INCOME TAX PREDICATED UPON CITIZENSHIP: COOK *v.* TAIT.

THE United States Supreme Court has recently handed down a decision [1] which is of considerable interest to those American citizens who are domiciled abroad and who secure their incomes from property situated in foreign countries. The case was as follows:

Cook is a native citizen of the United States. He acquired a residence and domicile in the City of Mexico where he carried on an extensive business. His entire income was derived from that business. None of the income, nor the property from which the income was derived, was ever within the territorial confines of the United States. The United States imposed a tax on Cook's income. The tax was imposed under the Revenue Act of 1921, section 210,[2] and a Regulation promulgated by the Commissioner of Internal Revenue.[3] Tait, United States Collector of Internal Revenue for the District of Maryland, demanded that Cook file an income tax return. Cook did so under protest. An income tax was assessed against him. He paid the first installment of the tax under protest and then brought suit to recover the amount so paid. He relied principally upon the argument that the tax was unconstitutionally assessed because he, his property and his entire income were and

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[1] (1924), 265 U. S. 47, 44 Sup. Ct. 444.

[2] 40 Stat. at L. 227, 233.

[3] "Citizens of the United States except those entitled to the benefits of section 262 * * * wherever resident, are liable to the tax. It makes no difference that they own no assets within the United States and may receive no income from sources within the United States. Every resident alien individual is liable to the tax, even though his income is wholly from sources outside the United States. Every nonresident alien individual is liable to the tax on his income from sources within the United States." Regulations of Commissioner of Internal Revenue, Art. 3.

A citizen is defined as follows: "An individual born in the United States subject to its jurisdiction, of either citizen or alien parents, who has long since moved to a foreign country and established a domicile there, but who has neither been naturalized in, or taken an oath of allegiance to that or any other foreign country, is still a citizen of the United States." *Ibid.*, Art. 4.

had always been outside the territorial limits of the United States. The Supreme Court decided against his contention.[4] It held that

> "The basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, nor was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation of citizen to the United States and the relation of the latter to him as citizen. The consequence of the relations is that the native citizen who is taxed may have domicile, and the property from which his income is derived may have situs, in a foreign country and the tax be legal—the government having power to impose the tax." [5]

The court based its decision, apparently, upon two of its former decisions [6] and gave no other authority for its holding. In view of the importance of the decision and the briefness of the opinion it is worthwhile to assemble the authorities bearing on the problem and to determine whether or not they are in accord with the instant decision.

It is evident that the questions to be decided do not involve the relations of a citizen of the United States to one of the several states; nor do they involve a consideration of the relations of one of the several states to the United States, or of one of the several states to a foreign government, or of the several states to one another. The questions involve only the relations of a citizen of the United States, who is resident and domiciled abroad, to the government of the United States. They concern the relation of a sovereign to one of its nationals abroad. They lie within the field of International Law. International Law is a part of the law of the United States.[7] But it is a part of the

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[4] Cook *v.* Tait (1924), 44 Sup. Ct. 444. The court said: "Or to put the contention another way, to the existence of the power and its exercise, the person receiving the income and the property from which he receives it must both be within the territorial limits of the United States to be within the taxing power of the United States. The contention is not justified and that it is not justified is the necessary deduction of recent cases." *Ibid.*, p. 444.

[5] *Ibid.*, p. 445.

[6] United States *v.* Bennet, 232 U. S. 299; United States *v.* Goelet, 232 U. S. 293.

[7] The Paquete Habana, 175 U. S. 677; Hilton *v.* Guyot, 159 U. S. 113;

law of the United States only in so far as the United States has adopted it as part of its law.[8] That part of International Law which would be repugnant to the Constitution of the United States has not been adopted by the United States, and, very likely, cannot be adopted. Four questions must, therefore, be considered:

1. Do the rules of International Law permit the United States to impose an income tax upon a citizen of the United States who is resident and domiciled in a foreign country and whose income is derived from real and personal property situated in that country even though the income has never been within the territory of the United States?
2. Does the Constitution of the United States put any impediment in the way of the operation of the rules of International Law dealing with the imposition of an income tax?
3. Is the Income Tax Section of the Revenue Act of November 23, 1921, section 210 constitutional?
4. Does this income tax Act apply to the plaintiff in the instant case?

