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FEDERAL ESTATE TAXATION AND THE WIENER CASE*

By George Donworth

On February 28, 1944, the Supreme Court of the United States by a six to three decision dismissed for want of jurisdiction the case of Flournoy, Sheriff and Ex-Officio Tax Collector of Caddo Parish, Louisiana, against Samuel G. Wiener and others. The majority opinion was written by Chief Justice Stone, and there was a dissenting opinion by Justice Frankfurter in which Justices Roberts and Jackson concurred. The dismissal naturally carries no intimation of the views of the Justices on the merits of the case which involved constitutional points of much importance, especially to property owners in the states where the community property system prevails. The story of the case requires a reference to the statutes of the United States relating to taxation of estates of deceased persons.

Section 810 of the United States Revenue Code, originally a part of the Revenue Act of 1926, enacts that "a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title."

Sections 811 and 811(a) enact that "the value of the gross estate of the decedent shall be determined by including the value at the time

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of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States, (a) *to the extent of the interest therein* of the decedent at the time of his death."

By Section 813 (b) it is enacted that the tax imposed by the Act of 1926 shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, or any possession of the United States, in respect of any property included in the gross estate, with a proviso that the credit allowed by this Subsection shall not exceed 80 per centum of the tax imposed by Section 810.

A majority of the states have taken advantage of this credit to the full extent permitted by enacting what have come to be called "take-up statutes" of which the law of the State of Washington, Section 11,202-(B) of Rem. Rev. Stat., is typical. By that section the legislature of this state has enacted that "where the tax imposed by the inheritance tax laws of the State of Washington is of a lesser amount than the maximum credit of eighty per cent of the federal estate tax allowed by the federal estate tax act, then the tax provided for by the said inheritance tax laws of the State of Washington shall be increased so that the amount of tax due the State of Washington shall be the maximum amount of the credit allowed under said federal estate tax act." And it is directed that the additional estate tax shall be paid as any ordinary charge against the estate.

By the Federal 1926 Act a sliding scale of the rate of taxation is fixed and certain deductions and exemptions are allowed. The tax imposed by the 1926 Act is known as the "federal basic tax."

By the Revenue Act of 1932 Congress enacted an additional estate tax which in turn prescribed a sliding scale of rates for the additional tax and fixed a lesser amount for the exemption. The rate thus prescribed begins at 3 per cent of the net estate and reaches as high as 77 per cent in the highest bracket. There is a specific provision to the effect that in the case of this additional estate tax, there shall be no credit or deduction for taxes levied by the states. Therefore, the 80 per cent credit clause and the several "take-up" statutes have no reference to the additional federal estate tax.

It is a principle common to all states having the community system that the community property is in the nature of partnership property, owned jointly and in equal interests by the husband and the wife, the community being a species of partnership akin in many respects to the business partnerships existing in other states. In all community property states the state inheritance tax laws have recognized the equal ownership of the wife and on the death of either spouse only an undivided one-half interest in the community property is the subject
of an estate or inheritance tax. The Commissioner of Internal Revenue, the Attorneys General of the United States and the courts have constantly recognized that on the death of either spouse only the half interest in the community property owned by the decedent, as determined by state laws, is subject to the federal estate transfer tax or is included in the estate valuation.

This proposition is so clear in the State of Washington that there have been but few decisions directly on the point, but the Inheritance Tax Department of the state has consistently ruled to that effect.

The established ruling by all the federal authorities has been to the same effect in administering federal estate taxation. Prior to the enactment of the Revenue Act of 1942, hereinafter described, the United States never attempted to levy an estate tax upon the interest of the surviving husband or wife in community property or to include more than one-half of the community property in the valuation of the estate taxed. Obviously, this is for the reason that there is no transfer of title as to the one-half of community property held by the surviving husband or wife, the survivor holding by the continuation of an existing title. Prior to October, 1942, the rulings of the Treasury Department and the Internal Revenue Bureau on this point have been consistent and uniform. As typical of the various rulings, see General Counsel's Memorandum No. 7773 in the matter of an estate in Texas (August, 1930) wherein it is stated (in a case where the wife elected to take under the provisions of the will instead of retaining her statutory community interest):

"it is the opinion of this office that the value of B's interest in the community property is not a part of A's gross estate within the purview * * * * of the Revenue Act of 1926, notwithstanding the fact that she elected to take under the will."

The general counsel then cites United States District Court cases arising in Texas and says:

"In each of those cases, the Court held without written opinion that the interest of the wife in the community estate was not a part of her deceased husband's gross estate. The government did not appeal from those decisions."

This ruling is merely illustrative of the long continued and undisputed interpretation of the federal estate tax law.

