiced at Morris and in the surrounding counties until he was appointed District Judge of the Sixteenth Judicial District. The appointment was made on March 10, 1887 and he was re-elected without opposition until November 20, 1899 when he was appointed a Justice of the Supreme Court of the State, having been elected to that position in 1898.[3] He continued in that office until he became the Chief Justice thereof following his election as Chief Justice on January 7, 1913. He continued as Chief Justice until his demise in 1923.[4]

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[3] Why the newly-elected justice was "appointed" to the Supreme Court requires explanation. In November 1898 Judge Calvin Brown was elected to a seat on the Court for a term beginning January 1, 1900. Daniel Buck, an incumbent judges who was defeated in 1898, decided not to serve to January 1, 1900, and resigned on November 20, 1899. Governor Lind thereupon appointed Brown to complete the remaining six weeks of this term. In January 1900 he began the six year term to which he was elected.

For an attempt to explain why the terms of some of the justices at this time did not start for a year, see Douglas A. Hedin, "The Puzzle of the Elections of 1892, 1898, 1904 and 1910" (MLHP, 2010).

[4] For his bar memorial, see "Calvin L. Brown" in *Testimony: Remembering Minnesota's Supreme Court Justices* 161-172 (Minn. Sup. Ct. Hist. Soc., 2008).

I attended the grades and high school at Morris, Minnesota, graduating from high school in 1903. I entered the University of Minnesota the fall of 1903, and graduated therefrom in 1907 at which time I was awarded the Bachelor of Arts degree. Upon such graduation I entered the University of Minnesota Law School and graduated therefrom in 1909, and was awarded the Bachelor of Laws degree.[5] I was admitted to the practice of law the next day, June 11, 1905, and immediately thereafter and on June 12 I went to and located at Bemidji where I engaged in the practice of law in partnership with Honorable Marshall A. Spooner until he moved a few years later to Minneapolis and entered into the practice of law there.

Upon his departure and from then on until the spring of 1918 I practiced alone at Bemidji. At that time I was appointed an Assistant Attorney General of the State of Minnesota by the Honorable Clifford L. Hilton, the Attorney General of the State. I was an Assistant Attorney General for some five years, and while holding that office I was also, on designation by, the Attorney General, a member of the Blue Sky Commission of the State, a body with regulatory authority over the sale of stocks, bonds and securities within the State. Upon appointment as Assistant Attorney General I with my family left Bemidji and moved to Minneapolis, where we resided until 1925 when we moved to Saint Paul and took up our residence there, where we still reside. Our children are married and have homes of their own.

While at Bemidji I was elected a member of the Bemidji School Board, and served in that capacity for a number of years I happened to be the President of the Board in 1917 and it was my privilege to distribute to the members of the graduating class of 1917 their diplomas. This fact no doubt is what prompted you to write to me asking that I go along with the members of this Class of fifty years ago in supplying you with a statement of my life's story briefly touching on the activities engaged in with particular reference to Bemidji activities and those subsequent to the departure from Bemidji.

Although I fear that very few of the members of the graduating class of 1917 will have any remembrance of me or my function in connection with the graduating exercises of 1917, I am glad to respond to the request for I

[5] The "Montreville J. Brown Memorial Scholarship" has been established at the University of Minnesota Law School.

am sure I will recollect the names of many of the members of the class and in addition thereto their parents.

I may as well start with my interest in athletics

My interest in this regard has always been in baseball and tennis. While at the University I made the Varsity baseball team in 1904, 1905, 1906 and 1907, and was awarded an "M" for each of those years. I was Captain of the team in 1906. We won no Big Ten Championships, but I am sure gave a good account of ourselves in each of the games played against Big Ten opponents, and all other opponents for that matter. I was one of the Varsity pitchers. Perhaps one of my best performances was against North Dakota State of Fargo, North Dakota. On that occasion we won by a score of 10 to nothing. I pitched and held the Dakota boys to one hit. I might add that I was a fast ball pitcher and on the occasion in question had a pretty strong wind in my favor.

While at Bemidji I was one of the promoters and organizers of the Bemidji Tennis Club. I happened to be good enough at the game to win the singles championship of Bemidji in 1916 and 1917.

I was elected City Attorney of the City of Bemidji and served in that capacity during 1917 and part of 1918. In 1918 I resigned as City Attorney upon being appointed an Assistant Attorney General of the State. It was in the late summer or early fall of 1923 that I resigned as an Assistant Attorney General of Minnesota and was invited to join Mr. William L. Oppenheimer, and his associates in the practice of law in Saint Paul. In due course I accepted this invitation and in a short time was made a partner in the firm. I have been a partner ever since. The firm name now is Oppenheimer, Hodgson, Brown, Wolff and Leach with offices at the First National Bank Building, Saint Paul, Minnesota.

As to my practice of the law, the same has been very general including my practice as an Assistant Attorney General. I think it can be said that during the time I have been practicing I have had to do with practically all phases of the law. I have enjoyed appellate court practice more than anything else in the law. In that field I have handled during my practice some 84 cases on appeal from the lower courts, including two in the Supreme Court of the United States and one in the Supreme Court of the State of South Dakota

where the courts took original jurisdiction of the cases. Of these 84, 69 were won, 25 being reversals of lower courts and of which 15 were lost.

These cases before the Supreme Court of the United States and the Supreme Court of South Dakota, all of which were won, are entitled:

State of North Dakota v. State of Minnesota,
263 U.S.365 (original in Sup. Ct. of the U.S.);

U. S. v. Minnesota,
270 U.S. 181 (original Sup. Ct. of U. S.);

White Eagle Oil and Refining Co. v. Gunderson, et al.
(original in the Sup. Ct. of the State of So. Dak.)
48 S.D. 608, 205 N.W. 614, 43 A.L.R. 397

From 1921 to 1931 I was an instructor at the Minnesota College of Law, a night law, school located at Minneapolis. I instructed on the subjects of chattel mortgages and mechanic's liens.

I have contributed some articles to the Minnesota Law Review, one entitled “The Minnesota Blue Sky Law”, published in the Review of February, 1919, Volume 3, page 149, and another entitled “A Review of the Cases on Blue Legislation,” published in the Review of May, 1923, Volume 7, page 432.

During the first World War I served as a member of the Draft Board of Beltrami County, Minnesota; and during the second World War I served as appeal agent for Draft Board No. 3, Ramsey County, Minnesota.

I am a member of the Masonic Lodge of Bemidji, having, demitted to that Lodge from the Lodge at Morris, Minnesota, where I was made a Mason. I served as Master of the Bemidji Lodge in 1916 and 1917. In 1933 I was elected and served that year as the Grand Master of Masons, A. F. and A. M., of Minnesota. I belong to all of the Masonic bodies having gone both Sottish and York Rites; and I am a member of the Shrine, Osman Temple, Saint Paul. Following my term as Grand Master I served some fourteen years as a member of the Board of Trustees of the Masonic Home located at or near Bloomington, Minnesota, not far from Minneapolis.

Some time after moving to Saint Paul, I was elected to and served on the Board of Directors and for several years as Vice President of the Minnesota Tuberculosis & Health Association.

*MONTREVILLE J. BROWN*
*M. W. Grand Master of Masons of Minnesota*
*1933*

I am a member of the Athletic Club of Saint Paul and the University Club of Saint Paul; and a member of the of the American Revolution, Minnesota Society.

I belong to two college fraternities, Alpha Delta Phi, academic and Phi Delta Phi, law.

I am a member of the American, Minnesota and Ramsey County Bar Association.

I am a Congregationalist and belong to the First Congregational Church, located in southeast Minneapolis. For many years I served as a member of the Board of Trustees of the Church and for quite a few years served as Chairman of the Board.

On November 10, 1910, I married Minnie Stinchfield of Rochester Minnesota, the daughter of Dr. Augustus W. and Martha (Bear) Stinchfield, the Doctor at the time being associated with the Drs. Mayo in the practice of medicine at Rochester. We have been blessed with four daughters, two, Katherine and Louise were born in Bemidji. The other two, Margaret and Joanne, were born in Minneapolis. They are all married and in the aggregate have presented Mrs. Brown and me with fourteen grandchildren. Two of the grandchildren are married and each has a child so we have two great grandchildren I have seen many other grandchildren

and great-grandchildren in my day but none seem to quite measure up to our own. I might add that Katherine attended Wellesley College located near Boston; Louise attended the University of Minnesota, taking the combined academic and law course. Upon her graduation from Law School she took the State Bar Examination, passed and was admitted to the practice of law in Minnesota. Margaret attended Vassar, and Joanne attended Carleton College for two years and then attended the University of Colorado at Boulder, Colorado, for two years.

Dated: November 1, 1967.

/s/ Montreville J. Brown

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# Appendix

Item Pages



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# APPENDIX

The following was published in the third volume of Henry A. Castle's *Minnesota: Its History and Biograpahy* (1915):

MONTREVILLE J. BROWN. A lawyer with a growing practice and influence at Bemidji, Montreville J. Brown is a son of Chief Justice Calvin L. Brown of the Minnesota Supreme Court, and has already shown much of the ability which has distinguished that eminent Minnesota jurist.

Montreville J. Brown was born at Morris, Minnesota, June 13, 1884, a son of Calvin L. and Annette Brown. His father was born at Goshen, New Hampshire, April 26, 1854, a son of John H. Brown. Judge Brown was engaged in the active practice of law at Morris, Minnesota, until 1887, when he went upon the district bench, serving there until 1899, and since November 29th of that year has been a justice of the Supreme Court of Minnesota, being now chief justice. He was married September 1, l879, to Annette Marlow of Willmar, Minnesota.

Montreville J. Brown received his early education at Morris, and is a graduate of the University of Minnesota, both in the academic and law departments. He finished his course in the former in 1907 and was graduated LL. B. in 1909. Since then he has been located in the general practice of his profession at Bemidji.

Mr. Brown has served three years as member the local school board and is a director of the Commercial Club. He is a member of the Minnesota Chapter of the Sons of the American Revolution. He belongs to the Alphi Delta Phi and the Delta Phi college fraternities, and is also affiliated with the Masonic order and the Benevolent and Protective Order of Elks. On November 19, 1910, Mr. Brown married Miss Minnie S. Stinchfield, Rochester, Minnesota. They are the parents of two children: Alice Katherine and Louise Stinchfield.

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STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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KNOW ALL MEN BY THESE PRESENTS, That I, Clifford L. Hilton, Attorney General of the State of Minnesota, by virtue of the authority vested in me by statute, and particularly by an Act of the Legislature entitled, "An Act relating to the duties and powers of the Attorney General and his assistants," approved April 17, 1905, as amended March 13, 1917, do hereby constitute and appoint Montreville J. Brown, of Bemidji, Minnesota, to be an Assistant Attorney General of the State of Minnesota for the period commencing January 1, 1923, and ending the first Monday in January, 1925, and until his successor is appointed and qualified, unless sooner revoked.

IN TESTIMONY WHEREOF, I have hereunto set my hand at St. Paul, Minnesota, this 30th day of December, 1922.

Clifford L. Hilton
Attorney General

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STATE OF MINNESOTA )
) SS
COUNTY OF RAMSEY )

I, Montreville J. Brown, do solemnly swear that I will support the Constitution of the United States, the Constitution of the State of Minnesota, and faithfully discharge the duties of the office of Assistant Attorney General of the State of Minnesota, to the best of my judgment and ability, so help me God.

Montreville J. Brown

Subscribed and sworn to before me
this 30th day of December, 1922.

Chief Justice, Supreme Court,
State of Minnesota.

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The following was published in the third volume of Theodore Christianson's *Minnesota: The Land of Sky-Tinted Waters* (1935):

MONTREVILLE J. BROWN, of the St. Paul law firm of Oppenheimer, Dickson, Hodgson, Brown & Donnelly, represents the third generation of a family that has furnished a continuous record of distinguished public service in Minnesota since the territorial period. As a family they belong to that group of pioneers historically distinguished as the "Yankees" who were the dominant element in Minnesota's early citizenship and affairs.

New Hampshire was a state which supplied a great many of Minnesota's prominent early citizens. From that state John H. Brown came to Minnesota Territory in June, 1855, not long after the consummation of the Indian treaties had 'made possible the settlement of the district known as the Minnesota River Valley. He established his home at Shakopee. He had studied law in the East, and in 1856 was admitted to practice before the territorial courts of Minnesota. With the rapid development of western counties, through the building of railroads, he moved in. 1871 to Willmar in Kandiyohi County. John H. Brown in 1875 was appointed by Gov. C. K. Davis as judge of the Twelfth Judicial District and by subsequent elections he held that office continuously until his death in January, 1890. He had also performed the duties, of county attorney and judge of the probate court. Judge Brown was a staunch Republican and known throughout the length and breadth of his district as a man of unimpeachable integrity. He married Orrisa Maxfield.

Before coming to Minnesota their home was on a farm near Newport, New Hampshire. Here was born a son to them named Calvin Luther Brown, on April 26, 1854. Educated in the common schools at Shakopee and then in the high school at Willmar. Calvin L. Brown began the study of law at the age of eighteen, and when nineteen years old tried a case before a justice of the peace. In 1876 he was admitted to the bar and soon afterwards located at Morris in Stevens County. In 1882 he was elected county attorney, and by reelection continued in office until 1887, when Governor McGill appointed him judge of the Sixteenth Judicial District. He was on the district bench until 1899, when the Democratic Governor Lind honored him by appointment as an associate justice of the Minnesota Supreme Court. His personal character, his learning, his unusual faculty for concentration did much to reinforce the prestige and influence of the Supreme Court throughout the twenty-four years of his service. In 1913 he was chosen chief justice, and held that office until his death on. September 24, 1923. He wrote many leading opinions in scares of important cases, and the United States Supreme Court sustained his decision in upholding the power of the state to increase the rate of railroad taxation, and the state's authority to compel railroads to construct bridges and viaducts at public highway crossings established after the location, of railways. He also wrote the opinion upholding the validity of the state inheritance tax, which also was subsequently affirmed by the United States Supreme Court. Justice Brown was a Republican, a member of the Congregational

Church, and in 1895-96 was grand master of the Grand Lodge of Masons of Minnesota. He married September 1, 1879, Annette Marlow. She was born in Houston County, Minnesota, daughter of Alexander and Elizabeth (Gaston) Marlow.

Montreville J. Brown, only son of the late Justice Calvin L. Brown, was born at Morris, Stevens County, Minnesota, June 13, 1884. After his early schooling at Morris he entered the University of Minnesota, where he was graduated with the A. B. degree in 1907 and took his law degree in 1909. He was an Alpha Delta Phi and Phi Delta Phi at the university. Locating at Bemidji, he began practice June 10, 1909, as a partner of Judge Marshall A. Spooner. He was city attorney of Bemidji in 1917-18, resigning his office and giving up his practice at Bemidji to become assistant attorney-general of Minnesota under appointment from Clifford L. Hilton. He was assistant attorney-general from 1918 to 1923, and during 1918-21 was a member of the State Securities Commission Mr. Brown has been engaged in general practice as a member of his present law firm since 1923. He is a member of the Minnesota State and American Bar associations, is grand master of the Grand Lodge of Masons of Minnesota, and a thirty-second degree Scottish Rite Mason. He belongs to the St. Paul Athletic Club, Somerset Club and the Town and Country Club, both of St. Paul.

He married November 19, 1910, Miss Minnie Stinchfield of Rochester, Minnesota, daughter of Dr. Augustus Stinchfield, who
died March 15, 1917, after many years of active association with the Mayo Clinic. Mr. and Mrs. Brown have four children: Alice Katherine, member of the class of 1933 in Wellesley College; Louise Stinchfield, attending the University of Minnesota; Margaret Annette; and Joan.

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# State of North Dakota

v.

# State of Minnesota

263 U.S. 365 (1923)

No. 10, Original
Argued January 3, 4, 1921
Restored to docket and ordered that supplemental
proofs be taken, April 18, 1921
Argued March 12, 13, 1923
Decided December 10, 1923
263 U.S. 365
IN EQUITY

*Syllabus*

1. Where a state, by changing the method of draining surface water from lands within her border, increases the flow of an interstate stream greatly beyond its natural capacity, so that the water is thrown upon farms in another state, the latter state has such an interest, as *quasi*-sovereign, in the comfort, health, and prosperity of her farm owners that resort may be had by her to the original jurisdiction of this Court, for relief by injunction against the state causing the injury.

