In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 62, Original

THE STATE OF NEVADA, *Plaintiff*,

VS.

THE STATE OF CALIFORNIA, *Defendant*.

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND BRIEF

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THE STATE OF NEVADA, *Plaintiff,*

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THE STATE OF CALIFORNIA, *Defendant.*

MOTION FOR LEAVE TO FILE COMPLAINT

The State of Nevada, by its Attorney General and by special counsel, Paul H. Cyril, asks leave of the Court to file its complaint against the State of California submitted herewith.

PAUL H. CYRIL
Counsel for Plaintiff

April 23, 1973

STATEMENT IN SUPPORT OF MOTION

This is an action by the State of Nevada against the State of California proposed to be instituted in this Court under the authority of Article III, Section 2, Clause 2, of the Constitution of the United States. The purpose of the proposed action is to establish that the courts of one state of the United States cannot constitutionally exercise jurisdiction over a sister state without that sister state's consent.

An automobile owned by the University of Nevada and being operated by an employee of the University, was involved in a two car collision on a highway in the State of California. The occupants of the second vehicle involved in the collision sued the State of Nevada and the University of Nevada first in the United States District Court for the Northern District of California and then in the California state courts. The Federal Court action was not pursued, probably because of the Eleventh Amendment; however, the petitioners were sued without their consent in the California state courts and were served with process under the California Vehicle Code Sections for service of process on non-resident persons.

Petitioners, based upon the theory of Nevada's sovereign immunity, successfully moved the San Francisco Superior Court to quash the service of process. The respondents appealed the order quashing service of process to the California Court of Appeal for the First District. The Court of Appeal affirmed the order.

Respondents petitioned for a hearing before the California Supreme Court. The order of the San Francisco Superior Court quashing service of process and the decision of the California Court of Appeal affirming the order were reversed by the California Supreme Court on the sole ground that, outside its own borders, the State of Nevada has no sovereign immunity and may, therefore, be sued in the California State Courts as may any Nevada individual or corporation.

Regardless of the outcome on the merits of the underlying case, the decision of the California Supreme Court has established a dangerous precedent. This precedent can only be avoided through affirmative action by this Court.

BRONSON, BRONSON & MCKINNON,
By PAUL H. CYRIL,
and
THE HONORABLE ROBERT LIST,
Attorney General of the State of Nevada,
Counsel for Plaintiff.

April 23, 1973

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No. ....., Original

THE STATE OF NEVADA, *Plaintiff*,

VS.

THE STATE OF CALIFORNIA, *Defendant*.

COMPLAINT

The State of Nevada, by its Attorney General, and by special counsel, brings this suit in equity against the defendant, the State of California, and for its cause of action states:

I

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States.

II

The California Supreme Court is an agency of the State of California created by the Constitution of the State of California, Article VI.

III

The State of California, through its Supreme Court, extended the personal jurisdiction of the California courts to give said courts power over the State of Nevada.

IV

Exercising this expanded concept of personal jurisdiction, in *Hall v. University of Nevada,* 8 Cal.3d 522, the California Supreme Court abrogated Nevada's sovereignty by holding the State of Nevada subject to the laws of California as if Nevada were a non-resident individual or corporation.

V

Sovereign immunity is a right which was possessed by each individual state, under international law, at the time the Constitution of the United States was signed.

VI

The right of sovereign immunity from suit by individuals was not surrendered in the Constitution of the United States.

VII

The right of sovereign immunity from suit by individuals is, therefore, reserved and guaranteed to the states under the Tenth and Eleventh Amendments.

VIII

The action of the California Supreme Court abrogating Nevada's sovereign immunity violates Nevada's rights reserved by and guaranteed under the Constitution of the United States.

IX

The action of the California Supreme Court will cause immediate and irreparable harm to the State of Nevada in that it seeks to compel Nevada to defend itself outside its own borders under the threat of unlimited liability; in violation of its own statutes; and in violation of decisions of its own Supreme Court which has ruled that Nevada officials are not authorized to purchase liability coverage beyond the limits of liability established by the Nevada Legislature.

WHEREFORE, plaintiff prays:

1. That a decree be entered declaring that the several states of the United States are possessed of sovereign immunity from suit in the courts of a sister state.

2. That a decree be entered declaring that the driving of a state-owned vehicle by a state employee upon the highways of a sister state does not constitute consent to suit in the courts of the sister state.

3. That the State of California and all of its officers, agents and employees be enjoined and prohibited from exercising personal jurisdiction over the State of Nevada.

4. For such other and further relief as this Court may deem proper and necessary.

PAUL H. CYRIL

April 23, 1973

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. ....., Original

THE STATE OF NEVADA, *Plaintiff*,

VS.

THE STATE OF CALIFORNIA, *Defendant*.

BRIEF SUPPORTING MOTION FOR LEAVE TO FILE COMPLAINT

ISSUES PRESENTED

That injunction is a proper remedy under the Court's original jurisdiction.

That violation of a state's sovereignty by a sister state raises a federal question.

That the courts of one state cannot constitutionally exercise jurisdiction over a sister state without its consent.

That, for the purposes of this case, Nevada cannot be deemed to have consented to suit in California courts.

That California's refusal to apply Nevada's statutory limitations of liability violates full faith and credit.

STATUTORY PROVISIONS INVOLVED

California Vehicle Code §§17451 et seq., California's nonresident motorist "long arm" statute, are fully set out in the Appendix.

