## Oswald, administrator, *v.* State of New York.

*Return of process.*

Return of process will be enforced, by rule on the marshal

Simmons. *Ingersoll* moved for a rule on the marshal of the district of New York, to return the writ in this cause; and, after advisement, The Court granted the rule in the following terms:

Ordered, That the marshal of New York district return the writ to him directed in this cause, before the adjournment of this court, if a copy of this rule shall be seasonably served upon him, or his deputy, or, otherwise, on the first day of the next term. And that in case of a default, he do show cause therefor, by affidavit taken before one of the judges of the United States.

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## State of Georgia *v.* Brailsford *et al.*

*Injunction.*

An injunction granted, to restrain the marshal from paying over money, collected by execution, until the right of the complainant to the same (which could not be decided in the original suit) should be determined.

This was a bill in equity, filed by "His Excellency Edward Telfair, Esq., governor and commander-in-chief in and over the state of Georgia, in behalf of the said state, complainant," against Samuel Brailsford, Robert Wm. Powell, and John Hopton, merchants and copartners, and James Spaulding, surviving partner of Kelsall & Spalding, defendants. The bill set forth the following case:

"That on the 4th of May 1782, the State of Georgia being then free, sovereign and independent, enacted a law entitled 'An act for inflicting penalties on, and confiscating the estates of, such persons as are therein *403] declared *guilty of treason, and for other purposes therein mentioned.' That, among other things, the law contained the following clauses: 'And whereas, there are divers estates and other property within this state, belonging to persons who have been declared guilty, or convicted, in one or other of the United States, of offences which have induced a confiscation of their estates or property within the state of which they were citizens: Be it, therefore, enacted, by the authority aforesaid, that all and singular the estates, both real and personal, of persons under this description, of whatsoever kind or nature, together with all rights and titles, which they may, do or shall hold, in law or equity, or others in trust for them, and also all the debts, dues and demands, due or owing to British merchants, or others, residing in Great Britain (which shall be appropriated as hereinafter mentioned), owing or accruing to them, be confiscated to and for the use and benefit of this state, in like manner and form of forfeiture as they were subjected to in the states of which they respectively were citizens, and the moneys arising from the sales which shall take place, by virtue and in pursuance of this act, to be applied to such uses and purposes as the legislature shall hereafter direct.

"'And be it further enacted, that all debts, dues and demands, due or owing to merchants or others residing in Great Britain, be and they are hereby *sequestered*, and the commissioners appointed under this act, or a majority of

them, are hereby empowered to recover, receive and deposit the same in the treasury of this state, in the same manner, and under the same regulations, as debts confiscated, there to remain for the use of this state, until otherwise appropriated by this or any future house of assembly.

"'And whereas, there are various persons, subjects of the king of Great Britain, possessed of or entitled to estates, real and personal, which justice and sound policy require should be applied to the benefit of this state; Be it, therefore, enacted, by the authority aforesaid, that all and singular the estates, real and personal, belonging to persons, being British subjects, of whatsoever kind or nature, which they may be possessed of, except as before excepted, or others in trust for them, or that they are or may be entitled to, in law or equity, as also all debts, dues or demands, owing or accruing to them, be confiscated to and for the use and benefit of this state, and the moneys arising from the sales which shall take place by virtue of and in pursuance of this act, to be applied to such uses and purposes as the legislature shall hereafter direct.'

"That by the operation of these clauses, all the debts, dues and demands of the citizens of Georgia to persons who had *been subjected to the penalties of confiscation in other states, and of British merchants [*404] and others residing in Great Britain, and of all other British subjects, were vested in the said state.

