language used in the act itself and the subject matter thereof. This act, as amended, passed the Senate on April 7, 1925, and passed the House on April 6, 1925. On April 8th both the House and the Senate agreed to a final adjournment on April 9th, and both did adjourn on that day. It will be seen that at the time of the passage of this act the members of the General Assembly knew with reasonable certainty when the body of the act would go into effect; so the provision regarding the time when the four sections would become operative was well known to the members of that body. It is reasonable to presume that the act would not have been passed by the General Assembly without the provision regarding said four sections, for the act was amended in both legislative bodies, and it required a conference committee to finally agree on the terms thereof, and it did not pass both bodies till near the end of the session. To disregard the provisions regarding said four sections would be clearly in violation of the act.

The members of the General Assembly well knew that this act could be suspended under the initiative and referendum, as similar acts passed by former assemblies were suspended and were rejected by the people. We must therefore presume that the members of the General Assembly intended to give employers, insurance companies and the Commissioners the fifty-four days after most of the act went into effect before sections 2 to 4, inclusive, and section 34 should become effective. And the people of the State, in voting on this proposition at the November election, knew that this legislative act provided that these four sections should not take effect until fifty-four days after the ratification of the act; and it must also be presumed that they knew the reasons therefor, to all of which the people signified their approval at the November election. I am, therefore, of the opinion that said four sections, which refer to the liability of employers to employes, do not take effect until fifty-four days after November 16, 1926, and the Commission is not justified in attempting to assume jurisdiction in the settlement of claims by employes against employers till then.

In support of my opinion I respectfully refer you to the following:

State ex rel v. Pond, 93 Mo. l. c. 624-6.

Salem Hospital v. Olcott, 67 Oregon 448, 136 Pac. 341.

Whittaker v. Mutual Life Ins. Co., 133 Mo. App. 664.

State ex rel v. Edwards, 136 Mo. l. c. 567-8.

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ENFORCEMENT OF A MONEY JUDGMENT AGAINST A STATE

The problem of the exact extent of the powers which may be exercised by the government of the United States without encroaching upon the rights of the constituent states, far from being settled by past judicial decisions, is still a subject of heated debate in some quarters, and will probably remain an open question for many years to come. One interesting phase of this general problem is the extent of the power of the

Supreme Court of the United States to enforce a judgment against a State, granting the judgment to be one which the court had jurisdiction to render. The problem may be stated more specifically in the following two questions: (1) May the Supreme Court, in an appropriate case, issue a writ of mandamus to the legislature of a State to compel it to levy a tax to pay a money judgment lawfully rendered against the State? (2) If so, may the court, in the event the legislature refuses to obey such mandamus, levy and collect such a tax through its own officers to satisfy the judgment?[1] When thus stated, the importance of the problem becomes evident, as it is not to be expected that an affirmative answer to either of these questions will be accepted by the champions of state sovereignty unless and until it is unequivocally declared to be the law by the highest tribunal of the land. Some writers, indeed,[2] seem to consider the matter as practically settled by the decision in the case of *Virginia v. West Virginia*[3] in favor of the power of the Supreme Court to use *any* means necessary to execute its judgments. If this is the true view of the law, whenever the necessity may arise, the Supreme Court may resort to such extreme measures as dictating to the legislature of a "sovereign State" the passage of a tax bill, or even usurping the wholly non-judicial function of levying a tax itself. But these authors, though entitled to the greatest respect in their expression of opinion as to what the law is or ought to be, aside from any particular case, are not justified in reading into the *Virginia v. West Virginia* case the implication of such extreme powers. All that case decided was that the Supreme Court had a right, and, in fact, a duty to enforce the judgment rendered in the cause, but the question of what means of enforcement were appropriate, was deferred for further argument—an indication, surely, that there was some doubt in the court's mind as to whether it could issue a mandamus to compel the levy of a tax. In view of the nature of the parties involved, the distinction between deciding that the court had a general power to enforce its judgment against the defendant State, and deciding that it had the power to use any particular mode of execution, can not be considered negligible.

Since it has never been directly decided that the Supreme Court has power to compel by mandamus the levy of a tax to pay a judgment against a state, the only justification for assuming that it has such power must be looked for in the decisions of more or less analagous cases and the dicta of the court. A review of all relevant cases will show that the proposition that this power exists in the court has not even the support which a unanimous line of dicta would give it.