I. The Rules of International Law.

It is an elemental principle of International Law that every citizen of a country owes allegiance to that country. Allegiance means that he is under the duty to support, protect and defend his country.

> "The word allegiance is employed to express the obligation of fidelity and obedience due by an individual as a citizen to his government in return for the protection he receives from it. Fidelity is evidenced not only by obedience to the laws of one's country and its service but by faithful disclosure to the government of the property owned by the

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The Lusitania, 251 Fed. 715, 732. See also letter of Secretary of State Jefferson to Minister Genet, June 5, 1793, announcing the acceptance of the principles of the law of nations as part of the law of the United States. 1 American State Papers, 150.

[8] Sears *v.* Scotia, 14 Wall. 170, 187; 1 Moore, Int. Law Dig., p. 2, § 1. See Beale, *Summary of the Conflict of Laws*, 3 Cases in Conflict of Laws, 501-505. Prof. Beale is a conceptualist in his legal philosophy and represents the view which has only recently been challenged by the pragmatists and realists in philosophy and by Professor Leon Guguit of the University of Bordeaux, France, and his followers in the United States, in jurisprudence.

> citizen which with that of other citizens is subject to the burdens necessary to sustain the government; by the payments of the citizen's just share of taxation and by responding with cheerfulness and alacrity to all calls lawfully made by the government to bear arms or render other personal service for the common defense and for the security of the liberties and the general welfare of his state." [9]

Blackstone defines allegiance as

> "the tie or ligamen which binds the subject to the king in return for that protection which the king affords the subject." [10]

Dicey adopts and approves of this definition.[11]

A citizen of the country can support his country by means of himself or by means of his property. The property may be within or without the territory of the sovereign. If it is within the territory of the sovereign, the sovereign can proceed directly against that property. If the property is outside of the territory, that property can be proceeded against (in the absence of a treaty with the sovereign within whose territory the property may actually be) only through a command issued to the citizen.

If the property is outside the territorial limits of the sovereign who seeks to impose the tax upon it, and the citizen to whom such property belongs is also outside of the territorial limits of the sovereign, and if it be true that no duty to pay taxes can be imposed by the sovereign upon the absent citizen, the result would be that the citizen would get protection from the sovereign while he, the citizen, is abroad and does or gives nothing in return for such protection. But if it is true that allegiance carries with it the correlative duties of support by the citizen and protection by the sovereign, it is rationally inconceivable that any protection can exist and be claimed by the citizen unless he fulfills his duty of supporting the government through the payment of such taxes as are imposed upon him.

The leading text-writers on International Law who have considered the question involved in this case are unanimous in hold-

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[9] WISE, CITIZENSHIP, 68 (1905).
[10] 1 BLACK, COMM., 366.
[11] DICEY, CONFLICT OF LAWS, 175.

ing that, (a) a non-resident, non-domiciled citizen owes the duty to pay income taxes levied upon him by his government, and (b) every sovereign has the right to levy such taxes upon him.

Story says:[12]

> "Upon this rule (*i. e.*, theory of territorial jurisdiction) there is often engrafted an exception of some importance to be rightly understood. It is that although the laws of the nation have no direct binding force or effect, except upon persons within its own boundaries, yet that every nation has a right to bind its own subjects by its own laws in every other place. In one sense this exception may be admitted to be correct and well founded in the practice of nations; in another sense it is incorrect or at least it requires qualification. Every nation has hitherto assumed it is clear that it possesses the right to regulate and govern its own native-born subjects everywhere; and consequently that its laws extend to and bind such subjects at all times and in all places. This is commonly adduced as a consequence of what is called national allegiance, that is, of allegiance to the government of the territory of a man's birth."

Further on he says:[13]

> "As to citizens of a country domiciled abroad, the extent of jurisdiction which may be lawfully exercised over them *in personam* is not so clear upon acknowledged principles. It is true that nations generally assert a claim to regulate the rights and duties and obligations and acts of their own citizens wherever they may be domiciled. And so far as these rights, duties, obligations and acts afterward come under the cognizance of the tribunals of the sovereign power of their own country, either for enforcement or for protection or for remedy, there may be no just ground to exclude this claim."

Wheaton says:[14]

> "In general the laws of the state applicable to the civil condition and personal capacity of its citizens operate upon them even when resident in a foreign country. Such are those universal qualities which take effect either from birth, such as *citizenship,* legitimacy and illegitimacy; at a fixed time after birth, as minority and majority; or at an inde-

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[12] STORY, CONFLICT OF LAWS (7th Ed.), Chap. 2, §§ 21, 22.

