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The Sovereign, Immunity of the States of the United States

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THE SOVEREIGN IMMUNITY OF THE STATES OF THE UNITED STATES

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I.

One of the most enduring and widespread doctrines of law is that of sovereign immunity. One may speculate that it is an inherent attribute or consequence of statehood, and that as a result the concept of sovereign immunity, under varying degrees and forms of articulation, is as venerable as the concept of the state itself. Without essaying an excursion into the uncertain origins of this doctrine as it has come to be known in modern jurisprudence,[1] it became publicized in English common law under the slogan "The king can do no wrong." This unnecessarily obtrusive expression of the doctrine caused it to be unpalatable to American courts after the overthrow of English rule in the colonies, and they abjured any such formulation of a legal principle.[2]

Nevertheless, it was only this approach and verbalization of the doctrine of sovereign immunity that was rejected. In a number of early cases after the Revolution the doctrine was vigorously applied in both state and federal courts. Indeed, so intense was the need felt for the substance of the doctrine, that its apparent impairment by a federal court decision in 1793 wherein article III, section 2 of the Constitution[3] was interpreted as subjecting a state to the court's jurisdiction at the instance of the citizen of another state,[4] promptly gave rise to the eleventh amendment, wherein such subjection of a state to federal jurisdiction was expressly prohibited.[5]

Statements of the doctrine of sovereign immunity have been

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1. Apparently it is generally considered to be a post-Roman concept, both as to the immunity of the domestic sovereign from the jurisdiction of its own courts (see Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476 (1953)) and as to the immunity of the foreign sovereign from judicial authority; as to the latter, the near universality of the Roman state precluded for the most part the possibility of there being foreign sovereigns in a status of equality with Rome, and hence the question of jurisdiction over a foreign sovereign was more theoretical than real, and did not lead to the formulation of legal doctrine (see Mustoe, *Rights and Liabilities of Foreign Sovereigns and Foreign States as Litigants*, 40 Jurid. Rev. 150 (1928)).

2. The slogan was solemnly renounced by the Supreme Court as forming any part of the law of the United States in Langford v. United States, 101 U.S. 341 (1879).

3. "The judicial power (of the United States) shall extend to all cases . . . — between a State and Citizens of another State."

4. Chisholm v. Georgia, 2 U.S. 419 (1793).

5. This Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

made so frequently by courts and writers that it is hardly an abstruse or esoteric thing, and little additional discussion of its content is needed. It may be simply stated as the rule that no sovereign may be subjected without its consent to the jurisdiction of a judicial tribunal. But it has at least two or three basic aspects. One is what may be termed the domestic immunity of the sovereign from the jurisdiction of the sovereign's own courts. Another may be viewed as international sovereign immunity, whereby the sovereign is not amenable to the jurisdiction of the courts of a foreign sovereign (or, in converse expression, whereby courts may not take jurisdiction of a foreign sovereign). A third facet may be said to exist, to the extent that a sovereign person may be considered as distinct from the state of which he is the head, whereby such an individual, by virtue of his office alone, is immune from the jurisdiction of any court, foreign or domestic.

Though sovereign immunity is conceded to be an integral part of the law of the land, a number of American writers have held it up to a great scorn and obloquy, particularly in its domestic aspects.[6] Perhaps the Hobbesian maxim ("The king can do no wrong") which adorned the doctrine when it was imported into our jurisprudence has been viewed as a nefarious counter-revolutionary device which, if not frustrated, may yet undo the accomplishments of our valiant predecessors of 1776. This may account at least in part for views sometimes expressed that fall little short of describing sovereign immunity as a surviving medieval anomaly that never had any proper function save its former utility as an instrument of torture employed by feudal tyrants in negotiating with their subjects. At first blush it may seem unreasonable, and perhaps "undemocratic", that the state should not be accountable for its acts before tribunals of justice. However, a thoughtful discussion of the merits or justification of sovereign immunity would involve a consideration of the nature and purpose of the state itself, and the results that would follow upon abolition of the doctrine. Such matters are far beyond the modest scope of this discussion.

