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Federally Owned Corporations and Their Legal Problems

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FEDERALLY OWNED CORPORATIONS AND THEIR LEGAL PROBLEMS

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The extensive operations of the government corporations makes the question of their taxation one of prime importance. To what extent are the states and municipalities to be denied tax revenue on properties taken over by the corporations, properties which heretofore have yielded fairly substantial sums? To what extent should the federal government permit taxation, and thus partial control, of its instrumentalities?

The doctrine that a state may not impose taxes upon instrumentalities of the federal government was first expounded in *M'Culloch v. Maryland,*[1] involving a state tax on banknotes issued by the Second Bank of the United States, a forerunner of the present day federal corporations, although it differed from those now under discussion in that its stock was not owned by the federal government. This case was followed by *Osborn v. Bank of the United States*[2] which declared unconstitutional a state law imposing a franchise tax on the Bank of the United States.

This broad proposition that no state has a right to tax the means employed by the federal government for the execution of its powers was limited by the case of *Thomson v. Pacific Railroad*[3] in which a state tax upon property of a state-incorporated railroad, which was subsidized by Congress and operated under federal statutes, was held invalid. The court gave recognition to the doctrine, but also said, "we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means."[4] *Railroad Company v. Peniston*[5] clarified this distinction while holding that a state could impose a tax even upon the property of a railroad chartered by Congress but not a tax upon its operations. It was said that a state tax on the property would in no way hinder the exercise of any powers of the federal government. *California v. Central Pacific Railroad Company*[6]

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[1] 17 U. S. 316, 4 L. ed. 579 (1819).
[2] 22 U. S. 738, 6 L. ed. 204 (1824).
[3] 76 U. S. 579, 19 L. ed. 792 (1869).
[4] 76 U. S. 579, 591, 19 L. ed. 792, 798 (1869).
[5] 85 U. S. 5, 21 L. ed. 787 (1873).
[6] 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. ed. 150 (1887).

also held that a state could not impose a franchise tax on a corporation chartered by Congress, but added that a state "may undoubtedly tax outside visible property of the company, situated within the state."[7]

As respects national banks, which receive their charters from the Comptroller of the Currency as authorized by an Act of Congress,[8] *Owensboro National Bank v. Owensboro,*[9] reviewing the cases up to then, held that states cannot "levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises," except as permitted by Congressional legislation.[10]

Williams v. City of Talladega[11] involved a municipal privilege tax levied upon the Western Union Telegraph Company, a corporation organized under the laws of the state of New York and doing a private business but also operating in accordance with certain federal statutes[12] and engaged in governmental activities. The tax was declared invalid because it made no exemption of that business which was governmental in character.

The constitutionality of Federal Land Banks and Joint Stock Land Banks, authorized by an Act of Congress,[13] was upheld in *Smith v. Kansas City Title and Trust Company*[14] in which the court reaffirmed the rule that a state may not tax federal instrumentalities except as permitted by Congress and upheld the power of Congress to declare the bonds issued by these banks exempt from state taxation.

A tax upon the recordation of mortgages was declared invalid as applied to mortgages owned by Federal Land Banks in *Federal Land Bank of New Orleans v. Crosland.*[15] The court held that the state was entitled to charge a reasonable fee to meet the expenses of registration but that a tax in the guise of a registration fee could not be imposed upon the Bank.

In summary, these cases stand for the general proposition that a state may not tax the franchises, operations, and intangibles of a corporation which is acting as a federal instrumentality because such tax might tend to interfere with its performance of its governmental functions, but that taxation of the tangible property of a corporation, incorporated either

[7] 127 U. S. 1, 40, 8 Sup. Ct. 1073, 1080, 32 L. ed. 150, 157 (1887).
[8] 13 STAT. 100 (1864), 12 U. S. C. A. §21 *et seq.* (1926).
[9] 173 U. S. 664, 19 Sup. Ct. 537, 43 L. ed. 850 (1899).
[10] 173 U. S. 664, 668, 19 Sup. Ct. 537, 538, 43 L. ed. 850, 852 (1899).
[11] 226 U. S. 404, 33 Sup. Ct. 116, 57 L. ed. 275 (1912).
[12] 14 STAT. 221 (1866), 47 U. S. C. A. §1 *et seq.* (1926).
[13] 39 STAT. 362 (1916), 12 U. S. C. A. §671 *et seq.* (1926); 39 STAT. 374 (1916), 12 U. S. C. A. §811 *et seq.* (1926).
[14] 255 U. S. 180, 41 Sup. Ct. 243, 65 L. ed. 577 (1921).
[15] 261 U. S. 374, 43 Sup. Ct. 385, 67 L. ed. 703 (1923).

under state or federal laws, acting as a federal agent is permissible when such agent is engaged in business for private profit.[16]

Although none of these cases involve a completely federally owned corporation such as those under discussion, they are important as setting forth the principles of state taxation which have been applied to the prototypes of the present day corporations and will be applied to them. Cases involving taxation of federally owned corporations first arose after the World War when questions concerning the war time corporations came to be litigated.

In the first taxation case involving the war-time corporations owned by the federal government, a Maryland District Court held that the Emergency Fleet Corporation was a governmental agency, exclusively employed in governmental work, and as such its property was not liable to state taxation.[17] A tax levied by Baltimore County, Maryland on land standing in the name of the Fleet Corporation and on certain ships, shipyard shops and appurtenances, which were to all effects the property of the Corporation although they were on land belonging to a private shipbuilding company, was declared void and its collection enjoined in a suit in which the United States appeared as plaintiff. No precedents were cited in the decision.

This decision was followed in the case of *United States Housing Corporation v. City of Watertown.*[18] The court, taking cognizance of the *Thomson* and *Peniston* cases, held that a tax upon property owned by the Housing Corporation was invalid, saying, "In the instant case the property itself was the only means and instrumentality by which the federal purpose could be carried out, and to tax this property would be to tax an agency solely engaged in carrying out the constitutional duties of the general government. It would be a tax on the means employed to carry out a federal power, and this . . . the municipality had no right to do."[19] An injunction was issued restraining the collection of taxes levied on the property of the Corporation.

Shipyard property in King County, Washington, title to which was

[16] For discussions concerning inter-governmental taxation, see: Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the State* (1918-1919) 31 HARV. L. REV. 321, 572, 721, 932; 32 HARV. L. REV. 234, 374, 634, 902; Cohen and Dayton, *Federal Taxation of State Activities and State Taxation of Federal Activities* (1925) 34 YALE L. J. 807; Note, *State Taxation of Federal Instrumentalities* (1930) 30 COL. L. REV. 92; Note, *Revaluation of States' Immunity from Federal Taxation* (1932) 81 U. OF PA. L. REV. 194; Boudin, *The Taxation of Governmental Instrumentalities* (1933) 22 GEO. L. J. 1, 254; Brown, *State Taxation of Interstate Commerce, and Federal and State Taxation in Intergovernmental Relations—1930-1932* (1933) 81 U. OF PA. L. REV. 247; Note, *Taxation of Government Instrumentalities* (1935) 1 N. J. L. REV. 98.

[17] United States v. Coughlin, 261 Fed. 425 (D. C. Md. 1919).

[18] 113 Misc. 679, 186 N. Y. Supp. 309 (1920).

[19] 186 N. Y. Supp. 309, 312 (1920).

in the Emergency Fleet Corporation, was held to be exempt from local taxation in *King County, Washington v. United States Shipping Board Emergency Fleet Corporation.*[20] The Circuit Court of Appeals for the Ninth Circuit, in an action brought by the Fleet Corporation to enjoin the collection of taxes levied upon the property, looked to the fact that the property was purchased by the Corporation with funds especially appropriated by Congress for that purpose and not with money paid in for capital stock of the Corporation. The court said, "Clearly, in the matter of expending this public money, under the direction of Congress and the President, in the purchase of property for governmental purposes, and in taking and holding the legal title thereto, the Corporation was acting as a naked trustee, and the entire beneficial interest was in the government." And the court added, "And what does it matter that the Fleet Corporation may, in a measure, have had the status of an ordinary corporation? . . . The taxable character of property is to be referred to the status of the real, rather than the nominal, owner."

Shortly thereafter two cases arose involving taxes levied upon the property of the United States Spruce Production Corporation, a corporation created under the laws of the state of Washington by the Director of Aircraft Production for war purposes and all of whose stock was owned by the United States.

In *United States Spruce Production Corporation v. Lincoln County, Oregon,*[21] a district court in Oregon denied a motion by the defendant to dismiss a bill in which the Spruce Production Corporation asked that the county be enjoined from collecting taxes assessed against property standing in the name of the Corporation. The county defended upon the theory set forth in *Thomson v. Pacific Railroad,*[22] that a state tax may lawfully be assessed against the property of the federal government but not against the operations of such agent. The court in answering this argument and holding the tax invalid put its decision upon two grounds: first, that this tax, even though on property, "would necessarily affect the very means, instruments, and agencies by which the general government was endeavoring to carry into effect its power to carry on war; the agency itself . . . being exclusively employed through the use and application of such means and property in governmental work;" second, "that where property, the title to which is in the principal, is immune from taxes, it is likewise immune if the title is standing in the name of an agent or trustee for such principal," citing the *King County* case.