Also for more than twenty years the federal income tax law has been administered with full recognition of the community property status in the states where that system of law has been enacted by the respective state legislatures. By court decisions and by administrative regulations and rulings, husbands and wives in the community property states have customarily filed separate returns in each year, each spouse returning for federal income tax purposes one-half of the community income in addition to the separate income (if any) of the
reporting spouse. This interpretation of the income tax act has been upheld in repeated decisions by the Supreme Court of the United States and other courts. Some of those cases are mentioned later in this paper. That authoritative interpretation remains in full force and effect. In the matter of the federal estate tax and the federal gift tax, however, the community property system is under attack.

By the Revenue Act of 1942, which took effect October 21, 1942, Congress made a number of changes in the federal estate tax law in derogation of recognition formerly given to the community property laws of the states where that system prevails. By Section 402(b)(2) of the 1942 act, Section 811 of the Internal Revenue Code was amended by inserting at the end thereof a new paragraph, now Section 811(e)(2), requiring the valuation of the gross estate of the decedent to include in certain cases the value of property never owned by the decedent, as follows:

“(2) Community Interests—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any state, territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent’s power of testamentary disposition.”

The foregoing paragraph has effect chiefly with reference to the valuation of the taxed estate. The matter of the imposition of a personal liability for the tax is covered by Section 411(a) of the same act, whereby Section 827(b) of the Internal Revenue Code is amended to read as follows (omitting the words relating to powers of appointment, which are not germane to this discussion):

“(a) Imposition of liability. Section 827(b) is amended to read as follows:

‘(b) Liability of transferee, etc. If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, * * * * * or beneficiary, who receives, or has on the date of the decedent’s death, property included in the gross estate under section 811(b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent’s death, of such property, shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, * * * or beneficiary, to a bona fide purchaser for an adequate and full consideration in money or money’s worth shall be divested of the lien provided in Section 827(a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in
possession, or beneficiary, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth."

Another section of the Revenue Act of 1942 in derogation of community property rights is Section 453, whereby all gifts of community property are declared to be gifts of the husband, except where traceable to compensation for personal services actually rendered by the wife or made from the separate property of the wife. Still another section of the new act having a similar purpose is Section 404(g)(4), whereby it is decreed that premiums on life insurance paid with property held as community property by the insured and surviving spouse shall be considered to have been paid by the insured.

In December, 1942, some six weeks after the enactment of the Revenue Act of 1942, Sam Wiener, Jr., died at Shreveport, La. At the time of his death he and his wife held interests in community property acquired chiefly through the husband's earnings during their marriage. Upon his death, under Louisiana law, one-half of the net community property remaining after the payments of debts and charges, belonged to the surviving wife by the continuing title by which she was the owner of that one-half at all times from its acquisition by the community. The Wiener will recognized the wife's community half interest and left the husband's half interest to three of his sons.

Wiener and wife were residents and citizens of Louisiana and were married in that state in 1907. The community estate was valued, after debts, succession charges and taxes, at more than $600,000. The three sons (referred to in Louisiana as the universal legatees and heirs) brought suit in an appropriate proceeding in the local court of the Parish of Caddo, Louisiana, asking the court to fix the inheritance taxes due that state, both under the original inheritance tax law of the state and the "take-up statute" imposing the further state tax as the minimum 80 per cent of the basic federal tax. The suit was in the nature of a declaratory judgment suit by the three sons against Flournoy in his official capacity as state tax collector. The tax collector contended that since the Federal Revenue Act of 1942 directed that all of the community property be included in the gross estate of the decedent, the 80 per cent take-up clause required the inclusion of the total community property in the valuation on which the state's 80 per cent would be computed. The tax collector accordingly contended that $14,330.90 was due the State of Louisiana rather than $8,224.09 which would have been the amount due to the state if the valuation for the federal estate tax had not been increased by including the value of the total community estate.

It is my understanding that neither the executor nor the heirs or legatees of Wiener had filed a federal estate tax return. Neither the
United States nor the Commissioner of Internal Revenue nor the local Federal Collector of Internal Revenue was a party to the action. It could be claimed (and in substance and in effect was claimed by the assistant attorney general of the United States in the briefs which he filed in behalf of the United States as friend of the court) that the new provisions found in the 1942 Revenue Act were not directly involved and that those new provisions were merely of interest insofar as they furnished a measuring rod for the ascertainment of the tax imposed by the "take-up statute" of Louisiana, a purely state question.

In the local Parish Court in Louisiana, the Wieners prevailed. The tax collector took an appeal to the Supreme Court of the state, which affirmed the judgment below, despite a brief filed in behalf of the United States asserting the contrary view.