[13] *Ibid.*, Chap. 14, § 540.

[14] INTERNATIONAL LAW (Dana's Ed.), 141, 142.

terminate time after birth, as idiocy and lunacy, bankruptcy, marriage and divorce ascertained by the judgment of a competent tribunal. The laws of the state affecting all these personal qualities of its subjects travel with them wherever they go and attach to them in whatever country they are resident." (Italics ours.)

Bar says: [15]

"It is obvious that certain extra-territorial effects must attend domicile and nationality; were this not the case the tie between the state and the persons belonging to it would be undone as soon as its territorial limits were passed and the composition of the state, so far as its subjects were concerned, would depend at any moment on accident. * * * Apart from actual presence in the territory, there exists a certain attachment of the individual to the state and of the state to the individual. The state must protect the individual who belongs to it even in a foreign country but at the same time may prefer certain claims against him, e. g., the claims for service in its defense, etc."

Further on he says: [16]

"Taxes which fall directly on persons as such will in the present day be more or less of the nature of income tax and the first question that must be considered is whether in this matter the domicile or the nationality of the person is to rule. *On principle of public law no objection can be taken to the state taxing its citizens who are living in a foreign country at its own discretion.*" (Italics ours.)

Oppenheimer says: [17]

"The law of nations does not prevent a state from exercising jurisdiction over its subjects traveling or residing abroad since they remain under its personal supremacy."

Professor Beale, of the Harvard Law School, states the principles involved thus: [18]

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[15] BAR, INTERNATIONAL LAW (Eng. trans. by G. R. Gillespie), 111-112 (1892).

[16] *Ibid.*, p. 247.

[17] 1 OPPENHEIMER, INTERNATIONAL LAW, 202.

[18] BEALE, CONFLICT OF LAWS, Part 1, p. 120.

Professor Beale then argues that the commands which the national sovereign can issue to the subject domiciled and resident abroad must be "nega-

"A sovereign may always rightfully oblige his subject, on his allegiance, to obey a command or rule laid upon him. This jurisdiction is in no sense exclusive of the territorial sovereignty of the sovereign of the territory where the subject in question happens to be. A private foreigner is always within the territorial jurisdiction of the sovereign within whose borders he is, but his own sovereign exercises additional rightful jurisdiction over him, a jurisdiction which is called personal. It will be noticed that personal jurisdiction is based only on law while territorial jurisdiction is based both on power and on law. The latter is the stronger. Personal jurisdiction must always yield to it."

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tive commands." By negative commands he means an order to forbear from doing something. Professor Beale bases this idea upon the following argument: If the national sovereign orders a thing done positively it may very well be that the thing ordered to be done is a contravention of the positive command of the territorial sovereign. There would therefore arise a conflict between the command of the national sovereign and the command of the territorial sovereign. In such a case the command of the territorial sovereign backed up by force must take precedence over the command of the national sovereign which is based upon law only. The duty to forbear from doing something in a foreign jurisdiction in response to a command from the national sovereign cannot, says Professor Beale, interfere with the positive commands of the territorial sovereign. Hence to avoid conflict the national sovereign can impose only negative duties upon its own citizen. CONFLICT OF LAWS, Part 1, p. 120, *et seq.*

But it is submitted, with all due deference, that Professor Beale seems to have overlooked two important points in his own argument. The first is this: The *negative* command issued by the national sovereign may very well come into conflict with the positive command of the territorial sovereign. For example, the national sovereign may command the subject to forbear from paying a tax upon land or a personal tax to the territorial sovereign, but the territorial sovereign may issue a positive command that such tax be paid. According to Professor Beale's own argument the command of the territorial sovereign must take precedence over the command of the national sovereign. So that the "negative command" is not a criterion to distinguish the powers of the national sovereign from the powers of the territorial sovereign. The second point Professor Beale seems to have overlooked is that his entire argument is based upon the *possibility of a conflict* between commands of the national sovereign and the territorial sovereign. It would therefore follow that in the absence of any such conflict there would be no impediment to the imposition of commands by the national sovereign. (In the instant case no conflict exists. There are no laws of the Republic of Mexico which prohibit a resident, domiciled alien from paying an income tax to his national sovereign.)

