BILLINGS

v.

UNITED STATES,

232 U.S. 261 (1914)

Decided February 24, 1914.

Mr. William D. Guthrie for Cornelius K. G. Billings.

Assistant Attorney General Adkins and Mr. Karl W. Kirchwey for the United States.

Mr. Chief Justice White delivered the opinion of the court:

It is necessary to determine whether these two cases from different courts are not virtually one and to be considered in that aspect.

The United States sued for the amount of a tax with interest. The alleged liability under the statute was challenged, and if it existed the statute was alleged to be repugnant to the Constitution of the United States, and right to interest was denied. The court held the statute to be constitutional, and judgment was awarded for the sum claimed, but the prayer for interest was rejected. Error was prosecuted directly from this court by the defendant, and from the circuit court of appeals by the United States; the first because of the constitutional questions, and the second because of the disallowance of interest. The circuit court of appeals certified a question concerning the right to recover interest, and the two cases before us consist of the direct writ of error on the one hand and the certificate on the other. Both writs of error when taken were authorized. Railroad Commission v. Worthington, 225 U.S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Macfadden v. United States, 213 U.S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490. Our jurisdiction, however, on the direct writ of error, is not confined to the constitutional questions, but embraces every issue in the case. Williamson v. United States, 207 U.S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163. The circuit court of appeals, however, has no power to ask instructions upon an issue which it has no right to decide, and we have no authority to instruct on such a subject, or to refuse to decide issues which are properly before us for judgment.

Under these conditions, we think the better practice is as regards the controversy as to interest, which was taken to the circuit court of appeals by writ of error, and in which cases the certificates now before us were drawn, to treat the writ of error from the circuit court of appeals as in substance pending here on a cross writ by the United States; and as without further orders the record is in such a condition as to enable us to decide the whole case, we proceed to do so.

Section 37 of the tariff act of August 5, 1909, chap. 6, 36 Stat. at L. 112, U. S. Comp. Stat. Supp. 1911, p. 1197, provided in part as follows:

> "There shall be levied and collected annually on the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure boat, or vessel, not used or intended to be used for trade, now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton."

The second paragraph of the provision, which we need not quote, gives the right to the owner of any "foreign-built yacht, pleasure boat, or vessel above described" to pay a duty of 35 per cent ad valorem, and thus secure an exemption from the tax provided by the first paragraph.

The act went into effect on August 6, 1909, and the collector of the port of New York thereafter made a demand upon C. K. G. Billings, the plaintiff in error, for the payment of $7,644; that is, of the sum produced by calculating $7 per ton on 1,091.71 tons, the tonnage of the foreign-built yacht Vanadis, owned and controlled by him.

Failing to pay, in January, 1911, the United States sued in the court below to recover the tax. The defendant was alleged to be a citizen of the United States, and the suit was averred to have been brought in the district nearest his residence. The ownership and use by him of the pleasure yacht Vanadis, an English foreign-built vessel, the levy based upon her tonnage according to the statute of the amount of $ 7,644, the demand for payment, the failure to pay on the 1st day of September, 1909, under the statute, were all alleged, and recovery of the tax as well as of interest was prayed. The answer admitted citizenship and the ownership of the yacht, and that she was a foreign-built pleasure craft, but set up three distinct defenses; the first, that

the vessel was not enrolled, registered, or documented as a vessel of the United States, and enjoyed no privileges because she was of that character. It was expressly admitted that "during the year preceding the 1st day of September, 1909," the said yacht "has been used by the defendant outside of the waters and territorial limits or jurisdiction of the United States from time to time and at various times . . . and was not used for six months during such year within the waters and territorial limits or jurisdiction of the United States or elsewhere."

The second defense expressly averred that the tax imposed by the statute was intended by Congress to be "an annual tax, that it should be prospective, and operate only upon the future use of any such foreign-built yacht, pleasure boat, or vessel, and that said annual tax did not accrue and could not be duly levied and collected prior to the 1st day of September in the year 1910."

The third defense after fully averring that there were within the United States many pleasure yachts not foreign built which were in use, and whose use was identical with that of a foreign-built yacht like the one which the defendant used, charged that the law imposing the burden sought to be enforced was void because repugnant to the due process clause of the 5th Amendment. The case was submitted to the court on bill and answer; and as we at the outset said, there was a judgment holding that the sum claimed was due by the defendant as an excise or duty upon the use of his yacht, and that the act imposing the tax was not repugnant to the Constitution, but that the government was not entitled to recover interest.

