Wyoming Law Journal

Volume 13 | Number 3 Article 3

December 2019

State Authority to Tax Private Interests in Federal Property

George J. Argeris

WYOMING LAW JOURNAL

VOL. 13 | SPRING, 1959 | NO. 3

Published in the Fall, Winter, and Spring by the University of Wyoming School of Law and the Wyoming State Bar.
Subscription Price $2.50 per year.

Mailing address: College of Law; University of Wyoming, Laramie, Wyoming.

NOTES

STATE AUTHORITY TO TAX PRIVATE INTERESTS IN FEDERAL PROPERTY

The state taxing power is one of the fundamental powers of state government. Not originally regarded as a possible threat to federal sovereignty, it was recognized in the Federal Constitution as being limited in only two respects.[1] In *McCulloch v. Maryland,* however, it was early recognized that the power of the state to tax federal property could provide the means of destroying federal sovereignty.[2] It was determined, therefore, that the state was without power to retard, impede, burden, or in any manner control the operations of laws constitutionally enacted by congress and thereby limited the scope of the state taxing power. This case was the forerunner of a series of cases of major importance dealing with state taxation of federal property and activities. No problem of state federal relations has given rise to greater variation and uncertainty. The uncertainty of which is best described by Justice Jackson in *United States v. Allegheny,* wherein he stated, "looking backwards it is easy to see that

1. U.S. Const. art. I, § 10, cl. 2 & 3.
2. 4 Wheat. 316, 4 L.Ed. 579 (1819).

the line between the taxable and immune has been drawn by an unsteady hand."[3] Many cases have since added to this wavering line, the most recent of which are commented on in this note in an effort to spell out the state authority to tax private rights in federal property.

Because the question of intergovernmental tax immunity most often arises as a result of state taxation of private interests within federally owned areas, the basis of state legislative jurisdiction therein need always be established.

It is well recognized that persons residing on lands owned by the United States may not for that reason alone be exempt from state taxation.[4] The basis of the states' jurisdiction to tax within the federal enclave was regarded as depending to a large degree upon the means by which the federal area was created.[5]

It is generally recognized that federal title to lands within territorial boundaries of the states were acquired by one of three methods; namely, (1) by the purchase from the states with their consent within the letter of Article 1, Section 8, clause 17 of the United States Constitution; (2) by purchase without the states consent as by condemnation and eminent domain, or (3) by continued possession with reservation of jurisdiction over lands at the time of admission of the state to the union.[6]

If land is acquired by the federal government under purchase with the consent of the state within the scope of clause 17, the state is without legislative jurisdiction therein unless such be reserved.[7] Exclusive federal taxing authority within an area thus acquired is held to arise from the declaration of the United States Constitution, Article 1, Section 8, clause 17, that congress shall have authority over places acquired by the consent of the state "for the erection of forts, magazines, dockyards and other needful buildings," "like (the) authority" it exercises over the district which is the seat of the federal government; that is, the broad power of "exclusive legislation whatsoever."[8] Consent by the state therefore without reservation is considered a prerequisite to the exclusive jurisdiction of the federal government.[9]

---

3. 322 U.S. 174 at 176, 64 S.Ct. 908, 88 L.Ed. 1209 (1944).
4. Atkinson v. State Tax Commissioner of Oregon, 303 U.S. 20, 58 S.Ct. 419, 82 L.Ed. 621 (1938).
5. Surplus Trading Company v. Cook, 281 U.S. 647, at 656, 50 S.Ct. 455, 74 L.Ed. 1091 (1930).
6. Fort Leavenworth Railroad Company v. Lowe, 114 U.S. 525, 5 S.Ct. 995, 29 L.Ed. 264 (1885); State v. Cline, ... Okla. ...., 322 P.2d 208 (1958).
7. Surplus Trading Company v. Cook, supra note 2; Concessions Company v. Morris, 109 Wash. 46, 186 Pac. 655 (1919).
8. Exclusive legislation is held to be consistent only with exclusive jurisdiction, see United States v. Allegheny, supra note 3 at 652.
9. The cession of exclusive jurisdiction to the Federal government by authority of a state consent statute may be held invalid to the extent that it is violative of a state constitution, prohibiting alienation of the power to tax. States having such constitutional provisions deny that the Federal Constitution, in granting exclusive jurisdiction to Congress through state legislative consent, could or was intended to