Nevada Revised Statutes relating to limited waiver of immunity from suit, Nevada Revised Statutes Sections 13.025 and 228.170 (2) are fully set out in the Appendix.

STATEMENT OF THE CASE

An automobile owned by the University of Nevada and being operated by an employee of the University was involved in a two car collision on a highway in the State of California. The occupants of the second vehicle involved in the collision sued the State of Nevada and the University of Nevada in the United States District Court for the Northern District of California and in the California State Courts. The petitioners were sued without their consent and were served with process under the California Vehicle Code sections for service of process on non-resident persons.

Petitioners, based upon the theory of Nevada's sovereign immunity and upon the unconstitutional application of the California "long arm" statute, successfully moved the San Francisco Superior Court to quash the service of process. The respondents appealed from the order quashing service of process to the California Court of Appeal for the First District. The Court of Appeal affirmed the order.

Respondents petitioned for a hearing before the California Supreme Court. The order of the San Francisco Superior Court quashing service of process and the decision of the California Court of Appeal affirming the order were reversed by the California Supreme Court on the sole ground that, outside its own borders, the State of Nevada has no sovereign immunity and may, therefore, be sued in the Cali-

fornia State Courts as may any Nevada individual or corporation.

The instant issue is a deceptive one for it deals *only* with the relationship between the several states and not with the ability of a plaintiff to obtain a convenient forum. The individual state employee is subject to suit in the state where the tort is committed, an action against his estate is pending in the Superior Court for Alameda County, California. The insurance which would be available if the state were sued is also available when only the driver is sued. This case is nothing more than California's direct infringement upon Nevada's most basic constitutional right, its sovereignty.

It is emphasized that this is *not* a dispute between plaintiffs and an insurance company. The only existing coverage is already applicable in an existing action pending against the estate of the employee driver.

The Court's attention is directed to a petition for certiorari entitled *University of Nevada v. Hall,* filed concurrently herewith.

REASONS FOR GRANTING THE MOTION FOR LEAVE TO FILE A COMPLAINT

INJUNCTION IS A PROPER REMEDY IN AN ORIGINAL ACTION

Granting an injunction to enforce a right asserted in an original action is a proper exercise of the Court's original jurisdiction. *(Alabama v. Arizona,* 291 U.S. 286, 78 L.ed. 798 (1934); and *Pennsylvania v. West Virginia,* 262 U.S. 554, 67 L.ed. 1117 (1922).)

THE DECISION BELOW INVOLVES A SUBSTANTIAL FEDERAL QUESTION WHICH HAS NOT BEEN SETTLED BY THIS COURT.

The sovereignty of a state under the Constitution of the United States is derived from the position of the original States as members of the community of nations. Each State was possessed of absolute sovereignty. When the Constitution of the United States of America was proposed there was considerable discussion in regard to those rights which the several States were surrendering. This Court has recognized the intent of the framers to preserve the sovereign immunity of the several states.[1]

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[1]Hamilton, in The Federalist, No. 81, made the following emphatic statement of the general principle of immunity: 'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would by the adoption of that plan be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence would be altogether forced and unwarrantable.'" *Monaco v. Mississippi* (1933) 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282, 1286-1287.

The importance to the People, the ultimate sovereign, of the several States retaining all rights not expressly surrendered in the Constitution is exemplified by the passage of the Tenth and Eleventh Amendments to the Constitution. The People saw fit to include within the Bill of Rights the Tenth Amendment, setting out their understanding of the relative position of a state in the federal system created by the Constitution,[2] providing:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

A part of the understanding of the People when the Constitution was ratified was the idea expressed by Hamilton in Federalist No. 81, that the States retained their sovereignty except as specifically surrendered in the Constitution.

Further evidence is found in the words of Madison spoken during the Virginia ratifying convention interrupting the jurisdiction of the Federal Judiciary:

> "Its jurisdiction in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court." (3 Elliot's Debates 533.)

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[2]"The 10th Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified and has no limited and special operation . . ." (*United States v. Sprague* (1931) 282 U.S. 716, 51 S.Ct. 220, 75 L.Ed. 640, 645.)

In the same ratifying convention, Marshall argued in support of Hamilton's and Madison's position:

> "I hope that no gentleman will think that a State will be called at the bar of the Federal Court . . . it is not rationale to suppose that the sovereign power should be dragged before a court." (3 Elliot's Debates 555.)

At one point the Federal Judiciary believed that it had the power to exercise jurisdiction over a State where that State was being sued by a citizen of another State. *(Chisholm v. Georgia,* 2 Dall. 419, 1 L.Ed. 440 (1793).) The Eleventh Amendment to the Constitution of the United States was adopted specifically for the purpose of overruling *Chisholm v. Georgia*[3] and is an affirmation that under our Constitution each State retained its sovereign immunity from suit without consent.

This Court has explicitly held:

> "No sovereign State is liable to be sued without her consent. Under the Articles of Confederation, a State could be sued only in cases of boundary. It is believed that there is no case where a suit has been brought, at any time, on bills of credit against a State; and it is certain that no suit could have been maintained on this ground prior to the Constitution.
>
> 'It may be accepted as a point of departure unquestioned,' said Mr. Justice Miller, in *Cunningham v. Macon, & B. R. R. Co.,* 109 U.S. 446, 451 [27:992], 'that neither a State nor the United

[3]*Monaco v. Mississippi* (1933) 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282, 1287.

> States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.' " *(Hans v. State of Louisiana* (1889) 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed 842, 848.)

