solute liability in workmen's compensation laws are obviously absent in libel cases.[16]

In the principal case the mistake was primarily one as to the truth of the publication. The statement was that the plaintiff was a negro, and the defense was that this statement, though untrue, was made without recklessness or knowledge of falsity. Obviously this would be no defense where the elements of *prima facie* liability exist. It is a peculiarity of this class of libels, however, that truth is not only an excuse, but negatives *prima facie* liability, for to say of a man that he is a negro is considered injurious to his reputation only if he was in fact, or at least by repute, a white man. The case falls, therefore, in the category of words on their face innocent, but defamatory because of extrinsic unknown facts.

THE INCOME TAX AND THE SIXTEENTH AMENDMENT. — Under the Constitution, taxes are divided into two classes,[1] it being provided that direct taxes must be apportioned among the states,[2] and that duties, excises, and imports shall be uniform.[3] The Sixteenth Amendment, ratified in 1913, gives Congress power to lay a tax on income "from whatever source derived," without apportionment. In *Brushaber* v. *Union Pacific R. R. Co.*,[4] Mr. Chief Justice White, upholding the income tax imposed by the Tariff Act of 1913, construed the Amendment as a declaration that an income tax is "indirect," rather than as making an exception to the rule that direct taxes must be apportioned. This construction was unnecessary to the result of the case, for, although a contrary result would, as the court said, make two parts of the Constitution inconsistent, it is perfectly possible for an Amendment to make an exception to a constitutional rule or even a complete change therein. Nevertheless, the interpretation adopted by the court will probably be accepted, as the Amendment was hardly intended to create a tax subject neither to apportionment nor to uniformity, and so the case seems to settle the place of the income tax in the constitutional scheme of classification.

The exact distinction between a "direct" and an "indirect" tax does not seem to have been very clearly understood by the framers of the Constitution.[5] The shiftableness of the ultimate burden is the usual

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bined the features of the Artemus Jones case and the Morrison case: it involved the issue of the degree of culpability both with respect to the application of the words to the plaintiff and the defamatory character of the words.

[16] See Wambaugh, "Workmen's Compensation Acts," 25 HARV. L. REV. 129.

[1] It seems to be generally agreed to-day that all possible taxes fall within one or the other of the two constitutional classes. See Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 557. It was formerly believed, however, that there might be a tax falling in neither class, which Congress might levy in any manner it saw fit. See Hylton v. United States, 3 Dall. (U. S.) 171, 173, 176. See 1 STORY, on the CONSTITUTION, 5 ed., § 955.

[2] Art. I, Sec. 2, cl. 3; Art. I, Sec. 9, cl. 4.

[3] Art. I, Sec. 8, cl. 1.

[4] Sup. Ct. Off., No. 140, decided January 24, 1916. See RECENT CASES, p. 558.

[5] Mr. Madison records: "Mr. King asked what was the precise meaning of direct taxation. No one answered." See Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 563.

economic test; and according to Locke, Turgot, and the physiocrats, whose views were widely accepted in the eighteenth century, the only possible direct tax would be on realty or the income therefrom,[6] because of their belief that the burden of all taxes ultimately falls on the land. The question was first presented to the Supreme Court in *Hylton* v. *United States*.[7] In that case, the court, composed almost entirely of members of the Constitutional Convention, held that an unapportioned tax on carriages kept for personal use or for hire was valid, and stated that direct taxes, in the constitutional sense, included only a capitation, or poll tax, and a tax on land. They expressly refused to decide the status of a tax on the produce of land.[8] This ruling was followed in a number of later decisions, in which a tax on the income of insurance companies,[9] a tax on bank note circulation,[10] a real estate succession tax,[11] and finally, in *Springer* v. *United States*,[12] a general income tax were held valid without apportionment. The only taxes apportioned by Congress were those on real estate and on slaves.[13]

Thus, the rule announced in the *Hylton* case became the settled interpretation of the constitutional provisions, and was accepted by all the text-writers on the subject.[14] In 1895, however, the Supreme Court, in the famous case of *Pollock* v. *Farmers' Loan & Trust Co.*,[15] decided by a majority of six to two, that a tax on the income from land, being in substance a tax on the land itself, was a direct tax. On rehearing,[16] it was further held by a vote of five to four, that the same rule must apply to a tax on the income from personalty, since, on the test of shiftableness, no distinction could be made between a tax on the ownership of realty, and one on the ownership of personalty. The *Hylton* case was rather summarily dismissed, as not covering the point at issue.[17] It was said in the first hearing that *Springer* v. *United States* was not in point, because only the question as to income from realty was before the court;[18] on rehearing, the case was not mentioned by the majority. This decision

[6] See 24 HARV. L. REV. 31, 33.

