not jurisdiction of the case. The reasoning of Lord Chief Justice Cockburn was not satisfactory upon this point.

The decision of Lord Stowell in the *Mud Islands Case*[1] clearly held that the marine league on the shore of the Gulf of Mexico extended three miles beyond the Mud Islands, which were eight miles from the coast, and that a capture of the French vessel by a British man-of-war between the Mud Islands and the coast was clearly in neutral territory and void. The Parliament by law claimed the marine league for British territory, and gave criminal jurisdiction to the courts of crimes occurring therein. The doctrine of the marine league has never been doubted in the United States and has been recognized in numerous cases. If a murder occurs within any of the waters of the State, can it be prosecuted in the State court? In the leading case of *United States v. Bevans*,[2] the court, through Chief Justice Marshall, held that the grant of admiralty jurisdiction does not by any means involve a cession of the waters of the State to the United States, and that the admiralty courts cannot try a case of crime committed within the State or its waters. The murder by Bevans was aboard a man-of-war in Boston harbor, and was cognizable in the State court and not in admiralty. The Chief Justice said that, under the war-power, Congress might punish murder on board a man-of-war whenever it enacted a law to do so, but it had not done so, and therefore the State had jurisdiction. No cases can be found to the contrary. In the case of *United States v. Coombs*[3] the defendant was punished for stealing from a wreck (property which was washed up on the land), but that was held to fall under the commerce power and not a case for admiralty; and in the late case of *Manchester v. Massachusetts*[4] (*Buzzards' Bay Case*), the decision and opinion of the court confirms these views, and sustains the State against the Federal jurisdiction.

[1] 5 Rob. Adm. 73.
[2] 3 Wheat. 336.
[3] 12 Pet. 722.
[4] 139 U. S. 340.

The doctrine in *Waring v. Clark*,[1] as expounded by Justice Wayne, sustains our admiralty jurisdiction on the ground that the admiralty courts in England, despite the rights of prohibition by the common-law courts, exercised a larger jurisdiction than was defined by the statute of Richard II.; and besides, the colonies and the Congress of Confederation held the more ancient limits of admiralty jurisdiction, and did not confine it within the circumscribed boundaries of those acts of Parliament. But while admiralty attaches its jurisdiction *in rem* for collision according to place, and may be exclusive of the common-law courts, yet it cannot seize a vessel which is in possession of a sheriff under State process. In *Taylor v. Carryl*[2] the State courts had seized a vessel under a proceeding by foreign attachment, and a motion was pending for an order of sale. With this condition of things a libel was filed in admiralty for seaman's wages, and the marshal served the process upon the vessel, and the Supreme Court held that the State possession prevailed over the admiralty. In the opinion of Mr. Justice Campbell, speaking for the court, Judge Story's Commentaries on the Constitution,[3] and a number of cases, are cited.[4] Chief Justice Taney, with three other justices, strongly dissented.

It has been further held that the saving of the common-law remedy to parties, in the ninth section of the Judiciary Act of 1789, does not take away the admiralty jurisdiction *in rem*. It applies to common-law jurisdiction *in personam*.[5] This distinction may reconcile the diverse views. The admiralty proceeds against the vessel itself. It is sued in admiralty, and to this extent the admiralty has exclusive jurisdiction; but another court may proceed *in personam* against the officers or master, and through this jurisdiction over the person affect the vessel itself, by execution, attachment or other lien.[6]

[1] 5 How. 441.
[2] 20 How. 583.
[3] Sec. 1666, and note.
[4] Moran v. Sturges, 154 U. S. 256.
[5] The Moses Taylor, 4 Wall. 556.
[6] The Moses Taylor, *supra;* The Hine v. Trevor, 4 Wall. 556; The Glide, 167 U. S. 606.

§ 373. "To controversies to which the United States shall be a party." The word "cases," which had been previously used, is now displaced by the word "controversy." A distinction has been drawn between the two words: "cases" include civil and criminal judicial controversies, but "controversies" is applied only to civil cases.[1] Whether this be a true distinction or not may be doubted. The word "all," before "controversies," is omitted; perhaps in part because it was not intended.

