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TAXATION — CONSTITUTIONALITY OF FEDERAL ADMISSIONS TAX AS APPLIED TO STATE UNIVERSITIES — In declaring invalid the federal tax so far as it applied to admissions to athletic contests conducted under the auspices of the Regents of the University System of Georgia, the United States District Court[1] has added another very interesting case to the many involving immunity from taxation growing out of

[36] The Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia, prepared by the Advisory Committee on Rules for Civil Procedure appointed by the Supreme Court of the United States and printed in May, 1936, follows the existing procedure upon this point in Rules 14, 15, 16-b, and 48-h.

[1] In Regents of University System of Georgia v. Page, (D. C. Ga. 1937) 18 F. Supp. 62, affirmed (C. C. A. 5th, 1937) 5 U. S. LAW WEEK 479.

The case arose on an application by the Regents to enjoin the Collector from proceeding under distraint warrants levied upon bank balances standing to the credit

our dual system of government. The question arose early, and scores of cases have since been decided.

The nature of the general problem is pointed out by the Supreme Court in the most recent case[2] involving the question in the following language:

> "But a federal tax in respect of the activities of a state or a state agency is an imposition by one government upon the activities of another, and must accord with the implied federal requirement that state and local governmental functions be not burdened thereby. So long as our present dual form of government endures, the states, it must never be forgotten, 'are as independent of the general government as that government within its sphere is independent of the States.' . . . And, as it was said in *Texas v. White*,[3] and often has been repeated, 'the preservation of the States, and

of athletic associations through whose agency complainant conducted its athletic and physical education activities. The levy had been made in the Collector's effort to collect sums of money claimed by him to be owing the United States as taxes on admissions to athletic events during the year 1934. The tickets to such events, though sold at a price bringing them within the scope of the tax act [44 Stat. L. 9, § 500 (1927), amended by 47 Stat. L. 169, § 711 (1933); 46 U. S. C., § 940 (1935)], contained the following notice printed on the back: "The University of Georgia, being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admission tax. The amount stated as a tax is so stated because the University is required to do so by Treasury regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax."

The District Judge dismissed the bill. (D. C. Ga. 1935) 10 F. Supp. 901. On appeal the Circuit Court of Appeals for the Fifth Circuit reversed this conclusion and remanded the case. The Court of Appeals clearly indicated its opinion that the Regents in the activities set forth in the bill of complaint, in connection with which the tickets of admission were sold, were carrying on a state governmental function, and that if the proof offered should bear out the allegations, an injunction should issue. Section 3224 of the Revised Statutes (1878) was not deemed a bar to injunctive relief in such situation. (C. C. A. 5th, 1936) 81 F. (2d) 577.

The District Judge, after hearing the case on the proofs, concluded that the allegations in the bill were proved, and thereupon, pursuant to the opinion expressed by the Circuit Court of Appeals, ordered that the injunction issue.

As to the proofs made by the Regents it will suffice to say that it was established that the physical education, health and athletic programs of the state educational institutions involved were adopted and supervised by their administrative officers and faculties; that such programs included intramural and intercollegiate athletics; that a large percentage of the student bodies, male and female, participated in these programs; that the expenses of these programs were supported in large measure by admission charges to athletic contests.

[2] Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 57 S. Ct. 495 (1937).

[3] 7 Wall. (74 U. S.) 700 at 725, 19 L. Ed. 227 (1868).

the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.' The unimpaired existence of both governments is equally essential. It is to that high end that this court has recognized the rule, which rests upon necessary implication, that neither may tax the governmental means and instrumentalities of the other. . . ."

It is unnecessary to cite cases other than those to which reference has already been made and those cited later herein to establish the doctrine in general that neither the United States nor a state may burden the governmental activities of the other by the levy of a tax. But this does not mean that it is always easy to determine whether a challenged tax is (1) really a "burden" (2) upon the exercise of a "governmental" activity. If the court concludes that the tax is such a "burden" upon such an activity, then the conclusion follows that the tax is invalid. Treatises might well be written on this subject. The purpose of this note is to consider rather sketchily the status of activities by state-supported educational institutions in respect to the federal tax on admissions in order to find, if possible, the decision indicated by the reported cases.

I.

