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REPUDIATION OF INTERGOVERNMENTAL TAX IMMUNITY
IN ANGLO-AMERICAN FEDERATIONS

The doctrine of intergovernmental tax immunity has no express constitutional basis, but is wholly the product of judicial construction. It traces ultimately to expressions in McCulloch v. Maryland, where the United States Supreme Court invalidated a discriminatory state statute which singled out transactions of the Federal government as a subject of taxation. The correctness of the strict holding of that case is unquestioned; but the extensive opinion, which constituted virtually a monograph on the science of government, abounded in dicta (including the aphorism that "the power to tax involves the power to destroy"), the repercussions of which could not then have been foreseen. That case involved federal immunity from state taxation. The converse situation was presented by Collector v. Day, which propounded a broad principle of implied reciprocal tax immunity even as to non-discriminatory levies. This doctrine has since met with severe criticism, and its scope has been limited drastically. It has been deemed applicable only where the function involved was strictly or essentially governmental, and has been repudiated where no direct burden was placed on the government, and where the person assessed was an independent

2. (U. S. 1819) 4 Wheat. 316.
3. (U. S. 1870) 11 Wall. 113.
5. See chronological collection of cases in Wasserman, Reciprocal Tax Immunity, Its Rise and Fall (1939) 62 N. J. L. J. 125.
contractor rather than a government employee.8 Recently the Court has flatly overruled Collector v. Day and has probably abandoned the doctrine of implied reciprocal tax immunity by the decision in Graves v. New York.9 That case involved a state income tax on the salary of an employee of the Home Owners' Loan Corp., which the Court stated was an agency of the Federal government employed in performing an essential governmental function. One may anticipate that, until the legislative base for permissible taxation is extended, no such claim of immunity will hereafter be sustained unless the tax involved is clearly discriminatory or unduly interferes with governmental operations. It must, however, be noted that the Graves case does not affect the holding of McCulloch v. Maryland. It is not proposed here to trace the history of intergovernmental tax immunities which has been treated elsewhere many times.10 The outright rejection by the Graves case of this frequently criticized doctrine is in striking contrast with the slow and gradual development which has normally characterized the Anglo-American judicial process.11 When an existing theory is economically undesirable and jurally untenable, the more drastic policy would seem preferable to the cautious approach characterized by distinctions and exceptions12 and exemplified by the previous reciprocal tax immunity decisions. Of late, the Supreme Court has tended away from the traditional technique of oblique withdrawal and has frankly overruled doctrines which appeared to

it of doubtful soundness.  But even though one agrees with Mr.
Justice Frankfurter that in an appropriate instance, such as
the Graves case, overt repudiation is better than covert aban-
donment, he should not overlook the jurist's admonition in
the concurring opinion that "A reversal of a long current of deci-
sions can be justified only if rooted in the Constitution itself as
an historic document designed for a developing nation."

The concept of intergovernmental tax immunity had a com-
parable historical development in Australia and Canada, the
other principal federations within the common-law system. The
relative rapidity with which the doctrine was abandoned in
these jurisdictions merits examination.

Under the British North American Act, 1867, which is Cana-
da's "Constitution," the powers of government are distributed
between the provinces and the Dominion in a manner roughly
analogous to the system prevailing in the United States. There
is the substantial difference, however, that the provinces possess
only delegated powers, while the residuary power is vested in
the Dominion. Taxation of property belonging to the Dominion
or to the provinces is expressly forbidden; but, in other re-

