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Michael Bruce Solomon

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NATIONAL BANKS—STATE TAX IMMUNITY

Plaintiffs, national banking institutions, brought suit against the Comptroller of the State of Florida and others to restrain them from levying, assessing, or collecting: 1) sales and use taxes on goods and services purchased or rented by plaintiffs; 2) intangible personal property taxes upon mortgages owned and recorded by them; and 3) documentary stamp taxes on notes, mortgages, or other evidences of indebtedness or shares of stock owned by plaintiffs. They contended that Florida was unable to lay these taxes upon them, as they were immune from such types of state taxation as instrumentalities of the federal government pursuant to the provisions of 12 U.S.C. § 548. Upon the plaintiffs' respective motions for summary judgment, the District Court, sitting as a three-judge court, *held*, injunction granted: national banking institutions, created and existing pursuant to federal statutes, were "instrumentalities of the United States" and therefore immune from these state and local taxes which were not within the purview of the federal statute (12 U.S.C. § 548) dealing with state taxation of national banks. *First National Bank v. Dickinson*, 291 F. Supp. 855 (N.D. Fla. 1968), *aff'd mem.*, 393 U.S. 409 (1969).¹

The oft-cited and much criticized case of *M'Culloch v. Maryland*² is necessarily the jumping off point for any discussion of state power to tax a national bank. In 1819 the United States Supreme Court, speaking through Chief Justice Marshall, declared a state tax on the Second Bank of the United States unconstitutional, as it constituted a "tax on the operation of an instrument employed by the government of the Union to carry its powers into execution."³ This impliedly became a violation of, for want of a better alternative, the Necessary and Proper Clause of the Constitution.⁴ Six years thereafter, in *Osborn v. Bank of the United States*,⁵ the Court applied *M'Culloch* to strike down an Ohio statute extracting a tax from all businesses not authorized to do business in the

1. The applicability of this case to the status of national banking institutions in this state and its resulting effect upon Florida's tax revenue scheme has recently brought unanticipated results in a related revenue area, with serious depletions of state coffers expected. The Florida Legislature recently passed a supposedly routine "Reviser's Bill" regulating savings and loan associations. Without being noticed before passage, it contained a clause providing that these associations could not be taxed in a different manner or at a higher rate than any other financial institution in this state. This would of course include national banks, who, under the instant case, are immune from state sales and use taxes. Previous to the passage of the bill into law, Florida savings and loan associations were afforded no such tax immunity. The loss in revenue is expected to cost Florida \$6 million a year. Repeal of the clause will be attempted at the next session of the legislature with the tacit approval of the savings and loan industry. Florida's Attorney General has cast some doubt, however, that the bill would have this effect.

2. 17 U.S. (4 Wheat.) 316 (1819).

3. *Id.* at 436-37.

4. U.S. CONST. art. I, § 8.

5. 22 U.S. (9 Wheat.) 738 (1824).

state. This necessarily included the national bank in question and excluded those that were state chartered.

These decisions, as well as others,⁶ provoked sharp controversy in Congress regarding the extent to which states should be allowed to tax national banks.⁷ The result of this controversy was a compromising Act⁸ designed to satisfy both those in favor of broad state taxation power and those desirous of complete federal immunity in this area.⁹ The scope and delineation of this Act was first remarked upon by the Supreme Court in 1899, in the case of *Owensboro National Bank v. Owensboro*.¹⁰ There the Court struck down a Kentucky non-discriminatory franchise tax laid upon a national bank. The Court declared:

This section, then, of the Revised Statutes is the measure of the power of a State to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any state tax therefore which is in excess of and not in conformity to these requirements is void.¹¹

Starting with *Owensboro*, a long line of decisions have shown that 12 U.S.C. § 548 furnishes the exclusive rule for state taxation.¹² Therefore, any state or local assessment not in conformity with it has been declared invalid,¹³ with national banks being subject to taxation only as provided by the statute.¹⁴ This result obtains because a state's power to tax is derived entirely from federal legislation.¹⁵

In its present form, 12 U.S.C. § 548¹⁶ embodies what its framers

6. *Weston v. Charleston*, 27 U.S. (2 Pet.) 449 (1829). See also notes 12-15, 26, 33-36, *infra*, and accompanying text.

7. *Agricultural Nat'l Bank v. Tax Comm'n*, 392 U.S. 339, 342 (1968).

8. Act of June 3, 1864, ch. 106, § 41, 13 Stat. 111, which was a forerunner of 12 U.S.C. § 548 (1945).

9. *Agricultural Nat'l Bank v. Tax Comm'n*, 392 U.S. 339, 342 (1968).