The United States is not suable except with its own consent. This is the attribute of sovereignty in a single State, and for like reasons in the United States. Of course, the United States are not suable in a State court; nor can the State court subordinate the authority of the United States to its jurisdiction.[2] If the United States has purchased property in a State merely as a proprietor, and not as a means of exercising their constitutional function, such property may be condemned by the State for streets, highways or public purposes, under its eminent domain, as the land of any other proprietor.[3] But where Congress buys or condemns property for the purpose of exercising Federal functions, the property is not subject to State law for taxation or condemnation as aforesaid.[4] But while it may not obstruct the Federal functions in respect to such property, unless it has ceded jurisdiction as provided under a former clause of the Constitution,[5] Congress can exercise no legislative function over such property. It is subject to the general legislative power of the State, except such as will obstruct its use in performing Federal functions.[6]

The United States may sue as plaintiff in their own or the State courts, or in the courts of a foreign country.[7] As above

[1] Tucker's Blackstone, Appen., 420–21; Chisholm v. Georgia, 2 Dall. 419, 431–32; Story's Commentaries, sec. 1168, note 2.

[2] Ableman v. Booth, 21 How. 506.

[3] United States v. Chicago, 7 How. 185.

[4] Ft. Leavenworth R. R. Co. v. Iowa, 144 U. S. 538; Palmer v. Barrett, 162 id. 399.

[5] Art. I, sec. 8, clause 15.

[6] People v. Godfrey, 17 Johns. 225; 114 U. S. 528, 538, *supra*.

[7] United States v. Wagner, 2 Ch. App. 582; Cooley on the Constitution, 133.

stated the United States cannot be sued in a United States court or elsewhere but by their consent. So that this clause is limited to cases where the United States is a party plaintiff. A remarkable case may now be referred to where a suit may be brought by a claimant of property held by the officers of the United States for the government. The officer, who is *locum tenens*, cannot plead that the United States are sued in his person, where the holding for the United States was without authority of law, and especially where it is unconstitutional.[1] This case was followed in a number of cases in respect to the suing of a State, to which reference will be had hereafter; the doctrine being that no officer can assert that he defends the State right or the right of the United States involved in his own defensive holding, where the State or the United States claim to hold by a title which was against law and unconstitutional. Such was the case in *United States v. Lee*, *supra*. The purchaser of the property of the plaintiff at a tax sale by an agent for the United States was held to be null and void because the sale was contrary to the Constitution and to the law. Therefore the United States could acquire no valid title under such a sale, and the officer of the United States could not protect the property from the claim of the true owner by alleging that the United States were the real defendants. They could not be the real defendants because they could not have acquired the title, which it was unconstitutional for them to acquire. In that case the United States by their counsel intervened and moved the dismissal of the suit because it was in fact against the United States. The court overruled the motion, gave judgment against the tenant who held for the United States, and the Supreme Court affirmed it. The opinion of the court was elaborate and reviews all the cases. Except in this class of cases the United States cannot be sued without their consent, as has already been stated; but in the year 1854 an act was passed creating what is known as the Court of Claims, the jurisdiction of which has been

[1] United States v. Lee, 106 U. S. 196.

considerably enlarged by an act passed in 1887. In this court the United States may be sued upon a contractual claim which might be asserted either at law or in equity, and very large jurisdiction was given to the court for inquiring into claims that are finally submitted to Congress. These statutes need not be critically commented upon. In the last act mentioned, *i. e.* in 1887, jurisdiction was given also to the circuit courts of the United States in a limited class of cases to allow suit for claims by private parties against the United States. When these courts render judgments in these cases against the United States there is no mode of enforcing them, and the judgment is of no avail until Congress appropriates money to pay it, which is usually done.