Nevertheless, it may be pointed out as a partial answer to such critics that, since the doctrine applies only when the sovereign does not consent to jurisdiction, waiver of sovereign immunity is available, and has often been utilized to remedy palpable injustices that

6. In this group of writings must be included Herbert Barry, whose article *The King Can Do No Wrong* appears in 11 Va. L. Rev. 349. He thus characterizes sovereign immunity: "This enlightened doctrine of the government and its agencies being outside of and above the law is an old story. In fact, it is so old that it is an anachronism. But it has not lost its youthful vigor."

the doctrine may sometimes entail—as most any general rule of law is susceptible of doing when its encounters the specific or eccentric circumstances of "hard cases". While an excursion into the large topic of the waiver of sovereign immunity cannot be undertaken here, it may be noted that these waivers, however wide may be their effectiveness, in no sense constitute a repudiation or modification of the doctrine itself. On the contrary, they are more correctly conceived as explicit reaffirmations of it, since they recognize that in the absence of waivers the doctrine would apply.[7] An express waiver of only part of the immunity implies that the edifice itself is to remain intact. Otherwise, the subject having come under governmental scrutiny, the immunity would have been abolished in toto, if it as such had been found unsuitable to the conditions of contemporary society.

It may be cogently argued that it is no justification of sovereign immunity to say that it may be waived. While the purpose of this discussion is to give an exposition of rather than a justification for a particular aspect of sovereign immunity, it is worthy of note that so eminent a jurist as Holmes defended the concept against viscerally inspired attacks in these words: "A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right stands."[8]

The peculiarities of the doctrine of sovereign immunity as applied to the states of the United States derive from their membership in a federation. It is clear that they are not "states" in the international sense of the word, as they have conceded to the federal government those indicia of sovereignty which would permit them to claim international personality or statehood. While direct authority appears to be lacking on the point, it may be assumed that no state of the United States could assert sovereign immunity as a matter of right before the courts of any jurisdiction outside the United States. The laws or policies of such jurisdictions would be operative, and as a practical matter probably the United States

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7. These waviers may take the form of the specific consent of the sovereign in individual cases, or in legislation setting up special courts (*e.g.*, the "Court of Claim," as in the United States and New York) and procedures specially designed to adjudicate claims against the sovereign, or exempting generally certain classes of actions against the sovereign from the bar of sovereign immunity, a most notable recent example of the latter being the Federal Tort Claims Act, first enacted in 1946 and revised in 1948.

8. Kawananakoa v. Polyblank, 205 U.S. 349 (1907).

government would intervene in such cases and they would ultimately be disposed of on a political level.[9]

Yet, for purposes of domestic United States law, it is established that the states did not abdicate that element of "sovereignty" as would support their immunity before federal and state courts of the country, and the Constitution expressly exempts them, as we have seen, from compulsory jurisdiction of the federal courts, save only in the event of suit brought by another state.[10] The sovereign immunity of the states then becomes a question of domestic law within this federal framework. It has its own "domestic" aspect as applied to each state, and its "international" aspect becomes part of "interstate" relationships.

II.

With regard to its domestic aspect the doctrine of sovereign immunity is in full vigor in each and all of the forty-eight states. Some state constitutions do not even permit the state to waive its immunity.[11] In rationalizing the rule, it has been stated that a judgment against the state would be illogical, as there would be no way to enforce the judgment, if there had been no consent to the suit, and hence no funds out of which a judgment might be paid.[12] Moreover, the subjection of public funds to seizure at the instance of a private party would be subversive of the public interest and impose an undue burden on the functioning of the government.[13] And, since the court is but an arm or agency of the state, it can only apply the standard of justice adopted by the state itself; hence, it is pointless for the court to interfere, as the claimant may submit his claim directly to the legislative or executive branches of the state, since they presumably would see to the payment of a just claim in the first instance, and if they were disposed to be unjust and tyrannical, a judicial pronouncement, whose enforcement would depend upon them, would be of little efficacy.[14]

The absolute domestic sovereign immunity of the states has been equally applied by the federal courts, where the states have been

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9. For further discussion along this line, see *infra* at footnote 28.

10. See Willis, *Doctrine of Sovereign Immunity Under the U. S. Constitution*, 15 Va. L. Rev. 437 (1929).

11. This appears to be or have been the case at least in Alabama, Arkansas, Illinois and West Virginia. See Note, *Immunity of State Agency from Suit*, 43 W. Va. L. Rev. 266 (1937).