10. 173 U.S. 664 (1899).

11. *Id.* at 669.

12. *Agricultural Nat'l Bank v. Tax Comm'n*, 392 U.S. 339 (1968); *Bank of Calif. Nat'l Ass'n v. Richardson*, 248 U.S. 476 (1919); *Covington v. First Nat'l Bank*, 198 U.S. 100 (1905); *Mercantile Nat'l Bank v. N.Y.*, 121 U.S. 138 (1887); *New York v. Weaver*, 100 U.S. 539 (1879); *Tarrant v. Bessemer Nat'l Bank*, 7 Ala. App. 285, 61 So. 47 (1912). See note 16 *infra*.

13. *First Nat'l Bank v. Adams*, 258 U.S. 362 (1922). See also *Owensboro Nat'l Bank v. Owensboro*, 173 U.S. 664 (1899); *New York v. Weaver*, 100 U.S. 539, 543 (1879).

14. *City of Pittsburgh v. First Nat'l Bank*, 55 Pa. 45 (1867).

15. *Cherokee State Bank v. Wallace*, 202 Minn. 582, 279 N.W. 410 (1938); *First Nat'l Bank v. Township of St. Joseph*, 46 Mich. 526, 9 N.W. 838 (1881); *State Bank v. Calvert*, 357 S.W.2d 160 (Tex. Civ. App. 1962).

16. This section's salient provisions are as follows:

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income

sought to accomplish. Their aim of absolute prohibition of state taxation of national banks was effected by the nonrecognition of any power of the states to tax the banks, except as to their real estate. On the other hand, preservation of state taxing powers over financial resources engaged in its development were retained by permitting state taxation of bank *shareholders* so as not to maintain a haven for investments free from state taxation.¹⁷ Furthermore, these provisions were coupled with a limitation preventing the above from being exercised in a discriminatory manner against national banks.¹⁸

In 1923, a substantial amendment to the statute authorized state taxation of national bank incomes and dividends,¹⁹ and declared that bonds, notes, or other evidences of indebtedness in the hands of individuals were not to be considered moneyed capital coming into competition with national banks.²⁰ Again, in 1926, Section 548 was amended to permit states to levy excise and franchise taxes measured by the entire income of the banks,²¹ but an attempt to allow states to levy sales and use taxes was unsuccessful.²²

In spite of this seemingly impregnable wall of case and statutory authority, several decisions have flown in the face of federal immunity from state taxation. The most important rationale employed to permit state taxation of these institutions is to have the tax incident fall upon some third party, such as a retailer selling to a national bank, and have the third party collect the tax for the state—although the payment of the tax is in reality by the bank.²³ This fiction is, however, being repudiated by the later, now controlling cases.²⁴ This argument, of course, is limited in applicability to those taxes which conceivably could have their incidence shifted, not including use, personal property, documentary stamp, and similar taxes.

In addition, attacks upon national bank tax immunity have been of a broader, more general nature. This manifests itself in the general trend which jurisdictions have taken in regard to the labeling of a tax-

1. (a) The imposition by any State of any of the above four forms of taxation shall be in lieu of the others

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

12 U.S.C. § 548 (1945).

17. Senator Fessenden, Chairman of the Finance Committee, so stated in his remarks on § 548. CONG. GLOBE, 38th Cong., 1st Sess. 1895 (1864).

18. 12 U.S.C. § 548 1(c) (1945). "[B]ut at no higher rate than is imposed on dividends from such other corporations." See note 16 *supra*.

19. Act of March 4, 1923, ch. 267, 42 Stat. 1499. See note 16 *supra*.

20. *Id.*

21. Act of March 25, 1926, ch. 88, 44 Stat. 223.

22. See *Hearing on S. 2547 Before the Subcomm. on Federal Reserve Matters of the Senate Comm. on Banking and Currency*, 81st Cong., 2d Sess., at 9 (1950).

23. *Western Litho. Co. v. State Bd. of Equalization*, 11 Cal. 2d 156, 78 P.2d 731 (1938).

