OFFICIAL OPINIONS

OF

THE ATTORNEYS GENERAL

OF

THE UNITED STATES

ADVISING THE

PRESIDENT AND HEADS OF DEPARTMENTS

IN RELATION TO

THEIR OFFICIAL DUTIES

EDITED BY

GEORGE KEARNEY

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CONTAINING

THE OPINIONS OF THE ATTORNEYS GENERAL

HON. T. W. GREGORY,

Of Texas.

HON. A. MITCHELL PALMER,

Of Pennsylvania.

HON. GEORGE W. WICKERSHAM,[1]

Of New York.

ALSO CONTAINING OPINIONS BY SOLICITORS GENERAL

HON. JOHN W. DAVIS, of West Virginia

HON. ALEX. C. KING, of Georgia

AND

Acting Attorney General

G. CARROLL TODD.

ALSO CONTAINING CITATIONS OF ACTS OF CONGRESS, THE REVISED STATUTES, THE CONSTITUTION, TREATIES AND CONVENTIONS, OPINIONS OF THE ATTORNEYS GENERAL, AN INDEX TO SUBJECTS, AND AN INDEX DIGEST.

[1] Several opinions rendered by Mr. Wickersham, and temporarily withheld from publication, appear in this volume.

ment, resort to the Court of Claims for an adjudication of their rights.

Respectfully,

T. W. GREGORY.

To the Secretary of the Navy.

INCOME TAX ON STOCK DIVIDENDS.

As there is not a plain and obvious conflict between the provisions of the Constitution and the provisions of the income-tax acts of September 8, 1916 (39 Stat. 756, 757, 766), and of October 3, 1917 (40 Stat. 329, 337, 338), levying an income tax on stock dividends payable out of earnings accrued since March 1, 1913, it is the duty of the administrative officer to comply with the provisions of the statute, leaving the question of its constitutionality to be determined by the courts.

The decision in *Towne* v. *Eisner* (245 U. S. 418) does not justify an administrative officer in setting aside and disregarding the present statute levying an income tax on stock dividends, since that decision does not in terms decide that Congress has not the power expressly to tax as income stock dividends of the character described in the present statute, although it did determine that the word "income" as used in the income-tax act of October 3, 1913, could not be taken to include stock dividends which had been declared from surplus profits earned prior to the taxing year and prior to the ratification of the sixteenth amendment to the Constitution.

Department of Justice,

January 26, 1918.

Sir: In your letter of the 18th instant you refer to the opinion of the Supreme Court in the case of *Towne* v. *Eisner*, decided January 7 last, and request my opinion whether, having in mind the rule of law laid down therein relative to stock dividends, Congress had the power under the provisions of the Constitution to enact the provisions contained in the income-tax acts of September 8, 1916 (39 Stat. 756, 757, 766), and October 3, 1917 (40 Stat. 329, 337, 338), levying an income tax on stock dividends payable out of earnings accrued since March 1, 1913.

The said act of September 8, 1916, after levying, by section 1, paragraph (*a*), a tax upon the entire net income received within the preceding calendar year by certain

persons, enacted by section 2, paragraph (*a*), that said net income should include income derived from dividends—

"*Provided*, That the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, joint-stock company, association, or insurance company, out of its earnings or profits accrued since March 1, 1913, and payable to its shareholders, whether in cash or in stock of the corporation, joint-stock company, association, or insurance company, which stock dividend shall be considered income, to the amount of its cash value."

A similar provision was contained in section 31, paragraph (*a*) of the act of October 3, 1917, except as to the extent to which said stock dividends should be considered income.

The question propounded, therefore, is whether Congress had the constitutional power thus expressly to make stock dividends taxable to the extent provided in the said acts.

In 10 Op. 56, 61, Attorney General Bates used the following language:

"4. The fourth question concerns the power of an Executive Department to examine and decide upon the validity of an act of Congress, and to disregard its provisions.

"There may possibly arise cases of plain and obvious conflict between the provisions of the Constitution and the provisions of a statute. In such cases, there is no room for construction, no ground for argument: and in all such cases, not only the judiciary Department, but every Department, and indeed every private man who is required to act upon the subject matter, must determine for himself what the law of the land, as applicable to the case in hand, really is. He must obey the law, the whole law; and if the conflict between the Constitution and the act of Congress—the higher and the lower law—be plain and unquestionable, he must, of necessity, disregard the one or the other. He can not disregard the Constitution, for that is the supreme law; and therefore he must obey the Constitution, even though, in doing so, he must disregard a statute. The Constitution is the highest and strongest law of all, and there-

fore the lower and weaker law must yield to it in every case, before every tribunal, high or low, judicial or executive. This is predicated of cases where the conflict of law is plain and obvious. But in cases in which the conflict of law is doubtful, and its existence has to be made out by argument, I think it is far more prudent for the administrative officer to follow the statute, and leave the party who may be dissatisfied with the decision to seek his remedy in the courts. * * *"

I concur in the view thus expressed that, unless the conflict between the law in question and the Constitution be plain and obvious, it is the duty of the administrative officer to comply with the provisions of the statute, leaving the question of its constitutionality to be determined by the courts.

In the present case such conflict as may exist between the statute and the Constitution is one not apparent upon the face of the former but requiring to be made out by argument. A provision of very much this same nature was sustained by the Supreme Court of the United States in relation to the Civil War income tax act in *Collector* v. *Hubbard*, 12 Wall. 1, 18, and in *Bailey* v. *Railroad Company*, 22 Wall. 604, 636, 637, D. C. 106 U. S. 109, 112, 113. The decision in *Towne* v. *Eisner* determined that the word "income" as used in the act of October 3, 1913, could not be taken to include stock dividends, which, it is to be noted, had been declared in that case from surplus profits earned prior to the taxing year and prior to the ratification of the sixteenth amendment. Whatever inferences may be drawn from this decision, it does not in terms decide that Congress has not the power expressly to tax as income stock dividends of the character described in the present statute. In the absence of such an explicit declaration, I am of the opinion that the matter is not so clear as to justify an administrative officer in setting aside and disregarding an express enactment of Congress.

Very respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF THE TREASURY.