

the award) an action in Tennessee to recover compensation under the Tennessee Act. The court held that by bringing the Ohio proceedings the widow had renounced her right under the Tennessee Act; and final judgment was entered for the company shortly before the action at bar was begun. The opinion states that the suit is one upon contract; that "the sole defense interposed is the proceedings in Ohio"; that the institution of the proceedings in Ohio "was a clear renunciation or disaffirmance of the contract"; "that the election thus made was irrevocable, because the petitioner [Mrs. Tidwell] has taken the benefit of the Ohio suit and the defendant [the Company] will doubtless take the detriment of that suit"; and the court added: "Not prejudging another case, but merely by way of answer to argument made in this case, we may observe that defendant's way of escape from the Ohio proceedings and award is not apparent, after the pleading by the defendant of such proceeding and award to defeat its liability herein." In view of this decision, we have no occasion to consider differences in phraseology between the Tennessee statute and that of Vermont.

Judgment for the plaintiff.

EX PARTE LA PRADE.

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS.

No. 21, Original. Argued April 17, 18, 1933.—Decided May 22, 1933.

1. A suit against a state officer in a federal court, alleging that a state statute is unconstitutional, that the defendant threatens to enforce it by suing *colori officii* for drastic penalties prescribed by the statute for its violation, and so will subject the plaintiff to irreparable injury unless enjoined, is a suit against the defendant as an individual. *Ex parte Young*, 209 U.S. 123, P. 455.

2. Such a suit abates upon the defendant's retirement from office, unless it can be revived against his successor under authority of a statute. P. 456.
 3. Arizona laws do not provide for substitution of the successor. *Irwin v. Wright*, 258 U.S. 219. P. 456.
 4. Section 780 (b), U.S.C., Title 28, providing for substitution of state officials in suits by or against them in the federal courts "relating to the present or future discharge of official duties," does not authorize the imposition of liability or restraint upon the successor on account of anything done or threatened by the predecessor individually. P. 458.
 5. In construing § 780, *supra*, which relates to substitution of both federal and state officers, it is to be borne in mind that while Congress can direct the conduct of federal officers in proceedings brought by or against them as such and may ordain that they may sue or be sued as representatives of the United States and stand in judgment on its behalf, it is not so empowered as to state officers. P. 458.
 6. Wrongs committed or threatened by an officer under an unconstitutional statute do not constitute ground for an injunction against his successor; nor does a declaration of the statute that he shall bring penalty suits to enforce it, since he might hold it unconstitutional and deem himself justified by his official oath in refraining. P. 458.
 7. In the absence of statutory authority, the District Court had no jurisdiction to substitute the successor as defendant in this case or to direct that the suit be continued against him. P. 459.
 8. The question is reserved whether, or in what circumstances, a successor in office who adopts the attitude of his predecessor and is proceeding or threatening to enforce an unconstitutional statute may be substituted in a pending suit. P. 459.
- Mandamus to issue.

MOTION for leave to file a petition for a writ of mandamus requiring a circuit and two district judges to dismiss, as to the relator, two suits in which he was made party defendant by orders of substitution. The argument was on the motion for leave to file and the judges' return to an order to show cause. See 2 F.Supp. 855.

Mr. Donald R. Richberg for petitioner.

Mandamus is the proper remedy, and in this case the only remedy. *Los Angeles Brush Mfg. Co. v. James*, 272 U.S. 701, and other cases.

The statute, by its terms "permits" a cause to be continued and maintained against the successor when he consents, and when the suit has been brought against the predecessor "as a public officer." It does not authorize the court to compel even a federal officer to consent to substitution, *Union Trust Co. v. Wardell*, 258 U.S. 537; *Smietanka v. Indiana Steel Co.*, 257 U.S. 1.

It is not to be assumed that the statute was intended to impose obligations on state officers, since no such authority has been delegated to the Federal Government, and it would be an invasion of the reserved power of the States for the Federal Government to impose duties and financial burdens on state officers.

