

construction of the language of the statute would seem to place as much emphasis upon the one purpose as upon the other.¹⁵ This is especially true in light of the use of the conjunctive "or." Moreover, accompanying sections providing for service payments apparently indicate that it was intended that the municipality should take over all functions consonant with the operation of the premises.

It is difficult to comprehend in what manner a requiring of a building permit, which is tantamount to inspection of the plan to see that it conforms with the general needs of that section of the community, or the requirement of inspection of the actual building could interfere with the governmental use. Municipal enforcement of a zoning ordinance requiring structures of a type incompatible with a low-cost housing project might be construed as obstructing the federal use and be denied but mere inspection would not forestall achievement of the ultimate purpose. One performing federal duties is not completely immune from all state control.¹⁶ The question is entirely one of degree. In *Cummings v. City of Chicago*,¹⁷ it was decided that a municipal ordinance requiring a permit prior to the construction of docks or similar structures did not conflict with the federal control of the watercourse and adjacent banks.

Constitutional Law—Tax Immunity of State Governmental Agencies—[Federal].—The state of Wyoming leased school lands to a private oil and gas company which subsequently executed a declaration of trust purporting to hold an undivided one half interest in the lease and the proceeds to be realized therefrom for the benefit of another corporation. The federal government sought to levy a tax upon the income of the beneficiary of the trust. *Held*, the tax upon the profits of the beneficiary derived under its lease from the state constituted no direct and substantial interference with the functions of the state of Wyoming. *Gillepsie v. Oklahoma*¹ and *Burnet v. Coronado Oil Co.*² are expressly overruled. *Helvering v. Mountain Producers Corporation*.³

This case is significant because of the President's recent proposal abolishing federal tax exemptions on state and federal securities and on incomes of state and federal employees.⁴ It is also important because it enables an evaluation to be made of the principle of *stare decisis* in constitutional law. It represents at least the second time

States of the sites of such projects. Otherwise doubts as to the rights of tenants to vote, to send children to local schools and to exercise other civil rights under the local laws might keep prospective tenants from taking advantage of such projects." House Report 2660. That such rights of suffrage may be guaranteed see *Renner v. Bennett*, 21 Ohio St. 431 (1871); *State ex rel. v. Board*, 153 Ind. 302, 54 N.E. 809 (1899).

¹⁵ 49 Stat. 2026 (1936), 40 U.S.C.A. §§422, 423 (Supp. 1937).

¹⁶ *First Nat'l Bank of Louisville v. Commonwealth of Ky.*, 9 Wall. (U.S.) 353 (1870); *Commonwealth v. Closson*, 229 Mass. 329, 118 N.E. 653 (1918).

¹⁷ 188 U.S. 410 (1902). See the cases therein cited relative to municipal control of bridges spanning navigable waters.

¹ 257 U.S. 501 (1922) (where Oklahoma was denied the right to tax income from a sale of an interest in a lease of Indian lands).

² 285 U.S. 393 (1932) (prohibiting federal taxation of income of a private oil company which leased school lands from the state of Oklahoma).

³ 58 S. Ct. 623 (1938).

⁴ *Chicago Daily News*, p. 1 (April 25, 1938).

that the United States Supreme Court has expressly overruled itself in this particular field of taxation.⁵

Difficulty in appreciating the function to be served by the doctrine of *stare decisis* accounts in no small measure for the confusion that reigns especially in the field of constitutional law. Keen appreciation of this fact was expressed by Justice Brandeis in his dissent to *Burnet v. Coronado Oil Co.*, wherein he said, "In cases involving constitutional issues of the character discussed, this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may . . . depend altogether on the force of the reasoning by which it is supported."⁶ But the Supreme Court has proceeded to interpret and apply the doctrine of *McCulloch v. Maryland* to mean that any tax upon a governmental agency is invalid *per se*,⁷ without apparently making an inquiry into the political background of Chief Justice Marshall's opinion. This seems peculiar especially since it is common knowledge that a strong federal government was Marshall's aim. The counterpart of the *McCulloch* case and a milestone on the road of confusion was *Collector v. Day*⁸ which prohibited federal taxation of state employees' incomes. In *Collector v. Day*, the Court regarded state immunity from federal taxation as a corollary of the *McCulloch* case. The state and federal government were equal in that each was supreme within its sphere and so each was immune from the taxing power of the other. But when Chief Justice Marshall spoke of supremacy he did not merely mean to reiterate that the federal government was supreme within its sphere. He emphasized the federal nature of our governmental structure to justify his refusal to allow a part to govern the whole. In this sense, the national government was supreme, and from this it does not necessarily follow that because a state cannot tax the federal government, the latter cannot tax a state government.