12. University of Maryland v. Maas, 173 Md. 554, 197 A. 123 (1938).

13. See Note, *Sovereign Immunity of the States: the Doctrine and Some of Its Recent Develpoments*, 41 Minn. L. Rev. 234 (1956).

14. Such a line of argument, without being further developed, scarcely disposes of all objections to it. See Pingrey, *State Sovereignty Superior to Courts*, 20 Cent. L.J. 167, (1885) and Note, *Liability of a State to be Sued in General*, 12 Ia. L. Rev. 309 (1927).

held immune from suit by their own citizens as well as by those of sister states.[15] The fact that federal question may have been involved has not affected the applicability of the state's immunity in federal courts.[16]

An attack on the sovereign immunity of the states in federal courts was made in *Hans v. Louisiana*[17] where a citizen of Louisana sued the state on its bonds in federal courts. The plaintiff contended that since the eleventh amendment merely stated that federal jurisdiction did not extend to suits against a state by citizens of another state, it had no applicability to suits against a state by its own citizens. However, the court found that the narrowness of the language employed in the amendment could be ascribed to the fact that it had been devised for the purpose of undoing the effects of *Chisholm v. Georgia*,[18] and there was hence no implication that the traditional concept of the state's sovereign immunity was otherwise compromised.

A most interesting and vigorous application of the domestic sovereign immunity of the states occurred in *Monaco v. Mississippi*.[19] This appears to be the only case in American legal history where a foreign sovereign state, as such, sought to sue one of the United States. The principality of Monaco brought suit in federal court against Mississippi on some bonds issued by that state and subsequently assigned to the principality. Generally, the courts of a sovereign state are available to suit by a foreign sovereign recognized by and enjoying friendly relations with the forum state.[20] Monaco was such a foreign sovereign, so far as the United States was concerned, and American courts would normally be bound under general principles of law and policy to entertain suits by Monaco against private parties. Therefore, the possibility seemed to exist for placing a limitation on the domestic sovereign immunity of the states by not permitting them to assert their immunity in American courts when the plaintiff was a friendly foreign sovereign, on the theory that otherwise the state is interfering with matters of foreign policy, which are solely within the competence of the federal government. Since no state of the United States is a "state" in terms of international law and usage, a foreign sov-

15. *E. g.*, O'Connor v. Slater, 22 F.2d 147 (8th Cir. 1927), *appeal dismissed*, 278 U.S. 188 (1929).

16. *E. g.*, *In re* State of New York, 256 U.S. 490 (1921), where federal admiralty jurisdiction was involved.

17. 134 U.S. 1 (1890).

18. See footnote 4, *supra*.

19. 292 U.S. 313 (1934).

20. This well settled rule is set forth by the language of the court in Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923).

ereign would not consider that it was suing a sovereign in our courts when suing a state, and hence would regard the raising of the bar of sovereign immunity as an act of bad faith and disruptive of the comity existing between it and the United States. And the United States might be subjected to retaliatory treatment in the courts of the affronted foreign sovereign. Therefore, the argument would conclude, sovereign immunity would not be available to a state of the United States in cases where the plaintiff party was a foreign sovereign.

Of course, when such a miniscule foreign sovereignty as Monaco is involved, no substantial foreign policy problems are likely to be apprehended. Conceivably, where the importance of the foreign state or other circumstances of the case were such that the national interests of the United States might suffer material detriment from a state's asserting its sovereign immunity against a foreign power, the federal courts might feel bound to deny the immunity, or at least to make inquiries of the federal executive as to the affect of the case on foreign policy matters and be guided by the replies received. Nevertheless, in the absence of any such developments, *Monaco v. Mississippi* remains as a staunch bastion of the domestic sovereign immunity of the states.

III.

It is to be borne in mind that the according of sovereign immunity, whether to a domestic or a foreign sovereign, is a question of the *lex fori.* Thus, whether a foreign sovereign will receive immunity may vary from one jurisdiction to the next, accordingly as each jurisdiction regards the rules of sovereign immunity and as each may regard the asserted sovereignty of the foreign party. On the international plane, the granting of immunity may hinge upon political matters, the chief of which being whether the sovereignty of the foreigner has been recognized by the government of forum. Considerations of this type are absent as between the states of the United States, all of whom take judicial notice of each other's existence and statehood, and repeatedly reiterate the comity that subsists between them. Thus, the immunity of a state from jurisdiction of the courts of a sister state was recognized at the outset of independence from Great Britain.[21] However, there have been some subsequent indications of possible limitation on the absolutism of the immunity of a state in the courts of a sister state.