13. Of the several illustrations available the following are representa-
tive: Fox Film Corp. v. Doyal (1932) 286 U. S. 123, overruling Long v.
Rockwood (1928) 277 U. S. 142; West Coast Hotel Co. v. Parrish (1936)
300 U. S. 379, overruling Adkins v. Children's Hospital (1923) 261 U. S.
525; Erie Railroad Co. v. Tompkins (1938) 304 U. S. 64, overruling Swift
v. Tyson (U. S. 1842) 16 Pet. 1; Rochester Telephone Co. v. Federal Com-
munication Comm. (1933) 59 S. Ct. 754, permitting judicial review of
"negative" orders of administrative agencies; Note (1939) 24 WASHINGTON
U. LAW QUARTERLY 591; Sharp, Movement in Supreme Court Adjudication—
A Study of Modified and Overruled Decisions (1932) 46 Harv. L. R. 361,
598, 795; Comment (1938) 5 U. of Chi. L. Rev. 697.
602.
15. Kennedy, Essays in Constitutional Law (1934) 115; Kennedy, Some
Aspects of Canadian and Australian Federal Constitutional Law (1930)
15 Corn. L. Q. 345, 352; Moore, The Constitution of the Commonwealth of
Australia (2d ed. 1910) 421.
16. Lefroy, Canada's Federal System (1913) 414; Kennedy, Essays in
Constitutional Law (1934) 109; Kennedy, Some Aspects of Canadian and
Australian Federal Constitutional Law (1930) 15 Corn. L. Q. 345, 348; See Mr. Justice Frankfurter's concurring opinion in Graves v. New York
(1939) 59 S. Ct. 595, 603.
17. 30 Vict. c. 3.
18. (1867) 30 Vict. c. 3, secs. 91, 92, 93, 94, 95.
19. (1867) 30 Vict. c. 3, secs. 91 and 92; Tennant v. Union Bank of
Canada [1894] A. C. 31; Attorney General for Canada v. Attorneys Gen-
eral for the Provinces [1896] A. C. 700; Department of Justice, Taxation
of Government Bondholders and Employees (1938) 73.
20. (1867) 30 Vict. c. 3, sec. 125.
pects, the doctrine of reciprocal tax immunity must be derived, if at all, by implication.  

Imposition of a municipal income tax on the salary of a member of the Dominion Parliament was held invalid in 1873, on the grounds of possible diminution of efficiency of Dominion officers and unwarranted interference with one government by another. McCulloch v. Maryland was referred to as a masterly solution of a similar problem in the “neighboring republic.” Indeed, there is reason to believe that then, and on other occasions, the great reputation and political wisdom of Marshall greatly impressed the judges and impelled them to an uncritical assent to his assertions. The provincial courts elsewhere adopted this view, and it became the established rule in Canada that provincial and local taxing power could not reach salaries of Dominion officials.

Neither the Supreme Court nor the Privy Council was called on to consider the problem until Bank of Toronto v. Lambe in 1887. In that case plaintiff bank, a Dominion corporation, challenged a Quebec tax, the amount of which was determined by paid up capital and the number of its branches. Insisting that the tax might impinge on the Federal banking control, the bank relied heavily on Marshall’s proposition that “the power to tax involves the power to destroy.” The Privy Council rejected this argument and sanctioned non-discriminatory provincial taxation of Dominion agencies. The doctrine of “necessary prohi-

24. Higgins, McCulloch v. Maryland in Australia (1905) 18 Harv. L. Rev. 559. The point made is that both the Canadian and Australian Courts may have been so affected.
27. Department of Justice, Taxation of Government Bondholders and Employees (1938) 74.
29. Quebec Act (1882) 45 Vict. c. 22.
bition” was unequivocally repudiated, *McCulloch v. Maryland* characterized as inconsistent with British constitutional law, and the provincial parliaments’ plenitude of power in the performance of their legal functions held not to be restricted by consideration of potential abuse. The maxim of Marshall was summarily dismissed on the basis of alleged constitutional differences. In *Abbot v. St. John*, decided in 1908, the Canadian Supreme Court concurred in this disapproval of the earlier Canadian rule and sustained the City of St. John in its imposition of an income tax on the salary of a Dominion Customs Officer. The doctrine of implied reciprocal immunity from non-discriminatory taxes was negatived without distinguishing earlier cases in the provincial courts, and exemption of Federal employees from bearing a share of the costs of local government was stigmatized as gross injustice. Davies, J., casually dismissed the potential abuse doctrine with the remark that “if, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted, it would be then time enough to consider the question and not to assume beforehand such a suggested misuse of the power.” Another justice stated: “No attempt is made to seize or appropriate the income itself, or to anticipate its payment.” It was accordingly held that the tax involved no real interference with the Dominion government and that the Dominion’s power over the salaries of the Dominion official had no appreciable connection with “the fiscal burdens incident to provincial or municipal citizenship.” Thus, the Canadian Supreme Court scotched decisively, within little more than twenty-five years after its inception, the emerging recognition by provincial courts of the “implied prohibition” doctrine of reciprocal tax immunity. Intergovernmental taxes may now be levied subject, of course, to

31. 40 Can. Sup. Ct. 597; Lefroy, Canada’s Federal System (1913) 417; Department of Justice, Taxation of Government Bondholders and Employees (1938) 75.
33. Maclellan, J., 40 Can. Sup. St. at 616; Department of Justice, Taxation of Government Bondholders and Employees (1938) 75.
34. Duff, J., 40 Can. Sup. Ct. at 615.