There can be no doubt that, except as surrendered in the Constitution, the several States have retained their sovereignty and in particular their soverign immunity from suit without their consent. Further, since an individual State's sovereignty is an essential element in determining a State's relationship in the Federal System to both its sister States and the Federal Government, it is a substantial federal question underlying the very Constitution itself.

COURT DECISIONS HAVE CONSISTENTLY HELD THAT A STATE IS NOT SUABLE WITHOUT ITS CONSENT

A case closely on point to the instant one is *Sullivan v. State of Sao Paulo* (2d Cir., 1941) 122 F.2d 355. In *Sullivan* the suit is one by a citizen of the United States of America against two of the federated states of Brazil. The *Sullivan* court stated that states in the American Union are immune from suit even in cases not covered by the Eleventh Amendment.[4]

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[4]"We believe, however, that the defendant states should be accorded sovereign immunity in their own right. The representation of the Brazilian Ambassador to the State Department has presented facts, accepted by the latter as true, which established that the

This Court recognized the immunity of the Territory of Hawaii to suit without its consent even though the territory derived all its powers by delegation from the United States Congress. The rule long established by this Court is that "No sovereign State is liable to be sued without her consent."[5]

THE REQUIREMENTS FOR FINDING THAT A STATE HAS CONSENTED TO BE SUED IN A COURT OTHER THAN ITS OWN.

The leading cases dealing with the issue of nature and quality consent by a state to be sued in courts other than its own are: *Chandler v. Dix, supra,* 194 U.S. 590, 48 L.Ed. 1129; and *Kennecott Copper Corp. v. State Tax Commission, supra,* 327 U.S. 573, 90 L.Ed. 863.

In *Chandler* the Supreme Court was faced with the issue of whether the State of Michigan had consented to be sued in the Federal courts. Plaintiff's property had been sold for taxes and he was alleging that the Michigan tax laws violated the United States Constitution. The *Chandler* court held that Michigan had

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Brazilian states occupy in the Brazilian Union a status comparable to that of our own states in the American Union. *It is well settled that the latter are immune from suit on general principles of international law in cases not covered by the 11th Amendment.* [Citation]" (Emphasis added) *Sullivan v. State of Sao Paulo, supra,* 122 F.2d 355, 358-359.

[5]*Hans v. State of Louisiana, supra,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842, 848; *Beers v. State of Arkansas* (1858) 61 U.S. 527, 15 L.Ed. 991; *Chandler v. Dix* (1903) 194 U.S. 590, 48 L.Ed. 1129; *Kennecott Copper Corp. v. State Tax Comm.* (1945) 327 U.S. 573, 90 L.Ed. 863; and *Parden v. Terminal Railroad of Alabama Docks Dept.* (1964) 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233, 237.

not consented. The Court referred to the Public Acts of Michigan, 1899, Act 97, Section 144, and stated:

> "That act provides that 'the auditor general shall be made a party defendant to all actions or proceedings instituted for the purpose of setting aside any sale or sales for delinquent taxes on lands held as state tax lands, or which have been sold as such, or which have been sold at annual tax sales, or for purpose of setting aside any taxes returned to him and for which sale has not been made.' But we are of opinion that if the foregoing words otherwise would apply to this case, they would not be construed as expressing a waiver by the state of its constitutional immunity from suit in a United States court. The provisions indicate that the legislature had in mind only proceedings in the courts of the state." *Chandler v. Dix, supra,* 48 L.Ed. 1129, 1131.

In *Kennecott,* the issue was whether the State of Utah had consented to be sued in the United States District Court. The United States District Court for the District of Utah had granted judgments in favor of the Plaintiffs. The Court of Appeals for the Tenth Circuit reversed the judgments with directions to dismiss the actions on the basis that the State of Utah had not consented to be sued in the Federal Courts holding:

> "The question here is in what sense did Utah use this phrase when it waived its immunity from suit? It had two immunities—it was absolutely immune from suit, and in addition thereto was also immune from suit in the Federal courts.

> Waiving its immunity from suit for the recovery of illegal taxes did not confer jurisdiction on Federal courts to entertain such actions unless the State in addition expressly consented that such a suit might be brought in the federal courts . . ." *Kennecott Copper Corp. v. State Tax Commission* (10th Cir. 1945) 150 F.2d 905, 907.

A State's commercial activity within a sphere regulated by statute can constitute consent only if (1) the legislative body enacting the statutory scheme intended to subject a State to suit under a given set of circumstances, and (2) the legislative body enacting the statutory scheme had the power to so subject a State to suit, as against the State's claim of immunity. (*Parden v. Terminal Railroad of Alabama Docks Department* (1964) 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233, 237).

THE STATE OF NEVADA CANNOT BE DEEMED TO HAVE CONSENTED TO SUIT IN THE CALIFORNIA COURTS

Unlike *Parden* there can be no holding that the California nonresident motorist statute controls an area where the several States have surrendered their sovereignty. The *Parden* Court held that only because the several States had surrendered to Congress the power to control interstate commerce, did Congress have the power to subject a State engaged in the proprietary operation of a railroad in interstate commerce to suit under the Federal Employer's Liability Act, 45 USC §551-56. *Parden* is merely an example of Blackstone's idea adopted by Mr. Justice

Wilson that "all jurisdiction implies superiority of power." (*Chisholm v. Georgia, supra,* 1 L.Ed. at 457.)

