

1934

## Constitutional Law: Taxation

Ernest O. Eisenberg

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Ernest O. Eisenberg, *Constitutional Law: Taxation*, 18 Marq. L. Rev. 261 (1934).  
Available at: <https://scholarship.law.marquette.edu/mulr/vol18/iss4/8>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [elana.olson@marquette.edu](mailto:elana.olson@marquette.edu).

execution provided by the law of the state which rendered the judgment for alimony, as such matters are governed by local practice and statutes, *Sistare v. Sistare*, supra; *Lynde v. Lynde*, 181 U.S. 183, 21 Sup. Ct. 555, 45 L.Ed. 810 (1901). South Dakota statutes, (Comp. L. 1929), provide that the court may require reasonable security for the payment of alimony, and may enforce the same by the appointment of a receiver, and may use any other remedy applicable to the case. Under the above cases it would seem that the Minnesota court was within its powers in enforcing the South Dakota decree by all the remedies that it had as its command.

The Wisconsin statutes, sec's. 247.23, 247.30, Wis. Stats. 1933, provide that the court may impose alimony as a charge on specific real estate or require sufficient security for the payment thereof, and upon neglect or refusal to pay such alimony the court may enforce the payment by execution or otherwise as in other cases; under sec. 295.03, Wis. Stats. 1933, the courts in this state have been given the additional power of enforcing the payment of alimony by contempt. It is a general principle of the law of divorce in this country that the courts, either of law or equity, possess no powers except such as are conferred by statute; and that to justify any act or proceeding in a case of divorce whether it be such as pertains to the ground or cause of action itself, to the process, or mode of enforcing the judgment or decree, authority therefor must be found in the statute and cannot be looked for elsewhere or otherwise asserted or exercised. *Barker v. Dayton*, 28 Wis. 367 (1871); *Swanson v. Swanson*, 161 Wis. 5, 152 N.W. 452 (1915); *In Re Gibic*, 170 Wis. 201, 174 N.W. 546 (1919). A judgment for alimony entered in a court of another state having general jurisdiction should be given the same faith and credit as in the state where rendered. *Estate of Wakefield*, 182 Wis. 208, 196 N.W. 541 (1923); *Mallette v. Sheerer*, 164 Wis. 415, 160 N.W. 182 (1916); *In Re Gibic*, supra. In *Kunze v. Kunze*, 94 Wis. 54, 68 N.W. 391 (1896), it was held that a divorce judgment which decrees the payment of alimony, and which in the state where rendered has the effect of a judgment at law for the payment of alimony may be enforced by an action at law in another state. The Minnesota court has taken a broad view, and has given the foreign decree the same means of enforcement as its own decrees.

C. C. C.

---

CONSTITUTIONAL LAW—TAXATION.—An action was brought by the plaintiffs on behalf of himself and all other taxpayers similarly situated, against Edward J. Barrett, Auditor of Public Accounts, and others, to restrain by injunction the expenditure of public money appropriated for the enforcement of a Retailers' Occupation Tax Act. The defendants demurred to the pleadings of the plaintiffs, which attacked the constitutionality of the Act. On a hearing, the demurrer was sustained, and the bills of plaintiffs were dismissed for want of equity. The plaintiffs appealed to the Illinois Supreme Court. *Held*, that the Act was constitutional and that the decree of the Sangamon circuit court should be affirmed. *Reif et al. v. Barrett, Auditor of Public Accounts, et al.*, (Ill. 1934) 188 N.E. 889.

In the State of Illinois the legislature is confined to three forms of taxation by virtue of the limitations of the State Constitution; these forms are: (1) property tax on a valuation basis; (2) occupation tax; and (3) franchise or privilege tax. *Bachrach v. Nelson*, 349 Ill. 579, 182 N.E. 909 (1932). Relying upon this Constitutional limitation, the appellants based their chief attacks against this Act on the ground that the Retailers' Occupation Tax was in reality an income tax, or a property tax, not levied on the valuation basis.

Regardless of the other issues raised in this case, the most important question to be determined by the Illinois Supreme Court was whether or not a tax levied on the privilege of engaging in the occupation of retailing, the amount of the tax being calculated on gross receipts, was an occupation tax, an income tax, or a graduated property tax. If the tax fell within the first group, it would be valid; if it fell within the latter two groups, it would be unconstitutional.

The Illinois Court at once drew the distinction between a property tax and an occupation tax in the following words: "A property tax is levied merely for the purpose of raising revenue and is levied against property. It does not seek or in any wise attempt to control the use, operation, or regulation of the property. When the tax is raised, the mission of the property tax has been fulfilled. \* \* \* On the other hand, an occupation tax has one of two missions: Either to regulate and control a given business or to impose a tax for the privilege of exercising, undertaking, or operating a given occupation, trade or profession." The Court then decided that the tax in the instant case was one for the privilege of exercising, undertaking, or operating a given occupation, and was not a property tax. *Winter v. Barrett*, 352 Ill. 441, 186 N.E. 113 (1933); *Sawyer v. City of Alton*, 3 Scam. 127 (Ill. 1841); *Denver City Railway Co. v. Denver*, 21 Colo. 350, 41 Pac. 826, 29 L.R.A. 608, 52 Am. St. Rep. 239 (1895); *Williamsport v. Wenner*, 172 Pa. 173, 33 Atl. 544 (1896); *Spreckels Sugar-Refining Co. v. McClain*, 192 U.S. 397, 24 S. Ct. 376, 48 L.Ed. 496 (1903); *Bowman v. Continental Oil Co.*, 256 U.S. 642, 41 St. Ct. 606, 51 L.Ed. 1139 (1921); *Foster & Creighton Co. v. Graham*, 154 Tenn. 412, 285 S.W. 570, 47 A.L.R. 971 (1926); *Fafill v Bracken*, 195 Ind. 551, 145 N.E. 312, 146 N.E. 109 (1925).

