

FEDERAL TAXATION OF INHERITANCE.

The Tariff Act of 1894, in § 28, provides, "that in estimating the gains, profits, and income of any person, there shall be included all income derived from . . . money and the value of all personal property acquired by gift or inheritance. . . ."

In denying the power of the State of California to tax the franchises of the Central Pacific Railroad Company, Mr. Justice BRADLEY thus expressed the views of the Supreme Court of the United States :

"Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice MARSHALL said, in *McCulloch v. Maryland*, 'The power to tax involves the power to destroy.' Recollecting the fundamental principle that the constitution, laws and treaties of the United States are the supreme laws of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a state. The power conferred emanates from and is a portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government and repugnant to its paramount sovereignty. It may be added that these views are not in conflict with the decisions of the court in *Thomson v. Pacific Railroad*, 9 Wall. 579, and *Railroad Co. v. Peniston*, 18 Wall. 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company and not upon its franchises or operations:" *California v. Pacific Railroad Co.*, U. S. 1, 41.

Students of political economy have defended the taxation of inheritances, especially when of personalty, on quite a number of grounds, some rather fanciful.

Their various arguments have been briefly and clearly

stated in an interesting monograph by Max West, Ph. D., University Fellow in Finance, Columbia College. The arguments which will demand the lawyer's attention are two :—

One is that succession to the estates of decedents is a privilege, dependent upon the will of the state ; and very respectable authority advocates carrying this doctrine to the extent of holding that the state is universal legatee, possessed of the power of withholding even every part of such estates from the relatives. The view of those who maintain this argument, in either its minor or full scope, is that the inheritance tax is the fee for the license to succeed.

Another argument is that the tax is upon the property transmitted. This is rather the view of a public financier than of a lawyer. The financier is aware of the escape of great proportions of personalty from all taxation, and would seize the opportunity of subjecting it to the tax collector as it passes through the Orphans' or Probate Courts.

The second proposition has not received judicial recognition, beyond a dictum or two.

The nature of the " tax " as an excise tax has been recognized with frequency, and by the highest authority.

In 1858, Judge Lee, of the Court of Appeals of Virginia, said of a collateral inheritance tax statute :

" The right to take property by devise or descent is the creature of the law and secured and protected by its authority.

" The legislature might, if it saw proper, restrict the succession to a decedent's estate, either by devise or descent to a particular class of his kindred, say to his lineal descendants and ascendants ; it might impose terms and conditions upon which collateral relations may be permitted to take it ; or it may to-morrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions, and declare that upon the death of a party his property shall be applied to the payment of his debts and the residue appropriated to public uses. Possessing this sweeping power over the whole subject, it is difficult to see upon what ground its right to appropriate a modicum of the estate, call it a tax or what you will, as the condition, upon which those who take the estate shall be per-

mitted to enjoy it, can be successfully questioned :” *Eyre v. Jacob*, 14 Grattan, 430.

In 1866, similar language was used by Judge Butler, then of the Pennsylvania judiciary and now of the United States Circuit Court. He said : “What is called a ‘collateral inheritance tax’ is a bonus, exacted from the collateral kindred and others, as the condition on which they may be admitted to take the estate left by a deceased relative or testator. The estate does not belong to them, except as a right to it is conferred by the state. Independently of government, no such right could exist. The death of the owner of property would necessarily terminate his control over it, and it would pass to the first who might obtain possession. The right of the owner to transfer it to another after death, or of kindred to succeed, is the result of municipal regulation, and must, consequently, be enjoyed subject to such conditions as the state sees fit to impose. See *Blackstone’s Commentaries*, 2nd book, pp. 10, 11, 12 and 13. We see the state continually imposing new conditions, sometimes enlarging, at others restraining the privilege, and sometimes again entirely taking it away by changing the parties who are to succeed. In Pennsylvania, up to 1833, we followed the rule of common law in ascertaining the ‘next of kin.’ Since that time we have pursued the rule of the civil law, which by employing a different mode of computation frequently confers the estate on an entirely different class of kindred. Up to 1855, if an intestate left brothers and sisters entitled to inherit, and also the grandchildren of a deceased brother or sister (their immediate parent also being dead), the brothers and sisters took the entire estate. Since that time they are required to share it with the grandchildren. Up to the same period, when nephews and nieces, the children of several brothers and sisters, alone, were entitled to inherit, they shared the estate equally ; since that time they take *per stirpes*, so that if there be six, one of them representing one deceased brother and the other five another, this one now takes as much as the other five. These instances are sufficient for illustration ; they might be almost indefinitely multiplied. They show how constantly the state

asserts its right to control the disposition of decedents' estates. And it does so, whether there be a will or not. If the decedent leaves a wife, the state gives her more than one-third of his personalty and a share of his realty, though he may have willed otherwise. Blackstone, in speaking of this subject, says: 'Nothing varies more than the right of inheritance and testament, under the different national establishments. In England, particularly, is this diversity carried to such a length as if it had been meant to point out the power of the law in regulating the succession to property, and how futile every claim must be that has not its foundation in the positive rules of the state. For instance, in the personalty the father may succeed to his children; in landed property he never can be their heir by the remotest possibility. In general, only the oldest son, in some places, only the youngest, in others, all the sons together, have a right to succeed to the inheritance. In realty, males are preferred to females, and the eldest male will usually exclude the rest, while, in the disposition of the personalty, females are admitted with the males, and no right of primogeniture is allowed.' I repeat, therefore, as the right to take by succession and testament is derived from the state, it must necessarily be enjoyed subject to such conditions as the state may impose:" *Strode v. Commonwealth*, 52 Pa. 182.