The years following *Collector v. Day* witnessed the steady extension of tax immunity as a result of the doctrine that taxation of a governmental agency was bad *per se*.⁹ But there also developed the theory that a non-discriminatory tax which does not impair

⁵ In *Fox Film v. Doyal*, 286 U.S. 123 (1932) the court upheld a state tax upon gross receipts from royalties earned under federal copyright law, and in doing so overruled *Long v. Rockwood*, 277 U.S. 142 (1928).

⁶ 285 U.S. 393, 412 (1932). See Sharp, Movement in Supreme Court Adjudication, 46 Harv. L. Rev. 361, 636 (1933).

⁷ 17 U.S. 315 (1819) (prohibiting the state of Maryland from levying a tax on notes of the Bank of the United States).

⁸ 11 Wall. (U.S.) 113 (1871) (where a federal tax on income of a state judge was held invalid).

⁹ *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895) (holding invalid a federal income tax on state and municipal bonds); *Farmers' and Mechanics' Savings Bank v. Minnesota*, 232 U.S. 516 (1914) (holding a state tax on bonds of a territory of the United States invalid since no tax could ever be levied upon an instrumentality of the federal government); *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U.S. 522 (1916) (where a state tax upon capital stock of a private corporation leasing Indian lands was held unconstitutional); *Panhandle Oil Co. v. Knox*, 277 U.S. 218 (1927) (state tax on sale of gasoline to United States coast guard fleet held invalid); *Indian Motor Cycle Co. v. United States*, 283 U.S. 570 (1930) (federal excise tax on sale of motorcycles to a Massachusetts town prohibited); *Brush v. Comm'r*, 300 U.S. 352 (1937) (income of an employee of municipal waterworks held exempt from federal taxation).

operating efficiency is unobjectionable.¹⁰ In addition the sixteenth amendment authorized Congress "to lay and collect taxes on incomes, from whatever source derived." It is this amendment and recent cases¹¹ which serve as the basis for the President's message. However, even though the sixteenth amendment may justify a direct tax upon a government agency,¹² it could not serve as the basis for a tax which would cripple state governments.¹³

The rationale of a non-discriminatory tax not impairing governmental operating efficiency, although, by far, more desirable than that of *Collector v. Day* is not free from difficulty. When a tax impairs operating efficiency is not easily ascertained. Thus, Justice Holmes who wrote the opinion in the *Gillepsie* case,¹⁴ which was expressly overruled by the instant decision dissented in the *Panhandle Oil* case.¹⁵ A growing awareness of necessity for thorough understanding of economic as well as legal factors has been accelerated by this type of litigation.¹⁶

To what extent abolition of federal tax immunity will benefit the federal government appears to be highly questionable.¹⁷ In 1922 estimates of the annual loss of federal revenue ranged from \$100,000,000 to \$300,000,000.¹⁸ There also seems to be conflict concerning the effect of tax immunity on state and municipal expenditures, and a resulting disagreement concerning the wisdom of effecting state subsidies through tax immunity.¹⁹ What effect the proposed law will have upon state and municipal interest rates and what effect it will have upon private industry are other problems that should receive careful consideration.

¹⁰ *Metcalf and Eddy v. Mitchell*, 269 U.S. 514 (1925) (upholding a federal tax on net income of consulting engineer for municipal works); *Wilcutts v. Bunn*, 282 U.S. 216 (1931) (holding a federal tax upon income derived from the sale of municipal and county lands valid); *Burnet v. A. T. Jergins Trust*, 288 U.S. 508 (1933); Justice Roberts' dissent in *Brush v. Comm'r.* 300 U.S. 352, 378 (1937); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) (wherein a state tax upon the gross income of an independent contractor engaged exclusively in federal construction, was sustained).

¹¹ Such recent decisions may be: *Helvering v. Therrel*, 58 S. Ct. 539 (1938) (federal tax on income of liquidator of state banks upheld. Since the salary was paid from assets of the banks, the liquidator was held not to be a state employee); *Atkinson v. State Tax Comm'n*, 58 S. Ct. 419 (1938) (state tax upon income of contractors constructing a federal dam held valid); *Helvering v. Bankline Oil Co.*, 58 S. Ct. 616 (1938) (federal income tax on corporation operating under a state lease upheld).

¹² *Corwin, Constitutional Tax Exemption*, 13 Nat'l Tax Rev. 51, 57 (1924).

¹³ "The power to tax is not the power to destroy while this Court sits," Holmes, J., dissenting in *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1927).

¹⁴ *Gillepsie v. Oklahoma*, 257 U.S. 501, 506 (1922) (where Justice Holmes said, "... a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards.")

¹⁵ 277 U.S. 218 (1927).