21. Nathan v. Commonwealth of Virginia, 1 U.S. (1 Dallas) 77 (1781).

This possible limitation grows out of modifications of the general doctrine of sovereign immunity that have developed as a result of the modern tendency of states to engage in activities and enterprises which have not been traditionally deemed as part of the function of sovereignty. The question then arises whether the sovereignty of the state renders it immune even as to those activities that have nothing to do with the discharge of its sovereign functions, and are the same sort of business that may properly be conducted by private parties. The absolutist view is that the immunity derives from the character of the defendant as a sovereign (*ratione personae*) and hence it is immaterial what may be the nature of the act giving rise to the claim against the sovereign. The opposing or limited theory is that the immunity attaches by reason of the character of the activity in which the sovereign was engaged (*ratione materiae*) and which gave rise to the claim against the sovereign, and the immunity will be limited to those claims deriving from acts performed in the discharge of sovereign functions.[22] Both of these views appear to have found application in state courts, although this terminology has not been employed by them.

North Dakota appears to have opted in favor of the absolute *ratione personae* theory in *Paulus v. South Dakota*.[23] South Dakota owned coal mines in North Dakota, and the plaintiff upon being injured as an employee in these mines brought an action against South Dakota in North Dakota courts under the North Dakota workmen's compensation statute. With regard to South Dakota's right as a sovereign, the plaintiff contended that the owning and operating of coal mines was not an activity partaking of the attributes of sovereign behavior and hence South Dakota could not assert its immunity as to them. But the court took the view that it was the prerogative of South Dakota to determine those activities in which it might properly engage as a sovereign. It pointed out that there is no technical or clear distinction between those acts which are sovereign in nature and those which are not, and moreover the practice of sovereigns as to which acts of theirs are customary or characteristic of their status is subject to change and evolution with the passage of time. It is possible to point to various salient facts of this case as bases for limiting and distinguishing it, as did the Georgia court as indicated

22. For a discussion of the absolute and limited theories (and of the Latinisms which have been devised for their embellishment), see Garcia-Mora, *Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications*, 42 Va. L. Rev. 335 (1956).

23. 58 N.D. 643, 227 N.W. 52 (1929).

in the discussion which follows. Nevertheless, the tenor of the *Paulus* case is clearly a strong endorsement of the *ratione personae* theory of sovereign immunity, as applied to a sister state of the United States.

Georgia, however, refused to accord sovereign immunity to Florida in an attachment suit brought against certain property located in Georgia and owned by Florida in connection with the operation of the state hospital.[24] The court rested its decision in part or alternatively on the ground that since this was an attachment proceeding, only the property itself was subjected to compulsory jurisdiction of the Georgia court, and if Florida chose to appear to defend its property it did so on its own motion in the same manner as it might have appeared as a plaintiff. Had the case been disposed of solely on such grounds, the issue of sovereign immunity would have been largely side-stepped. But in addition the court found that in entering Georgia for this purpose, Florida was not acting in its sovereign capacity, as the operation of hospitals for the insane and collateral activities in support of them were not within the orbit of cognizable state activities. The court saw no reason for favoring Florida; if it was going to compete with citizens of Georgia in matters of business and commercial behavior, it could not claim immunity from Georgia citizens' suits against it in Georgia courts. The *Paulus* case was recognized, but distinguished on the ground that the plaintiff there was a citizen of the state being sued; however, a closer study of these cases does not support the distinctions the Georgia court sought to make, and they are more realistically viewed as being in opposition.

The states of the United States are not unique political phenomena, and other federated states exist in the world, with varying degrees of autonomy and apportionment of powers between the central and state governments. Instances have occurred of states of other federal unions being sued in federal and state courts of the United States and the issue of their sovereign immunity has arisen. The treatment accorded such states is instructive for the light it sheds on the extent to which the sovereignty of the states of the United States is regarded as but a matter of domestic federal law, and the extent to which they are sovereign within the meaning, at least, of the principles governing sovereign immunity.

