to abstain from marriage in *Maddison v. Alderson*.[18] Throughout the whole discussion it must also be borne in mind that the remedy is one not to be demanded as a matter of right, but one to be exercised in the discretion of the court and that where it would operate unjustly upon innocent third persons, not parties to the contract, or be contrary to public policy, relief will be denied.[19]

That such an agreement is not a violation of the Statute of Wills has been decided by the Court of Appeals in the case of *Winne v. Winne*.[20] It was there laid down that it was "not a contract in the nature of testamentary disposition of the decedent's property." But Jarman[21] says in effect that an instrument, by which a person makes a disposition of his property to take effect after his death, is a testamentary disposition. The instrument in question would seem to fall within that definition and, therefore, to be against public policy in not having complied with the formalities prescribed by the Statute of Wills. Whether so patent a violation of the Statute of Wills should be permitted is doubted by some cases in the lower New York courts[22], but they go on to say that the rule is established otherwise.

According to the foregoing principles, the principal case appears to have been correctly decided. Not only were the acts explicable without assuming any contract, but they were capable of being compensated adequately in an action based upon *quantum meruit*. In fact the testator had indirectly compensated the plaintiff during his life by contributing to the support of, if not altogether maintaining, her children. Finally, the complainant was guilty of such a breach of the agreement in leaving him as to render enforcement of the contract, supposing one were sufficiently proved, a fraud upon the decedent.

Leonard G. Aierstok, '17.

The Federal Income Tax Law of 1913: Construction of the Sixteenth Amendment.—In the case of *Brushaber v. The Union P. R. Co., 36 Sup. Ct. 236 (1916)*, a very curious interpretation of the sixteenth amendment was urged. The appellant, a stockholder of the defendant corporation, filed his bill to enjoin the said defendant from complying with the income tax provisions of the act of 1913,[1] on

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[18]L. R. 8 App. Cas. 467 (1883).

[19]Owens v. McNally, *supra*, note 5; Johnson v. Hubbell, *supra*, note 1.

[20]166 N. Y. 263 (1901).

[21]Jarman on Wills, sec. 11.

[22]Gall v. Gall, *supra*, note 5; Shakespeare v. Markham, 10 Hun (N. Y.) 311 (1877).

[1]38 Stat. at L. 166. This act, sec. 2, chap. 16 of the Statutes of 1913, in general provides for a tax of one per centum on net incomes from individuals and corporations. This is called the normal tax. There is another tax, progressive in its nature, on incomes exceeding $20,000. This is called the additional tax. The act contains provisos exempting incomes not exceeding $3000, or $4000 if the individuals receiving them are married, and also certain classes of corporations, such as labor and agricultural associations, mutual savings banks not having a capital stock represented by shares; fraternal beneficiary societies, and other several organizations, religious, charitable, educational or commercial in their objects not operated for profit and no part of whose net income should inure to the benefit of any stockholder.

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the ground that the tax provided for in this statute was unconstitutional.

The contention of the appellant was as follows:

(1) The sixteenth amendment[2] provided for a new kind of a direct tax, a tax on incomes "from whatever source derived." This phrase, the appellant contended, implied that there were to be no exemptions and that there must be intrinsic uniformity. This kind of a tax, falling equally upon *all* corporations and individuals, irrespective of the fact that their incomes did not exceed $3000, or, in the case of corporations, that their purposes were agricultural, labor, etc.; and, falling equally on every dollar, i.e., with no progressive feature, was alone exempted from the general requisite of apportionment as to direct taxes, extablished by art. I, sec. 2, of the constitution.[3]

(2) The act of 1913 exempted certain classes of corporations, such as labor, agricultural societies and others, and also individuals whose incomes did not exceed $3000, or $4000 if married, besides providing for a progressive tax on incomes exceeding $20,000.

(3) Therefore, the tax being direct and not coming within the class authorized by the amendment, alone exempted from apportionment according to the appellant, is unconstitutional because said requisite has not been complied with.

The court through Chief Justice White held that the tax was constitutional. The major proposition of the appellant's argument is not true. Hence, the conclusion does not follow. The sixteenth amendment does not permit a new class of a direct tax, (in fact, as it will be later shown, the court does not think that the amendment treated the tax as a direct tax at all), carrying with it the distinguishing characteristic of a hitherto unrecognized uniformity,[4] both as to the property subjected to the tax and the persons to be affected thereby, that is to say, requiring the tax to be absolutely uniform on every dollar of income and on every person, thus denying the recognized power of Congress to lay a progressive tax and to make reasonable exemptions from the operation of this or any other law.

The words "from whatever source derived" were not put in the sixteenth amendment to support this interpretation. They were put in to render nugatory the celebrated case of *Pollock v. The Farmer's Loan and Trust Co.*[5] This case held that a tax, under the act of 1894,[6] on incomes derived from real and personal[7] property was

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[2]"The Congress shall have 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."

[3]"Representatives and Direct Taxes shall be apportioned among the several states which may be included in this Union, according to their respective numbers."

