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## CONSTITUTIONAL LAW-TAXATION - EXPRESS IMMUNITY OF FEDERAL INSTRUMENTALITIES

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CONSTITUTIONAL LAW — TAXATION — EXPRESS IMMUNITY OF FEDERAL INSTRUMENTALITIES — A federal land bank filed a complaint against defendant lumber company and the tax commissioner seeking exemption from a state sales tax on purchases of lumber by the bank. The Supreme Court of North Dakota<sup>1</sup> found the bank liable for the tax and on certiorari to the United States Supreme Court it was *held*, that the Federal Farm Loan Act<sup>2</sup> conferred express immunity from the tax upon the bank and that such Congressional exemption was constitutional by virtue of the "necessary and proper" clause. *Federal Land Bank of St. Paul v. Bismarck Lumber Co.* (U. S. 1941) 62 S. Ct. 1.

It was argued by the taxing authorities that a distinction should be made between governmental and private functions of the federal government for

<sup>1</sup> *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 70 N. D. 607, 297 N. W. 42 (1941).

<sup>2</sup> "That every Federal Land Bank . . . including the capital and reserves or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal and local taxation. . . ." Federal Farm Loan Act, § 26, 39 Stat. L. 360 at 380 (1916), 12 U. S. C. (1934), § 931. The wording of this statute should be compared to the exemption provision of the Home Owners Loan Act: "The bonds issued by the Corporation under this subsection shall be exempt . . . from all taxation . . . now or hereafter imposed by the United States or any District, Territory, dependency . . . or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempted from such taxation. . . ." 48 Stat. L. 128 at 130, § 4(c) (1933), 12 U. S. C. (1934), § 1463 (c). This section was recently construed in *Home Owners' Loan Corp. v. McGoldrick*, (S. Ct. 1941) 29 N. Y. S. (2d) 365, so as not to prohibit a municipal sales tax on electric current purchased by the Home Owners' Loan Corporation. Hence, on appeal, a reversal of this New York decision would appear to be justified in light of the principal case.

state taxing purposes. This theory, although appealing,<sup>3</sup> had been previously rejected by the Supreme Court's adoption of the doctrine that all functions of the federal government are governmental since that government is one of delegated powers only; <sup>4</sup> hence, there can be no "private" functions of the federal government. The present case, in expressly reaffirming the Court's prior decisions, again confines the distinction to the field of state immunity from federal taxation, where its application has a sounder foundation in governmental theory.<sup>5</sup> The principal case, in addition, indirectly raises this problem: Will the Court recognize a power in Congress to provide express immunity from state taxation for federal instrumentalities in cases where the Court has previously refused to imply such immunity in the absence of express exemption? The question is an important one in light of the Court's present tendency to restrict the scope of implied immunity. Such restriction is evidenced by a recent holding that a federal instrumentality is not immune from state taxation merely because the tax is ultimately borne by the government.<sup>6</sup> It is obvious that this doctrine alters prior decisions of the Court which indicated that an ultimate economic burden on the government was sufficient to raise an implied immunity.<sup>7</sup> On the other hand, Congress has the power to provide an express immunity from state taxation where it is "necessary and proper" to protect the federal instrumentality.<sup>8</sup> The present case strongly intimates that the Court will not question

<sup>3</sup> A distinction between governmental and private functions of the federal government was made by the New York court in refusing to find an implied immunity, since the function taxed was called a "private" one. *Home Owners' Loan Corp. v. McGoldrick*, (S. Ct. 1941) 29 N. Y. S. (2d) 365. This holding was based squarely on the decision of the Supreme Court of North Dakota in the principal case, so that a reversal of the New York court seems justified on this ground as well as on the statutory interpretation basis. See note 2, supra.

<sup>4</sup> *New York ex rel. Rogers v. Graves*, 299 U. S. 401, 57 S. Ct. 269 (1936). The same view is expressed in *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595 (1938).

<sup>5</sup> In *South Carolina v. United States*, 199 U. S. 437, 26 S. Ct. 110 (1905), it was held that as the immunity of states from federal taxation is based on the theory of the dual sovereignty of governments, the immunity of the states is limited to those activities which are governmental in character. The argument in the principal case is undoubtedly an adaptation of this distinction as applied to state immunity. For another aspect of the same argument, see 23 VA. L. REV. 922 (1937), where it is suggested that a valid distinction can be drawn between governmental and "commercial" powers of the federal government; "commercial" powers, although constitutional, are not necessarily governmental.

<sup>6</sup> In *Alabama v. King & Boozer*, (U. S. 1941) 62 S. Ct. 43, a sales tax imposed on purchases of a contractor who was under a cost-plus contract with the federal government was upheld even though the economic burden was passed directly to the government. For a discussion of this case, see 40 MICH. L. REV. 457 (1942).

<sup>7</sup> *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208 (1937), and *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595 (1938), had indicated that an implied immunity is raised when the tax in question imposes a direct economic burden on the federal instrumentality.

<sup>8</sup> Principal case, and *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595 (1938).

the discretion of Congress in providing express immunity in a particular case.<sup>9</sup> It seems, therefore, that Congress could provide immunity from a state tax the burden of which was not borne by the federal instrumentality so as to raise an implied immunity. Thus, the doctrines of implied and express immunity are not coextensive. As yet, however, there has been no case based squarely on that point, since it is arguable that in all the recent express immunity cases the tax could have been prohibited on grounds of implied immunity.<sup>10</sup> Until the Court holds in a particular case that Congress can confer express immunity, where the Court previously had refused to imply an immunity, the question is not entirely foreclosed. However, in the light of the Court's present and past commitments, it is extremely doubtful whether the Court will begin to inquire into the wisdom of Congress in providing a particular immunity and find it not within the scope of the "necessary and proper" clause.

<sup>9</sup> The Court said, "It is not our function to speculate whether the immunity from one type of tax as contrasted with another is wise. That is a question solely for Congress, acting within its constitutional sphere, to determine." 62 S. Ct. 1 at 6.

<sup>10</sup> *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466 at 478-479, 59 S. Ct. 595 (1938), pointedly refused to discuss the possibility of express exemption in refusing to find an implied immunity for the income of federal officers from a state income tax. In *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21, 60 S. Ct. 15 (1939), it was held that the Home Owners Loan Act expressly prohibited imposition of a state tax on the recording of mortgages but it is conceivable that the tax could also have been struck down on the authority of *Graves v. New York ex rel. O'Keefe*, supra, and *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208 (1937). *Alabama v. King & Boozer*, (U. S. 1941) 62 S. Ct. 43, would be strong authority today for striking down such a tax on implied immunity grounds since the mortgage tax was to be paid directly by the Home Owners Loan Corporation. The same argument applies to the facts of the principal case, since the sales tax was imposed directly on the land bank.