Although acceptance by federal authority is impliedly required by the state consent statutes, in order to vest federal jurisdiction, this is presumed[10] in the absence of a disclaimer.[11] After acceptance, and without reservation on the part of the state, the state will be without jurisdiction within the enclave unless the federal government should refuse to accept exclusive jurisdiction,[12] cede back to the state some jurisdiction,[13] or consent to state taxation of private interests or private use of federal exempt property therein,[14] or unless the land be used for purposes other than that provided for within the constitutional provision for which acquired.[15]

State consent statutes are to be strictly construed and relinquishment of the state taxing power will not be presumed unless the language in which the surrender is made is clear and unmistakable.[16] General statutory consent statutes enacted by many states allowing the federal government to purchase lands with consent of the state without expressly ceding exclusive jurisdiction to the federal government, have been held insufficient to divest the state of concurrent jurisdiction.[17]

---

empower the state legislature to give this consent notwithstanding state constitutional prohibition. International Business Machine Corporation v. Evans, 213 Ga. 333, 99 S.E.2d 220 (1957); the purpose of the requirement of consent in Article I, Section 8, Clause 17 was not held to authorize the states to cede jurisdiction, since they would have had this power in the absence of any specific constitutional provision. Fort Leavenworth Railroad Company v. Lowe, 114 U.S. 525, 540-1, 5 S.Ct. 995, 29 L.Ed. 264 (1885); but rather to protect the state by making consent a prerequisite to the exercise of exclusive federal jurisdiction, 5 Elliott, The Debates in Several State Conventions on Adopting The Federal Constitution 511 (1881).

10. Robbins v. United States, 146 U.S. 325, 13 S.Ct. 60, 36 L.Ed. 991 (1892).

11. Silas Mason Company v. State Tax Commissioner, 302 U.S. 186 at 207, 58 S.Ct. 233, 82 L.Ed. 187 (1937); Yellowstone Park Transportation Company v. Galatin County, 31 F.2d 644 (1929).

12. Wilson v. Cook, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 818 (1946).

13. See the Buck Act enacted by Congress in 1940, Title 4, U.S.C.A. §§ 105-110, which contains the following provision: "No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by a state . . . on the ground that the sale or use, with respect to which such tax is levied, occurred whole or in part within a Federal area; and such state or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such state to the same extent and with the same effect as though such area was not a Federal area." Davis v. Howard, 302 Ky. 149, 206 S.W.2d 467 (1947); McKee v. Bureau of Revenue, 63 N.M. 185, 315 P.2d 832 (1957). See also the Lea Act, 4 U.S.C.A. § 106.

14. Offutt Housing Company v. Sarpy, 351 U.S. 253, 76 S.Ct. 814, 100 L.Ed. 1151 (1956).

15. When land procured under Article I, Section 8, Clause 17 by consent of the state or by condemnation for a purpose public and is not so used, the legislative power of the state over the places acquired will be as full and complete as over any other place within her limits, Mississippi River Fuel Corporation v. Fontenot, 234 F.2d 898 (1956), certiorari denied, 352 U.S. 916 (1956); Nikis v. Commonwealth of Virginia, 114 Va. 618, 131 S.E. 236 (1926). In James v. Dravo Contracting Company, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 125 (1937) it was held that a narrow construction of the statute is rejected as being inconsistent with the broad purpose of the Constitution which gives the federal government powers and duties other than that of providing for the National defense, and the phrase "other needful buildings" has been construed as embracing whatever structures are found to be necessary in the performance of the functions of the federal government.

