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Constitutional Law--State Taxation of Federal Property in Possession of Private Contractor

J. L. R.

West Virginia University College of Law

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Moffitt, 115 U.S. 487, 501 (1885) (dictum). The later decisions of the Supreme Court, however, have indicated that expatriation can be justified only in regard to foreign relations; as, for example, a concession by the Government (in an expatriation case concerning marriage to an alien) that residence abroad is necessary to effect expatriation. *Savorgnan v. United States*, 338 U.S. 491, 503 (1950). There was also an implication that an expatriate must have gained a new nationality before losing the old. *Mackenzie v. Hare*, 239 U.S. 299 (1915).

It would seem to be the better rule that expatriation should be limited to those cases in which a person has acquired, or is in a position to acquire, a new nationality, and has voluntarily renounced American citizenship, or has voluntarily participated in some activity indicating allegiance to a foreign State and continued American citizenship would serve to embarrass the United States in the field of foreign affairs.

R. G. D.

CONSTITUTIONAL LAW—STATE TAXATION OF FEDERAL PROPERTY IN POSSESSION OF PRIVATE CONTRACTOR.—*P*, a subcontractor under a prime contract with the federal government, brought an action against the City and County of Detroit to recover taxes paid pursuant to the general property tax act of Michigan. MICH. COMP. LAW § 211.1 *et seq.* (1948). *P* had paid the taxes under protest, contending that the tax was in part assessed on federal property, since by the terms of the contract title to work in progress and other materials vested in the federal government upon partial payments of the contract price by the government, and hence such tax infringed the federal government's immunity from state taxation. The district court entered judgment for *P* and the Court of Appeals for the Sixth Circuit affirmed. 234 F.2d 380 (6th Cir. 1956). *Held*, (5-4), that the taxes, although styled property taxes, were in effect privilege taxes in that they were levies on a private party for the privilege of possessing and using government property in its own business for private gain and as such in no way infringed the federal government's immunity to state taxation. *Detroit v. Murray Corp.*, 355 U.S. 489 (1958).

It is well established that the property, officers and instrumentalities of the federal government are not proper subjects of state tax-

ation. Such immunity from state taxation was found to be necessary in order to maintain the essential freedom of government in performing its functions. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 579 (1819). But, as later noted, close distinctions in this area must be observed to maintain this freedom without unduly limiting the taxing power which is equally essential to both nation and state under our dual system. *James v. Dravo Contracting Co.*, 302 U.S. 134, 150 (1937). The task of trying to achieve this goal has not been easy.

In early cases state attempts to tax federal property were stricken down on an "economic incidence" test, that is, if the economic burden of the tax fell on the federal government the tax was invalid. *Collector v. Day*, 78 U.S. (11 Wall.) 316 (1870); *Traves v. Texas Co.*, 298 U.S. 393 (1936). But since it was realized that some portion of the economic burden of a valid tax on federal property in the hands of a private person would ultimately fall on the government, the test was discarded. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Alabama v. King & Boozer*, 314 U.S. 1 (1941).

Later cases looked only to the type of tax being imposed. If the tax was a privilege tax, imposed on a private party for activities carried on within the state, and who in the course of such activities uses government owned property, the tax was upheld even though measured in part or exclusively by the amount or value of the government property in his hands. *Curry v. United States*, 314 U.S. 14 (1941). But if the tax was simply an ad valorem tax on federal property in the hands of a private party, even though such private party was to pay the tax, the tax was invalid. *United States v. Allegheny County*, 322 U.S. 174 (1944). Such taxes, in order to be valid, must be strictly on the privilege of engaging in a particular activity which may employ government property and in no way have the earmarkings of an ad valorem tax on the government property. See *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953).

In *United States v. Allegheny County*, 322 U.S. 174 (1944), Pennsylvania attempted to add the value of government owned machinery, on lease to the contractor, to the value of the contractor's plant as a basis for an *ad valorem* property tax. The Court held the tax invalid because it was partially on government property. In *Esso Standard Oil Co. v. Evans*, *supra*, Tennessee imposed a *privilege* tax on the oil company for the storage of gasoline and included government owned gasoline stored by the company in the valuation for the tax. The tax was upheld by the Court on the ground that it

