

WHAT IS NOW AN INDIRECT TAX?

By LOUIS D. RICHARDSON.

Now that the smoke is beginning to clear away from the contest over the Income Tax Law, and the last decision of the court has been made, it is fitting for the lawyer to ask himself what is the state of constitutional law on the subject of direct and indirect taxes? One can leave the discussion of the merits of the decision until the question again comes before the courts. In fact, could any profit be made by discussing the correctness of the opinion of the court—little new could be said, almost every argument which could, by any ingenuity, be advanced by either side, having been made by the counsel engaged in the case or in the astute opinions of the majority and minority of the bench itself. What we want to do is to point out here exactly what is a direct tax under the decisions of the Supreme Court, including this last and principal utterance. For it must be remembered that the majority, in delivering their opinion, while they admitted that they did not follow the sentiments of the judges in the *Hilton* case, or in subsequent cases, as to the true criterion of what was a direct tax within the meaning of the constitution, nevertheless expressly contended that, in deciding a tax on incomes derived from personal or real property a direct tax, they did not overrule any of the court's previous decisions. We can therefore assume that those decisions are still law. For instance, that a tax on carriages is as good to-day as it was when the case of *Hilton v. United States* was decided; and therefore, reasoning by analogy, we can say that a tax on any species of personal property, which is used by the owner, is still a duty or license for its use, and therefore, that the United States can tax all steam engines, all cars, and, in fact, any

species of personal property where the tax is paid by the person who uses the same, irrespective of the fact of his being the owner or no.

Again, we can also say, since the case of *Pacific Insurance Co. v. Soule*, which decided that a tax on incomes of insurance companies was a direct tax, is left undisputed by the present decisions; that the income of any business, of any corporation, can still be taxed by Congress, using the rule of uniformity and not that of apportionment. A federal law taxing the income of all railroads, banks, insurance companies, manufacturing companies, etc., at a given rate would still be valid, at least as far as the income of these corporations was not derived from the investment of their capital in land or securities. From the decision in the Springer cases, as expressly interpreted by Mr. Chief Justice FULLER in his recent opinion, we can affirm that not only can the United States tax the incomes of corporations derived from the prosecution of their business, but also the incomes of all business and professional people; and from the decision in *Veazie Bank v. Fenno*, which is not in any wise qualified by this present decision, a tax on the special acts in business is still valid. That is, the United States can place a tax on all auction sales, on commercial paper, on checks, or on any other act which a man may do in the course of business. In fact, so long as the tax is not measured by the amount of property, real or personal, which a man has, or on the income from property, the tax is still valid. The recent decisions, as we read them, put forth two distinct propositions, the first is that a general property tax is a direct tax; the second, that a tax on incomes from property is a tax on the property, and therefore a tax on income is a direct tax, provided the income is derived from property, but is not a direct tax where the incomes consist of the gains or the profits of business. A tax which falls on the users of property as such, except the occupiers or users of real estate, is an indirect tax. Any tax which falls on the ownership of property as such, or the fruits of ownership, as rent or interest, is a direct tax, and must be apportioned among the several states.

This, then, is the law as we have it to-day from the highest tribunal in the country, though, in view of the way in which the majority of the court have dealt with the prior decisions on the subject, disregarding their spirit and excepting merely the letter of the decision itself, very little can be said to be finally decided in constitutional or other law. For instance, if the question of legal tender ever comes before the court again, the judges of that day can say that all that was actually decided in the legal tender cases was that Congress had the power to issue paper money and to redeem paper money issued in time of war.