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hard Stern and Son v. Bodden\textsuperscript{3} holds that if the rule of taxation is uniform, proper classification may be made and different rates applied to each class. Classification, however, must be based upon substantial distinction which make real differences, is the ruling of Kily v. Chicago, Milwaukee and St. Paul Ry. Co.\textsuperscript{4} The state can tax all privileges or select certain classes leaving others untaxed. Beals v. State.\textsuperscript{5} In the case of Pick v. Rubicon Hydraulic Co.\textsuperscript{6} the court held that the legislature can impose other restrictions upon corporations as to method of acquiring easements, than those applied to individuals.

LEWIS I. COHÉN

Taxation: State Taxation of Federal Agencies and Instrumentalities.

The application of the doctrine prohibiting state interference with the agencies and the instrumentalities of the federal government has been greatly enlarged by two recent decisions of the United States Supreme Court. Both of the cases were decided by a divided court, and it would seem from a summary review of the decided cases and the principles therein enunciated that the limits of the application of this doctrine are reached in this type of case.

The first of these cases is that of Long v. Rockford, 48 S.Ct. 463, in which it was held that royalties for use of patents cannot be taxed by the states. The argument being, that the primary object in granting and securing the monopoly to the inventor was the benefit to the public and community at large and secondarily to promote the progress of science and the useful arts. That the patent is the instrument by which that end is accomplished, and like a franchise granted by the United States is not subject to state taxation. If the state “cannot tax the patent, it cannot tax the royalties received from its use.”

The second case arose under a law enacted by the state of Mississippi providing that dealers in gasoline shall pay for the privilege of engaging in such business an excise tax of a designated amount per gallon upon the sale of gasoline. Defendant company sold gas to the United States Government for use in operation of Coast Guard fleet and Veteran’s Hospital. The company defended the action brought to recover taxes levied on this sale with the contention that the tax was void since it was an interference with the instrumentalities of the federal government. This view was upheld by the Supreme Court in Panhandle v. State of Mississippi, 48 S.Ct. 451. Quoting Mr. Justice

\textsuperscript{3}165 Wis. 75.
\textsuperscript{4}142 W. 154.
\textsuperscript{5}139 W. 544.
\textsuperscript{6}27 W. 433.
Butler, "A charge at the prescribed rate is made on account of every gallon required 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 immediate upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and the hospital."

That the state has no right to tax any of the constitutional means employed by the federal government to execute its constitutional powers, and no power by taxation or otherwise to retard, impede, burden or in any other manner control the operation of the constitutional laws enacted by Congress to carry into effect the powers vested in the national government are principles so well established as to be regarded now as fundamental and elementary. There are no express constitutional restrictions upon the states, except such as are involved in the exclusive power over foreign commerce and concurrent power in internal taxation given to Congress. By judicial construction from the necessary relation between the power of state taxation and the supremacy of the federal authority this doctrine has been evolved. It was first announced by Chief Justice Marshall in the celebrated case of *McCulloch v. Maryland*, 4 Wheat. 316. Therein it was held that the state could not without violating the constitution tax the notes of an United States Bank established within that state.

The language of Marshall has become classical, "That the power to tax involves the power to destroy; that the power to destroy and defeat may render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another which other with respect to those very measures, is declared to be supreme over that which exerts control."

In a later case, Marshall applied the rule to prevent state taxation obstructing or defeating the federal power to regulate commerce. The manifold application of the doctrine will be observed by a review of the following cases in which state taxation has been held invalid; a tax upon United States securities, salaries of United States officials,³

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¹ *Brown v. Maryland*, 12 Wheat. 419.
³ *Dobbins v. Erie County*, 16 Peters 435.
upon interstate passengers,\(^4\) lands and other property of the United States,\(^5\) lands held by Indians, under patents issued by virtue of treaties made with their tribes,\(^6\) railroad franchises granted by the United States,\(^7\) the incorporeal right secured by patent as distinguished from the product.\(^8\)

The following cases demonstrated the application of the doctrine where the interference with the federal government was more remote. In the case of *Choctaw, O. & G. R. R. v. Harrison*\(^9\) where the Federal Government under a contract with the Indian tribes was obliged to operate a coal mine, it was held that a lessee from the Government is an instrumentality of the United States and cannot be subjected to an occupation or privilege tax by the state. Under a similar set of facts, the Supreme Court held in *Indian Oil Co. v. Oklahoma*\(^10\) that the lessee being a Federal instrumentality, the state could not tax its interest in the leases. But in *Gillespie v. Oklahoma*\(^11\) the Supreme Court went much further and held that a lessee of restricted Creek and Osage lands is in effect an instrumentality used by the United States in fulfilling its duties to the Indians, and that therefore the *net income* derived by such lessee from sales of his share of oil and gas received under the lease, could not be taxed by the state.