[20] 282 Fed. 950 (C. C. A. 9th, 1923); Note (1923) 36 HARV. L. REV. 737.
[21] 285 Fed. 388 (D. C. Ore. 1922).
[22] *Supra* note 3.

A like situation was presented in *United States v. Clallam County, Washington.*[23] This was a suit brought by the United States and the Spruce Production Corporation to enjoin the collection of taxes assessed against the Corporation. The district court in Washington held the tax invalid on the ground that the property assessed was the property of the United States, held in the name of the Corporation, and had not been used for other than war purposes. The county took an appeal to the Circuit Court of Appeals which certified the question of taxation to the Supreme Court. The Supreme Court held that a tax upon the property of the Corporation was a tax upon the means employed by the federal government to carry out its purposes and was thus invalid, adding that since it was clear that the tax could not be imposed, it was "unnecessary to consider whether the fact that the United States owned all the stock and furnished all the property to the Corporation taken by itself would be enough to bring the case within the policy of the rule that exempts property of the United States."

A tax imposed by Delaware County, Pennsylvania upon lands title to which was in the Emergency Fleet Corporation was declared invalid by the Circuit Court of Appeals for the Third Circuit on the ground that the lands were owned by the United States even though title did happen to be in the Corporation.[24]

Each of these cases involved taxes assessed upon physical properties of the corporations created and entirely owned by the United States and used for war purposes. Either theory of exemption of their property from taxation as set out in the cases seems reasonable and logical and entirely justified under the circumstances.

A somewhat different case arose in New York where all the stock of an existing corporation, organized under the laws of New York, was purchased by an agent of the government with government funds and transferred to the Secretary of the Navy. The Corporation was operated by the agent for war purposes. A tax was assessed by the New York State Tax Commission based upon the net income of the Corporation for the year 1918. The Appellate Division annulled the assessment, holding that if the tax were regarded essentially as one upon net income it was a tax upon federal property and therefore void, or if it were considered as a tax payable for the privilege of doing a business or exercis-

[23] 283 Fed. 645 (W. D. Wash. 1922), *aff'd,* 263 U. S. 341, 44 Sup. Ct. 121, 68 L. ed. 328 (1923).

[24] United States Shipping Board Emergency Fleet Corporation v. Delaware County, Pennsylvania, 17 F. (2d) 40 (C. C. A. 3rd, 1927), *aff'd on rehearing,* 25 F. (2d) 722 (1928), *appeal dism'd, per curiam,* 275 U. S. 483, 48 Sup. Ct. 21, 72 L. ed. 385 (1927), *certiorari denied,* 278 U. S. 607 (2), 49 Sup. Ct. 12, 73 L. ed. 533 (1928); Notes (1927) 27 COL. L. REV. 998; (1927) 13 VA. L. REV. 504.

ing a franchise, it was invalid because it would tax operations of the federal government.[25]

Another group of cases arose when the war-time corporations started liquidating and disposing of their property.

In the city of New Brunswick, New Jersey, the United States Housing Corporation had, during the war, purchased a tract of land and erected a number of dwelling houses upon it. Beginning October 29th, 1919, some of the properties were sold to individual home buyers under contracts providing for the immediate payment of ten per cent of the purchase price and the balance to be secured by mortgages, the Housing Corporation agreeing to convey a fee simple title free and clear of all incumbrances.[26] The Act of Congress authorizing the Housing Corporation to dispose of its property provided that no sale or conveyance could be made on credit without reserving a first lien on the property for the unpaid purchase money.

The purchasers entered upon and took possession of the lots upon the execution of their respective contracts. Either then or later, each paid the Corporation the entire percentage of the purchase price which entitled him under the terms of his contract to receive a deed. Nearly all of such payments were made prior to October 1, 1920. But because the city had meanwhile assessed certain taxes on these properties, which remained unpaid, the Corporation refused to execute deeds to the purchasers; and they, consequently, did not execute notes and mortgages for the balance of the purchase price.

While the Corporation thus continued to hold the legal title, the city assessed the lots for taxation to the purchasers for the years 1920 to 1923, inclusive. And thereupon, to prevent threatened tax sales, the Corporation brought this suit, in which the United States joined as plaintiff, in the federal court for New Jersey, to have the assessments cancelled and sales for the collection of the taxes enjoined. None of the purchasers were parties to this suit.

The district court held that the assessment for the year 1920 was invalid, but, being of the opinion that the equitable title had passed to the purchasers under their contracts in such manner as to render the lots taxable as their property after the dates on which they had become entitled to their deeds, sustained the validity of the assessments for the year 1921 and subsequent years on all lots for which the purchasers had

[25] De La Vergne Machine Co. v. State Tax Commission, 211 App. Div. 227, 207 N. Y. Supp. 680 (1925), *aff'd*, 241 N. Y. 517, 150 N. E. 536 (2) (Mem. dec. 1925).

[26] This was done under an Act of Congress approved July 19, 1919. 41 STAT. 224, 5 Comp. St. Ann. (Supp. 1923) §3115 5/6 e.

become entitled to deeds prior to the date of the assessments, and denied an injunction to restrain the sales.[27]

On appeal,[28] the circuit court of appeals, being of the opinion that the assessment of taxes to the purchasers for 1920 and subsequent years, while the title to the lots was still in the Corporation, was invalid, reversed the decree of the district court and directed it to cancel the assessment for such years and enjoin the sale of the lots for the enforcement of the taxes so assessed.[29]

The Supreme Court modified both decrees and said, "although the City should not be enjoined from collecting the taxes assessed to the purchasers by sales of their interests in the lots, it should be enjoined from selling the lots for the collection of such taxes unless all rights, liens, and interests in the lots, retained and held by the Corporation as security for the unpaid purchase moneys, are expressly excluded from such sales, and they are made, by express terms, subject to all such prior rights, liens, and interests. This, we think, will meet the equities of the case as between the Corporation and the City, and fully protect the paramount right of the United States."[30]

The case of *City of Philadelphia v. Meyers*[31] applied the decision in the *New Brunswick* case and held that a purchaser of realty from the Federal Housing Corporation, having complied with all the conditions of the sale agreement, was liable for municipal taxes on that land even though the government had not yet issued the deed.

These two cases seem to be especially important because of the bearing they will have as to the taxation of subsistence homesteads and other low-cost housing projects which are to be sold on installment contracts.

In 1920, the Spruce Production Corporation sold certain of its lands to the Pacific Spruce Corporation under a contract which provided for the payment of two million dollars in installments, the title to the property and all improvements thereon to remain in the vendor until the purchase price was fully paid and other terms and conditions of the contract fully complied with by the purchaser. In 1926, when about $1,000,000 had been paid, Lincoln County, Oregon, imposed a tax on the estate, right, title, and interest of the purchaser in and to the property except the paramount interest therein of the United States, and threatened to impose a like tax in 1927. The buyer brought suit

[27] United States v. City of New Brunswick, 1 F. (2d) 741 (D. C. N. J. 1924).
[28] United States v. City of New Brunswick, 11 F. (2d) 476 (C. C. A. 3rd, 1926).
[29] The above three paragraphs are taken from 276 U. S. 547, 553, 48 Sup. Ct. 371, 372, 72 L. ed. 693, 697 (1928).
[30] City of New Brunswick v. United States, 276 U. S. 547, 556, 48 Sup. Ct. 371, 373, 72 L. ed. 693, 698 (1928).
[31] 102 Pa. Super. Ct. 424, 157 Atl. 13 (1931).

against the county to cancel the tax imposed and to enjoin the levying of the 1927 tax. The Circuit Court of Appeals for the Ninth Circuit affirmed a district court decision in favor of the plaintiff, holding that the government, through the Corporation, still retained more than the bare legal title to the property in that it still had an equitable interest in the land sufficient to keep it tax exempt.[32]

Port Angeles Western Railroad Company v. Clallam County, Washington[33] involved a similar contract under which the Spruce Production Corporation sold to a private railroad company a railroad constructed and owned by it, reserving title until final payment. This railroad had been declared tax exempt in *United States v. Clallam County*.[34] After the purchaser had paid several installments under the contract, the county assessed the interest of the buyer in the property. The district court held that the state had no power to tax the tangible property until the title to the property was conveyed, the United States, through the Corporation, being owner of the railroad until then.

Later the county assessed taxes upon the right, title, and interest of the purchaser in the contract for the sale of the railroad. The court, in a suit similar to the previous one, held that the interest in the contract, being property, distinct from the land itself and transferable and inheritable, was taxable. This tax cast no cloud upon the title of the United States to the railroad and was not a tax upon a federal instrumentality.[35]

All these cases clearly indicate that property belonging to the government owned corporations is tax exempt except so far as Congress may permit. And the language in the various cases also indicates that other state taxes such as those upon various phases of their operations will not be permitted.

