

prive him of his constitutional immunity from the use of this evidence against him; the balance of policy lies on his side rather than in favor of the rule of practice.

The language of the court is not very strong; moreover, the circumstances presented a strong case for the application of the rule which requires a motion before trial. Far from being undisputed or admitted, the illegality of the search and seizure in the case is debatable, depending on whether the court feels that probable cause existed for the arrest and search. To decide this fairly would require delay in the trial to permit each side to marshal its facts and arguments. If the motion before trial rule is to be retained at all, these Ohio cases would seem to call for its application.

It is to be noted, that even if the result of these cases were accepted as proper practice, it would not affect the great bulk of cases in which the problem of illegal searches and seizures arises; the instant cases arose in police court, whereas the chief source of questions of this nature is felony cases which are tried in the felony and circuit courts. The confusion and haste of the police court does not exist there and a defendant can find no such excuse, as the Ohio court found for him, to excuse his failure to file a timely motion to suppress such evidence.

Finally, we might regard the cases as other illustrations of a general distaste for the motion-before-trial rule. This general attitude might be, in some degree, a result of the fact that the question has lately arisen most often in prohibition law violation cases; perhaps the courts were less disposed in such cases to insist on the prosecution being safe from surprise attacks.

In any event, if the true tendency of the decisions be to delimit the rule into ineffectiveness by a growing number of exceptions, it might be better to adopt a simple, uniform rule which allows the objection to be made on the trial in all cases.

JOHN N. FEGAN

THE CONSTITUTIONALITY OF THE ILLINOIS INCOME TAX LAW OF 1932

The recent case of *Bachrach v. Nelson*¹ has made it impossible under the present provisions of the Constitution of Illinois to enjoy the advantages of the typical graduated income tax as a source of state revenue. The Illinois Constitution states that the General Assembly shall tax property in proportion to its value, authorizes a tax on certain designated businesses or occupations and on persons or corporations owning or using franchises or privileges, and provides that other objects or subjects can be taxed in such manner as may be consistent with principles of taxation fixed in the Constitution.² The Illinois legislature enacted a law imposing a graduated tax upon residents of the state on entire net income, upon nonresidents with respect to net income from sources within the state,

¹ 182 N. E. 909 (Ill. 1932).

² Const., art. 9, §§ 1, 2.

and upon fiduciaries or beneficiaries of estates or trusts respecting such estate or trust incomes. A nonresident who pays a tax in another state on income derived from sources in Illinois could credit such payment on his Illinois tax provided the other state allows a similar reciprocal right to nonresidents of that state. Nonresidents of Illinois were subjected to an additional penalty to which residents were not subjected, to wit, that any failure, willful or otherwise, to file a complete return would result in the nonresident's forfeiting the right to certain deductions.³ The Supreme Court of Illinois in the main case held the income tax unconstitutional since under the Illinois Constitution the legislature could impose only occupation, franchise, or privilege taxes, and property taxes based on value; that a tax on income is a tax on property and as such is invalid since not levied in proportion to value; and that certain of the provisions with regard to nonresidents are violative of the Constitution of the United States.

Sustaining its conclusion that under the Illinois Constitution the General Assembly can impose only property taxes based on value, in addition to occupation, franchise, and privilege taxes, the court reasons historically. An earlier Constitution made general property taxation by value the exclusive method of apportioning the tax burden.⁴ The present Constitution is a virtual re-enactment of this section.⁵ The "principles of taxation fixed in this constitution" are interpreted as the general property tax, in accordance with which all taxes must be imposed except those on businesses, occupations, franchises, or privileges. And while the legislature may tax other objects or persons, such taxes must be levied by the same *ad valorem* principle.⁶

If carried to its logical conclusion, this decision would mean that it is the duty of the Illinois legislature to tax income as property under the Constitution, and that the tax on income would have to be according to value. Such a tax would be a perversion of the taxing power, since an income of a certain amount would have to be regarded as the same amount of cash in hand, which it is not, and there would be no graduated feature so that the tax could be imposed upon ability to pay.

When, as at the present time, the state government is in need of new sources of revenue it would seem that the court would hesitate before declaring unconstitutional an income tax when there are authorities by which the tax could be sustained. The legislature must decide the policy as to levying and apportioning taxes and the courts have no concern with such policy except to see that constitutional limitations are observed.⁷ At least one court under a constitution similar to that of Illinois has refused to regard the legislature as restricted by it.⁸

³ Laws 1931-32, 1st Sp. Sess. 91.

⁵ Const. 1870, art. 9, § 1.

⁴ Const. 1848, art. 9, § 2.

⁶ Const., art. 9, § 2.

