Constitutional Law - Taxation - Husband and Wife

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people. With the responsibility for the plane on which the administration justice is maintained resting, then, exclusively on the courts, which must necessarily rely on the bar to aid them in performing their tasks, it is not illogical that the courts' interest in the quality of the bar should transcend that of the legislature, which is in no way responsible for the manner in which the courts exercise their sovereign powers.

In the instant case the court bottomed its claim to the right to ultimately determine who is to be admitted to practice before it on the ground of inherent power. It is respectfully submitted that whenever a court claims inherent power it opens itself to collateral attack by those who deny the existence of inherent power in our American courts. It was to defeat just such an attack as this that the learned justice bolstered his decision in the case by intimating that those who deny the court inherent power in the premises, nevertheless, readily concede that it possesses implied power therein (opinion page 449), and once the court's power be conceded in the premises, in the words of the learned justice, "the matter of its proper designation may afford an intriguing subject for mental sparring; but whether it be implied or inherent results in no substantial difference to the citizen or the rights and liberties of the people."

Disregarding the other points involved in the case, which in the opinion of the reviewer require no special elucidation or comment, the significant rule of the case is the holding—that a legislature is without power to enact a statute restoring to an attorney his license previously revoked by the supreme court, on the ground that it is an encroachment of the judiciary's power to fix additional qualifications for attorneys, which in the opinion of the judiciary are necessary for the proper administration of judicial functions.

**EUGENE PAUL LECHER**

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**CONSTITUTIONAL LAW—TAXATION—HUSBAND AND WIFE.** In a recent decision, *Hoeper vs. Tax Commission of Wisconsin, ___ U.S. ___*, 52 Sup. Ct. Reporter 120, the United States Supreme Court in overruling the Supreme Court of Wisconsin, declares void the enactments of the Wisconsin legislature, (Wis. Stats. 1929, 71.05 (2); 71.09 (4)),¹ providing for the addition of the wife's income to the husband's

¹ Sec. 71.05 (2) (d): In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife, and the income of each child under eighteen years of age shall be added to that of the husband or father, or if he be not living, to that of the head of the family and assessed to him except as hereinafter provided. The 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.
in computing the latter's tax liability. The plaintiff, a resident of Wisconsin, having paid his income tax under protest, instituted proceedings against the Tax Commission of Wisconsin, for the recovery of that portion in excess of the tax computed on his separate income, claiming that the statute as applied to him was contrary to the Fourteenth Amendment of the Federal Constitution guaranteeing due process and equal protection of the law.

The high court in sustaining this contention and denying the constitutionality of the statutes, takes judicial notice of the Wisconsin Married Women's Act, under which the husband's ownership and control of his spouse's property have been abolished, and particularly of the section providing, "that the individual earnings of every married woman except those earnings from labor performed by her husband or in his employ, or payable by him are her separate property and not subject to his control or liable for his debts."

It would seem, therefore, that the income tax statutes in question are inconsistent with the enactments granting separate property and income rights to the married woman, free from her husband's ownership or control, leading to the conclusion that this attempt by the state to measure the tax on one person's property or income in part by that of another (the wife) is arbitrary and discriminatory, and violative of the due process clause of the Fourteenth Amendment.

As to whether the tax statutes are justifiable on the ground that they were necessary to prevent frauds and evasions by married persons, the court cites Schlesinger vs. Wisconsin. In that case, a statute classifying all gifts inter vivos effective within six years from death as gifts made in contemplation of death was declared invalid because, admitting the apparent necessity, the rights guaranteed by the Federal Constitution take precedence, and the state is precluded from denying due process or equal protection of the law for any purpose whatsoever, no matter how commendable it may be.

However, Mr. Justice Holmes in his dissenting opinion, concurred in by Justices Brandeis and Stone, accords a wider latitude to the inherent regulatory taxing power of the state, and asserts that the classi-
Classification based on the marriage relation is not such an arbitrary and unreasonable prerogative as would place it in conflict with the due process clause of the Fourteenth Amendment. Pointing out that the ruling in Schlesinger vs. Wisconsin (supra), is not germane to the question because there there was no likely relation between the statute and the alleged evil to be remedied, he upholds the assumption of legislative authority to meet practical exigencies. "Unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said the limit of legislative power has been abused. To hold otherwise, would be to substitute judicial opinion of expediency for the will of the Legislature, a notion foreign to the American constitutional system." Applying this construction of constitutional limitations to the instant case, he further cites Income Tax Cases, 134 N.W. 673, (Wis.), where the court said, "Classification is justifiable in case there is some substantial difference of situation which suggests the advisability of difference of treatment. We think there is clearly such a difference in this, that experience has demonstrated that otherwise there will be many opportunities for fraud and evasion of the law which the close relation of husband and wife or parent and child makes possible if not easy."

The dissenting view goes on to say that the principal case is not analogous to the attempt to take one person's property for the purpose of paying another person's debt which would constitute a denial of the due process clause, since even though certain Wisconsin statutes declare a separation of property interests, it should not be overlooked that there is an actual community of interest where husband and wife live together and each would usually get the benefit of the income of the other.

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TORTS—PHYSICIANS—MALPRACTICE. Cook v. Moats, ___ Neb. ___, 238 N.W. 529. The defendant has been a regularly licensed and practicing osteopathic physician in the City of Blair, Nebraska, for twelve years. The plaintiff had a pain in her right leg and hip for some time. She went to the defendant for treatment. On May 6, 1930 in giving her a treatment and bending her knee firmly upward toward the body, pressing his weight upon it and twisting the same, the femur was fractured. Some time before this she had had one of her breasts removed for cancer, and the X-ray photographs taken after the frac-