[7] 3 Dall. (U. S.) 171. The decision went on the ground of the manifest absurdity and injustice of apportioning a tax on carriages or similar commodities, as well as on the supposed technical meaning put on "direct taxes" by the framers of the Constitution.

[8] By Paterson, J., 3 Dall. (U. S.) 171, 177.

[9] Pacific Insurance Co. v. Soule, 7 Wall. (U. S.) 433.

[10] Veazie v. Fenno, 8 Wall. (U. S.) 533.

[11] Scholey v. Rew, 23 Wall. (U. S.) 331.

[12] Springer v. United States, 102 U. S. 586.

[13] For a list of the direct taxes levied previous to 1880, see Springer v. United States, 102 U. S. 586, 598.

The inclusion of slaves in these taxes is to be explained on the ground that slaves were regarded as realty in many of the slave-holding states. See Springer v. United States, 102 U. S. 586, 599.

[14] See KENT, COMMENTARIES, Holmes' ed., 254; 1 STORY, on the CONSTITUTION, 5 ed., § 955; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 686.

[15] 157 U. S. 429. In this case, as in the Brushaber case, the suit was brought by a stockholder to enjoin the corporation from paying the tax. The dissent believed that the injunction could not be granted, since an injunction against the payment of taxes is forbidden by REV. STAT., § 3224, U. S. COMP. STAT., § 5947. The majority, however, took the other view without argument.

[16] 158 U. S. 601.

[17] *Ibid.*, 626.

[18] 157 U. S. 429, 579.

has been much criticised, both because it overthrew a well-settled rule of construction, and disregarded the intention of the framers of the Constitution,[19] and because since an apportioned income tax was impracticable, it prevented the government from availing itself of this valuable source of necessary income.[20]

The difficulty thus created was finally met by the adoption of the Sixteenth Amendment, which was immediately followed by the Tariff Act of 1913,[21] providing for a graduated tax on all incomes over $4000, with certain exemptions, and imposing on all corporations a duty to retain and pay over the tax due on the interest from corporate bonds and mortgages. The plaintiff in the *Brushaber* case attacked the constitutionality of the tax, on the ground that, as it did not comply with the provisions of the Amendment, since the words "income from whatever source derived" forbade exemptions, it was a direct tax which must be apportioned under the rule of *Pollock* v. *Farmers' Loan & Trust Co.*[22] The court decided, however, that the tax was within the scope of the Amendment, the words in question having been introduced merely to do away with the distinction between income from property and professional earnings made in the *Pollock* case. It was also claimed that the tax, if indirect, violated the uniformity rule, and that the progressive tax based on wealth, and the duty imposed on corporations, were in conflict with the due process clause of the Fifth Amendment. It is well settled, however, that the due process clause is not a limitation on the taxing power of Congress,[23] unless the classification is so arbitrary as to amount to a real confiscation of property. Moreover, it is clear that only geographical uniformity is necessary to satisfy the requirements of Article I, Section 8.[24] Thus, the unanimous opinion of the court in upholding the constitutionality of the tax is unquestionable, whether the Amendment is regarded as authorizing an exception to the rule of apportionment, or as definitely classifying the income tax as indirect.

IS LEGAL OR MORAL WRONG INVOLVED IN THE "KNOWLEDGE OF RIGHT AND WRONG" TEST OF INSANITY? — In an opinion of marked force and ability, the New York Court of Appeals, speaking through Judge

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[19] See 9 HARV. L. REV. 198; 20 HARV. L. REV. 280; 24 HARV. L. REV. 31.

[20] The practical effect of the decision seems to have been much less than might have been expected. Four years later, the Supreme Court, in Knowlton v. Moore, 178 U. S. 41, sustained an unapportioned succession tax on land. And, in 1911, in Flint v. Stone, Tracy Co., 220 U. S. 107, a tax upon the business of corporations, measured by the entire net income, was unanimously upheld. In both these decisions, the court distinguished the Pollock case on the ground that the tax there discussed was imposed on property because of its ownership, while in these cases it was a tax on the right to use property in a certain way. But the distinction seems more formal than substantial. See 24 HARV. L. REV. 563.

[21] Sec. II, ch. 16, 38 U. S. STAT. AT L. 166.

[22] 158 U. S. 601, 635.

[23] Patton v. Brady, 184 U. S. 608; McCray v. United States, 195 U. S. 27, 61; Billings v. United States, 232 U. S. 261, 282.

[24] Head Money Cases, 112 U. S. 580, 594; Knowlton v. Moore, 178 U. S. 41, 83; Patton v. Brady, 184 U. S. 608, 622; Flint v. Stone, Tracy Co., 220 U. S. 107, 158; Billings v. United States, 232 U. S. 261, 282.