

the provision in question is reasonable is made more probable by the fact that it had been adopted and sustained not only in Texas but in other States. *Grayburg Oil Co. v. Powell*, 118 Texas 354; *Lewis v. South Pacific Coast R. Co.*, 66 Cal. 209; *Cook v. W. S. Ray Mfg. Co.*, 159 Cal. 694; *Central Georgia Power Co. v. Stubbs*, 141 Ga. 172; *Begley v. Mississippi Valley Trust Co.*, (Mo.) 252 S. W. 84; *Morrinac Veneer Co. v. McCalip*, 129 Miss. 671, 683. We cannot say that it is not.

Order dismissing appeal vacated and judgment affirmed.

ALABAMA *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 82. Argued January 29, 1931.—Decided February 24, 1931.

A suit against the United States by a State to recover the amount of a privilege tax, with interest and penalty, the tax being based on a sale by the United States of surplus power generated at its hydroelectric plant in the State, *held* not within the jurisdiction conferred on the Court of Claims by Jud. Code, § 145, over claims founded upon the Constitution, upon any contract, express or implied, with the Government, or for damages arising in cases not sounding in tort. P. 506.

69 Ct. Cls. 340; 38 F. (2d) 897, reversed.

CERTIORARI, 281 U. S. 718, to review a judgment dismissing on the merits a claim which, the opinion holds, should have been dismissed for want of jurisdiction.

Messrs. Thomas E. Knight, Jr., Attorney General of Alabama, and *Oscar W. Underwood, Jr.*, with whom *Messrs. A. A. Evans* and *Charlie C. McCall*, Assistant Attorneys General, and *H. C. Kilpatrick* were on the brief, for petitioner.

In the exercise of granted powers by the Federal Government and of reserved powers by a State, the two sovereignties are upon an equality. *Collector v. Day*, 11

Wall. 113, 126, 127; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 521; *Texas v. White*, 7 Wall. 700, 725.

Whenever the Federal Government engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the State within which the business is carried on. *South Carolina v. United States*, 199 U. S. 437; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 157; *Bank of North Dakota v. Olson*, 33 F. (2d) 848.

Particularly is this true where the levying of the tax will not hamper or cripple the Federal Government in the direct and immediate performance of an essential governmental function. *Osborn v. U. S. Bank*, 9 Wheat. 740, 860, 866-7, 868; *National Bank v. Commonwealth*, 9 Wall. 353, 362; *Metcalf & Eddy v. Mitchell*, *supra*, 522, 523-4.

The State is entitled to recover upon the basis of an implied contract. There is a strong analogy in the cases requiring the United States, under an implied contract, to pay for private property which it takes for public use. *United States v. Lynah*, 188 U. S. 445; *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 656.

If it should be found that the State has the right to tax the United States for manufacturing and selling hydro-electric power, a cause of action, springing from the constitutional duty of the United States to pay the tax to the State, and based upon implied contract and within the terms of the Judicial Code, could logically be found, even though the contractual element were as slight as it was in the cases cited.

Under *United States v. Louisiana*, 123 U. S. 32, the Court of Claims is open to the States. It seems proper that they should be allowed to come in with the causes of action which are peculiar to them, as well as with those which are common with citizens, provided their peculiar causes are of the general types found within § 145 of the Judicial Code.

In essence the present claim is of the same character as claims by private citizens which have been sustained by this Court. *United States v. Palmer*, 128 U. S. 262, 269; *United States v. Berdan Firearms Co.*, 156 U. S. 552, 567, 568.

We are not asserting a contract implied in law, but a contract implied in fact, namely, implied from the facts that the United States manufactured and sold the power knowing the meaning of the Constitution, and therefore expecting to pay the tax, and that the State permitted the manufacture and sale expecting to collect the tax.

Two additional bases for recovery seem to be provided: (1) "Claims for damages, liquidated or unliquidated, in cases not sounding in tort." *Dooley v. United States*, 182 U. S. 222, 224; *United States v. Cornell Steamboat Co.*, 202 U. S. 184; *United States v. Morgan*, 99 Fed. 570; *Chappell v. United States*, 34 Fed. 673. The word "damages" is one of the broadest possible definition. (2) The claim is one "founded upon the Constitution of the United States." This provision covers claims under the Tenth Amendment to the Constitution as well as those under the Fifth Amendment. By the Tenth Amendment the inherent sovereign power of the State to collect taxes is reserved and is acknowledged, as clearly as if that power were specifically mentioned in the Amendment; so the power of the State to collect taxes is as much a part of the Constitution as is the Fifth Amendment. Cf. Justice Brown's concurring opinion in *United States v. Lynah*, 188 U. S. 445, 474-477; *Phelps v. United States*, 274 U. S. 341.