"That James Spalding, a citizen of Georgia, and surviving copartner of Kelsall & Spalding, was indebted to the defendants in the penal sum of 7058*l.* 9*s.* 5*d.* upon a bond dated the —— of ——— 1774, which debt, by virtue of the said recited law, was transferred from the obligees and vested in the state—Brailsford being a native subject of Great Britain, constantly residing there from the year 1767, until after the passing of the law; Hopton's estate, real and personal (debts excepted), having been expressly confiscated by an act of the legislature of South Carolina; and Powell coming within the description of persons, whose estates, real and personal (debts excepted), were also confiscated by acts of the legislature of South Carolina, if, after refusing to take the oath of allegiance, they returned to the state.

"That an action had been brought upon the bond, by Brailsford, Powell and Hopton, against James Spalding, as surviving partner of Kelsall & Spalding, in the circuit court for the district of Georgia, of ——— term 1791, in which action, there was a plea, demurrer to the plea, joinder in demurrer, and judgment thereupon for the plaintiffs.

"That the state had never relinquished its claim to this debt, but on the contrary, had asserted it by divers acts of the legislative, executive and judicial departments; and, particularly, by directing the attorney-general to apply for a rule, to be admitted to assert the claim, in all suits brought in any court, for debts within the descriptions of the confiscation law above cited.

"That the attorney-general applied to the circuit court, for the admission of the state, as a party, to defend its claim in the said suit of Brailsford and others *v.* Spalding, then depending there, which application was rejected; and that in that suit, as well as divers other suits, recoveries were had against citizens of the state, by British merchants, for debts within the descriptions of the confiscation law, upon the sole principle of debtor and creditor, and without any reference to the right and claim of the state."

The bill proceeded to charge a confederacy between the parties to the suit in the circuit court, to defraud the state; and that in pursuance thereof, the plaintiffs had issued execution against the defendant, and the defendant had confederated with them not to take out a writ of error; so that the defendant's property would be levied on, and disposed of, and the state would be defrauded of its just claim thereon.

The bill then suggested the general foundation for the jurisdiction on the equity side of the court; put the proper interrogatories; *and [*405] concluded with praying "that any levy, or further levies, under the said execution, and any sales in pursuance of a levy, and any moneys already raised, or that may be raised thereon, may be stayed in the hands of the marshal of the said circuit court, by an injunction from this honorable court. And that the marshal be directed to pay such sum, or sums, raised as aforesaid, to the treasurer of the said state of Georgia, to and for the use of the same, and that the said James Spalding be decreed to pay to the said treasurer the balance which may be due on the bond aforesaid, for the use aforesaid. And that the said state may be further or otherwise relieved, in all and singular the premises, as the nature and circumstances of the case shall require, and as to the court shall seem meet."

With the bill, there was filed an affidavit, made by Mr. John Wereat (the agent for Georgia), affirming "that the allegations therein contained are true;" and *Dallas*, for the state, moved that an injunction might issue, to the circuit court, to stay further proceedings, and also to the marshal of the Georgia district, to stay the money in his hands, if he shonld have levied, or shall levy, the same, on any execution issued in the cause of Brailsford *et al. v.* Spalding.

The motion was opposed by *Randolph*, for the defendants; and after argument, the judges delivered their opinions *seriatim*, on the 11th of August 1792.

Johnson, Justice.—In order to support a motion for an injunction, the bill should set forth a case of probable right, and a probable danger that the right would be defeated, without this special interposition of the court. It does not appear to me, that the present bill sufficiently claims such an interposition. If the state has a right to the debt in question, it may be enforced at common law, notwithstanding the judgment of the circuit court; and there is no suggestion in the bill, though it has been suggested at the bar, that the state is likely to lose her right by the insolvency either of Spalding, the original debtor, or of Brailsford, who will become her debtor for the amount, if he receives it, when in law he ought not to receive or retain it. Nor does the bill state any particular confederacy or fraud. The refusal to admit the attorney-general as a party on the record, was the act of a competent court; and it is not sufficient barely to allege, that the defendant has not chosen to sue out a writ of error. The case might, perhaps, be made better; but as I can only know, at present, the facts which the bill alleges, and which the affidavit supports, it is my opinion, that there is not a proper foundation for issuing an injunction.

