

## Federal Taxation of State Instrumentalities--Constitutional Law

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mailed December 31, 1923, and was not received until January, 1924. The Court found,<sup>17</sup> "the corporation did not have sufficient funds in its general checking account to pay the dividends on December 31, 1923" and because of that fact held that the dividend was income to petitioner in 1924.

In the *Shearman* case,<sup>18</sup> the Court attempts to reconcile its decision therein rendered with the decision in the case of *Commissioner v. Adams*.<sup>19</sup> In the *Adams* case, a resolution declared a dividend payable by checks, to be mailed on December 31st, on which day funds were available. The checks were received the following year and the income was held to be taxable in the following year. The Court, in its labored attempt to distinguish the *Shearman* case from the *Adams* case, declared,<sup>20</sup> "perhaps that case [*Adams* case] differs from this [*Shearman* case] in that the taxpayer was there entitled to receive the dividends only at such time as checks mailed were delivered." (In the *Shearman* case) "the time in which the taxpayer was entitled to receive the dividends was definitely fixed by resolution to be within the preceding year." This appears to be a futile attempt to distinguish the facts in two cases, between which we can find no difference. The Court, in the light of the *Bingham* decision,<sup>21</sup> should have regarded the holding of the *Adams* case as being erroneous, instead of drawing a distinction without a difference. It would seem that the decision in the *Shearman* case is sound, but the analysis of the precedents and the theory underlying the decision apparently was not clearly understood by the Court.

SEYMOUR SALS.

FEDERAL TAXATION OF STATE INSTRUMENTALITIES—CONSTITUTIONAL LAW.—The University of Illinois, an institution of higher learning maintained by the state of Illinois, imported certain laboratory equipment. Duties were levied under the appropriate paragraph of the Tariff Act of 1922 and were paid under protest. The university brought suit to recover them, claiming that, as an instrumentality of the state government, it was exempt from federal taxation. On appeal from decisions<sup>1</sup> affirming the action of the collector, *held*, affirmed. Customs duties may be levied under the power of Congress to regulate foreign commerce, and the fact that they are incidentally taxes will not render the levy invalid. *Board of Trustees of the*

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<sup>17</sup> *Id.* at 1331.

<sup>18</sup> *Supra* note 1.

<sup>19</sup> 54 F. (2d) 228 (C. C. A. 1st, 1931).

<sup>20</sup> *Supra* note 1, at 258.

<sup>21</sup> *Supra* note 6.

<sup>1</sup> 59 TREAS. DEC. 747 (1931); 61 TREAS. DEC. 1334 (1932).

*University of Illinois v. United States*, 289 U. S. —, 54 Sup. Ct. 443 (1933).

The preamble to the Tariff Act recites that it is enacted, among other purposes, to regulate commerce with foreign nations.<sup>2</sup> The power of Congress to regulate foreign commerce is exclusive.<sup>3</sup> The fact that the taxing power is used in such regulation does not invalidate the levy of the duties, for the laying of duties "is a common means of executing the power."<sup>4</sup> The revenue thereby secured is only "an incident to such an exercise of the power. It flows from but does not create such power."<sup>5</sup> The Court refuses to attempt to allocate some of the duties to an exercise of the power to regulate foreign commerce and others to the power to tax.<sup>6</sup>

It was early settled that, as a necessary implication from the nature of our government, the states and their governmental agencies should be free from federal taxation and vice versa.<sup>7</sup> More recent decisions have been concerned with the question whether, in a given instance, the state was performing a governmental, as distinguished from a proprietary, function.<sup>8</sup> In the instant case, the Court refrains from deciding whether the maintenance of a state university is a governmental function.<sup>9</sup> It simply holds that regardless of whether or not it is a state governmental instrumentality, it shall be required to pay customs duties. This decision indicates a departure from the general rule in so far as customs duties are concerned. Doubtless, the Court was influenced by the fact that the argument that the state governments were likely to be destroyed by the tax was scarcely plausible since this was the first time that the legality of such a levy was questioned. Furthermore, the free entry of merchandise imported by states and political subdivisions thereof would seriously decrease the revenue from customs duties; therefore, the Court leaves to Congress the extent, if any, to which such agencies may be relieved from the payment of duties.

J. F. M.

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<sup>2</sup> 42 STAT. 858 (1922): "An act to provide revenue, *to regulate commerce with foreign countries*, to encourage the industries of the United States and for other purposes." (Italics ours.)

<sup>3</sup> CONSTITUTION, Art. 1, §8, cl. 3; *Gibbons v. Ogden*, 9 Wheat. 1, 193 (U. S. 1824); *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349 (1904).

<sup>4</sup> STORY, THE CONSTITUTION (5th ed.) §1088.

<sup>5</sup> *Ibid.*

<sup>6</sup> "Where \* \* \* there is a profession of exercising two express powers, the exercise is supported if it can be brought under one." (1933) 33 COL. L. REV. 914, a discussion of the instant case.

<sup>7</sup> *Collector v. Day*, 11 Wall. 113 (U. S. 1870); *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819).

<sup>8</sup> Note (1932) 7 ST. JOHN'S L. REV. 143.

<sup>9</sup> (1929) 27 MICH. L. REV. 499.