16. 91 C.J.S., United States § 7, Note 59, P. 21, Wilson v. Cook, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 818 (1946);

17. Ryan v. State, 188 Wash. 115, 61 P.2d 1277, 1281 (1936).

Lands acquired without the consent of the state do not vest the federal government with exclusive jurisdiction to tax.[18] When lands are acquired by condemnation or eminent domain, and forts, arsenals, magazines and dockyards, or other public buildings are erected for the use of the federal government, such buildings with their appurtenances, as instrumentalities for the erection of its powers, will be free from any such interference of the state as would destroy or impair their effective use for the purposes designed.[19] And the state may cede to the United States exclusive jurisdiction in a manner not prescribed in the constitution or may prescribe conditions to the cession, if they are not inconsistent with the effective use of the property for the purposes intended.[20] But where the state has ceded exclusive jurisdiction and has reserved no power with respect to taxation, it may not thereafter impose a tax.[21]

Where the United States acquires land from the state for purposes not specified in the constitution by purchase with states consent, the United States has such jurisdiction over the land as may be ceded to it by the state. Where the United States acquires land from the state for purposes not specified in the constitution in any manner other than by purchase with the states consent, the United States holds the land just as any other proprietor, except that the land itself may not be taxed by the state.[22]

Land owned by the United States within a state admitted to the Union, passes to the state on admission and the federal government will only have such jurisdiction in the premises as it expressly reserved when the state was created.[23] Without reservation, the federal government will only have such jurisdiction as is ceded back by the state.[24]

The federal government may also acquire land underlying navigable streams under power conferred by congress by Article 1, Section 8, Clause 3, for purposes of construction of warves, piers, bridges, and dams and other

18. St. Louis-San Francisco Railroad Company v. Satterfield, 27 F.2d 586 (C.C.A. 8th 1928); Kohl v. United States, 91 U.S. 367, 23 L.Ed. 499 (1875).
19. Fort Leavenworth Railroad Company v. Lowe, 114 U.S. 525, 5 S.Ct. 995, 29 L.Ed. 264 (1885); see also Kohl v. United States, Ibid.
20. Fort Leavenworth Railroad Company, supra note 15; Surplus Trading Company v. Cook, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091 (1930); State v. Cline, ... Okla. ...., 322 P.2d 208 (1958).
21. Standard Oil Company of California v. People of State of California, 291 U.S. 242, 54 S.Ct. 526, 78 L.Ed. 775 (1934). There is, however, some authority to the effect that where a state has ceded exclusive jurisdiction to the federal government in a manner not provided for in the federal Constitution, the state laws in effect at the time of the cession and not inconsistent with the federal laws and use thereof by the federal government will persist until repealed by Congress, in re Ladd, 71 Fed. 31, 38 (C.C.D. Neb. 1896); Chicago R.I. and Pac. Ry. Co. v. McGlinn, 114 U.S. 542, 5 S.Ct. 1005, 29 L.Ed. 270 (1885); Arlington Hotel Company v. Fant, 278 U.S. 439, 49 S.Ct. 227, 73 L.Ed. 447 (1929).
22. Ryan v. State, 188 Wash. 115, 61 P.2d 1277, 1281 (1936).
23. Fort Leavenworth Railroad Company v. Lowe, 114 U.S. 525, 5 S.Ct. 995, 29 L.Ed. 264 (1885); St. Louis-San Francisco Railroad v. Satterfield, 27 Fed. 886 (C.C.A. 8th 1928).
24. Rogers v. Squier, 157 F.2d 948 (C.C.A. 9th 1946); State v. Cline, ... Okla. ...., 322 P.2d 208 (1958).

facilities aiding and advancing navigation and commerce.[25] The exclusive power of the federal government to regulate commerce which extends to the navigable waters of the country and to lands beneath them, did not give to the federal government exclusive jurisdiction thereover, except in matters relating to regulation of commerce and navigation.[26] Title to lands underlying navigable waterways passed to the states upon entry into the Union by virtue of their sovereignty, and the state is free to exercise exclusive legislative jurisdiction in all other matters within its territorial boundaries to the extent that it does not interfere with the federal purpose of regulating commerce and navigation, except in such instances as it has in some manner relinquished jurisdiction to the federal government.[27]

The states may, therefore, in the absence of a cession of exclusive jurisdiction, tax private property and private interests within federal property used in construction projects or other facilities located on such waters for the purposes of facilitating navigation and commerce. If the federal government is to prevent state imposition of property, use or income taxes on federal contractors on such waters, it must acquire the area without reservation of any taxing authority by the state or must immunize the activity and those involved thereon from taxation.

