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THE RIGHT OF STATES TO SUE THE UNITED STATES

MAY 10 (calendar day, MAY 13), 1926.—Ordered to be printed

Mr. STANFIELD, from the Committee on Claims, submitted the following

REPORT

[To accompany S. J. Res. 92]

The Committee on Claims, to whom was referred Senate Joint Resolution 92, having considered the same, recommend that it do pass with amendments.

An act of Congress approved July 1, 1862, and amended at various later dates, provided a tax against certain manufactured goods and raw materials. Under this law taxes were collected by the Federal Government from many citizens, partnerships, and corporations in many of the States during the years of 1866, 1867, and 1868. It is claimed that such taxes were levied in violation of the Federal Constitution for the reason that they were direct taxes and were not apportioned among the States according to the provisions of the Constitution.

The legislatures of many States, by legislative provisions, have authorized and directed their governors to propound to the United States a claim for moneys collected under the acts. Every State in the Nation, except three, has an interest in this matter.

The resolution provides that the United States consents that suits may be brought in the Supreme Court of the United States by any and every State which has passed, or which, within four years after the passage of this resolution, may pass an act directing the governor or other representative of the State to institute suit for these taxes, provided that the State shall, before suit is filed, make provision for the repayment of any money collected to the original taxpayers or their legal representative where their payment and ownership have been properly established, and also that provision shall be made for escheat to the State after a period of not less than two years from the time when collection shall have been made by the State, where the right of the original taxpayer has not been shown as provided; that the Supreme Court may hear and determine the questions and render judgments; that the United States shall contest the claims solely upon the ground of the legality of said acts, all other defenses being

waived; that if the acts under which the taxes were collected are declared to be unconstitutional, and the taxes are held to have been illegally collected, then the sole question to be determined by the court is the amounts of taxes collected in the respective States; and that no interest shall be allowed on any amount adjudged by the court to a State.

A hearing was held on the resolution and statements were made before the committee with reference to the matter. There is embodied in this report extracts from the statements made at the hearing:

The subcommittee met, pursuant to call, at 12.30 o'clock p. m., in the committee room, Capitol, Senator Robert N. Stanfield, chairman.

Present: Senators Stanfield (presiding), Goff, and Bayard.

Also present: Hon. Hubert D. Stephens, a Senator from the State of Mississippi.

Senator STANFIELD (chairman). The committee will come to order. We will proceed, Senator Stephens. You have a statement that you want to make?

Senator STEPHENS. Yes, Senator.

STATEMENT BY HON. HUBERT D. STEPHENS, A SENATOR FROM THE STATE OF MISSISSIPPI

The matter under consideration is Senate Joint resolution 92. Briefly, this resolution provides that certain States—and that includes nearly every State in the Union—shall have the right to institute a suit for the recovery of money that was paid, as is believed, to the Government when the Government had no right to collect the money, as taxes.

In the years 1866, 1867, and 1868, there were some 200 articles of personal property that were subjected to an ad valorem tax by the Federal Government.

Under this legislation there were about \$200,000,000 collected from the various States. I believe that every State in the Union, save Oklahoma, North Dakota, and South Dakota, are interested. Many of the States, 21, have already, through legislative enactment, provided that certain constituted authorities of the State should proceed to do what could be done with reference to obtaining a refund of the tax.

Under this bill it is proposed that the Supreme Court of the United States shall have jurisdiction; that each State that has passed resolutions through its legislature or that may within four years pass such resolution—that each such State shall have the right to institute suits in the Supreme Court of the United States for the recovery of the money; that when the money is recovered, if such shall be the case, that the original taxpayers or their legal representatives may, upon proper proof, recover for themselves the amount due them; that after a certain period, if the original taxpayer or the legal representative has not made proper proof so as to entitle the refund of the money to the taxpayer, that the money shall escheat to the State.

My information is that the following States have directed duly constituted authorities to ask return by the Federal Government of this tax: Delaware, Florida, Georgia, Illinois, Indiana, Louisiana, Maine, Minnesota, Mississippi, Montana, New Hampshire, New York, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and West Virginia.

It is apparent from that statement that there is considerable interest in this matter, and this interest will grow in other States if it shall develop that there is any possibility of relief being had.

From a study of the Constitution and the decisions of the Supreme Court, it seems to me that this money was illegally collected. It was a direct tax. For a long time it was thought that that provision of the Constitution of the United States with reference to direct tax did not relate to personalty; but under the decisions of the court it has been held that it does relate to personalty. So I think there is no doubt but that this was an unconstitutional tax. It is quite true that it is an old matter. When claims are presented to the Senate it is frequently said, "This is an old matter; why fool with it?" If the Federal Government collected a tax that it had no right under the Constitution to collect, the question of time should not be considered. This bill provides that the question

of time shall not be considered. In other words, the statute of limitations shall not be involved here. It provides [reading]:

"That the right of action to recover moneys alleged to have been illegally collected into the Federal Treasury as direct taxes during the years before mentioned is hereby vested in each State in which such direct taxes were paid, and which has passed or shall pass an act authorizing such suit to be brought as above provided.