A state or the United States may engage in activities which are essentially private businesses, and in so far as it has thus "stepped down" from its sovereign character it becomes subject to taxation by the other. If it is to be said that a state or its agency, the state university, has embarked upon the business of entertainment by sponsoring athletic games and contests, then it would seem clear that it has opened itself to federal taxes as did the state of South Carolina when it undertook to go into the liquor business.[4] Similarly, if it is concluded that the United States has engaged in the amusement business by scheduling football games, etc., for the Naval and Military Academies, then equally clearly the state in which such contests are conducted may levy taxes in respect thereto.[5]

[4] South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110 (1905).

[5] If the states of New York or Maryland were to attempt to tax the admissions to Academy games, the United States certainly would contend that in operating those institutions it was carrying on its sovereign functions, the development of the army and navy, and that intercollegiate games as conducted there were a part of the educational process; furthermore, that the United States has no power to engage in the business of entertainment, and it must not be considered as acting ultra vires. Such position probably is sound. By the same token, however, a state university may insist that it supports intercollegiate athletics only as a part of its educational program, and that it must not be deemed to be acting ultra vires as certainly it would be in conducting amusement enterprises for the public.

The answers to the questions thus raised can be arrived at only by a consideration of the purposes lying back of such games and contests, and that must necessarily include an examination of their origins and history.[6]

To many people of the street football constitutes intercollegiate athletics. Another common assumption is that the football activities and crowds of a rather small group of athletically prominent institutions are fairly representative of football in the hundreds of universities and colleges whose doings are chronicled briefly, if at all, in the press. In truth, football at most institutions is only one of anywhere from five to fifteen intercollegiate sports, all or nearly all of which, with perhaps the one exception, are probably conducted at a financial loss, so far as gate receipts are concerned. It is no doubt true that at the vast majority of colleges and universities even football does not earn enough to pay its own way. And even at those institutions with conspicuously large football income it is commonly true that the profit in that sport is insufficient to carry the deficits in their other athletic activities. In other words, a thorough survey would establish beyond a doubt that at by far the large majority of educational institutions athletic receipts must be supplemented by other income, either gifts, taxes, endowment, etc., in order to carry on their general physical education and athletic programs. Such facts as these make it more than difficult to believe that these institutions inaugurated and carry on intercollegiate athletics for the purpose of providing the general public with spectacular entertainment.

Moreover, it is well known by those who have considered the matter that it is only in recent years that even football games have produced large incomes. The sport certainly was not taken up by colleges for making money, and surely not for entertainment of the general public. One need not be particularly aged to remember when seating facilities for spectators were practically unknown and to recall that subscriptions among students and townspeople were necessary to defray the modest expenses. Yet the games, as games, are today, with minor changes in playing rules, essentially the same as they were in those earlier periods.

Such facts as these must be taken into account in reaching a con-

[6] It is worth noticing at the outset that if public monies raised by taxes are being used by the officials of a state university for the business of entertainment, no doubt a properly framed suit by a taxpayer would result in a judicial order stopping such business, for surely it would be beyond the chartered powers of the institution. The corporate body, the regents or whatever it may be, was created by the state to carry on the educational functions of government and it would seem prima facie at least that the activities which the responsible officers of such institution deem worthy of inclusion in its program are within the scope of the purposes of its creation.

clusion whether a state-supported university or college has "stepped down" from its sovereign governmental capacity in sponsoring intercollegiate athletic contests.[7] That a state university in carrying on its usual educational program is exercising an essentially governmental function would probably be denied by no one. "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged" is an oft-quoted sentence from Article III of the Ordinance of 1787. The final decision of the question now under consideration will turn on whether the court is of opinion that modern physical education and athletic activities have been properly added to the older traditional educational programs of these institutions. The court in the Georgia case was of opinion that they had.

In a number of cases courts have had occasion to consider whether physical education and athletics are included within the scope of educational activities and thus to be viewed as governmental functions. The cases fall into three classes: (1) those involving liability for damages, (2) those in which the power of eminent domain was sought to be exercised, and (3) those involving exemption from taxation.