To avoid, if it may be, the necessity of determining the constitutional question, we shall first decide what, if any, burden the statute imposes, and then, if necessary, consider its asserted repugnancy to the Constitution. In view of the requirement that direct taxes be apportioned, and assuming, as we do assume, that the act before us was adopted by Congress in the light of the ruling in Pollock v. Farmers' Loan & T. Co. 157 U.S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U.S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, it is certain that the tax levied by the provision was intended to be an excise tax upon "the use of every foreign-built yacht, pleasure boat, or vessel . . . now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States." This is not seriously, if at all, disputed in argument, the controversy turning first upon the period when the tax provided for is to take effect, and the nature and character of the use which

is taxed. These subjects are so interwoven that we consider and dispose of them together.

Was the tax due on the 1st day of September, 1909, or was it only due on the same day in September, 1910? In view of the positive direction that the tax shall be levied and collected on the 1st day of September, we can see no escape from the conclusion that the court below was right in holding that it became due on the 1st day of September after the passage of the act. The word "annually," upon which so much reliance to the contrary is placed, is manifestly used not for the purpose of postponing the time of payment, but rather as provision for continuity; that is, the word but shows the purpose of fixing the annual duty of levying and collecting the tax on the designated day. This becomes quite apparent when it is observed that if the word "annually" be removed, there would be room for the implication that the tax was to be but sporadic, and would therefore cease to be collectible after one payment. And it is equally clear that the six months clause is concerned not with the period when the tax imposed shall be levied and collected, but addresses itself to the subject-matter upon which the tax is placed; in other words, it qualifies the word "charter," and therefore only indicates when the use of a chartered vessel shall become subject to the duty imposed. The tax being leviable and collectible on the 1st of September in each year after the passage of the act, upon what was it assessed is the question. It seems difficult to answer it in clearer terms than does the text of the act when it provides that it shall be upon the use of the yachts with which the provision is concerned. But it is said to respond in the language of the act leaves the question virtually unanswered, since the extent of the use and its essential period are left wholly undetermined. But this is a misconception based upon a disregard of the fact that the word "use" in the text is unqualified, from which it results that the recurrence of the tax is annual and depends upon two elements,-ownership or charter rights, as specified in the act, and use for any time during the year. It is to be observed that the provision deals with ownership, and distinguishes between ownership and use, since it bases the tax not upon the former, but upon the latter. From this it follows that it is not ownership, but the election during the taxing period of the owner to take advantage of one of the elements which are involved in ownership,-the right to use which is the subject upon which the statute places the excise duty. In this view the fact of use, not its extent or its frequency, becomes the test, as distinguished from mere ownership, for that, in the statutory sense, could exist without use having taken place. The words of the statute under this construction were used in an every-day sense, and not in a technical one: in

other words, but convey the distinction without reference to nice analysis of the nature of things which is commonly conceived to exist between ownership and use. Let it be conceded that the ownership of property includes the right to use; plainly we think, as use and ownership are distinguished one from the other in the provision, the word "use," as there employed, means more than the mere privilege of using which the owner enjoys, and relates to its primary signification, as defined by Webster: "The act of employing anything or of applying it to one's service; the state of being so employed or applied." If the use which arises from the fact of ownership, without more, was what the statute proposed, then it is inconceivable why the difference between use and ownership was marked in the provision and made the basis of the tax which it imposed. While this construction in this case leads to the same conclusion as does that which the court below affixed to the statute, that is, that it taxed the privilege of use, or, in other words, the potentiality of using involved in ownership, inherently there is this fundamental difference between the interpretation we give and that which the lower court adopted, since the privilege of use is purely passive (or subjective),-a right which necessarily pertains to ownership and must exist where there is ownership, as one may not obtain ownership without acquiring the privileges of use which ownership gives. The other, on the contrary, that is, use in the statutory sense, although it arises from ownership, is active (objective); that is, it is the outward and distinct exercise of a right which ownership confers, but which would not necessarily be exerted by the mere fact of ownership. The contention that inequality must be the result from making the tax depend upon mere use without reference to the extent of its duration addresses itself not to the question of power, and is therefore beyond the scope of judicial cognizance. But it is to be observed that it may well have been that the character of the property with which the statute deals and the mere element of caprice as to its use and the uncertainties of the subject led to the fact of making the use alone the criterion as the wiser and juster method of operating equally upon all. Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession does not cause the act to be beyond the power of Congress under the Constitution to adopt. Flint v. Stone Tracy Co. 220 U.S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312, and authorities there cited. While the rule is that statutes should be so construed as to prevent them from operating retroactively, that principle is one of construction, and not of reconstruction, and therefore does not authorize a

judicial re-enactment by interpretation of a statute to save it from producing a retroactive effect.

As under the meaning which we thus give the statute the admitted use of the vessel was within its provision, and therefore the amount due for excise was rightfully imposed, and under our interpretation was due when demanded, we must consider whether the asserted repugnancy of the statute to the Constitution is well founded.