"That the United States shall contest such claims solely upon the ground of the constitutionality of said tax, other defenses being hereby waived; and if the court shall decide that said taxes were illegally collected, the United States shall defend no further than for the purpose of determining the amounts of taxes collected in the respective States which may institute suit hereunder."

As I was saying, we ask that the question of time be not considered. We put the proposition upon this ground: That under our contention this tax was illegally and unconstitutionally levied, and, therefore, the moneys were illegally and unconstitutionally collected; collected from the States, or at least from individuals from the States. And, feeling as we do about it, we feel that this great Government should have respect for the rights of the States; should be entirely willing that the question should be submitted to the Supreme Court of the United States, and if it should develop there that the tax was an illegal and unconstitutional tax, that amends should be made to the original taxpayer as far as possible, and if not possible that it should be made to him, then the remainder shall escheat to the State, under the theory that these taxpayers were citizens of the individual States; that the highest right with reference to direct tax resided in the States themselves, and that by virtue of this unconstitutional collection of the tax moneys, the States themselves were burdened by having money taken from the States when the Federal Government had no right to do that thing.

From time to time there has been some discussion of this matter and it has been looked upon very largely as a matter in which the South was interested. It is very frequently referred to as a cotton tax. It is quite true that there was a tax on cotton. It is quite true that the Southern States are largely interested. But the thing that I called attention to in the very outset shows that it is not a southern question by any means. The thing that I have in mind now is this:

First, that 45 States in the Union are interested; and, second, that if this money shall be refunded, a much larger sum will go into the Northern States than into the Southern States.

Third, as it was stated, it was not cotton alone that was involved. There were 200 separate and distinct articles, I believe, that were subject to taxation, and upon which taxes were collected.

So, for those three reasons that I have suggested it is not a southern proposition; it is not a local proposition; it is a national proposition. Of course, I should argue if it were simply a southern proposition, that the Federal Government should do entire justice to every State that is interested. But I am not here simply—

Senator GORF (interposing). If it were an illegal tax, a sectional question should not be advanced in any event.

Senator STEPHENS. No, sir; that is it exactly, and stated better than I could state it. It is not a sectional matter, as the Senator from West Virginia has said. But if it were only one State the principle would be the same. The thing to be considered is whether or not this Government had the right to invade the States and take therefrom money that, under the Constitution, it had no right to take from any citizen of the State.

And now, gentlemen, may I introduce Mr. Burton Smith, of the New York bar, who will discuss the matter.

Senator STANFIELD. Mr. Smith.

STATEMENT OF BURTON SMITH, OF THE NEW YORK BAR

Mr. BURTON SMITH. In reply to Senator Bayard's question, this resolution is intended to permit the Supreme Court not only to pass on the legality of this tax but also to render judgment for each State for the amounts collected in that State. The records show the amount paid, in the published report of the Commissioner of Internal Revenue, so the amount paid would not be difficult to determine. It would be a very simple problem.

Under the Constitution, Article I, section 2, subsection 3, "Representatives and direct taxes shall be apportioned among the several States * * * according to their respective numbers," and Article I, section 9, subsection 4, "No capitation or other direct tax shall be laid unless in proportion to the census

or enumeration hereinbefore directed to be taken." An ad valorem tax is not and can not be a per capita tax, but prior to the income tax case many lawyers believed that the inhibition against a direct tax applied only to real property. In the income tax case, however, Mr. Chief Justice Fuller said (158 U. S. 601-823):

"The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes, and we know of no warrant for excepting personal property from the exercise of the power."

And in reviewing the whole decision the court says, on page 637:

"Our conclusions may therefore be summed up as follows: * * *

"Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes."

While the income tax case was a majority decision, it has since been recognized again and again by unanimous court, and a constitutional amendment permitting tax on income has been passed recognizing the ruling in that case as firmly established in our jurisprudence, and it may be noted in this connection that this amendment provides for tax on income, but makes no provision for direct tax on property, thus showing the mind of the lawmakers and adherence to the doctrine that a direct or ad valorem tax on personal property by the Federal Government is unconstitutional.

RIGHTS OF STATES

It has been decided by the Supreme Court of the United States that escheat is to the State (Hamilton case, 161 U. S. 256). Furthermore, the State has the right to make itself trustee or administrator for the taxpayer in such a case as this. Fifteen States have done this, and to come within the resolution others must do so. (Savings Institute v. Malone, 221 U. S. 660.)

As this tax was an ad valorem tax, it could have been collected in the first instance by the State, and had the United States and each State had a taxing officer who collected for both, and apportioned the taxes, the amount of taxes collected in each State should have been delivered to each State.

Furthermore, questions of taxation are especially within the province of the sovereign, and the State is as much entitled to protect its citizens from illegal tax collections as it is to protect them in questions of the health of its citizens, diversion of the water, and kindred subjects; and the right of the State to act in such cases is recognized.