In an Oregon case[8] an action for personal injuries was based upon negligence of a school district in placing a radiator in a gymnasium hall used in connection with a school. Under the Oregon legislation the district was not liable if it was engaged in public or governmental activity, and it was held that there was no liability in this case. In a Minnesota case[9] an action was brought against a school district for injuries suffered by plaintiff, a member of the football team of the school operated by defendant. Plaintiff was injured while playing in a football game by unslaked lime placed on the gridiron by defendant as line markers. In holding that there was no liability because defendant was engaged in a governmental activity, the court said:

> "The football game at which plaintiff was injured was held under authority given to the school district by G. S. 1923 (1 Mason, 1927) § 2817. The authority there granted, to hold

[7] That some colleges and universities have overemphasized football and possibly some other sports must be admitted. It must also be conceded that in some instances practices and abuses have been allowed to develop and continue that make one wonder whether at such institutions, at least, intercollegiate athletics have not ceased to be a part of the educational program and become essentially a business. In the litigation in which the question now under examination will be definitely settled, it will be necessary for the court to conclude whether these practices are to be regarded as exceptional or typical.

[8] Spencer v. School District No. 1, 121 Ore. 511, 254 P. 357 (1927).

[9] Mokovich v. Independent School District No. 22, 177 Minn. 446, 225 N. W. 292 (1929).

athletic games and other contests as a part of its educational system, is permissive and not mandatory. Plaintiff contends that such permissive activities of the district are not governmental functions, hence liability follows. Cases . . . where a distinction is made between permissive and mandatory duties, in relation to parks and a zoo, are cited. . . . The test is whether the municipality is or is not exercising only governmental functions.

"It appears that a small charge was made for attendance at the football game. Is the defendant liable for that reason? It is well established in this state that a city or village, which operates an electric light or waterworks plant and sells current or water to private consumers, is liable for negligence in so far as it carries on such business for that purpose. . . . But, as pointed out in the Brantman case, this is based on the reasoning that, when a municipality takes over and operates a public utility, it is entering the field of private enterprise and should be held to the same liability as a private party operating under a franchise. We do not feel that the same rule should be extended to a public quasi corporation, such as a school district, which has no power to engage in any such business. Here there was a small incidental charge for admission of the public to the game. The fact of such charge being made would not appear sufficient to take the district out of its educational functions and convert its activity into one of a business or proprietary character. School districts may make incidental charges for other purposes. They may charge and receive tuition for non-resident pupils; buy and sell school books; receive rent for authorized uses of school buildings; and make other incidental charges. If the fact that such incidental charges are made places liability upon the district, then the rule of nonliability largely disappears." [10]

[10] 177 Minn. at 450-452. See also Anderson v. Board of Education, 49 N. D. 181, 190 N. W. 807 (1922). In that case it was held that the board was exercising its governmental functions in providing equipment for play-ground use. The court said (at p. 187): "So likewise may apparatus be provided for track or football, or basketball; and for smaller pupils, swings, teeter boards, and much other apparatus may be provided, all designed to improve the pupil in some respect. All such apparatus and much more, not necessary here to mention, the board is authorized to provide for use in the schools. All such apparatus is considered approximately as much a part of the needful supplies of schools as are the desks or other needful furniture. It constitutes a necessary part and portion of the school system. The school would not be kept in needful supplies, unless such were a part of them. Hence, when the board of education provides them, it is acting in a purely governmental capacity."

In a Washington case[11] it was held that a school district could use the power of eminent domain to acquire land for play-grounds which might be used for "the common athletic games current among schools of its class." In answering the contention that the land sought was not to be used for a public purpose, the court said:

> "It is contended that the land is sought rather as a play-ground for the pupils attending the school than for strictly school purposes. The testimony of the superintendent of the school, from which we have hereinbefore cited, undoubtedly lends color to this contention; but nevertheless we think the use for which the land is sought to be taken is a public use. The physical development of a child is as essential to his well being as is his mental development, and physical development cannot be had without suitable places for recreation and exercise. To acquire such grounds is, therefore, within the province of the public schools."[12]

The exemption of a gymnastic association from taxation was declared in an interesting Kentucky decision.[13] The language of the court is especially instructive:

> "Education is not confined to the improvement and cultivation of the mind. It may consist in the cultivation of one's religious or moral sentiments. It likewise may consist in the development of one's physical faculties. Those in charge of colleges and institutions of learning recognize this to be true. Their students are taught, not only the dead and modern languages, mathematics, and the sciences, etc., but the Bible and Christian evidences, and a gymnasium is maintained, and football and other athletic sports are encouraged. The cultivation of the mind, the improvement of our moral and religious natures, and the development of our physical faculties are necessary to perfect education. The framers of the Constitution did not use the term in such a restricted sense as to exclude exercises which tend to develop strength. This is of as much importance to the State as is the acquisition of a knowledge of Latin, Greek, mathematics, etc. . . .
>
> "If one institution afford an opportunity to acquire this perfect

[11] State ex rel. School District v. Superior Court, 69 Wash. 189, 124 P. 484 (1912).

