*FEBRUARY TERM, 1798.

Hollingsworth *v.* Virginia.

Suits against a state.—Constitutional law.

The 11th amendment to the constitution having deprived the supreme court of jurisdiction over suits against a state, by a citizen of another state, pending actions could be no further prosecuted.

An amendment to the constitution need not be presented to the president for his approval.

The decision of the court, in the case of *Chisholm* v. *Georgia* (2 Dall 419), produced a proposition in congress, for amending the constitution of the United States, according to the following terms:

"The judicial power of the United States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."

The proposition being now adopted by the constitutional number of states, *Lee*, Attorney-General, submitted this question to the court—whether the amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another state?

W. Tilghman and *Rawle* argued in the negative, contending, that the jurisdiction of the court was unimpaired, in relation to all suits instituted, previously to the adoption of the amendment. They premised, that it would be a great hardship, that persons legally suing, should be deprived of a right of action, or be condemned to the payment of costs,[1] by an amendment of the constitution, *ex post facto;* 4 Bac. Abr. 636–7, pl. 5. And that the jurisdiction being before regularly established, the amendment, notwithstanding the words "shall not be construed," &c., must be considered, in fact, as introductory of a new system of judicial authority. There are, however, two objections to be discussed.

*The amendment has not been proposed in the form prescribed by the constitution, and therefore, it is void. Upon an inspection of [*379 the original roll, it appears, that the amendment was never submitted to the president for his approbation. The constitution declares, that "every order, resolution or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment), shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, &c." Art. I. § 7. Now, the constitution likewise declares, that the concurrence of both houses shall be necessary to a proposition for amendments. Art. V. And it is no answer to the objection, to observe, that as two-thirds of both houses are required to originate the proposition, it would be nugatory to return it with the president's negative, to be repassed by the same number; since the reasons assigned for his disapprobation might be so satis-

[1] See Walker *v.* Smith, 1 W. C. C. 202.

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factory as to reduce the majority below the constitutional proportion. The concurrence of the president is required in matters of infinitely less importance; and whether on subjects of ordinary legislation, or of constitutional amendments, the expression is the same, and equally applies to the act of both houses of congress.

2d. The second objection arises from the terms of the amendment itself. The words, "commenced or prosecuted," are properly in the past time; but it is clear, that they ought not to be so grammatically restricted; for then a citizen need only discontinue his present suit, and commence another, in order to give the court cognisance of the cause. To avoid this evident absurdity, the words must be construed to apply only to suits to be "commenced and prosecuted." The spirit of the constitution is opposed to everything in the nature of an *ex post facto* law, or retrospective regulation. No *ex post facto* law can be passed by congress. Const. Art. I. § 9. No *ex post facto* law can be passed by the legislature of any individual state. Ibid. § 10. It is true, that an amendment to the constitution cannot be controlled by those provisions; and if the words were explicit and positive, to produce the retrospective effect contended for, they must prevail. But the words are doubtful; and therefore, they ought to be so construed as to conform to
*380] the general principle of the constitution. (*a*) In *4 Bac. Abr. 650, pl. 64, it is stated, that "a statute shall never have an equitable construction, in order to overthrow an estate;" but if the opposite doctrine prevails, it is obvious, that many vested rights will be affected, many estates will be overthrown. For instance, Georgia has made and unmade grants of land, and to compel a resort to her courts, is, in effect, overthrowing the estate of the grantees. So, in the same book (p. 652, pl. 91, 92), it is said, that "a statute ought to be so construed, that no man, who is innocent, be punished or endamaged;" and "no statute shall be construed in such manner, as to be inconvenient or against reason:" whereas, the proposed construction of the amendment would be highly injurious to innocent persons; and driving them from the jurisdiction of this court, saddled with costs, is against every principle of justice, reason and convenience. Presuming, then, that there will be a disposition to support any rational exposition, which avoids such mischievous consequences, it is to be observed, that the words "commenced and prosecuted" are synonymous. There was no necessity for using the word "commenced," as it is implied and included in the word "prosecuted;" and admitting this glossary, the amendment will only affect the future jurisdiction of the court. It may be said, however, that the word "commenced" is used in relation to future suits, and that the word "prosecuted" is applied to suits previously instituted. But it will be sufficient to answer in favor of the benign construction for which the plaintiffs contend, that the word "commenced" may, on this ground, be confined to actions originally instituted here, and the word "prosecuted" to suits brought hither by writ of error or appeal. For it is to be shown, that a state may be sued originally,

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(*a*) CHASE, Justice.—The words "commenced and prosecuted," standing alone, would embrace cases both past and future.

