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Constitutional Law - Intergovernmental Immunity from Taxation - Federal Taxation of Employees of Bi-State Corporation

J. D. M.

jected this idea. It is suggested that the reason for such distinction in interpretation is due to the theory that public policy ought to favor a liberal interpretation of the term "public use" or "public purpose" where the right to condemn is sought to be utilized by public agencies, and favor a strict interpretation where the right is claimed by private parties or private corporations.

F. S.

CONSTITUTIONAL LAW—INTERGOVERNMENTAL IMMUNITY FROM TAXATION—FEDERAL TAXATION OF EMPLOYEES OF BI-STATE CORPORATION—Respondents were employed by the Port of New York Authority, a bi-state corporation created by compact between New York and New Jersey, the purpose of which was to carry on an extensive program of port development. The Authority in furthering this program constructed and now operates interstate bridges and tunnels and a freight terminal. It also operates a bus line. The United States Commissioner of Internal Revenue determined deficiencies in respondents' income tax reports for the years 1932 and 1933. The Board of Tax Appeals exempted the salaries received by the respondents from the Authority and the Circuit Court of Appeals for the Second Circuit affirmed this ruling.[1] Thereupon the Commission appealed to the Supreme Court. *Held,* the judgment of the Circuit Court of Appeals is reversed. The burden placed upon the states by the taxation of such salaries is so remote, speculative and uncertain that by their exemption the federal taxing power would be restricted without any substantial protection thereby accruing to the state government. Moreover, such a tax does not incumber any function that has hitherto been considered essential to the states' existence as such. *Helvering v. Gerhardt,* 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 962 (1938).

The doctrine of the immunity of federal instrumentalities from state taxation dates from the celebrated case of *McCulloch v. Maryland.*[2] This doctrine has also been applied to officers of the federal government.[3] It is reciprocal in that the states and their officers and instrumentalities are likewise immune from

1. 92 F. (2d) 999 (1937).
2. 17 U.S. 316, 4 L.Ed. 579 (1819).
3. Dobbins v. Commissioners of Erie County, 41 U.S. 435, 10 L.Ed. 1022 (1842).

federal taxation.[4] However, this immunity does not extend to independent contractors,[5] and, as regards state agencies and instrumentalities, it is applied only where the tax in question interferes with an ordinary governmental as distinguished from a proprietary activity.[6] Thus, federal excise taxes upon liquor sold by a state are valid.[7] In the application of the governmental-proprietary distinction, state immunity has suffered inroads, whereas that of the federal government remains apparently intact.[8] A state corporation which supplies transportation, water and light is not engaged in such a governmental function as to be exempt from a federal corporate excise tax.[9] Tobacco sold to a state hospital is subject to a federal stamp tax.[10] A municipal wharf is taxable.[11] A state university in choosing to support the admittedly governmental function of education by conducting football games cannot thus relieve such activity from a federal admissions tax.[12] Salaries received by state officers and employees as members of the board of trustees of a municipal elevated railway,[13] or as manager of a municipally owned waterworks[14] are taxable by the federal government. But the salary of the general counsel of the Panama Rail Road Company, a corporation of which the entire stock (except 13 shares) is owned by the United States, has been held to be immune from state taxation, although such company

4. Collector v. Day, 78 U.S. 113, 20 L.Ed. 122 (1870); United States v. B. & O. Railroad Co., 84 U.S. 322, 21 L.Ed. 597 (1872); Pollock v. Farmers Loan and Trust Co., 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895); Indian Motorcycle Co. v. United States, 283 U.S. 570, 51 S.Ct. 601, 75 L.Ed. 1277 (1931); Burnet v. A. T. Jergins Trust, 288 U.S. 508, 53 S.Ct. 439, 77 L.Ed. 925 (1933).

5. Metcalf & Eddy v. Mitchell, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384 (1926); Lucas v. Reed, 281 U.S. 699, 50 S.Ct. 352, 74 L.Ed. 1125 (1930); Group No. 1 Oil Corporation v. Bass, 283 U.S. 279, 51 S.Ct. 432, 75 L.Ed. 1032 (1931); Trinityfarm Construction Co. v. Grosjean, 291 U.S. 466, 54 S.Ct. 469, 78 L.Ed. 918 (1934); Roberts v. Commissioner of Internal Revenue, 44 F.(2d) 168 (1930).

6. South Carolina v. United States, 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261, 4 Ann. Cas. 737 (1905); Ohio v. Helvering, 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307 (1934); Helvering v. Powers, 293 U.S. 214, 55 S.Ct. 171, 79 L.Ed. 291 (1934); United States v. California, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567 (1936).

7. South Carolina v. United States, 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261 (1905); Ohio v. Helvering, 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307 (1934).

8. See Stoke, State Taxation and the New Federal Instrumentalities (1936) 22 Iowa L. Rev. 39, 55-59.

9. Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389, Ann. Cas. 1912B, 1312 (1911).

10. Liggett & Myers Tobacco Co. v. United States, 13 F. Supp. 143 (Ct. Cl. 1936).

11. City of Galveston v. United States, 10 F. Supp. 810 (Ct. Cl. 1935). cert. den. 297 U.S. 712, 56 S.Ct. 589, 80 L.Ed. 998 (1936).

12. Allen v. Regents of University System, 304 U.S. 439, 58 S.Ct. 980, 82 L.Ed. 975 (1938).

13. Helvering v. Powers, 293 U.S. 214, 55 S.Ct. 171, 79 L.Ed. 291 (1934).

14. Denman v. Commissioners, 73 F.(2d) 193 (C.C.A. 8th, 1934).

operates private passenger and freight lines, two hotels, a dairy, and a commissary.[15] In fact, it may be asserted as a general proposition that the Supreme Court has never declared a state tax upon a federal instrumentality valid because such instrumentality was not exercising a usual or ordinary governmental function.[16]

The complicated body of the law of the immunity of national banks from state taxation is not within the scope of this inquiry. However, it is interesting to note that in *State v. Whitney National Bank of New Orleans*[17] the Louisiana Supreme Court sustained a license tax on office buildings operated by a national bank, with respect to such parts of the buildings not used in banking but were rented to third parties, and that in *Parker v. Mississippi Tax Commission*[18] a state income tax upon an officer of the Federal Land Bank was upheld.

The principal case stresses the fact that in order for immunity to accrue it is necessary that the taxed function be indispensable to the maintenance of the government, and that the burden be not speculative, but direct and ascertainable. The burden falling on either government from taxation of the income of the employees of its corporations by the other government will be found in almost every instance to be speculative. Moreover, not many of such corporations can be found to be indispensable to the maintenance of government. It seems, therefore, that the tests of the *Gerhardt* case should certainly apply reciprocally, and that state attempts to tax the employees of the federal corporations which have entered fields traditionally private should be upheld.

J. D. M.

DAMAGES—PUNITIVE OR EXEMPLARY DAMAGES NOT RECOVERABLE—The plaintiff sent draperies to the defendant laundries to be cleaned. Certain of the articles were returned so damaged as to be unfit for further service. They had been in use by the plaintiff for seven years and during that time their value had

15. New York ex rel. Rogers v. Graves, 299 U.S. 401, 57 S.Ct. 269, 81 L.Ed. 306 (1937).
16. See Note (1936) 49 Harv. L. Rev. 1323.
17. 189 La. 211, 179 So. 84 (1938).
18. 178 Miss. 680, 174 So. 567 (1937).