

POLITICAL DANGERS OF THE INCOME-TAX DECISION.

THE Income-Tax cases just decided will rank with the legal-tender cases and the electoral commission, as examples of the extraordinary power which one man may sometimes exercise under our system of government. Not only was a tax-law, out of which a return of \$30,000,000 annually had been expected, declared null and void by a single vote, but the question was so close that two judges changed in opinion on the reargument. On the first hearing six out of eight judges held the law void as to so much of one's income as is derived from rentals, while four only of them held it void as a whole. On the second hearing, a ninth judge being present, one of the six, together with the new judge, concluded that it was valid as to the rentals, and valid also as a whole. One judge, however, who had voted against it on the rentals question alone, now concluded to vote against it as a whole; and the final poll stood, therefore, five to four on each question. The decision of the court on the first hearing found not a single supporter on the second.

Like the legal-tender cases, again, the decision reversed the previous ruling of the same court upon a great and fundamental political question, which was the centre of a hot political controversy. It differs from those cases in that the decisions which it overrules were unanimous, and had long been acquiesced in.

It is the purpose here to consider, not the merits of the decision, but its probable effects. To do so, the decision itself, and the controversy decided, must first be explained. The case did not turn upon the points mainly discussed by the public. The charges so hotly urged against this income-tax, that it was ununiform and inquisitorial, counted for nothing. The tax, as the court decided that it should have been laid, would have been certainly less uniform and might have been no less inquisitorial.

The Constitution gives Congress the power to lay taxes and duties. It provides that direct taxes shall be apportioned among the several States according to their populations as shown by the census. It

puts no such restriction upon duties, which are, on the contrary, to be uniform throughout the United States. The court decided in 1880, in Judge Springer's case, by a unanimous vote of the seven judges then sitting, that an income-tax essentially like the late one was a duty and not a direct tax, and therefore valid. A similar ruling had been made in 1868, by a unanimous decision of the eight judges then forming the tribunal, upon the validity of a corporation income-tax; and in these and other cases the court had said that the definitions had been substantially settled as early as the case of Mr. Hylton's carriage-tax, in 1796. Congress, therefore, in enacting the revenue law of 1894, and providing that a certain portion of the existing deficit should be met by the proceeds of an income-tax, acted in reliance upon very clear and definite rulings of the Supreme Court itself. It could not have laid any tax with greater assurance of safety. It could not foreknow the future actions of the court. It had to shape its legislation by the decisions of the past.

Five judges now rule, however,—and these five are entitled to speak for the court,—that the seven of 1880 and the eight of 1868, that Chief-Justices Chase and Waite, Associate-Justices Nelson, Miller, Strong and Bradley and the rest, were all mistaken; and that an income-tax is a direct tax, not a duty. The argument by which this conclusion is arrived at is, of course, a historical rather than a legal argument. The point in issue is the meaning of certain words in the parlance of the eighteenth century. A considerable amount of material was laid before the court by the appellants' counsel, such as fragments of partially reported debates, controversial pamphlets, private letters, official reports. Some material was added by the research of the court; some, at the second hearing, by the Government, which, at the first hearing, had stood upon the decisions alone; some by volunteer newspaper contributors, who probably gave the court the benefit of their individual researches by means of marked copies. Much of this material will be found valuable by the historian. He will probably, however, regard the result as requiring further review on his own part, for the time was far from sufficient for such investigation as a historian would consider it necessary to devote to such a question, or as a lawyer or judge would under ordinary circumstances expect to spend upon it. The rehearing, for instance, which was not expected before October, was brought suddenly on upon thirteen days' notice; and such preparation as the Government was able to make upon these historical matters was made within that period.

Probably much evidence, of important bearing upon this question, will be found in the future.