24. *Id.* See Annot., 117 A.L.R. 838-39 (1938) (petitioner's brief synopsis). See also *Agricultural Nat'l Bank v. Tax Comm'n*, 392 U.S. 339 (1968).

payer as a "federal instrumentality." Courts have applied established guidelines to determine whether or not an entity has reached the status of a federal "agency."²⁵ Some courts have, in fact, rejected as insufficient those very characteristics which were used to establish a national bank's federally immune status in *First Agricultural National Bank of Berkshire County v. State Tax Commission*,²⁶ the sole and controlling case cited in *First National Bank of Homestead*.²⁷

The altered character of the national banks provides the tax immunity critics substantial ammunition. Today's national bank, while part of the Federal Reserve System, does not hold membership therein exclusive of counterpart state banks, nor does it perform the important federal securities and currency functions it once did.²⁸ Congress has heretofore provided national banks with features designed to make them more competitive with their state brethren, such as branch banking,²⁹ fiduciary powers,³⁰ and rates of interest on loans³¹ and savings deposits³² similar to those of other banks. In short, they enjoy all of the advantages of state chartered financial institutions, but suffer none of the detriments.

Though other jurisdictions provide us with a plethora of decisions in this area, Florida has had but three prior to the instant case. In 1898, the then Circuit Court of Appeals held that a Florida statute requiring a national bank to pay personal property taxes as agent for its shareholders, retaining a lien upon their investment assets for the amount paid, was invalid as applied to an insolvent national bank with no shareholder assets to levy upon.³³ The court held this amounted to a *M'Culloch-Osborn* violation; that is, state taxation upon a "bank chartered by congress."³⁴

The cases of *Roberts v. American National Bank of Pensacola*³⁵ and *Folsom v. First National Bank of Graceville*,³⁶ came before the supreme court in 1929. Although the supreme court affirmed lower court decrees adjudging discriminatory taxation of bank shareholders to be invalid, the court spoke as to the scope of 12 U.S.C. § 548 as follows:

25. *Federal Land Bank v. Bismark Lumber Co.*, 314 U.S. 95 (1941); *Clallan County v. United States*, 263 U.S. 341 (1923); *Union Pac. R.R. v. Peniston*, 85 U.S. (18 Wall.) 532 (1873).

26. 392 U.S. 339 (1968).

27. *Union Pac. R.R. v. Peniston*, 85 U.S. (18 Wall.) 27 (1873). *Cf.* *Broad River Power Co. v. Query*, 288 U.S. 178 (1933).

28. *See Agricultural Nat'l Bank v. Tax Comm'n*, 392 U.S. 339, 353-59 (1968) (Marshall, J., dissenting).

29. 44 Stat. 1228 (1927), *as amended*, 12 U.S.C. § 36(c) (1964).

30. 12 U.S.C. § 92(a) (1964).

31. 48 Stat. 191 (1933), *as amended*, 12 U.S.C. § 85 (1964).

32. 12 U.S.C. § 371 (1964).

33. *Stapylton v. Thaggard*, 91 F. 93, 94 (5th Cir. 1898).

34. *Id.*

35. 97 Fla. 411, 121 So. 554 (1929).

36. 97 Fla. 424, 121 So. 559 (1929).

The foregoing Act of Congress prescribes the full measure of the power of the state to impose taxes upon national bank associations or their shareholders. Any assessment not in conformity therewith is unauthorized and invalid.³⁷

In the instant case, the United States District Court reached the only decision which precedent would allow. In doing so it cited but one recent Supreme Court decision, *First Agricultural National Bank of Berkshire County v. State Tax Commission*,³⁸ and but two statutes contained in the United States Code—12 U.S.C. § 21 *et seq.*, which the court noted contained provisions creating national banks, and 12 U.S.C. § 548, previously discussed.³⁹ In *Berkshire*, the majority reached the correct, if archaic, result by referring to the *M'Culloch*, *Osborn*, and *Owensboro* cases by impliedly showing that a taxpayer did not have to be wed to the government to be dubbed a federal instrumentality.⁴⁰ By the same token, *Berkshire County* contained, in Justice Marshall's dissent,⁴¹ a well-reasoned argument against immunity, placing its reliance primarily upon the now nonfederal character of national banks. Secondly, it attacked the premise of § 548 providing the sole criteria for state taxation.⁴² Apparently, there is some small authority for this position.⁴³

While the instant case sought injunctive relief as opposed to a declaratory judgment, and involved personal property taxes in addition to the sales and use taxes of *Berkshire County*, the facts common to both cases provided sufficient grounds for the District Court in the instant case to go no further than to label the plaintiff banks federal instrumentalities.

Every tax that the court restrained Florida from further levying, assessing, or collecting has had occasion to be declared invalid as applied to national banks by states: sales⁴⁴ and use taxes,⁴⁵ intangible personal property taxes,⁴⁶ and taxes on evidences of indebtedness.⁴⁷

37. *Roberts v. American Nat'l Bank*, 97 Fla. 411, 417, 121 So. 554, 557 (1929).