The federal statute could not constitutionally authorize the court to compel La Prade, as a state officer, to accept substitution for Peterson because:

(a) Suit against La Prade as a state officer would be a suit against the State in contravention of the Eleventh Amendment. *Ex parte Ayers*, 123 U.S. 443; *Minnesota v. Hitchcock*, 185 U.S. 373; *Fitts v. McGhee*, 172 U.S. 516; *In re State of New York*, 256 U.S. 490.

(b) The Federal Government can not exercise the reserved powers of the States by imposing duties and financial burdens on state officers.

(c) The original suits were maintained on the ground that they had been brought against Peterson as an individual and not as a state officer. *Ex parte Young*, 209 U.S. 123, 159; *Poindexter v. Greenhow*, 114 U.S. 270; *In re State of New York*, 256 U.S. 490.

There is no privity between Peterson and La Prade. *United States v. Boutwell*, 17 Wall. 604; *Gorham Mfg. Co. v. Wendell*, 261 U.S. 1,

La Prade can not be made responsible for Peterson's wrongdoing. *Smietanka v. Indiana Steel Co.*, 257 U.S. 1; *United States v. Boutwell*, *supra*.

The personal liability of Peterson as an individual defendant can not be shifted to La Prade. *Gorham Mfg. Co. v. Wendell*, 261 U.S. 1.

La Prade can not be required to defend himself without a complaint filed against him, a summons issued, or any opportunity to plead or to present evidence in his own behalf. The suit against Peterson can not be transformed by a mere order of substitution into a suit against La Prade. *United States v. Boutwell*, 17 Wall. 604; *Richardson v. McChesney*, 218 U.S. 487.

It is apparent that La Prade is not only required, by the order in this case, to step into Peterson's shoes, to be charged with the alleged wrongdoing of Peterson, but he must undertake the financial burden of carrying on a suit which, through its conduct by Peterson, carries with it ultimate liability not only for the costs already incurred, but also liability for the costs which the new defendant must incur, or else fail in his defense. Here is a case in which over 8,000 pages of testimony have been taken; the costs of a reference to master, approximating \$15,000 have been incurred.

If all costs to the present time were disregarded, it would be necessary for La Prade, as a substitute defendant, to subject himself to enormous costs which would be required for an appeal to the Supreme Court from the decision of the three-judge court.

Such substitution would not be "due process of law." *McVeigh v. United States*, 11 Wall. 259; *Windsor v. McVeigh*, 93 U.S. 277.

There is an entire lack of jurisdiction in the three-judge court to proceed against petitioner. *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70; *Champlin Rfg. Co. v. Corporation Comm'n*, 286 U.S. 210, 238.

Messrs. Robert Brennan and Henley C. Booth, with whom *Messrs. Homer W. Davis, Guy V. Shoup, and E. E. McInnis* were on the brief, for respondents.

Petitioner's remedy was to appeal from the final decree, entered before he filed his petition.

He should have remained and participated in the final hearing, and would not thereby have consented to the substitution, or added in the least to the power and jurisdiction of the District Court over him. *Harkness v. Hyde*, 98 U.S. 476, 479; *Southern Pacific Co. v. Denton*, 146 U.S. 202, 206; *Merchants H. & L. Co. v. Clow & Sons*, 204 U.S. 286, 289.

It would be consistent with the former decisions of this Court to decline, on this application, to consider the jurisdiction of the District Court. *In re Chicago, R. I. & P. Ry. Co.*, 255 U.S. 273.

The substitution statute vested discretionary power in the District Court to make the substitution order, and unless the statute is invalid the order was proper.