Nor does it seem probable that the "governmental-proprietary" function distinction which has arisen in connection with the immunity or non-immunity of state operations from taxation by the federal government will be extended to this field of taxation. In the first place, it seems doubtful that any such distinction can be made with reference to the various operations of the federal government. The government has no reserved powers under which it may enter business as have the states, and it would seem that as a government of limited powers it can

[32] Lincoln County, Oregon v. Pacific Spruce Corporation, 26 F. (2d) 432 (C. C. A. 9th, 1928), *aff'g* 21 F. (2d) 586 (D. C. Ore. 1927).

[33] 20 F. (2d) 202 (W. D. Wash. 1927).

[34] *Supra* note 23.

[35] Port Angeles Western Railroad Company v. Clallam County, Washington, 36 F. (2d) 956 (W. D. Wash. 1930), *aff'd*, 44 F. (2d) 28 (C. C. A. 9th, 1931), *certiorari denied*, 283 U. S. 848 (4), 51 Sup. Ct. 495 (2), 75 L. ed. 1475 (2) (1931); Note (1930) 8 N. C. L. REV. 479.

constitutionally exercise only governmental functions.[36] Hence, if the operations of these corporations are constitutional, they are governmental functions. Further, it is improbable that the federal courts would make such a distinction and thereby permit an invasion of federal supremacy by state taxation.[37]

If the exemption of these corporations from taxation imposes a hardship upon local taxing districts, the remedy lies with Congress, not the courts.[38]

In some of the statutes involving federal corporations, Congress has specifically mentioned what shall, and shall not, be tax exempt.

Section 10 of the Reconstruction Finance Corporation Act[39] provides that "any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation . . . . ; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

Two cases involving the Reconstruction Finance Corporation have already arisen from its ownership of preferred stock of banks. *United States and Reconstruction Finance Corporation v. Lewis*[39a] held that shares of preferred stock in national banks located in Kentucky and in state banks organized under the laws of Kentucky owned by the R. F. C. were not subject to a state tax levied against the owners of such stock. The court held that this stock was in reality the property of the United

[36] See, Alabama v. United States, 38 F. (2d) 897, 902 (Ct. Cl. 1930), *rev'd* by the Supreme Court without discussion of the merits, 282 U. S. 502, 51 Sup. Ct. 225, 75 L. ed. 492 (1931).

[37] See articles cited *supra* note 16.

[38] See, VAN DORN, GOVERNMENT OWNED CORPORATIONS (1926) 253-254; U. S. S. B. Emergency Fleet Corporation v. Delaware County, Pa., 25 F. (2d) 722 (C. C. A. 3rd, 1928); Lincoln County, Oregon v. Pacific Spruce Corporation, 26 F. (2d) 435, 437, 438 (C. C. A. 9th, 1928).

Congress, in a somewhat similar situation not involving government owned corporations, did aid certain counties in Washington and Oregon by directing the Secretaries of the Treasury and the Interior to pay to the several counties in Oregon and Washington within whose boundaries the reverted Oregon and California Railroad Company land grants were located amounts of money equal to the taxes that would have accrued against these lands for the years 1916 to 1926, inclusive, if the lands had remained privately owned and taxable. Act of July 13, 1926, 44 STAT. 915-916. *Cf.* fn. * (1928) 14 VA. L. REV. 182, where inaccuracy appears as to the above.

[39] 47 STAT. 5, 9 (1932), 15 U .S. C. A. §610 (1935).

[39a] 10 F. Supp. 471 (W. D. Ky. 1935).

States and was held by the Corporation only as an agent. The court discussed the various provisions of the R. F. C. Act and inferred from such provisions that the corporate entity was fictitious. In the course of its opinion, the court said:

"There is no doubt whatever that all the property of the Reconstruction Finance Corporation is in reality the property of the United States Government, and that all the activities of that corporation are just as much activities of the government as if they were conducted by the Secretary of the Treasury in his official capacity, or by some other government official. . . . If the Act of Congress, instead of creating the Reconstruction Finance Corporation, had created an executive office and provided for the appointment of a natural person to fill same, and had invested such officer with the powers conferred upon the Reconstruction Finance Corporation, no one could question the proposition that such officer was an agent of the United States Government, and that all the property which he held was the property of the United States; and this is none the less true because Congress has seen fit to use a corporation instead of a natural person."

The Court of Appeals of Maryland reached a contrary conclusion when a similar set of facts was presented to it. The R. F. C. claimed exemption from a Maryland tax levied against it as the owner of shares of preferred stock of a national bank located in Maryland. The Corporation claimed that it was a governmental instrumentality exempt from state taxation and that, in addition, Congress exempted the property of the Corporation, except real property from all taxes. However, the Maryland court held that neither this statute nor the general governmental immunity extended to stock held by the R. F. C. prevented the levying of state taxes on such shares.[39b] This case is clearly not in accord with the previous holdings respecting the taxation of government owned corporations. Nevertheless, the decision was upheld by the United States Supreme Court in *Baltimore National Bank v. State Tax Commission of Maryland.*[40] The Supreme Court decision was specifically limited to the single question of whether shares in a national bank, subscribed for and owned by the Reconstruction Finance Corporation, might be taxed by a state. In answering this question in the affirmative, the Court interpreted Section 5219 of the Revised Statutes[40a] which provides that all the shares of a national banking association whose principal place of business is within the limits of a state are subject to taxation by the state, with certain minor conditions as

[39b] State Tax Comm. of Maryland v. Baltimore National Bank, 180 Atl. 260 (Md. 1935).

[40] 56 Sup. Ct. 417 (1936).

[40a] 13 STAT. 99 (1864), 12 U. S. C. A. §548 (1927).

to manner of imposition. The Court held that "all shares" included those held by the R. F. C. regardless of the fact that the Corporation is a governmental agency. The Court did not cite any of the previous decisions concerning state taxation of government owned corporations, but confined itself to an interpretation of this statute. Based upon such a foundation, this decision is still in accord with those previously discussed. But it does, however, represent a departure from the strict theory of exemption from all state taxation of the several corporations of the government.

This decision was handed down February 3rd, 1936. On February 10th, bills were introduced in the Senate by Senator Fletcher[40b] and in the House by Representative Steagall[40c] which would exempt from taxation by the several states all preferred stock, notes, and debentures held by the R. F. C. in national banks and state banks and trust companies. The Senate passed its bill on February 24th by a vote of 38 to 28.[40d] On February 25th, the House of Representatives took its bill under discussion, but, after lengthy discussion, rejected it by a vote of 173 to 165.[40e]

About three weeks after the House of Representatives defeated its own bill, the Senate bill was taken under consideration on the floor of the House. An amendment affecting the rates of interest on loans to closed banks and trust companies was added to the Senate bill. Debate on the bill was had on several different days,[40f] and on March 19th, the House passed the Senate bill by a vote of 218 to 144.[40g] The Senate concurred in the House amendment the following day.[40h]

The bill was signed by the President March 20th, 1936 to become the law,[40i] and to nullify the effect of the decision of the Supreme Court.

The provisions of the statutes in regard to the Home Owners' Loan

[40b] S. R. 3978; 80 Cong. Rec. 1763 (1935). The text of this bill is reported at 80 Cong. Rec. 2698. See also, N. Y. Times, Feb. 12, 1936, at 31.

[40c] H. R. 11047; 80 Cong. Rec. 1809.

[40d] The bill was reported by the Committee on Banking and Currency (Report No. 1545) on Feb. 11, 1936. 80 Cong. Rec. 1832.

For the debate and vote by the Senate on the bill, see 80 Cong. Rec. 2672-2668 and 2692-2698.

During the debate an attack was made by Senator Couzens on the payment to Walter J. Cummings, Treasurer of the Democratic National Committee, of a salary of $75,000 as Chairman of the Board of the Continental Bank of Chicago and of $15,000 as Trustee of the Chicago, Milwaukee and St. Paul Railroad. Mr. Cummings was named to these positions as the representative of the R. F. C.

[40e] The bill was reported by the Committee on Banking and Currency (Report No. 1995) on Feb. 13, 1936. 80 Cong. Rec. 2068.

For the debate and vote by the House on the bill, see 80 Cong. Rec. 2837-2864.

[40f] 80 Cong. Rec. 4030-4031, 4061-4064, 4128-4137, 4216-4241.

[40g] 80 Cong. Rec. 4241.

[40h] 80 Cong. Rec. 4268, 4260-4262. See also 80 Cong. Rec. 4203.

[40i] Act of March 20, 1936, Pub. Act No. 482, 74th. Cong. 2nd. Sess.