§ 374. The next clause is, "to controversies between two or more States." It will be noted that it does not say to "all" controversies, and therefore there is a class of which the Federal courts have no jurisdiction. The reason for establishing this jurisdiction is very obvious and is stated in the *Federalist* with great force.[1] The authority to settle disputes between the States concerning boundaries, jurisdiction, or any other cases whatsoever, was vested by the Articles of Confederation in Congress, but this was a very cumbrous mode of adjudicating them. What better or more appropriate tribunal for adjudicating controversies between the States than the Supreme Court? Colonial disputes had a precedent in the case of *Penn v. Lord Baltimore*.[2] Since the Constitution went into operation many cases of controversies between the States have been before the Supreme Court, and reference will be made to them.[3] These cases hold that questions of boundary, territorial right and property rights of all kinds are proper for this jurisdiction; but it has been held in the noted case of *Commonwealth of Kentucky*

[1] No. LXXX.
[2] 1 Vesey, 444.
[3] Rhode Island v. Massachusetts, 12 Pet. 757; Missouri v. Iowa, 7 How. 660; Florida v. Georgia, 17 id. 478; Alabama v. Georgia, 23 id. 505; Virginia v. West Virginia, 11 Wall. 39; Tennessee v. Virginia, 158 U. S. 257; Maryland v. West Virginia (now pending).

v. Dennison,[1] upon the refusal of the Governor of Ohio to extradite a criminal upon the demand of the State of Kentucky, that at the suit of Kentucky the constitutional duty of the State of Ohio could not be enforced, and that it was a political issue between the States and not one for judicial decision.

§ 375. The next clause is, "between a State and citizens of another State." It is obvious that it was well to extend the jurisdiction of the Federal courts to such cases, but the word "all" was omitted so that the State may sue a citizen of another State in the Federal court, or in the court of the State of which the defendant is a citizen. The *Federalist*[2] gives a satisfactory exposition of the reasons for this. The court of a citizen defendant might not be an impartial arbiter between the plaintiff State and its citizen. Impartiality and justice would more reasonably be expected from the Federal tribunals. This clause gave rise to a noted controversy. It gave the Federal court jurisdiction of controversies between a State and the citizens of another State. That is clear enough where the State is plaintiff; but did the clause mean that the citizen of another State might sue the State in a United States court? In the *Federalist*, above referred to, Mr. Hamilton said that this construction had been raised as an objection to the Constitution, and he undertook to controvert it by saying that it was impossible fairly to construe the Constitution to mean that a citizen as plaintiff could be party to a controversy with a State, and contended that it was contrary to the principle that a sovereign could not be sued without its consent. Despite this strong statement of the *Federalist*, in the celebrated case of *Chisholm v. Georgia*[3] the Supreme Court decided that Chisholm, a citizen of North Carolina, could sue the State of Georgia upon a money claim in the Supreme Court. The decision was rendered on the 19th of February, 1793, and on the 21st of February, so great was the alarm produced by the decision, an amend-

[1] 24 How. 66.
[2] No. LXXX.
[3] 2 Dall. 419.

ment was proposed to the Constitution in Congress which would render nugatory that decision. The history of the proceedings which eventuated in the adoption of the eleventh amendment to the Federal Constitution is given in a number of cases in the Supreme Court.[1]

This amendment must therefore be considered with the clause we are now commenting on. It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." As part of the history of this clause the original proposition did not contain the words "be construed to." Had it been adopted in its original form, it would have been a future limitation to the use of the judicial power. With the insertion of the words "be construed to" it had a retroactive effect by condemning the construction which had been given the original Constitution by the decision in *Chisholm v. Georgia*, *supra*, when the amendment was called to the attention of the Supreme Court.[2] A number of cases were dismissed from the docket because, by virtue of the amendment, the jurisdiction which had been assumed was taken away. The construction of this amendment has been the subject of a good deal of controversy, to which attention must now be called.

§ 376. First, a citizen of another State or of a foreign nation cannot sue a State in the courts of the United States, by reason of this amendment.

Second, as the eleventh amendment did not in terms forbid a citizen to sue his own State, it was contended that he could do so, because the prohibition of the eleventh amendment did

[1] Cohens v. Virginia, 6 Wheat. 406; also Haygood v. Southern, 117 U. S. 52; In re Ayres, 123 id. 443; North Carolina v. Temple, 134 id. 130; In re Neagle, 135 id. 1–23; Antoni v. Greenhow, 107 id. 711; Coster v. Greenhow, 114 id. 317; New Hampshire v. Louisiana, 108 id. 76; United States v. Texas, 143 id. 621; and especially the author's statement *arguendo* In re Ayres, 123 U. S. 443; Ex parte Wilson, 114 id. 417.