Petitioner's contention that the statute only empowers a court to permit and does not authorize a court to compel substitution does violence to its words. If any explanation of legislative intent were necessary, then the statement of Mr. Justice Van Devanter at the hearing before the Senate Committee (Hearing of Subcommittee on Judiciary of Senate, 68th Cong., 1st Sess., on S. 2061, A Bill to Give the Supreme Court Authority to Make and Publish Rules in Common Law Actions—Feb. 2, 1924), that a successor sought to be substituted is "given opportunity to show cause, if he have any, why the substitution should not be made," and the statement in the House Judiciary Report, H.Rep. No. 1075, 68th Cong., p. 7, that under the statute "new state, county, and city officers may be substituted after notice to them and if such substitution is shown not to work them injustice," conclu-

sively negative petitioner's contention. *Union Trust Co. v. Wardell*, 258 U.S. 537.

The substitution statute as applied here does not violate the Fifth, Tenth, or Eleventh Amendments. Congress has power by appropriate legislation to prevent the invasion by States of the exclusive and occupied legislative field of Congress under the commerce clause, and to prevent interstate commerce being unduly burdened, and to enforce the Fourteenth Amendment.

Because an action against an individual who is a state officer, and which relates to the present or future discharge of his official duties, can be maintained only so long as he is clothed with official authority to do the act sought to be enjoined, it abates as soon as he ceases to hold such office, unless there is a statute providing for the substitution of his successor. That is the obvious and necessary purpose of the substitution statute. Such a defendant is not, because of that situation, sued in his official capacity or as a representative or agent of the State, within the Eleventh Amendment cases. Nor are the principles applicable that govern abatement of actions against individuals, such as an action to enjoin a threatened trespass tortious in character, personal in nature and not commanded by a state statute authorizing and requiring the trespass.

The purpose is, among other things, to provide for adjudication of constitutional questions in the federal courts in suits against officials relating to the present or future discharge of their duties. Another purpose is to enable the successors of the state officials against whom final decrees have been entered to be substituted and take or carry on appeals.

While judicial power can only be exercised in a case or controversy, its exercise is not confined to the forms of procedure that existed in 1789.

Congress is authorized by appropriate legislation to enforce the Fourteenth Amendment, and to carry into effect the power to regulate interstate commerce. The substitution statute is a valid exercise of that power.

Failure to appear would no more have affected the power of the District Court to adjudicate the controversy than failure of his predecessor to appear in response to the original subpoena would have affected it.

If plaintiffs do not bring suits, and if defendants do not defend suits or have not in advance by their conduct or agreements become liable for costs, no costs can be assessed against them.

The question of petitioner's liability for costs incurred while his predecessor was the defendant of record is moot, because the motion for leave to file petition was made on March 13, 1933, after the filing on March 8, 1933, of final decrees that adjudged that plaintiffs should collect no costs from either petitioner or his predecessor.

In some of the cases holding there could be no substitution without a statute providing therefor, lack of privity is referred to. What this Court meant was that there was not such privity as exists for example between a trustee and his successor; that there was not such privity that the action would survive in the absence of a statute so providing.

There is ample relationship between petitioner and his predecessor to sustain the substitution statute and the action of the District Court thereunder.

The duty of petitioner is precisely the same as that of his predecessor—to enforce the law unless competently restrained. Neither could disclaim that intention; nor is a threat by either necessary to the jurisdiction.

When the official sued is under a statutory duty to prosecute, that is sufficient for jurisdiction. *Pennsylvania v. West Virginia*, 262 U.S. 553, 592; *Pierce v. Society of Sisters*, 268 U.S. 510; *Williams v. Boynton*, 147 N.Y. 426.

Section 3 of the Arizona Act specifically provides that the penalties thereunder "shall be recovered and suits therefor brought by the Attorney General, or under his direction, in the name of the State." No discretion in the matter is entrusted to the Attorney General.

The Legislature and the Attorney General are agents of the State and capable of unlawful action; and the latter is bound to obey the former.