W. Tilghman.—But if the court can construe them, so as to confine their operation to future cases, they will do it, in order to avoid the effect of an *ex post facto* law, which is evidently contrary to the spirit of the constitution.

and yet not in the supreme court, though the supreme court will have an appellate jurisdiction; as, where laws of the state authorize such suits in her own courts, and there is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity. (1 U. S. Stat. 80, § 13; Id. 85, § 25.) Upon the whole, the words of the amendment are ambiguous and obscure; but as they are susceptible of an interpretation, which will prevent the mischief of an *ex post facto* construction (worse than an *ex post facto* law, inasmuch as it is not so easily rescinded or repealed), that interpretation ought to be preferred.

Lee, Attorney-General.—The case before the court is that of a suit against a state, in which the defendant has never entered an appearance; but the amendment is equally operative in all the cases against states, where there has been an appearance, or even where there have been a trial and judgment. An amendment *of the constitution, and the repeal of a law, are not, manifestly, on the same footing; nor can an explanatory [*381 law be expounded by foreign matter. The amendment, in the present instance, is merely explanatory, in substance, as well as language. From the moment those who gave the power to sue a state, revoked and annulled it, the power ceased to be a part of the constitution; and if it does not exist there, it cannot in any degree be found or exercised elsewhere. The policy and rules which, in relation to ordinary acts of legislation, declare that no *ex post facto* law shall be passed, do not apply to the formation or amendment of a constitution. The people limit and restrain the power of the legislature, acting under a delegated authority; but they impose no restrain on themselves. They could have said, by an amendment to the constitution, that no judicial authority should be exercised, in any case, under the United States; and if they had said so, could a court be held, or a judge proceed, on any judicial business, past or future, from the moment of adopting the amendment? On general grounds, then, it was in the power of the people, to annihilate the whole, and the question is, whether they have annihilated a part of the judicial authority of the United States? Two objections are made: 1st. That the amendment has not been proposed in due form. But has not the same course been pursued relative to all the other amendments that have been adopted?(*a*) And the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of investing the president with a qualified negative on the acts and resolutions of congress. 2d. That the amendment itself only applies to future suits. But whatever force there may be in the rules for construing statutes, they cannot be applied to the present case. It was the policy of the people, to cut off that branch of the judicial power, which had been supposed to authorize suits by individuals against states; and the words being so extended as to support that policy, will equally apply to the past and to the future. A law, however, cannot be denominated retrospective, or *ex post facto*, which merely changes the remedy, but does

(*a*) CHASE, Justice.—There can, surely, be no necessity to answer that argument. The negative of the president applies only to the ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the constitution.

not affect the right; in all the states, in some form or other, a remedy is furnished for the fair claims of individuals against the respective governments. The amendment is paramount to all the laws of the Union; and if any part of the judicial act is in opposition to it, that part must be expunged. There can be no amendment of the constitution, indeed, which may
*382] *not, in some respect, be called *ex post facto;* but the moment it is adopted, the power that it gives, or takes away, begins to operate, or ceases to exist.

THE COURT, on the day succeeding the argument, delivered a unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state.

BINGHAM, Plaintiff in error, *v.* CABOT *et al.*

Jurisdiction.

The process and pleadings must set forth the citizenship of the parties, in order to confer jurisdiction on the circuit court.[1]

THIS action came again before the court,(*a*) on a writ of error; and an objection was taken to the record, that it was not stated, and did not appear in any part of the process and pleadings, that the plaintiffs below, and the defendant, were citizens of different states, so as to give jurisdiction to the federal court. The caption of the suit was—"At the circuit court begun and held at Boston, within and for the Massachusetts district, on Thursday, the first day of June, A. D. 1797, by the honorable Oliver Ellsworth, Esq., Chief Justice, and John Lowell, Esq, district judge—John Cabot *et al. v.* William Bingham:" And the declaration (which was for money had and received to the plaintiff's use) set forth, "that John Cabot, of Beverly, in the district of Massachusetts, merchant, and surviving copartner of Andrew Cabot, late of the same place, merchant, deceased, Moses Brown, Israel Thorndike and Joseph Lee, all of the same place, merchants, Jonathan Jackson, Esq., of Newburyport, Samuel Cabot, of Boston, merchant, George Cabot, of Brooklyn, Esq., Joshua Ward, of Salem, merchant, and Stephen Cleveland, of the same place, merchant, all in our said district of Massachu-
*383] setts, and Francis Cabot, of Boston *aforesaid, now resident at Philadelphia aforesaid, merchant, in plea of the case, for the said William, at said Boston, on the day of the purchase of this writ, being indebted to the plaintiffs, &c., promised to pay, &c." The defendant pleaded *non assumpsit,* and an issue being thereupon joined and tried, there was a verdict and judgment for the plaintiff, for $27,224.93 and costs.

Lee, Attorney-General, contended, for the plaintiff in error, that there was not a sufficient allegation on the record, of the citizenship of the parties, to sustain the jurisdiction of the circuit court, which is a limited jurisdiction. Though the constitution declares, that "the citizens of each state shall be

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(*a*) See *ante,* p. 19.

[1] See note to Emory *v.* Grenough, *ante,* p. 369.