The State of California cannot, under our Constitution, have superiority over the State of Nevada. Each state, as it enters the Union, assumes a position as an equal to its sister states, inferior only to the Federal Government where sovereignty has been relinquished under the Constitution. Even if the California legislature had intended their nonresident motorists statute to apply to the State of Nevada, it was without power to do so. Neither is the decision of a University of Nevada employee to drive upon the California highways of the same character as the decision of the Alabama Legislature authorizing the railway to engage in business "as though it were an ordinary common carrier." (*Parden v. Terminal Railway of Alabama Docks Dept. supra,* 12 L.Ed. 2d at 236.) Such employee's decision cannot be construed as constituting legislative consent to suit, especially in view of Nevada's limited waiver of immunity.[6]

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[6]As in the *Chandler* case, *supra,* the waiver of sovereign immunity is a limited one and indicates that the legislature had in mind only proceedings in Nevada state court. (*Chandler v. Dix, supra,* 48 L.Ed. 1129, 1131.) At the time of the collision, Section 13.025 of the Nevada Revised Statutes provided:

"Venue of actions against the State of Nevada.

(1) Except as provided in subsection 2, any action or proceeding against the State of Nevada shall be brought in a court of competent jurisdiction in Ormsby County.

(2) Any tort action against the State of Nevada which is based on the alleged negligence of a State officer or employee and in which the damages sought to be recovered are for physical injury or death may be brought in a court of competent jurisdiction in the county where the action injury occurred."

When the underlying tort occurred, Nevada Revised Statutes, Section 13.025 provided:

> "(2) Any tort action against the State of Nevada which is based on the alleged negligence of a State officer or employer and in which the damages sought to be recovered are for physical injury or death may be brought in a court of competent jurisdiction in the county where the actual injury occurred."

Section 13.025 subsection (1) provided:

> "Except as provided in subsection 2, any action or proceeding against the State of Nevada shall be brought in a court of competent" (Section 13.025 was repealed in 1969)

Nevada Revised Statutes, Section 228.170 now provides:

> "Commencement or Defense of Action to Protect State's Interest,
>
> . . . .
>
> (2) Such actions may be instituted in any district court in the State or in any justice Court of the proper county."

Additionally, the Nevada Supreme Court has interpreted the legislative intent of Nevada's statute to "waive immunity and correlatively, to strictly construe limitations upon that waiver." (*State v. Silva* (1970) 68 Nev. 911, 478 P.2d 591, 593).

THE CALIFORNIA SUPREME COURT'S DECISION IS VIOLATIVE OF THE FULL FAITH AND CREDIT CLAUSE

The decision of the California Supreme Court renders inapplicable any Nevada statutory limitation on Nevada's waiver of sovereign immunity, on the basis that "the sovereignty of one state does not extend into the territory of another".[7]

There are two limitations which have been enacted by Nevada, which are particularly relevant to this petition and whose non-application petitioners submit to be violative of full faith and credit. They are: the limitation as to in which courts Nevada has consented to be sued;[8] and the statutory limit of liability in tort to $25,000 per claimant which the Nevada legislature has established for claims against the State of Nevada.[9]

Non-application of the first limitation requires Nevada to defend suits outside of its borders and to employ out of state counsel to represent its interests. Non-application of the second limitation exposes Nevada to unlimited liability, contradicts the meaning of the statutes enunciated by the Nevada Supreme Court,[10] and directly frustrates Nevada's sovereign interest in the orderly administration of its finances.[11]

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[7]Note 6 *supra.*

[8]Nevada Revised Statutes, Section 41.035(1).

[9]*State v. Silva* (1970) 68 Nev. 911, 478 P.2d 591, 593.

[10]*State v. Silva, supra; Rogers v. State* (1969) 85 Nev. 361, 455 P.2d 172; *Kaminski v. Woodbury* (1969) 85 Nev. 667, 462 P.2d 45.

[11]Nevada has relied upon its legislature's limitations of the State's liability by procuring insurance in the instant case with limits on liability of $25,000 per claimant and $100,000 per accident.

The full faith and credit clause[12] requires an appraisal of the governmental interests of each jurisdiction and the protection of those interests which are the greater. (*Alaska Packers Assoc. v. Industrial Accident Commission of California* (1935) 294 U.S. 523, 55 S.Ct. 518, 79 L.Ed. 1044).

In this case, the interests of California do not relate to its sovereignty but rather relate to providing a forum and a remedy for its citizens.

California's interests are satisfied in this case by the plaintiff's ability to sue the individual driver. This has been done and through such action, the California plaintiffs are able to reach all available liability insurance. If, as is *not* the case here, the available insurance did not provide coverage up to California's financial responsibility laws, the plaintiffs would have their own uninsured motorist coverage available.

The interests of Nevada, on the other hand, are directly related to its sovereignty and to Nevada's governmental operation. Where must it go to defend itself? How will it finance an unlimited judgment?

Petitioners respectfully submit that the interests of Nevada and California in this case are different in quality, that the governmental interest of Nevada is the greater, and, therefore, the full faith and credit

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[12]Section 1, Article 4 of the Constitution of the United States provides:

> "Full Faith and Credit shall be given in each state to the Public Acts, Records, and Judicial Proceedings of every other State."

clause compels the recognition and application of Nevada's statutory limitations.