[2] Hollingsworth v. Virginia, 3 Dall. 378.

not reach him. But the fallacy of this contention is obvious from the fact that the original Constitution did not authorize a suit in the United States courts between a State and its own citizen, while it did authorize suits between a State and citizens of other States. There is no occasion, therefore, for the eleventh amendment to prohibit a construction of the original Constitution allowing a suit between the State and its own citizen. So the Supreme Court in two cases has decided that a citizen cannot sue his own State in the courts of the United States.[1]

Third, this amendment leaves the original Constitution unchanged as to a suit between two or more States, and, as we have already seen, the jurisdiction of the Supreme Court is fully recognized as to controversies in respect to boundaries and the like brought by one State against another.[2] Furthermore, it has been held that under the original terms of the Constitution, a controversy between the United States and a State is within the jurisdiction of the United States courts. This has been so decided where the United States was plaintiff under the original Constitution, to which the eleventh amendment as to such cases does not apply.[3] It has not yet been decided whether in such a controversy the State may be a plaintiff. An Indian tribe cannot sue a State, because the tribe is not a State.[4] Nor can the District of Columbia or a Territory sue a State, because neither of these is a State; and so also it is a well-settled doctrine that a resident of a Territory or of the District is not a citizen of a State who can sue the citizen of one of the States in the United States court.[5] The form of process against a State when sued has been adjudicated in the cases already referred to, but especially in *The State of New Jersey v. The State of New York*.[6]

[1] Hans v. Louisiana, 134 U. S. 1; North Carolina v. Temple, id. 22.

[2] Florida v. Georgia, 17 How. 478; Virginia v. West Virginia, 11 Wall. 39, and other cases cited *supra*.

[3] United States v. North Carolina, 136 U. S. 211; United States v. Texas, 143 id. 21.

[4] The Cherokee Nation v. Georgia, 5 Pet. 1.

[5] Hepburn v. Ellzey, 2 Cr. 445; Scott v. Jones, 5 How. 343, 377.

[6] 5 Pet. 284.

Fourth, a State may, by the original Constitution, sue a citizen of another State, and citizens and subjects of foreign States, in the United States courts.

Fifth, a bank or other corporation, wherein a State is one of the corporators, or is sole corporator, may, however, be sued by a citizen of another State. The State doffs its sovereignty when it becomes a stockholder, and the corporation is a being distinct from its corporators. The suit in such cases is therefore not against the State, but against the corporation and legal entity distinct from its corporators.[1] The opinion of Mr. Justice Curtis in *Curran v. Bank of Arkansas*[2] expounds this fully.

Sixth, but where a State prosecutes a citizen for a crime and convicts him, the citizen may appeal from the highest State court to the Supreme Court of the United States under the twenty-fifth section of the Judiciary Act already mentioned. It was contended in the case of *Cohens v. Virginia*[3] that this appeal by the convict was a suit against the State, but Chief Justice Marshall, in that famous case, made the distinction that, while the citizen could not assert a claim against the State and get judgment for it, he might on appeal get a judgment reversed which the State had unconstitutionally obtained against him. The appeal simply brought the case of the State against him for review in the appellate court, but in that case it was held that the appeal to the Supreme Court only lay after the highest appellate court in the State had decided against the right of the citizen. It is worthy of note, however, that while the court in that case decided it had jurisdiction to reverse, yet upon the merits it decided to affirm. The same doctrine will hold where the State in a civil suit obtains a judgment against a citizen contrary to his claim of right under the Constitution, laws or treaties of the United States, and this by virtue of the twenty-fifth section of the Judiciary Act.

[1] Briscoe v. Bank of Ky., 11 Pet. 692; Curran v. Arkansas, 15 How. 304; Bushnell v. Kennedy, 9 Wall. 387.

[2] 15 How. 301.

[3] 6 Wheat. 864.