[12] 69 Wash. at 195. See also Reiger v. Board of Education, 287 Ill. 590, 122 N. E. 838 (1919); People v. Pommerening, 250 Mich. 391, 230 N. W. 194 (1930). In the latter case it was decided that the University of Michigan could condemn land for a golf course; also that it was immaterial that the golf course would be administered by a Board in Control of Athletics, since such board, even acting in a corporate capacity, was merely an operating agency of the University carrying on its educational activities.

[13] German Gymnastic Assn. v. City of Louisville, 117 Ky. 958 at 961-962, 80 S. W. 201 (1904).

education, it is one of education. If three institutions are organized —one seeking by a course of instruction to cultivate the mind, one by a method of instruction to improve students' religious or moral conditions, and another to teach physical culture to produce a better physical development, each is an institution of education, as much as the one at which the student can require the threefold knowledge. It is simply a matter of judgment or convenience, on the organization of institutions of education, whether one shall furnish all the opportunities for the acquisition of an education or whether there shall be separate institutions for that purpose. Our conclusion is that the appellant is an institution of education, not employed for gain, and is exempt from taxation."

2.

The admissions tax is required by the statute to be paid by the ticket purchaser, so the question at once arises whether a tax so to be paid can be a "burden" upon the state university, assuming for the moment, at least, that intercollegiate games are not outside the scope of governmental activities. Two cases in the Supreme Court seem to afford an unmistakable answer to the question. In *Panhandle Oil Co. v. Knox*[14] the Court struck down a state tax to be reported and paid by the seller of gasoline in so far as the tax in terms applied to sales to the United States. Nothing in the taxing act called for the payment of any tax by the United States or any other purchaser. The Court said:

> "The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales to the government. . . . A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons."

The same view was applied in *Indian Motocycle Co. v. United States*[15] when a tax was sought to be imposed by the United States

[14] 277 U. S. 218 at 222, 48 S. Ct. 451 (1928).

[15] 283 U. S. 570, 51 S. Ct. 601 (1931). Cf. Liggett & Myers Tobacco Co. v. United States, 299 U. S. 383, 57 S. Ct. 239 (1937), where a federal tax on tobacco, "hereafter sold" was upheld as to tobacco sold to a hospital owned by Massachusetts. The case is noted in 35 MICH. L. REV. 1027 (1937). See also 35 MICH. L. REV. 168 (1936), noting Graves v. Texas Co., 298 U. S. 393, 56 S. Ct. 818 (1936),

in respect to sales made by the manufacturer of motorcycles to the city of Westfield, Massachusetts. The tax was declared by the statute to be payable by the seller, and it was accordingly argued, as in the *Panhandle* case, that there was, therefore, no burden imposed upon the municipality. The Court rejected the contention, relying on the *Panhandle* decision.[16]

3.

It is thus evident that, as indicated above, the first issue is whether the activity of a state-supported educational institution in conducting athletic contests to which admissions are sold is to be classified as governmental or private. If the answer to this question is that the operation is private, it is clear that the tax is within the federal power. If, however, the answer is otherwise, then it must further be considered whether the burden of the tax is so slight or remote that it is to be upheld despite the governmental character of the activity.

There is no established formula pointing unerringly to the an-

invalidating a state tax on distributors or storers of gasoline in respect of sales to the federal government for governmental purposes.