2. In a suit of that character, the burden upon the plaintiff sustaining her allegations is much greater than that imposed upon the plaintiff in an ordinary suit between private parties.

3. In view of the Eleventh Amendment, a claim for money damages, made by a state on behalf of her individual citizen, against another state, is beyond the original jurisdiction of this Court.

4. The evidence in this case shows that floods in the Bois de Sioux River, resulting in inundations of riparian farm lands in North Dakota, were caused by excessive rainfalls during a series of years, rather than by drainage operations conducted by Minnesota, and fails to sustain the peculiar burden resting on North Dakota to prove her allegations to the contrary.

Bill dismissed without prejudice.

This was a suit brought originally in this Court by the State of North Dakota to enjoin the State of Minnesota from continuing to use a system of drainage ditches constructed by the latter state, and for money compensation for damage to North Dakota farmers caused by overflows of the Bois de Sioux River, attributed by the plaintiff to the construction and operation of the ditches. The plaintiff also sought damages for destruction of public roads, bridges, etc., caused by the overflows. *See also* 256 U. S. 220.

Messrs. M. H. Boutelle and John Lind, both of Minneapolis, Minn., and I. C. Pinkney, of Peoria, Ill., for the State of North Dakota.

Messrs. M. J. Brown, of St. Paul, Minn., Charles R. Pierce, of Washington, D. C., Charles E. Houston, of Wheaton, Minn., Clifford L. Hilton and Egbert S. Oakley, both of St. Paul, Minn., and John E. Palmer, of Minneapolis, Minn., for the State of Minnesota.

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

This is a bill in equity exhibited by the State of North Dakota against the State of Minnesota. The bill avers that the latter state has, by constructing cut-off ditches and straightening the Mustinka River, increased the speed and volume of its flow into Lake Traverse, and thereby raised the level of the lake, causing its outlet, the Bois de Sioux River, to overflow and greatly to injure a valuable farming area in North Dakota lying on the west bank of that stream. The damage to the complainant in destruction of roads and bridges is alleged to be $5,000, and the damage to owners of the farms in destruction of crops and injury to the arable quality of their land to be more than $1,000,000. A further allegation is that the ditch is likely at every period of high water to cause overflows as injurious as those complained of. The prayer is for an order enjoining the continued use of the ditches and a decree against the State of Minnesota for the damages sustained by the complainant state and its farmers. Minnesota, in her answer, admits the construction of the ditches for drainage and sanitation, but denies that they caused the overflow complained of, and avers that the flooding was due to unusual rainfall in the successive years of 1914, 1915, and 1916.

One owning land on a watercourse may by ditches and drains turn into it all the surface water that would naturally drain there, but he may not thus discharge into the watercourse more water than it has capacity to carry, and thus burden his lower neighbor with more than is reasonable. In such cases, the injured party is entitled to an injunction. *Jackman v. Arlington Mills,* 137 Mass. 277; *McKee v. Delaware Canal Co.,* 125 N.Y. 353; *Noonan v. Albany,* 79 N.Y. 470; *McCormick v. Horan,* 81 N.Y. 86; *Merritt v. Parker,* 1 N.J.Law, 460; *Tillotson v. Smith,* 32 N.H. 90; *Mayor v. Appold,* 42 Md. 442; *Baldwin v. Ohio Tp.,* 70 Kan. 102; 1 Farnham on Waters, § 488, p. 1633; Gould on Waters, § 274.

If one state, by a drainage system, turns into an interstate river water in excess of its capacity, and floods its banks in another state, and thus permanently and seriously injures valuable farmlands there, may the latter state have an injunction in this Court?

The jurisdiction and procedure of this Court in controversies between states of the Union differ from those which it pursues in suits between private parties. This grows out of the history of the creation of the power, in that it was conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force. The jurisdiction is therefore limited generally to disputes which, between states entirely independent, might be properly the subject of diplomatic adjustment. They must be suits "by a state for an injury to it in its capacity of *quasi*-sovereign. In that capacity, the state has an interest independent of and behind the titles of its citizens, in all the earth and air of its domain."

> "When the states, by their union, made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi* sovereign interests, and the alternative to force is a suit in this Court."

*Georgia v. Tennessee Copper Co.,* 206 U. S. 230, 206 U. S. 237.

In accord with this principle, this Court has entertained a suit by one state to enjoin the deposit by another state, in an interstate stream, of drainage containing noxious typhoid germs because dangerous to the health of the inhabitants of the former. *Missouri v. Illinois,* 180 U. S. 208, 180 U. S. 241; 200 U. S. 200 U.S. 496, 200 U. S. 518. It has assumed jurisdiction to hear and determine a bill to restrain one state from a diversion of water from an interstate stream by which the lands of a state lower down on the stream may be deprived of the use of its water for irrigation in alleged violation of the right of the lower state. *Kansas v. Colorado,* 185 U. S. 125, 185 U. S. 141-143; 206 U. S. 206 U.S. 46, 206 U. S. 95. In *Wyoming v. Colorado,* 259 U. S. 419, 259 U. S. 464, it granted relief to one state to prevent another from diverting water from an interstate stream to the injury of rights acquired through prior appropriations of the water by landowners of the former state under the doctrine of appropriation recognized and administered in both states. In *Georgia v. Tennessee Copper Co., supra,* it enjoined in behalf of a state the generation and spread of noxious fumes by a factory in another state because it was a public nuisance in destroying crops and forests within the borders of the former state. In *Pennsylvania v. West Virginia,* 262 U. S. 553, 262 U. S. 592, at the suit of one state, this Court has enjoined another state from enforcing its statute by which the flow of natural gas in interstate commerce from the latter state was forbidden, to the threatened loss and suffering of the people of the suing state who had become dependent for comfort and health upon its use. It needs no argument, in the light of these authorities, to reach the conclusion that, where one state, by a change in its method of draining water from lands within its border, increases the flow into an interstate stream, so that its natural capacity is greatly exceeded and the water is thrown upon the farms of another state, the latter state has such an interest as *quasi*-sovereign in the comfort, health, and prosperity of her farm owners that resort may be had to this Court for relief. It is the creation of a public nuisance of simple type for which a state may properly ask an injunction.

In such action by one state against another, the burden on the complainant state of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties.

> "Before this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the . . . invasion of rights must be of serious magnitude, and it must be established by clear and convincing evidence."

*New York v. New Jersey,* 256 U. S. 296; *Missouri v. Illinois,* 200 U. S. 496, 200 U. S. 521.

North Dakota, in addition to an injunction, seeks a decree against Minnesota for damages of $5,000 for itself and of $1,000,000 for its inhabitants whose farms were injured and whose crops were lost. It is difficult to see how we can grant a decree in favor of North Dakota for the benefit of individuals against the State of Minnesota in view of the Eleventh Amendment to the Constitution, which forbids the extension of the judicial power of the United States to any suit in law or equity prosecuted against any one of the United States by citizens of another state or by citizens and subjects of a foreign state. The evidence discloses that nearly all the Dakota farm owners whose crops, lands, and property were injured in these floods contributed to a fund which has been used to aid the preparation and prosecution of this cause. It further appears that each contributor expects to share in the benefit of the decree for damages here sought in proportion to the amount of his loss. Indeed, it is inconceivable that North Dakota is prosecuting this damage feature of its suit without intending to pay over what it thus recovers to those entitled. The question of the power of this Court in such a case was very fully considered in *New Hampshire v. Louisiana,* 108 U. S. 76. There, citizens of one state held bonds of another state, payment of which was in default. The holders assigned the bonds to their state, which, as assignee, brought an action in this Court to recover a decree for the amount due against the obligee in the bonds. The law of the suing state authorizing the suit provided that, on recovery, the money should be turned over to the assignors, less the expenses of the litigation. Recovery was held to be forbidden by the Eleventh Amendment, and the bill was dismissed. It was argued that, as a sovereign, the state might press the claims of its citizens against another state, but it was answered by this Court that such right of sovereignty was parted with by virtue of the original Constitution, in which, as a substitute therefor, citizens of one state were permitted to sue another state in their own names, and that, when the Eleventh Amendment took away this individual right, it did not restore the privilege of state sovereignty to press such claims. The right of a state as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another state by prayer for injunction is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state. For this reason, the prayer for a money decree for the damage done by the floods of 1915 and 1916 to the farms of individuals in the Bois de Sioux valley is denied for lack of jurisdiction.

Having thus pointed out the rules of law which must control our conclusion, we come to consider the much disputed issues of fact upon which our decision as to the injunction prayed turns.

The boundary line between South Dakota and North Dakota on the west, and Minnesota on the east, runs through the middle of Lake Traverse, and thence north by the channel of the Bois de Sioux River until that river joins the Otter Tail River to make the Red River of the North. Lake Traverse lies in a basin between Minnesota and South Dakota. The east and west line between the two Dakotas is some five miles north of the point of discharge of the lake into the Bois de Sioux. The basin is the bed of an ancient lake formed by glacial action. The present lake reaches from southwest to northeast, has an average width of more than two miles and is, with its extended ponds and swamps, about twenty miles long. To the south, it has high rocky banks and is a real lake. As it extends toward the north, it is divided into smaller lakes or ponds or sloughs by deltas from entering streams. The Mustinka River reaches the lake at its northern end just beyond the region of its high banks and makes a delta walling off Mud Lake. The Bois de Sioux flows north, and is a sluggish stream, with low marshy banks for fifteen miles to a point opposite where the Rabbit River enters from the Minnesota side. Beyond that, its banks grow higher. It flows down the eastern side of its basin, so that the Minnesota lowlands on its bank are of small area.

The watershed for Lake Traverse and the Bois de Sioux as far as the mouth of the Rabbit River, but not including the watershed of that river, is 1,442 square miles, of which 924 miles are in Minnesota and 518 miles are in the Dakotas. Of the 924 miles of Minnesota watershed, 131 miles drain directly into the lake, and 793 miles drain through the Mustinka. Of these, the drainage from 105 miles enters below the ditches and tributaries which play any part in our problem. It will thus be seen that the drainage into the lake and the Bois de Sioux from the Mustinka River and the ditches, here under consideration, is from a watershed of 688 miles, or something less than 50 percent of the whole watershed by the run-off from which the basin of the Bois de Sioux in 1915 and 1916 was overflowed. The Mustinka watershed extends northeast from Lake Traverse across a level prairie country, embracing much of Traverse county and part of Grant County, Minnesota, until it reaches on the east, north, and south a much higher level of hills and hollows with lakes and standing pools called, in this case, the Moraine Zone. The trend of the Mustinka River bed upwards from the lake is at first to the northeast some twenty-odd miles to a point where Twelve Mile Creek enters the river from the south, thence easterly several miles to where Five Mile Creek enters the river also from the south. Above this point, the river is known as the Upper Mustinka. Of these three constituents, Twelve Mile Creek is the dominant stream, draining 364 miles, or 54 percent, of the whole Mustinka watershed. Five Mile Creek drains 121 square miles, or 16 2/3 percent, while the Upper Mustinka drains 203 square miles, or 29 percent. The Upper Mustinka is a winding, crooked stream, with banks not always well defined, and with a fall in its channel of 2.25 feet to the mile. Five Mile Creek is less crooked, but with low banks easily overflowed and a slope of five feet in the mile. Twelve Mile Creek has a slope in its channel of 2 2/3 feet for nine miles and 1 1/4 feet in the next three. It has higher banks than the others, and a more marked channel, and rarely overflows.

The original Mustinka Ditch was intended to drain farmlands in Grant County, east of Traverse County, and was built before 1900 from a point in the Upper Mustinka near the Town of Norcross in a westerly direction along the valley of that stream some seven miles, cutting off its curves and crossing the Five Mile Creek south of its confluence with the Mustinka, and emptying at right angles into Twelve Mile Creek. There was a great flood, due to a succession of wet years, in 1906 and 1907. The farmers in the lower watersheds of the Five Mile and Twelve Mile Creeks concluded that the state ditch, as it was called, was the cause of the flooding, and, in a petition, they asked the legislature, by further work, to relieve them from danger of future overflows. The legislature was thus induced to pass an act in 1911 (Laws Minn.1911, c. 138) containing a preamble on the recitals of which North Dakota strongly relies to support its case as admissions of Minnesota. The preamble recited that the ditch constructed before 1900 to drain lands in Grant County had, in crop seasons of several years, caused the flooding of 8,000 acres of farmland in Traverse County never before overflowed, to the damage of farmers in that county of $28,000, and had created a condition dangerous to the health of the inhabitants. The act then proceeded to authorize the expenditure of $35,000 by the state drainage commissioners to remedy the situation. The money was expended in the building of a cut-off ditch 2 1/2 miles in length, which continued the old ditch at right angles across the Twelve Mile Creek to the main channel of the Mustinka, and also in the straightening of the river from the mouth of the cut-off to the lake, a distance of some fifteen miles. The bend in the Mustinka which the new ditch cut off was about seven miles long, thus saving some 5 miles in flow of the water. The straightening of the river below the cut-off shortened the river's course from that point to the lake three miles. Halfway down to the lake, the river runs by the town of Wheaton, near which, in 1916, there was, notwithstanding these improvements, a wide and prolonged overflow of its banks.

The evidence in the case consisted, first, of the testimony of farmers in the overflow region in the valley of the Bois de Sioux as to the extent of the flood and their losses in 1915 and 1916; second, of farmers in the Mustinka watershed as to the floods of 1915 and 1916 and the effect in their neighborhood; and, third, of expert engineers and a geologist as to the part played by the ditches in these floods.

The engineers who were called by North Dakota said that the immediate cause of overflow was the maintenance in Lake Traverse of a high water level of 977 feet above the sea during part of the summer of 1915 and all of 1916; that this was three feet above the mean lake level of 974 feet; that the last foot or more of this rise was caused by the state ditching of the Mustinka, which prolonged the floods two summer seasons. One of these witnesses, Ralph, who had been state drainage engineer, first of Minnesota and then of North Dakota, and who seems to have been employed to prepare the case for the latter state, says that the ditching on the Mustinka raised the lake from one to one and a half feet in 1916. Dean Shenehon, another engineer expert, says that, when the lake is at a mean height of 974, the Minnesota ditches are responsible for a permanent increase in the level of from three to six inches, say four inches, and that, in time of flood, when the lake rises to 977, the ditches account for 10 inches. The varying estimates of these two principal witnesses for North Dakota do not seem to rest on definitely ascertained data. We have no government or other gaugings of the flow from

the Mustinka into the lake before the cut-off was completed in 1915. The first of such gaugings was taken near Wheaton in March, 1916. The cubic feet of flow into the lake from the Mustinka, before the cut-off ditch was constructed, is therefore a matter of judgment, rather than calculation, dependent on the probable run-off during the period of floods from the watershed, the extent of detaining basins that then existed, the possible evaporation under then conditions, the cross-sections of the present ditches compared with probable cross-sections of the channel of the old river as it was before the ditches and the straightening of the river, and the extent to which it then overflowed its banks in time of flood. Most of these factors and their effect were a matter of unsatisfactory estimate in the absence of actual gaugings and measurements of the flow into the lake from the old Mustinka in a state of nature. The situation was indeed complex, as Dean Shenehon expressed it. He said he could not say definitely how large a detaining basin was destroyed by the new work. He left the subject with this general statement:

> "I looked over that country, and, in my judgment, all that complex of cut-off canals, and state ditches, and improved Mustinka River, from the outlet of the cut-off to Lake Traverse and the laterals or ditches entering it, in my judgment, increased the runoff of waters in flood conditions substantially fifty percent. . . . I have viewed the conditions, and, in my judgment as an engineer, which is the best judgment I can give you, the runoff is fifty percent greater than in a state of nature."

Having thus reached the proportion of increase, the witness' estimate was that the flow into the lake from the Mustinka in a state of nature was 1,600 cubic second feet, and that the ditching by the state added 800 cubic feet, and that increase accounted for maintenance of the high lake level and the continuous flood complained of. the assumption that there was what Ralph called the Delta Zone, covering from seventy to one hundred square miles lying immediately east of Twelve Mile Creek and extending east toward the Upper Mustinka, and north beyond the line of the cut-off and old ditch. Both Ralph and Shenehon maintained that this was a low, moist, marshy region, with a rim which acted as a retaining basin for the overflowed waters of the confluence of the three Mustinka constituent streams, and that the cut-off, by draining this, prevented the former heavy loss by evaporation, accelerated the flow, and increased the volume of the water carried down to the lake by one-half, and would give every recurring flood the same effect.