Solicitor General Thacher, with whom *Assistant Attorney General Rugg* and *Messrs. Bradley B. Gilman* and *Erwin N. Griswold* were on the brief, for the United States.

A tax is not the result of agreement. As stated in *Russell v. United States*, 182 U. S. 516, 530, to give the

502

Opinion of the Court.

Court of Claims jurisdiction, the demand sued on must be founded on a convention between the parties—"a coming together of minds."

A tax obligation is sometimes loosely spoken of as a debt, but it is not a debt based upon any contractual relationship. *Cooley*, Taxation (4th ed., 1924), § 22; *Camden v. Allen*, 26 N. J. L. 398; *Perry v. Washburn*, 20 Cal. 318; *Carondelet v. Picot*, 38 Mo. 125; *Nebraska City v. Gas Company*, 9 Neb. 339; *Pierce v. Boston*, 3 Metc. (Mass.) 520; *Peter v. Parkinson*, 83 Oh. St. 36; *Lane County v. Oregon*, 7 Wall. 71; *Meriwether v. Garrett*, 102 U. S. 472, 513; *Liberty Mut. Ins. Co. v. Johnson Shipyards Corp.*, 6 F. (2d) 752; *St. Joseph Land Co. v. MacLean*, 32 F. (2d) 984; *United States v. Minnesota Investment Co.*, 271 U. S. 212, 217.

An implied contract, in order to give the Court of Claims or a District Court under the Tucker Act jurisdiction to give judgment against the Government, must be one implied in fact and not one based merely on equitable considerations and implied in law. To the same effect are: *Merritt v. United States*, 267 U. S. 338, 340; *Sutton v. United States*, 256 U. S. 575, 581; *Tempel v. United States*, 248 U. S. 121.

It is true that an action of debt or assumpsit may, under many circumstances, be brought for the recovery of a tax from a private party. See *United States v. Chamberlin*, 219 U. S. 250. But the fact that a private individual would be liable, under the same circumstances, in an action of assumpsit, does not bring the case within the jurisdiction of the Court of Claims. *Goodyear Tire & Rubber Co. v. United States*, 276 U. S. 287, 293.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought in the Court of Claims by the State of Alabama to recover from the United States a

tax imposed by the law of the State upon the privilege of manufacturing and selling hydro-electric power, together with interest at eight per cent. and a penalty of fifteen per cent. for failure to pay the tax when due. The claim is based upon a sale by the United States of the surplus power generated by it at its dam at Muscle Shoals, Alabama, under the Act of June 3, 1916, c. 134, § 124; 39 Stat. 166, 215. The Government demurred on the ground that the petition does not set forth a cause of action within the jurisdiction of the Court. The demurrer was sustained and the petition dismissed upon its merits. A writ of certiorari was granted by this Court. 281 U. S. 718.

We are of opinion that the petition should be dismissed, not upon the merits, which would import jurisdiction to deal with them, but for want of jurisdiction under the Act establishing the powers of the Court of Claims. Judicial Code, § 145, U. S. Code, Title 28, § 250. That jurisdiction extends to "all claims (except pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable; *Provided*" etc.

The contract to be recovered upon under § 145 Jud. Code must be an actual one, and, if implied, must be implied in fact, not merely implied by fiction, or as it is said, by law. *Baltimore & Ohio R. Co. v. United States*, 261 U. S. 592, 597. There is no ground for asserting an actual contract here. The State suggests that cases of property

taken by eminent domain furnish an analogy. But in those cases where there is a recovery the United States admits the title that it takes and in view of the Constitution reasonably is understood to promise the compensation that in such circumstances it is bound to pay. *Phelps v. United States*, 274 U. S. 341, 343. *International Paper Co. v. United States*, ante, p. 399. But here the United States has not admitted and does not admit the right of the State to tax it for its sales, and therefore does not by selling import a promise to pay for what, so far as appears, it does under a claim of right. Levying a tax does not create a contract. It is a unilateral act of superior power, not depending for its effect upon concurrence of the party taxed.

We do not see how the claim of the State can be said to be founded upon the Constitution. If the claim is valid, which we are far from implying, it is under the State's original powers as such, and the only bearing of the Constitution is that it did not take the power away. Neither do we regard the claim as one for damages in a case not sounding in tort within the meaning of the Act. There are few cases of this sort that cannot be brought under the head of a contract implied in law; and, it being established that such contracts are not within the jurisdiction of the Court of Claims, we think that this phrase cannot be extended to a controversy concerning the boundary between the two sovereign powers. The claim is not technically one for damages as was the claim in *assumpsit*. It is a claim for a tax that the United States never has promised to pay and for a penalty. It does not fall within the Act as it has been construed for many years.

Judgment reversed.

Petition to be dismissed for want of jurisdiction.