⁷ *Green v. Frazier*, 253 U.S. 233 (1920); *Blunt v. U.S.*, 255 Fed. 332 (1918).

⁸ *Stanley v. Gates*, 179 Ark. 886, 19 S.W. (2d) 1000 (1929). A constitution providing for taxation of property according to value and then providing that certain occupations and privileges could be taxed does not prohibit imposition of an income tax under the doctrine of *expressio unius est exclusio alterius*.

However, the Illinois Constitution declares that the General Assembly shall provide revenue by levying property taxes by valuation, and the court seizes upon this as excluding all other forms of taxes not expressly permitted by the Constitution.⁹ A constitutional declaration that all property shall be taxed in proportion to its value is mandatory.¹⁰ Under the present Constitution of Illinois the legislature can impose an income tax only if it is regarded as a tax on property, and the tax as such is invalid since levied on the basis of graduation instead of valuation as required by the Constitution. Where the Constitution of Illinois was not involved, the Supreme Court of Illinois has not regarded an income tax as a tax upon the particular property or business from which such income is derived.¹¹

There is a decided split of authority as to whether or not an income tax is a tax on property. In the principal case the Illinois court takes its stand with those jurisdictions recognizing income as property within constitutional provisions respecting taxation.¹² Such a tax is within a constitutional provision limiting the tax rate to a certain percentage of the value of the taxable property within the state,¹³ and a tax on incomes derived from property must conform to a constitutional requirement that property taxes be proportional.¹⁴ A tax imposed upon incomes of individuals and partnerships is held by the same jurisdiction to be a tax on property and not an excise tax.¹⁵

Numerous other courts decide that an income tax is not a tax on property so as to come within a constitutional requirement that all property taxes be laid according to value.¹⁶ An income tax is an excise, not a property tax.¹⁷ One

⁹ Const., art. 9, § 1.

¹⁰ *San Pedro R. Co. v. Los Angeles*, 180 Cal. 18, 179 Pac. 393 (1919).

¹¹ Provisions in a lease requiring the lessee to pay, when due, all taxes, of every kind, levied upon the real estate demised or upon any improvements thereon, or upon any interest of the lessor in or under the lease, do not require the lessee to pay the Federal income tax of the lessor on the rentals received under the lease. *Young v. Illinois Athletic Club*, 310 Ill. 75, 141 N.E. 369 (1923).

¹² *State v. Pinder*, 30 Del. 416, 108 Atl. 43 (1919); *Opinion of the Justices*, 266 Mass. 583, 165 N.E. 900 (1929).

¹³ *Eliasberg Bros. Mercantile Co. v. Grimes*, 204 Ala. 492, 86 So. 56, 11 A.L.R. 300 (1920).

¹⁴ *Opinion of the Justices*, 220 Mass. 613, 108 N.E. 570 (1915).

¹⁵ *Eaton, C. & P. Co. v. Commonwealth*, 237 Mass. 523, 130 N.E. 99 (1921).

¹⁶ *Stanley v. Gates*, 179 Ark. 886, 19 S.W. (2d) 1000 (1929); *Waring v. Savannah*, 60 Ga. 93 (1878); *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930); *Glasgow v. Rowse*, 43 Mo. 479 (1869); *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S.W. 196 (1918) (which the Supreme Court of Illinois cited in support of the principal case).

¹⁷ *Sims v. Ahrens*, 167 Ark. 557, 271 S.W. 720 (1925); *Diefendorf v. Gallet*, 10 P. (2d) 307 (Idaho 1932); A Miss. statute provided for a tax on all annual incomes, with certain exceptions. Pl., state revenue agent, sued to recover from def. corporation an income tax. Def. contended tax was one on property and void because the property was not assessed in proportion to value as required by state constitution. *Held*, it was an excise and not a property tax, and hence pl. should recover. *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4, 25 A.L.R. 748 (1921); *Opinion of the Justices*, 77 N.H. 611, 93 Atl. 311 (1915); "While there is some au-

court's approach to the problem is that an income tax is a tax, not on property, but against the recipient of the income.¹⁸ The textwriters apparently would not favor the principal case but would agree with the courts which hold that an income tax is not a tax on property.¹⁹

Another classification would be on the basis of two Supreme Court cases. Income derived from real and personal property is itself property and so an income tax is a tax on property insofar as it taxes the income from property; a tax on income derived from trades, professions, or vocations is a tax not upon property but upon activity and is an excise tax.²⁰ Under this classification that portion of the tax levied upon income from occupations would not have to conform to the constitutional requirement of levy according to the value of the property, but since it would not be a property tax, it could not be upheld under the Constitution as interpreted by the court in *Bachrach v. Nelson*. And even if permitted under the Constitution of Illinois the result would be undesirable since the excise would place upon incomes from occupations alone a burden which the legislature intended to be borne as well by income from property, and which would not be subject to tax because it was not levied on a basis of valuation. It is submitted that the true holding of the Pollock case was that a tax upon income from property was such a direct tax as was required to be apportioned under the provisions of the Federal Constitution existing at the time of the case, and that the doctrine of the case should be strictly confined. Logically, a tax upon income from property is not the same as a tax upon property itself, since a tax on property is imposed whether or not the property produces income, and a tax on income from property is imposed only if the property produces income.