Corporation are also very similar to those concerning taxation of the RFC.[41]

With reference to the Federal Farm Mortgage Corporation, the statutes provide: "(a) The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation . . . ; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. (b) Mortgages executed to the Land Bank Commissioner and mortgages held by the corporation, and the credit instruments secured thereby, and bonds issued by the corporation under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation (except surtaxes, estate, inheritance, and gift taxes)."[42]

Similarly, the Federal Savings and Loan Insurance Corporation is exempt from taxes, except that real property of the corporation is subject to local taxation, and surtaxes, estate, inheritance, and gift taxes may be imposed upon its bonds and other obligations.[43]

No provision is made in the Tennessee Valley Act of 1933 as to its exemption from taxation or granting permission for taxes to be levied against the corporation. However, Congress provided for the payment of certain sums by the Corporation which would approximate the taxes it might otherwise pay if it were a private corporation. Five per cent of the gross proceeds received from the sale of power generated at Dam Number 2 or from any other hydropower plant later constructed in Alabama is to be paid to the state of Alabama. Likewise, five per cent of the gross proceeds from the sale of power generated at Cove Creek Dam or any other plant located in Tennessee is to be paid to the state of Tennessee. There is a further provision for the payment of two and one-half per cent to Alabama and the same amount to Tennessee of the gross proceeds from the sale of additional power generated because of the effects of the operation of one or more plants in both states.[44] It is interesting to note that Congress provided that in determining the gross proceeds the board is not to take into consideration the proceeds of any power sold or delivered to the government of the United States or any department or agency thereof nor any power used in the operation of locks on the Tennessee River or for experimental purposes or for the

[41] 48 STAT. 128, 129 (1933), 12 U. S. C. A. §1463 (c) (1935).

[42] Act of Jan. 31, 1934, §12, 48 STAT. 344, 347, as amended by 48 STAT. 360 (1934), 12 U. S. C. A. §1020f (1935).

[43] Act of June 27, 1934, §402 (e), 48 STAT. 1256, 1257 (1934), 12 U. S. C. A. §1725 (e) (1935).

[44] Act of May 18, 1933, §13, 48 STAT. 58, 66 (1933), 16 U. S. C. A. §831 *l* (1935).

manufacture of fertilizer or for any government purposes. Thus, the states benefit by these payments in lieu of taxes only from those operations of the Corporation which directly rival the operations of privately owned power companies. The percentages required to be paid can be revised by the board with the approval of the President, but no change in percentages can be made more often than once in five years nor without giving the states of Alabama and Tennessee an opportunity to be heard concerning such changes. The board has also adopted the policy of paying to municipalities and other units of government sums of money equal to that which the TVA would have to pay as taxes if it were a privately owned public utility.[45]

The language in these statutes providing for the exemption from state taxation would seem in one sense to be ineffectual. The states cannot tax federal instrumentalities except so far as may be permitted by congressional legislation, and specifically granting these corporations exemption is giving them nothing more than they already have. Nor can the enumeration of a number of exemptions serve to remove the power of a state to tax if the operations and property of the corporations could otherwise be taxed.

When the Commodity Credit Corporation, the Housing Corporation, and the Subsistence Homesteads Corporation (and probably the Surplus Relief Corporation and the Electric Home and Farm Authority) were incorporated under the laws of Delaware, the state waived payment of the ordinary incorporation taxes[46] and charged only nominal fees for services actually rendered, such as the filing of the applications and the issuing of certificates. Likewise, the annual franchise taxes have been waived, only a nominal fee being charged for the filing of the annual report.

However, when the Export-Import Banks took out charters in the District of Columbia, the recorder demanded payment of the regular incorporation taxes.[47] These were paid under protest, and the certificates of incorporation issued. The writer is advised that negotiations are

[45] See, Note, *State Taxation and Regulation of the Tennessee Valley Authority* (1934) 44 YALE L. J. 326.

[46] For Delaware fees, see, PARKER AND SMITH, THE CORPORATION MANUAL (36th ed. 1935) 290.

[47] D. C. CODE (1929) tit. 10, §14: "All corporations incorporated in the District of Columbia shall pay to the recorder of deeds at the time of the filing of the certificate of incorporation 40 cents on each $1000 of the amount of the capital stock of the corporation as set forth in its said certificate: *Provided, however,* That, the fee so paid shall not be less than $25."

Id. tit. 10, §15: "All the fees and emoluments of the office of recorder of deeds of the District of Columbia shall be paid at least weekly to the collector of taxes for the District of Columbia for deposit in the Treasury of the United States to the credit of the District of Columbia."

under way for the recovery by the Banks of these taxes and that if necessary, legal action will be taken to secure their refund.

Inasmuch as these corporations are authorized by congressional legislation and executive order and directed to be set up as federal instrumentalities, it would seem that from their inception they are exempt from state taxation. A state may legitimately impose reasonable charges for services rendered by the state relative to their incorporation, but there appear to be no reasons why a state could refuse to charter a federal instrumentality unless all taxes imposed by law were paid. This would be a direct interference with and a tax upon the operations of an instrumentality of the national government.[48]

The state chartered corporations have adopted policies of refusing to pay any taxes imposed by the various states except in those instances where the tax constitutes a reasonable charge for some service rendered. An evident exception is the Warrior River Terminal Company, a subsidiary of the Inland Waterways Corporation, which has been paying to the State of Alabama taxes on tangible property, permit taxes, and franchise taxes.[48a]

The Wartime Housing Corporation made agreements with local governmental units to pay amounts equal to what it would have paid as special assessments and *ad valorem* taxes had its property been subject thereto.[49]. It is doubtful whether the contemporary corporations will adopt the same attitude. It is more likely that they will take the position that the federal government is conferring vast benefits upon the states and localities which more than offset any amount which the state might collect in taxes if they were not engaged in federal operations. The Comptroller-General and the Attorney-General have indicated to the Subsistence Homestead Corporation that it is not to pay state taxes upon land it buys and owns except that it may make reimbursements for exceptional services rendered.[50]

The problem of federal taxation of the corporations is unlikely to arise. They are directly engaged in governmental functions and for that reason it would be illogical to impose federal taxes upon them. The principal and interest of bonds and other obligations of the RFC, the Home Owners' Loan Corporation, the Federal Deposit Insurance Corporation, the Federal Farm Mortgage Corporation, and the Federal Savings and Loan Insurance Corporation are exempt from federal taxation

[48] *Cf.* Federal Land Bank of New Orleans v. Crosland, 261 U. S. 374, 43 Sup. Ct. 385, 67 L. ed. 703 (1923).

[48a] Pamphlet, *Annual Report of the Inland Waterways Corporation, Calendar Year 1933* (Govt. Printing Office, 1934) 17, 49.

[49] *Report of the U. S. Housing Corporation* (Gov't Printing Office, 1920) Vol. I, p. 347.

[50] Advice to writer from the Federal Subsistence Homesteads Corporation.

by the acts setting up the corporations. This was undoubtedly done to encourage the purchase of any of their obligations which might be offered for public sale. However, should Congress for some reason decide to impose taxes upon the property or operations of these federally owned corporations, it may properly do so.

V

In respect to crimes concerning a government owned corporation, the view has been adopted that in such cases the corporations are distinct entities, apart from the government. This view is laid down by the Supreme Court in *United States v. Strang*.[51] In that case, an inspector employed by the Emergency Fleet Corporation was indicted under a statute making it a criminal offense for an officer or agent of a business concern to be employed or act as an officer or agent of the United States for the transaction of business with such concern.[52] The Court said: "The Corporation was controlled and managed by its own officers and appointed its own servants and agents who became directly responsible to it. Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the corporation only and could contract only for it. In such circumstances we think they were not agents of the United States within the true intendment" of the statute.[53]

Prior to this decision by the Supreme Court, there had been a division of opinion in the lower federal courts. The first case of this type to arise concerned an indictment charging a conspiracy to defraud the United States. The alleged conspiracy involved the sale of tobacco to the Panama Railroad Company through its commissary department and a division of the profits of such sale between the two sellers and the manager of that department of the railroad. The circuit court of appeals held that when the United States enters into commercial business, it abandons its sovereign capacity, and is to be treated like any other corporation; and therefore, although it absolutely owns the Panama Railroad Company and is the only one profiting or losing by the railroad company's activities, a conspiracy to defraud the railroad company is not a conspiracy to defraud the United States within the meaning of the Penal Code.[54]

[51] 254 U. S. 491, 41 Sup. Ct. 165, 65 L. ed. 368 (1921); Note (1921) 21 COL. L. REV. 485.

[52] Crim. Code §41, Act of March 4, 1909, c. 321, §41, 35 STAT. 1088, 1097 (1909), 18 U. S. C. A. §117 (1929).

[53] 254 U. S. 491, 493, 41 Sup. Ct. 165, 166, 65 L. ed. 368, 369 (1921).