PRACTICAL DIFFICULTIES IN ALLOWING THE CALIFORNIA COURT'S DECISION TO STAND

How would the respondents, assuming they are able to pursue their cause in the California State Courts to a judgment, be able to enforce that judgment against the State of Nevada? They could seek enforcement in the Nevada State Courts; however, Nevada has never recognized a sister state's power to exercise jurisdiction over or grant a judgment against the State of Nevada and would undoubtedly refuse to enforce the judgment for lack of jurisdiction of the California Courts. The respondents could then return to this Court, present the same issues which are being presented now, and thereby, this Court being willing, obtain enforcement of the California judgment. But the Eleventh Amendment of the United States Constitution denies all Federal Courts, jurisdiction where a State is being sued by a citizen of another state. Since the Federal judiciary cannot act as a neutral arbiter of any possible liability assessed against the State of Nevada in the California courts, the potential exists for unresolved conflict among the States. The plaintiffs would have obtained an unrecognized and unenforceable obligation of the State of Nevada.

In the event that the State of Nevada has attachable property within the State of California, Nevada

or any other state in Nevada's position operating in good faith within the framework of our federal system is vulnerable, under the California Rule, to the complaint of any individual filed in a California state court. Nevada's only avenue of redress would be to institute an original action in this Court presenting the same issues which are presently being presented. It is only through the present determination by this Court of the effect of one State's sovereign immunity as a defense to the exercise of jurisdiction by the courts of a sister state that the very predicament of inter-state discrimination, conflict and prejudicial relations, the prevention of which was at the very genesis of the United States Constitution, can be avoided.

The California Supreme Court's opinion abolishes any element of California's sovereign immunity when the State is present or doing business in any other state of this nation or in any other country of the world. If the State of California should deprive an individual in a neighboring country or state of water through allowing diversion or pollution, that individual could now sue the State of California in the local courts of his home state be it Nevada, Oregon, or Mexico. If a state contracts to purchase a product or a service will it now be subject to jurisdiction and suit by an individual or corporate seller wherever that sale was made?

Finally, any state which sells or transfers state or local bonds outside its own state boundaries will be subject to the jurisdiction in any state court where

such bonds are sold or transferred. Such a flurry of suits may be instituted by individuals in state courts against another state that allowing this California decision to stand would virtually open Pandora's box.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

PAUL H. CYRIL,
BRONSON, BRONSON & MCKINNON,
and
THE HONORABLE ROBERT LIST,
Attorney General for the State of Nevada,
Counsel for Plaintiff.

April 23, 1973.

(Appendix Follows)

Appendix

Appendix

California Vehicle Code Section 17451:

"The acceptance by a non-resident of the rights and privileges conferred upon him by this Code or any operation by himself or agent of a motor vehicle anywhere within this State, or in the event the non-resident is the the owner of a motor vehicle then by the operation of the vehicle anywhere within this State by any person with his express or implied permission, is equivalent to an appointment by the non-resident of the director or his successor in office to be his true and lawful attorney upon whom may be served all lawful process in any action or proceeding against the non-resident operator or non-resident owner growing out of any accident or collision resulting from the operation of any motor vehicle anywhere within this State by himself or agent, which appointment shall also be irrevocable and binding upon his executor or administrator."

California Vehicle Code Section 17453:

"The acceptance of rights and privileges under this Code or any operation of a motor vehicle anywhere within the State as specified in Section 17451 shall be a signification of the irrevocable agreement of the non-resident, binding as well upon his executor or administrator, that process against him which is served in the manner provided in this Article shall be of the same legal force and validity as if served upon him personally in this State."

California Vehicle Code Section 17454:

"Service of process shall be made by leaving one copy of the summons and complaint in the hands of the director or in his office at Sacramento or by mailing either by certified or registered mail, addressee only, return receipt requested, a copy of the summons and complaint to the office of the director in Sacramento. Service shall be effective as of the day the return receipt is received from the director's office. A fee of Two Dollars ($2.00) for each non-resident to be served shall be paid to the director at the time of service of a copy of the summons and complaint and such service shall be a sufficient service on the non-resident subject to compliance with Section 17455."

California Vehicle Code Section 17455:

"A notice of service and a copy of the summons and complaint shall be forthwith sent by registered mail by the plaintiff or his attorney to the defendant. Personal service of the notice and a copy of the summons and complaint upon the defendant wherever found outside this State shall be the equivalent of service by mail."

Until 1969, Section 13.025 of the Nevada Revised Statutes provided:

"Venue of actions against the State of Nevada.

(1) Except as provided in subsection 2, any action or proceeding against the State of Nevada shall be brought in a court of competent jurisdiction in Ormsby County.

(2) Any tort action against the State of Nevada which is based on the alleged negligence of a State officer or employee and in which the damages sought to be recovered are for physical injury or death may be brought in a court of competent jurisdiction in the county where the actual injury occurred."

Fifty-Fifth Session

Assembly Bill No. 34—Messrs. McKissick, Close, Hilbrecht and Torvinen

Chapter 63

An Act relating to place of trial; repealing the requirement that actions against the State of Nevada be brought in Ormsby County; and providing other matters properly relating thereto.

[Approved February 28, 1969]

The People of the State of Nevada, represented in Senate and Assembly,

do enact as follows:

Section 1. NRS 13.025 is hereby repealed

Sec. 2. This act shall become effective upon passage and approval.

Nevada Revised Statutes:

228.170 Commencement or defense of action to protect state's interest.

1. Whenever the governor shall direct, or, in the opinion of the attorney general, to protect and secure the interest of the state it is necessary that a suit be commenced or defended in any court, the attorney general shall commence such action or make such defense.