The authorities almost unanimously hold that it is the duty of an executive officer to comply with a state statute until the courts declare it unconstitutional, unless he would be under a personal liability if he complied and the statute were afterwards annulled; and that in the absence of personal liability, the defense of unconstitutionality may not be raised in a mandamus proceeding by any such officer. *State ex rel. v. State Board*, 84 Fla. 592; Harv. L. Rev., June, 1929, p. 1071. See *Columbus & Greenville Ry. Co. v. Miller*, 283 U.S. 96, 99; *Smith v. Indiana*, 191 U.S. 138; *Braxton County Court v. West Virginia*, 208 U.S. 192; *Marshall v. Dye*, 231 U.S. 250, 258; and *Stewart v. Kansas City*, 239 U.S. 14, 15.

The Fifth Amendment is not violated by the substitution.

The Arizona Train Limit Defense Statute and the acts and agreements of the state officials thereunder constituted such a consent by the State to the hearing and adjudication of the suits that petitioner is bound thereby. Act of Mar. 13, 1931 (c. 63, p. 142, Laws, 1931).

MR. JUSTICE BUTLER delivered the opinion of the Court.

Arthur T. La Prade, Attorney General of Arizona, applied for leave to file a tendered petition for writ of mandamus requiring Circuit Judge Wilbur and two district judges, constituting a United States district court in that State, to dismiss as to petitioner two suits in equity to which the court, against his opposition, had made him a

party defendant in substitution for his predecessor in office. We directed the judges to show cause why the leave prayed should not be granted, assigned the case for argument, directed briefs to be filed on or before the day set, stayed proceedings against petitioner, and directed the district court to continue its term pending the final determination of petitioner's application. The judges made their return to the rule. On the appointed day, there being no material controversy as to controlling facts, we heard oral arguments upon the merits.

The Act of the Arizona legislature approved by the governor, May 16, 1912, and on referendum by a majority of the voters of the State, November 5, 1912, being § 647, Revised Code, 1928, declares that it shall be unlawful for any company operating a railroad in that State to run over its line any train consisting of more than 70 freight or other cars exclusive of caboose, or any passenger train of more than 14 cars, and provides that any company that shall willfully violate any of the provisions of the Act shall be liable to the State for a penalty of not less than \$100 nor more than \$1,000 for each offense, and that such penalty shall be recovered, and suits therefor brought, by the attorney general in the name of the State.

July 24, 1929, the Atchison, Topeka and Santa Fe Railway Company and the Southern Pacific Company, respectively, brought suits in the federal court above referred to against K. Berry Peterson, then attorney general of the State. By its complaint each of the plaintiffs shows that it operates a line of railroad and trains for interstate transportation in and through Arizona; sets forth facts on which it claims that enforcement of the statute against it would violate the commerce clause, the due process clause of the Fourteenth Amendment, various provisions of the Interstate Commerce Act and other laws of the United States regulating interstate transportation by railroad; alleges that, if plaintiff shall operate trains con-

sisting of more than the specified number of cars, the defendant unless enjoined will institute numerous prosecutions for recovery of the prescribed penalties; asserts that the damage and injury which it daily sustains by reason of the statute is great and irreparable, and prays that defendant be temporarily and permanently enjoined.

In each case defendant answered and moved to dismiss the bill on the ground that the suit was one against the State prohibited by the Eleventh Amendment. The court consolidated the cases, refused temporary injunctions and denied defendant's motions to dismiss. 43 F. (2d) 198. It then appointed a master, who heard and reported the evidence together with his findings of fact, conclusions of law and recommendations for decrees in favor of plaintiffs. Defendant filed exceptions to, and moved to suppress, the report. The parties filed their briefs; and the court, in accordance with their stipulation, set down the causes for hearing at San Francisco on February 8, 1933. In the meantime, January 3, 1933, defendant's term of office expired and the petitioner, La Prade, then became the attorney general of the State. January 30, the plaintiffs delivered to petitioner a copy of an application to the court for an order substituting him as party defendant and gave notice that the application would be presented to the court at the time and place so fixed.