[54] Salas v. United States, 234 Fed. 842 (C. C. A. 2nd, 1916); Note (1917) 15 MICH. L. REV. 348. Same case, decided on different points, United States v. Burke,

On the other hand, two district courts held that conspiracies to defraud the Emergency Fleet Corporation were conspiracies to defraud the United States within the meaning of the same act. The courts held that the Fleet Corporation was an agency of the United States expending funds appropriated by Congress and that a conspiracy to defraud the Corporation would have the effect of depleting such funds and therefore defraud the government.[55]

In 1918, Congress, by amending section 35 of the Penal Code, specifically made it a crime against the United States to present false claims or to aid in the payment of such fraudulent claims, to steal personal property, to conspire to defraud by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, to deliver false receipts or vouchers for military or naval property, or to fraudulently deliver money or property used for military service, when a corporation in which the United States is a stockholder is involved.[56]

This statute has been construed and applied in two cases. In *United States v. Bowman*,[57] a conspiracy to defraud the Emergency Fleet Corporation by presenting and obtaining payment of a false and fraudulent claim against the Corporation for more fuel oil than was actually delivered was held a federal criminal offense.[58] An indictment charging a similar conspiracy against the Fleet Corporation was sustained in *United States v. Walter*.[59] The Court said, "the United States can protect its property by criminal laws, and its constitutional power would not be affected if it saw fit to create a corporation of its own for purposes of the Government, under laws emanating directly or indirectly from itself, and turned the property over to its creature." However, the Court limited the application of the statute, saying it "should be construed to refer only to corporations like the Fleet Corporation that are instrumentalities of the government and in which for that reason it owns stock."

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218 Fed. 83 (S. D. N. Y., 1914); United States v. Burke, 221 Fed. 1014 (S. D. N. Y., 1915).

[55] United States v. Carlin, 259 Fed. 904 (E. D. Pa., 1917); United States v. Union Timber Products Co., 259 Fed. 907 (W. D. Wash., 1919).

[56] Act of Oct. 23, 1918, 40 Stat. 1015 (1918), 18 U. S. C. A. §§80, 82, 83, 84, 85 (1927).

[57] 260 U. S. 94, 43 Sup. Ct. 39, 67 L. ed. 149 (1922), *rev'g* 287 Fed. 588 (S. D. N. Y. 1921).

[58] This was held a crime punishable in the United States even though the conspiracy took place on the high seas on a vessel owned by the Emergency Fleet Corporation, and in the port and city of Rio de Janeiro. This aspect of the case was noted in (1923) 32 YALE L. J. 513; (1923) 71 U. OF PA. L. REV. 173.

[59] 263 U. S. 15, 44 Sup. Ct. 10, 68 L. ed. 137 (1923), *rev'g* 291 Fed. 662 (S. D. Fla., 1921); Note (1924) 72 U. OF PA. L. REV. 158 in which the amending of section 35 of the Penal Code was evidently overlooked.

Although the Penal Code was amended to cover government owned corporations before the Supreme Court held in *United States v. Strang* that such a corporation was a separate entity, Congress evidently had that possibility in mind when it amended the statutes.[60] Congress seemed to recognize the fact that government owned corporations have a character of their own and are separate and distinct from the government in certain respects.

In a recent case involving an alleged crime against the United States by a conspiracy to obstruct the proper use of funds of the Reconstruction Finance Corporation, the Circuit Court of Appeals for the Eighth Circuit did not follow *United States v. Strang* but held that the R. F. C. was a direct agency of the government and that any conspiracy against the Corporation was an impediment to the exercise of a function by the Federal Government.[61] The defendant was indicted for a violation of section 37 of the Criminal Code[62] which makes illegal a conspiracy to commit an offense against the United States or to conspire to defraud the government. This section was not amended in 1918 when Congress amended section 35 to include government owned corporations. In reaching its conclusion that the Corporation was a direct agency of the government, the court cited the previous cases involving other corporations owned by the United States and distinguished those which held the corporations to be distinct entities. The court clearly disregarded the ruling of the Supreme Court in the *Strang* case that government owned corporations were distinct entities and that a crime against one was not a crime against the United States itself, even though there was a possibility that the offense might be punishable under federal laws.

In the acts creating some of the present day corporations, certain actions in connection with the corporations are made federal criminal offenses, and certain provisions of the Penal Code are extended to cover dealings with the Corporations.[63] These provisions were evidently inserted because of the theory laid down by the Supreme Court that a government corporation is a distinct entity with respect to crimes committed concerning it unless they are covered by statute.

[60] The offense charged in this case occurred before the enactment of the statute although the decision was handed down afterwards.

[61] Langer v. United States, 76 F. (2d) 817 (C. C. A. 8th, 1935).

[62] 14 STAT. 484 (1867); 18 U. S. C. A. §88 (1927).

[63] Reconstruction Finance Corporation, Act of Jan. 22, 1932, §16, 47 STAT. 5, 11-12 (1932), 15 U. S. C. A. §601 (1935); Tennessee Valley Authority, Act of May 18, 1933, §21, 48 STAT. 58, 68-69 (1933), 16 U. S. C. A. §831 (1935); Federal Savings and Loan Insurance Corporation, Act of June 27, 1934, §512, 48 STAT. 1246, 1265 (1934), 12 U. S. C. A. §1701 (1935).

VI

Those cases involving government owned corporations in which the character of the corporations has been discussed have divided as to their status. As mentioned previously, the corporations are considered separate entities for the purposes of actions against them for torts and breaches of contract, but, so far as state taxation of them is concerned, the corporations are treated as agencies of the government with all the governmental immunity from state taxation. There are numerous other individual and groups of cases which also bring out their dual aspect and which merit consideration.

In 1866, Congress passed the Post Roads Act offering certain valuable privileges to telegraph companies. If the companies desired to accept such privileges, they had to agree to give telegrams "between the several departments of the government and their officers and agents" priority over all other business at such rates as the Postmaster-General should annually fix.[64] This offer was accepted by the several telegraph companies. The rates are usually fixed at a percentage of the regular commercial rates.

From 1916 to 1922, the Western Union Telegraph Company transmitted messages for the Emergency Fleet Corporation at the government rates. In May of the latter year, the Western Union demanded commercial rates for all telegrams sent by the Fleet Corporation. The company continued sending messages for the Corporation at the reduced rates, reserving the right to later collect the full rates. The Western Union later sued the Fleet Corporation to recover for June and July 1922 the difference between the amount paid by the Fleet Corporation for telegrams sent and the regular commercial rates for such telegrams. The Supreme Court of the District of Columbia rendered a judgment in favor of the Western Union. This decision was affirmed by the Court of Appeals of the District of Columbia, the court holding that even though the government owned all its stock the Fleet Corporation was a distinct entity and not such an agent of the government as should be entitled to preferential telegraph rates.[65]

However, in *U. S. S. B. Emergency Fleet Corporation v. Western Union Telegraph Company*,[66] the Supreme Court held that the Fleet Corporation was entitled to the government rate, not because it was an

[64] Act of July 24, 1866, 14 Stat. 221 (1866), 47 U. S. C. A. §§1-6 (1928), as amended by Act of June 19, 1934, 48 STAT. 1064, 1101 (1934), 47 U. S. C. A. §601 (1935) transfering the duties, powers and functions of the Postmaster General under the original act to the Federal Communications Commission.

[65] U. S. S. B. Emergency Fleet Corporation v. Western Union Telegraph Company, 13 F. (2d) 308 (C. of A. D. of C. (1926); *certiorari granted* 273 U. S. 681, 47 Sup. Ct. 236, 71 L. ed. 837 (1926).

[66] 275 U. S. 415, 48 Sup. Ct. 198, 72 L. ed. 345 (1928).

instrumentality of the government, but because it was a department of the United States within the meaning of the Post Roads Act. The Court reasoned that the services of the Corporation were obviously of a public nature and that it never did any business except on behalf of the United States. Further, since the business of the Corporation was conducted at a continuous loss with the deficit being made up out of the Treasury, to force the Corporation to pay regular rates would directly affect the government. The Court said that one of the reasons for the use of a corporate agency was to enable the government to employ commercial methods and to conduct its operations with a freedom supposed to be inconsistent with accountability to the Treasury. But, the Court added, "it obviously was not the intention of the government in employing a corporate agency to deprive itself of the right of priority of transmission and of the lower rates secured through the Post Roads Act."[67]

There is a dictum in this case which may possibly become important in any future litigation on the same matter. During the course of its opinion the Court said, "Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the government. They are private corporations in which the government has an interest." It would seem from this that any such instrumentalities would be held not entitled to preferential rates. The Federal Land Banks, which are government instrumentalities operated as a part of the Farm Credit Administration but are only 50% owned by the government, constitute an example of the corporations which might come within this grouping.

On the other hand, government owned corporations are not entitled to preferences in bankruptcy because they are distinct entities. The National Bankruptcy Act provides the order of payment of claims out of a bankrupt estate. Among those entitled to priority are "debts owing to any person who by the law of the States or the United States is entitled to priority."[68] The Revised Statutes provide that debts due the United States by any insolvent person or estate shall be first satisfied.[69]

The Emergency Fleet Corporation had a claim against a bankrupt

[67] *Ibid.* at 423, 48 Sup. Ct. 198, 201, 72 L. ed. 345, 349 (1928).