The Supreme Court of Maine has recently expressed similar views. It says: "The constitution guarantees to the citizen the right of acquiring, possessing and protecting property, Art. 1, § 1, which includes also the right of disposal. But the guaranty ceases to operate at the death of the possessor. There is no provision of our constitution or that of the United States which secures the right to any one to control or dispose of his property after his death, nor the right to any one, whether kindred or not, to take it by inheritance. Descent is a creature of statute, and not a natural right: 2 *Blackstone's Com.*, pp. 10, 11, 12, 13; *Strode v. Com.*, *supra*. At common law, prior to the statute of distribution in England, 22 and 23 Car. II, descent of personal property could hardly be recognized, and even after the statute requir-

ing administration to be granted, the administrator, after the payment of the debts and funeral expenses of the deceased, was entitled to retain to himself the residue of his effects, the court holding that there was no power to compel a distribution: *2 Bl. Com.* 515; *Edwards v. Freeman*, 2 P. Wms. 442. Degrees of kindred and the laws of descent, in the several states of the Union, differ widely. In this state, there have been frequent changes in the law governing the subject. It is entirely within the province of the legislature to determine who shall and who shall not take the estate, and the proportion in which they may take, and whether severally or as joint tenants, *per capita* or *per stirpes*. In the absence of constitutional prohibition, the legislature is supreme, and may dispose of an intestate decedent's estate, after payment of his debts, to any class or classes of his kindred, to the exclusion of any class or classes. It may limit heirship to lineal descendants, to the absolute exclusion of all collaterals.

“While it has always been the policy of our law to allow collaterals to inherit in default of lineal descendants, and to allow the disposal of estates by will, which take effect only at the death of the owner, and when his ownership has ceased, the policy may be changed if the legislature so determine; and it is competent for it, if it chooses, to retain this general policy, and to annex to the privilege of taking a decedent's property, by descent or will, such conditions as it may deem wise. An excise tax upon the value of the property so allowed to be received by the collateral or stranger to the blood, leaves him in much better condition than an absolute withdrawal of the privilege would. He cannot complain of unjust taxation, when the state allows him to take a property, subject to a duty of two and one-half per cent., when the state has the right to exclude him from the whole:” *State v. Hamlin*, 86 Maine 504. See also the language of the court in *Minot v. Wintthrop* (Massachusetts), 38 N. E. Rep. 514.

In *Mayer v. Grima*, 8 How. 490, the United States Supreme Court say of a Louisiana statute affecting successions of aliens, etc.: “Now, the law in question is nothing more than an exercise of the power which every state and sovereignty

possesses of regulating the manner and terms upon which property, real or personal, within its dominion, may be transmitted by last will and testament or by inheritance, and of prescribing who shall and who shall not be capable of taking it."

In *Brettum v. Fox*, 100 Mass. 234, the Massachusetts court say: "The objection of the respondent that the statute could not constitutionally limit the owner's power of testamentary disposition is equally novel and unfounded. The power to dispose of property by will is neither a natural nor a constitutional right, but depends wholly upon statute, and may be conferred, taken away or limited and regulated in whole or in part, by the legislature; and no exercise of legislative authority, in this respect, is more usual than that which secures to a widow a certain share in the estate of her husband."

In *United States v. Fox*, 99 U. S. 315, after premising that the several states of the Union possess the power to regulate the tenure of real property within their respective limits, the modes of its acquisition and transfer, the rules of its descent and the extent to which a testamentary disposition of it may be exercised by its owners, it was held that the United States could not succeed by a devise of land to it in New York, the law of that state not authorizing such a devise.

The state, then, with a view to the tranquility and welfare of the entire community, appoints certain persons as the distributees of the estates of decedents, either as legatees, devisees, next of kin or heirs. These persons derive their title directly through the state law. Now it is upon this very appointing transaction that it is proposed to impose a federal tax. Congress would say in effect to the state that it should not name any one to take by virtue of its appointing power except subject to a tax upon such taking. Is this constitutional?

In *Scholey v. Rew*, 23 Wall. 331, the validity of the succession taxes imposed by the United States Statutes of 1864 and 1866, was considered. The validity was sustained. It was said of the case by the Massachusetts Supreme Court: "There was no room for any contention that the Congress of the United States could regulate in the states the transmission

of property by will or inheritance, and the question was whether it had authority under the taxing power to impose such taxes. The decision was that such taxes were not direct taxes, but excises or duties, and, as such, within the authority of Congress to lay and collect without apportionment among the states :” *Minot v. Winthrop*, 38 N. E. Rep. 514.