States are subject to the equal protection clause in exercising taxing power;²¹ the requirement being that the state refrain from arbitrary classification in exerting the taxing power.²² It follows that a graduated income tax is not contrary to the equal protection clause.²³ A state may impose a tax on the incomes of nonresidents arising from any business or occupation carried on within the state without violation of due process.²⁴ If such a tax does not give nonresidents

thority to the contrary, the view more generally taken is that an income tax is not a tax on property, but is more nearly within the category of excise taxes." 61 C.J., *Income Taxes*, 1559, §§ 2306, *et seq.*

¹⁸ *Norris v. Cary*, 238 N.W. 415 (Wis. 1931).

¹⁹ *Black, Income and Other Federal Taxes* (4th ed. 1919), § 2; *Cooley, Taxation* (4th ed. 1924), 3477, §§ 1743-1751.

²⁰ *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895); *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1 (1916).

²¹ *Ohio Oil Co. v. Conway*, 281 U.S. 146 (1930).

²² *Quaker City Cab Co. v. Commonwealth of Pa.*, 277 U.S. 389 (1928); 28 Col. L. Rev. 972 (1928); 27 Mich. L. Rev. 800 (1929).

²³ Const., U.S., Amend. 14; *State v. Frear*, 148 Wis. 456, 134 N.W. 673 (1912), writ of error dismissed, 231 U.S. 616 (1913).

²⁴ Const., U.S., Amend. 14; *Shaffer v. Carter*, 252 U.S. 37 (1920); 20 Col. L. Rev. 457 (1920); 18 Mich. L. Rev. 547 (1920).

the benefit of exemptions given residents of the state, it is void as abridging the privileges and immunities of citizens of the United States, and it is not remedied by allowing the nonresident to deduct from his tax a tax paid on such income in the state of his residence, if such state allows a like deduction by nonresidents within its borders; a state cannot barter away the rights of its citizens to the enjoyment of the privileges and immunities clause, and discrimination cannot be corrected by retaliation.²⁵

JOHN N. HUGHES

ANNULMENT OF MARRIAGE FOR FRAUDULENT MISREPRESENTATION

The question whether a fraudulent misrepresentation as to fortune is ground for annulment of marriage was presented in New York in the recent case of *Shonfeld v. Shonfeld*.¹ Reversing the Appellate Division, the Court of Appeals, by a divided bench (4 to 3), decided that it was error to hold as a matter of law that the misrepresentation could not be material.

The court, speaking through Crouch, J., based its decision on the New York statute,² declaring that "Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential," as interpreted in *Di Lorenzo v. Di Lorenzo*.³ As the fraud which will invalidate a marriage has never been precisely defined, the court is left free to meet each case as it arises. It need not necessarily concern what are commonly called the "essentials" of the marriage relation, but will be sufficient if it is material to the giving of consent, in the sense that if the misrepresentation had not been made, the consent would not have been given.

The misrepresentation was not a mere exaggeration or misstatement of her means or prospects, which might or might not be an incentive to marriage. It was a definite statement of an existing fact without which, as the defendant clearly understood, no marriage was presently practicable.^{3a}

A vigorous dissenting opinion was written by Crane, J., in which the construction of the statute given in the *Di Lorenzo* case, upon which the court relied, was critically assailed as dictum. A marriage is something more than a mere civil contract; it results in a status, to which legal rights and liabilities attach in which the state has an interest. Fraud which will invalidate such a

²⁵ Const., U.S., art. 4, § 2; *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920); 20 Col. L. Rev. 457 (1920); 18 Mich. L. Rev. 547 (1920); 29 Yale L. Jour. 799 (1920).

¹ 260 N.Y. 477, 184 N.E. 60 (1933), reversing 258 N.Y. S. 338.

² C. 14, § 10 of the New York Cons. Laws (Domestic Relations Law).

³ 174 N.Y. 467, 67 N.E. 63, 63 L.R.A. 92 (1903). See also comments in 1 Corn. L. Quar. 48 (1916) and 6 Corn L. Quar. 199, 401 (1921).

^{3a} *Shonfeld v. Shonfeld*, 260 N. Y. 477, 184 N.E. 60, 62 (1933).