Where lands are within the exclusive jurisdiction of the United States, they are immune from taxation by a state and even private property or possessory interests thereon are not subject to state taxation.[28] However, assuming that the state does have jurisdiction to tax within a federal area and possesses the requisite statutory authorization, it may subject to taxation any possessory property interests therein that private individuals may hold.[29]

The states have the right to subject unpatented mining claims or possessory rights therein to an ad valorem tax.[30] Taxation of a mining claim even though unpatented is taxation of a possessory right asserted not by the United States, but by others not immune from taxation by the state.[31] The tax is not the same in this regard as tax on minerals in place or a tax on the fee simple title. It is the possessory interest which is taxable and not the mine itself, and the tax must of necessity be designed to tax that possessory interest else it may be objected to as a taxation of immune federal property.[32]

It is equally well established that the states may tax improvements on

25. Atkinson v. State Tax Commissioner, 303 U.S. 20, 58 S.Ct. 417, 82 L.Ed. 621 (1938).
26. Ibid.
27. Ibid.
28. Sheridanville Inc. v. Borough of Wrightstown, 225 F.2d 473 (3d Cir. 1955).
29. 84 C.J.S. Taxation, § 199; Paso Robles War Memorial Hospital District v. Negley, 29 Cal.2d 203, 173 P.2d 813 (1946).
30. Consolidated Uranium Mines Inc., 156 F.Supp. 24 (U.S.D.C.D. Utah 1957).
31. Ibid.
32. Ibid.

federal lands made by pre-emptioners, homestead and other claimants or occupants at their own expense.[33]

The states may tax lands and improvements entered under homestead reclamation acts even if the patent itself has not issued from the federal government.[34] Such lands and improvements, however, are not subject to state taxation until the equitable title has passed to the entryman and this occurs upon final proof and issuance of a final certificate showing that the entryman has performed all conditions precedent to the acquiring of title.[35] The patent is merely the formal grant following this procedure, being at the convenience of the land office and is often delayed. The situation is analagous to those instances where land over which the federal government had exclusive jurisdiction is sold to a private individual and the government retains legal title for security and the land being taxed to the private individuals under real estate taxes because the transaction was in reality a mortgage and the government a mortgagee and not the owner of the lands.[36]

Improvements made on federal lands held by private individuals under lease are taxable to the lessee as personal or real property if by the terms of the lease title to the same are in him with the right of removal up to the termination of the lease.[37] Without such provisions, and in such instances as improvements become property of the federal government as owner of the fee, the lands or buildings are not taxable to the lessee under ad valorem real property statutes. The United States consent to waiver of its immunity from taxation of real property is to the extent of permitting local taxation of a lessee's interest in government property, but such a statute is permissive only and no tax is possible unless local tax statutes provide for it,[38] and it has been held that a real property tax did not provide for taxation of the lessee's interest.[39]

The doctrine of tax immunity of the federal government which originated in the *McCulloch* case, remained intact for more than a century before beginning a phase of constant shrinkage. The most significant narrowing of this concept was effected in 1937 when the Supreme Court of the United States upheld a gross receipts tax upon a federal contractor engaged in federal construction, because it placed no direct burden upon the federal government.[40]

33. 61 C.J. p.364, note 33; Paso Robles War Memorial Hospital District v. Negley, 29 Cal.2d 203, 173 P.2d 813 (1946).
34. Irwin v. Wright, 258 U.S. 219, 42 S.Ct. 293, 62 L.Ed. 573 (1922).
35. Ibid.
36. Land O'Lakes Dairy Company v. Wadena County, 229 Minn. 263, 39 N.W.2d 164 (1949); S.R.A. v. Minnesota, 327 U.S. 558, 66 S.Ct. 749, 90 L.Ed. 851 (1936).
37. Dayton Development Ft. Hamilton Corporation v. Boyland, 133 N.Y.S.2d 831 (S.Ct. Kings County 1954).
38. Grumman Aircraft Engineering Corp. v. Bd. of Assessors of Town of Riverhead, 161 N.Y.S.2d 393, 2 N.Y.2d 500, 141 N.E.2d 794 (1957).
39. Fort Hamilton Manor Inc. v. Boyland, 173 N.Y.S.2d 90, 4 N.Y.2d 192, 149 N.E.2d 856 (1958).
40. James Dravo Contracting Company, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937).