Ralph also insisted that, in the state of nature, before the ditching, whenever there was high water in the Mustinka, the water flowed north over a ridge or low height of land into the sources of the Rabbit River in Tintah Slough; that thus a very considerable amount was carried directly to the Bois de Sioux basin, some fifteen miles north of the lake, and that, by this diversion, the level of the lake was kept lower. Now, he said, the cut-off made this diversion negligible, and, of course, added to the flow into the lake. The weight of the evidence, however, is that it has only been when the level of the Mustinka River at the confluence with the Twelve Mile Creek exceeds the height of 998 feet above the sea that it has flowed into the Rabbit River; that it reached this height during the summers of 1915 and 1916, and that then the same amount of water flowed over into the Rabbit Creek as formerly. While in a general way Ralph was corroborated by Dean

Shenehon and Professor Chandler, another expert witness, neither of these attached much importance to the part played by the diversion into the Rabbit River from the Mustinka, either before or after the state ditching works.

The case for North Dakota was much weakened by the weight of evidence showing that the great detaining basin in the so-called Delta Zone was nonexistent. The testimony of three engineering experts and a geologist called by Minnesota, who examined the watershed, as well as the numerous farmers and old-time residents who lived on, and successfully cultivated, all of the Delta Zone, was convincing to show that the land was ordinary prairie land, with an inclination to the north and northwest of five feet in a mile down to the Mustinka, and without any rim or rising border to make a detaining basin. The slope of the zone was said by one competent witness to be greater than that of much of the fertile prairie lands of Illinois. There were only two places in the neighborhood which could be described as possible detaining basins. One was the Redpath Slough, which yields wild hay in a dry season and covers an area of six or seven square miles. The other was Tintah Slough, a basin of like character, already referred to as one of the sources of the Rabbit River, and not in the Mustinka watershed.

The testimony adduced by the defendant state tended to show that the new cut-off which had been constructed to avoid floods in this region in high water was not regarded as effective by whose who had pressed for its construction because, in times of flood, their lands were overflowed apparently as much as before. There was substantial evidence that the cut-off did not run full in times of the highest water because of the obstruction from the onrush at such times of the Twelve Mile Creek at right angles across the union of the old and new ditches. The Twelve Mile Creek thus dominated the ditches to such an extent that it carried much of its water north to its old confluence with the Upper Mustinka, and round the old bend of that stream of six or seven miles. The result, as estimated by Minnesota's witnesses, was that the old bend at the crest of the flood carried twice as much water as the cut-off.

Professor Bass, for Minnesota, testified that, at the time of flood, it took nine hours for the water by way of the cut-off from Twelve Mile Creek to reach the lake, and thirteen hours by way of the old bend, and his estimate was that, before the cut-off was built, it would have taken eighteen hours. This would seem to indicate that the difference in speed of flow into the lake made by the new cut-off in a flood which lasted all summer would be negligible in effect. Doubtless the ditches of the Mustinka helped to carry the water into the lake faster than before they were constructed, but a speedier flow of the same amount of water would, in an entire summer of flood, have but little effect on the height of the lake or the overflow in its outlet through the Bois de Sioux valley. Mr. Meyer and Mr. Morgan, witnesses for Minnesota and both engineers of great experience in floods, say that a more rapid flow into a lake with an outlet will not raise the level of the lake as high as a slower inflow, because the more rapid the inflow, the greater the opportunity for outflow during the period of rising.

An additional factor of the high water on the banks of the Bois de Sioux in time of flood, as pointed out by Professor Bass, were in the railroad embankments and county roads crossing the whole sloughlike basin of the Bois de Sioux. These, with their limited

outlets, he thought, served to dam the flooded river in its sluggish flow. He also called attention to the obstruction by the backwater from the discharge of the Rabbit River which delivered itself with such force as to throw gravel and debris over to the opposite bank of the Bois de Sioux. Professor Bass relied on special measurements made for the purpose by a competent engineer, of the capacity of the bend, the Twelve Mile Creek, and the old ditch and the new cut-off, as well as that of the straightened river between the cut-off and the lake, the extent of the flooding halfway down the river to the lake near Wheaton and the basin of the Bois de Sioux. He testified that, when the lake was at the highest flood level, the added and more rapid flow due to the ditches did not increase this more than two inches, and was negligible in creating a flood in the Bois de Sioux.

A marked difference between the evidence of the experts for the complainant and of those for the defendant was in respect to the effect they attributed to the rainfall in 1914, 1915, and 1916. Those for North Dakota insisted that in neither 1915 nor 1916 was there the exceptional rainfall to produce the unusual flood in the Bois de Sioux valley, and that this was a significant fact in support of the view that the exceptional overflow in that valley was due to the artificial cut-off and the straightening of the Mustinka River bed. This contention was met and completely overcome by the government records and other evidence of the rainfall and floods in 1915 and 1916 in the whole upper Red River valley. The evidence satisfactorily establishes the fact to be that the flood in 1915 and that in 1916 exceeded any flood in that region for a succession of years since 1881. Great floods seem to have occurred about every ten years, and to have been the result of excessive precipitation for three successive years. One was in 1881. Another of these was in the period of 1895, 1896, and 1897. Another was in the period of 1905, 1906, and 1907, and a third was in the period of 1914, 1915, and 1916. The last two were greater than the second. There was a run-off all over the upper Red River valley in the year 1916 greater than in any period preceding since 1902. There were heavy rains in 1914, so that, in October, there was an accumulated excess of 3.54 inches. In 1915, the excess continued to grow, until, in October of that year, there was an excess of 7.94 inches. Winter came on when the waters were at flood, and froze them, so that the spring freshets of 1916 were very heavy, and these were succeeded by heavy precipitation in June and July, so that, by the fall of 1916, there was an excess of 16.15 inches. The flood was thus continuous during the whole summer season of that year. There was no opportunity to plant in the fall of 1915, because it was so wet, and in 1916 cultivation was impossible. The soil was described as mush. The farmers of all that region, not only in the valley of the Bois de Sioux, but in the Mustinka watershed and elsewhere in the upper valley of the Red river, had only a third or half of a crop in 1915, and in 1916 there was no crop at all, due to excessive and continuous rain.

It is not contended on behalf of the complainant that the damage from the floods of 1915 and 1916 in the Bois de Sioux were due to the higher flood line reached in those years so much as to the prolonged period during which the waters lay on the flooded area. It is admitted that such freshets were to be expected in the spring from time to time, but it is said that previously they had only lasted from three to eight days, and that the water receded, leaving the land on the banks of the Bois de Sioux cultivable and productive in the proper season. We cannot fail to note, however, that this strip, half a mile to two miles wide and fifteen miles long, injury to which is complained of, was low and subject

to overflow. There were sloughs in it running into the Bois de Sioux, and the government survey showed on the plats that 27 percent of it was marshy. Much of the tract was good farming land, except in time of excessive flood, which the history of the region shows, as we have said, was to be expected about every ten years.

It is difficult for a court to decide issues of fact upon which experts equal in number and standing differ flatly, and when their conclusions rest on estimates upon the correctness of which the court, without technical knowledge, cannot undertake to pass. In such cases, the court looks about for outstanding facts from which the lay mind can safely draw inferences as to the probabilities. The court is also aided by its judgment of the care and accuracy with which the contrasted experts respectively have determined the data upon which they base their conclusions. The experts called by Minnesota in this case seemed to us to use more specific and accurately ascertained data for their estimates than those for North Dakota, and this circumstance, as well as the more satisfactory factory reasons given, lead us to think that their conclusions are more to be depended on.

When we consider the extent and prolonged period of the floods of 1915 and 1916, covering, as they did, the whole upper valley of the Red river, of which the Mustinka watershed was but a small part, when we note that that watershed is only one-half of what feeds Lake Traverse, when we find that all this upper Red River valley was drenched with continuous rain for two summer seasons, with a frozen flood between them, when it appears that the farmers of the Mustinka valley lost as much of their crops in 1915, and had as total a loss in 1916, as the farmers on the Dakota banks of the Bois de Sioux, when we know that these farmers in the Bois de Sioux are used to frequent floods in the spring for three to eight days because of the low level of their lands, the system of state ditching in the Mustinka sinks into a circumstance of negligible significance in the consideration of the mighty forces of nature which caused these floods. To attribute to such a minor, but constant, artificial incident a phenomenal effect for two whole summer seasons, without a recurrence since, is to fly in the face of all reasonable probability. The evidence must be clear and convincing indeed to support such a theory. Instead of that, it is a combination of estimates, and conjecture based on no accurate knowledge of the flow of the Mustinka before the ditches were put in, and depending greatly on a hypothetical detaining basin in the so-called Delta Zone, existence of which the greater weight of the evidence negatives. Moreover, as already pointed out, the burden of proof that the state of North Dakota must carry in this case is much greater than that imposed on the ordinary plaintiff in a suit between private individuals.

The possibility of saving these Bois de Sioux lands from recurring floods, whether each year or every ten years, by controlling and distributing the flow from the lake and making larger its outlet suggests itself even to the layman. The capacity of the present outlet is between 1,200 and 1,500 cubic second feet, offering too small opportunity for safe escape of the high water of the lake, which experience shows may be expected in that region. Accordingly, after the first hearing of this case, without reaching a conclusion as to the legal responsibility for the overflow complained of, and with the thought that the court might be able to provide for a proper remedy in its decree, it ordered a rehearing

and the taking of supplemental proof, deemed necessary to an adequate consideration and disposition of the cause, as to the possibility and cost of ameliorating the flood conditions by means other than the injunction prayed in the bill. The order specified the projects to which the proof should be directed as follows:

First, to a project for detaining basins in the Mustinka River watershed.

Second, to a sluice dam in Lake Traverse.

Third, to improvements of the Bois de Sioux outlet by increasing its capacity.

Fourth, to making an outlet from the lake across a height of land into Big Stone Lake which drains into the Mississippi; and

Fifth, to a larger diversion of the Mustinka River waters into the Rabbit River.

The court also directed proof as to the flood conditions which had prevailed in the area claimed to have been flooded since the filing of the bill. Three engineers were to be called on each side.

All the remedies suggested by the Court were rejected by the engineers of both sides as impracticable except those of a sluice dam in Lake Traverse and the enlarging of the capacity of the lake outlet through the Bois de Sioux. The engineers for North Dakota thought that such an improvement could be constructed for about $100,000, while the engineers for Minnesota insisted that the dam and dredging provided at that cost would be a mere temporary and unsatisfactory makeshift, and that ampler works needed for a permanent remedy would require an expenditure of from two and a half to five times as much. The evidence further showed that there had been no flooding of the lands in question since the filing of the bill, a period of six years, although there had been a very great rainfall and large increases in the flow of the Mustinka River in the spring of 1917, which was followed by a dry season.

The conclusion we have come to on the issue of fact -- that Minnesota is not responsible for the floods of which complaint is made -- makes it unnecessary for us to consider this evidence as to a practical remedy for them, and requires us to leave the opinions and suggestions of the expert engineers for the consideration of the two states in a possible effort by either or both to remedy existing conditions in this basin.

*The bill is dismissed without prejudice.*

[The costs were adjudged against the plaintiff. *See post,* p. 263 U. S. 583. REPORTER.]

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# STATE OF NORTH DAKOTA

v.

# STATE OF MINNESOTA

## 263 U. S. 583 (1924)

Decided: January 21, 1924

No. 10, Original

IN EQUITY.

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

The Clerk has asked instruction concerning the taxation of costs.

By far the greater number of suits between States have been brought for the purpose of settling boundaries.[1] In the first, Rhode Island v. Massachusetts,4 How. 591, 639, the bill was dismissed. There was no provision as to costs in the decree and the record of fees is not available. In *584 Missouri v. Kentucky,11 Wall. 395, the bill was dismissed with costs, from which we infer that the defeated party paid them. In the remaining thirteen the costs were equally divided.

In Nebraska v. Iowa, 143 U.S. 359, 370, Mr. Justice Brewer, speaking for the Court, said: "The costs of this suit will be divided between the two States, because the matter involved is one of those governmental questions in which each party has a real and vital, and yet not a litigious, interest." And in Maryland v. West Virginia, 217 U.S. 577, 582, Mr. Justice Day delivering the opinion of the Court, said:

"The matter involved is governmental in character, in which each party has a real and yet not a litigious interest. The object to be obtained is the settlement of a boundary line between sovereign States in the interest, not only of property rights, but also in the promotion of the peace and good order of the communities, and is one which the States have a common interest to bring to a satisfactory and final conclusion. Where such is the nature of the cause we think the expenses should be borne in common, so far as may be, and we therefore adopt so much of the decree proposed by the State of Maryland as makes provision for the cost of the surveys made under the order of this court."

The same rule, however, does not apply to cases in which the parties have a litigious interest. In New Hampshire v. Louisiana and New York v. Louisiana,108 U.S. 76, 91, the complainant States brought suits upon bonds of Louisiana assigned to them by their citizens for the purpose of avoiding the inhibition of the Eleventh Amendment. The suits

were dismissed with costs adjudged against the complainants.

In South Dakota v. North Carolina, 192 U.S. 286, 321, the suit was on bonds of North Carolina donated by the original purchasers to South Dakota and there was judgment for South Dakota for the amount due with costs of suit.

In Missouri v. Illinois, 200 U.S. 496, 526, which was a bill to restrain Illinois and her subordinate agency, the Chicago Sanitary District, from discharging sewage into the Mississippi and exposing the people of Missouri to danger of typhoid fever from germs in their drinking water, the bill was dismissed without prejudice but the costs were adjudged against the complainant State.

In New York v. New Jersey, 256 U.S. 296, 313, the bill sought to restrain the pollution of the harbor of New York. The bill was dismissed without prejudice, but the costs were adjudged against New York.

In Kansas v. Colorado, 206 U.S. 46, 117, the suit was brought to enjoin diversion of flowing water. Apparently the Court regarded the issue as a non-litigious one the settlement of which would be useful to both States and, following the boundary cases, divided the costs. In Wyoming v. Colorado, 259 U.S. 496; 260 U.S. 1, 3, where the issue was similar, the costs were adjudged one-third to Wyoming, one-third to Colorado, and one-third to two corporate defendants at whose expense the case had been defended by Colorado.

The present proceeding is clearly a litigious one. The persons whose lands were overflowed raised a fund to conduct the litigation. The bill of North Dakota asked for a decree of injunction with $5,000 for damages to state property and $1,000,000 for damages to residents of North Dakota with the purpose, presumably, of distributing the latter sum to injured residents, contributors to the fund. The exact agreement as to the use of the funds thus raised does not appear in the record. When the State Engineer of North Dakota, Mr. Ralph, the chief witness for the State, was cross-examined in respect to it, he refused to answer by advice of counsel for North Dakota. The natural inference is that the fund was being used in the conduct of the litigation. We think that the circumstances put this case in the category with New Hampshire v. Louisiana, Missouri v. Illinois, and New York v. New Jersey, and that the costs should be taxed against North Dakota, the defeated party.

*It is so ordered.*

NOTES

[1] Rhode Island v. Massachusetts, 4 How. 591, 639; Missouri v. Iowa, 7 How. 660; Same Case, 10 How. 1; Missouri v. Kentucky, 11 Wall. 395; Indiana v. Kentucky, 136 U.S. 479; Same Case, 159 U.S. 275; Same Case, 163 U.S. 520, 527; Nebraska v. Iowa, 143 U.S. 359, 370; Iowa v. Illinois,147 U.S. 1; Same Case, 151 U.S. 238; Same Case, 202 U.S. 59; Missouri v. Iowa, 160 U.S. 688, 692; Same Case, 165 U.S. 118; Missouri v. Nebraska, 196 U.S. 23; Same Case, 197 U.S.577; Washington v. Oregon, 211 U.S. 127; Same Case, 214 U.S. 205; Missouri v. Kansas,213 U.S. 78; Maryland v. West Virginia, 217 U.S. 577, 585; North Carolina v. Tennessee, 235 U.S. 1, 17; Minnesota v. Wisconsin, 252 U.S. 273; Same Case, 254 U.S. 14; Same Case, 258 U.S. 149; Arkansas v. Mississippi, 256 U.S. 28, 35; Georgia v. South Carolina, 257 U.S. 516, 523; Oklahoma v. Texas, 258 U.S. 574.