Westlake says,[19] in dealing with the control of the national sovereign over nationals abroad:

> "Since a tie between a state and its nationals is a personal one, it is not broken by geographical distance. * * * Since the duty of allegiance and the right of protection are correlative, the right to allegiance would be lost by the omission to give protection. * * * When the nationals of one state are in the territory of another, whether resident there or for a transient purpose, the authority of the former over them can still be exercised, not by action on the foreign soil for any such action would be usurpation of the territorial sovereignty of that soil but by enacting penalties to be enforced on the return of the culprits to its own territory or fines to be levied upon the property which they may have there."

Hyde, in dealing with the subject of taxation in International Law, says:[20]

> "It must be clear that the right of the territorial sovereign to impose a personal tax upon an individual depends upon the intimacy and closeness of the relationship that has been established between itself and him. Internationally, a sufficient relationship always exists between the state and its national, and that regardless of his residence.

Mr. Hyde adds:[21]

> "Thus no international problem arises if a state endeavors to tax personally a non-resident national and to collect what is levied against him out of his property found within its territory. In case no such property is there to be found, all diplomatic protection may be withheld from such a national who declines to pay what is assessed against him. The imposition of such a penalty is hardly a matter of international concern."

Webster,[22] dealing with the law of citizenship, says in regard to the imposition of revenue and income taxes:

> "A state has the right to levy a tax on its citizens abroad. The collections of such a tax is difficult. The authorities

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[19] WESTLAKE, INTERNATIONAL LAW, Part 1, pp. 206-208.

[20] 1 HYDE, INTERNATIONAL LAW, 362.

[21] *Ibid.*, p. 362, and note.

[22] WEBSTER, THE LAW OF CITIZENSHIP, 167-168 (1891). *Cf.* 1 WHARTON, CONFLICT OF LAWS (3rd Ed.), 160.

> of the foreign state in which the citizens reside cannot be called upon to make the collection, nor is there any power to enforce them. This, however, does not prevent notice to such citizens residing abroad that such a tax is due and is to be paid by them to the authorities of their country."

Black, dealing with the imposition of income taxes upon American citizens residing abroad, says:[23]

> "American citizens who take up a residence abroad, whether temporary or permanent, and whether from choice or for business purposes (including diplomatic and consular officers), remain liable for the income tax. Theoretically such persons are taxable upon their entire net income (above the statutory exemption) no matter how or whence derived."

The foregoing quotations make it evident that the leading text-writers on International Law agree that a national sovereign has the power to impose income taxes upon its non-resident foreign-domiciled citizens. The sources from which such incomes are derived are immaterial.

The United States Supreme Court had, in 1914, approximated to the position taken by text-writers on International Law in the two cases relied upon by Mr. Justice McReynolds in the instant case. In *United States* v. *Bennett*[24] the facts were as follows:

A citizen of the United States who was domiciled in the United States owned a foreign-built yacht. The yacht was used wholly outside of the limits and territorial jurisdiction of the United States. Under the provision of a tariff act[25] the yacht

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[23] BLACK, INCOME AND OTHER FEDERAL TAXES (4th Ed.), 103. In this connection it is to be noted that the payment of an income tax is, *inter alia*, of importance in determining the citizenship of a nonresident former national. Payment of an income tax is prima facie evidence of continued citizenship. Nonpayment of an income tax is presumptive evidence that the former national has given up his allegiance. See BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD, 694-697, 706; Mr. Fisk, Secretary of State, to Mr. McVeagh, Dec. 13, 1870, Foreign Relations, 1871, 887-888; BORCHARD, DIPLOMATIC PROTECTION, 728, *et seq.*; Murray *v.* Schooner Charming Betsey, 2 Cranch. 64, 120; 3 MOORE, DIG. INT. LAW, 763.

[24] 232 U. S. 299.