The controversy first came up in 1794, when a duty on certain personal property (namely, carriages) was enacted over the protest of James Madison, who insisted that a tax on personal property was not a duty, but a direct tax. This duty was not on the manufacture, importation or sale of the carriage, but upon its use by the owner, whether kept for his private enjoyment or for hire. As to the latter it was thus an income-tax. At the instance, doubtless, of Mr. Madison and his friends, a test case was made up by Mr. Hylton, which was argued and decided in 1796. Of the four judges who concurred in the decision of that case, two had been members of the Constitutional Convention nine years before. One of the two was James Wilson; and he had also been, not only one of the five members of the Committee of Detail, which had taken so large a part in framing the Constitution, but even the spokesman for that committee on the matter of taxation. Unfortunately, he delivered no opinion in the Supreme Court, and his opinion in the lower court has not been preserved, so far as known. The court held the tax, though upon property, to be a duty, and therefore not a direct tax within the meaning of the Constitution; for, if a tax answered both definitions, the former should govern.

It will be noticed that the court used the word "duty" in a wider sense than the sense now familiar. The word is now, and in some States was then, used as equivalent to "impost" or customs duty. In the Constitutional Convention, nine years before, Luther Martin, the Attorney-General of Maryland, had asked the Committee of Detail why the word "duties" was used in addition to "imposts" in the draft Constitution. Mr. Wilson had answered that it had a wider signification, extending "to a variety of objects, as stamp duties," etc. Martin had then reported to his legislature that there was a very broad power of taxation lurking here; and the matter was doubtless one discussed in the ratifying convention of that State. One of the leading members of that convention was Samuel Chase, and he, as a Supreme-Court Justice in Hylton's case, calls attention to the breadth of this definition, and says that it comes from England. But the English definition of the word "duty" was very broad indeed. It comprised *every tax not laid by a rule of apportionment*. Among the familiar duties, besides the duties of impost and excise, were those on inhabited houses, windows, shops, man-servants, coaches, offices and pensions; and also the stamp duties, which included bonds

and mortgages, leases and conveyances, with probates of wills, insurance policies, newspapers, etc. This broad definition, as the Government maintained in the cases just disposed of, was the one applicable to the American Constitution; the puzzling clauses of that document, so far as they related to property taxes, meaning simply that all apportioned taxes should be apportioned according to population, and that all other taxes should be uniform throughout the United States.

Certain prominent gentlemen, however, were dissatisfied with the decision of Hylton's case when it was announced, and either protested against it, or argued that it should be narrowly interpreted. They took the point of view of the new political economy taught by Adam Smith, and thought that "direct tax" rather than "duty" should be the governing phrase. Among these were Madison and Gallatin, and probably John Marshall. The same view has now been adopted by a majority of the present Supreme-Court justices, for reasons set forth in their opinions; and, if I understand their decision aright, the word "duties" in the Constitution is to be confined for the future, at least so far as property-taxes are concerned, to imposts (or customs duties) and excises. The word "excise" is not to be understood in its broader sense, as then understood in Massachusetts and explained in Congress by Fisher Ames, including taxes *on the use* of personal property; for that would include income-taxes. It must be confined to its strict definition, comprising only taxes on the manufacture or sale of merchandise, and also, perhaps, on the sale of real-estate. Whether the duties on occupations and the like still exist in our constitutional system, the court leaves undecided.

Among the many duties revived by Congress during our civil war as means of supporting the Union, and which would seem to be no longer available, are the duties on descents and devises of real property; on legacies and distributive shares of personal property; on carriages, yachts, billiard-tables, watches, musical instruments, and gold and silver plate; on bonds and mortgages, on stocks, and on deeds and leases of land. The duties on the net incomes of corporations (as measured by the interest paid on their bonds, the dividends paid on their stock and the sums carried annually to surplus account), must hereafter be subjected to large deductions, if they can be renewed at all.

The reasoning of the court, in fact, exempts all wealth from effective Federal taxation. For nobody denies that taxation on so large a scale by a system of apportionment is a lame and unsatisfactory

proceeding at the best, sure to be seldom tried and little relied upon. Even in the case of a land-tax, it has not proved well fitted for emergencies. The Federal Government has never attempted to reach personal property in this way; nor can it be doubted that such an attempt would be a failure.