24. Florida State Hospital for Insane v. Durham Iron Co., 66 Ga. 350, 17 S.E.2d 842 (1941). The attachment proceedings were brought against the governor of Florida and the various state officials comprising his cabinet, but it was treated by the court as making the State of Florida a party to the litigation.

In such instances the courts are free to apply their interpretations of the doctrine without limitation by the structures of the federal constitution and its regulation of relations between states. To the extent that the states of these foreign federations occupy a status similar to that of the states of the United States, presumably their entitlement to the enjoyment of sovereign immunity should be similar.

The defendant in *Molina v. Comision Reguladora del Mercado de Henequen*[25] was a corporation, at least quasi-public in nature, and the defense was raised that this involved a suit against the Mexican state of Yucatan, which, as a state of a federal union, was entitled to immunity in the same way as a state of the United States. While the decision rested in part on the aspect that this was a suit against a foreign corporation rather than the state of Yucatan, the court nevertheless seemed to feel that in any event there would have been no necessity to accord immunity to an entity such as Yucatan, which, being but a member of a federation of states, had no sovereignty of its own to assert, as Mexico alone was sovereign over the territory known as Yucatan. The defendant urged that the municipal law of the United States and New Jersey accorded sovereign immunity to the states of federations, but the court sought refuge from this contention by saying that in any case the defendant was a corporation, and not the state of Yucatan.

However, a federal court decision exemplified greater respect to the two Brazilian states of Sao Paulo and Rio Grande do Sul.[26] After disposing of the attempt of the Brazilian government to intervene in the suit, the court stated that these two states could claim sovereign immunity in their own rights. The court stated that the facts laid before it by the Brazilian ambassador and the State Department, of whom inquiries had been made, compelled the conclusion that "Brazilian states occupy in the Brazilian union a status comparable to that of our own states in the American union." Although recognizing controversy and uncertainty as to the suability of the constituent states of a federal union, the court concluded: "It seems clear to us that the law should accord the immunity which we claim for our own states (*Monaco v. Mississippi, supra*) to foreign states whose constitutional position is the same."

An indication of how the sovereign immunity of states of the United States might fare abroad may be gleaned from the refusal

25. 91 N.J.L. 382, 103 A. 397 (Sup. Ct. 1918).
26. Sullivan v. State of Sao Paulo, 122 F.2d 355 (2d Cir. 1941).

of a French court to accord such immunity to the Brazilian state of Ceara, because of its lack of international personality.[27] It is doubtful that an American state could urge that it had more "stateness" or sovereignty than a Brazilian state, or that a foreign court would investigate the internal structure of various federal unions, so as to differentiate between them and grant or withhold immunity on the basis of the degree of sovereignty discovered in the instance of each union or each state. All such embarrassments can be avoided by limiting the immunity to states that are sovereign in the international sense. Yet, such a court might still grant immunity to a political subdivision of its own federal and complex sovereignty, as did the British court in *Duff Development Co. v. Kelantan.*[28]

Probably the general attitude of American courts with regard to the immunity of states of the United States outside their own courts or in courts of sister states is reflected in the opinion of Justice Holmes in *Kawananakoa v. Polyblank*[29] quoted with approval in *Sullivan v. State of Sao Paulo, supra*: "The doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights." While the universal validity of this definition may be doubtful at best, it clarifies thinking about the doctrine in that it frankly admits that "sovereign" immunity is broader than it purports to be, and may be applicable to entities that could not properly be generally characterized as sovereign.

IV.

The term "sovereign" may be used in an abstract sense to refer to the state or the government of it, without specifying any particular person or office or institution as being the repository of sovereignty. Indeed, a great deal of philosophical energy and cerebration has been expended in searching for the exact site which either does or ought to serve as the repository for this elusive, if not chimerical, phenomenon. However, the term may also be used to refer to the flesh-and-blood person who serves in the capacity of head of state.