Originally in a series of cases, the Court held that sales or excise taxes could not be collected on goods sold to departments or instrumentalities of the federal government on the theory that the burden fell ultimately on the latter,[41] or imposed on economic burden thereon.[42] By 1941 the impact of the economic burden on the federal government through the operation of the contract with the private individual was not considered paramount. The Court in *Alabama v. King Boozer*[43] upheld a state sales tax imposed not directly upon the government, but directly upon a government contractor for materials purchased by him for use in the performance of a government contract. The contract was cost-plus which provided that the United States would re-imburse the contractor for taxes paid. The Court declared that a state tax was not invalid merely because the economic burden of the tax would be shifted to the federal government through the operation of the contract.

Against this trend of restricting federal immunity from state taxation stand two Supreme Court decisions, *Kern-Limerick, Inc. v. Scurlock*,[44] and *United States v. Allegheny County*,[45] both of which have been distinguished on their facts.

The *Kern-Limerick* case involved as did the *Alabama* case, the imposition of a state sales tax on goods purchased by a federal contractor for use in fulfilling a cost-plus fixed fee contract. The tax was held unconstitutional as a direct imposition on goods purchased by the federal government.

The *Kern-Limerick* case has since been held to spell the outer limits of the *Alabama* case and has been distinguished from the latter in that pursuant to the terms of the contract, the contractor in the *Kern* case was only a purchasing agent of the federal government, and title to the goods passed directly to the United States from the vendor thus making the government the purchaser.[46] In the *King Boozer* contract, title was to vest in the federal government only after delivery of the materials to the contractor and an inspection by federal officials. Thus while the United States bore the economic burden of the state tax in each instance, the incidence or directness of the tax in the *Alabama* case fell on the contractor and not the United States.

41. Panhandle Oil Co. v. Knox, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928); Indian Motorcycle Company v. United States, 283 U.S. 570, 51 S.Ct. 601, 75 L.Ed. 1277 (1936).
42. See Indian Motorcycle Company v. United States, ibid.
43. 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941).
44. 347 U.S. 110, 74 S.Ct. 403, 98 L.Ed. 546 (1954).
45. 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209 (1944).
46. Armed Services Procurement Act, 62 Stat. 21, 41 U.S.C. (Supp. V.) § 157 et seq., "Material - Purchases": "(a) . . . equipment required for the accomplishment of the work under this contract shall be furnished by the contractor. The contractor shall act as purchasing agent for the government in effecting such procurement and the government shall be directly liable to the vendors for the purchase price." "(b) . . . title to all such . . . equipment . . . shall pass directly from vendor to the government without vesting in the contractor, and such title . . . shall vest in the government at the time payment is made therefore by the government or the contractor, whichever of said events shall first occur."

As a result of these cases and others, it is well established that taxes may be imposed on goods sold to as well as goods held by federal contractors in fulfilling federal contracts through the title vesting provisions of which the goods would ultimately but not directly vest in the federal government.

It has very recently been established in the Supreme Court of the United States, by three Michigan cases, that users of tax exempt property, title to which was in the federal government, whether in fulfillment of federal contracts or for use in their own commercial activities, could not avail themselves of the immunity of the federal government, and the use of the property was held taxable to them as the taxes imposed were designed to tax their interests and did not effect a tax directly on federal property.[47] To be a valid tax, the state must attempt to segregate the interest of the private person from that of the federal government and tax it, and the consent of the federal government is not necessary unless it be within a federal enclave in which the federal government has exclusive jurisdiction.

In *City of Detroit v. Murray Corporation,*[48] Murray corporation, a sub-contractor under a prime contract for the manufacture of airplane parts for the United States, was taxed upon personalty acquired for performance of the sub-contract by both city and county authorities. Title to the property assessed had passed to the United States. Murray paid the taxes under protest and brought suit to recover the taxes. The United States intervened claiming title to the property. The district court held that the property had been improperly subjected to the tax and the court of appeals affirmed; on certiorari from the United States Supreme Court, held, reversed. The constitutional right of tax immunity of the federal government is not infringed by local taxes the incidence of which fall upon the possession of government property.