38. 392 U.S. 339 (1968).

39. *First Nat'l Bank v. Dickinson*, 291 F. Supp. 855, 856 (N.D. Fla. 1968).

40. 392 U.S. 339 (1968). See the Court's treatment of the Red Cross as a federal agency in *Department of Employment v. United States*, 385 U.S. 355, 360 (1966).

41. 392 U.S. 339, 348-59 (1968).

42. *Id.* at 359-63.

43. *Accord*, *Liberty Nat'l Bank v. Buscaglia*, 21 N.Y.2d 357, 370, 235 N.E.2d 101, 108, 288 N.Y. S.2d 331 (1967). *Cf.* *Tradesmens Nat'l Bank v. Oklahoma Tax Comm'n*, 309 U.S. 560 (1940).

44. *Western Litho. Co. v. State Bd. of Equalization*, 11 Cal. 2d 156, 78 P.2d 731 (1938). See also *Nat'l Bank v. Dept. of Revenue*, 334 Mich. 132, 54 N.W.2d 278 (1952); *Nat'l Bank v. City of Covington*, 21 F. 484 (C.C.S.D. Ky. 1884), *aff'd*, 198 U.S. 100 (1905).

45. *Agricultural Nat'l Bank v. Tax Comm'n*, 392 U.S. 339 (1968). *But cf.* *Bank of America v. Bd. of Equalization*, 209 Cal. App. 2d 708, 26 Cal. Rptr. 348 (1962).

46. Intangible personal property tax is not a "tax under any other form of taxation substituted by the general assembly for the tax on bank shares." *General Am. Life Ins. Co. v. Bates*, 363 Mo. 143, 249 S.W.2d 458 (1952).

47. *Central Nat'l Bank v. McFarland*, 20 F.2d 416, 418-20 (D. Kan. 1927), *aff'd*, 26 F.2d 890 (10th Cir. 1928), *cert. denied*, 278 U.S. 606 (1928).

Since the *Berkshire County* decision, courts have been obligated to vouchsafe national banks from the reach of state coffers. It was observed in *Berkshire County*:

Because of § 548 and its legislative history, we are convinced that if a change is to be made in state taxation of national banks, it must come from the Congress, which has established the present limits.⁴⁸

If anyone is to act in reversing the policy of according tax-free treatment to national banks⁴⁹ it must, indeed, be the Congress, for the courts have shown that they are unwilling to respond to change conditions in this area.

MICHAEL BRUCE SOLOMON

ONE PARTY'S CONSENT TO ELECTRONIC SURVEILLANCE

The defendant was a uniformed police officer who suggested to one Matthews, an employee of Wells Fargo Armored Service, that he allow the defendant and "pros" to "hold him up" with the understanding that no one would be hurt and that Matthews would get a share of the money. Matthews reported the proposition to his employer and the F.B.I., who persuaded him to pretend to acquiesce in the defendant's plan. Matthews arranged to meet the defendant and the "pro" at the Orange Bowl. The police and the F.B.I. put a microphone and transmitter on the person of Matthews and sent him to the meeting equipped to record the conversations of the parties. Thereafter, there were numerous telephone conversations between the defendant and Matthews in which the proposed robbery was discussed. These conversations were recorded by the police with the knowledge and consent of Matthews.

Subsequently the robbery took place. The numerous police officers who had staked out the scene of the robbery apprehended the defendant. The defendant was adjudicated guilty pursuant to a jury verdict. On appeal, the District Court of Appeal, for the state of Florida, Third District, *held*, affirmed: An incriminating recording received from electronic

48. 392 U.S. 339, 346 (1968).

49. Comptroller Fred O. Dickinson, shortly after the Supreme Court affirmance, sent a resolution to the Florida Congressional Delegation which expressed, in part, the following:

In these days of rising costs and increased demand for public services, Florida can ill afford to lose even a penny in revenue much less the millions of dollars that would be taken away if needed legislation [is] not passed.

It [the legislation] means that national banks will not be discriminated against, but at the same time they will no longer enjoy immunity from state and local taxes.

Miami Review, Mar. 6, 1969, at 16, col. 1.

See also address by Hon. Ralph Turlington, Speaker of the House, Fla. Legislature, Aug. 22, 1969, calling for federal legislation permitting states to tax national banks. Senator Spessard Holland of Florida has recently also called for federal legislation either modifying or repealing 12 U.S.C. § 548.