The applications for substitution were made under 28 U. S. C., § 780.* It provides that, where a suit brought

*(a) Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is

by or against a state officer is pending in a federal court at the time of his separation from his office, the court may permit the cause to be continued and maintained by or against such officer's successor if within six months it be satisfactorily shown that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved. The section requires that the officer, unless expressly consenting thereto, be given reasonable notice of the application and an opportunity to present any objection which he may have. As grounds for the substitution, plaintiffs' application merely stated that each suit relates to the future discharge of the official duties of the Attorney General of Arizona and, following the language of the statute, that there is a substantial need for continuing and maintaining it and obtaining adjudication of the questions involved.

Plaintiffs, at the appointed time and place, applied to the court for the order of substitution. The petitioner appeared specially and objected. He insisted that, each of the suits being against his predecessor individually, the questions involved became moot upon the expiration of the latter's term of office; that, there being no pleading

pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

charging him with having threatened to enforce the state enactment, there was no cause of action against him; that he could not be held for the costs theretofore incurred, and that the suits should be dismissed. After hearing the parties, the court by an order merely containing a recital in the general words of the statute as to the need for continuing the suits, made the petitioner defendant in each case.

Promptly, upon somewhat amplified grounds, he filed a motion that the cases be dismissed. The court denied the motion. Petitioner and his counsel declined to participate in further proceedings in the case. The court heard plaintiffs orally and, March 8, 1933, filed its opinion, findings of fact and conclusions of law, and entered decrees adjudging the statute unconstitutional and enjoining petitioner. It declared that no costs up to and including the entry of the final decree should be assessed against petitioner or his predecessor. The opinion, 2 F. Supp. 855, construes the statute to impose the duty of enforcement upon each succeeding attorney general and declares that, as long as there is an attorney general in the State, the threat of prosecution is always present and the resulting injury, if any, always impends.

The injunctions sought are not aimed at the State or the office of attorney general or to restrain exertion of any authority that belongs to either. Each complaint charges that, because of a void enactment and the purpose of defendant under color of his office to enforce it by means of suits which it purports to authorize, plaintiff is prevented from operating trains that are of suitable size and necessary for the proper conduct of the transportation business, and so continuously suffers great and irreparable injury. The suits were brought against defendant, not as a representative of the State, but to restrain him individually from, as it is alleged, wrongfully subjecting plaintiff to such unauthorized prosecutions. In *Ex parte*

Young, 209 U.S. 123, the court said (p. 159): "The Act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." The principle there stated has since been applied in numerous decisions here. See e.g., *Hopkins v. Clemson College*, 221 U.S. 636, 642 *et seq.* *Truax v. Raich*, 239 U.S. 33, 37. *Terrace v. Thompson*, 263 U.S. 197, 214. *Sterling v. Constantin*, 287 U.S. 378, 393.

The laws of Arizona do not authorize substitution of petitioner for his predecessor. See *Irwin v. Wright*, 258 U.S. 219, 222. The suits abated when defendant Peterson ceased to be attorney general. And unless empowered by § 780, the district court is without jurisdiction to direct that petitioner be substituted and that the suits be continued and maintained against him. *United States ex rel. Bernardin v. Butterworth*, 169 U.S. 600, 605. *Shaffer v. Howard*, 249 U.S. 200, 201. *Gorham Mfg. Co. v. Wendell*, 261 U.S. 1.

Subdivision (a) of § 780 applies only to proceedings brought by or against officers of the United States or those holding office directly or mediately under the authority of Congress. It is derived from the Act of February 13, 1925, c. 229, § 11 (a), 43 Stat. 941. It enlarges the Act

of February 8, 1899, c. 121, 30 Stat. 822, which was passed after our decision in *United States ex rel. Bernardin v. Butterworth*, *supra*. It was there held that a suit to compel the Commissioner of Patents to issue a patent abated by the death of the Commissioner and could not be revived so as to bring in his successor even upon consent of the latter. At the conclusion of its opinion the court said (p. 605): "In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, in the case of suits against the heads of departments abating by death or resignation, it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method."

