

## COMMENT.

In our last issue we referred briefly to Mr. Justice Hagner's decision on the Income Tax question, of which only a newspaper report was then available. Since then, we have seen the full official report of the opinion, and we think that a condensed statement of the objections taken to the tax, and the way they are disposed of by the Court, will usefully supplement our former review of the earlier objections and decisions on the subject.

The case was *Moore v. Miller, Commissioner of Internal Revenue*, and it prayed an injunction to restrain the defendant from collecting income tax from the complainant.

The bill contained five specific objections to the tax, viz: (1) Duplication; (2) Discrimination; (3) Inclusion of Aliens; (4) No exception of the incomes of corporations which, although carried on for profit, are instrumentalities and agencies of the State governments, and, as such, are not subject to taxation by the United States; (5) That assessments are to be made upon income earned and received prior to the time at which the provisions of the Act took effect.

The objection that the tax was in the nature of a direct tax, although adverted to by complainant's counsel, was not insisted on under the decisions in *Springer v. U. S.*, 102 U. S. 586, and *Pacific Co. v. Soule*, 7 Wall. 446.

The Court dealt with these specific objections as follows:

1st. As to Duplication, which is to be understood as referring to an assessment on income derived from dividends on stock in corporations, such corporations being themselves assessed on their profits.

The Court holds that it is fair to presume that the Treasury will enforce this provision of the Act in such a manner as to prevent a harsh construction. But it is settled law that, vexatious as a Duplication may be, it is not possible practically to avoid it in every case. No question of constitutional law is thereby raised, and the legislative control is complete.

2d. The exemption of incomes not exceeding \$4000 is not discrimination between citizens. The tax is uniform when it operates with the same force and effect in every place where the subject is found. There is no discrimination in the Act between

the different persons who are authorized to avail themselves of the \$4000 exemption; every person is equally entitled to its benefits.

3d. The inclusion of resident aliens in the provisions of the Act works no injury to the complainant, and a party applying for an injunction must show some personal grievance, actually existing or impending. Furthermore, the inclusion is justifiable because the protection of the government, to which such aliens are entitled, is the consideration for which taxes are demanded.

4th. The complainant not having alleged that he is interested, as a shareholder or otherwise, in such corporations as this objection refers to, again fails to show the personal grievance or injury that would entitle him to an injunction. But the statute does not in words, or by necessary implication, include such corporations, and, having no power to tax them, it is to be presumed that Congress did not intend to include them.

5th. The very point appears to have been decided in *Stockdale v. Insurance Co.*, 20 Wall. 331, where Mr. Justice Miller says, "The right of Congress to have imposed this tax by a new statute," "although the measure of it was governed by the income of the" "past years, cannot be doubted; much less can it be doubted" "that it could impose such a tax on the income of the current" "year, though part of that year had elapsed when the statute" "was passed. The joint resolution of July 4th, 1864, imposed a" "tax of 5 per cent on all incomes of the previous year, although" "one tax on it had already been paid, and no one doubted the" "validity of the Act, or attempted to resist it."

Having thus dealt with the specific objections, the Court shows that a Court of Equity will not pronounce an act unconstitutional without the clearest proof of the violation of the Constitution, nor will it enjoin the collection of a tax merely because of the illegality, hardship, or irregularity of it. Some special circumstances, bringing the case under some head of equity jurisdiction, must be shown. The alleged special grounds in the present case are the absence of adequate remedy to recover the taxes if paid over, and that, if such remedy exist, a multiplicity of suits would result.

Both these grounds the Court holds to be untenable. For if a party pays, under protest, a tax to a collector having no legal right to demand it, he can recover it back, and the party receiving it cannot escape responsibility by having paid it over to the government. And although separate actions at law would have to be brought for each successive year, each suit would present different features constituting a distinct cause of action, and the relief by injunction on the ground of multiplicity of suits can only be

granted when the subject matter of the litigation is substantially the same, and not where each has a distinct object, founded on distinct and separate grounds. Finally, the Court holds that section 3224 of the Revised Statutes of the United States, forbidding any suit to be brought for the purpose of restraining the assessment or collection of any tax, is broad enough in its terms to cover a special tax like the income tax. The objection that that section only applies to real revenue acts and not to counterfeits of them is met by the following quotation from Mr. Justice Blatchford in *Snyder v. Marks*, 109 U. S. 192: "There is therefore no force in" "the suggestion that Section 3224, in speaking of a tax, means" "only a legal tax, and that an illegal tax is not a tax and so does" "not fall within the intention of the statute, and the collection of" "it may be restrained. The statute clearly applies to the present" "suit, and forbids the granting of relief by injunction."

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Congress, by the statutes recently passed, regulating immigration has given final jurisdiction over aliens applying for admission to the appropriate immigration officers with appeal to the Secretary of the Treasury. Several cases turning on the construction of these statutes have been brought into the Federal Courts, and two interesting and apparently antagonistic decisions are reported in 63 Fed. Rep. 263, and 64 Fed. Rep. 485. The first, *In re Howard*, was a petition for writ of *habeas corpus* to obtain release from custody in which the relator was held as an immigrant entering in violation of the contract-labor law. Although the relator proved clearly that he was entitled to enter this country under the clause of the above act admitting "persons employed strictly as domestic servants," nevertheless, following the decisions of the Supreme Court in *Nishimura Ekiu's Case*, 142 U. S. 660, and in *Fong Yue Ting v. U. S.*, 149 U. S. 698, which uphold the right of Congress to give final determination of the status of an immigrant to federal officers, the Court held that it could not overrule the Secretary's decision, and that his "grant of power should be construed as expressed." The other seemingly contradictory decision, was given on a motion to quash a writ of *habeas corpus* sued out on behalf of Fom Yum, a passenger on the steamer *Galic*, who claimed to be an American-born citizen. By the terms of a clause in the Sundry Civil Appropriation Act of August 18, 1894, making a decision of the appropriate immigration officer to the admission of an *alien* final, unless reversed on appeal to the Secretary of the Treasury, the Court here held that power was not given to such officers to

determine the preliminary question whether a person coming into the United States is a citizen or an alien. The power given to such officer summarily to determine the status of *aliens* was recognized, but not the power to decide who is an "alien immigrant," for, says the Court, "it is difficult to see how his decision upon a fact on which his very jurisdiction rests can be deemed conclusive." The conflict in these cases is, however, only apparent. The petitioners were held for deportation under different statutes, and, in Howard's case, while it showed that he belonged to a class of immigrants privileged to enter this country, the fact that he was an "alien" and an "immigrant," made the Secretary final judge. The Fom Yum decision indicates a legitimate jealousy of a too liberal construction of legislative grants of power.