In the case of Georgia v. Tennessee Copper Co. (206 U. S. 230) the right to protect from noxious gases was recognized, and in the case of Wyoming v. Colorado (259 U. S. 419) and numerous other cases the water proposition was discussed. All of these cases are cited by Mr. Chief Justice Taft in the case of North Dakota v. Minnesota (68 L. Ed. 342, 346; 263 U. S. 365, 375).

The wealth of a State consists in the combination of its authority to tax and the tax-paying ability of the people. Where an outside power has collected a tax which did not belong to that power, it has literally put its hand into the pocket of the State. The only way under our Constitution for a State under those circumstances to recover what was improperly taken from it is to ask the Federal Government for its return, and the effect of that request coupled with escheat provisions is to declare the amount which does not go to the claimants to be a State tax duly levied and collected; it is a levy of a tax by the State.

JURISDICTION OF THE SUPREME COURT

The United States Supreme Court has original jurisdiction in this case, and in any case where suit is brought by a State against the United States or by the United States against a State. (Minnesota v. Hitchcock, 185 U. S. 373.)

CONCLUSION

In this case we ask for no appropriation, but simply ask that the limitations be waived, protest waived, and that the States be given an opportunity to test their rights in court.

This is thoroughly in accord with precedent, as is shown by the case of U. S. v. Hvoslof (237 U. S. 1). That was a suit brought in 1913, and a recovery under the Federal statutes was allowed for taxes illegally paid during 1898 and other years. It was brought under the act of 1912, and it appears that a prior act had authorized recovery by parties who paid the taxes and that suit by a taxpayer

was decided adversely because there had been no protest. The act of 1912 waived protest and limitations.

Richard Olney, Attorney General, acting in his official capacity in connection with the application for a rehearing in the Income Tax case and reported in that case (*Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601-606), said:

"Second. Though of minor consequences, it is certainly relevant to point out that if the new exposition of the Constitution referred to is to prevail, the United States has under previous income tax laws collected vast sums of money which on every principle of justice it ought to refund, and which it must be assumed that Congress will deem itself bound to make provision for refunding by appropriate legislation."

The States of Oregon, West Virginia, and Delaware have passed legislation directing their respective governors to retain counsel to propound to the Federal Government the claims of the State for this tax. Eighteen other States, by appropriate legislation and executive action, have done the same thing, and we thus appear before you representing 21 States. We simply ask an opportunity to determine whether this tax was legally paid. Various isolated efforts have been made to bring this before the Congress, but for the first time it has been brought in the present form, and these States confidently believe that after consideration the Senate will determine that this great Government, of which these States are a component part, has no need, however great may be its obligation, to levy an illegal or unconstitutional tax; that it has no need to retain a tax heretofore illegally collected; and that when it becomes apparent that the property of a citizen has been thus taken in violation of the law and of the Constitution the Government will restore the property thus wrongfully taken. The wealth of the country is ample to meet the demands of the Government and to meet them in a legal way. We believe you will say there can be no palliation or excuse for the deliberate withholding of property admittedly taken in violation of the Constitution, and we believe you will determine that the fact that the Government has long delayed this act of common justice is the greater reason why it should act promptly, and the fact that large sums are involved is but the measure of its former injustice and affords no reason whatever for the refusal to redress this wrong. An individual would never be heard to say, "I have wrongfully taken your property, but I have taken so much that it will at embarrass me to make restitution"; and this Government in common sense and common justice should never make the excuse that the wrong was so extensive, the number of citizens despoiled or the amount of property taken so great, that restitution is now impracticable or impossible.

Therefore, the committee makes a favorable report upon the resolution with the following amendments:

That the title be amended in line 4 by inserting before the word "years" the word "fiscal," and after the word "years" by inserting the words "ending June 30."

On page 1, line 1 of the preamble, strike out the words "an act of Congress approved"; in line 2, strike out the words "July 1, 1862, and amended July 13, 1866, and March 2"; in line 3, strike out the figures "1867" and insert the words "various acts of Congress."

On page 1, line 5 of the preamble, before the word "years," insert the word "fiscal," and after the word "years" insert the words "ending June 30."

On page 2, strike out such parts of the preamble as appear on that page and insert the words:

Whereas legislatures of many States have passed acts authorizing and directing their governors to propound to the United States their claim to all moneys heretofore illegally collected and covered into the Federal Treasury as a direct tax upon property situated in said States.

On page 2, line 3, after the word "suits," insert the words "to recover the taxes hereafter mentioned."

On page 2, line 4, after the word "it," insert the words "and heard and determined."

On page 2, line 9, strike out the word "received" and insert the word "covered."

On page 2, line 10, after the word "tax," insert the words "during the fiscal years ending June 30, 1866, 1867, and 1868."

On page 2, line 11, strike out the words "during the years 1866, 1867, and 1868."

On page 2, line 18, after the word "recover," insert the words "in the Supreme Court of the United States."

On page 2, line 19, after the word "collected," insert the words "and covered."

On page 3, line 6, strike out the word "constitutionality" and insert the word "legality."

On page 3, line 9, after the word "defend," insert the words "such suit or suits."

On page 3, line 11, after the word "hereunder," add the words "provided no interest shall be allowed."