But before reviewing the authorities, it will be interesting to observe

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[1] Of course, no execution could be issued against the property of the State which is used for public purposes.

[2] William C. Coleman, "The State as Defendant under the Federal Constitution; the Virginia—West Virginia Debt Controversy," 31 HARV. LAW REV., 210; Thomas Reed Powell, "Coercing a State to Pay a Judgment: Virginia v. West Virginia, 17 MICHIGAN LAW REV., 1.

[3] Commonwealth of Virginia v. State of West Virginia, 246, U. S., 565, 38 S. Ct., 400, 62 L. Ed., 883 (1918).

how it has happened that the court has been able even to the present day to postpone a direct decision on the question. The effect of *Chisholm v. Georgia*[4] holding that a money judgment could be recovered against a State by a citizen of another State, was destroyed by the Eleventh Amendment to the Constitution, which removed from the jurisdiction of the federal courts all suits by citizens of one State against another State,[5] the largest class of cases in which the problem of execution against a State might have arisen. This left only suits against a State by the United States, a foreign country, or another State, in which the problem might be raised, and these classes of cases must be further limited by excluding all cases involving merely boundary disputes, as not calling for the recovery of money damages from the defendant State. Such cases as *Kansas v. Colorado*[6] would also have to be excluded, because the relief, if granted, would have consisted merely in the prohibition of certain acts of the defendant State—in the case referred to, the using of water from the Arkansas River for irrigation, to the prejudice of the plaintiff State. The first case since the Eleventh Amendment was interpreted by *Hollingsworth et al v. Virginia,*[7] in which an attempt was made to recover a money judgment against a State, was *New Hampshire v. Louisiana,*[8] in which such judgment was refused on the ground that it was only nominally a suit between two States, the real parties plaintiff being citizens of New Hampshire, and hence the Eleventh Amendment applied. At the same time was decided the case of *Louisiana ex rel Elliot et al v. Jumel,*[9] in which there was, in effect, an attempt to recover a judgment against a State, though, in form, only an attempt to compel officers of the State to pay over sums due the relators on certain bonds issued by the State, performing all duties necessary to effectuate this result, including levying and collecting a tax. The Supreme Court held that the suit was in reality against the State, and therefore was properly dismissed, as the State was not, and could not have been made, a party defendant. Whether such a suit against State officers could have been maintained in a case where a judgment against the State had been lawfully obtained, was not decided. In 1890, *Hans v. Louisiana*[10] decided that a suit against a State, by a citizen of the same State, though not within the terms of the Eleventh Amendment, could not be entertained by the federal courts, on the familiar principle that a sovereign is not subject to suit without its consent, and no consent to suits of this character could be implied from the State's assent to the terms of the Constitution of the United States. No suit by a foreign nation against a State of the Union has come before the United States Supreme Court, a suit by an Indian tribe against a State being excluded from this class, and in fact,

[4] 2 Dall. 419, 1 L. Ed., 440 (1793).
[5] Including those then pending. Hollingsworth et al v. Virginia, 3 Dall. 378, 1 L. Ed., 644 (1798).
[6] 185 U. S., 125, 46 L. Ed. 838, 22 S. Ct., 552 (1902); 206 U. S., 46, 51 L. Ed., 956, 27 S. Ct., 655 (1907).
[7] 3 Dall., 378, 1 L. Ed., 644 (1798).
[8] 108 U. S., 76, 27 L. Ed., 656, 2 S. Ct., 176 (1883).
[9] 107 U. S., 711, 27 L. Ed., 448, 2 S. Ct., 128 (1883).
[10] 134 U. S., 1, 33 L. Ed., 842, 10 S. Ct., 504.

excluded from the jurisdiction of the federal courts altogether.[11] No suit by the United States against a State, in which a money judgment might have been rendered, has reached the point where the means of execution had to be considered. In *United States v. State of North Carolina*[12] judgment was in favor of defendant, and in *United States v. State of Michigan*[13] defendant's demurrer was overruled, but evidently the case was settled without further contest, as there is no record of an answer being subsequently filed.