Suppose an attempt to levy an income-tax by apportionment, exempting small incomes, as must be done in any proper income-tax. The total amount of money to be raised must first be fixed. Then it must be divided up among the States in proportion to their population. Then the number of incomes in each State over the given amount must be ascertained and the quota of that State assessed upon the incomes *pro rata*. This would be unfair enough even if an income were a definite object with a fixed location, like a house. The taxpayers in some States would pay two or three times as much as taxpayers in other States. An income, however, is not a tangible object, nor has it any fixed location. It is usually regarded by legal fiction as belonging wherever its owner chooses to plant his "legal residence." A large income thus wanders from county to county or from State to State, often for the sole purpose of avoiding taxation. One wealthy man moves into Rhode Island for that purpose; another into New Jersey. Moreover, under a system of apportionment many large incomes could never be reached at all. A woman, who is also a millionaire, marries an English duke or a French count. Her income, though entirely the product of American labor, instantly becomes free of taxation under such a system. Queer questions also arise. A man gets rich in Nebraska, invests his property in land there, and lives on the rents. Then, in order to escape taxation, or to get into "society," or for whatever other reason, he moves to New York, or to Rhode Island, or to the District of Columbia. The court holds that a tax on rents is a tax on the land rented. Is his income to be taxed in Nebraska or at his new residence?

The principle of apportionment is grossly unfair as well as impracticable. The industries of our nation are closely intertwined. Each section is partly dependent on the others for its support. Wherever the men with large incomes choose to settle themselves, the incomes which they enjoy are really the joint product of the industry of the entire nation. Each man should, therefore, pay his own share; and to apportion according to legal residence would be to make a sectional tax, discriminating in favor of those parts of the country where wealthy people like to congregate.

It may safely be assumed that the nation will levy no income-taxes under this new theory of the Constitution. Nor can the States levy such taxes efficiently. The sources of a large income are often scattered all over the Union, and the State which its fortunate possessor selects to reside in cannot tap them. To make the tax efficient the owner and his property should both be within the jurisdiction. State income-taxes never have been successful, and the result of this decision is probably to release individual incomes from all effective taxation.

What are its practical consequences? Will it actually embarrass the operations of the Federal Government? It is easy to make light of such a decision in times of peace, when we have immense revenues from customs duties to help us along. But shall we always be at peace? And can we count upon the customs duties in times of war? Many prominent men—Senators, Representatives, journalists and aspirants for high office—would like to see us plunge right off into a war with the Kingdom of Great Britain and Ireland. Let us assume that they succeed in getting us to do so. Let us assume that no other nation is dragged into the war against us; that no injury is done to our commerce by hostile fleets; and that our customs duties therefore remain as productive as ever upon imports from neutral nations. Still, we lose at once our revenue from the products of the British Empire, two-fifths, say, of the custom-house receipts. Add to this deficit the expenses of the war, and we have the problem confronting the Secretary of the Treasury,—How is the money to be got? It will be wanted quickly, not by any slow process of apportionment and valuation. Doubling the existing duties would be no safe reliance. As customs duties are raised, their product is apt to decline. Excises will of course multiply. Heavy duties will be laid on gross receipts from transportation, most of which, like our present duties and excises, will rest on the shoulders of the poor man. But will this suffice to make up the share which ought to be borne in such a war by the present generation? That will be the problem. And as the Supreme Court has closed the door upon wealth, perhaps the nation will find its way out through another door opened by the same court. Perhaps it will pay its way by a new issuance of greenbacks. Because the wealth of the country cannot be taxed effectively, the impositions upon the poor man will be

doubled, and an immense debt again established for his descendants to pay. Part of this debt will probably be in the shape of more fiat money, to plague rich and poor alike for a generation to come.

