St. John's Law Review

Volume 10
Number 2 *Volume 10, April 1936, Number 2*

Article 10

May 2014

Incidents of Progressive Taxation

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proceeding to enforce this lien is one *in rem.*[94] An attorney procuring a judgment in the Municipal Court of the City of New York has a lien enforceable in the Supreme Court.[95]

The attorney's charging lien takes priority over attaching creditors.[96]

The right to the charging lien is assignable where the assignment carries with it no breach of the attorney's duty to preserve his client's confidence inviolate.[97]

Conclusion.

The general attitude of the courts toward attorneys' liens, as gleaned from the foregoing cases, is one of benevolent despotism. If the attorney has been ethical, the court will go far to protect his rights. For example, where an attorney had neither a retaining nor a charging lien, the court went so far as to create an equitable lien in his favor.[98]

From the time he is first retained, an attorney has a retaining lien on the client's property which comes into his possession. The retaining lien covers all the services he has rendered and all disbursements made. When the attorney undertakes to prosecute a claim in the client's favor, he has a charging lien on the proceeds of the action, but his protection as against third parties operates only from the time a summons is served.

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INCIDENTS OF PROGRESSIVE TAXATION.

"Equity in taxation" observed a learned author[1] "is an elusive mistress, whom perhaps it is only worth the while of philosophers to pursue ardently and of politicians to watch warily." This elusive mistress has, however, exercised a powerful influence upon events in the

191 N. E. 842 (1934); *In re* Levin's Estate, 154 Misc. 700, 278 N. Y. Supp. 36 (Surr. Ct. 1935).

[94] Oishei v. Pennsylvania R. R., 117 App. Div. 110, 102 N. Y. Supp. 368 (1st Dept. 1907), *aff'd memo.*, 197 N. Y. 544, 85 N. E. 1113 (1908).

[95] Tynan v. Mart, 53 Misc. 49, 103 N. Y. Supp. 1033 (Sup. Ct. 1907); Duringshoff v. Coates & Co., 93 Misc. 485, 157 N. Y. Supp. 230 (Sup. Ct. 1916).

[96] Williams v. Ingersoll, 89 N. Y. 508 (1882).

[97] See Leask v. Hoagland, 64 Misc. 156, 164, 118 N. Y. Supp. 1035, 1041 (Sup. Ct. 1909), *aff'd memo.*, 136 App. Div. 658, 121 N. Y. Supp. 197 (1st Dept. 1910). *Cf.* text to note 51, *supra.*

[98] Schoenherr v. Van Meter, 215 N. Y. 548, 109 N. E. 625 (1915) (Corporation having appropriated the benefit of an attorney's services, subsequently became bankrupt and refused payment to the attorney.).

[1] DALTON, PRINCIPLES OF PUBLIC FINANCE (1929) 94.

realm of taxation in recent years and seems destined to play an even more important role in the period which lies ahead.[2] It would seem that equity in taxation is a problem for the economist to ponder and for legislators to enact into law, but where standards, indefinite as they may be are applied by the Constitution,[3] the judiciary becomes the final arbiter of the tax.

Progressive taxation, in which the amount of tax percentage levied upon property or income increases with additions in tax base,[4] has met with warm approval among economists and political scientists.[5] Economists, however, may examine the factors involved in a tax problem, show that the arguments *pro* and *con* are nicely balanced, and then proceed to drop the issue. It is therefore necessary for the scope of this note to consider, in so far as it is possible, only the working of the judicial mind, for it is there that the academic questions of economists become practical questions to which answers must be given. Unfortunately, perhaps, the courts are human institutions and the members have human limitations which necessarily include their own political, social and economic philosophies.[6] Thus it may be difficult, in the light of present accepted principles of taxation, to read the challenge and the philosophy of the Supreme Court of the United States as enunciated some two score years ago, wherein the Court held a federal tax on income unconstitutional. Said Mr. Justice Field in the *Pollock* case [7]—the first of the income tax cases:

> "The present assault upon capital is but the beginning. It will be the stepping stone to others, larger and more sweeping till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness."

