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Constitutional Law-Taxation

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CONSTITUTIONAL LAW—TAXATION—Wisconsin attempted to tax plaintiff's income on the basis of the combined total of his income and that of his wife. *Held*, unconstitutional, contrary to due process.¹ The state law provided that in computing income tax, the income tax of married persons shall be computed on the combined average taxable income of husband and wife.² Taxes levied shall be payable by such husband, or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation. The assessor asserted against the plaintiff, a tax computed on the combined total of his and his wife's income as shown by separate returns, treating the aggregate as the income of the husband. The amount so ascertained and assessed exceeded the sum of taxes which would have been due had their taxable incomes been separately assessed. This resulted from the fact that the statute in question provides for surtaxes graduated according to the amount of the taxpayer's net income. The greater the income, the higher the tax paid. Plaintiff paid the tax under protest, and seeks to recover so much thereof as was in excess of the tax computed on his own separate income. He asserted that the statute, as applied to him, violated the Fourteenth Amendment. The Supreme Court of Wisconsin overruled this contention,³ and plaintiff appealed. The United States Supreme Court held that since the state had taken from the marriage status, except in its purely social aspects, all the elements which differentiated the status of the married person from that of the single person, a mere difference in social relations does not so alter the taxable status of one receiving income as to justify a different measure for the tax. Therefore, the classification was arbitrary, discriminatory, and a denial of due process.

By the law of Wisconsin,⁴ a wife's property is her own—and she may convey, devise or bequeath same as though she were unmarried. Since in law and in fact, her income is her separate property, the question is whether the state has the power by an income tax law to measure the husband's tax—not by his own income—but, in part, by that of another. Any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process.⁵ That which is not income cannot be made such by calling it income.⁶ Although the Wisconsin court sustained the statute in question⁷ on the ground that the provisions under attack are necessary to prevent

¹ *Hoepfer v. Tax Com. of Wisconsin*, 52 Sp. Ct. Rep. 120 (1931).

² Wisconsin Statutes, 1929, No. 71.05, subd. 2 (d), and No. 71.09, subd. 4 (c).

³ *Hoepfer v. Tax Commission*, 202 Wis. 493 (1930).

⁴ *Wisconsin Statutes*, 1929, No. 246.01-.05.

⁵ *Knowlton v. Moore*, 173 U. S. 41, 77.

⁶ *Nichols v. Collidge*, 274 U. S. 531.

⁷ *Hoepfer v. Tax Commission*, 202 Wis. 493 (1930).

fraud and evasions because the marriage relation offers opportunities that do not exist to the same degree for single persons, for shifts and transfers of property to secure exemptions from income taxes and to avoid the higher brackets of such a tax, the United States Supreme Court held that rights guaranteed by the Federal Constitution are superior to the supposed necessity of these provisions to prevent fraud and evasions because of the opportunities for same offered by the marriage relation. The State is forbidden to deny due process of law or equal protection of the laws for any purpose whatsoever. The provisions of the tax statute do not re-establish what was formerly an incident of the marriage relation. Since the property of the wife is still her own, the effort to tax the husband for the wife's income did not make it his income and so the taxing as a joint income, that which under the state's law is owned separately, merely to secure a higher tax than would be the sum of the taxes on the separate incomes, is an arbitrary and unreasonable classification. A forbidden tax cannot be enforced to facilitate the collection of one properly laid.⁸

The dissenting opinion, written by Justice Holmes, in which Justices Brandies and Stone concurred, was based on the ground that the husband and wife usually get the benefit of the income of each other, and that taxation may consider not only the legal command over, but the actual enjoyment of the property taxed.⁹ The minority held that it is the Court's business to supply any formula necessary to carry out the expressed intent of the legislature, and that the legislature here had clearly indicated that it intended to accomplish a certain result within its power to do—that of keeping one characteristic of the marriage relation. Since the minority were of the opinion that the difference between the marriage status and that of an unmarried person was a reasonable basis for the classification, the question of denying due process does not arise under their view.

The minority view is very plausible, for a tax on the basis of joint incomes would seem not unreasonable in view of the fact that the benefit of such incomes might enure to the head of the family, and he would then be enjoying the income taxed, though he has not the legal command over it.¹⁰ However, the state legislature has expressly made the wife's income her separate property¹¹ and, while the legislature undoubtedly has the power to change the incidents of the marriage relation, as long as it has given the wife the absolute control over her income, the measurement of the husband's tax on the basis of the joint income to give the state the benefit of the increased tax on the larger income is clearly an attempt to measure the tax on one person's property or income by reference to the property or income of another, and so is contrary to the Fourteenth Amendment.¹²

L. J. H.

LANDLORD AND TENANT—ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE—On April 15, 1927, the plaintiff leased certain real estate to the

⁸ *Schlesinger v. Wisconsin*, 270 U. S. 230.

⁹ *Corliss v. Bowers*, 281 U. S. 276.

¹⁰ *Ibid.*

¹¹ Wisconsin Statutes, 1929, No. 246.01-.05.

¹² *Knowlton v. Moore*, 178 U. S. 41, 77.