

that taxes of the former kind were not understood to be direct taxes when the Constitution was ratified, and second in the importance attached to the government's immediate need for revenue.

A dissenting opinion in the principal case holds that the tax on gifts is a direct tax and is therefore unconstitutional because unapportioned, and points out that the substance and not the form governs the determination of whether taxes are direct or excise. Mr. Justice Sutherland says, "A tax imposed upon an ordinary gift measured by the value of the property given . . . is a tax by indirection upon the property, as much, for example, as a tax upon the mere possession by the owner of a farm, measured by the value of the land possessed, would be a tax on the land." But this opinion overlooks the fact that the right to give property is one merely incident to the property, and more logically classed as a use of the property than as the property itself.

E. S., '31.

CONSTITUTIONAL LAW—JURISDICTION OVER FOREIGN CONSUL'S DIVORCE.—A consul's wife's suit for divorce in a district court of the United States was dismissed on the ground that divorce jurisdiction is exclusively that of the states. She then filed her suit in the state court of Ohio, where an order for temporary alimony was made after the consul's objection to the jurisdiction of the court was overruled. A writ of prohibition was denied, and this decision was affirmed by the United States Supreme Court. *Ohio ex rel. Popovici v. Aigler* (1930) 50 S. Ct. 154. It was held that the provisions of Const. Art. 3, sec. 2, that the judicial power shall extend to and that the Supreme Court shall have original jurisdiction in all cases affecting ambassadors or other public ministers and consuls must be interpreted in the light of the tacit assumptions on which it is reasonable to suppose that the language was used, including the fact that the whole subject of domestic relations belongs exclusively to the states, and that jurisdiction of federal courts over divorce has always been denied.

By the Judiciary Act of 1789 the District Courts of the United States were given jurisdiction, exclusively of the courts of the several states, of all suits against consuls and vice consuls, except for certain offenses mentioned in the Act. This was repealed by 18 Stat. 318 (1875) so that from 1875 until 1911 there was no statutory provision which made jurisdiction of the federal courts exclusive of the state courts in suits against consuls and vice consuls. On Mar. 3, 1911, the U. S. Judicial Code was amended as follows: "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states. . . Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls." 36 Stat. 1161 (1911), 28 U. S. C. A. 371. In the face of this statute the Supreme Court refuses to consider a divorce suit as included within the "all suits and proceedings" phrase.

Directly contra are two New York decisions, one based on the Judiciary Act of 1789 and the other on the statute of 1911. In *Davis v. Packard*

(N. Y. 1833) 6 Wend. 327, it was held in an action of debt that a state court cannot claim jurisdiction of civil suits against foreign consuls, as the judicial power of the United States extends to all cases affecting ambassadors and other public ministers and consuls. In 1915 the New York Supreme Court held that it had no jurisdiction over a wife's action for separation from her husband, who was consul for the Republic of Peru. *Higginson v. Higginson* (1916) 96 Misc. 457, 158 N. Y. S. 92. This is, of course, squarely contra to the decision in the *Popovici* case.

The decision of the Supreme Court is particularly striking when considered in the light of many state decisions. It was held that the exemption of a foreign consul from suit in state courts cannot be avoided by joining another with him as defendant, and that the consul cannot waive his right of exemption. *Durand v. Halbach* (Pa. 1835) 1 Miles 46. Another case declared that a defect in the state's jurisdiction may be taken advantage of even after defendant has pleaded the general issue. *Davis v. Packard*, above. A later New York case held that it was the duty of the state court to confess want of jurisdiction and declare its former proceedings void when it appeared that a foreign consul is the defendant. *Griffen v. Dominguez* (1853) 9 N. Y. Super. Ct. 656. All that can be said of the principal case is that the Supreme Court refused to hear divorce suits, any statutes concerning consuls to the contrary notwithstanding.

G. E. S., '31.

CONSTITUTIONAL LAW—REGULATION OF THE ICE INDUSTRY IN ARKANSAS.—

The Arkansas Supreme Court was called upon to decide the constitutionality of a statute, Ark. Acts 1929, p. 110, which provided for regulation of the ice industry in the state, vesting the power to regulate, supervise, establish and enforce prices and rates, require records and fees, etc., in the State Railroad Commission. The statute was upheld, except for three minor provisions allowing the Commission power to refuse to grant permits to establish new ice businesses in towns where one already existed, or to provide for joint operation of two businesses in the interests of economy. These provisions, said the court, tend to create a monopoly in violation of the state constitution. But the general regulation and rate making power vested in the Commission was sustained. *Bourland Ice Co. v. Franklin Utilities Co.* (1929) 22 S. W. (2d) 993. The statute in question was discussed in the light of its constitutionality in 15 ST. LOUIS L. REV. 88.

The basis of any decision upholding regulation of rate making in an industry is that such business must be affected with a public interest. *Munn v. Illinois* (1876) 94 U. S. 113. Chief Justice Taft divided businesses so clothed with a public interest as to justify public regulation into three classes: (1) those which are carried on under authority of a public grant or franchise, as common carriers and other public utilities; (2) certain exceptional occupations, historically regarded as of public interest and so regulated, as inns and cabs; and (3) other businesses which have come to have such a peculiar relation to the public that government regulation has been superimposed on them—where the owner, by devoting his business to