The question then arose whether the tax was an income tax, in that by requiring the retailer to pay a 2% tax on his gross sales, it really taxed his income. The Illinois Court answered this question by stating: "The tax here in question is not levied on the basis of income, but is levied on the privilege of engaging in the occupation, the amount of tax calculated on gross receipts."

With careful reasoning the court then distinguished this case from that of *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 38 S.Ct. 373, 62 L.Ed. 827 (1917); and from that of *Great Northern Railway Co. v. Minnesota*, 278 U.S. 503, 49 S. Ct. 191, 73 L.Ed. 477 (1928); by pointing out that in the *Minnesota* cases there was no attempt to tax or license the business of operating a railroad, but rather a tax based upon the gross earnings of the railroads, whereas in the instant case, the tax was upon the occupation, and the use of the gross cash sales as the basis for measuring the tax was but incidental. The true distinction between an income tax, and the occupation tax in the instant case, was pointed out by the Illinois Supreme Court in the following words: "Generally speaking, an income tax is necessarily based upon income from investments, gains of a business, or earnings from labor, trade or profession. \* \* \* In the case at bar, however, the subject of the tax is the privilege to engage in the business of selling tangible personal property to purchasers for use or consumption. *Whether the person following such business makes a profit is wholly immaterial so far as his liability to pay the tax is concerned.* He pays not upon profits or income, but he pays a tax upon the gross receipts of the business. \* \* \* The gross receipts are not the subject of the tax, but merely the standard by means of which the amount of the tax is determined."

This case illustrates only too well the devious reasoning which courts are forced to resort to, when the taxation policy of a state is archaic, or when constitutional limitations are unreasonable. Although the Constitution prohibits the

use of income taxes in the State of Illinois, the Occupation Tax adopted, so closely resembled the income tax in many of its phases, that the Supreme Court was forced to write page upon page of legal reasoning to distinguish between the two.

E. O. E.

**FIXTURES—FORECLOSURES OF LAND CONTRACTS—ADJUSTMENT BETWEEN THE VENDOR IN A LAND CONTRACT AND A CHATTEL MORTGAGEE CLAIMING POSSESSION OF FIXTURES.**—The plaintiff contracted to sell the premises in question to one of the defendants. The vendor, according to the terms of the contract, put up a building which the vendee occupied. The vendee installed the bowling alleys and other equipment. The vendee had purchased the alleys on credit and had given a purchase money mortgage to the seller to secure the price of the alleys. The vendee, apparently, had satisfied that obligation, but had subsequently borrowed a sum of money from another creditor and had given to him a chattel mortgage on the bowling alleys to secure that loan. The plaintiff-vendor had no knowledge of the subsequent transaction and did not in fact give its consent. The defendant-vendee had carried insurance on the alleys in a policy separate from that covering the building. The vendee was in default on the land contract. The vendor sued to foreclose. The second chattel mortgagee, the only one in the case claimed the bowling alleys. The court entered a judgment of foreclosure and enjoined the defendants from removing the bowling alleys. *Held*, on appeal, judgment affirmed, the bowling alleys were fixtures and were covered by the plaintiff's title. *David G. Jones Co. v. Weed*, (Wis., 1934) 253 N.W. 181.

Bowling alleys when installed on the premises are fixtures. *Brunswick-Balke-C. Co. v. Franzke-Shiffman R. Co.*, 211 Wis. 659, 248 N.W. 178 (1933). In the most simple situation that means that, as between a grantor and a grantee, the grantor's interest in the premises and the fixtures is divested in favor of the grantee by a conveyance covering the premises. See *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12 (1877); *Capehart v. Foster*, 61 Minn. 132, N.W. 257, 52 Am. St. Rep. 582 (1895); *Doll v. Guthrie*, 233 Ky. 77, 24 S.W. (2d) 947 (1930). As between the vendor in the land contract and the vendor who had furnished the fixtures, bowling alleys, or whatnot, to the proprietor-vendee on a conditional sale agreement or with a chattel mortgage back, the chattel vendor would be protected against the vendor in the land contract in the event of a default by the buyer on the chattel mortgage obligation or conditional sale agreement. *Campbell v. Roddy*, 44 N.J.Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889 (1889). He could take his bowling alleys out of the place provided he could do so without impairing the building. This result follows although the court may be willing to admit that the alleys or other equipment are fixtures. The court has to make an adjustment between two security claimants. The vendor ought not get more security than that for which he had bargained. Until the chattel vendor's claim is satisfied his security interest is dominant. When his claim is satisfied then the fixtures are covered by the other claimant's interest as the principal case has decided.

When security is given to a creditor by way of a mortgage covering the real estate after the equipment has been installed on credit, and the seller of the equipment has a recorded chattel mortgage or conditional sale agreement to secure his claim, the real property mortgagee without notice is protected. The chattel vendor will be enjoined from taking out the equipment if he tries to reach his security after the purchaser's default. The recording of his security instru-