This point is illustrated by several cases of state taxation of Dominion corporations: *Brewers’ & Maltsters’ Ass’n v. The Attorney General* [1897] A. C. 231; *Workmen’s Compensation Board v. Canadian Pac. Ry.* [1920]
the specific constitutional provisions previously mentioned, and to the continuing rule prohibiting discriminatory taxes or taxes calculated to assist in provincial exclusion of Dominion corporations.

The development of this phase of the law in Australia has been characterized by confusion. The Commonwealth of Australia Constitution Act of 1900, patterned more or less intentionally after the Constitution of the United States, delegates specific powers to the Commonwealth and leaves the residuary powers in the states. As under the British North American Act, only taxation of governmental property is expressly forbidden. Divergence of view as to tax immunity of instrumentalities was manifested from the outset. In 1904, the High Court of Australia upheld exemption of salaries of Commonwealth offices from state taxation, citing McCulloch v. Maryland and distinctly recognizing the doctrine of implied immunity. The corollary exemption of state agencies from federal taxation was likewise recognized. The views expressed in McCul-

A. C. 184; and see Mr. Justice Frankfurter's concurring opinion in Graves v. New York (1939) 59 Sup. Ct. 595, 603.
37. John Deere Plow Co. v. Wharton (1915) A. C. 330; Great West Saddlery Co. v. The King [1921] 2 A. C. 91; Department of Justice, Taxation of Government Bondholders and Employees (1938) 75.
39. (1900) 63 and 64 Vict. c. 12.
40. Sweetman, Australian Constitutional Developments (1925) 337; Warner, Introduction to Some Problems of Australian Federalism (1933) 2. The truth of this assertion was recognized by the Australian judiciary in Australasian Temperance and General Mutual Life Assurance Co., Ltd. v. Howe (1922) 31 C. L. R. 290, 330.
41. (1900) 63 and 64 Vict. c. 12 secs. 51, 107; Higgins, McCulloch v. Maryland in Australia (1905) 18 Harv. L. Rev. 559; Moore, The Constitution of The Commonwealth of Australia (2d ed. 1910) 65; Department of Justice, Taxation of Government Bondholders and Employees (1938) 77.
42. (1900) 63 and 64 Vict. c. 12, sec. 114.
44. Deakin v. Webb (1904) 1 C. L. R. 585, 10 A. L. R. 237; Moore, The Privy Council and the Australian Constitution (1907) 23 Law Q. Rev. 373; Moore, The Constitution of the Commonwealth of Australia (2d ed. 1910) 428. Later cases illustrating the application of this doctrine either to states or to the Commonwealth: Municipal Council of Sydney v. Commonwealth (1904) 1 C. L. R. 208; Roberts v. Ahern (1904) 1 C. L. R. 406; Commonwealth v. New South Wales (1906) 3 C. L. R. 807; The Federated Alm-

loch v. Maryland, Collector v. Day, and their satellite decisions, were thus incorporated into the Australian constitutional fabric. On the other hand, in Wollaston's case, the Supreme Court of Victoria rejected the doctrine, remarking that the Crown's check on legislation obviated the dangers against which the American courts had to guard.

The development of the constitutional principle took a peculiar course at this point by reason of a rule of appellate practice which permitted a state supreme court to certify appeals to either the High Court of the Commonwealth or the Privy Council. After the State of Victoria adopted the view of the High Court and reversed its own prior holding, a case in point was appealed to the Privy Council in 1907. In this case, the doctrine of implied immunity against non-discriminatory intergovernmental taxation was rejected. The court stressed the fact that the tax did not interfere unduly with governmental operations and was not discriminatory. The dictum in McCulloch v. Maryland, which had previously been followed, was declared inappli-

Wales Ry. Traffic Employees Ass'n (1907) 4 C. L. R. 488; The King v. Barger (1908) 6 C. L. R. 41; Commonwealth v. McKay (1908) 6 C. L. R. 72; The King v. Sutton (1908) 5 C. L. R. 789; Attorney General for New South Wales v. Collector of Customs (1908) 5 C. L. R. 818. These statutes went beyond mere taxation.