The cases upon this subject are not in harmony. Nor can all be reconciled. The most that can be said is that there is a distinct tendency manifested to hold invalid all interferences with the property, agencies, obligations and officers of the Federal Government.

It is apparent that the application of the recognized principles to the manifold situations that arise out of the exercise of their powers by the two sovereigns does of necessity in some instances present considerable difficulty. The broad language of Marshall in *McCulluch v. Virginia* has unfortunately been the cause of the application of the doctrine to situations where the interference with the Federal Government has been very remote.

The power to tax may be the power to destroy, yet this maxim cannot be applied to its logical conclusion. In the minutest analysis every state tax affects or diminishes the subject of federal taxation, and from the very necessities of the situations presented by two sovereignties

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\(^4\) *Crandall v. Nevada*, 6 Wall. 35.  
\(^6\) Case of Kansas Indians, 5 Wall. 737.  
\(^7\) *California v. Pac. R.R. Co.*, 127 U.S. 3  
\(^8\) *Weber v. Virginia*, 103 U.S. 344.  
\(^9\) 235 U.S. 292.  
\(^10\) 240 U.S. 292.  
having the same territorial limits but with different jurisdictional spheres the proper functioning of either in raising revenues will at times indirectly affect the other. "It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is for that reason inhibited by the Constitution. To hold that would deny to the states all power to tax persons and property." Nor should it be an invasion of this principle that a tax levied by one government may eventually be borne by the other.

The rule is well established that in order for a tax by one government to invade the province of the other, it must directly and immediately constitute a burden upon the latter's governmental function. The two inquiries therefore common to all cases should be first, whether the tax imposed by the state does in fact invade the domain of the Federal Government, and secondly whether the extent or the manner of the interference renders it unwarranted.

Now with these principles in mind the extreme consequences resulting from the late decisions of the Supreme Court in Long v. Rockwood and Panhandle v. Mississippi are more apparent. Justice Holmes writes the dissenting opinion in both cases. In the Rockwood case Holmes takes issue with the statement that patents are instrumentalities of the Federal Government, for he says, "they are used by the patentees for their private advantage alone" and that "the most that can be said is that a tax is a discouragement so far as it goes, and to that extent in its immediate operation runs counter to the government intent." And in the Panhandle case speaking of the analogy of a tax on commodities sold to the Federal Government with that affecting interstate commerce, "But obviously it does not follow from the invalidity of a tax directly burdening interstate commerce that a tax upon a domestic seller is bad because he may be able to shift the burden to a purchaser, even though an agency of the Government, who is willing to pay the price with the tax and who has no rational ground for demanding favor. I am not aware that the President, the Members of Congress, the Judiciary, or to come nearer to the case at hand, the coast guard or the officials of the Veterans' Hospital because they are instrumentalities of the government and cannot function naked and unfed, hitherto having been entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales."

The interference in either of these cases is certainly not immediate, in the one instance the tax is levied on the patentee, and the second on the domestic seller. It is true that in each instance there may be some

12 Union Pac. R. Co. v. Peniston, 18 Wall. 5.
slight effect upon the Federal agency or instrumentality, yet with due
derence they seem extremely remote.

As Justice Holmes points out, the power to tax is not the power to
destroy as long as the United States Supreme Court sits with power
to prevent an abuse of such privilege. In those cases where the only
objection to the tax is that it remoely effects the functions of the
Federal Government, it would be better to regulate such taxation
rather than prohibit it entirely. In any event it is apparent that these
two late cases materially enlarge the application of the doctrine, if not
beyond its proper scope, certainly beyond the limits previously recog-
nized.

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