The challenge of the *Pollock* case was answered by the Sixteenth Amendment,[8] the philosophy therein enunciated has been inculcated in

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[2] 14 THE ENCYCLOPEDIA OF THE SOCIAL SCIENCES (1934) 540.

[3] U. S. CONST. Amend. V, XIV.

[4] FUNK & WAGNALLS, NEW STANDARD DICTIONARY (1925). SELIGMAN, *infra* note 5, at p. 3. A tax is progressive when the relation varies in such a way that, as the amount taxed itself increases, the tax will represent a continually larger fraction of that amount.

[5] SELIGMAN, PROGRESSIVE TAXATION IN THEORY AND PRACTICE (2d ed. 1908) and authorities therein cited.

[6] Shientag, Book Review, current issue, p. 379. State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, 51 Sup. Ct. 540 (1930). Mr. Justice Sutherland dissenting. "The decisions have depended not only upon the varying facts which constituted the background of the particular legislation under consideration, but also, to some extent, upon the point of view of the courts or judges who have been called upon to deal with the question." At 550.

[7] Pollock v. Farmer's Loan and Trust Co., 157 U. S. 429, 607, 15 Sup. Ct. 673 (1895).

[8] The Congress shall have the 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.

the *modus operandi* that our tax measures have in many instances adopted.

Progressive taxation has received but incidental consideration in the constitutional tests of *equality* and *uniformity*. Rates proportioned "to an ability to pay" [9] have met the test of equality when questioned in the *Brushaber* [10] income tax case. This was but a reiteration of the standards determined in the *Pacific Express Co.*[11] case and the *Bells Gap* [12] case that diversity of taxation with respect to amount, and the state's inherent privilege to impose different rates, were entirely consistent with *uniformity* and *equality*.

Neither in inheritance nor in gift taxation does a progressive rate raise the constitutional question of arbitrary classification. With the determination in the *Magoun* [13] case that the subject taxed was the privilege, granted by the state, to transmit property, any limitation thereon was proper; while such tax on estates by the Federal Government would always meet the test of geographical uniformity established in the *Knowlton* case.[14]

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[9] Income Tax Cases, 148 Wis. 456, 134 N. W. 673 (1912). It (income tax) has been in use in various forms, and generally with the progressive feature, by many of the civilized governments of the world for decades. Argument in its favor is that taxation should logically be imposed according to ability to pay rather than on mere possession of property.

[10] Brushaber v. Union Pacific R. R., 240 U. S. 1, 36 Sup. Ct. 236 (1916). Progressive rate does not violate equality as based on ability to pay. Income Tax Cases, 148 Wis. 456, 134 N. W. 673 (1912); Dallas Gas Co. v. State, 1924 Tex. Civ. App., 261 S. W. 1063.

[11] Pacific Express Co. v. Seibert, 142 U .S. 339, 351, 12 Sup. Ct. 250 (1892). The Court has repeatedly laid down the doctrine that diversity of taxation as to amount and class is not inconsistent with perfect uniformity "* * * and that a system which imposes the same tax upon every species of property, irrespective of its nature, condition, or class, will be destructive of the principles of uniformity and equality in taxation. * * *"

[12] Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533 (1892). Different specific rates may be imposed upon different trades and professions, and the rates of excise may be varied upon various products. Giozza v. Tiernan, 148 U. S. 657, 13 Sup. Ct. 721 (1893). The Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation.

