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CONSENT OF STATE AS AFFECTING JURISDICTION IN MUNICIPAL BANKRUPTCY

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THE attempted, now perhaps successful, extension of the federal bankruptcy power over the political subdivisions of the states has given rise to much legal controversy. This controversy has its foundation in the political conception of states rights which, when applied in the field of constitutional law, creates the principle that the powers of the federal government may not be exercised in such manner as to interfere with the sovereignty of the states.

When Congress passed the municipal bankruptcy law in 1934, the cry of interference with state sovereignty was immediately raised. In the case of *Ashton vs. Cameron County Water Improv. Dist.*, (80 L. ed. 1309), the Supreme Court gave heed to the cry and the act was declared unconstitutional in a hotly disputed decision.

Regardless of this ruling, Congress did not feel that assistance under the bankruptcy power to distressed political subdivisions, was without the pale of its jurisdiction. So on August 16, 1937, Congress amended the bankruptcy law and added thereto Chapter X which provided for the composition of the indebtedness of the taxing agency and instrumentalities of the states. Upon a challenge to its constitutionality, this act fared better than its predecessor, and in the case of *United States vs. Bekins* (82 L. ed. 751), its constitutionality was affirmed.

Growing out of these two laws and the opinions of the Supreme Court is the interesting question of whether the consent of the state is a condition precedent to the operation of Chapter X. The majority opinion in the Ashton case adjudicated its immateriality. Justice McReynolds said: "Neither consent nor submission by the states can enlarge the power of Congress." However, in a dissenting opinion written by Justice Cardozo and concurred in by Chief Justice Hughes and two other members of the court, the view is expressed that the act will not disturb the equilibrium between state and national power; the element of consent being the weight that preserves the balance. This dissenting opinion of Justice Cardozo becomes of present importance because under the intimation of the *Bekins* case, it may become a law.

Before going further with a discussion of these two decisions, let us briefly glance at the provisions of the two laws and compare them.

As to legislative purpose the laws cannot be identified. In each an attempt is made to bring the debtor-creditor relationship arising between the individual and the political subdivision under the control of the bankruptcy court, and to effect an involuntary impairment of the dissenting creditors obligation to the end that a composition of indebtedness becomes possible. From many aspects, justice is done. The defeat of a fair composition agreement by a selfish minority cannot be accomplished. A political subdivision stumbling in a hopeless mire of financial distress, can rehabilitate and relieve its landowner of impossible tax burdens, free perhaps to do the same thing over again and accomplish another legalized rape of the investor who seems always attracted like the moth to the flame. Many other considerations might suggest sound economic purpose, but this article is not written on that subject. It suffices to say that the laws have, apparently, a legitimate purpose.

The laws are closely associated in the matter of procedure. Under both laws the municipality or political subdivision can proceed only on its voluntary petition. Both require that the petition be filed in good faith, and that the political subdivision have authority under the laws of the state to carry out the plan. Chapter IX required acceptance of the plan by 30 per centum of the creditors in the case of irrigation, drainage, reclamation, and levee districts, and 51 per cent in case of all other districts, providing, however, that the 30 per cent clause was not applicable when a loan has been offered by an agency of the United States. Chapter X requires that 51 per cent of the creditors of the district shall approve the filing of the petition and 66 2/3 per cent shall approve the plan. Under each law, the creditors are given a right to present the objections at a hearing for such purpose, and in each case the judge is to approve the plan only if he is satisfied it has been filed in good faith and is fair to all parties concerned.

A careful study of the provisions of these laws fails to reveal, at least substantially, that the latter act invades state sovereignty less than the former. Both purpose a composi-

tion of indebtedness; both bring the state agency under the jurisdiction of the bankruptcy court to accomplish this end, and both suspend the creditors remedies under the state law while jurisdiction is retained. The inclusion in the latter law of provisions requiring the assent of a greater number of creditors to the filing of the petition and the approval of the plan would not lessen interference.

In the *Bekins* case, Chief Justice Hughes distinguishes the *Ashton* case by quoting the report of the Senate Committee on Chapter X. This report consists mostly of conclusions. Neither the report nor the opinion specifically point out wherein Chapter IX offends, and Chapter X fails to offend. Perhaps the committee is right when it says "the bill here recommended for passage expressly avoids any restriction on the powers of the states or their arms of government in the exercise of their sovereign rights and duties." But the applicability of the statement seems as pointed in relation to Chapter IX as to Chapter X. The conclusion is warranted that there is as much interference with state sovereignty in one law as the other. To the writer the differencs are those of words and not of substance.

With these considerations in mind, let us examine the opinion of the court in the *Bekins* case. It should be observed that this case involved a petition under Chapter X of an irrigation district organized under the laws of California. Under a statute passed in 1934 by the California legislature, consent was given to any taxing district in the state to file the petition mentioned in the "Federal Bankruptcy Statue." Certain bonholders of the district moved to dismiss the petition on the grounds that Chapter X of the bankruptcy act violated the fifth and tenth amendments to the Constitution of the United States. The district court held the statute invalid, considering itself bound by the decision in the *Ashton* case.

No doubt, in the briefs and arguments of counsel for the objecting bondholders, the contention was made that the Act was unconstitutional because it did not expressly require the consent of the states, and that even though such consent had actually been given in this case, nevertheless, this express provision was essential to its validity. The court held that an express provision was nonessential, but implies that the ques-

tion of whether consent is necessarily an open one. The court said: "It is unnecessary to consider the question whether Chapter X would be valid as applied to the irrigation district in the absence of the consent of the state which created it, for the state has given its consent. We think that this sufficiently appears from the statute of California enacted in 1934."