45. See cases cited supra, note 44; Higgins, McCulloch v. Maryland in Australia (1905) 18 Harv. L. Rev. 559; Kennedy, Some Aspects of Canadian and Australian Federal Constitutional Law (1930) 15 Corn. L. Q. 345; Kennedy, Essays in Constitutional Law (1934) 115; Department of Justice, Taxation of Government Bondholders and Employees (1938) 77-80.


47. This is not expressly set out in the Constitutional Act of 1900, but was established by Webb v. Outtrim [1907] A. C. 81, as a matter of construction of 65 and 64 Vict. c. 12, secs. 73, 74. Its propriety is frequently challenged: see Moore, The Privy Council and the Australian Constitution (1907) 23 Law Q. Rev. 373; Wickersham, The Police Power, A Product of the Rule of Reason (1914) 27 Harv. L. Rev. 297, 302; Haines, Judicial Interpretation of the Constitution Act of the Commonwealth of Australia (1917) 30 Harv. L. Rev. 595; Department of Justice, Taxation of Government Bondholders and Employees (1938) 77, n. 292.


able because of an asserted fundamental difference in the American and Australian constitutional systems, to wit, the check of the Crown over the Australian legislative process.50

If this decision had been followed, it would have eliminated the doctrine from Australian constitutional law within three years after its acceptance. The Australian High Court, however, did not find the reasoning of Halsbury, who had spoken for the Privy Council, to be persuasive and adhered to its former position.51 The consequence was confusion, the High Court staunchly supporting the American rule and the Privy Council rejecting it.52

As a solution, the High Court in 1907 suggested federal legislation which would abolish appeal from state courts to the Privy Council and divest Federal employees of immunity from state income taxation.53 Statutes embodying both recommendations were enacted in 1907,54 and judicially sustained shortly thereafter.55

While the taxation of incomes of governmental employees was thus removed from controversy, other aspects of the immunity of instrumentalities doctrine continued to plague Commonwealth-State relations for several years,56 until the doctrine was finally disavowed in its entirety by the High Court in Amalgamated Society of Engineers v. Adelaide Steamship Co., Ltd.57 That case, which involved a conflict between state and federal statutes,58 might well have been decided on more limited grounds. However, the Court declared its adherence to the canon of liberal construction, without resort to implications, as a principle of

50. [1907] A. C. at 89.
51. Baxter v. Comm'r of Taxation (1907) 4 C. L. R. 1087; Department of Justice, Taxation of Government Bondholders and Employees (1938) 79.
53. Flint v. Webb (1907) 4 C. L. R. 1178; Department of Justice, Taxation of Government Bondholders and Employees (1938) 79.
54. The issue of immunity of salaries of federal employees was covered by the Commonwealth Salaries Act, 1907, and the appellate issue by the Judiciary Act, 1907.
55. Chaplin v. Comm'r of Taxes for South Australia (1911) 12 C. L. R. 375.
56. Department of Justice, Taxation of Government Bondholders and Employees (1938) 80.
58. See (1900) 63 and 64 Vict. c. 12, sec. 109.
constitutional interpretation. The doctrine of immunity of instrumentalities was characterized as one of political exigency and expedience and not proper for judicial consideration. Admittedly, significant particular differences between the constitutional and judicial systems of Canada, Australia, and the United States exist;59 nevertheless, they are sufficiently alike to make comparison worthwhile.60 In all three, the implied immunity doctrine was adopted and, after a rather uneasy existence, was then abolished. This process, which in Australia required but sixteen years,61 took thirty in Canada,62 and nearly seventy in the United States.63

On the principle, heretofore mentioned,64 that summary repudiation of a poorly conceived or formulated judicial doctrine is preferable to a policy of lingering attrition, the Australian and Canadian record in this connection is better than the American. It is to be hoped that we will not in other respects disregard the available constitutional experience of those federations and delay correction of our errors.

CARROLL J. DONOHUE.

THE NEGATIVE ORDER DOCTRINE: ROCHESTER TELEPHONE CORPORATION v. UNITED STATES

On April 17, 1939, the "negative order doctrine"71 was unexpectedly overruled by the Supreme Court, through Justice Frankfurter, after a concise review of its scope, effects, and value. In Rochester Telephone Corp. v. United States;3 the Federal Communications Commission adjudged a telephone company in Rochester, N. Y. under the "control" of the New York Tele-

61. 1904 to 1920.
62. 1878 to 1908.
63. 1871 to 1939.
64. See supra, note 13.

2. (1939) 59 S. Ct. 754.