[25] Sec. 37, Tariff Act of August 5, 1909, c. 6, 36 Stat. at L. 11, 112, provided in part as follows: "There shall be levied and collected annually on

was taxed. It was contended by the owner of the yacht that the tax was illegal. The Supreme Court held, however, that the tax was constitutional and properly levied. Mr. Justice White, speaking for the court, and referring to the argument of counsel that no property could be taxed unless it was in the territory of the taxing sovereign, said: [26]

> "* * * The principle of the cases is thus stated in the argument: 'It is a settled rule of constitutional law that the power to tax depends upon jurisdiction of the subject-matter of the tax. A long line of unbroken authority illustrates this firmly established doctrine in its various aspects and although the cases have all risen under state laws, their reasoning is applicable to and controlling in the case of a Federal tax act.'
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> "But the misapprehension consists not in a misconception as to what the cases relied on decided, but in taking for granted that because the doctrine stated has been applied and enforced in many decisions with respect to the taxing power of the States, that the same principle is applicable to and controlling as to the United States in the exercise of its powers. The confusion results from not observing that the rule applied in the cases relied upon to many forms of exertion of state taxing power is based on the limitations on state authority to tax resulting from the distribution of powers ordained by the Constitution. In other words, the whole argument proceeds upon the mistaken supposition, which is sometimes indulged in, that the calling into being of the Government under the Constitution, had the effect of destroying obvious powers of government instead of preserving and distributing such powers. The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins. But this has no application to the Government of

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the first day of September by the collector of the 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 nor intended to be used in 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."

[26] United States *v.* Bennett (1914), 232 U. S. 299, 305-307.

the United States so far as its admitted taxing power is concerned. It is coextensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense. Indeed the existence of such a wide power is the essential resultant of the limitation restricting the States within their allotted spheres, for if it were not so then government in the plenary and usual acceptation of that word would have no existence. Because the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority and thus destroying the rights of other States and at the same time saving their rights from destruction by the other States, in other words of maintaining and preserving the rights of all the States, affords no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty. But it is said in the decided cases relied upon, the principle which was announced was that the power to tax was limited by the capacity of the taxing government to afford that benefit and protection which is the true basis of the right to tax and which causes, therefore, taxation where such capacity to confer benefit and afford protection does not exist to be a mere arbitrary and unwarranted burden. But here again the confusion of thought consists in mistaking the scope and extent of the sovereign power of the United States as a nation and its relation to its citizens and their relations to it. It presumes that government does not by its very nature benefit the citizen and his property wherever found. Indeed, the argument, while holding on to citizenship, belittles and destroys its advantages and blessings by denying the possession by government of an essential power required to make citizenship completely beneficial."

In *United States* v. *Goelet* [27] an American citizen who was resident and domiciled in a foreign country built a yacht abroad. The yacht was never within the territory of the United States. Under the tariff act then in force [28] a tax was imposed on the

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[27] (1914), 232 U. S. 293.

[28] See note 25, *supra.*

yacht. The court held that the tax was illegal because the statute provided that the tax was to be levied by the "Collector of Customs nearest the residence of the managing owner" of the yacht. The court said that the terms of the statute necessarily imported that the owner must be a resident of the United States before the statute would apply. But in dealing with the power of the United States to tax the yacht, Mr. Justice White, speaking for the court, said: [29]

> "Not in the slightest degree questioning that there was power to impose the excise duty on a citizen owning a foreign-built yacht, wholly irrespective of the fact that he was permanently domiciled in the foreign country, and putting out of view all questions concerning the non-application of the statute to the case in hand, purely because of the situs of the yacht itself, the single matter for decision is, do the terms of the statute provide for the payment by the citizen of the United States who has a permanent residence and domicile abroad of an excise duty because of the use by him as owner or charterer under the terms of the statute of a foreign-built yacht?"

It would seem, therefore, that the United States has the power to predicate the imposition of an income tax on its citizens even though they are resident and domiciled in a foreign country and the source of the income is property outside of the territory of the United States.

II. Constitutional Powers of the United States to Impose an Income Tax.

The power to tax is an inherent power of government. The declaration in the Constitution of the United States that "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States" [30] simply declares explicitly the powers which every sovereign has. It adds nothing to the powers already possessed by the United States when the United States became a nation. The stipu-

[29] 232 U. S. 293, 296-297. See remarks of Rose, C. J., in Cook v. Tait, 286 Fed. 409, 410-412.

[30] Art. 1, § 8, cl. 1.

lation that "all duties, imposts and excises shall be uniform throughout the United States" [31] is but a declaration *as to the methods* to be followed in the imposition of taxes.