# UNITED STATES

# v.

# STATE OF MINNESOTA.

270 U.S. 181 (1926)

No. 17, Original.

Argued Jan. 4 and 5, 1926.
Decided March 1, 1926.

Suit in equity by the United States against the State of Minnesota for cancellation of land patents and to recover value of lands sold. Decree for the United States for part of the relief sought; otherwise, for the State of Minnesota.

The Attorney General and Mr. W. W. Dyar, of Washington, D. C., for the United States.

Messrs, M. J. Brown and G. A. Youngquist, both of St. Paul, Minn., and Charles R. Pierce, of Miami, Fla., for the State of Minnesota.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit in equity brought in this court by the United States against the state of Minnesota to cancel patents issued to her for certain lands under the swamp land grant, or, where the state has sold the lands, to recover their value and to leave the patents uncanceled as to such lands. Seven patents, for about 153,000 acres, are brought in question. The first was issued May 13, 1871, and the others at different times from May 17, 1900, to June 10, 1912. The bill was filed May 7, 1923. The state answered, and the case was heard and submitted on the pleadings and much documentary evidence. The issues presented are chiefly of law.

It is not questioned that the lands were swampy and in this respect within the swamp land grant, nor that the patents were sought by the state and issued by the land officers in good faith. But it is insisted, on behalf of the United States, first, that by treaties and other engagements with the Chippewa Indians, entered into before the patents were issued, the United States became obligated to apply the lands and the proceeds of their sale exclusively to the use, support, and civilization of the Chippewas, and that this operated to exclude or withdraw the lands from the swamp land grant; secondly, that the state failed to select or claim the lands within the period prescribed in the act making the grant, and thereby lost any right which she may have had to have them patented to her; and, thirdly, that the grant was subject to a condition whereby the

state was required to apply the lands or the proceeds of their sale in effecting their reclamation by means of needed ditches, and that before the patents were issued the state, by an amendment to her Constitution, had disabled herself from complying with that condition and proclaimed her purpose to apply the lands and their proceeds otherwise, and thereby and lost any right she may have had to receive the patents. Stating it in another way, the insistence, on the part of the United States, is that the lands were appropriated or set apart for the Chippewas, that the land officers, misconceiving their authority in the premises, issued the patents contrary to the provisions of the act making the swamp land grant and in disregard of obligations to the Indians which the United States had assumed and was bound to respect, that those obligations are still existing and must be performed, and that to enable the United States to proceed with their performance it is entitled to a cancellation of the patents as respects such of the lands as still are held by the state and to recover the value of such as she has sold.

Besides disputing the several contentions just stated, the state advances two propositions, either of which her counsel conceive must end the case.

The first proposition is that the suit is essentially one brought by the Indians against the state, and therefore is not within the original jurisdiction of this court. In support of the proposition it is said that the United States is only a nominal party, a mere conduit through which the Indians are asserting their private rights; that the Indians are the real parties in interest, and will be the sole beneficiaries of any recovery; and that the United States will not be affected, whether a recovery is had or denied.

It must be conceded that, if the Indians are the real parties in interest and the United States only a nominal party, the suit is not within this court's original jurisdiction. *New Hampshire v. Louisiana*, 2 S. Ct. 176, 108 U. S. 76, 27 L. Ed. 656; *Hans v. Louisiana*, 10 S. Ct. 504, 134 U. S. 1, 33 L. Ed. 842; *North Dakota v. Minnesota*, 44 S. Ct. 138, 263 U. S. 365, 374-376, 68 L. Ed. 342. But the allegations and prayer of the bill-by which the purpose and nature of the suit must be tested-give no warrant for saying that the Indians are the real parties in interest and the United States only a nominal party. At the outset the bill shows that the Indians, although citizens of the state, are in many respects, and particularly in their relation to the matter here in controversy, under the guardianship of the United States and entitled to its aid and protection. This is followed by allegations to the effect that the Indians had an interest in the lands before and when they were patented to the state, that the patents were issued by the land officers without authority of law and in violation of an existing obligation of the United States to apply the lands and the proceeds of their sale exclusively to the use and benefit of the Indians, and that it is essential to the fulfillment of that obligation that the lands-or, where any have been sold, their value in their stead-be restored to the control of the United States. And the prayer is for a decree compelling such a restoration and declaring that the lands and moneys are to be held, administered, and disposed of by the United States conformably to that obligation.

Whether in point of merits the bill is well grounded or otherwise, we think it shows that the United States has a real and direct interest in the matter presented for

examination and adjudication. Its interest arises out of its guardianship over the Indians, and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations, and in both aspects the interest is one which is vested in it as a sovereign. *Heckman v. United States*, 32 S. Ct. 424, 224 U. S. 413, 437, 444, 56 L. Ed. 820; *United States v. Osage County*, 40 S. Ct. 100, 251 U. S. 128, 132, 133, 64 L. Ed. 184; *La Motte v. United States*, 41 S. Ct. 204, 254 U. S. 570, 575, 64 L. Ed. 410; *Cramer v. United States*, 43 S. Ct. 342, 261 U. S. 219, 232, 67 L. Ed. 622; *United States v. Beebe*, 8 S. Ct. 1083, 127 U. S. 338, 342-343, 32 L. Ed. 121; *United States v. New Orleans Pacific Ry. Co.*, 39 S. Ct. 175, 248 U. S. 507, 518, 63 L. Ed. 388. And see *United States v. Nashville, Chattanooga & St. Louis Ry. Co.*, 6 S. Ct. 1006, 118 U. S. 120, 126, 30 L. Ed. 81; *In re Debs*, 15 S. Ct. 900, 158 U. S. 564, 584, 39 L. Ed. 1092.

Counsel for the state point out that the Indians could neither sue the state to enforce the right asserted in their behalf nor sue the United States for a failure to call on the state to surrender the lands or their value, and from this they argue that the United States is under no duty, and has no right, to bring this suit. But the premise does not make for the conclusion. The reason the Indians could not bring the suits suggested lies in the general immunity of the state and the United States from suit in the absence of consent. Of course, the immunity of the state is subject to the constitutional qualification that she may be sued in this Court by the United States, a sister state, or a foreign state. *United States v. Texas*, 12 S. Ct. 488, 143 U. S. 621, 642, et seq., 36 L. Ed. 285. Otherwise her immunity is like that of the United States. But immunity from suit is not based on and does not reflect an absence of duty. So the fact that the Indians could not sue the United States for a failure to demand that the state surrender the lands or their value does not show that the United States owes no duty to the Indians in that regard. Neither does the fact that they could not sue the state show that the United States is without right to sue her for their benefit. But it does make for and emphasize the duty, and therefore the right, of the United States to sue. This is a necessary conclusion from the ruling in *United States v. Beebe*, supra, where much consideration was given to the duty and right of the United States in respect of the cancellation of patents wrongly issued. This court there pointed out special instances in which the government might with propriety refrain from suing and leave the individuals affected to settle the question of title by personal litigation, and then said that where the patent, if allowed to stand,

> "would work prejudice to the interests or rights of the United States, or would prevent the government from fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the government to institute judicial proceedings to vacate such patent."

The state's second proposition is that the suit is barred by the provision in the Act of March 3, 1891, c. 561, § 8, 26 Stat. 1095, 1099, being Comp. St. § 5114 (also chapter 559, p. 1093), limiting the time within which the United States may sue to annul patents, and, if not by that provision, then by a law of the state. But both branches of the proposition must be overruled. The provision in the act of 1891 has been construed and adjudged in prior decisions-which we see no reason to disturb-to be strictly a part of the public land laws and without application to suits by the United States to annul patents,

as here, because issued in alleged violation of rights of its Indian wards and of its obligations to them. *Cramer v. United States*, supra, page 233 (43 S. Ct. 342); *La Roque v. United States*, 36 S. Ct. 22, 239 U. S. 62, 68, 60 L. Ed. 147; *Northern Pacific Ry. Co. v. United States*, 33 S. Ct. 368, 227 U. S. 355, 367, 57 L. Ed. 544. And it also is settled that state statutes of limitation neither bind nor have any application to the United States, when suing to enforce a public right or to protect interests of its Indian wards. *United States v. Thompson*, 98 U. S. 486, 25 L. Ed. 194; *United States v. Nashville, Chattanooga & St. Louis Ry. Co.*, supra, pages 125, 126 (6 S. Ct. 1006); *Chesapeake & Delaware Canal Co. v. United States*, 39 S. Ct. 407, 250 U. S. 123, 125, 63 L. Ed. 889.

We come therefore to the merits, which involve a consideration of the past relation of the Indians to the lands and of the nature and operation of the swamp land grant to the state.

The lands are all within the region formerly occupied by the Chippewas. By a treaty made in 1837 the Indians ceded the southerly part of that region to the United States (7 Stat. 536); and by a treaty made in 1855 they ceded to it a further part adjoining that ceded before (10 Stat. 1165). But by the latter treaty nine reservations were set apart out of the ceded territory as 'permanent homes' for designated bands. Four of these reservations were called the Mille Lac, the Leech Lake, the Winnibigoshish, and the Cass Lake. This was the situation in 1860, when the swamp land grant theretofore made to other states was extended to Minnesota. Most of the ***197** lands in question are within what was then ceded territory and outside those reservations. The rest are within the Mille Lac, Leech Lake, Winnibigoshish, and Cass Lake Reservations as then defined.

By a treaty made in 1863 six of the reservations, including the Mille Lac, but not the Leech Lake, the Winnibigoshish, or the Cass Lake, were ceded to the United States, and a large reservation surrounding the Leech Lake, the Winnibigoshish, and the Cass Lake Reservations, was set apart as 'future homes' for the Indians then on the ceded reservations. 12 Stat. 1249. The twelfth article of that treaty declared that the Indians were not obligated to remove from the old reservations to the new until certain stipulations respecting preparations for their removal were complied with by the United States. The United States complied with the stipulations and most of the Indians on the ceded reservations other than the Mille Lac removed, but some remained on and around those reservations. The same article declared:

> "Owing to the heretofore good conduct of the Mille Lac Indians (the bank occupying the ceded Mille Lac reservation), they shall not be compelled to remove as long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

Some of the Mille Lac band removed, but many remained on and around the ceded reservation. A treaty negotiated in 1864, and amended and ratified in 1865, enlarged the large reservation set apart in 1863. 13 Stat. 693. By a treaty made in 1867 the greater part of the large reservation set apart in 1863 and enlarged in 1865 was

ceded to the United States, and an area of approximately 36 townships around White Earth Lake was set apart as a new reservation, to which the Indians in the ceded territory were to remove. 16 Stat. 719. That treaty left the Leech Lake, Winnibigoshish, and Cass Lake Reservations within what remained of the large reservation established in 1863 and 1865. After the White Earth Reservation was created, many of the Indians in the ceded territory removed to it, but some remained on or around the ceded tracts. By executive orders made in 1873, 1874, and 1879, additions were made to some of the reservations. The next change came in 1889.

Under the Act of January 14, 1889, c. 24, 25 Stat. 642, the Chippewas ceded and relinquished to the United States all of their reservations, here described as then existing, save as a part of the White Earth Reservation was set aside for allotments in severalty, which were to be made by the United States and accepted by the Indians as their homes. The cession was declared to be for the purposes and on the terms stated in that act, and was to become effective on the President's approval, which was given March 4, 1890. The act provided that the lands so ceded should be surveyed, classified as pine or agricultural, and disposed of at regulated prices, and that the net proceeds should be put into an interest-bearing fund of which the Chippewas were to be the beneficiaries.

The Mille Lac reservation, although included in the cession of 1863, was again included in the cession under the act of 1889. It was surveyed and opened to settlement and disposal under the public land laws after the cession of 1863; but this led to a controversy with the Indians over the meaning and effect of the clause in the twelfth article of the treaty of 1863, relating to the removal of the Mille Lac band, and that controversy resulted in a suspension of disposals. The controversy continued up to the cession under the act of 1889 and was adjusted and composed in that cession. *United States v. Mille Lac Band of Chippewas*, 33 S. Ct. 811, 229 U. S. 498, 57 L. Ed. 1299. But after the survey and before the suspension about 700 acres,[FN1] shown by the field notes of the survey to be swampy, were patented to the state under the swamp land grant. The patent of May 13, 1871, was for these lands.

In 1909, under a permissive statute, 35 Stat. 619, c. 126, the Mille Lac band brought a suit against the United States in the Court of Claims to recover for 'losses sustained by them or the Chippewas of Minnesota' by reason of the opening of the Mille Lac Reservation to settlement and disposal. In that suit recovery was sought in respect of all lands in that reservation which the United States had disposed of otherwise than under and in conformity with the act of 1889, including those patented to the state as swamp lands May 13, 1871. Evidence was introduced showing the lands so patented and their value, and one of the questions discussed in the briefs and pressed for decision at the final hearing was whether the Indians were entitled to recover in respect of the lands in that patent, or were precluded therefrom by a provision in the act of 1889, as accepted by the Indians, which the United States insisted had operated to confirm the state's claim under the patent. By the ultimate findings and judgment that controversy was resolved against the Indians and in favor of the United States. 51 Ct.Cl. 400. No appeal was taken from that judgment and it became final. It awarded about $700,000 to the Indians on account of the disposal of other lands, held not within the confirmatory

provision, and the award was paid by putting the money in the Chippewa fund before mentioned. 39 Stat. 823, c. 464. Of course, the United States is without right to any recovery here in respect of the lands as to which it was adjudged there to be free from any obligation or responsibility to the Indians. So the lands in the patent of May 13, 1871, need not be considered further.

The other reservations were surveyed after the cession under the act of 1889. The field notes of the survey showed some of the lands to be swampy, and 152,124.18 acres so shown were patented to the state under the swamp land grant. They are the lands for which patents were issued from May 17, 1900, to June 10, 1912. Of these lands 706 acres were within the Leech Lake, Winnibigoshish, and Cass Lake Reservations as defined and existing in 1860, when the swamp land grant was extended to the state, and the others are lands which had been ceded by the treaty of 1855 and were public lands in 1860.

In the brief on behalf of the United States an effort is made to overcome the cession in the treaty of 1855 by inviting attention to particular statements in correspondence and other papers of that period and arguing therefrom that the treaty was hastily negotiated with chiefs and warriors, not fairly representative of the bands affected, who were brought to Washington for the purpose and were there subjected to influences and pressure which prevented them from exercising a free judgment and adequately portraying and protecting the interests of such bands. But we think the argument is without any real basis in fact. The inferences sought to be drawn from the statements to which attention is invited are refuted rather than supported by the papers as a whole. While it appears that there was some dissatisfaction with the original selection of those who were to represent the Indians, it also appears that other chiefs and warriors representing the Indians who were dissatisfied were sent to Washington by the local superintendent of Indian affairs and that they actively participated in the negotiations and signed the treaty. The negotiations occupied ten sessions spread over a period of seven days and were reported. The reports indicate that the Indians who participated ably and loyally represented all the bands and spoke for them openly and with effect. Indeed, they persuaded the representatives of the United States to make concessions advantageous to all the bands which were much more favorable than those first proposed. They included headchiefs, subchiefs and warriors, 16 in all. Several had represented these Chippewas in making earlier treaties, and afterwards came to represent them in making others.

But, while the earnestness of counsel has induced us to examine the basis of the argument advanced, there is another reason why the effort to overcome the cession must fail. Under the Constitution the treaty-making power resides in the President and Senate, and when through their action a treaty is made and proclaimed it becomes a law of the United States, and the courts can no more go behind it for the purpose of annuling it in whole or in part than they can go behind an act of Congress. Among the cases applying and enforcing this rule some are particularly in point here. In *United States v. Brooks*, 10 How. 442, 13 L. Ed. 489, where a grant made to certain individuals by the Caddo Indians in a treaty between them and the United States was assailed by the United States as induced by fraud practiced on the Indians, the court held that 'the

influences which were used to secure' the grant could not be made the subject of judicial inquiry for the purpose of overthrowing the treaty provision making it. In *Doe v. Braden*, 16 How. 635, 10 L. Ed. 1090, a provision in the treaty whereby Spain ceded Florida to the United States which annulled a prior grant to the Duke of Alagon was assailed as invalid on the ground that the king, who made the treaty, was without power under the Spanish constitution to annul the grant. But the court refused to go behind the treaty and inquire into the authority of the king under the law of Spain-and this because, as was explained in the decision, it was for the President and Senate to determine who should be recognized as empowered to represent and speak for Spain in the negotiation and execution of the treaty, and as they had recognized the king as possessing that power it was *202 not within the province of the courts to inquire whether they had erred in that regard. And in *Fellows v. Blacksmith*, 19 How. 366, 372, 15 L. Ed. 684, where a treaty with the New York Indians was asserted to be invalid on the ground that the Tonawanda band of Senecas was not represented in the negotiation and signing of the treaty, the court disposed of that assertion by saying:

> "But the answer to this is that the treaty, after executed and ratified by the proper authorities of the government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can go behind an act of Congress."