Finally there came a case in which a test of the power of the Supreme Court to enforce its judgment against a State bade fair to arise. *South Dakota v. North Carolina*[14] was, like *New Hampshire v. Louisiana,* supra, an action by one State on bonds issued by another State. But, whereas in the earlier case the bonds had been assigned to the State merely for the purpose of enabling suit to be brought on them for the benefit of the private individuals who were the real parties in interest, in the later case the plaintiff State was the *bona fide* owner of the bonds, by virtue of a gift, suing in its own interest, and no attempt to evade the effect of the Eleventh Amendment could be imputed. A money judgment against the State of North Carolina was rendered; but the question whether the court could compel the levy of a tax to pay the judgment was not decided, because the bonds in question were secured by certain railroad stocks in which the defendant State had an interest, which the court ordered sold to satisfy the judgment, reserving the question of what should be done in case the sum so realized should prove insufficient, until such contingency should actually occur. As a matter of fact, the contingency did not occur, because the defendant State finally acquiesced in, and paid, the judgment.[15]

Then came the case of *Virginia v. West Virginia,* involving a dispute over the distribution of the public debt of the State of Virginia between Virginia and West Virginia at the time of the separation of West Virginia from the mother State. This controversy came before the Supreme Court nine times, on various questions, some of which touched on the power of the court to execute a judgment against the defendant State, and some of which did not. In the original case[16] the court merely disposed of a demurrer, and remarked incidentally,[17] "It is not to be presumed on demurrer that West Virginia would refuse to carry out the decree of this court. If such repudiation should be absolutely asserted we can then consider by what means the decree may be enforced." At each of the subsequent hearings, the consideration of the means of execution was postponed, for one reason or another,[18] even when there would have been no occasion for such postponement had

[11] Cherokee Nation v. State of Georgia, 5 Pet., 1, 8 L. Ed., 25 (1831).
[12] 136 U. S., 211, 34 L. Ed., 336, 10 S. Ct., 290 (1890).
[13] 190 U. S., 379, 47 L. Ed., 1103, 23 S. Ct., 742 (1903).
[14] 192 U. S., 286, 48 L. Ed., 448, 24 S. Ct., 269 (1904).
[15] This fact is stated by Justice Brewer, who delivered the opinion in South Dakota v. North Carolina, in REPORT OF THE THIRTEENTH ANNUAL MEETING OF THE LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION, 107, pp. 170, 171.
[16] 206 U. S., 290, 51 L. Ed., 1068, 27 S. Ct., 732.
[17] Page 319 in official report.
[18] 209 U. S., 514, 52 L. Ed., 914, 28 S. Ct., 614. (Case referred to a master.)

the suit been between private individuals. On several of these hearings, the court expressed a hope that the defendant State would pay the judgment of its own accord, and on the hearing preceding the final one, the only reason assigned for denying execution was, that the State might be given an opportunity so to pay. On the final hearing, though the court asserted its authority to enforce its judgment, which was admitted at this time by the parties, it again evaded a direct answer as to the means of execution by setting a future date for argument on the propriety of a writ of mandamus ordering the legislature of West Virginia to levy a tax to pay the judgment, or of such other means of execution as might be suggested. At the same time the court hinted that it would welcome help from Congress in the form of a special statutory remedy particularly applicable to the case, by deciding that Congress had power to create such a remedy. As in the North Caroline case, *supra,* the court was relieved of the necessity of deciding on the means of execution, by the eleventh hour acquiescence in, and payment of, the sum adjudged to be due, by the State of West Virginia, without coercion, the money being raised by a bond issue.

Thus for over a hundred years since the adoption of the Constitution has the question of the power of the United States Supreme Court to enforce a money judgment against a State been unsettled, and even now, though its power to enforce such such a judgment has been definitely upheld, it is still an open question what means of execution may be used. Whether a mandamus could, under any circumstances, be used to compel a State legislature to levy a tax to pay such a judgment, is a question the decision of which it is unsafe to predict, for what few analagous decisions and relevant dicta there are do not agree in their effect; and the same may be said of the further question, whether the court could itself levy a tax to satisfy a judgment against a State. The following summary of the arguments and authorities on each side will make this apparent.

First, in favor of the power to issue a mandamus to compel the State legislature to levy a tax, we have:

1. The decisions in *Virginia v. West Virginia*[19] and *South Dakota v. North Carolina,*[20] already referred to, that the court may enforce a money judgment by *some* means.

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220 U. S., 1, 55 L. Ed., 353, 31 S. Ct., 330. (Hope of agreement between the parties expressed after certain questions were adjudicated.)

222 U. S., 17, 56 L. Ed., 71, 32 S. Ct., 4. (Final decree deferred to give time for legislature of West Virginia to meet.)