Article 1, section 9, clause 4 of the Constitution of the United States, dealing with direct taxes, states that "No capitation, or other direct, tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken." This clause does not deal with the power of the United States to tax but with the methods to be followed by the Congress in imposing taxes.[32]

Article I, section 9, clause 5 states that "No tax or duty shall be laid on articles exported from any state." This is the only express prohibition connected with the taxing power of the United States which the Constitution contains. It is explicitly directed toward exports. It is the only limitation placed by the Constitution upon the unlimited right to tax which the law of nations gives to every sovereign, but as it is explicitly directed toward export taxes, it has no relation to the instant case, for an income tax is not a tax upon exports.

The language of Mr. Justice Fields sums up the law in connection with the taxing power of the United States, as established by a long line of decisions culminating in the leading case of *Pollock* v. *Farmers Loan & Trust Company.*[33] In that case Mr. Justice Fields said [34] in his concurring opinion:

> "In deciding then the question of whether the income tax violated the Constitution, we have to determine not the existence of a power in Congress, but whether an admittedly unlimited power to tax (the income tax not being a tax on exports) has been used according to the restrictions as to methods for its exercise found in the Constitution. Not the power, it must be borne in mind, but the manner of its use is the only issue presented in this case."

In the same case Chief Justice Fuller, in giving the opinion

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[31] *Ibid.*

[32] Pollock *v.* Farmers Loan and Trust Co. (1895), 157 U. S. 429; 158 U. S. 601.

[33] *Ibid.*, 157 U. S. 429.

[34] *Ibid.*, p. 614.

of the court, quotes and accepts the language of Chief Justice Chase in the License Tax cases,[35] in which the latter said:

> "It is true that the power to tax is a very extensive power. It is given in the Constitution. With only one exception and only two qualifications, Congress cannot tax exports, and it must impose direct taxes by the rules of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and *thus only,* it reaches every subject and may be exercised at its discretion."

Chief Justice White sums up the power of Congress to impose taxes in the following language:

> "That the authority conferred upon Congress by Section 8 of Article I, 'to lay and collect taxes, duties, imposts and excises' is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine. And it has also never been questioned from the foundation, without stopping presently to determine under which of the separate headings the power was properly to be classed, that there was authority given, as the part was included in the whole, to lay and collect income taxes. Again it has never moreover been questioned that the conceded complete and all-embracing taxing power was subject, so far as they were respectively applicable, to limitations resulting from the requirements of Art. 1, Section 8, Cl. 1, and 'all duties, imposts and excises shall be uniform throughout the United States,' and to the limitations of Art. I, Section 2, Cl. 3, that 'direct taxes shall be apportioned among the several states' and of Art. I, Section 9, Cl. 4, that 'no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." [36]

The Sixteenth Amendment to the Constitution of the United States reads as follows:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

It has been definitely established by the United States Supreme

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[35] 5 Wall. 462, 471.

[36] Brushaber *v.* Union Pacific R. Co. (1916), 240 U. S. 12, 13.

Court that the Sixteenth Amendment does not confer any powers which the United States did not already possess before the adoption of the Amendment. It simply acts upon the methods by which taxes, within the power of the Government, may be levied. Nor does the Amendment increase any powers to tax which the United States possessed before the adoption of the Amendment. This is evident from the decision handed down in the case of *Brushaber* v. *Union Pacific R. Co.* where the Supreme Court said [37] through Chief Justice White:

> "The whole purpose of the (Sixteenth) Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the course whence the income was derived. * * * The Amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock Case was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed upon the taxed income upon which it directly operated but by taking into view the burden which resulted on the property from which the income was derived. * * * The command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the Pollock Case by which alone such taxes were removed from the great class of excises, duties, and duties subject to the rule of uniformity and were placed under the other or direct class."

In *Stanton* v. *Baltic Mining Company*,[38] the Supreme Court said that the Brushaber case decided that the Sixteenth Amendment

> "prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived, that is, by testing the tax not by what it was—a tax on income—but by a mistaken theory deduced from the origin or source of the income taxed. * * * We are

[37] *Ibid.*, p. 18.
[38] (1916), 240 U. S. 103.

> here dealing solely with the restriction imposed by the Sixteenth Amendment on the right to resort to the source whence an income is derived in a case where there is a power to tax for the purpose of taking the income tax out of indirect to which it generically belongs and putting it in the class of direct to which it would otherwise belong in order to subject it to the regulation of apportionment." [39]

There is nothing in the Sixteenth Amendment, therefore, which limits or impedes the inherent taxing power of the United States. And it follows that there is nothing in the Constitution of the United States (except the prohibition of taxes on imports) which impedes in any way the exercise of powers to tax which the United States possesses according to rules of International Law. There is no constitutional impediment to the imposition of an income tax upon non-resident, non-domiciled citizens of the United States no matter what the source of the income may be.