The propriety of this rule and the need for adhering to it are well illustrated in the present case, where the assault on the treaty cession is made 70 years after the treaty and 40 years after the last installment of the stipulated compensation of approximately $1,200,000 was paid to the Indians.

By the Act of September 28, 1850, Congress granted to the several states the whole of the swamp lands therein then remaining unsold. 9 Stat. 519, c. 84 (Comp. St. §§4958-4960). The first section was in the usual terms of a grant in praesenti, its words being that the lands described 'shall be, and the same are hereby, granted.' The second section charged the Secretary of the Interior with the duty of making out and transmitting to the Governor of the state accurate lists and plats of the lands described, and of causing patents to issue at the Governor's request, and it then declared that on the issue of the patent the fee simple to the lands should vest in the state. The third section directed that, in making out the lists and plats, all legal subdivisions the greater part of which was wet and unfit for cultivation should be included, but where the greater part was not of that character the whole should be excluded. The question soon arose whether, in view of the terms of the first and second sections, the grant was in praesenti and took effect on the date of the act, or rested in promise until the issue of the patent and took effect then. The then Secretary of the Interior, Mr. Stuart, concluded that the grant was in praesenti in the sense that the state became immediately invested with an inchoate title which would become perfect, as of the date of the act, when the land was identified and the patent issued. 1 Lester's Land Laws, 549. That conclusion was accepted by his successors, was approved by the Attorney General (9 Op. Attys. Gen. 253), was adopted by the courts of last resort in the states affected, and was sustained by this court in many cases. (*French v. Fyan*, 93 U. S. 169, 170, 23 L. Ed. 812; *Wright v. Roseberry*, 7 S. Ct. 985, 121 U. S. 488, 500 et seq., 30 L. Ed.

1039; *Rogers Locomotive Works v. Emigrant Co.*, 17 S. Ct. 188, 164 U. S. 559, 570, 41 L. Ed. 552; *Work v. Louisiana*, 46 S. Ct. 92, 269 U. S. 250, 70 L. Ed. 259). A case of special interest here is *Rice v. Sioux City & St. Paul R. R. Co.*, 4 S. Ct. 177, 110 U. S. 695, 28 L. Ed. 289. The question there was whether the act of 1850 operated, when Minnesota became a state in 1858, to grant to her the swamp lands therein. The court answered in the negative, saying that the act of 1850 'operated as a grant in praesenti to the states then in existence'; that it 'was to operate upon existing things, and with reference to an existing state of facts'; that it 'was to take effect at once, between an existing grantor and several separate existing grantees'; and that, as Minnesota was not then a state, the act made no grant to her.

By the Act of March 12, 1860, c. 5, 12 Stat. 3, Congress extended the act of 1850 to the new states of Minnesota and Oregon; the material terms of the extending act being as follows:

> "That the provisions of the act (of 1850) be, and the same are hereby, extended to the states of Minnesota and Oregon: Provided, that the grant hereby made shall not include any lands which the government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.
>
> "Sec. 2. That the selection to be made from lands already surveyed in each of the states including Minnesota and Oregon, under the authority of the act aforesaid, * * * shall be made within two years from the adjournment of the Legislature of each state at its next session after the date of this act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the Governor of the state, that the surveys have been completed and confirmed.' (Comp. St. § 4965).

The words 'be, and the same hereby are, extended,' in the principal provision, and the words 'the grant hereby made,' in the proviso, signify an immediate extension to these new states of the grant in praesenti made to other states in 1850. Other parts of the proviso signify an exclusion of particular lands from the grant as extended, but not a change in its nature. Indeed, if the grant as extended were regarded as taking effect only on the issue of the patent, the proviso would be practically an idle provision; while if the grant be regarded as in praesenti, like the original, the proviso serves a real purpose. Of course, the principal provision and the proviso are to be read together and taken according to their natural import, if that be reasonably possible-and we think it is.

Thus understood, they show that Congress, while willing and intending to extend to these new states the grant in praesenti made to other states in 1850, was solicitous that the reservation, sale, and disposal of lands (pursuant to laws in existence at the date of the extension) should not be interrupted or affected pending the identification and patenting of lands under the grant, and that the proviso was adopted for the purpose of excluding from the grant as extended all lands which might be reserved,

sold, or disposed of (in pursuance of any law theretofore enacted) prior to the confirmation of title under the grant-the confirmation being the issue of patent. Many acts of that period granting lands in words importing a present grant-where the lands were to be afterwards identified under prescribed directions-contained provisions excluding lands that might be disposed of in specified ways before the identification was effected. But those provisions never were regarded as doing more than excepting particular lands from the grants, and, unless there were other provisions restraining the words of present grant, the grants uniformly were held to be in praesenti, in the sense that the title, although imperfect before the identification of the lands, became perfect when the identification was effected and by relation took effect as of the date of the granting act, except as to the tracts failing within the excluding provision. *St. Paul & Pacific R. R. Co. v. Northern Pacific R. R.* 11 S. Ct. 389, 139 U. S. 1, 5, 35 L. Ed. 77; *Missouri, Kansas & Texas Ry. Co. v. Kansas Pacific Ry. Co.*, 97 U. S. 491, 497, 24 L. Ed. 1095; *Schulenberg v. Harriman*, 21 Wall. 44, 60-62, 22 L. Ed. 551.

The act of 1860 was construed as we here construe it by Secretary Delano in 1874 (1 Copp's P. L. L. 475), and by Secretary Schurz in 1877 (2 Copp. 1081); and their construction was adopted and applied by their successors up to the time of this suit,[FN2] and was approved by the Attorney General in 1906, 25 Op. Atty. Gen. 626. So, even if there were some uncertainty in the act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction. *United States v. Burlington & Missouri River R. R. Co.*, 98 U. S. 334, 341, 25 L. Ed. 198; *Schell's Executors v. Fauche*, 11 S. Ct. 376, 138 U. S. 562, 572, 34 L. Ed. 1040; *Louisiana v. Garfield*, 29 S. Ct. 31, 211 U. S. 70, 76, 53 L. Ed. 92; *United States v. Hammers*, 31 S. Ct. 593, 221 U. S. 220, 228, 55 L. Ed. 710; *Logan v. Davis*, 34 S. Ct. 685, 233 U. S. 613, 627, 58 L. Ed. 1121.

While the grant as extended to Minnesota was a grant in praesenti, it was restricted to lands which were then public. The restriction was not expressed, but implied according to a familiar rule. That rule is that lands which have been appropriated or reserved for a lawful purpose are not public, and are to be regarded as impliedly excepted from subsequent laws, grants, and disposals which do not specially disclose a purpose to include them. *Wilcox v. Jackson*, 13 Pet. 498, 513, 10 L. Ed. 264; *Leavenworth, Lawrence & Galveston R. R. Co. v. United States*, 92 U. S. 733, 741, 745, 23 L. Ed. 634; *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 14 S. Ct. 496, 152 U. S. 114, 119, 38 L. Ed. 377; *Scott v. Carew*, 25 S. Ct. 193, 196 U. S. 100, 49 L. Ed. 403. Thus the general words of the acts of 1850 and 1860 must be read as subject to such an exception *Louisiana v. Garfield*, supra, page 77 (29 S. Ct. 31).

The 706 acres, before described as within the Leech Lake, Winnibigoshish, and Cass Lake Reservations as originally created, were not public lands when the grant was extended to the state, but were then reserved and appropriated for the use of the Chippewas, and so were excepted from the grant. Probably the patenting of them to the state was a mere inadvertence, for it was not in accord with rulings of the Secretary of the Interior on the subject. But, be that as it may, the patenting was contrary to law and in derogation of the rights of the Indians under the act of 1889. Therefore the United

States is entitled to a cancellation of the patents as to these lands, unless the state has sold the lands, and in that event is entitled to recover their value.

The 152,124.18 acres, before described as within the cession of 1855, were not reserved or otherwise appropriated when the grant was extended, but were then public lands; and, being swampy in character, they were included in the grant and rightly patented under it, unless there be merit in some of the contentions of the part of the United States which remain to be considered.

It is said that these lands, although public when the grant was extended, were afterwards reserved and appropriated for the use of the Chippewas by treaties made before the title under the grant was confirmed by the issue of patents, and that this brought the lands within the exception made by the proviso. The contention appears to be in direct conflict with the words of the proviso which limit the exception made therein to lands reserved, sold or disposed of in pursuance of laws enacted before the grant was extended. But, by way of avoiding this conflict, it is said that the treaties were made in the exercise of a power conferred by the Constitution, which is a law adopted before the extension, and therefore that the lands must be held to have been reserved and appropriated in pursuance of a prior law in the sense of the proviso. We assent to the premise, but not to the conclusion. The words of the proviso are 'in pursuance of any law heretofore enacted.' We do not doubt that, rightly understood, they include a prior treaty as well as a prior statute. But we think it would be a perversion of both their natural import and their spirit to hold that they include either a subsequent treaties subsequent statute. Of course, all treaties and statutes of the United States are based on the Constitution; and in a remote sense what is done by or under them is done under it. But lands are never reserved, sold or disposed of directly under the Constitution, but only in pursuance of treaties made or statutes enacted under it. The words 'heretofore enacted,' in the proviso, are words of limitation and cannot be disregarded. They show that it is not intended to have the same meaning as it if said, 'in pursuance of any law,' and that what it means is any treaty or statute theretofore made or enacted.

It next is said-assuming the grant was in praesenti and included these lands-that in virtue of the treaty-making power the United States could, and did by the treaties of 1863, 1865, and 1867, divest the state of her right in the lands and appropriate them to the use and benefit of the Chippewas. The decisions of this Court generally have regarded treaties as on much the same plane as acts of Congress, and as usually subject to the general limitations in the Constitution; but there has been no decision on the question sought to be presented here. The case of *Rice v. Minnesota & North-western R. R. Co.*, 1 Black, 358, 17 L. Ed. 147, is cited as giving some color to the contention; but in so far as it has a bearing it tends the other way. The controversy there was over the validity of an act of Congress repealing a prior act making a grant of lands to the then territory of Minnesota in aid of the construction of a proposed railroad. The granting act, while containing words of present grant, declared that 'no title' should pass to the territory until a designated portion of the road was completed, and also that the lands should not inure to the benefit of any company constituted and organized prior to the date of that act. The territory, anticipating a grant in aid of the undertaking, already had attempted to transfer her rights under the grant to a company incorporated

theretofore; and the litigation was with that company. The repealing act was passed less than two months after the granting act and before the construction of the road was begun. The court held that the grant was not in praesenti, because the words of present grant were fully overcome by other provisions; and also that the repealing act was valid, because no right had passed to the territory or the company up to that time. But the court deemed it proper to say (page 373) that if the granting act had passed a present right, title or interest in the lands, the repealing act would be 'void, and of no effect,' and also (page 374) that if the granting act had operated to give to the territory a beneficial interest in the lands, it was 'clear that it was not competent for Congress to pass the repealing act and divest the title.'

But if the treaty-making power be as far reaching as is contended-- which we are not now prepared to hold--we are of opinion that no treaty should be construed as intended to divest rights of property-such as the state possessed in respect of these lands-unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question. And, of course, the rule before stated, that where lands have been appropriated for a lawful purpose they are to be regarded as impliedly excepted from subsequent disposals which do not specially include them, applies to treaty disposals as well as to statutory disposals.

On examining the treaties we do not find anything in them which may be said to be certainly indicative of a purpose to divest the state of her right to these lands. The areas reserved by the treaties were described in general terms -- as by indicating the exterior boundaries or designating the area as a stated number of townships around a particular lake. The area were very large -- one comprising more than a million acres. No doubt the descriptions were sufficient to carry the whole of each area, if free from other claims; but there was nothing in them or in the other provisions signifying a purpose to disturb prior disposals or to extinguish existing rights under them. True, it was said that the reservations were established as 'future homes' for the Indians; but this meant that the Indians were to live within the reservations, and did not have reference to any particular lands within their limits. The areas were vastly in excess of what would be needed for individual homes and farms, and included many lands wholly unfit for that purpose. The areas were dotted with lakes--some navigable--and with swamps--some almost impassable. In short, it is apparent that the treaties dealt with extensive areas in a general way and not with particular lands in a specific way. So we think they must be read as impliedly excepting the swamp lands theretofore granted to the state and leaving her right to them undisturbed.

The case of *Minnesota v. Hitchcock*, 22 S. Ct. 650, 185 U. S. 373, 46 L. Ed. 954, is cited as making for a different conclusion; but it does not do so. The question there was whether the state was entitled, under the school land grant, to sections 16 and 36 in the part of the Red Lake Reservation which was ceded under the act of 1889. That grant was expressed in words of promise, not of present grant. Title was to pass when the lands were identified by survey, if they were then public; and if at that time they were not public but otherwise disposed of, the state was to be entitled to other lands in their stead. The lands in question never had been public; and their cession under the act of 1889 was not absolute or unqualified but in trust that they be sold as provided in that act

for the benefit of the Indians. After that cession the lands in the ceded part of the reservation were surveyed and the government officers took up the task of selling them in pursuance of the trust. The state then sued to establish her claim to sections 16 and 36 and to prevent their sale. The court ruled against the state, and the following excerpt from the opinion (page 393 (22 S. Ct. 658)) discloses the grounds on which the decision proceeded:

> "Congress does not, by the section making the school land grant, either in letter or spirit, bind itself to remove all burdens which may rest upon lands belonging to the government within the state, or to transform all from their existing status to that of public lands, strictly so called, in order that the school grant may operate upon the sections named. It is, of course, to be presumed that Congress will act in good faith; that it will not attempt to impair the scope of the school grant; that it intends that the state shall receive the particular sections or their equivalent in aid of its public school system. But considerations may arise which will justify an appropriation of a body of lands within the state to other purposes, and if those lands have never become public lands the power of Congress to deal with them is not restricted by the school grant, and the state must seek relief in the clause which gives it equivalent sections."

It further is said that, assuming the state was entitled to these lands, she lost her right by failing to make selection of them within the prescribed period after they were surveyed. There is no merit in this contention. It rests on a misconception of what constitutes a selection in the sense of the requirement in the second section of the act of 1860, before quoted. The earlier statute of 1850, in its second section, charged the Secretary of the Interior with the duty of making out and transmitting to each state accurate lists of the lands falling within the grant; and to do this it was necessary that he determine which lands were swampy and which were not swampy. The act said nothing about the evidence on which his determination should be based or the mode of obtaining the evidence. In taking up the administration of the grant, the Secretary accorded to each state a choice between two propositions: First, whether she would abide by the showing in the government surveyor's field notes; and, second, if the first proposition was not accepted, whether she would through her own agents make an examination in the field and present claims for the lands believed to be swampy accompanied by proof of their character. Some of the states elected to abide by the surveyor's field notes and others elected to take the other course. In the administration of the grant these elections were respected and given effect, save as there were some merely temporary departures. Where the election was to abide by the field notes that, without more, was regarded a continuing selection by the state of all lands thus shown to be swampy. Where the election was to take the other course the presentation of claims with supporting proofs was regarded as a selection by the state. This was the settled practice when the act of 1860 was passed; and the provision in its second section requiring that selection be made within a designated period is to be construed in the light of that practice. Neither that act nor the one of 1850 contained any other provision which reasonably could be said to require a selection by the state. Possibly the provision in the second section of the act of 1850 requiring the Secretary to make

out and transmit to each state accurate lists of the lands falling within the grant might be said to lay on him a duty to make selections. But, if this was the selection meant by the second section of the act of 1860, the states could not be charged with any dereliction or neglect by reason of his delay. But we think it meant a selection by the state as that term was understood in the administrative practice. There had been objectionable delay prior to the act of 1860 on the part of some of the states in carrying out their election to make examinations in the field and present claims with supporting proof, and the second section of that act shows that it was specially directed against unnecessary delay in making that kind of selections. It evidently was intended to accord to those states reasonable opportunity for making necessary appropriations and to require that they then proceed diligently with the examinations in the field and the presentation of their claims and proofs.