2. Such actions may be instituted in any district court in the state, or in any justice's court of the proper county.

[6:67:1867; B §2778; BH §1783; C §2004; RL §4133; NCL §7312]

In the Supreme Court
of the
State of California

IN BANK

S. F. No. 22942

Diane Hall, a Minor, etc., et al.,
Plaintiffs and Appellants,
v.
University of Nevada et al.,
Defendants and Respondents.

[Filed December 21, 1972]

OPINION

Plaintiffs appeal from an order quashing service of summons and complaint on the defendants, University of Nevada, a corporation, and the State of Nevada.

Plaintiffs filed suit in the San Francisco Superior Court to recover damages for personal injuries alleging that the injuries resulted from a collision in California between their automobile and a car owned by the University and State of Nevada and operated by their agent acting within the scope of his agency.[1]

[1]The special administrator of the deceased agent was also named as a defendant.

Service on the university and the state was made pursuant to section 17450 et seq. of the Vehicle Code which provide a method for service on nonresidents who have operated vehicles on the highways of this state, whose agents have done so, or who have consented to the use of their motor vehicles on our highways. With respect to accidents occurring in the state due to such use, the sections provide for service on the Director of Motor Vehicles and notice of service to the nonresidents by registered mail.

The university and the state moved to quash service on the ground that California courts do not have jurisdiction over the State of Nevada and its governmental agencies. The motion was granted.

(1) We have concluded that sister states who engage in activities within California are subject to our laws with respect to those activities and are subject to suit in California courts with respect to those activities. When the sister state enters into activities in this state, it is not exercising sovereign power over the citizens of this state and is not entitled to the benefits of the sovereign immunity doctrine as to those activities unless this state has conferred immunity by law or as a matter of comity.

This principle is illustrated by *Parden v. Terminal R. Co.*, 377 U.S. 184, 190 et seq. [12 L.Ed2d 233, 238 et seq., 84 S.Ct. 1207], involving the operation by a state of a railroad in interstate commerce. The court recognized the general rule that a state is immune from suit in federal court by its own citizens and citizens of another state. The court, however, applied

an exception to the general rule and held that because it engaged in interstate commerce, the state was subject to the Federal Employers' Liability Act (45 U.S.C. §§51-60) and could be sued under the act in the federal courts. The court, quoting from *Maurice v. State of California,* 43 Cal.App.2d 270, 275, 277 [110 P.2d 706], held that the state by engaging in interstate commerce by rail and thereby subjecting itself to the federal legislation must be deemed to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued without its consent.[2] (See also *California v. Taylor,* 353 U.S. 553, 568 [1 L.Ed.2d 1034, 1043-1044, 77 S.Ct. 1037]; *United States v. California,* 297 U.S. 175, 185 [80 L.Ed. 567, 573, 56 S.Ct. 421].)

The principle has also been recognized in state decisions relating to other states. Thus, in *People v. Streeper* (1957) 12 Ill.2d 204 [145 N.E.2d 625, 629-630], an injunction proceeding was permitted with respect to property owned by one state in another state, and in *State v. Holcomb* (1911) 85 Kan. 178 [116 P. 251, 254], taxation by one state of property therein owned by another state was permitted. Each proceeding was brought in the state where the property was owned. As pointed out in *Streeper,* the "sovereignty of one State does not extend into the territory of another so as to create immunity from suit or freedom from judicial interference." (145

[2]The dissenting justices in *Parden* expressly agreed that Congress had the power to condition a state's permit to engage in interstate commerce upon a waiver of sovereign immunity but disputed whether Congress had intended to do so.

N.E.2d at p. 629; see also *Georgia v. Chattanooga,* 264 U.S. 472, 479 [68 L.Ed. 796, 798-799, 44 S.Ct. 369]; *City of Cincinnati v. Commonwealth* (1942) 292 Ky. 597 [167 S.W.2d 709, 714]; *State v. City of Hudson* (1950) 231 Minn. 127 [42 N.W.2d 546, 548-549]; *State* ex rel. *Anderson v. City of Madison* (Mo. 1969) 444 S.W.2d 443, 445; Note, 81 A.L.R. 1518.) Although these cases involve enforcement of property duties rather than in personam jurisdiction and a transitory action, they reflect that state sovereignty ends at the state boundary.

It is urged that as a matter of comity sister states should be immune from liability in California. In *Paulus v. State of South Dakota* (1924) 52 N.D. 84 [201 N.W. 867], a citizen of South Dakota was injured while working in a mine owned by that state but located in North Dakota. In holding that as a matter of comity the North Dakota courts should not exercise jurisdiction over its sister state, the Supreme Court of North Dakota relied in part on the fact that the plaintiff was a citizen of South Dakota, and to this extent the case is distinguishable because the plaintiffs herein are California citizens. The court also relied upon the potential embarrassment to the states.

Possible embarrassment may not be held controlling when it is weighed against the policies which warrant the exercise of jurisdiction in the instant case. In upholding the validity of a nonresident motorist statute such as the one under which respondents were served, the United States Supreme Court has pointed

out: "Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. . . . [T]he State may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served." (*Hess v. Pawloski,* 274 U.S. 352, 356-357 [71 L.Ed. 1091, 1094-1095, 47 S.Ct. 632].) The same view has been adopted by the Supreme Court of Nevada in upholding its nonresident motorist statute, (*Kroll v. Nevada Industrial Corporation* (1948) 65 Nev. 174 [191 P.2d 889, 893].)