[16] A case in the Circuit Court of Appeals for the Ninth Circuit [United States v. King County, 281 F. 686 (1922)] is even more clearly in point. In that case the question was whether a federal tax on transportation tickets, payable by the purchaser, was collectible in respect to tickets sold by a county in the operation of a ferry. The court held the tax invalid as to such tickets, being a burden upon and interference with the governmental functions of the state of Washington. The court said: "It is true that in the present case the tax was not imposed directly upon the county of King, but upon the persons paying to it the transportation charges; but it is obvious that the collection of those charges is at least one of the means which the county must resort to for the purpose of paying the costs of the ferry, which, if insufficient, must be made good from its other revenues or by general taxation. Hence it seems plain that the federal tax here involved is an interference with and a burden upon the governmental functions of the state." 281 F. at 690. See also such cases as Ambrosini v. United States, 187 U. S. 1, 23 S. Ct. 1 (1902), declaring unconstitutional a federal tax upon licenses and bonds required by the city of Chicago in connection with the liquor business; Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 52 S. Ct. 443 (1932), in which the income derived by a private lessee of state lands granted by the United States to the state of Alabama for the support of the common schools and leased for the extraction of oil and gas, in respect of operations under such lease was exempt from federal taxes. The lease provided for a reservation to the state for the public school fund of part of the gross production, the lessee taking the remainder. The Court looked upon the lease as an instrumentality of the state in the exercise of a strictly governmental function, and a tax upon the "income of the lessee arising therefrom would amount to an imposition upon the lease itself." There has been a tendency to confine the rule of the Coronado case to situations involving pretty closely analogous facts. See, for example, Burnet v. A. T. Jergins Trust, 288 U. S. 508, 53 S. Ct. 439 (1933); Wanless Iron Co. v. Commissioner, (C. C. A. 8th, 1935) 75 F. (2d) 779; Hobart Iron Co. v. Commissioner, (C. C. A. 6th, 1936) 83 F. (2d) 25.

swers.[17] Signposts indicating the line leading to the conclusion have been "fixed by decisions that this or that concrete case falls on the nearer or farther side."[18] "We are, of course, quite able to say that certain functions exercised by a city are clearly governmental—that is, lie upon the nearer side of the line [19]—while others are just as clearly private or corporate in character, and lie upon the farther side. But between these two opposite classes, there is a zone of debatable ground within which the cases must be put upon one side or the other of the line by what this court has called the gradual process of historical and judicial 'inclusion and exclusion.'"[20] In the *Brush* case the operation by the city of New York of a municipal water system, though water was sold for a profit, was deemed governmental rather than private despite the settled doctrine in the New York courts that the operation of waterworks by a municipality falls within the category of corporate activities so that in respect thereof there is no immunity from tort liability.

A clear instance of an enterprise conducted by the state that is private in character, hence subject to federal taxation, is the liquor business, as shown by the leading case of *South Carolina v. United States*,[21] referred to above. If a state or a state university were to hire teams of performers and thus enter the amusement business, it would seem undeniably subject to federal taxes, for it has entered "the market place seeking customers" and thus divested itself of its governmental

[17] Indeed the Court has deliberately chosen to avoid the framing of a formula: "We think, therefore," the Court said in Brush v. Commissioner, 300 U. S. at 365, "that it will be wise to confine, as strictly as possible, the present inquiry to the necessities of the immediate issue here involved, and not, by an attempt to formulate any general test, risk embarrassing the decision of cases in respect of municipal activities of a different kind that may arise in the future."

[18] Hudson County Water Co. v. McCarter, 209 U. S. 349 at 355, 28 S. Ct. 529 (1908).

[19] Later in the opinion reference is made to a few activities which the court apparently deems unmistakably governmental. These are (1) construction and operation of highways, (2) maintenance of schools, (3) issuance of permits and licenses, (4) recording documents, (5) administration of justice, (6) operation of the postal service. It is pointed out that no one would seriously dispute the governmental character of these functions though charges were made for the services.

[20] Quoted from the opinion in the Brush case, 300 U. S. at 365.

[21] 199 U. S. 437, 26 S. Ct. 110 (1905). See also Ohio v. Helvering, 292 U. S. 360 at 369, 54 S. Ct. 725 (1934). In this case the court said: "If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned."

character, as said by the Supreme Court in *Ohio v. Helvering*.[22] Some intercollegiate athletic contests do attract large numbers of "customers," but one may reasonably doubt whether that fact is sufficient to conclude that the universities have abandoned their educational functions.

In *Helvering v. Powers*[23] the operation by a state of a street railway was deemed "a business enterprise," and the doctrine of the South Carolina case was applied, with the result that the salaries of members of the board of trustees which managed the railway were held subject to federal taxation. It was not controlling, the Court declared, that the members of the board were "public officers" of the state of Massachusetts. "While the undertaking is for the public benefit," the Court, through the Chief Justice, said, "it is still a particular business enterprise—the operation of a street railway—and the functions of the trustees are limited accordingly."[24]