Iredell, Justice.—I sat in the circuit court, when the judgment was

rendered in the case of Brailsford and others *v.* *Spalding ; but I shall give my opinion, on the present motion, detached from every previous consideration of the merits of the cause.

The debt claimed by the plaintiffs below, was likewise claimed by the state of Georgia. The state applied to be admitted to assert her claim, but the application was rejected ; nor has any writ of error been instituted upon the judgment. These facts, however, are only mentioned, to introduce this remark, that the circuit court could not, with propriety, sustain the application of Georgia ; because, whenever a state is a party, the supreme court has exclusive jurisdiction of the suit ; and her right cannot be effectually supported, by a voluntary appearance before any other tribunal of the Union. Not being a party, nor capable of resorting, as a party, to the circuit court, it is very much to be questioned, whether the state could bring a writ of error on the judgment there, even if her claim appeared on the record.

Every principle of law, justice and honor, however, seem to require, that the claim of the state of Georgia should not be, indirectly, decided or defeated, by a judgment pronounced between parties, over whom she had no control, and upon a trial, in which she was not allowed to be heard. If, indeed, the court could not devise a mode, for admitting a fair investigation and determination upon that claim, it would be useless to grant an injunction : but I think a mode may easily be prescribed, in strict conformity with the practice and principles of equity.

It was in the power of the defendant in the circuit court, to have filed a bill of interpleader, in order, for his own safety, to settle the rights of the contending parties ; but neither in that form, nor by instituting a suit herself, could Georgia have derived the benefit of supporting her claim in her own way, before any other than the supreme court. In this court, therefore, we ought now to place the state upon the same footing, as if a bill of interpleader had been regularly filed here ; which can be done by sustaining the present suit ; and when the parties are all before us, we may direct a proper issue to be formed, and tried at the bar. Thus, justice will be done to Georgia, and an irreparable injury may be prevented ; while the adverse party, even if he ultimately succeeds, can only complain of a short delay.

With this view, I think, that an injunction should be awarded to stay the money in the hands of the marshal, until this court shall make a further order on the subject.

Blair, Justice.—The State of Georgia seems to have done all that she could to obtain a hearing. An application was made to the circuit court, in the nature of a claim to interplead ; but being refused, her alternative, under all the circumstances of the case, is an appeal to the equitable jurisdiction of the supreme *court. It is true, perhaps, as the counsel has suggested, that the defendant below pleaded the confiscation act of Georgia in bar to the action ; but it is a sufficient answer to this argument, that the state was not a party ; and no right can be defeated, in law, unless the party claiming it has himself an opportunity to support it. [*407

If the state of Georgia was entitled to the bond, she is equally entitled to the money levied by the marshal in satisfaction of the bond, or rather of the judgment rendered upon it ; and as the execution directs the marshal to

pay the amount to the plaintiffs below, I can perceive no other mode of preventing a compliance, while we inquire into the right of receiving the money, than that of issuing an injunction to stay it in the hands of the officer.

It appears to me, to be too early, likewise, to pronounce an opinion upon the titles in collision ; since, it is enough, on a motion of this kind, to show a colorable title. The state of Georgia has set up, her confiscation act, which certainly is a fair foundation for future judicial investigation ; and that an injury may not be done, which it may be out of our power to repair, the injunction ought, I think, to issue, until we are enabled, by a full inquiry, to decide upon the whole merits of the case.

Wilson, Justice.—I confess that I have not been able to form an opinion which is perfectly satisfactory to my own mind, upon the points that have been discussed. If Georgia has a right to the bond, it is strictly a legal right ; but to enforce a strictly legal right, the present seems, at the first blush, to be an awkward and irregular proceeding. Again, Georgia had not a right, or she had a right, to be admitted to a hearing in the circuit court ; but in the former case, it would be no ground of complaint, that her application was rejected ; for she is bound by the law ; and in the other case, she would be entitled to bring the subject before us, as a court of law ; since she was refused the exercise of a legal right.