[13] Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283, 18 Sup. Ct. 594 (1898). *Held* that a state inheritance tax was a levy on the right to transmit and therefore a graduation of tax which discriminated between blood relatives and those further removed was valid. DOS PASSOS, COLLATERAL INHERITANCE TAX (1890) 20. To effect that a statute is not unconstitutional where the graduation discriminates between classes and not members of a class. Keeney v. Comptroller, 222 U. S. 525, 32 Sup. Ct. 105 (1911); State v. Handlin, 100 Ark. 175, 139 S. W. 1112 (1911); Kochersperger v. Drake, 67 Ill. 122, 47 N. E. 321 (1897); Booth v. Commissioner, 130 Ky. 88, 113 S. W. 61 (1908); Union Trust Co. v. Wagner Probate Judge, 125 Mich. 487, 84 N. W. 1101 (1901); *In re* Keeney, 194 N. Y. 284, 87 N. E. 428 (1909); Nunemacher v. State, 129 Wis. 190, 108 N. W. 627 (1906).

[14] Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747 (1900). Case involved a progressive tax on legacies and transfers of personal property. Any argument as to the enormity of the tax because of its progressive feature was held to be without merit.

Gift taxes received a summary disposition by the courts in an opinion based on the historical concept of such levy as an excise.[15] A graduated rate was, therefore, but the cause for reaffirmation that classification by amount was the fair object of the legislature [16] and not repugnant to the Fifth Amendment [17] nor to the Fourteenth Amendment [18] if uniform as to each class taxed.

Progressive taxation is always an incident of franchise taxation whether of domestic or foreign corporations. But again the question of uniformity of rates as between the individual [19] and the corporation [20] or the domestic and foreign corporation has been disposed of on the state's inherent power [21] to condition and delimit the privilege [22] of existing as a corporation and to regulate admission [23] for business

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[15] New York Trust Co. v. Eisner, 256 U. S. 345, 41 Sup. Ct. 506 (1921). Always treated as a duty or an excise and "on this point a page of history is worth a volume of logic."

[16] Stebbins v. Riley, 268 U. S. 137, 45 Sup. Ct. 424 (1925). State estate tax levy.

[17] Patten v. Brady, 184 U. S. 608, 22 Sup. Ct. 493 (1902); McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769 (1904); Flint v. Stone Tracy Co., 220 U. S. 108, 31 Sup. Ct. 342 (1911) (federal tax on corporations for privilege of exercising franchise); Maxwell v. Bugbee, 250 U. S. 525, 40 Sup. Ct. 2 (1919).

[18] Browmley v. McCaughn, 280 U. S. 124, 50 Sup. Ct. 46 (1929). Gift tax. Scheme of graduation and exemption did not infringe on Fourteenth Amendment.

[19] Bank of California v. San Francisco, 142 Cal. 276, 75 Pac. 832 (1904). A tax on corporate franchise does not discriminate where the same is not imposed on individual.

[20] See Home Ins. Co. v. New York, 134 U. S. 595, 10 Sup. Ct. 593 (1880). Tax is on privilege of doing business though the base may be corporate income from any source, including federal. Blackrock Copper Mining & Milling Co. v. Tangey, 34 Utah 369, 98 Pac. 180 (1928). Franchise tax is not property tax and need not conform to uniformity on property.

[21] Home Ins. Co. v. New York, 134 U. S. 595, 600, 10 Sup. Ct. 593 (1880). "No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows." Barclay & Co. v. Edwards, 267 U. S. 442, 45 Sup. Ct. 348 (1924). It may tax foreign and not domestic corporations. National Paper & Type Co. v. Bowers, 270 U. S. 630, 46 Sup. Ct. 335 (1925).

[22] International Trust Co. v. American Loan & Trust Co., 62 Minn. 501, 65 N. W. 78 (1895). "A privilege as distinguished from a mere 'power' is a right peculiar to the person or class of persons on whom it is conferred. As applied to a corporation, it is ordinarily used as synonymous with 'franchise' and means a special privilege conferred by the state which does not belong to citizens generally of common right, and which cannot be enjoyed or exercised without legislative authority."