In determining whether a state is carrying on a governmental enterprise or has engaged in a private business, the court very properly, since state and municipal ownership and operation of private businesses is essentially a modern development, inquires whether the activity in question is one in which states have "traditionally" engaged. In *United States v. California*[25] the Court, through Justice Stone, said that the sovereign immunity from taxation implied from the nature of our federal system

> "requires that it be so construed as to allow each government reasonable scope for its taxing power . . . which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. . . . Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power."[26]

It probably would not be denied that states have "traditionally engaged" in education of their people. It is no doubt equally clear that they have not "traditionally engaged" in the amusement busi-

[22] See preceding note. That some educational institutions have permitted abuses to creep into their athletic programs, that in a few conspicuous instances they have in effect hired performers and that they have overemphasized the profit feature may be admitted. Occasionally these exceptional practices have been made to appear the usual ones, characterizing all intercollegiate athletics, as the occasional wayward son of a minister is depicted as the to-be-expected result of preachers' offspring.

[23] 293 U. S. 214, 55 S. Ct. 171 (1934).

[24] 293 U. S. at 223. See, too, United States v. California, 297 U. S. 175, 56 S. Ct. 421 (1936).

[25] 297 U. S. at 184.

[26] The Court concluded that there was no similar restriction upon the plenary power of Congress to regulate interstate commerce.

ness. Thus, as indicated above, if a state or its instrumentality, the state university, were to engage football players or other athletes to put on exhibitions for the entertainment of its citizens, it would be futile to argue, in the light of the authorities, that such activity would be beyond the federal taxing power. Again, then, it must be evident that in answering the question now under examination the Court will have to decide whether state universities in their intercollegiate athletic programs have undertaken a business or, on the contrary, have permitted the admittedly business features to develop in an enterprise that is in origin and function an incident of their educational programs.[27] The position of the Court on this particular question would seem to be practically determinative of the decision.

4.

Though it was declared in the *Indian Motocycle* case that "where the principle [immunity from taxation upon the means and operations whereby either the United States or the States exercise their governmental powers] applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute,"[28] it has been suggested that inquiry should be made in each case as to whether the challenged tax actually burdens the sovereignty which is carrying on the activity.[29] Whatever may be said about the theoretical advantages of such test, the fact remains that in the cases where the tax was deemed a direct levy upon the sovereign or its instrumentality in respect of the operation of a governmental function, the imposition has been stricken down without regard to the extent of the burden. No doubt the amount of the taxes involved in the sale of the motorcycle in the *Indian Motocycle* case or in the sale of the gasoline in the *Panhandle Oil Company* case was not large, and there

[27] The furnishing of water was considered in Brush v. Commissioner, 300 U. S. 352, 57 S. Ct. 495 (1937), a function in which municipalities "traditionally engaged." It was not the less a governmental activity, the Court said, because water was sold, large sums of money were handled, and a profit was sought to be made. See also United States v. King County, (C. C. A. 9th, 1922) 281 F. 686. When the United States enlarged the postal service to include the parcel post and fixed rates designed to produce a profit it probably would not have been seriously suggested that the transactions of the Post Office in such enlarged activity were subject to state taxation even though the service was in direct competition with the existing express business.

[28] 283 U. S. 570 at 575, 51 S. Ct. 601 (1931).

[29] Early language by Chief Justice Marshall to the effect that "The power to tax is the power to destroy," has had its effect. In his dissenting opinion in the Panhandle Oil Company case, 277 U. S. 218 at 223, 48 S. Ct. 451 (1928), Justice Holmes said that "In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. . . . The power to tax is not the power to destroy while this Court sits."

was no showing that the municipality in the one case or the United States in the other would be the least bit crippled by payment thereof.[30] In the cases holding that income from public bonds and salaries of public officers is exempt from taxation by the other sovereign, no suggestion has been made that if the amount involved in the particular situation under examination is small the tax might be upheld.

But this is not to say that the court never looks to the nature or extent of the burden. An extreme argument might be made that any tax collected reduces by that much the amount of property available for the other sovereign to reach. Such suggestion has been summarily dismissed. Many examples might be given. It will suffice to refer to one or two. In the frequently cited case of *Metcalf and Eddy v. Mitchell*,[31] wherein it was held that compensation received by consulting engineers (not public officers or employees) for services rendered states and municipalities was not exempt from the federal income tax, Justice Stone, speaking for the court, referred to those instances in which it was sought to tax "those agencies through which either government immediately and directly exercises its sovereign powers," also to those situations in which the tax is imposed in respect of property which is used or from which one derives a profit "in his dealings with the government." As to the former he declares that the immunity from tax is clear and well settled; as to the latter it is equally clear there is no such exemption. The opinion continues:

> "While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power. . . . But here the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services.