Seventh. We come now to an important question. Can the eleventh amendment be evaded in its operation by suing the officers, boards or other functionaries of the State, and not suing the State by them? This question has been the subject of great and learned controversy. In the case of *Osborne v. Bank of United States*[1] the court said that the eleventh amendment did not apply unless the State was made a party defendant on the record; but in a later case, to which reference will be made, that doctrine has been clearly overruled.[2] In *Louisiana v. Jumel*, *supra*, a board of the State of Louisiana held some funds which, by prior obligations of the State, the board was to hold in trust for their payment. The State legislature afterwards enacted that the board should not pay out any of those funds for these special creditors. The creditors thereupon sued the board to compel the payment of their obligations out of that fund, but the court held that the board was really the State — the authority through which the State held these funds for creditors,— and that to make the board pay the creditors with these funds was equivalent to making the State do so. Therefore the Supreme Court held that it was still a suit against the State; that the State was not a party on the record; and gave judgment for the State. The same doctrine was affirmed in the later cases above cited. In the leading case of *In re Ayres*[3] the State of Virginia had directed its Attorney-General to sue delinquent tax-payers where they had tendered tax-receivable coupons in payment of their taxes, which the Supreme Court decided, in *Antoni v. Greenhow*[4] and *Poindexter v. Greenhow*,[5] that the State was bound to receive. The collecting officers of the State had been forbidden by the law of Virginia to receive these coupons in payment of taxes, and the Attorney-General of

[1] 9 Wheat. 738.

[2] Louisiana v. Jumel, 107 U. S. 711; Cunningham v. Railroad Co., 109 id. 446; Hagood v. Southern, 117 id. 52.

[3] 123 U. S. 443.

[4] 107 U. S. 769.

[5] 114 U. S. 270.

the State was directed to sue any such tax-payer, in which suit the tax-payer was allowed to plead the tender as the discharge of his obligation. One of the large creditors of the State of Virginia filed a bill stating that the coupons upon the bonds of the State were made unsalable by this legislation of the State, and praying an injunction against the Attorney-General and other attorneys for the Commonwealth forbidding them to bring the suits which the law of the Commonwealth had ordered. The Attorney-General and others proceeded to sue despite the injunction order. The judge of the United States court thereupon, upon proper process against them for contempt, fined and imprisoned them. They brought a writ of *habeas corpus*, issued from the Supreme Court, for their release from custody, upon the ground that these proceedings were virtually an injunction against the State forbidding its suing for its taxes, and this despite the fact that the State was not made a party on the record. The Supreme Court held, in a learned opinion of Mr. Justice Matthews, that the State had a constitutional right to sue; and as it could sue only by its officers, an injunction against the officers was an injunction against the State, and that virtually the whole proceeding was a suit against the State of Virginia. The officers were released under the *habeas corpus*. This latter case was followed by that of *McGahey v. Virginia*[1] and *Pennoyer v. McConnaughy*.[2] In the last case Mr. Justice Lamar quoted from the decision of Mr. Justice Bradley in *McGahey v. Virginia*, in which there was a summary of the propositions established by previous decisions, the third of which propositions is in these words: "That no proceedings can be instituted by any holder of said bonds or coupons against the Commonwealth of Virginia, either directly by suit against the Commonwealth by name, or indirectly against her executive officers, to control them in the exercise of their official functions as agents of the State." On the other hand, it has been distinctly held that where the State by its officer seizes the

[1] 135 U. S. 562. [2] 140 U. S. 1.

property of a citizen contrary to his right claimed under the Constitution, such citizen may sue the officer in trespass or other action, and the officer cannot plead, in justification of his action, that it was authorized by law and therefore is virtually the action of the State, because the State cannot authorize an act which by the Constitution it is forbidden to do, and that such citizen may sue such officer to recover his property, or damages for taking it, or by injunction to prevent the taking of it, and such suit will not be contrary to the eleventh amendment, because the officer cannot make his act the act of the State when the State, by the Constitution, is forbidden to do the act. The cases on this subject, besides those already cited, will be referred to in a note.[1] The decisions cited in the note hold that no suit against a State or its officers is allowed by the eleventh amendment to compel any affirmative action against the State or its officers. The State cannot be so enforced; but where the State through its officers is taking affirmative action against a citizen, contrary to his constitutional right, he may either prevent it by injunction or redress it by an action against the officer, and, because the officer is without constitutional authority from the State to do the act, judgment will be allowed against the officer. It will be noted that this is substantially the same principle upon which the decision in *United States v. Lee*,[2] heretofore referred to, rested. In both cases the officer of the State was the State, as far as any suit against him was concerned, where he performs the duties which the State has constitutional power to impose upon him; but where the State has no such authority to impose the duty, his act is defenseless under the shield of the State, and he is liable for it as an individual.