Shortly after the act of 1860 the propositions theretofore submitted to other states were submitted to Minnesota by the Secretary's direction in a letter from the Commissioner of the General Land Office. After stating the propositions the Commissioner said:

> "By the adoption of the first proposition the state will receive all the lands to which she is justly entitled, as the field notes of the survey are very full in characterizing or giving descriptions to the soil; and an important reason for doing so is that she will incur no expense in selecting or designating the lands."

By an act of her Legislature, passed in 1862 (Laws 1862, c. 62), Minnesota elected to abide by the surveyors' field notes, and her Governor promptly notified the Commissioner and the Secretary of that election. It has been respected and given effect, with one temporary interruption, and has been treated as a continuing selection by the state of all lands shown by the surveyor's field notes to be swampy. 2 Copp's P. L. L. 1034; 32 L. D. 65, 533-535. In 1877 Secretary Schurz, in overruling a contention like that we now are considering, held that the action of the state Legislature in 1862, was an effective selection. 2 Copp's P. L. L. 1081. Similar contentions were pronounced untenable by the Attorney General in 1906 (25 Op. Attys. Gen. 626), and by the Secretary of the Interior in 1909 (37 L. D. 397). On principle, as also out of due regard for the administrative practice, we think the election by the state Legislature, approved by the Governor as it was, was a timely and continuing compliance with the requirement in the second section of the act of 1860. What would have been the effect of a failure to comply with that requirement we need not consider here.

The further contention is made that the state before the issue of the patents forfeited her right to receive them by disabling herself, through an amendment to her Constitution, from complying with the provision in the act of 1850 directing that the lands passing to the state under the grant, or the proceeds of their sale, 'be applied, exclusively, as far as necessary,' in effecting their reclamation by means of needed levees and ditches. The state did declare in an amendment to her Constitution, adopted in 1881, that the lands should be sold and the proceeds inviolably devoted to the

support and maintenance of public schools and educational institutions; but it does not follow that she disabled herself from reclaiming the lands or formed or declared a purpose not to reclaim them. On the contrary, her statutes enacted since the amendment and the published reports of her officers show that she adopted and proceeded to carry out extensive reclamation plans applicable to all swamp lands within her limits, that she and her municipal subdivisions expended many millions of dollars in this work, and that they are still proceeding with it. But, apart from this, the contention must fail. It rests on an erroneous conception of the effect and operation of the provision relied on, as is shown in repeated decisions of this court. We think it enough to refer to *United States v. Louisiana*, 8 S. Ct. 1047, 127 U. S. 182, 32 L. Ed. 66, for the controversy there was between the United States, the grantor, and one of the stated to which the grant was made. The court cited and reviewed the earlier cases and then said (page 191 (8 S. Ct. 1052)):

> "Under the act of 1850, the swamp lands are to be conveyed to the state as an absolute gift, with a direction that their proceeds shall be applied exclusively, as far as necessary, to the purpose of reclaiming the lands. The judgment of the state as to the necessity is paramount, and any application of the proceeds by the state to any other object is to be taken as the declaration of its judgment that the application of the proceeds to the reclamation of the lands is not necessary."

And also (page 192 (8 S. Ct. 1052)):

> "If the power exists anywhere to enforce any provisions attached to the grant, it resides in Congress, and not in the court."

The same principles have been applied in later and related cases. *Stearns v. Minnesota*, 21 S. Ct. 73, 179 U. S. 223, 231, 45 L. Ed. 162; *Alabama v. Schmidt*, 34 S. Ct. 301, 232 U. S. 168, 58 L. Ed. 555; *King County v. Seattle School District*, 44 S. Ct. 127, 263 U. S. 361, 364, 68 L. Ed. 339.

Finally much stress is laid on the provisions of the act of 1889, the cession under it, and resulting rights of the Indians and obligations of the United States. But it suffices here to say that the act of 1889 was without application to lands in which the Indians had no interest, that the cession under it was only of lands in which they had an interest, and that the resulting rights of the Indians and obligations of the United States were limited accordingly.

Our conclusion on the whole case is that the bill must be dismissed on the merits as to all the lands, excepting the 706 acres described as within the Leech Lake, Winnibigoshish, and Cass Lake Reservations as defined and existing in 1860, and that as to them the United States is entitled to a decree canceling the patents for such as have not been sold by the state and charging her with the value of such as she has sold. By reason of the relation in which the United States is suing, the value should be determined on the basis of the prices which would have been controlling had the

particular lands been dealt with, as they should have been, under the act of 1889. *United States v. Mille Lac Band of Chippewas*, supra, 510 (33 L. Ed. 811).

The parties will be accorded 20 days within which to suggest a form of decree giving effect to our conclusions and to present an agreed calculation of the value of so much of the 706 acres as has been sold.

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Footnotes:

FN1 This may include one or two small subdivisions which had been patented theretofore to a Mille Lac chief, Shaw-vosh-kung, under the first article of the treaty of 1865.

FN2 3 Land Dec. 474, 476; 22 Land Dec. 388; 27 Land Dec. 418; 32 Land Dec. 65, 328; 37 Land Dec. 397.

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White Eagle Oil and Refining Co. v. Gunderson, et al.
48 S. D. 608, 205 N.W. 614 (S. D. 1925)



WHITE EAGLE OIL & REFINING CO., Plaintiff, v. GUNDERSON, Governor, et al, Defendants.

STATE OF SOUTH DAKOTA ex rel MUTUAL TANK LINE CO. et al, Plaintiffs, v. GUNDERSON, Governor, et al, Defendants.

(205 N. W. 614.)

(File Nos. 6030, 6042. Opinion filed October 28, 1925.)

1. **States—Officers—Parties—Actions—"Suits Against the State" and "Suits Against State Officers" Distinguished.**

Cases in which decrees require performance of obligation of state in its political capacity by affirmative official action of defendants are suits against the state, while actions at law or suits in equity against persons violating and invading plaintiffs' personal and property rights under color or authority unconstitutional and void while claiming to act as officers of state are suits against state officers.

2. **States—Parties—Officer Sued as Individual and Not as Officer, and Court Not Ousted of Jurisdiction Because He Asserts Authority as Officer.**

In suits against one violating and invading plaintiffs' personal and property rights under color or authority unconstitutional and void, defendant is sued as individual, not as officer of government, and court is not ousted of jurisdiction because defendant asserts authority as officer of state, but to make out defense he must show authority sufficient in law to protect him.

3. **States — Injunctions — Gasoline — Courts Cannot Interfere with State's Statutory Right to Sell Gasoline, but May Prevent Any One in Custody Thereof from Selling It Without Legal Authority.**

Courts cannot interfere with property interest of state in gasoline proposed to be sold by it, under Laws 1925, c. 184, nor with any incident of property, such as right to sell it, but any one in custody thereof may be prevented from selling it without legal authority.

4. **Courts—Appeal and Error—Supreme Court's Original Jurisdiction Should Not Be Exercised to Protect Private or Local Rights.**

Supreme Court's constitutional jurisdiction is primarily appellate, and its original jurisdiction should be assumed only when interests of state at large are directly involved in preserving its sovereign prerogatives or franchises, preventing its offices from usurpation, intrusion, or invasion, or protecting its

citizens' liberty, but not to protect private or local rights, except when application cannot properly be made to subordinate court.

5. **Courts—Prohibition—Constitutional Law—Supreme Court Will Assume Jurisdiction of Original Action to Test Constitutionality of Act Relating to Sale of Gasoline by State.**

As original action to test constitutionality of Laws 1925, c. 184, presents policy of state in dealing in gasoline as commodity, which affects not only parties, but many others similarly situated and widely distributed over state, issues involved must eventually be decided by Supreme Court, and interests of state at large are directly involved in alleged diversion and misapplication of public funds, Supreme Court will assume jurisdiction thereof.

6. **States—Parties—Injunction—Taxpayer or Elector Need Not Have Special Interest in Suit nor Suffer Special Injury to Bring Action to Restrain Public Officers from Acting Under Alleged Unconstitutional Law.**

Taxpayer or elector need not have special interest in suit nor suffer special injury to himself to enable him to protect public rights by action to test constitutionality of Laws 1925, c. 184, relating to sale of gasoline by state, and restrain public officers from acting thereunder.

7. **Courts—Attorney General—Supreme Court Will Hear Original Suit to Restrain State Officers from Acting Under Unconstitutional Law on Relation of Taxpayers or Electors, Where Attorney General Is Defendant and Refuses to Prosecute.**

Generally, Supreme Court will not exercise original jurisdiction in suit to restrain public officers from acting under unconstitutional law, unless prosecuted in name of state on relation or information of Attorney General, but where latter is party defendant and refuses to prosecute action, suit will be heard on relation of taxpayers or electors.

8. **Taxation—Gasoline—Unconstitutional Law—State Cannot Levy and Collect Taxes to Conduct Business of Selling Gasoline.**

Under Const., art. 11, sec. 2. state may not levy and collect taxes to conduct business of selling gasoline under Laws 1925, c. 184, as gasoline is not a natural resource of state, and business of buying and selling it is not within Const., art. 13, sec. 1, authorizing state to own and conduct proper business enterprises to develop resources and improve economic facilities of state, though gasoline may be used in development of state's resources.

**9. Highways—Appropriations—Act, Authorizing Investment of Funds Appropriated by Prior Act for Highway Purposes in Gasoline, etc., for Sale by State, Held Unconstitutional.**

Laws 1925, c. 184, authorizing state to invest motor fuel tax funds, levied and appropriated for highway purposes, under Laws 1923, c. 225, as amended by Laws 1925, cc. 228, 229, in gasoline, oils, etc., for sale at retail, violates Const., art. 11, sec. 8, prohibiting use of taxes raised and appropriated for special purpose, whether object be exercise of police power to control and regulate dealing in gasoline or a private purpose.

Original action by the White Eagle Oil & Refining Company, and by the State of South Dakota, on the relation of the Mutual Tank Line Company and others, against Carl Gunderson, as Governor of the State of South Dakota, and others. Demurrer to complaints overruled, and temporary injunction allowed.

In case No. 6030:

*Oppenheimer, Dickson, Hodgson, Brown & Donnelly,* of St. Paul, Minn., and *Sutherland, Payne & Linstad,* of Pierre, for Plaintiff.

*Buell F. Jones,* Attorney General, and *E. D. Roberts* and *R. F. Drewry,* Assistants Attorney General, for Defendants.

In case No. 6042:

*McNulty, Wiliamson & Smith,* of Aberdeen, for Plaintiffs.

*Buell F. Jones,* Attorney General, and *E. D. Roberts* and *R. F. Drewry,* Assistants Attorney General, for Defendants.

(1) To point one of the opinion, Plaintiff cited: Mullen v. Dwight et al, 42 S. D. 171, 173 N. W. 645; Reagon v. Farmers Loan and Trust Co., 154 U. S. 362, 38 L. ed. 1014; Louisiana v. Jumel, 107 U. S. 711; Antoni v. Greenhow, 107 U. S. 769; Cunningham v. Macon & B. R. Co., 109 U. S. —; Hagood v. Southern, 117 U. S. 52; Osborn v. Bank of United States, 22 U. S. (9 Wheat.) 738; Davis v. Gray, 83 U. S. (16 Wall.) 203; Elmer v. Wallace, 275 Fed. 86.

Defendant cited: Tankford v. Okla. Engraving Co., 130 Pac. 278; State v. Cockerell, 112 Pac. 1000; Lovett v. Tankford, 145 Pac. 757; Tankford v. Platte Iron Works, 235 U. S. 460; Wertz v. Nestos (N. D.), 200 N. W. 524.

(6) To point six, Plaintiff cited: Chamton v. Zabraiskie, 11 Otto 601, 25 L. ed. 1070; Owensboro Water Works Company

v. City of Owensboro (Ky.), 96 S. W. 867; Merchants' Police, etc., Telegraph Co. v. Citizens' Telephone Company, 93 S. W. 642, 20 Ky. Law Rep. 512; Bayley v. City of New Orleans, 23 Fed. 843; Santa Clare County v. Southern Pac. R. Co., 118 U. S. 394, 6 Sup. Ct. 132, 30 L. ed. 118; Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. ed. 630; Davenport v. Buffington, 97 Fed. 234; State v. Lien, 9 S. D. 297, 68 N. W. 748; State v. Menzie, 17 S. D. 535, 97 N. W. 745.

(8) To point eight, Plaintiff cited: In re Opinion of the Judges, 43 S. D. 648, 180 N. W. 957; Green v. Frazer, 64 L. ed. 878; Cooley on Taxation, Sec. 1818; Morton, Bliss & Co. v. Comptroller General, 4 S. C. 430, Id. 458; Lawrence National Bank v. Barber, 24 Kan. 534; Smith v. Haney, 73 Kan. 506, 85 Pac. 550; Chambe v. Durfee, 100 Mich. 112, 38 N. W. 661; Board of Education v. Board of Trustees, 113 Ky. 234, 68 S. W. 10; Lambert v. Board of Trustees (Ky.), 152 S. W. 802; People v. Lippincott, 65 Ill. 548; Sleight v. People, 74 Ill. 47; Hughes v. Board, 25 S. D. 480, 127 N. W. 613; Limitation of Taxation, 3 S. D. 456, 54 N. W. 417; City of Centerville v. Turner, 25 S. D. 300, 126 N. W. 605.

Defendant cited: In re Opinion of the Judges, 43 S. D. 684, 180 N. W. 957; Mackey v. Reeves, 42 S. D. 340, 175 N. W. 359.

(9) To point nine, Plaintiff cited: Wheeler v. S. D. Land Settlement Board, 43 S. D. 551, 181 N. W. 359; Peterson Oil Co. v. Frary, 46 S. D. 258, 192 N. W. 842; In re Opinion of Judges, 182 Mass. 605, 66 N. E. 25, 60 L. R. A. 592; Lowell v. Boston, 111 Mass. 454; Dodge v. Township of Mission, 107 Fed. 827; In re Opinion of the Judges, 58 Maine 590.

Defendant cited: Paulus v. State (N. D.), 201 N. W. 867; In re McKenna's Estate, 25 S. D. 369, 126 N. W. 611, 33 L. R. A. (N. S.) 616; State v. Kirby, 34 S. D. 281, 148 N. W. 533.

