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Constitutional Law--Income Tax--Husband and Wife as Taxable Unit

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STUDENT NOTES

CONSTITUTIONAL LAW — INCOME TAX — HUSBAND AND WIFE AS TAXABLE UNIT. — A statute 1 provided that, as to persons living together as members of a family, the income of the wife and of each child under eighteen should be assessed as that of the husband or head of the family, and that a tax should be paid on the aggregate amount according to the applicable graduated rate. H married a widow with separate property and a separate income from a partnership of which she was a member; he seeks to recover the excess of the tax paid over that which he would have had to pay on his own income alone. The state court sustained

1 Wis. Stat. (1929) § 71.05 (2) (d). The act provided for rates graduated with reference to the size of the income up to $12,000, with a flat rate of six per cent. on amounts in excess of $12,000. Wis. Stat. (1929) § 71.06. However, spouses could make separate returns at their option, or a single joint return. In either case the tax was to be computed on the combined average taxable income, exemption allowed but once and divided equally between them, and a tax paid by each in the proportion that the average income of each bore to the combined average income. Wis. Stat. (1929) § 71.09 (4) (c.).

The dissenting opinion of Mr. Justice Holmes, in which Mr. Justice Brandeis and Mr. Justice Stone concur, sets forth the preferable viewpoint. Upon the lowest argumentative level, the statute might have been sustained as a preventative measure against fraudulent evasions of surtaxes by colorable transfers of property among members of a family. The majority, citing Schlesinger v. Wisconsin,6 state that tax evils may not be reached by a blanket regulation which is unconstitutional. Certainly in view of the eminent dissenters, it cannot be assumed categorically that this regulation is unconstitutional and, therefore, inappropriate for the prevention of tax evasions. One need not inquire of accountants to learn about the within-the-law manipulations of clients. Almost every case before the Board of Tax Appeals, purporting to involve an essentially different situation, is illustrative.

The majority state that married women’s acts have destroyed

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2 Hooper v. Wisconsin Tax Commission, 202 Wis. 493, 233 N. W. 100 (1930).
3 55 S. Ct. 120 (1931); comments in (1932) 32 Col. L. Rev. 374 and (1932) 45 Harv. L. Rev. 740.
4 This was one of the grounds of the state court’s decision, supra n. 2. The statute was first sustained upon this ground twenty years ago in Income Tax Cases, 145 Wis. 456, 134 N. W. 673, 135 N. W. 164 (1912). It is immaterial that the husband and wife in the Hooper case enjoyed bona fide separate incomes, for it has often been decided that administrative necessity may justify the inclusion of innocent transactions within a prohibited class, supra n. 3, at 123, 124. Cf. Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 33 S. Ct. 44 (1912).
5 270 U. S. 250, 46 S. Ct. 260 (1926) (invalidating a statute which, for purposes of inheritance tax, classified all gifts inter vivos, effective within six years of death, as gifts made in contemplation of death).
6 Some possible manipulations are as follows: (1) the husband creates a revocable trust under which the income from property is paid to the wife for life, remainder over to children, but this income was held validly taxed to the grantor-husband in Corliss v. Bowers, 281 U. S. 376, 50 S. Ct. 336 (1930); (2) so-called ‘wash’ sales of stock to create deductible losses for the purpose of income tax returns, e. g., X sells stock, which he purchased for $10,000, for $2,000, reports a loss of $8,000 and a few days later buys the same stock back at virtually the same price for which he sold; this situation is now expressly covered by the Revenue Act of 1928, § 113, disallowing deduction for alleged loss on sale of stock or securities where substantially identical property is repurchased within 30 days before or after such sale date; (3) A, the sole owner of a prosperous business, forms a partnership including B, his wife, and minor children, C and D, dividing the profits equally. A files a separate return as does B both for herself and as guardian for the children and high surtaxes are avoided. It is said the government has never questioned such returns; (4) A, B and C are stockholders in a corporation making large profits; they set up a partnership, composed of their wives, which becomes the selling agency for the product of the corporation by contract, thereby reducing the profits of the original corporation which the husbands report as dividends and getting a large part of the income into the partnership where it becomes distributable to the wives who file separate income tax returns.
the former economic identity of husband and wife, and becloud the issue with the proposition that one person may not be taxed for the property of another. Long ago Mr. Justice Holmes distinguished between the practical effect of the husband's power and its legal ground, and in his answer here that "usually each would get the benefit of the income of each without inquiry into the source" he suggests the real issue of treating the family as an economic unit and the basis of a reasonable classification for tax purposes. Although both are comparatively recent developments, the chronological connection is probably the only one that exists between giving married women property rights and assessing income taxes. Statutes enacted to release married women from subjection to marital power seem irrelevant where no question of protection is involved.10

9 Arnett v. Reade, 220 U. S. 311, 31 S. Ct. 425 (1911), (suit to quiet title where statute provided both husband and wife must join in conveyances of realty acquired during coverture; held, that deed of husband alone is ineffectual to convey community property even though acquired prior to passage of the act. Certainly where, as here, legal title is involved, the legal ground is important, but where taxation is involved, the practical effect of the husband's power becomes all important).