The attention of the Supreme Court, in *Scholey v. Rew*, was directed to the question just indicated, whether succession taxes are direct taxes, or whether they are excises ; and consideration was not given to the interference with the prerogative of the state through such legislation by the national government.

That case was decided in 1874, before the subject of inheritance taxation had attracted the attention since bestowed upon it.

In *Cooley on Taxation*, that eminent jurist says : “The federal government is also without power to tax the corresponding means or agencies of the states, or the salaries of state officers ; the state in the exercise of its functions being entitled to the same immunity from congressional interference that the nation is from that of the state :” p. 85.

“If the states cannot tax the means by which the national government performs its functions, neither, on the other hand, and for the same reasons can the latter tax the agencies of the state governments :” *Cooley Const. Lim.* 483.

The familiar language of Chief Justice MARSHALL may be quoted here : “That the power to tax involves the power to destroy ; that the power to destroy may defeat and render useless the power to create ; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied :” *McCulloch v. Maryland*, 4 Wheat. 431.

So much of the Internal Revenue Law as required process in state courts to be stamped, as a condition of the validity of legal proceedings, was pronounced unconstitutional and void : *Fifield v. Close* (1867), 15 Mich. 505 ; *Warren v. Paul* (1864),

22 Ind. 276; *Union Bank v. Hill* (1866), 3 Cold. (Tenn.) 325.

“There is nothing in the constitution which can be made to admit of any interference by Congress with the secure existence of any state authority within its lawful bounds. And any such interference by the indirect means of taxation, is quite as much beyond the power of the National legislature as if the interference were direct and extreme:” *Fifield v. Close*.

In *State v. Garton*, 32 Ind. 1, it was held that Congress has not power under the constitution to impose a tax upon official bonds given to a state by its officers, that the acts of Congress requiring instruments to be stamped, if they meant to affect such bonds, went beyond the Congressional power and were in so far unconstitutional.

The nearest case, in principle, to the subject we are now considering, is, perhaps, that of *Sayles v. Davis*, 22 Wis. 225, where it was held that Congress cannot, without the consent of the state, impose a stamp duty upon tax deeds executed under the laws of the state.

Mr. Justice NELSON in *Collector v. Day*, said: “The general government, and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the tenth amendment, ‘reserved,’ are as independent of the general government as that government within its sphere is independent of the states:” 11 Wallace, 113. In this case, it was held that it is not competent for Congress under the constitution of the United States to impose a tax upon the salary of a judicial officer of a state.

If we trace back the history of federal taxation of successions to decedent's estates, we will see that such legislation does not come to us well accredited and approved. On the contrary, it comes to us discredited by the accompaniment of

false and ill-considered ideas, ideas which have been rejected in the courts.

On April 17, 1794, it was recommended by a committee of the House of Representatives that certain stamp duties should be imposed, including the following :

On inventories of the effects of deceased persons, ten cents.

On receipts for legacies or shares of personal estate, where the sum is above \$50 and not exceeding \$100, twenty-five cents ; more than \$100 and not exceeding \$500, fifty cents ; for every further sum above \$500, one dollar. Not to extend to wives, children or grandchildren.

Two years later, the Committee on Ways and Means reported to the House : That a duty of two *per centum ad valorem* ought to be imposed on all testamentary dispositions, descents and successions to the estates of intestates, excepting those to parents, husbands, wives or lineal descendants : U. S. St. at L. 527.

By the Stamp Act of July 6, 1797, there was imposed a tax of fifty cents on inventories ; and a tax, varying according to amounts received, on receipts for legacies and distributive shares of personal estate. The widow, children and grandchildren were exempt. The Act ceased July 1, 1802, by repeal, and was in force four years.

In 1815, the financial necessities of the war of 1812 induced the Secretary of State to recommend three different inheritance taxes, one on all testamentary instruments and letters of administration. The measure was abandoned, the treaty of peace having, even then, been signed.

In the Revenue Tax Acts passed to gather income for the preservation of the Union, etc., taxes were imposed on inheritances, on probates and letters of administration, and on bonds of executors and administrators, by Acts of July 1, 1862, June 30, 1864, July 13, 1866, March 2, 1867.

The legislation just narrated has been taken in substance from the admirable monograph by Max West, already mentioned. It manifests but one thought, namely, to raise revenue ; the legitimacy of the means was not considered. The provisions for taxes on judicial process in the states, on inven-

tories, etc., manifest the carelessness as to regular methods, so only that revenue was raised. Those provisions have fallen through their repugnance to constitutional law ; shall the tax on inheritance be sustained ?

What power in the state shall control the United States if the latter has power to tax successions? What limit can be fixed to the latter's power, other than its own discretion? The taxation may be so heavy that the state will find itself prevented from similar taxation. Its regulations may be embarrassed, and rendered unsuitable by reason of the manner in which the federal authority is exercised.

And yet it was declared, in *United States v. Fox*, 94 U. S. 315, that the power to regulate the descent and testamentary disposition of real estate, and it is true also of personalty, is in the state.

Let us quote again from *California v. Pacific Railroad Company*, mentioned at the beginning of this article, and apply the language to the power to succeed to decedents' estates: "The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty."

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