¹⁶ See Justice Stone's dissent in *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 581 (1930).

¹⁷ *Hardy, Tax Exempt Securities and the Surtax* (1926); *Magill, Tax Exemption of State Employees*, 35 Yale L. J. 956 (1926); *Seligman, The Income Tax 615 et seq.* (1914); *Powell, National Taxation of State Instrumentalities* (1936); *Hinrichs, The Cost of Tax Exempt Securities*, 41 Pol. Sc. Q. 271 (1926).

¹⁸ *Hardy, op. cit. supra* note 17, at 41.

¹⁹ *Id.*, at 117 et seq.

These problems are not raised by the principal case, but before proposed legislation is enacted, they should merit close scrutiny. The gratifying feature of the principal case is that it is another blow to the theory of *Collector v. Day*. In the future, the Court will probably not approach the problem by considering whether a state agency is being taxed but whether such a tax would hamper the state in performing its duties.

Corporations—Parent and Subsidiary—Set-off of Subsidiary's Claims against Parent's Indebtedness—[Indiana].—The defendant manufacturing corporation maintained a subsidiary under a separate name, the latter's sole asset being a deposit in the plaintiff bank. In financial reports of the defendant to the plaintiff the subsidiary was referred to as a "selling division." Checks and remittances, although in the subsidiary's name, were honored only upon the signatures of those who were also officers of the parent corporation, and were frequently used to transfer the subsidiary's account to that of the defendant. In an action by the receiver of the bank on a note-indebtedness, owed to the bank by the defendant, the defendant successfully set-off the subsidiary's deposit. On appeal, *held*, reversed. No mutuality in the cross-claims since the manufacturing and sales corporations were distinct entities. *Feucht v. Real Silk Hosiery Mills*.¹

It is frequently stated that where the corporate fiction is resorted to as a means of evading defined public policy or a statute,² or of achieving a forbidden monopoly,³ or of perpetrating fraud,⁴ or of immunizing the parent corporation from tort⁵ or contract⁶ liabilities apparently incurred by its subsidiary, the court at the instance of the injured party will pierce the corporate shell to fix responsibility on the actual principal.⁷ The novel question raised by the instant case is whether in the absence of

¹ 12 N.E.(2d) 1019 (Ind. App. 1938).

² *People v. North River Sugar Refining Co.*, 121 N.Y. 582, 24 N.E. 834 (1890); *State ex rel. Marsh v. Safford*, 117 Ohio St. 576, 159 N.E. 829 (1927); *United States v. Delaware, L. & W. Ry. Co.*, 238 U.S. 516 (1914); *United States v. Lehigh Valley Ry. Co.*, 220 U.S. 257 (1911).

³ *Federal Gravel Co. v. Detroit & M. Ry. Co.*, 249 Mich. 49, 226 N.W. 677 (1929); *United States v. Lake Shore & M.S. Ry. Co.*, 203 Fed. 295 (D.C. Ohio 1912); *Aluminum Co. of America v. Fed. Trade Comm'n*, 284 Fed. 401 (C.C.A. 3d 1922).

⁴ *Mosher v. Lee*, 32 Ariz. 560, 261 Pac. 35 (1927); *Security Bank & Trust Co. v. Warren Light & Water Co.*, 170 Ark. 50, 278 S.W. 643 (1925); *Donovan v. Purtell*, 216 Ill. 629, 75 N.E. 334 (1905).

⁵ *Costan v. Manila Electric Co.*, 24 F. (2d) 383 (C.C.A. 2d 1928); *The William Van Driel*, 252 Fed. 35 (C.C.A. 4th 1918); *Auglaize Box Board Co. v. Hinton*, 100 Ohio St. 505, 126 N.E. 881 (1919). *Cf.* *Berkey v. Third Avenue Ry.*, 244 N.Y. 84, 155 N.E. 58 (1926); *Owl Fumigating Corp. v. California Cyanide Co., Inc.*, 24 F. (2d) 718 (D.C. Del. 1928).

⁶ *Luckenbach S.S. Co. v. W. R. Grace & Co.*, 267 Fed. 676 (C.C.A. 4th 1920); *Start Electric Ry. v. McGinty Contracting Co.*, 238 Fed. 657 (C.C.A. 6th 1917). *Cf.* *First Nat'l Bank v. Walton*, 146 Wash. 367, 262 Pac. 984 (1928); *Kingston Dry Dock Co. v. Lake Champlain Transportation Co.*, 31 F. (2d) 265 (C.C.A. 2d 1929).

⁷ For general discussion as to when courts will disregard corporate personality see *Wormser, Piercing the Veil of Corporate Entity*, 12 Col. L. Rev. 496 (1912); *Stevens, Corporations* § 19 (1936).