9 The majority state that "it can hardly be claimed that a mere difference in social relations so alters the taxable status of one receiving income as to justify a different measure for the tax," supra n. 3, at 122. Why not? In Maxwell v. Bugbee, 250 U. S. 525, 40 S. Ct.2 (1919) an inheritance tax upon the estate of a non-resident decedent, the rate of which was determined by the combined value of local and foreign assets, was sustained. In (1932) 45 Harv. L. Rev. 740 it is argued from this case that "just as the advantage of owning property makes it reasonable to take that property into account in determining a rate, even though the state is powerless to tax its devolution directly, so here the advantage derived from a spouse's income makes an analogous determination reasonable. However, it is questionable whether the economic advantages resulting to one spouse from the other's income are sufficient to justify the statute so far as it provided that the head of a family should be taxable for the incomes of members." The Bureau of Internal Revenue has recently defined "head of a family" as a taxpayer, who may be single, who supports in one household one or more persons over whom he exercises family control, based on some moral or legal obligation to do so, as widower supporting in one household an aged mother and a daughter. It was decided that such a person is entitled to the same Federal income tax exemption of $3,500 as a married person. If such exemption be allowed, is it not reasonable that such "head of a family" should bear a tax burden according to the combined income of the members thereof? N. Y. Times, Mar. 5, 1932.

10 "But taxation is not so much concerned with the refinements of title as it is with actual command over property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title, whereas here he did not. But from the point of view of taxation there would be no difference." Mr. Justice Holmes in Corliss v. Bowers, supra n. 6.

10 A similar classification has been made in England both with respect to
The treatment of husband and wife under the Federal income tax law demonstrates the inapplicability of the fundamental proposition of the majority to this situation. Apparently it was only in community property states that the government attempted to collect a higher tax from the husband upon the basis of the combined income of husband and wife. In *U. S. v. Robbins* attorneys on both sides thought the proper method of approaching the problem was to ascertain the nature of the wife's interest in community income in California by finding what rights of ownership she might exercise over it. It was decided that the whole income from community property was assessable to the husband since the wife's interest there was a mere expectancy and the husband was in fact the owner of the community property during the life of the community. Mr. Justice Holmes said then "even if we are wrong as to the law of California and assume the wife had an interest in community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole." Of course, Congress had never said expressly that the husband should be so taxed. California promptly passed a statute to avoid this result, and in a series of recent decisions it was held that in all the community property states in question, including California as to which an anomalous result was reached, the wife has such a present vested interest that she is entitled to be treated as the owner for the purpose of filing a

the rights of married women, 45 & 46 Vict. c. 75, § 1 (1882), and the assessment of the wife's income to the husband, 17 & 18 Geo. 5, c. 10, § 42 (96) (1927).


12 All the revenue acts have simply provided that every individual with a certain income shall file a return, e. g., the Revenue Act of 1928, § 51. The Treasury Department has twice suggested to Congress without success that the husband be taxed upon the whole community income.

13 *Cal. Civil Code*, § 161a, effective July 29, 1927, "the respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband . . . . This section shall be construed as defining the respective interests and rights of husband and wife in community property."


15 If received a salary of $3,600 which under the California law was community income and, therefore, if and his wife are each permitted to file a separate return for one-half. *U. S. v. Malcolm*, supra n. 14. Thus a highly paid executive may escape his just surtax burden, he returns one-half the salary, the wife one-half, although he earns it all.
separate income tax return covering one-half the community income. With one possible exception the Federal government has a uniform policy now in both community property and other states. Up to June 26, 1922, the Treasury Department permitted a husband and wife, who had originally elected to file a joint return, to file amended separate returns, but on that date a contrary ruling was made, so that now they may have to pay a higher tax based on their aggregate income. 

If it be said that the Hoeper case, in which Mr. Justice Roberts also wrote the majority opinion, stands for uniformity in state and federal income tax administration, the answer is simply that the only desirable uniformity is as to the federal law. The state of Wisconsin has said expressly that the husband shall be so taxed and has applied this law for over twenty years. It would seem that the "benign" attitude evinced so recently toward other legislation might have permitted Wisconsin to continue to tax incomes in this manner.

—Bernard Sclove.

Contempt of Court — Falsification of Evidence. — A federal judge sitting in New York deplores the loose ideas of testifying now current in our courts and the numerous perjuries on the witness stand that escape notice. Rather than stop short with depreciatory remarks regarding this evil, as other juristic commentators are prone to do, he proceeded to sentence a witness who had perjured himself for contempt of court. The witness, J. D., had testified that he was on board a certain scow at the time of its sinking and that he had seen the accident. Two other witnesses testified that they had met J. D. when he arrived on the scene of the disaster, and at that time he was first informed of the sinking of the scow. J. D. thereupon confessed that he had lied, and the judge held him in contempt of court for having wilfully testified falsely. The Dunnigan Sisters.

Whether perjury can be summarily punished as contempt of court is a question which often arises. The cases seem to agree

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10 The Revenue Act of 1928, § 51 (b) (1) and (2). See also Sol. Op. 90, Treasury Dept. Cumulative Bull. No. 4, p. 236 (June 1921).


1 The Dunnigan Sisters, 58 F. (2d) 502 (D. C., S. D. N. Y., 1931).

*Ibid.