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MUNICIPAL CORPORATIONS — POWER OF CONGRESS TO PASS ACT FOR READJUSTMENT OF MUNICIPAL DEBTS — In 1934, Congress amended the National Bankruptcy Act so as to authorize any municipality or other political subdivision of any state to effect a readjustment of its debts by proceedings in

courts of bankruptcy.[1] A water district in Texas petitioned the United States District Court asking for a readjustment of its obligations. After the dismissal of the proceedings in the District Court,[2] but before the reversal of the decision by the Court of Appeals,[3] the state legislature of Texas passed an act empowering municipalities and other political subdivisions to proceed under the federal statute.[4] *Held*, that the municipal debt readjustment act is unconstitutional, the fiscal affairs of a political subdivision of a state not being subject to control or interference by the Federal Government. *Ashton v. Cameron County Water Improvement District No. One*, (U. S. 1936) 56 S. Ct. 892.

The question as to whether the act is within the scope of the bankruptcy clause of the Constitution is not considered by the Court.[5] The Court assumes "for this discussion that the enactment is adequately related to the general 'subject of bankruptcies.' "[6] The decision is based upon the ground that the act constitutes an unconstitutional interference by the Federal Government with a political subdivision of a state.[7] The act of the Texas legislature authorizing municipalities and other political subdivisions to take advantage of the act did not remove the objection. The consent or submission of the state cannot enlarge the power of Congress.[8] The Court relies upon taxing cases where the power of the Federal Government to tax state instrumentalities has been denied.[9] The same principle is held to apply to the bankruptcy clause. The Court's fear of the effect of a decision upholding the act seems unfounded. If the existence of the power claimed is upheld, what, the Court asks, is to pre-

[1] 48 Stat. L. 798, 11 U. S. C. secs. 301-303 (1934).

[2] In re Cameron County Water Improvement District No. 1, (D. C. Tex. 1934) 9 F. Supp. 103.

[3] Cameron County Water Improvement District No. 1 v. Ashton, (C. C. A. 5th, 1936) 81 F. (2d) 905.

[4] Tex. Laws (1935), c. 107, p. 293.

[5] It was generally believed that this was one of the grounds on which the act would be attacked. For a discussion of this aspect of the question see: Briggs, "Shall Bankruptcy Jurisdiction be Extended to Include Municipalities and Other Taxable Subdivisions?" 19 A. B. A. J. 637 (1933), reprinted in 8 J. N. A. REFEREES BANKR. 70 (1934); 21 VA. L. REV. 101 (1934).

[6] Since bankruptcy assumes there is a debtor whose estate is at the disposal of creditors, some writers have taken the view that governmental units fall outside the power. GLENN, LIQUIDATION, § 419 (1935). In the dissenting opinion this question is considered, Justice Cardozo pointing out that the history of the bankruptcy clause has been one of an expanding concept.

[7] The act had been upheld in two cases arising in California. In re East Contra Costa Irrigation District, (D. C. Cal. 1935) 10 F. Supp. 175; In re Imperial Irrigation District, (D. C. Cal. 1935) 10 F. Supp. 832, noted in 34 MICH. L. REV. 731 (1936).

[8] This would seem to assume that the act constitutes an interference with a state instrumentality. If there is no interference, it seems that no power has been conferred on Congress by act of the state legislature.

[9] The principle of the non-taxability of the instrumentalities of the Federal Government by the states was first enunciated in McCulloch v. Maryland, 4 Wheat. (17 U. S.) 316 (1819). For an excellent statement of the corollary of this principle see Collector v. Day, 11 Wall. (78 U. S.) 113 (1870).

vent the extension of the act to the state, and to involuntary as well as to voluntary proceedings. The answer would seem to be in the power of judicial review by the Supreme Court.[10] While the power to tax is the power to destroy, the Court has distinguished corporate and governmental functions of states and municipalities when passing upon the constitutionality of acts of Congress levying taxes upon state instrumentalities.[11] Voluntary debt readjustment might be distinguished from a tax which is forced upon a state.[12] While a tax is a burden, the debt readjustment act confers a benefit. The minority opinion adjudges the present act rather than others which may follow. Until the balance of power between state and Federal Government is actually disturbed, the minority would not declare an act unconstitutional; the majority fears the existence of the power claimed and not merely the outcome of what has already been attempted. No federal municipal debt readjustment act would seem to meet the objections of the Court.[13] Under previous decisions of the Court, state legislatures do not have the power to pass debt readjustment acts for cities.[14] Thus the door to a satisfactory plan of debt readjustment for financially embarrassed municipalities seems closed.[15]

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[10] Justice Holmes took the view that as long as the Supreme Court sits the power to tax is not the power to destroy. Dissenting opinion in Panhandle Oil Co. v. Mississippi, 277 U. S. 218 at 223, 48 S. Ct. 451 (1928). Applying this principle in the present case, the Court might have taken the view that action by Congress does not interfere with the balance of powers between states and the Federal Government unless a burden is imposed on the state or its subdivisions. To paraphrase the view of Justice Holmes, as long as the Supreme Court sits the power to pass bankruptcy legislation is not the power to destroy.

[11] A drainage district is a political subdivision of the state which is engaged in the performance of governmental functions. Houck v. Little River Drainage District, 239 U.S. 254, 36 S. Ct. 58 (1915). Thus it would not have been possible in the present case to use that principle to uphold the law. For cases where the Court has distinguished corporate and governmental functions in the field of taxation see: South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110 (1905); Indian Motorcycle Co. v. United States, 283 U. S. 570, 51 S. Ct. 601 (1931); Ohio v. Helvering, 292 U. S. 360, 54 S. Ct. 725 (1934); Helvering v. Powers, 293 U. S. 214, 55 S. Ct. 171 (1934), noted in 33 MICH. L. REV. 1283 (1935).

[12] See 83 UNIV. PA. L. REV. 920 (1935).

[13] To forestall the objection that it constituted an interference by the Federal Government with a state instrumentality the present act provided (48 Stat. L. 802-803, 11 U. S. C., § 303): "(k) Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any political subdivision thereof in the exercise of its political or governmental powers, including expenditures therefor, and including the power to require the approval by any governmental agency of the State of the filing of any petition hereunder and of any plan of readjustment. . . ."

[14] Sturges v. Crowninshield, 4 Wheat (17 U.S.) 122 (1819); 1 DILLON, MUNICIPAL CORPORATIONS, 5th ed., § 113 (1911). Such a statute would be unconstitutional under the contract clause of the Federal Constitution.

[15] On the extent of municipal defaults and the need of legislation providing for the readjustment of debts see: Dunstan, "Federal Legislation to Help Defaulting

Municipalities," 8 J. N. A. REFEREES BANKR. 73 (1934); Seasongood, "Municipal Administration and Bankruptcy," 9 J. N. A. REFEREES BANKR. 84 (1935); 7 J. N. A. REFEREES BANKR. 164 (1933); 46 HARV. L. REV. 1317 (1933). On the difficulties facing a creditor in enforcing municipal obligations see: Fordham, "Methods of Enforcing Satisfaction of Obligations of Public Corporations," 33 COL. L. REV. 28 (1933); 43 YALE L. J. 924 at 962 (1934).