PER CURIAM. These are original actions brought to test the validity and constitutionality of chapter 184, S. L. 1925, relating to the sale of gasoline by the state of South Dakota. They are before us upon demurrer to the complaints. As the same questions are involved in both cases with only slight differences in the facts stated, we consider the cases together. The complaint

in the case, White Eagle Oil & Refining Company v. Gunderson et al, alleges the corporate capacity of the plaintiff; that it is a non-resident of the state but a taxpayer within the state paying general taxes, and the tax levied upon users of gasoline as provided by chapter 225, S. L. 1923, and amendments thereto; that the defendants are officers of the state of South Dakota holding the respective offices as follows: Carl Gunderson, Governor; James L. Driscoll, Treasurer; E. A. Jones, Auditor; Buell F. Jones, Attorney General; and Carl Gunderson, Joe W. Parmley, John E. Peart, and Chauncey T. Bates, member of the state highway commission; that on or about the 18th of July, 1925, the defendants Carl Gunderson, as Governor, and James L. Driscoll, as Treasurer, met, and at such meeting (called by telephone on one day's notice and unattended by the Attorney General of the state) decided that the retail prices exacted by dealers in gasoline in the state of South Dakota were unreasonable and excessive, and directed the state highway commission to buy gasoline and to sell the same at retail throughout the state, and further decided at said meeting to establish by, and through, the state highway commission, stations for the sale of gasoline at retail in the county seat of each county in the state, and elsewhere within the state; that the said members of the highway commission, purporting to act under said order and direction, are planning and threatening to enter extensively in the retailing of gasoline throughout the state and have placed orders for large quantities of gasoline to be bought for that purpose, and are about to purchase a large amount of equipment and material for the purpose of erecting and maintaining storage and service stations for the sale of gasoline at more than 25 stations; that said defendants are planning to pay for the gasoline so ordered, and for the material and equipment from the public funds of the state, to wit, from the state highway funds which have been or are to be paid into the treasury from the motor fuel license tax imposed by chapter 225, S. L. 1923, and amendments thereto; that said defendants are planning and threatening to use such funds to the sum of $50,000 for the purpose of purchasing material and equipment; that such material and equipment is being bought for no other use or purpose or service to the state; that such officers are planning and threatening to use at least $40,000 or $50,000 additional in the business of selling gaso-

line, and maintaining of stations and in paying the costs and expenses of their operation; that the members of the state highway commission are threatening to approve claims for the paying out of said funds, and the defendant E. A. Jones, auditor, is threatening to approve and allow such vouchers and to issue warrants upon the treasurer therefor, unless restrained by this court; that plaintiff has been for many years engaged in the business of producing, refining, selling, and distributing gasoline, and is now so engaged in this state; that plaintiff has approximately 65 service and tank stations in the state and owns and operates valuable properties, equipment, and facilities for the sale of gasoline to the general public at retail; that plaintiff has invested in such properties over $300,000; that many of said stations are located in the same communities and will be in direct competition with those about to be established by the defendants; that the yearly sale of gasoline by plaintiff approximates 9,000,000 gallons; that plaintiff has established and now owns in the state a successful growing business to which is attached a valuable good will and the patronage of a large number of customers; that plaintiff is a substantial taxpayer of the state, its properties are assessed within the state, and it pays the general property tax thereon; that plaintiff owns numerous motor vehicles and pays to the state of South Dakota the three cent gallon tax on each gallon so used and thereby becomes a contributor to the motor fuel license tax fund; that plaintiff has since October 1, 1921, paid $261,176.77 as a motor fuel license tax and is continuing monthly to make further payments of such tax; that said tax is paid to the state auditor, which the auditor is required to pay over to the treasurer, except such as may be refunded under the provision of said chapter 225 and amendments; that such defendants have sold, are now selling, and will sell at retail gasoline for a charge or price no more than the cost thereof to the state plus the cost of handling and contingencies without anything by way of profit; that in such retailing of gasoline defendants will use money raised by the motor fuel license tax, including that contributed by plaintiff, and will conduct said business on premises and in buildings and with the use of property belonging to the state which were purchased and acquired in part for other purposes and paid for with money collected from taxpayers for other purposes; that such business will

be conducted and managed in part by officers and employees of the state whose salary and wages are paid out of funds raised by general taxation; that the inevitable effect of the engaging of the state in the selling of gasoline, as it has engaged in, is now engaging and will engage in, will be to exclude from said state this plaintiff and all other persons, firms, and corporations for the reason that private business and enterprises engaged in selling gasoline cannot survive in competition with the state on the basis it has sold, now is selling, and purposes to sell, and for the further reason that the properties, facilities, and money employed and used by the state is, and will be, exempt from all taxation and the properties, facilities, and money employed by the plaintiff and other persons is and will be subject to taxation; that said business carried on by defendants has been, is being, and will be conducted and managed in part by officers and employees whose salaries and wages will be paid out of moneys raised by general taxation including property of plaintiff, whereby said business in a large measure relieved of that cost and expense commonly known as "overhead cost" will be less to the defendants than to the plaintiff and others engaged therein; that the prices at which plaintiff has sold and is selling gasoline in the state are not, and have not, been exorbitant, nor have they been excessive over an amount equal to the cost of said products plus the cost of handling, overhead and a fair profit on the capital invested; that the engaging in and carrying on of the business of selling gasoline by the defendants is illegal and without authority of law; that the engaging in and carrying on of the business of selling gasoline, as now engaged in or proposed to be engaged in by the defendants, is confiscatory of the property and business of this plaintiff in the state of South Dakota, and a taking of its said property and business without compensation and without due process of law, in violation of the Constitution of the United States and in violation of the Constitution of the state of South Dakota; that plaintiff has no adequate remedy at law; that defendants threaten to, and will hereafter, unless restrained therefrom, continue the operation of said unlawful business as the result of which further, greater and irreparable damage to plaintiff will occur; that plaintiff and other private corporations and persons engaged in the lawful business of selling and distributing gasoline products in the state of South

Dakota are sustaining and will, if defendants' acts aforesaid are not restrained, continue to suffer great and irreparable financial loss and damage by reason thereof; this suit is brought on behalf of all others similarly interested who may join herein. The complaint sets out in full chapter 184, S. L. 1925, and numerous constitutional provisions which it is claimed said act violates.

The complaint of the plaintiffs in case, State ex rel Mutual Tank Line Co. et al v. Gunderson et al, is similar in purport and effect to the foregoing except in the following particulars: These plaintiffs allege that they are resident taxpayers, while in the former case the plaintiff is a nonresident; that they stated to the Attorney General of this state the facts set forth in their complaint and requested such officer to commence and prosecute this action, and that the Attorney General refused to do so; that no notice of the meeting of the Governor, Treasurer, and Attorney General was given to plaintiffs or any other persons interested in the result; that the highways of the state are subject to heavy and constant traffic, and the funds are appropriated and needed for the construction, reconstruction, repair, and maintenance of such highways, and unless highways already constructed are maintained and repaired they will be destroyed and the public will suffer a total loss of the funds invested therein, and if further highways are not built and graveled that public interest will be hampered and the defendants by their illegal conduct are diverting funds provided and appropriated for such construction, reconstruction, maintenance, and repair; that the issues tendered by this action involve grave public questions which must eventually be passed upon by this court, and irreparable damage would result should their decision be delayed during the period necessary for trial in an inferior tribunal and appeal therefrom; that the acts of the defendants, in engaging in the business of selling gasoline at retail within the state of South Dakota at approximately cost, has caused numerous retailers of gasoline within the state of South Dakota to discontinue the gasoline business, and that the continued acts of the defendants in engaging in the retail sale of gasoline will force these relators and others similarly situated to meet their price or go out of business, and will deprive the relators and others similarly situated of the right to make a fair profit upon their property and labor, and will deprive relators and others

similarly situated of their property without compensation, and without any opportunity to be heard, and without any due process of law.

The defendants demurred to both complaints on the following grounds:

That it appears upon the face of the affidavit and application for temporary injunction that this court has no jurisdiction of the defendants or the subject of the application or action, for the reason that said proceeding and action is against the state of South Dakota, which has not consented to be sued; that it appears upon the face of plaintiffs' application that if plaintiffs are injured as alleged, that such injury is only personal and private, and is not such as to call into exercise the original jurisdiction of this court; that it appears upon the face of plaintiffs' said affidavit and application that sufficient facts are not therein stated to constitute a cause of action or to entitle plaintiffs to the relief demanded.

Considering the questions raised in the order presented by the demurrer, we have first, Is this a suit against the state?

In the case of Mullen v. Dwight et al, Regents of Education, 42 S. D. 171, 173 N. W. 645, we said:

"Many actions and judicial proceedings may be instituted, in any courts having jurisdiction, against state officers and state agencies which are not deemed actions or suits against the state. An action against state officers to compel them by mandamus, or other similar process, to perform official duties of a purely ministerial nature, involving the exercise of no discretion of political or governmental power, is not a suit against the state, and may be maintained without its consent. Likewise, state officials may be restrained or prohibited by appropriate action or procedure, in any court having jurisdiction, from performing unlawful acts as such officials, without the consent of the state, as such procedure is not deemed a suit against the state. 36 Cyc. 916, 917; Greenwood Cemetery Co. v. Routt, 17 Colo. 156, 28 P. 1126, 15 L. R. A. 369, 31 Am. St. Rep. 284; Rolston v. Missouri Fund Com., 120 U. S. 390, 7 S. Ct. 599, 30 L. ed. 721; German Ins. Co. v. Van Cleve [Cleave], 191 Ill. 410, 61 N. E. 94; Gunter v. Ry. Co., 200 U. S. 273, 26 S Ct. 252, 50 L. ed. 477." Ex p.arte Young, 209 U. S. 123, 28 S Ct. 441, 52 L .ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

[1-3] The distinction between suits against the state and suits against state officers may be expressed as follows: Those cases in which the decrees require by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the state in its political capacity, are suits against the state; while those actions at law or suits in equity maintained against defendants who, while claiming to act as officers of the state, violate and invade the personal and property rights of the plaintiffs under color or authority unconstitutional or void, are not suits against the state. In these latter cases, the defendant is sued, not as or because he is an officer of the government, but as an individual, and the court is not ousted of jurisdiction because the defendant asserts authority as an officer of the state. To make out his defense, he must show that his authority was sufficient in law to protect him. The gasoline proposed to be sold under the statute in question is the property of the state, and as an incident of such property subject to sale by the state when the Legislature so provides. The courts cannot interfere with the property interest of the state therein nor with any of the incidents of property, but we thing it clear that any one in custody of the state's property who attempts to sell it without authority of law can be prevented from doing so. The court, in preventing an officer or individual from selling the state's property without authority, is not preventing the state from doing so.

Second: Is this action one that this court will entertain in the exercise of its original jurisdiction and have the parties an interest in the suit which entitles them to be heard?

[4-5] The jurisdiction of the Supreme Court by the Constitution is primarily appellate. The original jurisdiction of this court should be assumed when the interests of the state at large are directly involved in the preservation of its sovereign prerogatives, or its franchises, in the prevention of its offices from usurpation, intrusion, or invasion, or for the protection of the liberty of its citizens, but not to protect private or local rights, except in special cases, when for some perculiar cause application cannot properly be made to a subordinate court. Everitt v. Board of County Commissioners, 1 S. D. 365, 47 N. W. 296; State ex rel Dakota Central Telephone Company v. City of Huron, 23 S. D. 153, 120 N. W. 1008; Oss v. State Depositors' Guaranty Fund

Commission, 48 S. D. 258, 204 N. W. 21. The case at bar presents the policy of our state in dealing in gasoline as a commodity, which affects many citizens of the state, not only the parties to this action but many others similarly situated, and widely distributed over the state. It is also apparent that the issues here involved must eventually be decided by the Supreme Court, which we think is a consideration that may properly influence us in determining to assume jurisdiction in an original action. State v. Smith, 184 Wis. 455, 200 N. W. 65.

[6, 7] The complaint alleges that the public funds of the state are being diverted and misapplied, making it appear that the interests of the state at large are directly involved. Upon the question of the interest of plaintiffs entitling them to bring this action, we cite Weatherer v. Herron, 25 S. D. 208, 126 N. W. 244, where it is held any taxpayer or elector may in proper case sue to restrain public officers from an illegal act. Nor is it necessary that the taxpayer or elector have a special interest in the suit or suffer special injury to himself to enable him to protect public rights. State v. Lien, 9 S. D. 297, 68 N. W. 748; State v. Menzie, 17 S. D. 535, 97 N W. 745. But generally this court will not exercise its original jurisdiction in such cases, unless the action is prosecuted in the name of the state upon the relation or information of the Attorney General. However, since the Attorney General is a party defendant and refuses to prosecute the action, we think we should hear the suits on the relation of plaintiffs.

[8] Third: Does the complaint state a cause of action? Plaintiffs contend that chapter 184, S. L. 1925, is unconstitutional. The constitutionality of the law under which the officers are acting is the important question. The legislative act is as follows:

"Section 1. The state highway commission of this state is hereby granted authority, when so directed by the Governor, the Attorney General and the State Treasurer, or a majority of them, to buy gasoline, oils, and lubricants, and sell the same at retail in this state. Provided that the authority herein granted shall not be exercised except when the retail prices exacted by other dealers are found by the Governor, the Attorney General and the State Treasurer, or a majority of them, to be unreasonable and excessive. For such purposes, all tanks or other storage facilities now or hereafter owned, leased or used by the state of South

Dakota, and said highway commission, not exclusively for highway or other particular purposes, may be used in carrying on such business.

"Section 2. There is hereby granted to the state highway commission the right to use such state highway funds, which have, or shall be paid into the state from the motor fuel license tax, under the provisions of chapter 225 of the Session Laws of 1923, and amendments thereto, for the purpose specified in section 1 hereof, provided however, that such funds so used shall not exceed the sum of one hundred thousand dollars ($100,000.00) at any time.

"Section 3. All sales of gasoline, oils and incidental commodities made under the authority herein granted, shall be made for cash only, and at no time shall such sales be made at a loss to the state.

"Section 4. The state highway commission shall keep an accurate account of all receipts and disbursements made in the purchase and sale of gasoline, oils and lubricants, the total amount purchased and sold at each established selling agency, together with all expenses incident to such business, which shall be included in the annual report of said commission." Section 5. Emergency clause.

Plaintiffs contend that this act violates that portion of section 2, art. 11, or our Constitution providing that:

"Taxes * * * shall be levied and collected for public purposes only."

Our country has developed under the individualistic theory of government, not socialistic. The United States and state Constitutions and laws have been framed under a policy having primary regard for individual rights. As was said by the Kansas court in the case of State v. Kelly, 71 Kan. 811, 81 P. 450, 70 L. R. A. 450, 6 Ann. Cas. 298:

"It has been the policy of our government to exalt the individual rather than the state, and this has contributed more largely to our rapid national development than any other single cause. Our Constitution was framed, and our laws enacted, with the idea of protecting, encouraging and developing individual enterprise and if we now intend to reverse this policy, and to enter the state as a competitor against the individual in all lines of trade and

commerce, we must amend our Constitution and adopt an entirely different system of government."

And by the Massachusetts court in Re Opinion of Judges, 182 Mass. 605, 66 N. E. 25, 60 L. R. A. 592:

"Until within a few years it generally has been conceded, not only that it would not be a public use of money for the government to expend it in the establishment of stores and shops for the purpose of carrying on a business of manufacturing or selling goods in competition with individuals, but also that it would be a perversion of the function of government for the state to enter as a competitor into the field of industrial enterprise, with a view either to the profit that could be made through the income to be derived from the business, or to the indirect gain that might result to purchasers if prices were reduced by governmental competition. There may be some now who believe it would be well if business was conducted by the people collectively, living as a community, and represented by the government in the management of ordinary industrial affairs. But nobody contends that such a system is possible under our Constitution."

It is generally conceded that the supplying of water for municipalities is a public purpose for which taxes may be levied; the same may be said of furnishing gas or electricity. The usual reason being that such commodities as water, gas, and electricity cannot be furnished by private persons or corporations without the exercise of eminent domain. The right of the state to engage in the sale of intoxicating liquors was upheld in the case of State ex rel v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345, the right being predicated upon the police power of the state to control and regulate the liquor traffic. The court says:

"The police power is a public purpose, * * * a tax levied for its enforcement would be as lawful as a tax to raise funds to build a state house."

In the case of Laughlin v. Portland, 111 Me. 486, 90 A. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734, the act empowering a city or town to maintain a permanent wood, coal, and fuel yard for the purpose of selling at cost such commodities was sustained. On the other hand, it has been held that the business of oil refining (State v. Kelly, 71 Kan. 811, 81 P. 450, 70 L. R. A. 450, 6 Ann. Cas. 298), the manufacture and sale of ice (State ex

rel v. Orear, 277 Mo. 303, 210 S. W. 392; Union Ice & Coal Co. v. Ruston, 135 La. 898, 66 So. 262, L. R. A. 1915B, 859), the selling of coal at retail (Baker v. Grand Rapids, 142 Mich. 687, 160 N. W. 208; Opinion of Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809; Opinion of Justices, 182 Mass. 605, 66 N. E. 25, 60 L. R. A. 592), establishing and operating a state elevator (Rippe v. Becker, 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857), loans to working people for the purpose of securing homes (Opinion of Judges, 211 Mass. 624, 98 N. E. 611, 42 L. R. A. [N. S.] 221), owning and operating movie theaters (State ex rel 720, Ann. Cas. 1914D, 949), and other similar lines of business cannot be entered into by the government and supported by public taxation. There is nothing essentially different in the business of retailing gasoline from that of any other commodity, and while it may be conceded that gasoline under present economic conditions is a necessity, there is no reason why it may not be retailed by private enterprise. There is no need of the exercise of the right of eminent domain; it is not contraband as is intoxicating liquor, and no governmental restrictions are placed upon trade in gasoline, as such. Private persons have as much right to engage in the sale of this commodity as in the sale of any other useful or necessary article. We are satisfied the state may not enter into the business of selling gasoline and levy and collect taxes to conduct such business, unless, as suggested by the defendants, article 13 of our Constitution, and especially section 1 of said article, empowers the state to enter into such business.