This court has repeatedly emphasized that this state and its residents and taxpayers have a substantial interest in providing a forum where a resident may seek whatever redress is due him. (*Buckeye Boiler Co. v. Superior Court,* 71 Cal.2d 893, 899, 906 [80 Cal.Rptr. 113, 458 P.2d 57]; *Fisher Governor Co. v. Superior Court,* 53 Cal.2d 222, 225 [1 Cal.Rptr. 1, 347 P.2d 1].) The state also has an interest from the point of view of the orderly administration of the laws in assuming jurisdiction in cases where most of

the evidence is within its borders and where a refusal to take jurisdiction may result in multiple litigation.[3] (*Id.*) The presence of the evidence and witnesses in California could, of course, mean that plaintiffs if not permitted to proceed in California could find themselves seriously hampered in proving their case elsewhere.

To hold that the sister state may not be sued in California could result in granting greater immunity to the sister state than the immunity which our citizens have bestowed upon our state government. If a sister state has not abrogated sovereign immunity for tort, it is conceivable that a California citizen would be denied all recovery for an automobile accident in this state even though if the State of California had been the defendant recovery would have been permitted.

Finally, it must be pointed out that in a society such as ours, which places such great value on the dignity of the individual and views the government as an instrument to secure individual rights, the doctrine of sovereign immunity must be deemed suspect. (*National Bank v. Republic of China,* 348 U.S. 356, 359-361 [99 L.Ed. 389, 396-397, 75 S.Ct. 423]; *Muskopf v. Corning Hospital Dist.,* 55 Cal.2d 211, 214-216 [11 Cal.Rptr. 89, 359 P.2d 457].)

We conclude that the State and University of Nevada are not immune from suit in California for the driving of their agent within the scope of his em-

[3]Apparently, the instant case is proceeding to trial against the special administrator of the estate of the driver.

ployment or for the permissive use of their car within this state. This conclusion makes it unnecessary to consider plaintiffs' further contention that the State of Nevada has consented by statute to suit in California.[4]

The order appealed from is reversed.

Wright, C.J., McComb, J., Tobriner, J., Mosk, J., Burke, J., and Sullivan, J., concurred.

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[4]Plaintiffs urge that Nevada has abrogated sovereign immunity by statute. The state and the university claim that the waiver of immunity was a limited one and that the statutory provisions abrogating immunity should be interpreted as permitting action in the courts of Nevada only. Since we conclude that Nevada does not have immunity from liability for its activities in California, the extent to which Nevada has waived immunity by statute and the extent, if any, to which it can or has limited the statutory waiver is immaterial. Even if we assume that Nevada limited its statutory waiver of immunity to actions in its courts, such limitation would not be applicable to the instant case involving activities in California because the sovereignty of one state does not extend into the territory of another.

In the Court of Appeal
State of California
First Appellate District

DIVISION TWO

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1 Civ. No. 28689
(Sup. Ct. No. 603599)

DIANE HALL, et al.,
Plaintiffs and Appellants,

vs.

UNIVERSITY OF NEVADA, a corporation, and STATE OF NEVADA,
Defendants and Respondents.

[Filed May 11, 1972]

OPINION

We have concluded that, in the absence of express consent to be sued in a foreign jurisdiction, one sovereign state is not subject to the in personam jurisdiction of another. Accordingly, we affirm the trial court's order quashing service of summons and complaint upon respondents University of Nevada and State of Nevada.

Plaintiffs-appellants filed suit in San Francisco Superior Court to recover damages for personal injuries arising from an accident in California in which their vehicle collided with a car owned by respondents

and operated by their agent acting within the scope of his agency. In effecting service of process upon respondents, appellants utilized the California long-arm statute (Veh. Code §§17450-17463) which permits substituted service of summons and complaint upon nonresident motorists.

Appellants concede, as they must, that under the well settled rule neither the state nor any of its agencies enjoying sovereign immunity can be sued unless consent is given to maintain the action against them (Innes v. McColgan (1942) 52 Cal.App.2d 698, 700; McPheeters v. Board of Medical Examiners (1946) 74 Cal.App.2d 46, 49; 45 Cal.Jur.2d, § 159, p. 512 et seq.); and that this general prohibition also extends to a tort action brought against the state either in its own courts or those of a sister state (57 Am.Jur.2d, § 24, p. 33). They insist, however, that (1) respondents have, by statute, expressly waived immunity, and/or (2) the requisite consent to waive immunity may be given impliedly, and that the operation of the Nevada automobile in California constituted such consent. For the reasons which ensue, we are compelled to reject both contentions.

Appellants' first argument is primarily based on Nevada Revised Statutes, section 41.031, which provides in pertinent part that "The State of Nevada hereby *waives its immunity from liability* and action and hereby consents to have *its liability* determined in accordance with the same rules of law as are applied to civil actions against individuals and corporations. . . ." (Emphasis added.)

Appellants' reliance on the cited code section is obviously misplaced. It is evident that the present case is not concerned with the extent and conditions of a potential tort liability to which respondents may be subjected in a *proper* court, but solely with a jurisdictional issue, namely: whether or not respondents have consented to the jurisdiction of the California court. Therefore, the relevant code section is section 13.025, which, at the time of the accident, read as follows:[1]

"1. Except as provided in subsection 2, any action or proceeding against the State of Nevada shall be brought in a court of competent jurisdiction in Ormsby County.