[4]The only recognized uniformity in federal taxation is that established by art. 1, sec. 8, "all duties, imposts and excises shall be uniform throughout the United States," and this has only been held to mean geographical uniformity. See Knowlton v. Moore, note 12, *post*.

[5]157 U. S. 429 (1895). [6]28 Stat. at L. 509.

[7]The court in 157 U. S. 429 was equally divided as to whether a tax on the income from personal property was a direct tax, but on a rehearing, 158 U. S. 601, 637, the court held that a tax on the income from personal property was likewise direct and unconstitutional if not apportioned.

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unconstitutional because it should be considered as a direct tax and subject to the requisite of apportionment. This requisite, the court said through Fuller, C. J., was one of the great compromises at the Federal Constitutional Convention. Its purpose was to protect the more wealthy states from being unjustly taxed by a less wealthy majority. For this reason representatives to the national Congress, or the power to dispose of the revenues derived from taxation, and direct taxes were to be apportioned among the several states according to their respective numbers. The court concluded that to tax the incomes from realty was to tax the realty itself, which together with a capitation tax was the only kind of direct taxation well recognized as such by the framers of the constitution,[8] and therefore, unless apportioned would be in violation of this fundamental compromise. To quote from the opinion of the court:[9] "an annual tax upon the annual value or annual uses of real estate, appears to us *in substance* (italics are mine) as an annual tax on the real estate, which would be paid out of the rent or income."

Chief Justice White, who delivered a dissenting opinion in the *Pollock* case, interprets this holding to mean that an income tax is not by nature a direct tax. He says that the *Pollock* case "recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement of apportionment of direct taxation was adopted to prevent."

On this interpretation, he bases his argument against another contention of the appellant, namely, that the sixteenth amendment provides for a tax, subject neither to the requirement of uniformity, since the tax there provided is treated as a direct tax, nor subject to the requirement of apportionment since it is expressly relieved from it by the words of the amendment.[10]

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[8]There was a great deal of uncertainty at the Constitutional Convention as to what "direct taxes" meant. "Mr. King asked what was the precise meaning of *direct* taxation? No one answered." (Madison's Journal of the Constitutional Convention. Aug. 20, 1787). But it is certain that it was generally understood by the framers that a tax on real property and a capitation tax belonged to the class of direct taxes. This idea was prevalent too in the early history of Congress. In 1794, Congress levied a tax on carriages "for the conveyance of persons which shall be kept by or for any person for his or her own use, or to be held out for hire, or for conveying of passengers." Madison opposed it on the ground that it was a direct tax and that unless apportioned, would be unconstitutional. Yet the tax was levied. Patterson, J., himself a member of the Convention, said in the case of Hylton v. United States, 3 Dall. 171 (1794), which considered the constitutionality of this tax, "I never entertained a doubt that the principal, I will not say the only, objects that the Framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land. There are numerous statements in the records of the Convention to the effect that the only certainty in the mind of the Framers concerning the word direct taxes was that a tax on land and a capitation tax was included in them."

[9]At p. 581.

[10]This argument is also presented in Mr. Dwight W. Morrow's article "The Income Tax Amendment," 10 Columbia Law Review 379, 412. "The Pollock case," he says, "holds distinctly that a tax from income from real and personal property is not 'an excise duty or impost' but a direct tax." The Sixteenth

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The amendment, the court said, judged by the purpose for which it was passed, does not treat income taxes as direct taxes but simply removes the ground which led to their being considered as such in the *Pollock* case, namely, the source of the income. Therefore, they are again to be classified in the class of indirect taxes to which they by nature belong. To quote again from the opinion: "That the contention that the amendment treats a tax on income as a direct tax although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation since the command of the amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived forbids the application to such taxes of the rule applied in the *Pollock* case by which alone such taxes were removed from the great class of excises, duties and imports subject to the rule of uniformity, and were placed under the other or direct class. This must be unless it can be said that although the Constitution, as a result of the amendment, in express terms excludes the criterion of source of income, that criterion yet remains for the purpose of destroying the classification of the Constitution by taking an excise out of the class in which it belongs and transferring it to a class in which it cannot be placed consistently with the requirements of the Constitution."

Summarizing: In the first place, the words "from whatever source derived" were put in the amendment to do away with the ruling of the *Pollock* case, in so far as it held that a tax on the income derived from real or personal property was a direct tax which would be unconstitutional if not apportioned, and not to create a new kind of a direct tax clothed with a hitherto unrecognized uniformity both as to the property and persons to be affected thereby, which tax alone was to be exempted from apportionment. Secondly, the result of the sixteenth amendment was not to create a tax free from the requirements of uniformity and apportionment but to render without effect the decision of the *Pollock* case and place taxes on incomes from real and personal property in the classification to which they by nature belong, namely, that of indirect taxes, and hence, subject to the rule of uniformity. This should allay all fear of injustices which would have been rendered possible if the contention urged by the appellant had been upheld.