was a tax on the company's exercise of the privilege to engage in such operations and not on the government property. The distinguishing feature of these two cases lies in the type of tax imposed, the ad valorem tax "on" government property in *Allegheny* was struck down; the privilege tax "on" the company in *Esso Standard* was upheld though government property was used in determining the measure of the tax. The distinction here is vital in view of the fact that the Court in the principal case believed that it was controlled by the principles expressed in *United States v. City of Detroit*, 355 U.S. 466 (1958), and *United States v. Township of Muskegon*, 355 U.S. 484 (1958); these cases being decided on the same day, prior to the principal case. In those cases private parties were using government property for private profit, one under a lease, the other by permit. The state statute provided that when exempt real property is used by a private party in a business conducted for profit the private party is subject to taxation to the same extent as though he owned the property. *United States v. City of Detroit*, 355 U.S. at 468. The Court upheld the tax in both cases, reasoning that the tax was not "on" government property but rather on the private party for the privilege of using government property. The Court also held that since users of other property, which had been exempt by the state, were required to pay the tax, then the tax did not discriminate against the users of federal property. *Quaere*, was the question of discrimination present in those cases? Admittedly the state, having granted certain property immunity from taxation, could withdraw that immunity in the user's hands when such property is given to use for private profit, but would it not seem that the real problem is whether a state could tax federal property under such a statute since its immunity from state taxation is not granted by the state but derived from the federal constitution? But this is a problem for another time. It is sufficient to say that the tax imposed in these two cases was not an ad valorem tax but was more closely a privilege tax and that they should have fallen under the principles of *Esso Standard*. It seems clear, if it be acceptable that these taxes were privilege taxes, that whether a state attempt to tax government property failed or succeeded, to this time, depended upon whether it was an ad valorem or a privilege tax.

The principal case introduced a new rule, that is, even though the tax statute is considered and construed to be an ad valorem tax statute and the tax imposed under it is a tax "on" property, the Court

will look to the net effect of the tax and uphold it as a tax on a private party for the privilege of using government property. The court in reaching this result reasoned that the tax should not be struck down because it did not expressly state that the person in possession is taxed for the privilege of using or possessing personal property but that this was merely a verbal omission that could be obviated by merely adding a few words to the statute. *Detroit v. Murray Corp.*, 355 U.S. at 493. The practical effect of adding words to the taxing statute was to give to the statute the same net effect as the taxing statute involved in *City of Detroit and Township of Muskegon*, the only difference being that, in the two mentioned cases, the state had specifically taxed the users of exempt "real" property, while here the Court added words so as to include users of exempt "personal" property. To illustrate the operation of the statute with the added words, suppose that Murray had in his hands government property which he was using in his business valued at \$10,000. He has also in his business his own property valued at \$10,000. The state imposes upon Murray an ad valorem tax. Under the holding of the principal case the state may (1) assess Murray's own property at value, and (2) assess the government property at value to Murray for the privilege of using such property. If the tax rate is three per cent of value assessed then Murray will owe a tax of \$600 under the ad valorem statute. The state then imposes on Murray a tax for the privilege of carrying on his particular activity within the state. Under the holdings of the privilege tax cases the state may measure the tax by the total amount or value of the property in Murray's hands, thus the state (1) values the amount of Murray's property, and (2) values the amount of government property in Murray's hands. If this tax rate is three per cent of valuation then Murray will owe another \$600 under the privilege tax statute, or a total tax of \$1,200. But suppose now that the property in Murray's hands was not that of the government but of some other private individual who is a resident of the taxing state. Under the ad valorem tax the state would (1) levy the tax "on" Murray's property, and (2) levy the tax "on" the property of the private individual. Under this statute Murray would have to pay the tax on both properties because he was the possessor, but he could recover the amount paid on the property not his own from the real owner. Of course under the privilege tax Murray would have to pay such tax on the valuation of both properties and could not recover against the owner of the property he was using. If the tax rate is again the same then Murray would, in both taxes, have to pay a total tax of \$1,200 but he could

recover \$300 of this amount from the true owner of the property under the ad valorem tax, for an adjusted total of \$900. It would seem that, because Murray is unfortunate enough to be using government property, he must pay \$300 more tax than if he had been using the property of some private individual. Could the state also impose on Murray a tax like that in *City of Detroit* or *Township of Muskegon*, that is, a tax "for the privilege of using exempt property"? Or would it be limited to either the tax collected under the ad valorem statute or the tax collected under the privilege of using exempt property statute?

It is believed that the holding of the principal case will have more far reaching implications than was contemplated. Is it not now possible for any state in the union to simply impose the traditional ad valorem tax on private parties using government property and indirectly collect the same amount as though the tax were levied "on" the government property, even though the same private parties are not subjected to any form of a privilege tax? It is submitted, if the result in this case is the desirable one, that such result should be formulated into policy by Congress so that the positions, in this area, of the federal government, the states, and the private party doing business with the federal government will have some degree of certainty.

J. L. R.

CONTRACTS—ACCEPTANCE BY TELEPHONE—PLACE OF CONTRACT.—

An action of account was brought by the offeror in a contract for the reinsurance of certain risks. The outcome is dependent on the enforceability of the contract, and due to differences in the statute of frauds in Pennsylvania and New York (the New York statute contains the provision making contracts not to be performed within one year unenforceable unless in writing; the Pennsylvania statute omits this provision), the enforceability is in turn dependent on the place of the contract. *P.*, with offices in Philadelphia, traveled to New York to communicate an offer to *D.* *P.* returned to Philadelphia, where he was contacted by telephone by *D.* accepting the offer. *Held*, reversing the lower court, that acceptance by telephone of an offer takes place where the words are spoken. *Linn v. Employers Reinsurance Corp.*, 139 A.2d 638 (Pa. 1958).