Moreover, in time of stress, it is most important that the nation may have recourse to taxes which will be both certain and elastic; in other words, to taxes which may be increased or diminished with some certainty as to the amount of money which will thus be obtained. This is the case with income-taxes. Great Britain, when it adds a penny in the pound to the tax, knows pretty nearly what additional revenue will come in. This is not the case with excises or customs duties, especially the latter. Increasing the duty on an imported article often means decreasing its importation. On the other hand, if the duty remains unchanged, or even is reduced, still its importation may decrease from decreased use or from growth of domestic manufactures.

I have said that excises and customs duties rest on the shoulders of the poor man. I mean the man of moderate means, whose income is exhausted in the support of himself and his family in a moderate degree of comfort. Excises and customs duties come mainly from articles of general consumption. It is admitted by most statesmen and economists that they are mainly paid by the man whose income mostly goes out in obtaining such articles; and that this man of moderate means, when the revenue of the country is derived entirely from such taxes, pays far more than his share in proportion to his income. This is especially the case with what are called "specific duties"; which, as John Stuart Mill said in England, are "a flagrant injustice to the poorer class of contributors, unless compensated by the existence of other taxes from which, *as from the present income-tax*, they are altogether exempt." So Senator Sherman in 1870 said that the income-tax of that day was "the most just and equitable tax that is now levied by the United States of America, without an exception," because it was the "only discrimination in our tax-laws that will reach wealthy men as against the poorer classes of people," who still "necessarily pay nine-tenths of all the taxes." This possibility of a balance between the poor and the rich is removed by the new constitutional interpretation.

Should the nation rest satisfied with its now restricted power? I do not think so. I do not think that it is good for the poor man to be overtaxed. I do not think that it is good in the long run for the

rich man, that the immense majority of the people in this country should have a just grievance against the fortunate holders of accumulated property. It is said that there are no classes in this country, and that class distinctions should never be alluded to. Unfortunately there is a distinction between rich and poor which cannot be wiped out under our present civilization. If individual ownership of accumulated property is a good thing—and I think it is, for if it were abolished, the elements of aspiration and hope would largely be taken out of life—then care should be taken that such property should bear at least its full share of every public burden. It should never be placed for a moment in the wrong.

It is said that there is really a balance struck in this regard by State and local taxation. That is true to a certain extent. Real property there bears a large part of the burden—but it is the real property of rich and poor alike. And personal property still almost wholly escapes. But assume that State taxes are a compensation in times of peace. Where is the compensation for the immense mass of additional taxation, nearly all laid by the Federal Government, in time of war? The volunteer army which marches out to protect all our property is filled up by poor men, or men of moderate means. Are they to bear as well a ninefold share of the expense, in proportion to their means? They are to bear it, unless the Constitution shall in some way be restored to the place where it was supposed to be for the first century of its life.

A way of restoring it has been suggested by the majority as well as by the minority of the court. The Supreme Court has no absolute and final veto upon legislation. It practically exercises, though with immensely greater power, the functions of the British House of Lords as at present recognized. It has a "suspensive veto." It can force an appeal to the people. Its veto cannot be overruled by a mere majority. But if there be a real defect in the Constitution, which the people really want to mend, it will sooner or later be mended by a constitutional amendment. If the practical exemption of wealth from the Federal taxing power is as repugnant to the people of to-day as I believe it would have been surprising to their ancestors of a century ago, then sooner or later the amendment will be made. It may be delayed by the immense influence which accumulated wealth now exercises upon political machines, upon journalism, and upon the other ordinary channels of agitation. But whatever is fair and right is bound to come.

There is another possible effect of this decision, worthy of grave consideration. I have already mentioned one point of similarity between the Federal Supreme Court and the British House of Lords. There is another. Both can be "packed" if the other branches of the Government wish a decision reversed. For this and other reasons it is of extreme importance that the Constitution should be regarded by the voters of the country as a thing fixed and immutable save by an amendment adopted by themselves,—as a form of government which can indeed expand and adapt itself to new phases of civilization, but which is not subject to alteration according to the varying personality of any single body of men, however august. This is of especial moment as to those constitutional provisions which have a political aspect. Much of the reverence paid to Supreme-Court decisions is due to the fact that, except in the damaging legal-tender cases, that court has, prior to the present year, so consistently followed the doctrine of *stare decisis* when expounding such provisions. The American people have been taught that the Constitution grows, but does not change, except when they themselves openly set to work to change it. The stability of our Government has become the wonder of the world.