[30] The stamp tax sought to be imposed in the Ambrosini case, 187 U. S. 1, 23 S. Ct. 1 (1902), no doubt was relatively insignificant. Yet the Court concluded that it could not be imposed.

[31] 269 U. S. 514 at 522, 46 S. Ct. 172 (1925).

rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way." [32]

While it is settled that income in the form of interest derived from investments in public securities is exempt from taxation by the other sovereign, it was held in *Willcuts v. Bunn* [33] that the immunity does not extend to profits derived from the resale of such securities. The Chief Justice said:

"If the tax now in question is to be condemned, it must be because of practical consequences and not because purchases and sales by private owners of state and municipal bonds are a part of the State's action in borrowing money. It would be far-fetched to say that such purchases and sales are instrumentalities of the State. They are not transactions made directly or indirectly in behalf of the State or in the course of the performance of any duty of the State. Sales are merely methods of transferring title to the obligation, that is, the right to receive performance of the promise of the State or municipality." [34]

Under the rule of the *Indian Motocycle* case a federal sales tax upon articles sold to a state university is unconstitutional, even though the taxing act in terms requires the seller to pay such tax. It seems clear that any attempt by the United States to lay a tax upon registration cards or diplomas issued by such institution would be similarly invalid. What then of an attempt to tax the transaction involved in the sale of tickets to intercollegiate games? Must it not be obvious, in view of the foregoing, that the answer depends upon the position taken on the question referred to herein more than once—are such games incidental to the educational activities of the universities, or are they to be viewed as enterprises resulting from an embarking by the institutions upon a private business? To arrive at a sound conclusion on this specific question one must be acquainted not only with the scope of the modern concept of education but also with the history and background of intercollegiate athletics.[35]

[32] 269 U. S. at 524.

[33] 282 U. S. 216, 51 S. Ct. 125 (1931).

[34] 282 U. S. at 229. See also Taber v. Indian Territory Illuminating Oil Co., 300 U. S. 1, 57 S. Ct. 334 (1937).

[35] If it should be concluded that the admissions tax as applied to events under the auspices of state universities is within the powers of the Congress, a question will

It may be urged that since the universities charge admission and, in the case of football at least, sometimes make a profit, their intercollegiate athletic activities cannot be listed as educational and thus governmental. The answer, on the authorities, seems clear. In two recent cases the Supreme Court held particular operations governmental though charges were made for services rendered and the objective was the making of a profit.[36]

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still remain as to whether state officers and employees can be compelled to act as the tax collector. On this general problem, see Kentucky v. Dennison, 24 How. (65 U. S.) 66, 16 L. Ed. 717 (1861). If the universities are deemed to be engaged in a private business, it is possible that it may be held that the collections must be made by the university staff. If the operation is viewed as governmental, then the duty to collect becomes a moot question, for the tax itself is invalid. If, finally, the tax should be upheld on the ground that while the business is not private yet the burden is too remote, then it is likely that the duty of collection must be borne by the federal officers.

Another incidental question that will arise, in respect to a number of state universities, is the effect of the incorporation of the board or committee through which the institution conducts its intercollegiate athletics. None of these corporations, so far as is known, is organized for private profit. The occasion for the corporate body is probably to be found in mere convenience in conducting the inevitable business features, making of contracts, etc. plus the avoidance of personal liability on the part of those members of the faculty to whom the responsibility of supervision and management have been delegated. The very recent case of People of State of New York v. Graves, 299 U. S. 401, 57 S. Ct. 269 (1937), is a complete answer to objections along this line. In that case the United States as owner of all the stock of a New York corporation (organized as a private corporation for profit apparently) was using the corporation as a governmental agency in the operation of the Panama Canal. It was held that the salary of an officer of that corporation was, therefore, exempt from a state tax.

[36] People v. Graves, 299 U. S. 401, 57 S. Ct. 269 (1937); Brush v. Commr., 300 U. S. 352, 57 S. Ct. 495 (1937). See also Commr. v. Ten Eyck, (C. C. A. 2d, 1935) 76 F. (2d) 515; Hoskins v. Commr., (C. C. A. 5th, 1936) 84 F. (2d) 627.

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