In a later part of the opinion the court reserves its judgment on the essentiality of consent by resolving the question for decision in this language:

"We are thus brought to the inquiry whether the exercise of the federal bankruptcy power in dealing with a composition of the debts of the irrigation district, upon its voluntary application, and with the states' consent must be deemed to be an unconstitutional interference with the essential independence of the state as preserved by the constitution."

In several other instances the Chief Justice indicates the significance of consent. He says:

"While the instrumentalities of the national government are immune from taxation by a state, the state may tax them if the national government assents, and by a parity of reasoning the consent of the state could remove the obstacle to the taxation by the federal government of the state agencies to which the consent applied.

"The bankruptcy power is competent to give relief to debtors in such plight and, if there is any obstacle to its exercise in the case of districts organized under the state law, it lies in the right of the state to oppose federal interference. The state acts in aid, and not in derogation, of its sovereign powers. It invites the intervention of the bankruptcy power to save its agency which the state is powerless to rescue. Through its cooperation with the national government the needed relief is given. We see no ground for the conclusion that the Federal Constitution, in the interest of state sovereignty, has reduced both sovereigns to helplessness in such a case."

In this language we must notice the striking similarity to the dissenting opinion of Justice Cardozo in the *Ashton* case. The above analogy of Chief Justice Hughes to the taxing power was also made by Justice Cardozo when he said "Persuasive analogies tell us that consent will preserve a balance threatened with derangement. A state may not tax the instrumentalities of the central government. It may do so, however, if the central government consents." Thus throughout the entire opinion in the *Bekins* case, Chief Justice Hughes never seems to escape from the persuasion of the dissenting opinion in the *Ashton* case, in which he concurred.

Notice should be taken of that paragraph of the decision, which indicates that consent is immaterial. It is as follows:

> "Our attention has been called to the difference between Section 80 (k) of Chapter IX, and Section 83 (i) of Chapter X, of the Bankruptcy Act in the omission from the latter of the provision requiring the approval of the petition by a governmental agency of the State whenever such approval is necessary by virtue of the local law. We attach no importance to this omission. It is immaterial, if the consent of the State is not required to make the federal plan effective, and it is equally immaterial if the consent of the State has been given as we think it has in this case."

This statement can be reconciled with the language of the case suggesting the importance of consent. It is easy to believe that the approval by a governmental agency of the state is unimportant, for that is something far different than consent as manifest by an act of the State Legislature.

There are those who will argue that the *Bekins* case holds specifically that Chapter X is not an interference on state sovereignty and that the question of consent was foreclosed by the majority opinion in the *Ashton* case. But why then does the court say that they do not decide the question of whether the law would be operative in the absence of the state's consent? Why do they draw analogy with the tax cases where the presence or absence of consent absolutely determines the operation of the law? Why do they thread consent through the theory of practically every other paragraph of the decision? Perhaps the answer is that the court is laying the foundation for a subsequent pronouncement, when the question is brought before it in a proper case, that jurisdiction under the act is dependent upon the state, first having given its consent. Perhaps the court is intimating that the Act is effective until the state expresses its disapproval, however, this presupposes a presumption of consent which would indeed be a violent one. Perhaps these statements are mere dicta which we have misconstrued and the statement in the *Ashton* case is still the law.

The answer appealing most to me is that jurisdiction depends upon consent. Governmental harmony seems best preserved by allowing the state to decide whether its children shall run to the bankruptcy court and wash their hands. By

this alternative, the jealous Guardians of states' rights have little left to argue about except principle, and the federal government divides the culpability of the action, as some bondholders describe it, with the state legislature.

Whatever may be the merit or lack of merit of the question raised, there is one thing certain, that it is the last possible contention which the bondholders, in states not having a consent statute, may assert against this legislation.

DOMESTIC RELATIONS

BONYNGE, J., *on Marriage and Allied Matters. New York State Bar Assn., March 10, 1937*

Plaintiff wife sought to annul marriage because husband refused to fulfill his promise to go through with a religious ceremony after a civil marriage. The plaintiff swore that there was no cohabitation following the civil rites. The court, after remarking that the case was one of several similar cases tried at the January term, observed:

"Such a recrudescence of religious fervor in the present age tends to tax the credulity of the court. Nor are its doubts allayed by the extraordinary lack of ardor and curiosity manifested by these young benedicts, or the quite exceptional fortitude and virtue displayed by the females of the species. In a word, the stories sound fantastic and unbelievable. However, truth is sometimes stranger than fiction, and it may well be that the nuptial couch has ceased to serve its time-honored function. In the face of recent warnings, old-fashioned jurists must not permit their antediluvian ideas to impede mankind's headlong progress toward the almost perfect state. Either they must streamline their ideas or be denied the privilege of earning even so little of their salt as they are said to merit nowadays. Already beauticians and surgeons are chortling at the profits of face-lifting and glandular operations in prospect for judges who hope to baffle their eager successors. Hence if the plaintiff will submit to a physical examination by a physician to be designated by the court, and his findings corroborate her claim that the marriage was never consummated, the court will defer to his superior wisdom. Otherwise the complaint will be dismissed." (*B. v. B.*, Sup. Ct., Special Term, Pt. V, Kings County, Bonynge, J., Feb. 17, 1937.)