[23] Paul v. Virginia, 8 Wall. 168 (U. S. 1869). State may, for purposes of admission, classify separately domestic and foreign corporations as to taxing status. Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 34 Sup. Ct. 15 (1913); People *ex rel.* Chicago v. Kent, 300 Ill. 324, 133 N. E. 276 (1921); International Paper Co. v. Commissioner, 228 Mass. 101, 117 N. E. 246 (1917); Germanic Life Ins. Co. v. Commissioner, 85 Pa. 513 (1877); 52 Tex. Civ. App. 634, 115 S. W. 361 (1908) (higher license and franchise tax as condition to doing business; Commissioner v. United Cigarette Match Co., 119 Va. 447, 89 S. E. 935 (1916). State may domesticate foreign corporation so as to subject it to taxation on all its property within the state.

purposes. When, however, a foreign corporation has been admitted within the state, a graduated tax, which in operation creates a classification between domestic and foreign corporations, will violate the Fourteenth Amendment if the foreign corporation has become firmly established within the state.[24] Any graduation in taxes over that of the domestic corporation will create an arbitrary classification and an unequal subjection.[25]

A graduated tax has not, of itself, offered a discriminatory classification of taxpayers until very recently, and that by indirection. The economic situation [26] created by the conflict between chain and independent stores, launched the states into regulatory measures in the form of sales taxes. The attack was reflected in a classification of retailers for the purposes of imposing heavier taxes on a class embracing the chain store. Judicial sanction is given to such classifications [27] on the theory that the imposition operates with equal effect on all within the same class.[28] Logical excuse must be found for the classification either in differences of operation,[29] vol-

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[24] Hanover Fire Ins. Co. v. Harding, 272 U. S. 494, 47 Sup. Ct. 179 (1926) (had acquired a large clientele, which, if compelled to give up, would cause the ruin of the company.)

[25] Southern R. R. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287 (1910); Kansas City, Memphis & Birmingham R. R. v. Stiles, 242 U. S. 111, 37 Sup. Ct. 58 (1916). After admission foreign corporation stands equal with domestic corporation and any graduated rates thereafter applied must keep on par with domestic corporation. Air Way Corp. v. Day, 266 U. S. 71, 45 Sup. Ct. 12 (1924) (Ohio statute). *Contra:* Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 38 Sup. Ct. 295 (1918). State does not surrender its power to revise taxing system by merely licensing the corporation. Facts in this case did not establish that irreparable injuries would be sustained by the corporation if forced to leave the state.

[26] Becker and Hess, *Chain Store License Tax* (1929) 7 N. C. L. REV. 115. The conflict of interest between the independent and the chain. "* * * for in its final analysis, the legislation attempted and enacted but reflects a recognition of the struggle and the remedies proposed merely accentuate its existence."

[27] Kentucky Railroad Cases, 115 U. S. 321, 6 Sup. Ct. 57 (1885). There is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality only requires the same means and methods to be applied impartially to all the constituents of each class.

[28] Note (1928) 77 U. OF PA. L. REV. 121. The tax imposed should operate on all alike under certain circumstances.

[29] American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 Sup. Ct. 43 (1900) (taxed sugar refiners and exempted refining by planters); Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. 192 (1911) (taxed hand laundries and not machine laundries); Bradley v. Richmond, 227 U. S. 477, 33 Sup. Ct. 318 (1913) (higher graduated rate on private banks lending money at high rate, and low rate on commercial banks); Metropolis Theatre v. Chicago, 228 U. S. 61, 33 Sup. Ct. 444 (1913) (a tax graduated with the increase in theatre ticket prices); Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 315, 34 Sup. Ct. 493 (1914) (license fee higher on those delivering in person than by wagon). "difference in mode of doing business between the local tradesman and itinerant dealer, and we are unable to say that the distinction made between them for the purposes of taxation is arbitrarily made."

ume of business,[30] or administrative ability.[31]