The Murray Corporation relied on *United States v. County of Allegheny* which held that the state did not have the power to tax the property of the federal government.[49] The taxes in the *Murray* case were styled a personal property tax and Murray relied on this to support its contention that the taxes were actually levied against the property of the United States. The court explained that the *Allegheny* case was not controlling as the state there had not attempted to separate the taxpayers interest from that of the government.[50] The court in the *Allegheny* case had expressely reserved the question whether a state could tax a person possessing federal property for the possession and use of such property in

47. City of Detroit v. Murray Corporation of America, 355 U.S. 489, 78 S.Ct. 485, 2 L.Ed.2d 441 (1958); United States v. City of Detroit, 255 U.S. 466, 78 S.Ct. 474, 2 L.Ed. 424 (1958); United States v. Township of Muskegon, 355 U.S. 484, 78 S.Ct. 483, 2 L.Ed. 436 (1958).
48. 355 U.S. 489, 78 S.Ct. 485, 2 L.Ed.2d 441 (1938).
49. 255 U.S. 489 at 494 (1958).
50. Ibid.

connection with his own profit making. In the *Murray* case, however, there was state statutory authorization for the taxation of Murray's possessory interest in the federal property. The particular Michigan statute involved here did not expressly state that the person in possession is taxed "for the privilege of using or possessing" personal property, but the court felt that to strike down a tax because of such verbal omission would only prove a victory for empty formalisms.[51] The court felt that lawful possession of property was a valuable right when the possessor could use such for his own personal benefit and was therefore taxable to the individual if the requisite authority so provided.[52]

The general property tax of Michigan as well as the City of Detroit did provide that a lien would attach to the property for the failure to pay and that unpaid taxes would become a personal debt against the owner of the property.[53] The majority of the court did not consider these provisions controlling, but the dissent felt that they were significant in illustrating that the taxes were in fact taxes on the property itself and not on the privilege of possession.

In the two other Michigan cases, *United States v. Township of Muskegon*, and *United States v. City of Detroit*, the parties taxed were using either by lease or permit tax exempt real property of the federal government.[54] One of the lessees, Borg-Warner, was leasing from the government an industrial plant in Detroit for use in their private manufacturing business, and the other lessee, Continental Motors, was leasing another plant for use in fulfilling federal contracts. The property was held taxable to the lessees under Michigan real property law which provided that when tax-exempt property is used by a private party in business conducted for profit that person is subject to taxation to the same extent as though he owned the property.[55]

In sustaining the tax, the court held that a tax on the lessee's or permit holder's privilege of using tax exempt property for his own personal advantage is not a tax on the exempt property itself and therefore not uncontitutional.

51. The relevant statutory provisions are set forth in full in 6 Mich. Stat. Ann. §§ 7.1, 7.10, 7.81, Comp. Laws 1948, §§ 211.1, 211.10, 211.40, and Tit. VI, c. II, § 1 and Tit. VI, c. IV, §§ 1, 7, 26, 27, of the Charter of the City of Detroit. They provide in part that "The owners or persons in possession of personal property shall pay all taxes assessed thereon. . . . In case any person by agreement or otherwise ought to pay such tax, or any part thereof, the person in possession who shall pay the same may recover the amount from the person who ought to have paid the same."
52. Supra note 49 at 492.
53. Supra note 49 at 501.
54. Supra note 47.
55. Now complied in 6 Mich. Stat. Ann. 1950 (Supp. 1957) §§ 7:7(5) and (6). The act reads: An act to provide for the taxation of lessees and users of tax exempt property, Section 1. When any real property which for any reason is exempt from taxation is loaned, leased or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, such property . . . shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property.

It is significant that the Michigan statute providing for taxation of the lessees and user of tax exempt real property involved in these cases expressly provided that such taxes would not, if assessed against lessees, effect a lien against the property and would only effect a personal debt of the lessee when due.[56] Such provisions were expressly commented on in the majority opinion in upholding the position that the taxes were imposed not on the federal property but on the lessees for their use thereof. The court here unlike the *City of Detroit v. Murray Corporation*[57] case gave significance to these facts in determining that the tax was not levied on the property of the United States and declared that in so determining, it was necessary to consider all relevant factors involved in the nature of the tax.

