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Constitutional Law--Municipal Corporations--Constitutionality of Act Extending Bankruptcy Act to Cover Political Subdivision of States

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since it tends to discourage dummy directors or directors who are lax in attending to corporate affairs.

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CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — CONSTITUTIONALITY OF ACT EXTENDING BANKRUPTCY ACT TO COVER POLITICAL SUBDIVISIONS OF STATES. — Petitioner, an irrigation district organized under the laws of Texas,[1] presented a petition to the District Court in accordance with the Sumners Act,[2] amending the Bankruptcy Act[3] to provide for the relief of insolvent political subdivisions of states by a readjustment of their obligations. The Act provided that a plan of readjustment should be put in force if (1) the state consented, (2) two-thirds of the creditors should agree to the plan, and (3) the district judge should consider the plan to be a fair one. The state had consented;[4] thirty per cent of the creditors had consented, and it was believed that the requisite two-thirds would consent; but the district court dismissed the petition on the ground *inter alia,* that the Sumners Act was unconstitutional.[5] This decree was reversed in the circuit court of appeals,[6] and the Supreme Court granted *certiorari. Held,* that the Act was unconstitutional in that it impaired state sovereignty. Four justices dissented. Petition for a rehearing denied.[7] *Ashton v. Cameron County Water Improvement District No. 1.*[8]

The theory of the majority of the Court was that since it was well established that the federal government and the governments of the several states were each immune from taxation by the other,[9]

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[1] TEX. COMP. STAT. (Vernon, 1928) §§ 7622-7807.

[2] 48 STAT. 798 (1934), 11 U. S. C. A. §§ 301-303 (Supp. 1934).

[3] 30 STAT. 544 (1898), 11 U. S. C. A. § 1 *et seq.* (1927).

[4] Tex. Laws 1935, c. 107.

[5] *In re* Cameron County Water Improvement Dist. No. 1, 9 F. Supp. 103 (1934).

[6] Cameron County Water Improvement Dist. No. 1 v. Ashton, 81 F. (2d) 905 (1936).

[7] (1936) 4 U. S. L. WEEK 146.

[8] 56 S. Ct. 892, 80 L. Ed. 910 (1936).

[9] McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (U. S. 1819); Weston v. Charleston, 2 Pet. 449, 7 L. Ed. 481 (U. S. 1829); Collector v. Day, 11 Wall. 113, 20 L. Ed. 122 (U. S. 1870); United States v. Railroad Co., 17 Wall. 322, 21 L. Ed. 597 (U. S. 1873); Mercantile National Bank v. New York, 121 U. S. 138, 7 S. Ct. 826 (1887); Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 S. Ct. 673, 158 U. S. 601, 15 S. Ct. 912 (1895); Ambrosini v. United States, 187 U. S. 1, 23 S. Ct. 1 (1902); Indian Motocycle Co. v. United States, 283 U. S. 570, 51 S. Ct. 601 (1931); Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 52 S. Ct. 443 (1932).

Congress could not extend the Bankruptcy Act to cover the political subdivisions of a state because the Congressional powers to levy taxes[10] and to enact uniform laws on the subject of bankruptcies[11] are of equal rank in our scheme of government. In other words, since Congress would be unable to pass an act levying a tax upon the bonds of this irrigation district, Congress could not pass an act enabling it to readjust its bonded indebtedness. That the state was perfectly willing to allow Congress to impair its sovereignty in this fashion made no difference because, in the first place, consent by the states cannot enlarge the powers of Congress, and, secondly, since a state cannot pass a law impairing the obligation of contracts,[12] it may not indirectly achieve the same result by permitting Congress to do so.

Mr. Justice McReynolds, in writing the majority opinion, apparently disregarded a recent case which is directly in point. *Baltimore National Bank v. State Tax Commission*[13] held that where an Act of Congress subjected *all* shares of national banking institutions to state taxation, national bank shares held by the Reconstruction Finance Corporation, admittedly an agency of the federal government, were taxable by a state. Hence a state may tax the revenues of an agency of the federal government if the federal government consents to the levy of such tax. It must necessarily follow under *Collector v. Day*[14] which lays down a rule that has been followed in all subsequent cases on the point,[15] *i. e.*, that the federal government and the several states are on an equal basis in so far as immunity from taxation is concerned, that if the states may tax the revenues of federal agencies upon consent being given by the federal government, then the federal government may tax state agencies if the state consents. Therefore, if the analogy of the taxation cases be applied, the Sumners Act must be constitutional because it is expressly provided in the Act that its terms shall not apply unless the state consents. To accept the argument made by Mr. Justice McReynolds in the principal case that consent by