With these thoughts before us an examination of the *Stewart Dry Goods Co.*[32] case should be fruitful. The tax imposed on retailers was graduated in proportion to the volume of gross sales (the first $400,000 at one rate and a percentage increase with each additional $100,000). Since this tax is clearly not a privilege nor estate tax it cannot invoke the peculiar principles applicable there. A classification according to volume of sales had been indirectly approved in the *Jackson*[33] and the *Ligget*[34] cases where there was ample proof that with the increase in the number of stores there would be a corresponding increase in gross sales. A factor common in all of these cases was the graduated rate which generally involves the *"ability to pay"* doctrine in a test of constitutional equality. The majority of the court was of the opinion that volume of sales was not, by itself, a sufficient indication of *ability to pay* and therefore (though a comparison with adjudicated classifications would not reveal the difference)[35] the tax was invalid as an arbitrary burden. It is submitted that the majority opinion is based upon a finding of fact. A close reading of the facts presented leads to a sympathetic adoption of the closing sentences of the dissenting opinion.[36] "In fine, there may be classification for the purpose of taxation according to the nature of the business. There may be classification to size and the power and opportunity of which size is an exponent. Such has been the teaching of the law books, at least until today." There may also be a progressive tax which will involve no discriminating burden if the classification is proper.

The principles of progressive taxation must be viewed in the light of Chief Justice Marshall's oft-quoted statement that the power

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[30] Clark v. Titusville, 184 U. S. 329, 22 Sup. Ct. 382 (1902). Tax graduated with increase in sales. Citizens Telephone Co. v. Fuller, 229 U. S. 322, 33 Sup. Ct. 833 (1913). In taxing telephone companies, those within a class doing less than $500 were exempted.

[31] Penny Stores, Inc. v. Mitchell, 59 F. (2d) 789 (S. D. Miss. 1932), *aff'd*, 287 U. S. 672, 53 Sup. Ct. 95. Rate graduated with increase in stores. Difference is not in ownership but in organization. It may seem arbitrary to draw the line between five and six stores, but such a line exists where the metamorphosis in organization takes place. At 792.

[32] Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 55 Sup. Ct. 525, *cert. denied*, 295 U. S. 768, 55 Sup. Ct. 525 (1935).

[33] State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, 51 Sup. Ct. 540 (1931). One store paid tax of $3.00; two to five stores paid $10.00 with an increase in rate corresponding to increase in ownership of stores. *Held*, not capricious or arbitrary.

[34] Louis K. Ligget Co. v. Lee, 288 U. S. 517, 53 Sup. Ct. 481 (1933). Tax was measured by number of stores in county. The distinction is the occasion for the classification.

[35] *Cf.* with cases cited in *supra* notes 29, 30 and 31. Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376 (1904); Pacific American Fisheries v. Alaska, 269 U. S. 269. *Contra:* Quaker City Cab Co. v. Commonwealth of Pa., 277 U. S. 389, 48 Sup. Ct. 553 (1927). Discrimination between company and individual operators.

[36] Mr. Justice Cardozo.

to tax involves the power to destroy.[37] In the absence of constitutional prohibition, the legislature has the right finally to determine the amount or rate of a tax.[38] During a period in which large expenditures are deemed necessary, the power to meet these needs must not be limited, even though the vigor with which the power to raise revenue may be employed, is burdensome and oft confiscatory. If taxes, heavy though they may be, are to be levied, they should be so distributed as to promote a desired social policy. "Ability or faculty to pay" has come to be the test in determining the justness of taxation.[39] And it appears that in all possible situations the presence of a progressive rate offers no obstacle to the validity of the tax measure, provided that a proper classification has been accomplished.[40] Proper classification revolves about the *ability to pay,* for it is "not only the basis of taxation but the goal towards which society is steadily working. It lies instinctively and unconsciously at the bottom of all our endeavors at tax reform." [41]

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[37] McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819).

[38] COOLEY, THE LAW OF TAXATION (1924) 178; Fairbanks v. United States, 181 U. S. 283, 21 Sup. Ct. 648 (1901).

[39] State *ex rel.* Foot v. Bazille, 97 Minn. 11, 106 N. W. 93 (1905).

[40] The revenue measure, now under consideration, providing for a progressive tax on undistributed surplus should encounter no difficulties because of the graduated rate.

[41] SELIGMAN, TAXATION (1895) 72.