Subdivision (b) applies only to proceedings brought by or against those holding office under state authority. As to such, it authorizes "similar proceedings" to those specified in subdivision (a). It was passed after our decision in *Irwin v. Wright*, *supra*. The opinion shows (p. 222) that a suit to enjoin a public officer from enforcing a statute is personal and, in the absence of statutory provision for continuing it against his successor, abates upon his death or retirement from office. The court held that the Act of February 8, 1899, did not authorize the substitution of a county treasurer for his predecessor in a suit against the latter to enjoin collection of taxes. We suggested that it would promote justice if Congress were to enlarge the scope of that Act so as to authorize substitution in suits by or against state officers and said: "Under the present state of the law, an important litigation may be begun and carried through to this court after much effort and expense, only to end in dismissal because, in the necessary time consumed in reaching here, state officials, parties to the action, have retired from office. It is a defect which only legislation can cure."

Subdivision (c) extends to all cases covered by (a) and (b). It merely requires that before substitution a non-consenting officer shall be given notice and opportunity to object. It does not prescribe the showing of facts necessary to warrant an order that the proceeding be continued by or against the successor. When construing the section, it is to be borne in mind that Congress has authority to direct the conduct of federal officers in proceedings brought by or against them as such and may ordain that they may sue or be sued as representatives of the United States and stand in judgment on its behalf (*I.C.C. v. Oregon-Washington R. & N. Co.*, 288 U.S. 14, 27), but that Congress is not so empowered as to state officers. The section is merely permissive; it does not require but merely authorizes the court to order substitution in the cases covered. It extends only to suits "relating to the present or future discharge of . . . official duties." At least as to state officers it does not purport to authorize the imposition of liability or restraint upon the successor on account of anything done or threatened by the predecessor individually.

As shown above, the purpose of the suits was to prevent a wrong about to be committed by defendant acting outside, and in abuse of the powers of, his office. The wrongs threatened or committed by him constitute no ground for injunction against petitioner. Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for recovery of penalties shall be brought by the attorney general is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it. United States Constitution, Art. VI, cl. 3. Arizona Revised Code, 1928, § 63. The statement of Chief Justice Taft writing for the Court in *Gorham Mfg. Co. v. Wendell*,

supra, is pertinent. He said (p. 4): "The inherent difficulty in all these cases is not in the liability and suability of the successor in a new suit. It is in the shifting from the personal liability of the first officer for threatened wrong or abuse of his office to the personal liability of his successor when there is no privity between them, as there is not if the officer sued is injuring or is threatening to injure the complainant, without lawful official authority. There is no legal relation between the wrong committed or about to be committed by the one, and that by the other."

It follows from what has been said that § 780 has no application to the case as presented and that the district court had no jurisdiction to substitute petitioner as a party defendant in place of his predecessor or to direct that the suits be continued and maintained against him. We have no occasion to decide whether or in what circumstances a successor in office who adopts the attitude of his predecessor and is proceeding or threatening to proceed to enforce the statute may be substituted in a pending suit. That question is not here and is reserved.

Petitioner's application for leave to file is granted, the case will be docketed and respondents' return filed, and a writ of mandamus will issue commanding the respondents to vacate the decrees against petitioner and to dismiss the suits as to him.

It is so ordered.

BEVAN v. KRIEGER, SHERIFF.*

APPEALS FROM THE SUPREME COURT OF OHIO.

No. 784. Argued May 8, 9, 1933.—Decided May 22, 1933.

1. Witnesses subpoenaed by a notary public to give depositions, pursuant to § 11529 of the General Code of Ohio, failed to attend; and

* Together with No. 785, *Koehrman v. Krieger, Sheriff*, and No. 786, *Stranahan v. Krieger, Sheriff*.