[10] U. S. CONST. Art. I, § 8, cl. 1.
[11] U. S. CONST. Art. I, § 8, cl. 4.
[12] U. S. CONST. Art. I, § 10, cl. 1.
[13] 297 U. S. 209, 56 S. Ct. 417 (1936).
[14] 11 Wall. 113, 20 L. Ed. 122 (1870).
[15] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 S. Ct. 673, 158 U. S. 601, 15 S. Ct. 912 (1895); Plummer v. Coler, 178 U. S. 115, 20 S. Ct. 829 (1900); Ambrosini v. United States, 187 U. S. 1, 23 S. Ct. 1 (1902); Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 52 S. Ct. 443 (1932); Carter v. Carter Coal Co., 56 S. Ct. 855, 865, 80 L. Ed. 749, 761 (1936).

the state can not enlarge the powers of Congress, it is necessary to repudiate either *Collector v. Day* and the large number of cases which follow it or the *Baltimore Bank* case, the rule of which was followed in *British-American Oil Producing Company v. Board of Equalization,*[16] a case decided after the principal case.

In regard to the argument that a state can not indirectly impair the obligation of contracts by permitting Congress to do so, it would seem just as logical to argue that since a state cannot coin money, it may not indirectly achieve the same result by permitting Congress to do so. The apparent intent here was merely to reiterate the argument that a state cannot enlarge the powers of Congress by consent, which argument seems to be satisfactorily answered by the *Baltimore Bank* case and the *Producing Company* case when read in conjunction with the doctrine represented by *Collector v. Day.*

Irrespective of the question of consent by the state, is the readjustment of obligations of insolvent political subdivisions a proper exercise of the power "To enact . . . Uniform Laws on the Subject of Bankruptcies"?[17] Due to the fact that the states are prohibited from passing laws impairing the obligation of contracts,[18] the insolvent political subdivision may not look to the state for aid, and, according to the principal case, it can expect no relief from the federal government. Was it the thought of the framers of the Constitution that here was a power so inherently dangerous that it should be given to neither the states nor the federal government, but should be left to fall by some convenient wayside?[19]

As Mr. Justice Cardozo points out in dissent, the average market value of lands in the district was seventy-five dollars per acre and the total bonded indebtedness per acre was approximately one

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[16] (1936) 4 U. S. L. WEEK 387.
[17] U. S. CONST. Art. I, § 8, cl. 4.
[18] U. S. CONST. Art. I, § 10, cl. 1.
[19] See Sauer, *An Experiment in Municipal Refinancing: Factual Background of Ashton v. Cameron County Water Improvement District No. One* (1936) 5 GEO. WASH. L. REV. 1, wherein it is pointed out that up to the time the Supreme Court handed down its decision in Ashton v. Cameron County Water Improvement District No. 1 (*supra* n. 8), some seventy districts had filed petitions for debt readjustment pursuant to the provisions of Section 80. Fifty of the seventy cases had proceeded to a hearing on the petition and forty confirmation decrees had been entered by some twenty-seven different United States district court judges. In only one case, the Ashton case, was the constitutionality of the Act denied, and the decision of the district court to this effect was reversed by the circuit court of appeals.

hundred dollars. Suffice it to say that conditions were serious enough that presumably over two-thirds of the bondholders were willing to accept 49.8 cents on the dollar in satisfaction of their claims. It does not seem sociologically desirable to hold in such a case that the refusal of a very small minority of creditors to assent to a plan of readjustment may place both the debtor district and the majority of its creditors in a Daedalian Labyrinth with no hope of release.

H. A. W., Jr.

CRIMINAL LAW — EMBEZZLEMENT — PROSECUTION OF RETAILER FOR FAILURE TO TURN OVER SALES TAX. — A statute of Illinois imposes a tax upon motor fuel, the tax to be paid with the purchase price by the autoist to the dealer. The dealer in gasoline is especially made by the statute the agent of the state to collect the tax and is allowed the actual cost of making collection and payment. The defendant, a dealer, failed to remit the tax under circumstances tending to show *animus furandi*. He was indicted for embezzlement. Defendant contended that a debtor-creditor relationship existed and that the sole penalty was that provided by the statute, a fine. Indictment quashed. People brought writ of error. *Held*, that the relationship between the dealer and the state being that of principal and agent and the penalty imposed by the act being recoverable in the absence of intent to misappropriate, a dealer who intentionally misappropriates the tax may properly be indicted for embezzlement. *People v. Kopman*.[1]

On a similar set of facts in Wisconsin, the Illinois decision was followed. The Wisconsin statute does not expressly declare the agency nor allow the compensation. The court held this difference in the statutes immaterial, saying that the fact of agency follows from the declaration in both statutes that the tax is imposed for the privilege of operating motor vehicles on the public highway and therefore the express provision is unnecessary. *Anderson v. State*.[2]

The similarity between the statutes involved in the Wisconsin and Illinois cases, and the West Virginia Consumers Sales Tax[3] is apparent. Should the retailer in West Virginia convert the tax, in whole or in part, to his own use, might he be convicted of em-

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[1] 358 Ill. 479, 193 N. E. 516 (1934).
[2] 265 N. W. 210 (Wis. 1936).