It was argued on the part of the government and the corporations taxed, that since the tax was measured by the value of the property used, it should not be treated as anything else but a contrivance to lay a tax on the property itself. The court held, however, that such a reassuring device was neither irregular nor extravagant. It was believed that the act providing for such taxation was apparently designed to equalize the annual tax burden carried by private businesses using tax exempt property with that of other businesses using non-exempt property. The use of exempt property is worth as much as use of comparable taxed property during the same interval, and as such a permissible exercise of the taxing power of Michigan to so compute it.[58] A number of earlier decisions by the United States Supreme Court had supported this method of computing the amount of taxes for privilege of using tax exempt property.[59]

It can be said in conclusion, therefor, that for the most part intergovernmental tax immunity as it should be known remains and a tax which is a tax directly on federal immune property itself will be held unconstitutional and void. However, in so far as concerns private persons claiming immunity for the ordinary business operations connected with governmental activities, no implied constitutional immunity will be granted upon the basis of hypothetical interferences with governmental functions or by passing it off as a direct tax on federal property.

As regards the right of a state to tax private interests in federal property, it can be said generally that if the state is without jurisdiction to tax in a particular federal area, it will have authority to tax therein only when consented to by the federal government, and only to the extent so consented. If on the other hand, the state has jurisdiction therein all possessory interests of private individuals are taxable by the state if the authority granted the taxing authorities is sufficiently broad to cover such

56. 6 Mich. Stat. Ann. 1950 (Supp. 1957) §§ 7.7(5) and (6), section 2.
57. 355 U.S. 466 at 469 (1958).
58. Supra note 57 at 470.
59. Ibid.

interests, and this is equally true to all federal property, real or personal, held or used by private individuals for their own gain.[60]

Congress can, however, if and when it desires under its sovereign powers immunize any federal agency or activity from state taxation and thereby prevent even the taxation of private interests in federal property used or held under government contract, and thus could have changed in advance the outcome of the *Alabama* and *Dravo* cases.

GEORGE J. ARGERIS

PRIORITY BETWEEN MORTGAGES AND MECHANICS LIENS

In the Colorado decision of *Darien v. Hudson*,[1] the issue of priority arose between a purchase money mortgage and a mechanic's lien. The mortgagee had given the mortgagor additional funds to repair the house on the property and had the mortgage recorded immediately. The mortgagor failed to apply these funds for the improvements, and as a result mechanics liens were filed by the materialmen. The court held that the mortgage did not take priority over the lien claimants, even though recorded first. Before discussing the cases that are relevant to this problem, the Wyoming lien law and its interpretation should be considered.

Our Wyoming lien law was taken from Missouri. The three sections which are pertinent to this problem say in substance that a mechanic's lien shall attach to a building or improvement in preference to any prior lien or incumbrance upon the land; that such building can be sold and removed by the purchaser;[2] that a mechanic's lien shall be preferred to liens that attach subsequent to the commencement of the building or improvement;[3] and that a mechanic's lien shall not affect any lien, incumbrance or mortgage upon the land that was in existence at the inception of the mechanic's lien.[4]

These three sections were discussed in *Prugh v. Imhoff*.[5] The rule seems to be that a separate and distinct building or erection is required for the lien to have preference over an earlier mortgagee and where the lien results only from repairs or improvements, the mechanic's lien is not prior. As the court said in interpreting these sections, since a mortgage covers the building as well as the land, the lien for repairs, or improvements which are put upon such existing building, will be subject to the prior lien of the mortgage or deed of trust; otherwise, one's principal

60. Carson v. Roan-Anderson Co. et al., 342 U.S. 232, 72 S.Ct. 257, 96 L.Ed. 257 (1952).

1. Darien v. Judson, 134 Colo. 213, 302 P.2d 519 (1956).
2. Wyo. Comp. Stat. § 55-203 (1945).
3. Wyo. Comp. Stat. § 55-207 (1945).
4. Wyo. Comp. Stat. § 55-403 (1945).
5. 44 Wyo. 143, 9 P.2d 152 (1932).