In Commercial Pacific Cable Company v. Philippine National Bank, 263 Fed. 218 (S. D. N. Y. 1920), *aff'd per curiam*, 269 Fed. 1022 (C. C. A. 2nd, 1920), a bank chartered by a special act of the Legislature of the Philippne Islands and with 85% to 90% of its capital stock owned by the Philippine government was held not a department of the government within the meaning of the Post Roads Act. This bank was a government depositary and did government banking business and at the same time engaged in extensive private banking operations.

[68] 30 STAT. 563 (1898); 11 U. S. C. A. §104 (b) (5) (1927).

[69] 1 STAT. 515, 676 (1897, 1899), 31 U. S. C. A. §191 (1927). See, Bramwell v. U. S. Fidelity and Guaranty Company, 269 U. S. 483, 46 Sup. Ct. 176, 70 L. ed. 368 (1926); *In re* Atlantic, G. & P. S. S. Co., 289 Fed. 145 (D. C. Md. 1923).

shipbuilding company. This was allowed as a general claim against the bankrupt's estate, but the Fleet Corporation contended that it should receive priority as being a claim for a debt due the United States. The Corporation's argument was that the Fleet Corporation was the agent or representative of the United States and that the contract was made for and on behalf of the United States and hence the debt due thereunder was a debt due and owing to the United States and therefore entitled to priority of payment under the statute. The referee in bankruptcy refused to grant such priority and was sustained by the district court. The circuit court of appeals affirmed the decision, holding that the Fleet Corporation was a distinct legal entity and that the ownership of its stock by the United States did not invest the Corporation with the character of sovereignty or the privileges or immunities of the sovereign, and hence that the Fleet Corporation was not entitled to the government's priority.[70] The Supreme Court affirmed these decisions in *Sloan Shipyards Corporation v. U. S. S. B. Emergency Fleet Corporation*[71] using the same theory.[72]

In *United States v. Wood*[73] the government filed a bill in equity asserting this same claim as its own and asking priority. The district court dismissed the bill on the ground that it had no jurisdiction to entertain such a bill, jurisdiction being in the bankruptcy court. The court based its decision on the further ground that the debt was not due the United States but was due the Fleet Corporation, as principal and independent contractor, and therefor not entitled to priority.[74]

But notes given in payment of a vessel purchased from the Fleet Corporation and made payable to the United States, the contract of sale also being in the name of the United States, have been held entitled to the governmental priority on the ground that the United States was the real creditor and the only one in whose name the claim could be presented.[75]

The Reconstruction Finance Corporation has been held to be subject to the bankruptcy laws and the necessity of complying with them as any ordinary corporation. During the reorganization of the Rock Island Railway, the R. F. C. and several banks were enjoined from converting

[70] *In re* Eastern Shore Shipbuilding Corporation, 274 Fed. 893 (C. C. A. 2nd, 1921), *certiorari granted,* U. S. S. B. Emergency Fleet Corporation v. Wood, 257 U. S. 627, 42 Sup. Ct. 56, 66 L. ed. 404 (1921).

[71] 258 U. S. 549, 42 Sup. Ct. 386, 66 L. ed. 762 (1922).

[72] Leave was granted to petition for a rehearing in 42 Sup. Ct. 588 (1922) but evidently was not used.

[73] 290 Fed. 109 (C. C. A. 2nd, 1923), *aff'd.* per curiam, 263 U. S. 680, 44 Sup. Ct. 134, 68 L. ed. 503 (1923).

[74] See also, West Virginia Rail Company v. Jewett Bigelow and Brooks Coal Company, 26 F. (2d) 503 (E. D. Ky. 1928).

[75] Whan v. Green Star S. S. Corporation, 22 F. (2d) 483 (C. C. A. 2nd, 1927).

or disposing of various collateral securities held as security for notes given by the railway. The R. F. C. objected and claimed that sections 77 and 2(15) of the Bankruptcy Act were limited by section 5 of the R. F. C. Act which empowered the Corporation to take over and liquidate collateral accepted by it as security. The circuit court of appeals affirmed the action of the district court in granting the injunction and was in turn upheld by the Supreme Court.[75a] That Court held that although the R. F. C. is entirely owned by the United States, it is a corporation limited by its charter and the general law. The Court said that the R. F. C. Act did not give the Corporation greater rights as to the enforcement of its outstanding credits than were enjoyed by other persons or corporations in the event of proceedings under the Bankruptcy Act and that the provisions of the Bankruptcy Act, including section 77, were binding on the R. F. C. in the absence of some pertinent statutory exception.

The activities of the United States Grain Corporation gave rise to an interesting case which involved the question of the status of that corporation and its relation to the government.

The statutes for the government of the Navy provide that no goods or merchandise for freight or traffic, except gold, silver or jewels for freight or safe-keeping, shall be received on board a naval vessel.[76] Navy regulations permitting the carrying of gold on a naval vessel provide that when the officer in command receives any gold on board he shall sign bills of lading for the amount and be responsible for it. The regulations then provide that for carrying such gold the shippers shall pay the usual percentage for freight, to be divided among the commander of the vessel, the commander in chief, and the navy pension fund, or if the commander in chief does not signify in writing that he will unite in being responsible for the shipment, the percentage shall be divided between the commanding officer and the pension fund.[77]

In 1919, the United States Grain Corporation owned $5,000,000 in gold which it wanted carried from Constantinople to New York City. The Grain Corporation requested and received from the Secretary of the Navy an order suspending these provisions of the navy regulations as to carrying gold for a percentage. However, the commanding officer of the destroyer detailed to carry the gold for the Corporation refused to waive his responsibility for the shipment and his right to the freight charges. The gold was delivered in New York and payment of one per cent of the value of the gold as freight charges was demanded and

[75a] Continental Illinois Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway Co., 294 U. S. 648 (at 684), 55 Sup. Ct. 595, 79 L. ed. 1110 (1935).

[76] REV. STAT. 1624, art. 8, subd. 13, 34 U. S. C. A. §1200, art. 8, subd. 13 (1928).

[77] Navy Regulations (1913) art. 1510.

refused. Whereupon, the commanding officer of the transporting destroyer commenced an action against the Grain Corporation for that amount.

Judgment was rendered for the defendant in the district court. The circuit court of appeals, however, reversed this decision and held the naval officer entitled to the percentage claimed on the ground that the Secretary of the Navy was without authority to suspend the provisions of the regulations covering compensation. The fact that the Corporation shipped the gold and the officer assumed responsibility and refused to waive his right to compensation was held to entitle him to recover. The governmental character of the Grain Corporation was discussed only briefly. The court disposed of it, saying, "the government created this agency but the corporate responsibility is that of a private corporation."[78]

The Supreme Court, in *United States Grain Corporation v. Phillips*,[79] reversed the circuit court of appeals, basing its decision upon the governmental aspect of the Corporation. The Court deliberately pierced the corporate veil and held that since the government owned all the stock of the Corporation, the Corporation's property in effect belonged to the government. Therefore, since the plaintiff was commander of a naval vessel, he was only acting in the course of his duty in carrying the gold, gold which belonged to the United States even though legal title was in the Grain Corporation. The Court held that the order of the Secretary of the Navy embodied no suspension of the regulations but only a recognition that this was not a service for which the plaintiff was entitled to extra compensation. The Court in deciding this case evidently had the attitude that the naval officer was not entitled to the stipulated percentage because the property in question was closely connected with the prosecution and aftermath of the War through the American Relief Administration, the Grain Corporation, and the United States Food Administration, all acting for the United States. This attitude was summed up when the Court said, "But for purposes like the present imponderables have weight. When as here the question is whether the property was clothed with such a public interest that the transportation of it no more could be charged for by a public officer than the carrying of a gun, we must look not at the legal title only but at the facts beneath forms."

United States ex rel Skinner and Eddy Corporation v. McCarl,[80] decided three months prior to the *Western Union* case,[81] presents a

[78] Phillips v. U. S. Grain Corp., 279 Fed. 244 (C. C. A. 2nd, 1922).
[79] 261 U. S. 106, 43 Sup. Ct. 283, 67 L. ed. 552 (1923).
[80] 275 U. S. 1, 48 Sup. Ct. 12, 72 L. ed. 131 (1927).
[81] *Supra* note 66.

distinctly different *ratio decidendi.* Skinner and Eddy Corporation brought a petition for a writ of mandamus to compel the Comptroller General to pass upon its claims against the government arising out of contracts made with the Emergency Fleet Corporation. The claims were presented to the Comptroller General for allowance because the Skinner and Eddy Corporation wanted to be in a position to use them as a credit if the United States should, as was then threatened, sue on the contracts. The statutes provide that in suits brought by the United States against individuals no claim for credit can be allowed unless it has been presented to the General Accounting Office and been disallowed,[82] and the Company thought that such presentation would be necessary to enable it to use their claims as a set-off to the government's suit.

Congress created the General Accounting Office in 1921 as an independent establishment of the government.[83] The act creating it provides that "all claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."[84] The office is in charge of the Comptroller General, an independent officer appointed by the President for a term of fifteen years and removable only for cause by a joint resolution of Congress or by impeachment proceedings. He is not eligible for reappointment.[85] All expenditures of the government are audited by the General Accounting Office, and the present Comptroller General has kept a close check on all government spending.