It is true, that, under the federal constitution, an inferior tribunal cannot compel a state to appear as a party ; but it is a very different proposition to say, that a state cannot, by her own consent, appear in any other court, than the supreme court. The general rule applies among all sovereigns, who, as equals, are not amenable to the courts of each other ; and yet I remember an action was instituted and sustained, some years ago, in the name of Louis XVI., King of France, against Mr. Robert Morris, in the supreme court of Pennsylvania.[1]

Under these impressions, I am disposed to think, that the state of Georgia ought rather to have sued out a writ of error, than to have asked for an injunction ; but still, in the existing *circumstances of the case, I have no objection to retain the money within the power of the court, until we can better satisfy ourselves both as to the remedy and the right.

*408]

Cushing, Justice.—The judicial act expressly declares, that "suits in equity shall not be sustained, in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." Now, if Georgia has any right to the debt in question, it is a right at law, for which, of course, the law will furnish a plain, adequate and complete remedy. The decision of the circuit court, in a case to which Georgia was neither party nor privy, did not, and could not, take away either the right or the remedy of the state. Nor can Spalding, the defendant below, be made liable twice, for the same debt, without his wilful *laches*. For it is in his power to bring a writ of error ; and then, the whole merits of the claim of Georgia appearing on the record, we must decide it as a question of law, either by affirming or reversing the judgment, so as to bind us, in any suit which Georgia might institute for the same cause.

[1] King of France *v.* Morris, cited 3 Yeates 251.

Besides, the state of Georgia (notwithstanding the judgment of the circuit court) may bring an action of *indebitatus assumpsit* against Brailsford (who is a man of fortune), after they have received the money, upon the principle of *Moses* v. *Macferlan* (2 Burr. 1005), and with stronger reason; as, in that case, the parties, in both courts, were the same; but in the case proposed, they would be different, and one of them has never been heard. In some form, therefore, Georgia may obtain complete redress at law.

I do not, upon the whole, consider the refusal of Spalding to bring a writ of error (which he is not compellable to bring), nor any other suggestion in the bill, as a sufficient foundation for exercising the equitable jurisdiction of the court; and consequently, I think, that an injunction ought not to be awarded.

Jay, Chief Justice.—My first ideas were unfavorable to the motion; but many reasons have been urged, which operate forcibly to produce a change of opinion.

The great question turns on the property of a certain bond—whether it belongs to Brailsford, or to Georgia? It is put in suit by Brailsford; but if Georgia, by virtue of the confiscation act, is really entitled to the debt, she is entitled to the money, though the evidence of the debt happened to be in the possession of Brailsford, and though Brailsford has, by that means, obtained a judgment for the amount.

Then the only point to be considered is—whether, under these circumstances, it is not equitable to stay the money in the *hands of the marshal until the right to it is fairly decided? and so avoid the risk of putting the true owner to a suit, for the purpose of recovering it back? For my part, I think, that the money should remain in the custody of the law, until the law has adjudged to whom it belongs; and, therefore, I am content, that the injunction issue. [*409

An injunction granted.(*a*)

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## Hayburn's Case.

### *Constitutional law.*

It is not in the power of congress, to assign to the judiciary any but judicial duties.

This was a motion for a *mandamus*, to be directed to the circuit court for the district of Pennsylvania, commanding the said court to proceed in a certain petition of William Hayburn, who had applied to be put on the pension list of the United States, as an invalid pensioner. The principal case arose upon the act of congress passed the 23d of March 1792. (1 U. S. Stat. 243.)

The Attorney-General (*Randolph*), who made the motion for the *mandamus*, having premised that it was done *ex officio*, without an application from any particular person, but with a view to procure the execution of an act of congress, particularly interesting to a meritorious and unfortunate class of citizens, The Court declared, that they entertained great doubt upon

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(*a*) See the same case, *post*, p. 415, and 3 Dall. 1, as well as on a motion to dissolve the injunction, as on a trial of the merits, upon a feigned issue.