Amendment substantially provides that even though a direct tax it shall not be subject to the rule of apportionment. There is not the slightest suggestion in the amendment that it is the intention of the people to make such a tax subject to the rule of uniformity. . . . Congress may in one year lay a tax upon the incomes of the citizens of New York from real and personal property because the crops in the West have been bad; the next year they may lay such a tax upon the citizens of Nevada because the mining business has been unusually good." Chief Justice White, however, thinks that the Pollock case did not declare income taxes on real and personal property to be direct by nature, but only in so far as it was necessary for the court to regard them as such in order to prevent a violation of the spirit of the Constitution.

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The appellant further contends that the Act of 1913 is unconstitutional because of several of its provisions which are claimed to want in due process and to be in violation of the uniformity clause.[11] For the purposes of illustration, some of these objections which are typical of the rest, follow:

1. The progressive tax feature and the exempted incomes,—those not exceeding $3000, or $4000 if the person receiving the income is married—, are based on wealth alone and, therefore, repugnant to the due process clause of the fifth amendment.

2. The duty of collecting the tax at the source which is cast upon corporations, because of the expense to be incurred thereby, is repugnant to due process of law, being the taking of property without compensation.

3. The law discriminates against bondholders, in favor of individuals not having their investments in bonds, since it is depriving said bondholders of the use of their money during the interval between the deducting and paying of the tax by the corporations.

4. Bondholders are further discriminated against in that they must include the incomes from these bonds, whose tax already has been deducted by the corporations, in making a return of all income. This results in double taxation, in the consequent labor and expense in applying for a refund, and further, in a deprivation of the use of the money in the interval.

5. Corporations are discriminated against in favor of individuals, in that the amount of interest paid which ean be ieducted from the taxable income of corporations is limited to interest on indebtedness not exceeding one-half of the sum of bonded indebtedness and paid-up capital stock.

6. Corporations are further discriminated against, in that they are not allowed to deduct from their taxable incomes dividends from stock of other corporations whose incomes have already been taxed, whereas individuals are given that privilege.

7. Discrimination, for the purpose of ascertaining exempted incomes, between single and married persons, and between the exempted incomes of husband and wife living together and those who are not.

The court held that these numerous and minute, "not to say in many respects hypercritical," contentions do not violate, in the first place, the uniformity clause, for it is well settled that this clause only exacts geographical uniformity. This court in the leading case of *Knowlton v. Moore*[12] held "that the words 'uniform throughout the United States' do not relate to the inherent character of the tax as respects its operation on individuals, but simply requires that *whatever plan* or *method* (italics are mine) Congress adopts for carrying

[11]There is no question that as to taxes on incomes from the professions or business the rule of uniformity must be complied with since these taxes were not held to be direct by the case of Pollock v. The Farmer's Loan & Trust Co., *supra*, note 5.

[12]178 U. S. 41, 84 (1900). Also see in accord: Patton v. Brady, 184 U. S. 608, 622 (1902); Flint v. Stone Tracy Co., 220 U. S. 107, 158 (1911); Billings v. United States, 232 U. S. 261, 282 (1914).

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the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, wherever a subject is taxed anywhere the same must be taxed everywhere throughout the United States, and at the same rate."

In the second place, the above provisions do not violate the due process clause of the fifth amendment, because it is equally well settled that such clause is not a limitation upon the taxing powers of Congress.[13] This doctrine, however, the court further stated, is limited. Congress cannot under a seemingly exercise of the taxing power pass an act which should be "so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the fifth amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."[14] No such case, however, is presented here.

The court further held that a progressive tax does not transcend the conception of all taxation and is not a mere arbitrary abuse of power which was wanting in due process. That such has always been the manner in which they have been regarded is shown by the fact that progressive taxes were passed early in the history of Congress and in nearly all of the income taxes passed prior to the act of 1894. Moreover, the court said, the "absolute want of foundation in reason" of this contention "was plainly pointed out in *Knowlton v. Moore*," *supra*, "and the right to urge it was necessarily foreclosed by the ruling in that case made." It is doubtful, however, whether as to the general power of Congress to lay a progressive tax this last statement was correct.[15]

Ramon Siaca, '16.

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[13]Treat v. White, 181 U. S. 264, 269 (1901); Patton v. Brady, 184 U. S. 608, 621 (1902); McCray v. United States, 195 U. S. 27, 61 (1904); Flint v. Stone Tracy Co., 220 U. S. 107, 158 (1911); Billings v. United States, 232 U. S. 261, 282 (1914).

[14]It is interesting to note that this limitation is expressed also by Chief Justice White in similar language in McCray v. United States, at p. 64, *supra*, note 13.

[15]See Mr. Frank Warren Hackett's article on "The Constitutionality of the Graduated Income Tax Law," 25 Yale Law Journal 427 (Apr. 1916). In the case of Knowlton v. Moore, *supra*, it was stated that the question was disposed of in Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 293 (1898). In this case we find that the basis of the decision is the power of the state to attach any condition it pleases to a grant of the right to inherit or receive property by devise. The Knowlton ease, of course, which is a case of a federal inheritance tax, does not rest upon exactly the same proposition. Yet all that we find in this case on this proposition is the following statement by Mr. Justice White: "some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative and not judicial. The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the court usurps a purely legislative function." But this seems to be nothing more than *obiter dictum*.

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