Control over the financial transactions of the war time corporations was exercised by their own administrators. The Comptroller of the Treasury, and later the Comptroller General, had little to do with the accounts of these corporations except in certain isolated instances specifically directed by Congress.[86]

When Skinner and Eddy Corporation presented its claims to the Comptroller General, he declined to consider them, insisting that he had neither the duty nor the power to do so. He disclaimed all jurisdiction over the accounts of the Fleet Corporation and maintained that control was in the hands of the Corporation itself or else the Shipping Board.

[82] Act of Mar. 3, 1797, 1 STAT. 515 (1797), 28 U. S. C. A. §774 (1928).
[83] Act of June 10, 1921, 42 STAT. 23 (1921), 31 U. S. C. A. §§41-120 (1927).
[84] Act of June 10, 1921, c. 18, §305, 42 STAT. 23, 24 (1921), 31 U. S. C. A. §71 (1927).
[85] Act of June 10, 1921, c. 18, §303, 42 STAT. 23 (1921), 31 U. S. C. A. §43 (1927).
[86] See, 275 U. S. 1, 6-8, 48 Sup. Ct. 12, 14, 72 L. ed. 131, 134-35 (1927).

His position was upheld by the Supreme Court and the Court of Appeals of the District of Columbia.[87]

The Supreme Court of the United States affirmed these decisions, holding that the Comptroller General had no jurisdiction over these claims and had properly refused to consider them. The Court said: "The Fleet Corporation is an entity distinct from the United States and from any of its departments or boards, and the audit and control of its financial transactions is, under the general rules of law and the administrative practice, committed to its own corporate officers, except so far as control may be exerted by the Shipping Board." In this opinion, the Court presented as a reason for the use of a corporation the ability to use commercial methods and to be free from accountability to the Treasury.[88]

Later, when the United States sued the Company, the district court held that presentation of the claims to the Shipping Board was sufficient to meet the requirements of the statute[89] so as to enable the claims to be used as a set-off to the government's suit.[90]

Three months after the decision by the Supreme Court, an article appeared in the Virginia Law Review criticizing the use of the corporate device by the government specifically on the ground that the General Accounting Office did not audit or control the expenditures made by the corporations.[91] This article was written by one of the legal advisers in that office.[92]

In the fall of 1933, when government owned corporations were being created in rapid succession, Comptroller General McCarl reversed the stand he took in 1923 and 1924 when he had claimed he had no power or duty to audit the accounts of the Fleet Corporation and was sustained by the Supreme Court after three years of litigation. He insisted that expenditures made in setting up corporations in Delaware had to be approved by him and that the accounts of all the corporations

[87] 8 F. (2d) 1011 (C. of A. D. of C. 1925).

[88] See, SCHNELL, *Federally Owned Corporations and Their Legal Problems* (1936) 14 N. C. L. REV. 238, 244. [89] *Supra* note 82.

[90] United States v. Skinner & Eddy Corporation, 28 F. (2d) 373 (W. D. Wash. 1928), *decree modified,* 35 F. (2d) 889 (C. C. A. 9th, 1929). See also, *In re* Skinner & Eddy Corporation, 265 U. S. 86, 44 Sup. Ct. 446, 68 L. ed. 912 (1924); United States v. Skinner & Eddy Corporation, 5 F. (2d) 708 (W. D. Wash. 1925).

But see, United States v. Fisher Flouring Mills Company, 295 Fed. 691 (W. D. Wash. 1924) in which it was held that in a suit by the United States on a cause of action assigned to it by the Fleet Corporation the defendant was not entitled to plead as a set-off claims against the Fleet Corporation which had not been presented to the accounting officers of the Treasury as prescribed by 1 STAT. 515 (1797), 28 U. S. C. A. §774 (1928). It was probably because of this case that the Skinner & Eddy Corporation wanted the Comptroller General to pass upon its claims.

[91] McGuire, *Government by Corporations,* 14 VA. L. REV. 182 (1928). See also, McGuire, *The United States Shipping Board Emergency Fleet Corporation* (1922) 56 AM. L. REV. 786.

[92] McGuire still is counsel in the General Accounting Office.

were subject to audit by the General Accounting Office. Those in charge of the various corporations resisted the Comptroller General's claim to jurisdiction because they did not want to be subject to the red tape necessarily involved with accountability to him and because they did not want him to interfere with their free spending. A heated controversy developed, especially between Secretary of the Interior Ickes and Comptroller General McCarl concerning the financing of the Public Works Emergency Housing Corporation.[93] The difficulties were resolved by the issuance of an Executive Order which, it was said, the president issued at the insistence of the Comptroller General. This order provided that "accounts of all receipts and expenditures by governmental agencies, including corporations, created after March 3, 1933, the accounting procedure for which is not otherwise prescribed by law, shall be rendered through the General Accounting Office in such manner, to such extent and at such times as the Comptroller General of the United States may prescribe for settlement and adjustment. . . ."[94]

This order makes all the recently created government corporations except the Reconstruction Finance Corporation, which was created January 22nd, 1932, subject to the jurisdiction of the Comptroller General. The charters of those corporations created by Congress are silent as to the auditing of their accounts with the exception of that of the Tennessee Valley Authority. Section 9(b) of the Tennessee Valley Authority Act provides that the Comptroller General shall audit the transactions of the TVA at such times as he shall determine. No other procedure has been provided for either the Congressionally or State chartered corporations.

Some of the corporations have objected strenuously to this supervision by the Comptroller General claiming that it hampers them in their operations because of the delay entailed and because of the refusal of the Comptroller General to approve certain expenditures the corporations deem necessary and proper. Other corporations have no objections to make and say the accountability to the Comptroller General makes little or no difference in the effectiveness of their operations.[95]

Employees of the Emergency Fleet Corporation were held not to be governmental employees but rather employees of a private corporation. In *United States v. Strang*,[96] which was discussed previously in connection with crimes involving the corporations,[97] an inspector employed by

[93] See, Schnell and Wettach, *Corporations as Agencies of the Recovery Program* (1934) 12 N. C. L. REV. 77.

[94] Ex. Order No. 6549, Jan. 3, 1934.

[95] See, generally, Munson, *The Duties of the Controller as a Corporate Officer* (1934) 20 A. B. A. J. 57 (with reference to government corporations).

[96] 254 U. S. 491, 41 Sup. Ct. 165, 65 L. ed. 368 (1921), cited note 51, *supra*.

[97] *Supra* page 351.

the Emergency Fleet Corporation was held not to be an agent of the United States so as to make him subject to prosecution under section 41 of the Criminal Code[98] which makes it a criminal offense for an officer or agent of a business concern to be employed or act as an officer or agent of the United States for the transaction of business with such concern.

In a later case in the Court of Claims, a brigadier-general of the United States Army who had retired and become president and then general manager of the Fleet Corporation from July 1926 to March 1929 brought suit against the United States for that portion of his retired officer's pay which had been withheld during that period.[99] This pay was withheld from him while he was connected with the Fleet Corporation because of the congressional prohibition against dual office holding. The Court of Claims awarded him the amount so withheld, holding that the Fleet Corporation was a private corporation and not a part of the government and that consequently his only government office was that of retired brigadier-general. He was held to be entitled to the regular compensation attached to that office. The court held that a position with the Fleet Corporation was not a government office within the meaning of the legislation concerned.

The contrary view has been taken by the Supreme Court of Appeals of Virginia with respect to an attorney employed by the Home Owners' Loan Corporation. The city attorney of Bristol, Virginia, was appointed a district attorney for the Corporation. Thereupon, a quo warranto proceeding was commenced to remove him from his city office on the ground that the Virginia Code prohibited any person holding a federal position from holding a state office. The court discussed the Home Owners' Loan Act and concluded that the Corporation was such an instrumentality of the United States that the attorney's "employment as attorney for the Home Owners' Loan Corporation is under the government of the United States, and his acceptance of such employment and the emoluments therefrom was in contravention of section 290 of the Code." However, the court, in the exercise of its discretion, refused to grant the writ and cause him to surrender his city office on the ground that no practical benefit would result to the relator or the general public.[99a]

A Pennsylvania court held that in a claim for compensation under the Pennsylvania Workmen's Compensation Act made by a workman who was injured in the course of his employment with the Emergency

[98] Act of March 4, 1909, c. 321, §41, 35 STAT. 1088, 1097 (1909), 18 U. S. C. A. §93 (1927).

[99] Dalton v. United States, 71 Ct. Cl. 421 (1931).

[99a] Com. *ex rel,* Kelly v. Rouse, 163 Va. 841, 178 S. E. 37 (1935).

Fleet Corporation, an answer denying liability on the ground that the Corporation was an arm of the government and not subject to the laws of Pennsylvania could not be maintained.[100] It would seem inferable from this that the court regarded the workman as an employee of the Corporation and not of the government.