"2. *Any tort action against the State of Nevada* which is based on the alleged negligence of a state officer or employee and in which the damages sought to be recovered are for physical injury or death *may be brought in a court of competent jurisdiction in the county where the injury occurred.*" (Emphasis added.)

In interpreting the above code section, we adhere to the rule that statutes conferring the right to sue the state, being in derogation of the state's sovereign capacity must be strictly construed (County of Los Angeles v. Riley (1942) 20 Cal.2d 652, 662; Yasunaga v. Stockburger (1941) 43 Cal.App.2d 396, 400-401; 45 Cal.Jur.2d, § 160, p. 515 et seq.; 57 Am.Jur.2d, § 70, p. 80). The statutory language granting consent to

[1]In 1969 an act was passed repealing the requirement that actions against the state be brought in Ormsby County. This act, however, brought about only a change that suits against the state can be brought in any county of Nevada, and in no way constituted the required express consent to be sued in other states.

such suits must be *explicitly* and *expressly* announced (Elizabeth River Tunnel District v. Beecher (1961) 117 S.E.2d 685, 689).

A simple reading of the cited code section persuades us that the statute lacks the required express language to subject respondents to foreign in personam jurisdiction; and, under the foregoing authorities, such jurisdiction may not be established by implication. Our conclusion is further supported by section 228.170(1)[2] of the Nevada Revised Statutes, which specifically requires that suits against the state be brought in Nevada, and by the interpretation of an analogous statute in State Tax Commission v. Kennecott Copper Corp. (1945) 150 F.2d 905 (affd. 327 U.S. 573) where the court held that the statutory phrase of " 'any court of competent jurisdiction' " did not, by implication, include the federal court sitting in the state, because before a state can be subjected to suit "the statute must use language which evidences *a clear intent to submit to the jurisdiction* of federal courts." (P. 907; emphasis added.)

Additionally, the statutory scheme as a whole leaves no doubt that the emphasized portion of section 13.025 contemplates suits merely within the boundaries of the State of Nevada. This is evidenced by the complete lack of statutory provisions which would set up proce-

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[2]Section 228.170(1) provides that "Whenever the Governor shall direct or in the opinion of the Attorney General to protect and secure the interest of the State, it is necessary that suit be commenced or defended in any court, the Attorney General shall commence such action or make such defense. (2) *Such action may be instituted in any district court in the State or in any justice court of the proper county.*" (Emphasis added.)

dures for out-of-state suits, such as rules for venue, service of process, and other procedural requirements (cf. Ford Co. v. Dept. of Treasury (1945) 323 U.S. 459).

Appellants' second argument is simply an attempt to extend the California long-arm statute.[3]

While such an argument has a certain appeal to one's sense of logic, is begs the fundamental question, i.e., whether one state may legislate away the sovereignty of a sister state.

Clearly it may not, for, as we have seen, state sovereignty may be waived only by a clear and unambiguous statutory enactment of the state Legislature

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[3]The relevant sections of the long-arm statute provide as follows:

"§ 17451. Service of process on nonresident

"The acceptance by a nonresident of the rights and privileges conferred upon him by this code or any operation by himself or agent of a motor vehicle anywhere within this state, or in the event the nonresident is the owner of a motor vehicle then by the operation of the vehicle anywhere within this state by any person with his express or implied permission, is equivalent to an appointment by the nonresident of the director or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against the nonresident operator or nonresident owner growing out of any accident or collision resulting from the operation of any motor vehicle anywhere within this state by himself or agent, which appointment shall also be irrevocable and binding upon his executor or administrator.

"§ 17453. Agreement on validity of process

"The acceptance of rights and privileges under this code or any operation of a motor vehicle anywhere within this state as specified in Section 17451 shall be a signification of the irrevocable agreement of the nonresident, binding as well upon his executor or administrator, that process against him which is served in the manner provided in this article shall be of the same legal force and validity as if served on him personally in this state."

concerned which directs the conditions, mode and manner of the purported waiver (Ford Co. v. Dept. of Treasury, supra; State of California v. Superior Court (1936) 14 Cal.App.2d 718, 722-723; 81 C.J.S., § 214, p. 1304).

Appellants' reliance on People v. Streeper (1957) 145 N.E.2d 625 and State v. Holcomb (1911) 116 P. 251 is patently misplaced. In each of those cases the dispute revolved around and concerned property located in the forum state (in Streeper injunctive relief was asked, while Holcomb involved the state taxation of property); and in each case the court simply adhered to the long-established principle that a state has *in rem* jurisdiction over the property located in its territory. In People v. Streeper, supra, the court was eager to point out that where the property of another state is properly before the court, the *court will proceed to discharge its duty concerning the property but the state may not be compelled to come in as a party.* (Pp. 630-631.)

Although no exact case has been presented to us nor have we found any, the closest in point is Paulus v. State of South Dakota (1924) 201 N.W. 867. In that case defendant South Dakota owned and operated a coal mine in North Dakota. Plaintiff, a mine employee, suffered personal injuries and sued South Dakota in the court of North Dakota, contending that, by owning and operating the coal mine in North Dakota, defendant South Dakota impliedly waived its sovereignty and thereby consented to the jurisdiction of North Dakota.

Concluding that South Dakota could not, without its express consent, be sued in North Dakota, the court held that considerations of comity impelled it to refrain from exercising jurisdiction. The same considerations apply to the case at bar.

The order is affirmed.

Certified for Publication

Kane, J.

We concur:

Taylor, P. J.

Rouse, J.