231 U. S., 89, 58 L. Ed., 135, 34 S. Ct., 29. (Final judgment further postponed until a commission appointed for the purpose should have an opportunity to settle the matter out of court.)

234 U. S., 117, 58 L. Ed., 1243, 34 S. Ct., 889. (Because of the peculiar character of the parties, case reopened after judgment to allow proof of credits and other matters which would, if allowed, reduce the amount of the judgment.)

238 U. S., 202, 59 L. Ed., 1272, 35 S. Ct., 795. (These credits adjudicated, the court tacitly assuming defendant State would submit to the decree.)

241 U. S., 521, 60 L. Ed., 1147, 36 S. Ct., 719. (Execution denied pending meeting of newly elected legislature to give it an opportunity to take steps to pay voluntarily.)

246 U. S., 565, 62 L. Ed.. 883, 38 S. Ct., 400. (Final hearing, discussed in the text.)

[19] See note 3.

2. Certain broad statements to the effect that jurisdiction to render a judgment includes full power to execute it, contained in cases not involving a State as a party.[21] Of course, the difference in the facts makes these cases of little value in the present discussion.

3. A dictum by Chief Justice Waite, in *Louisiana v. Jumel*[22] as follows: "When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose."

All of the preceding dicta and decisions, it will be seen, depend for their relevancy to the point in issue, upon whether it is possible to imply the power to issue a particular form of execution from the mere power to execute a judgment, plus a state of facts making that form of execution the only one which would be effectual.

4. In addition to the above, there is a group of cases, showing that a mandamus to compel the levy of a tax to pay a judgment is not unknown to the law, though it has hitherto been issued only against the legislative bodies of municipalities, whose status is, of course, quite different from that of sovereign states.[23]

On the other hand, tending to deny the right to issue a mandamus against a State legislature to levy a tax, we have:

1. The general principle that a State is sovereign within its own domain, and that the federal government can not control the officers of a State government in the exercise of their powers as such, of which the power of the legislature to levy a tax is certainly one.

2. The general principle that discretionary acts, which would include the levying of a tax, can not be compelled by mandamus.

3. The following very positive but extra-judicial statement by Justice Brewer, who delivered the opinion of the court in *South Dakota v. North Carolina, supra,* referring to that case: "We could not compel the Legislature of North Carolina to meet and pass an act; the marshal could not levy upon the public buildings of the State; what would be the significance of a judgment which the court was powerless to enforce?"[24]

4. In reply to any argument to the effect that the power to issue a mandamus may be implied from necessity, where it is the only way to enforce the duty of the State to pay a judgment, it may be shown that there is at least one case, according to *Kentucky v. Dennison,*[25] in which a State or its officers may have a clear duty under the national Constitu-

[20] See note 14.

[21] Wayman v. Southard, 10 Wheat. 1, 6 L. Ed., 253 (1823); Bank of U. S. v. Halstead, 10 Wheat. 51, 6 L. Ed., 264 (1823); Gordon v. U. S., 2 Wall., 561, 17 L. Ed., 921 (1865), see also 117 U. S., 697.

[22] See note 9.

[23] Board of Supervisors of Rock Island County v. U. S. ex rel Von Hoffman v. Quincy, 4 Wall., 535, 18 L. Ed., 403 (1867); U. S. ex rel Riggs v. Johnson County, 6 Wall., 166, 18 L. Ed., 768 (1868); Labette County Commissioners v. U. S. ex rel. Moulton, 112 U. S., 217, 28 L. Ed., 698, 5 S. Ct., 118 (1884).

[24] REPORT OF THE THIRTEENTH ANNUAL MEETING OF THE LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION, 107, pp. 170-171.

tion, which can not be enforced by federal authority, but depends for performance on the honor and integrity of the representatives of the State. The court in the case cited, though holding most emphatically that the interstate rendition of fugitives from justice is an absolute duty, refused to compel such rendition by a mandamus against the governor of a State, on the ground that no power is given to the judiciary or other department of the federal government to use any coercive means to compel the performance of this constitutional duty.[26] This decision, though severely criticized as political, not judicial, has never been overruled, and has been referred to as still being the law in several later cases in the Supreme Court,[27] including the comparatively recent one of *Drew v. Thaw*,[28] though it has not been cited for the point mentioned. It must be admitted that including the duty of a State to pay a judgment against it, among those which can not be enforced by the federal government would be receding from the point reached by *Virginia v. West Virginia;* it is not so certain, however, that the duty of the legislature to vote a tax to pay such a judgment is not one of these unenforceable duties.