III. The Income Tax Section of the Revenue Act of November 23, 1921 Is Constitutional.

So far as the writer has been able to ascertain, *Cook* v. *Tait*, the instant case, is the only case which has been brought to test the constitutionality of the income tax section of the Revenue Act of November 23, 1921. The constitutionality of the income tax section of the Revenue Act of 1918, the language of which was practically identical with the language in the Act of 1921 was unchallenged. The same is true of that section of the Income Tax Law of 1916 which dealt with individual incomes. But the constitutionality of the Income Tax Law of 1913 was challenged.

In 1916 the case of *Brushaber* v. *Union Pacific R. Co.*[40] was decided. In that case the income tax provisions of the Tariff Act of 1913 were attacked on the grounds that they were retroactive in their operation and were *contra* to the Fifth Amendment. The Supreme Court held, however, that the statute was legal. In the same year the Brushaber case was up-

[39] *Ibid.*, 112-113.

[40] See note 36, *supra*.

held and followed in *Stanton* v. *Baltic Mining Company.*[41] In that case the Supreme Court decided that the income tax provisions of the Tariff Act of 1913 was in conformity with the provisions of the Sixteenth Amendment and not beyond the power conferred upon Congress by that Amendment.

Our principal interest in the Income Tax Law of 1913 is in the following clause:

> "That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from *all sources* in the preceding calendar year to every citizen of the United States *whether residing at home or abroad* and to every person residing in the United States though not a citizen thereof a tax of one per centum per annum Upon such income except as hereinafter provided * * *."

Two things are to be noted in this phrasing. First, that net incomes from "all sources are taxed; and second, that the tax is laid upon citizens whether residing at home or abroad. This Act, therefore, expressly contains the imposition of an income tax upon a non-resident citizen, no matter from which source his income may be derived! If an act as all-inclusive upon its face as this is constitutional, it follows *a fortiori* that an equally inclusive act will also be constitutional even though the extent of the second act must be found by inference and interpretation. The Income Tax Section of the Revenue Act for 1916[42] reads as follows:

> "Section 1-A. That there shall be levied, assessed, collected and paid annually upon the entire net income received in the preceding calendar year from all sources by every individual, a citizen or resident of the United States, a tax of two per centum upon such income; and a like tax shall be levied, assessed, collected and paid annually upon the entire net income received in the preceding calendar year from all sources within the United States by every individual, a non-resident alien, including interest on bonds, notes or other interest-bearing obligations of residents, corporate or otherwise."

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[41] See note 38, *supra.*

[42] Act of September 8, 1916, 39 Stat. at L. 756.

The Income Tax Section of the Revenue Act for 1918 [43] reads as follows:

> "Sec. 210. That, in lieu of the taxes imposed by subdivision (a) of Section 1 of the Revenue Act of 1916 and by section 1 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax at the following rates:
>
> "(a) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 216: Provided, That in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 6 per centum;
>
> "(b) For each calendar year thereafter, 8 per centum of the amount of the net income in excess of the credits provided in section 216; Provided, That in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 4 per centum."

The Income Tax Act of November 23, 1921, section 210,[44] reads as follows:

> "That, in lieu of the tax imposed by Section 210 of the Revenue Act of 1918, there shall be levied, collected and paid for each taxable year upon the net income of *every individual* a normal tax of 8 per centum of the amount of the net income in excess of the credits provided in Section 216: Provided, That in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 4 per centum."

A comparison of the various income tax laws shows that the language used in them varies so little that, so far as questions of constitutionality are concerned, the Brushaber case and the Baltic Mining case must be held to be controlling and to decide that the Income Tax Act of 1921 is constitutional. It is within the power conferred by the Sixteenth Amendment and is not limited by any other section of the constitution.

The Income Tax Sections of the Tariff Act of November 23, 1921, Applied in Cook *v.* Tait.