It is because of this doctrine of *stare decisis*—standing to decisions—that the Supreme Court, though its membership has continually been replenished from the political world, has itself stood in the public esteem so far above all politics. It is thus that its development of the Constitution has met with respect and acquiescence, and that it has become the recognized bulwark of liberty, and of property, and of local self-government, against transient legislative aggression. Its position, so far apart from party conflict, has been almost unique, like the Speakership of the British House of Commons. Is it now to develop into something more like the Speakership of the American House of Representatives? I believe that that will be its destiny if often, at a time of high feeling and amidst newspaper clamor, it reverses past decisions and abandons principles of constitutional construction inherited from ancient times. Its authority once received a severe shock when it reversed the decision, only a year old, of a divided court. It now, by the casting vote of a single man, reverses two unanimous decisions of many years' standing, and in effect overrules a series of unanimous decisions reaching back for a century. Newspapers print the portraits of the majority with adulation, and of the minority with abuse;

and proclaim with anthems of praise the great principle that the Constitution is to be interpreted according to the judgment of the majority of the nine living members of the court, unfettered by the errors of their predecessors; that the document whose meaning was once fixed has become a shifting quicksand. I do not question this principle in point of law. It has become consecrated by the decision of the court. To supporters of the income-tax it shows a ray of hope. But is it fortunate that this is the law? I should have felt more confident of the correct answer to that question, were it not for some who have joined in the anthems.

I find it hard to divest myself of a fear that the new principle, if it shall receive any further application, will open a new era for the court. The reasoning which segregates the nine judges of to-day from the nine judges of thirty years ago, which charges the present judges with the responsibility of reviewing the errors of their predecessors, destroys the continuity of the court in the public mind. The same reasoning segregates each individual judge from his eight associates, and properly places his individual portrait at the head of the column which sets forth his individual opinion or records his individual change of mind. But the public is not satisfied with an unlimited veto-power in any individual. If the court establishes the doctrine of change, the people, by adding new justices, can control and direct the movement. They can bring up again this question of the taxability of wealth. That, probably, is inevitable. They can bring up again the national bank, the control of commerce, the legal-tender notes. They can inquire into the constitutionality of the Fourteenth and Fifteenth Amendments. When some new socialistic law is wanted, they can demand a convenient constitutional power from their packed Supreme Court, as a Congressional majority looks to its Speaker for a convenient parliamentary rule. Will wealth, for the present moment released from a small pecuniary assessment, profit or lose in the end by the new gospel of instability? It may be well for the wealthy reader, laying aside for an hour the newspaper which daily reflects his ideas, to think this question over by himself.

The Supreme Court decision did not turn upon any of the special objections raised to this particular income-tax. Hence a discussion of this tax, as distinguished from the ideal income-tax, is not appropriate here. The exemptions were unusually great, owing to amendments secured from the Senate by associations claiming to be *quasi-charitable* in character. Otherwise it differed from its prede-

cessors only in details. The lowest income taxed was \$4,000, that being assumed to be the upper limit of the incomes unfairly discriminated against by previous tariff and internal-revenue taxation. The limit of the income-tax of 1870 was \$2,000. That of the highest grade of the graduated income-tax of 1864, discussed in Judge Springer's case, was \$10,000.

The question whether an income-tax can properly be levied in time of peace is one that cannot be decided by a court. Congress is the judge of the necessity, at any given time, for any tax which can be levied at all. Our ancestors made many promises, when they were trying to secure the ratification of the Constitution, as to the rarity with which direct taxation would be imposed. As soon as they began work, however, they admitted that it was a subject as to which policy must be the only guide. Any tax levied may properly be called a war-tax so long as the Treasury is struggling with an immense annual deficit, where, but for pensions to veterans of the civil war, we should have an annual surplus of double the amount.

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