Even if the power of the Supreme Court to execute a judgment against a State by means of a mandamus ordering the legislature of the State to levy a tax be granted, the question of what could be done in case the legislature refused to obey the mandamus, prefering to stand committed for contempt, remains undecided. For the court to step into the place of the legislature and levy the tax through its own officers would be a usurpation of legislative functions by the judiciary which is not even permitted in the case of a judgment against a municipality, which admittedly can be enforced by a mandamus against the municipal legislature. The following extracts are from cases which are authority for this rule:

> "This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."[29]
>
> 'The power of taxation is legislative, and can not be exercised otherwise than under the authority of the Legislature."[30]
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> "It is not only not one of the inherent powers of the court to

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[26] 24 How., 66, 16 L. Ed., 717 (1861).

[27] See William C. Coleman, "The State as Defendant under the Federal Constitution; the Virginia—West Virginia Debt Controversy," 31 HARV. LAW REV., 210.

[28] Taylor v. Taintor, 16 Wall., 366, 21 L. Ed., 287 (1873); Ex parte Com. of Virginia & Coles, 100 U. S., 339, 25 L. Ed., 676 (1880); Ex parte Siebold, 100 U. S., 371, 25 L. Ed., 717 (1880).

[29] 235 U. S., 432, 59 L. Ed., 302, 35 S. Ct., 137 (1914); p. 439 in official report.

[30] Rees v. City of Watertown, 19 Wall., 107, 22 L. Ed., 72 (1873); p. 116 in official report.

levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the state government."[31]

"Of course it does not follow from the fact that a court has authority to issue a writ of mandamus to compel officers to perform their duty that it can perform that duty in their place."[32]

The language used in these cases would seem to be conclusive of the question of the court's power to levy taxes to pay a judgment against a State; but in the last of the above cases, Justice Holmes points out a distinction between the case where a municipality is defendant and that of an action against a State, which would leave it open to the court to reach a different decision in the latter case. He says: " . . . the obligation upon which the judgment was recovered[33] was an obligation under, not paramount to, the authority of the state. It is true that the district court of the United States had jurisdiction of the suit upon the contract, but the extent of the obligation imposed was determined by the statutes of Missouri, not by the Constitution of the United States or any extraneous source, the Constitution only requiring that the obligation of the contract should not be impaired by subsequent state law. The plaintiff, by bringing suit in the United States court, acquired no greater rights than were given to him by the local statutes. The right so given was to have a tax levied and collected, it is true, but a tax ordained by and depending on the sovereignty of the state, and therefore limited in whatever way the state saw fit to limit it when, so to speak, it contracted to give the remedy. It is established that 'taxes of the nature now in question can only be levied and collected in the manner provided'[34] by the statute, and therefore that it is impossible for the courts to substitute their own appointee in place of the one contemplated by the act."[35]

After this review of the authorities, all that can safely be said in summing up is, that whether the Supreme Court of the United States can enforce a money judgment properly rendered against a State of the Union by means of a mandamus compelling the legislature of the State to levy a tax to pay the judgment, and whether, if the preceding question be answered in the affirmative, the court may itself levy a tax for such purpose, through its own officers, if the legislature refuses to obey such mandamus, are still open questions, capable of being decided either way.

F. W. FISCHER, '27.

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[30] Meriwether et al v. Garrett & Sons, et al, 102 U. S., 472, 26 L. Ed., 197 (1880); p. 501 in official report.

[31] Heine v. Board of Levee Commissioners, 19 Wall., 655, 22 L. Ed., 223 (1874); p. 661 in official report.

[32] Yost v. Dallas County, 236 U. S., 50, 59 L. Ed., 460, 35 S. Ct., 235 (1915); p. 57 in official report.

[33] Against a county.

[34] The words in single quotation marks are from State ex rel Cramer v. Judges of County Court, Cape Girardeau County, 91 Mo., 452, 3 S. W., 844 (1887); p. 454 in official report, and were quoted in Seibert v. Lewis (also cited as Seibert v. U. S.), 122 U. S., 284, 30 L. Ed., 1161, 7 S. Ct., 1190 (1887); p. 298 in official report, whence Justice Holmes seems to have taken them.

[35] See note 32; pp. 56-57 in official report.