Depending on the constitutional form or political theory in force, the head of state may either himself possess the totality of the

27. State of Ceara v. Dorr, Cour de Cassation, [1932], Receuil Dalloz 196.
28. [1924] A.C. 797.
29. 205 U.S. 349 (1907).

state's sovereignty, or be merely the highest official representative of the sovereignty, which resides elsewhere than in his person—presumably, in the people. But irrespective of the rule or theory of sovereignty applicable to a particular state, the titular head of a sovereign state is entitled to personal immunity from courts' jurisdiction. While there has been some doubt cast upon the personal sovereign immunity of the president of a republic when he is not acting in his official capacity,[30] it appears that a president will be accorded personal sovereign immunity on the same basis as a monarchical head of state, irrespective of a president's technical standing as a "sovereign".[31]

The interest in this point for purposes of this discussion is whether the governors of the states can assert personal immunity from judicial process on the basis of their status as princes or heads of states. If the states are sovereign, at least for purposes of application of the sovereign immunity principle, will their governors, as heads of state, enjoy the same personal immunity that is accorded to emperors, kings, presidents, and other princes?

It seems quite clear that this aspect of sovereign immunity does not apply to the states or their governors. Courts may decline to entertain suits against governmental agencies, corporations or officers on the grounds that the suit, under the particular circumstances of the case, or the particular characteristics of the named defendant, is essentially one against the state itself, from whom the defendant is indistinguishable. The courts would consider themselves without jurisdiction because of the operation of the principles of sovereign immunity. Another basis for denying relief against such defendants is not lack of jurisdiction, but because the matter at issue involves the prerogatives or discretion of public officials or bodies, which have been accorded to them by the law of the jurisdiction, and judicial intervention would be improper. The latter type of situation does not involve any principle of jurisdictional immunity, as jurisdiction will be entertained for the purpose of determining whether the matter at hand involves official acts beyond the scope of judicial fiat. And, provided the suit does not fall within the former category as being one against the state itself, the court may grant the relief sought on proper proof, such as abuse of discretion or unauthorized acts on the part of the defendant.

30. See Peterson, *Rights and Immunities of A Sovereign Ruler*, 88 Cent. L.J. 28 (1919), and Glenn, International Law (1895).
31. See Fenwick, International Law, 307 (3rd ed. 1948).

With regard to subordinate officials or agencies of the state, sovereign immunity could only be an issue to the extent that they succeed in identifying themselves with the state. Nor does a governor as defendant raise an issue as to his own personal immunity as a "sovereign" or "prince" if he claims identification with the state or that the matter in question is solely within his official capacities and discretion. In other terminology, such as appeared earlier in the discussion, unless the governor asserts immunity absolutely (*ratione personae*) on the basis of the sanctity of his person rather than qualifiedly because his acts of which complaint is being made were done in his official capacity (*ratione materiae*), he does not assert any immunity peculiar to himself distinct from that of the state.

It has rarely occurred that any governor has sought immunity on the theory of the sanctity of his person as head of the state. However, it cannot be said that there has been any general authoritative dogma against such a rule of law as part of American jurisprudence. That it remains an unresolved issue is indicated by the fact that in a case of quite recent vintage[32] a defendant governor asserted that the court had no jurisdiction over his person, although it proved not to be necessary to decide the point in disposing of the case.

The typical suit in which a governor is apt to be made defendant is usually an injunction or mandamus action, with the center of controversy being official acts or determinations by the governor. It does not appear that any governor has ever attempted to assert in a federal court personal immunity from jurisdiction. His resistance to the suit has been usually based on a contention that the complaint involved acts within his official authority and discretion. Federal courts have assumed jurisdiction for the purpose of deciding these issues. In so doing, the courts necessarily decide not only whether they have jurisdiction, but the substantive question of granting the relief sought as well. For, if courts have jurisdiction of a governor only when he is behaving unlawfully or in excess of his powers, by deciding they have jurisdiction they have also decided that the governor has misbehaved in the manner alleged as entitling the plaintiff to relief. This clearly amounts to no "immunity" at all, and places governors on no different footing than any other public official.