Nor are employees of the Panama Railroad Company regarded as employees of the government. An opinion of the Attorney-General held that such employees were employees of a private corporation.[101] Also, a federal statute relating to the limitation of hours of daily service of laborers and mechanics employed upon public works by the United States does not apply to those employed by the Panama Railroad Company.[102] However, employees of the Alaska Railroad have been held by the Attorney-General to be employees of the United States.[103] In one of the opinions concerning the people employed by that railroad, the Comptroller-General held that an employee of the Alaska Railroad was an employee of the United States, prohibited from receiving payment for both services in the Alaskan legislature and to the railroad at the same time.[104]

The government owned corporations are considered distinct entities with respect to the guarantee of the bonds of some of them by the United States. The bonds are not direct obligations of the government and are not primarily payable by it, they must first be presented to the corporations for payment. If, upon demand by a holder of guaranteed bonds, the interest or principal of the bonds were not paid by the Corporation, then the bonds might be presented to the Treasury for payment. This procedure was set out by the Attorney-General in an opinion to the Secretary of the Treasury[105] and indicates that he conceived of the corporations and the government as being separate and distinct.

Decisions of the Comptroller of the Treasury in 1920 and of the Comptroller-General in 1921 held that such officials, in certain circumstances, considered the Fleet Corporation and the Housing Corporation as parts of the government rather than units by themselves. Freight shipments of property of the Fleet Corporation were held entitled to land

[100] Sullivan v. U. S. S. B. Emergency Fleet Corporation, 76 Pa. Super. Ct. 30 (1921).

The United States Supreme Court dismissed a writ of error and refused certiorari without discussing the question. The Court said that the record did not show a controversy over the validity of any treaty, statute, authority, federal or state, on constitutional grounds so as to support the writ of error. U. S. S. B. Emergency Fleet Corporation v. Sullivan, 261 U. S. 146, 43 Sup. Ct. 292, 67 L. ed. 577 (1923).

[101] 25 Op. A.G. 465, 469.

[102] Act of August 1, 1892, 27 STAT. 340, 40 U. S. C. A. §321 (1928).

[103] 8 Dec. C. G. 420 (1929). [104] 5 Op. C. G. 806 (1926).

[105] Opinion of the Attorney General to the Secretary of the Treasury, September 14th, 1934.

grant deductions and the preferential government freight rates because such property was that of the United States.[106] Similarly, hotels owned by the United States Housing Corporation were held to be public buildings of the United States and entitled to preferential gas rates and free water from the District of Columbia under certain statutes entitling the federal government to such preferences from the Government of the District.[107] Another decision held that the United States Housing Corporation, "which was established by authority of law to perform a governmental function and was maintained and supported from funds of the United States," was a government establishment and that miscellaneous supplies for it had to be purchased in accordance with the federal statute providing that certain miscellaneous supplies for executive departments and other government establishments in Washington should be purchased under contracts made by the Secretary of the Treasury.[108]

Although these cases concerning the governmental character of the federally owned corporations have been presented as groups and types, it cannot be asserted with definiteness that any future case falling within the same category would be decided the same way. Each case would probably depend upon the circumstances surrounding the action, any statutes involved, and the arguments of counsel. Nor can a rule be laid down as to when the courts will hold the corporations to be a part of the government and to partake of its privileges and immunities or to be separate and apart from the government.

VI

The various government owned corporations, whether organized under an Act of Congress or incorporated under the laws of some state, would seem to be beyond the control or regulation of any state except so far as might be permitted by the corporations or by the federal government. Whether or not they are to be considered as a part of the government itself or as distinct entities, they are governmental instrumentalities and as such do partake of certain governmental immunities. This proposition that the states cannot interfere with the operations of federal instrumentalities, established as early as the case of *McCulloch v. Maryland*[109] was upheld in the taxation cases previously discussed. It was reaffirmed in cases involving national banks in which it was held that national banks, being instrumentalities of the government, "the states can exercise no control over them nor in any wise affect their

[106] 1 Dec. C. G. 279 (1921).
[107] 27 Dec. C. T. 163 (1920). The statute involved was the Act of Sept. 1, 1916, 39 STAT. 716 (1916), 40 U. S. C. A. §23 (1928).
[108] 26 Dec. C. T. 673 (1920). The statute involved was the Act of June 17, 1910, c. 297, §4, 36 STAT. 531 (1910), 41 U. S. C. A. §7 (1928).
[109] 17 U. S. 316, 4 L. ed. 579 (1819).

operation, except in so far as Congress may see proper to permit."[110] The same view was evinced in *Stockton v. Baltimore and New York Railroad Company,*[111] decided by Justice Bradley of the Supreme Court while sitting in the Circuit Court in New Jersey, which disposes of the matter of state control in the following language:

"It is undoubtedly just and proper that foreign corporations should be subject to the legitimate police regulations of the state, and should have, if required, an agent in the state to accept service of process when sued for acts done or contracts made therein. . . . But in the pursuit of business authorized by the government of the United States, and under its protection, the corporations of other states cannot be prohibited or obstructed by any state. . . . At all events, if Congress, in the execution of its powers, chooses to employ the intervention of a proper corporation, whether of the state, or out of the state, we see no reason why it should not do so. There is nothing in the constitution to prevent it from making contracts with or conferring powers upon state corporations for carrying out its own legitimate purposes. What right of the state would be invaded? The corporation thus employed, or empowered, in executing the will of Congress, could do nothing which the state could rightfully oppose or object to."

It is the policy of the presently operating government corporations to comply with those state laws which do not interfere with the operations of the corporations. This policy has been adopted in order to avoid as much conflict as possible between the corporations and state and local officials. The corporations do insist, however, that such compliance with state laws in no way affects their privileges and prerogatives as federal instrumentalities.[112]

Although two cases involving the Emergency Fleet Corporation suggested that it was subject in certain respects to state recordation regulations,[113] it does not seem than any real encroachment by the states

[110] Farmers' and Mechanics' National Bank v. Deering, 91 U. S. 29, 34, 23 L. ed. 196, 199 (1875); Easton v. Iowa, 188 U. S. 220, 23 Sup. Ct. 388, 47 L. ed. 452 (1903).

[111] 32 Fed. 9, 14 (C. C. D. N. J. 1887).

[112] This information was obtained from counsel for several of the corporations.

[113] Shooters Island Shipyard Co. v. Standard Shipbuilding Corp., 293 Fed. 706 (C. C. A. 3rd, 1923), *reaff'd,* 3 F. (2d) 1022 (C. C. A. 3rd, 1925) suggested that the Fleet Corporation, "though a governmental agency, does not stand in the place of the government so as to share the immunities of the sovereign, but in its transactions as a distinct corporate entity it was bound to observe the law of the state in which it was doing business." In this case, the point involved was the execution and recordation of a chattel mortgage to the Fleet Corporation, which the court said had to be in conformity with the state law.

Gielow v. Eastern Shore Shipbuilding Corp., 265 Fed. 845 (D. C. Md. 1919) held that the Fleet Corporation, even though a government agent, could not, without authority from Congress, make a contract for construction of vessels giving it title to material not yet on board the vessels, which title would be valid against the trustee in bankruptcy of the construction company, thought not recorded, as required by state law. It was held that the Fleet Corporation had to comply with the state recordation statutes.

upon the governmental immunities of the corporations will be permitted by the courts.

Nor should state regulations or control of these corporations be permitted. Otherwise, they would be hindered in their operations and the advantages gained from the use of the corporate device would be lost.

VII

There are as yet few reported decisions involving the government owned corporations organized under the present administration. However, it is highly probable that any cases involving them which may arise will be decided upon the basis of the law as established by decisions in cases involving earlier government corporations. If there is no definite rule respecting a problem that might arise, the principles of the previous decisions will undoubtedly be applied.

The law of government owned corporations seems to have developed upon a practical basis. In general, the interests of the federal government have been well protected and the proper functioning of the corporations expedited. At the same time, the corporations have been reduced to the status of an ordinary suitor before the courts, and the principles of law as applied to private litigants have controlled when there would be no disadvantage to the federal government by so doing. This has been a sound development especially suitable to organizations such as these. The government owned and operated corporations are performing useful governmental functions in an efficient manner and should partake of the privileges and immunities of the federal government. At the same time, by using the corporate device, the federal government has adopted an instrument of private law and should be bound by the ordinary rules of law applicable to corporations generally. Thus far, the cases involving government corporations have been decided, for the most part, on a sound basis. There are numerous questions which have not yet arisen in connection with these corporations. When they arise, the courts will necessarily be guided by the precedents which have been discussed herein. Thus the development of the law of government owned corporation may be expected to follow lines of practical adjustment—already indicated both by courts and administrators—as consistent with government ownership and operation of large business enterprises.[114]

[114] No attempt has been made in this article to discuss or evaluate the work and activities of the various government corporations. However, the use of the corporate device as a method of performing governmental activities has been justified by the efficient and rapid manner in which most of the corporations have functioned. The use of corporations owned and operated by the federal government has now become an established method of carrying out certain functions of the government.