Recent amendments to our Constitution evidence a tendency to depart from the earlier fundamentals of our government, and experiment in socialism and paternalism. The state has been authorized to enter into business enterprises, such as the manufacture and sale of cement; the drainage of agricultural lands; the irrigation of agricultural lands; state hail insurance; the manufacture, distribution, and sale of electric current; mining, distribution and sale of coal; the establshing and maintaining of a system of credits to assist in the building of homes; rural credits; and works of internal improvement. In Mackey v. Reeves, 42 S. D. 347, 175 N. W. 359, we said:

"These amendments evidence a fundamental change in the policy of the government, primarily designed to effect an early

development of the resources and economic facilities of the state. But they do not evidence an intent to abrogate or modify article 11, § 2, of the Constitution, which declares that: 'Taxes * * * shall be levied and collected for public purposes only.' This provision clearly inhibits the collection, and necessarily the expenditure, of public moneys for private benefit as distinguished from public purposes. * * * An appropriation of public money to be constitutional must be for some use or object which, directly or indirectly, in some degree or manner will materially aid in the proper functioning of some governmental agency, and in so doing will serve a public purpose."

There is nothing in any of these amendment to the Constitution which can be construed to apply to the sale of gasoline by the state, unless it be that portion of section 1 of article 13 which says that the state, "for the purpose of developing the resources and improving the economic facilities of South Dakota, * * * may own and conduct proper business enterprises." It is a well-known fact that petroleum and its products including gasoline are not natural resources of South Dakota; that gasoline may be used in the development of the resources of the state is not sufficient to place the business of buying and selling gasoline within the meaning of this provision. If we were to so hold it would lead to a practical removal of all restrictions upon the state to engage in business, since there is nothing which its not useful and used in activities developing the resources of the state.

[9] But it is contended by respondents that the act in question is an exercise of the police power; that the purpose of the act is to control and regulate dealing in gasoline by preventing the charging of extortionate prices therefor, and therefore does not violate the provision of the Constitution requiring taxes to be levied for public purposes, only, since the police power is a public purpose. If this act be an exercise of the police power, it may be conceded that the purpose is public, but as we are confronted with another section of the Constitution which we think is decisive of these cases, we will not determine whether or not that act is an exercise of police power or whether or not the Legislature can enact a law which will accomplish the purpose therein intended. We leave those questions undecided, confining ourselves to the constitutionality of the act as enacted.

Section 8 of article 11 of our Constitution provides:

"No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same, to which the tax only shall be applied."

Chapter 225, S. L. 1923, as amended by chapters 228 and 229 of Laws of 1925, levy a tax upon motor fuel and appropriate such tax for highway purposes. The object of the tax provided for in the said chapter 225, and amendments thereof, was to raise revenue for highway purposes by imposing a tax upon motor fuels. The tax is appropriated to the "construction, reconstruction, maintenance, or repair of highways or roads" under the jurisdiction of the state highway commission. Its title reads:

"An act to impose a tax upon the sale of motor vehicle fuels; * * * and for the disposition of the revenue derived therefrom. * * *"

And the act purports to have no other object than to raise revenue for highway purposes. Chapter 184, S. L. 1925, the act in question, authorizes the use of the motor fuel funds levied and appropriated under chapter 225, and amendments, to enforce chapter 184. It makes no difference whether its object and purpose be an exercise of the police power or a private purpose, it violates section 8 of article 11 of our Constitution, because it diverts funds levied and appropriated to another purpose. We think it entirely clear that the investment of the motor fuel funds in gasoline, oils, and lubricants for sale at retail is a diversion of the funds from the highway use to which it was appropriated, to another use. Especially is thus true when the funds are invested in permanent fixtures, tanks, and filling stations necessary in the retailing of gasoline. Under this provision of the Constitution, no taxes raised and appropriated for a special purpose may be used for another purpose. In re Limitation of Taxation, 3 S. D. 456, 54 N. W. 417; Aldrich v. Collins, 3 S. D. 154, 52 N. W. 854; 37 Cyc. 1588; Cooley on Taxation, § 1818; Morton, Bliss & Co. v. Comptroller General, 4 S. C. 430, 458; Lawrence National Bank v. Barber, 24 Kan. 534; Smith v. Haney, 72 Kan. 506, 85 P. 550; Chambe v. Durfee, 100 Mich. 112, 58 N. W. 661; Board of Education v. Board of Trustees, 113 Ky. 234, 68 S. W. 10; Lambert v. Board of Trustees, 151 Ky. 725, 152 S. W. 802, Ann. Cas. 1915A, 180; People v. Lippincott, 65 Ill. 548; Sleight v. People,

74 Ill. 47; School District No. 24 v. Smith, 97 Or. 1, 191 P. 506; Epperson v. Howell, 28 Idaho 338, 154 P. 621. For the foregoing reasons, the demurrer must be overruled. Defendants are allowed 30 days in which to answer the complaint if they desire to do so, but in the meantime the defendants are enjoined from doing any of the acts complained of in plaintiffs' complaint; such injunction to be effective and binding upon the defendants when they are served with a copy of a formal order properly attested and filed in this case.

Demurrer overruled, and temporary injunctional order allowed.

CAMPBELL, J., not sitting.

Note.—Reported in 205 N. W. 614. See, Headnotes (1) and (2), American Key-Numbered Digest, States, Key-No. 191(2), 36 Cyc. 917; (3) States, Key-No. 191(1), 36 Cyc. 918; (4) and (5) Courts, Key-No. 206(17 1-16), 15 C. J. Sec. 550; (6) States, Key-No. 168½, 36 Cyc. 921 (Anno.); (7) States, Key-No. 207(3), 36 Cyc. 909; (8) Taxation, Key-No. 23, 37 Cyc. 720; (9) Taxation, Key-No. 99¼, 37 Cyc. 1588.

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# Obituary

St. Paul Dispatch,
Saturday, June 5, 1971 [6]

. . . .

## Memorial Rite Saturday (sic) For Montreville Brown

A memorial service for St. Paul attorey, Montreville J. Brown, 86, will be held at 1:30 p.m. Tuesday . . .

Mr. Brown, a member of the law firm of Oppenheimer, Brown, Wolff, Leach and Foster, died Friday in the Highland Chateau Nursing Home after an illness of several months.

Mr. Brown, 740 River Drive, was a native of Morris, Minn. He received his law degree from the University of Minnesota in 1909 and practiced law for a time in Bemidi, where he served as city attorney and on the city school board.

He served as an assistant state attorney general from 1918 to 1923, when he joined the Oppenheimer firm. He served as legal counsel of the Metropolitan Airports Commission.

Mr. Brown taught law at the Minnesota College of Law from 1921 to 1931. He contributed to numerous legal periodicals.

He was a member of several Masonic organizations and served a term as grand master of the Minnesota Masons. He was a member of the St. Paul Athletic Club, the University Cliub, the American, Minnesota and Ramsey County Bar Associations and the American Judicare Society.

Survivors include his wife, Minnie Stinchfield Brown; four daughters, Mrs. Raymond Brown, Detroit; Mrs. Robert Christianson, Edina; Mrs. Conley Brooks, Long Lake, Minn.; and Mrs. Theodore Wright, St. Paul; two sisters, Edna and Margaret Brown, both of Minneapolis, and 15 grandchildren and seven great-grandchildren.

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[6] Inexplicably the *Dispatch* misstated the day of Brown's funeral. An obituary in the *St. Paul Pioneer Press* has not been located.

# MEMORIAL
## RAMSEY COUNTY BAR ASSOCIATION [7]

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On Friday, April 28, 1972, Memorial Services in honor of those members of the Ramsey County Bar who died during the past year were held in the Court House.

STATE OF MINNESOTA, COUNTY OF RAMSEY,
District Court, Second Judicial District.

Present: Judge Gunnar H. Nordbye, Senior Judge, United States District Court, District of Minnesota; Judges Ronald, E. Hachey, John W. Graff, Archie L. Gingold, Edward D. Mulally, Harold W. Schultz, David E. Marsden, J. Jerome Plunkett, Otis H. Godfrey, Jr., Stephen Maxwell, Hyam Segell, and James M. Lynch of the Ramsey County District Court; Judges J. Clifford Janes and E. Thomas Brennan of the St. Paul Municipal Court; and Judge Andrew A. Glenn of the Ramsey County Probate Court. The Honorable Edward J. Devitt, Chief Judge of the United States District Court, District of Minnesota, was present in the audience.

Also present. Officers and members of the Ramsey County Bar Association and families and friends of deceased members of the Bar.

CHIEF JUDGE JOHN W. GRAFF: Ladies and gentlemen: In conformity with the custom of long standing we meet here today to pay thoughtful tribute to the members of the Bar who have passed away during the preceding year. As is customary, the exercises will be conducted by the Ramsey County Bar Association, and the Court at this time will recognize Mr. Frank S. Farrell, President of the Ramsey County Bar Association.

MR. FRANK S. FARRELL: Thank you, Your Honor. May it please the Court, Your, Honors, Members of the Bar, Families and Friends: At this time we have asked the Ramsey County District Court to set aside this day for the holding of Memorial Services for those members of our profession who have passed away in this last year. We meet here as friends to pay our respects to them and to recall their good works. At the conclusion of this ceremony, we shall move the Court to make these memorials a part of the permanent records of this Court and in so doing a part of the permanent records of our County.

[7] For the complete memorial proceedings, see "Ramsey County Bar Memorials – 1972" (MLHP, 2016).

Mr. Mortimer B. Miley is the Chairman of the Legal History and Biography Committee of the Ramsey County Bar Association. He will be conducting this ceremony and if the Court please, I would like to request that Mr. Miley be recognized at this time for the purpose of conducting this service, Your Honor.

CHIEF JUDGE JOHN W. GRAFF: The Court at this time recognizes Mr. Mortimer B. Miley, the Chairman of the Ramsey County Legal History and Biography Committee.

MR. FRANK S. FARRELL: Thank you, Your Honor.

MR. MORTIMER B. MILEY: That you, Mr. Farrell, and may it please the Court and Friends: Memorials have been prepared for presentation here today by various committees that are made up from the membership of the Ramsey County Bar Association, in behalf of the following recently deceased members of said Bar Association.

. . . .

MR. MILEY: The Honorable Walter F. Rogosheske, Mr. W. F. Oppenheimer, Mr. Gordon Shepard, Mr. Philip Stringer, Mr. Benno F. Wolff and Mr. Lawrence M. Hall have prepared a memorial on behalf of Mr. Montreville J. Brown, which will now be presented to you by Mr. Gordon Shepard.

Mr. Shepard read the memorial for Montreville J. Brown;

MONTREVILLE J. BROWN died June 4, 1971, at the age of 86, after 62 years of active and outstanding law practice. He was the son of Calvin L. and Annette (Marlow) Brown and was born at Morris, Minnesota, June 13, 1884. He and his forebears have a record of achievement paralleling the history of our state. In 1855 his grandfather, John H. Brown, came to Shakopee from Goshen, New Hampshire. He published a newspaper and practiced law there until 1871, when he moved to Willmar, Minnesota, becoming in 1875 District Judge of the Twelfth Judicial District, which judgeship he held until his death in 1890.

Monte's father, Calvin L. Brown, was instructed in the law by his father, John. He practiced first at Willmar and thereafter at Morris until 1887, when he was appointed District Judge of the Sixteenth Judicial District, a post he held until 1899, when he became a Justice of the Minnesota Supreme Court. He was elected Chief Justice in 1913 and served as such until his death in 1923.

Monte's elementary education was in the public schools of Morris, Minnesota. He received his academic and legal degrees from the University of Minnesota, the Bachelor of Law Degree in 1909. While at the University he became a member of Alpha Delta Phi academic and Phi Delta Phi law fraternities.

He located in Bemidji and practiced there until 1918, when he was appointed an Assistant Attorney General of Minnesota by the Honorable Clifford L. Hilton, then Attorney General of the State. While holding that office, he was designated by the Attorney General to be a member of the State Securities Commission, first created in 1917 to assume regulatory authority over the sale of stocks, bonds and securities within the state. Upon appointment as Assistant Attorney General, Monte moved his family from Bemidji to Minneapolis and resided there until 1925, and then established his residence in Saint Paul.

From 1923, and until his death, Monte was associated as a partner in the practice of law with Mr. William H. Oppenheimer and their partners and associates, with offices in Saint Paul.

Monte Brown's life, reflecting the legal heritage of his father and grandfather, was one of serious dedication to the practice of his profession and of public service both within and paralleling his professional life. While at Bemidji he served for a number of years as an elected member and, in time, as President of the School Board and also as City Attorney. During World War I he was a member of the Beltrami County Draft Board. During his residence in the Twin Cities he was very active in the First Congregational Church in southeast Minneapolis, serving many years as a member of its Board of Trustees and as Chairman of the Board. From 1921 to 1931 he taught law at the Minnesota College of Law in Minneapolis and contributed articles to the Minnesota Law Review on legislation and decisions relating to the regulation of securities. He was a member of the Ramsey County, Minnesota and American Bar Associations and also of the American Judicature Society.

Monte's legal practice was varied. Thorough analysis of legal problems and legal research was its cornerstone, but Monte never lost sight of the evidentiary substance necessary to sustain his conclusions before a court. With this kind of an approach, Monte developed a considerable appellate practice, which he particularly enjoyed. He participated in some 84 appeals from District Court decisions on a variety of issues, including two to the United States Supreme Court and one to the Supreme Court of the State of South Dakota.

Monte's interest in public law continued during the entire period of his practice in Saint Paul. When the Minneapolis-Saint Paul Metropolitan Airports Commission was created in 1943, it, like the Securities Commission in 1917, was an agency administering a new frontier. Monte, representing his firm, became general counsel of the Commission and served in that capacity until shortly before his death. All major litigation, consisting of eight or more appeals to the Supreme Court, involving the constitutionality of the Minneapolis-Saint Paul Metropolitan Airports law and problems arising thereunder, was conducted by Monte. During this time he also represented the City of Minneapolis as special counsel in rate hearings involving the Twin City Rapid Transit Company, which extended over a period of ten years or more and culminated in several appeals to the Supreme Court.

Monte was active in Masonry, belonging to all of the Masonic bodies including both Scottish and York Rites, and was a member of the Osman Temple, Saint Paul. He served as Grand Master of Masons of Minnesota in 1933 and for fourteen years as a member of the Board of Trustees of the Masonic Home of Minnesota. During the period of his St. Paul residence over varying periods of time he was a member of several of the private, social clubs in the community.

Monte was much interested in sports, particularly fishing, tennis and baseball. While an undergraduate at the University, he pitched Varsity baseball for all four years and was captain of the team in 1906. This interest in baseball continued throughout his life. Batting averages were second nature to him—so much so that he kept a batting average on his 84 Court appeals. This record, by the way, was very respectable, with 69 wins and only 15 losses, a batting average of .821.

While Monte Brown's public record is, for us, a worthy legacy, it is the fine qualities of the man which we, who knew him, will always have with us and treasure. Very reserved, somewhat shy, taciturn, and stern in appearance, to those who knew him he displayed a delightful but low-keyed sense of humor. He had an uncompromising dedication to what was ethical, right and fair, not only from the standpoint of legal relationships but concerning attitudes toward his fellowmen in every walk of life. It was this dedication, coupled with a direct and deeply perspective evaluation of the complex problems which were presented to him, that made his advice to his clients so valuable, not just for the problem at hand, but as a continuing guide for conduct.

We, his partners, associates and fellow lawyers, miss him greatly and share with his widow, Minnie Stinchfield Brown, his daughters, Katherine Brown,

Louise Christianson, Margaret Brooks, Joanne Wright and their families a treasured memory of his life.

Respectfully submitted,
LAWRENCE M. HALL
WILLIAM H. OPPENHEIMER
JUSTICE WALTER F. ROGOSHESKE
GORDON SHEPARD
PHILIP STRINGER
BENNO F. WOLFF

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Posted MLHP: February 11, 2017.