It has been conclusively determined that the requirement of uniformity which the Constitution imposes upon Congress in the levy of excise taxes is not an intrinsic uniformity, but merely a geographical one. Flint v. Stone Tracy Co. supra; McCray v. United States, 195 U.S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Knowlton v. Moore, 178 U.S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the Amendments thereto, especially by the due process clause of the 5th Amendment. McCray v. United States, 195 U.S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561, and authorities there cited. Nor is there anything in Carroll v. Greenwich Ins. Co. 199 U.S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66, or Twining v. New Jersey, 211 U.S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14, which in the remotest degree nullifies or restricts the principle thus stated. Indeed it is apparent, if the suggestion as to the meaning of those cases were assented to, it would result in rendering the Constitution unconstitutional. This certainly was the view entertained by the pleader when the answer in the case was prepared, since the sole attack on the constitutionality of the statute was based upon the assertion that it was repugnant to the due process clause of the 5th Amendment. And such also is the line of the argument at bar where the fundamental rights secured by the 5th Amendment are constantly referred to as the basis upon which the unconstitutionality of the statute is urged. Is there foundation for this claim under the 5th Amendment, is then the issue, and that, of course, requires a statement of the grievances which it is asserted result from upholding the tax. They all come to this,- that to impose a burden in the shape of a tax upon the use of a foreign-built yacht when a like tax is not imposed on the use of a domestic yacht under similar circumstances is so beyond the power of classification, so abhorrent to the sense of justice, and so repugnant to the

conceptions of free government, as to be void even in the absence of express constitutional limitation. We do not stop to point out the obvious unsoundness of the contentions, nor, indeed, to direct attention to the self-evident demonstration of their want of merit even from the point of view of the power to classify, since the differences between things domestic and things foreign, and their use, are apparent on the face of things, and are expressly manifested by the text of the Constitution. We say we do not stop to do these things because in any event we are of opinion the conclusion cannot be escaped that the propositions, each and all of them, whatever may be their form of expression, are in substance and effect but an assertion that the tax which the statute imposes is void because of a want of intrinsic uniformity; and therefore all the contentions are adversely disposed of by the previous decisions of this court on that subject. That which is settled beyond dispute may not be disregarded and be brought into the realm of that which is controvertible and questionable by the mere garb in which propositions are clothed.

Was the government entitled to interest? is then the remaining question which we must decide in view of the purpose which we at the outset expressed of treating the United States as here present, and urging its right to interest on a cross writ of error. The cyclopedias and textbooks state the doctrine to be that in the absence of a statute expressly so directing, taxes bear no interest. The principle is thus announced in 37 Cyc. p. 1165: "Delinquent taxes do not bear interest unless it is expressly so provided by statute. But it is competent for the legislature to prescribe the payment of interest as a penalty for delay in the payment of taxes, and to regulate its rate. This however, can be effected only by an act plainly manifesting the legislative intention as to the right to recover interest, its amount, and the date from which it shall begin, the latter being ordinarily the time when the assessment is complete and the taxes become payable." Cooley Taxn. p. 17; Sedgwick, Damages, 9th ed. 332; Sutherland, Damages, 3d ed. 337; Black, Tax Titles, 2d ed. 236, and see note in 6 L.R.A. (N.S.) p. 694. And the statement of the text is borne out by the decided cases in nearly all of the state courts of last resort. On the other hand, the government relies upon four cases in this court where interest was allowed as a matter of course on taxes due the United States. Sun Cheang-Kee v. United States, 3 Wall. 320 18 L. ed. 72; Western Union R. Co. v. United States, 101 U.S. 543, 25 L. ed. 1068; Litch-field v. Webster County, 101 U.S. 773, 25 L. ed. 925; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223. We say as a matter of course, because in the cases referred to, the subject was