This judicial attitude in the federal courts was exemplified by

32. State *ex rel.* Lemon v. Langlie, 45 Wash. 2d 82, 273 P.2d 464.

two cases for injunction against the governor of Minnesota growing out of industrial disturbances in the state. In one of these[33] it was stated that the injunction would lie because the governor had exceeded his executive powers, while it was denied in the other case. In denying the injunction the court stated: "Within the range of the Governor's permitted discretion, his acts are not subject to the regulations or control of the judiciary. Arbitrary and capricious acts of the Governor, and those having no relation to the necessities of the situation, may be enjoined by the courts, as any clear abuse of power by an executive may be enjoined."[34]

It appears, then, that the restrictions on the federal judiciary as to jurisdiction over states, as set forth in the eleventh amendment, do not operate in favor of state governors. It is true, that if the suit against the governor is construed as being against the state, sovereign immunity will be a bar to the jurisdiction.[35] This, of course, involves the immunity of the state rather than the governor. And the state courts have frequently issued injunctions and mandamus orders against their own governors. While suits for such relief are often denied, it has not normally been for lack of jurisdiction of the governor's person, and no inherent repugnancy has appeared regarding the concept of subjecting a governor to the courts of his own state. The prevailing view in the states was succinctly expressed in *Hollman v. Warren, Governor:*[36] "Generally speaking, it is settled in this state that in an appropriate case, a writ of mandate will issue against the Governor of the state." The statement would be just as valid for injunctions, and no doubt for actions of prohibition and in the nature of quo warranto as well.

Yet, there is authority to the contrary as well. In Arkansas and Massachusetts there have been court opinions which seemingly recognize the inviolability of the person of the governor through judicial process. In the former jurisdiction, the court has found that the executive of the states, like the President of the United States, are not liable to having their acts examined by the courts.[37] And in the latter instance, Chief Justice Knowlton reasoned as follows in abjuring the concept of a governor as amenable to court jurisdiction: "An order under a writ of mandamus against the Governor, if he should refuse to obey it, might present the strange

33. Strutwear Knitting Co. v. Olson, 13 F. Supp. 384 (D. Minn. 1936).
34. Powers Mercantile Co. v. Olson, 7 F. Supp. 865 (D. Minn. 1934).
35. Governor of Georgia v. Madrazo, 26 U.S. (1 Peters) 110 (1828).
36. 32 Cal.2d 351, 196 P.2d 562 (1948).
37. Hawkins v. the Governor, 1 Ark. 570 (1839).

spectacle of a direction by the court to the executive forces of the government, to coerce and punish the chief executive officer of the state, who commands and controls the military forces that are utlimately relied upon for the maintenance of law and order. It seems better to hold that, for whatever he does officially, the Governor shall answer only to his own conscience, to the people who elected him, and in the case of the possible commission of high crime or misdemeanor, to a court of impeachment."[38]

But even the foregoing language would limit the governor's immunity to his public or official acts or capacities. If a truly absolute and full-blown sovereign immunity were to be enjoyed by a governor, he would also be immune from suits relating to his personal matters having no connection with his office. Here indeed would be a theory of immunity tracing back to the mystique of anointment into the exalted ranks of princes, and, on the more practical level, to a time when the public treasury was hardly distinguishable, if at all, from the prince's personal estate. How diluted and temperate would be the joy with which the American electorate would receive such a doctrine! For that reason alone, it would be politically suicidal, and thus substantially impossible, for a governor to employ such a means of defense.

An attempt by a foreign governor to assert personal immunity when sued in the jurisdiction on a purely personal indebtedness was rejected in *American Industrial Finance Corp. v. Sholz.*[39] The governor of Florida was served with process in Illinois, when that prince was attending an American Legion convention in Chicago, allegedly pursuant to his official duties. However, the court found he was there as a private citizen, so that he was unquestionably subject to jurisdiction; whether he might have been exempt from jurisdiction for such a suit if he had been considered to be in Illinois on official business of Florida, is not settled in this decision.

Therefore, it appears that governors are not accorded the immunities as heads of states consistent with the qualties of sovereignty with which American courts vest those states. This may be viewed as a logical consequence of the artificiality of the sovereign immunity of the states of the United States. The immunity of heads of truly sovereign states follows as a matter of course and practicality, and the affairs of states and harmonious relations between them could not get on if their courts were to take jurisdic-

38. Rice. v. Draper, 207 Mass. 577, 93 N.E. 821 (1911).
39. 279 Ill. App. 45 (1935).

tion of their own and foreign princes. Because the states of the United States are not truly sovereign, and they do not conduct relations with other states, the justifications or necessity that support the immunity of heads of actually sovereign states do not apply to the states of the United States.