It is an axiom of statutory construction that the courts will

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[43] 40 Stat. at L. 1062.
[44] 42 Stat. at L. 233.

avoid, whenever possible, construing a statute in such wise as to lead to absurd or unjust results.[45] It is a corollary of this axiom that a statute is to be construed sensibly and to accomplish the legislative intent.[46] It follows, therefore, that the income tax law under discussion should be construed so as to conform with reason and sense if such construction can be given to the statute without doing violence to its express terms.

It is first to be noticed that the tax is levied upon "every individual"; second, that this tax is "a normal tax of 8 per cent"; third, that there is a modification in favor of "a citizen or resident"; fourth, that such citizen or resident is to pay a tax of 4 per cent upon his net income.

It is submitted that the phrase "every individaul" connotes all individuals who may come within the legislative power of Congress, that is, within the power of the United States. We have already demonstrated that non-resident, non-domiciled citizens are within the legislative power of the United States because of their citizenship and because of their allegiance to the United States. It follows therefore that non-resident, non-domiciled citizens of the United States are included in the phrase "every individual."

This conclusion is strengthened by reference to the proviso. The exception is plainly made in the case of a citizen. It is obvious that a citizen is to pay less than a non-citizen, otherwise the proviso becomes absurd and the statute would read that "every citizen (individual)" is to pay "a normal tax of 8 per centum"—provided that a citizen is to pay 4 per cent on his income. Such construction being obviously absurd cannot be accepted. Hence, as already said, "every individual" means "every citizen."

The proviso contains a special ruling in regard to a "resident of the United States." Therefore Congress must have had in mind that income taxes would be levied upon non-residents and that the phrase "every individual" included every non-resident whom the Government could lawfully reach.

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[45] Pickett *v.* United States, 216 U. S. 456, 461.

[46] Johnson *v.* Southern Pac. Ry. Co., 196 U. S. 17.

If this were not so the statute would be absurd once more, for if "every individual" meant "every resident individual," the statute would have to read as though every resident individual was to pay a normal tax of 8 per cent provided that if he were a resident of the United States he must pay a 4 per cent tax upon his income. It is obvious then, that "every individual" includes every non-resident individual.

This conclusion is strengthened by a comparison of the pertinent phrases in the various income tax sections of the different revenue acts. In the Act of 1913 the language is "every citizen of the United States, whether residing at home or abroad." This language expressly includes the plaintiff.

The pertinent phrase in the Act of 1916 is "by every individual, a citizen or resident of the United States." The fact that the qualifying clause "whether residing at home or abroad," found in the Act of 1913, was eliminated from the Act of 1916 does not establish the intention of Congress to exclude non-resident, non-domiciled citizens of the United States from the operation of this Act. For it is obvious that the grammatical construction of the sentence "by every individual, a citizen or resident of the United States" makes it equivalent to the phrasing "by every individual, who is a citizen of the United States or who is a resident of the United States." Furthermore, it is reasonable to suppose that Congress had in mind when it used the phrase "every individual," and then made that phrase more clear by stating that they referred to citizens or residents, that American citizens were sometimes domiciled and resident abroad, and intended to reach those citizens, for otherwise the phrase "every individual" would have to be excluded from the statute and the statute would be construed as reading, "by resident citizens or resident non-citizens of the United States." If this was the purpose, Congress should have said so. It is reasonable to suppose that Congress did not intend to exclude non-resident, non-domiciled citizens unless they expressly so stated. So that the statute of 1916 must be construed as meaning that every citizen of the United States whether resident or domiciled at home or abroad is included within the terms of the statutes.

The pertinent phrase in the Statute of 1918 is exactly like the phrase in the Statute of 1921. This we have already considered.

It would seem to follow, therefore, that the phrase "every individual" as used in the Income Tax Law of 1921 means and applies to every citizen of the United States whether resident or non-resident in the United States. As Cook was a citizen of the United States, this statute applies to him. It embraces him expressly because he is a citizen even though a non-resident. That he was domiciled in a foreign country is immaterial. The taxing power of the United States reaches him there in accordance with principles of international law.

The decisions of the United States Supreme Court in the instant case is fully supported by reason and authority. The writer is glad that this is so. There was, and is, entirely too strong a tendency on the part of selfish citizens of the United States to call loudly for their rights to protection when abroad and at the same time seek by legal and illegal means to evade their responsibilities and duties as citizens. A citizen who demands protection from his government should be compelled to pay for the maintenance of that protection.

Albert Lévitt.

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