not discussed and the liability for interest was practically admitted. The government also relies on a careful and clear opinion by Maxey, Judge, in the circuit court for the western district of Texas, holding that interest was due to the United States on customs duties. United States v. Mexican International R. Co. 154 Fed. 519. Whether the practice applied in the previous decisions of this court should be now followed, or the theory established by the state cases adopted and made the rule as to taxes due the United States, is therefore the question. Its solution must depend not upon the mere authority of the state cases, but upon the conclusiveness of the principles upon which such cases rest, and their concurrence with the principles by which interest is allowed in the courts of the United States,-considerations which require us to determine the nature of the duty which arises from the liability for a tax imposed by the United States, not only inherently, but as well from the practice which has obtained in the past in the enforcement of the law of the United States, and the implication of legislative sanction, if any, to such practice which may have arisen. It would serve no purpose to refer to the abhorrence which obtained in early times concerning the payment of interest, and the evolution by which the legitimate character of interest was gradually understood, and it came to be recognized that its payment was, as a general principle, but the compensation due for the use of money, or that its allowance was merely for damages caused by delay in discharging a duty, and therefore in default on a contract to pay money, even without express legislation so directing, interest would be allowed. The subject was explained in National Bank v. Mechanics' Nat. Bank, 94 U.S. 437, 24 L. ed. 176, and was reviewed in Reid v. Rensselaer Glass Factory, 3 Cow. 393, 5 Cow. 587. To avoid prolixity we do not review the state cases as to nonliability for interest on default for taxes, but content ourselves with stating that we think it is apparent that the conclusion which they sustain, leaving aside minor differences, rests upon two fundamental propositions: First, the necessity for an express statute providing for interest except in cases of contract, and second, that even where there is a statute providing for interest on all debts, such statute is not applicable to taxes because they are not debts, and therefore must be enforced alone by virtue of express legislative penalties, except where a provision exists giving eo nomine interest on taxes. But both of these propositions are in conflict with the settled doctrine established by the decision of this court. Thus, as to the necessity for a statute, it was long ago here decided, in view of the true conception of interest, that a statute was not necessary to compel its payment where, in accordance with the principles of

equity and justice in the enforcement of an obligation, interest should be allowed. Young v. Godbe, 15 Wall. 562, 565, 21 L. ed. 250, 251:

> "It is said there is no law in the territory of Utah prescribing a rate of interest in transactions like the one in controversy in this suit, and that, therefore, no interest can be recovered. But this result does not follow. If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account. The rate must be reasonable, and conform to the custom which obtains in the community in dealings of this character."

And the decisions of this court have often since exemplified the principle by considering the question of the responsibility for interest from the point of view of reason and justice, even though no express statute existed for compelling this payment. So, also, as to the nature and character of the obligation to pay taxes. As long ago as Meredith v. United States, 13 Pet. 486, 10 L. ed. 258, it was decided, the court speaking by Mr. Justice Story (p. 493): "It appears to us clear upon principle, as well as upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer."

Again, in United States v. Chamberlin, 219 U.S. 250, 55 L. ed. 204, 31 Sup. Ct. Rep. 155, the nature and character of an obligation to pay a stamp duty was considered, and the right to collect it by action of debt was passed upon, and it was held that the obligation to pay was a debt, and that it could be enforced by suit in the absence of an exclusive remedy created by the statute by which the obligation was imposed. In the course of the opinion, various decisions of this court recognizing the right of the United States to enforce internal revenue duties by suit were referred to, and the statute to the same end was cited, and its application to the case in hand was pointed out upon grounds which in reason may well be said to cause the statute to be applicable to the case here before us. In addition, in repeated adjudications in this court it has been settled that in a suit to recover taxes which have been illegally assessed, interest would be allowed against the official, although the real responsibility was on the government. The concluded doctrine on this subject was thus stated in a recent case after referring to the exemption of the United States from liability for interest (National Home v. Parrish, 229 U.S. 494, 496, 57 S. L. ed. 1296, 1298, 33 Sup. Ct. Rep. 944):

> "On the contrary, in suits against collectors to recover moneys illegally exacted as taxes and paid under protest, the settled rule is, that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector, but directly from the Treasury. Erskine v. Van Arsdale, 15 Wall. 75, 21 L. ed. 63; Redfield v. Bartels, 139 U.S. 694, 35 L. ed. 310, 11 Sup. Ct. Rep. 683."

The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to contract; no interest without statute in the United States rule; interest in all cases where equitably due unless forbidden by statute. In one no suit for taxes as a debt without express statutory authority; in the other, the right to sue for taxes as for a debt in every case where not prohibited by statute.

From this review it results that the doctrine as to nonliability to pay interest for taxes which have become due which prevails in the state courts is absolutely in conflict with the doctrine applied to the same subject in this court, and cannot now be made the rule without repudiating settled principles which have been here applied for many years in various aspects, and without in effect disregarding the sanction either expressly or impliedly given by Congress to such rules. From this it follows that although in the cases in this court to which we at the outset made reference which enforced the liability for interest, and which are here controlling if they be not now overruled, there was no controversy as to the liability for interest, this was presumably because the matter was deemed not disputable as the direct result of the then-settled doctrine that interest could be recovered by the United States on a default in payment of import duties. Under this condition we can see no ground for departing from the rule which the cases enforced, and we are therefore constrained to the conclusion that the court below was wrong in rejecting the prayer of the government for interest, and its action in that respect must be reversed, while in others it must be affirmed.

Modified and affirmed.