[1] Coupon Cases, 114 U. S. 269; Cunningham v. Railroad Co., 109 id. 453; Hagood v. Southern, 117 id. 52–70; Davis v. Gray, 16 Wall. 203; Tomlinson v. Branch, 15 id. 460; Litchfield v. Webster Co., 101 U. S. 773; Board of Liquidation v. McComb, 92 id. 531. All of these decisions are fully reviewed by Justice Bradley and Justice Lamar in the cases referred to. McGahey v. Virginia, 135 U. S. 662; Pennoyer v. McConnaughy, 140 id. 1; Fitts et al. v. McGhee et al., 172 id. 516.

[2] 106 U. S. 196.

Eighth. A creditor of a State, as we have seen, cannot sue the State for the debt under the eleventh amendment. Can he assign it to his own State with power to do so for him, and thus give jurisdiction to the Supreme Court, because it is a controversy between two States? This was attempted in recent cases. The court will look to the real parties to the suit, and in the cases of *New Hampshire v. Louisiana* and *New York v. Louisiana*[1] the court found that the suits were brought by the plaintiff States for and in behalf of its citizens, and the jurisdiction was denied as being in effect contrary to the eleventh amendment, because by a suit of the citizen against a State.

Ninth. Can a foreign State sue a State of this Union in the United States court? A foreign State may sue in the Supreme Court.[2] It may sue citizens and corporations of the United States. Can it sue a State? This has never been decided, but from the terms of the original Constitution it gives jurisdiction to controversies between a State and foreign States, citizens or subjects; and as the eleventh amendment forbids a suit by foreign citizens against a State, but does not forbid a suit by a foreign State against a State, it would seem that the original Constitution stands unaffected by the eleventh amendment as to a controversy between a State of the Union and a foreign State, whichever may be plaintiff or defendant. But it has been decided that the United States may only be sued, as by its law it is permitted, in the Court of Claims.

§ 377. In controversies between a State and citizens of another State, or between citizens of different States, etc., the question arises, Who is a citizen of a State within the meaning of these clauses of the Constitution? A citizen may be a citizen of a State, as to jurisdiction, when he resides in that State.[3] A resident of a Territory or of the District of Columbia is not a citizen of a State and cannot sue or be sued in the United States court.[4] He must sue in

[1] 108 U. S. 76.
[2] The Sapphire, 11 Wall. 164.
[3] Gassies v. Ballou, 6 Pet. 761; Shelton v. Tiffin, 6 How. 163.
[4] Hepburn v. Ellzey, 2 Cr. 445–48.

a State court, or be sued in the court of the Territory or in the court of the District of Columbia. An alien, if he has declared his intention to become a citizen, may sue as such in the United States court.[1] A much-controverted question here arises: Is a corporation created by a State a citizen within the meaning of these jurisdictional clauses. It is very obvious that a corporation is not a citizen in the true primal sense of that term. It is a metaphysical entity, a creature of the law, distinct from the personality of all its corporators. A citizen, in the true sense of the term, is a human being, with personal rights and capable of personal privileges and immunities; but it was held in an early case that the reason of the jurisdictional clause of the Constitution applied to the cases of the corporations of different States. The reason that jurisdiction was given between citizens of different States to the United States courts was the apprehension that the State courts, in such controversies, might not be as impartial as a court of the United States. The State court depends for its authority upon the State creating it; its environments consist of the nature, feeling and sympathies of the people of the State. A United States court is created by the Constitution of the Union, and in its independence of State authority and separation from State influence would be a better tribunal for the trial of questions in which the rights of the stranger were involved. This reason for the jurisdiction where the parties were citizens is stronger where one of the parties is a corporation; if the stranger citizen might be prejudiced in a State court, *a fortiori* might a stranger corporation be. Then again it was easy to see that the corporation, which was a being of the law and not a personality, yet represented persons who would likely be citizens of the State which created it. While therefore in form it was a corporation, a legal entity, and not a person representing persons who were citizens of the States which created it, the reason of the rule led to the early decisions that a corporation of a State was to be regarded, for

[1] Story on the Constitution, sec. 1700.