The decision of the Louisiana Supreme Court, filed June 21, 1943, is reported in 14 South. (2d) 475. That court declared Section 402(b) (2) of the Revenue Act of 1942 to be unconstitutional as a federal enactment because it violated the Fifth Amendment to the Constitution of the United States. It further held that the Louisiana take-up 80 per cent statute, if construed to require the inclusion in the valuation of Wiener's gross estate of the half of the community belonging to the wife, violated the due process guaranteed by the Fourteenth Amendment to the Constitution of the United States. The court said:

"It is obvious, therefore, that the wife's interest in the community property in Louisiana does not spring from any fiction of the law or from any gift or act of generosity on the part of her husband but, instead, from an express legal contract of partnership entered into at the time of the marriage. There is no substantial difference between her interest therein and the interest of an ordinary member of a limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to a managing partner. The only real difference is that the limitations placed on the managing partner in the community partnership are fixed by law, while those placed on the managing partner in an ordinary or limited partnership are fixed by convention or contract."

From the judgment of the Louisiana Supreme Court, Flournoy, the tax collector, appealed to the Supreme Court of the United States. In that court six briefs were filed. Those briefs consisted of: (a) the original and reply briefs of the appellant tax collector; (b) the brief of the appellees, the Wieners; (c) the brief for the United States filed by the solicitor general and assistant attorney general of the United States as amici curiae; (d) the brief as amici curiae filed by 13 members of the bar, representing the Louisiana State Bar Association and the Louisiana Community Property Taxpayers Committee, the Washington State Bar Association and the Committee of Community Property Taxpayers of the State of Washington, the State Bar of Texas,
the State Bar of California, the State Bar of Arizona and the Idaho State Bar Commission; and (e) the brief filed by the attorneys general of the States of California, Arizona, Idaho, Nevada, New Mexico, Texas and Washington and the chief counsel of the Oklahoma Tax Commission.

The briefs of the appellant tax collector and the brief of the United States argued in support of the constitutionality of the federal enactment in question. The United States brief also urged the court not to accept jurisdiction of the case. All the other briefs attacked the federal enactment as being in violation of the Constitution of the United States.

As we are not concerned at this time with any attempt to have the Supreme Court of the United States reconsider the judgment of dismissal, I discuss here only the validity of the federal enactment in question under the legislative powers of Congress. I note, however, in passing that the majority opinion written by Chief Justice Stone, directing the dismissal of the appeal, uses the following language:

"The only tax here sought to be imposed is the state inheritance tax authorized by Act No. 119. The state court having held that that Act is either inapplicable or, if applicable, is an infringement of the Fourteenth Amendment, any ruling we could make as to the validity of Sec. 402(b) (2) could afford no basis for affirming, modifying or setting aside the decision of the state court that by reason of the invalidity or inapplicability of Act. No. 119, the tax demanded cannot be imposed. * * * Hence the case stands in the same posture as those in which we have repeatedly held that where the judgment of a state court rests in part on a non-federal ground adequate to support it, this Court will not consider the correctness of the decision which the state court also made of a federal question otherwise reviewable here."

Naturally it was the briefs of the actual parties to the case, appellant and appellees, and the appellant's assignments of error that presented the vital questions on which the jurisdiction of the court depended. The briefs of the several amici curiae, however enlightening or elucidating, could not enlarge the jurisdiction of the court.

The validity, as a federal enactment of Section 402(b) (2), is of vital importance to property owners in all the community property states. It is reassuring to know that by the briefs filed, the attorney general of the State of Washington and the State Bar Association of the State of Washington, along with the attorneys general and bar associations of other community property states, have gone on record in the strongest possible terms in asserting the unconstitutionality of the federal enactment in question.

Let us proceed now to review the reasons supporting the proposition that the enactment is unconstitutional. In this discussion, so far as
state laws are concerned, I shall refer principally to the community
property law of the State of Washington, knowing that the lawyers
that I am addressing are interested chiefly from that point of view. As
is well known, the laws of the other community property states are
sufficiently like ours to furnish substantial parallels.

It is submitted that the following propositions are sound law:

1. IT IS A FUNDAMENTAL HOLDING OF THE UNITED STATES SUPREME
COURT THAT, AS A MATTER OF SETTLED POLICY, IT WILL FOLLOW
THE STATE DECISIONS INTERPRETING STATE LAWS GOVERNING
PROPERTY AND PROPERTY RIGHTS, ALSO THAT THE WHOLE SUB-
JECT OF DOMESTIC RELATIONS OF HUSBAND AND WIFE BELONGS
TO THE LAWS OF THE SEVERAL STATES AND NOT TO THE LAWS OF
THE UNITED STATES.

In Warburton v. White (176 U. S. 484, 496), this rule is enunciated
in the following language:

"Where the state decisions have interpreted state laws
governing real property or controlling relations which are
essentially of a domestic and state nature, in other words,
where the state decisions establish a rule of property, this
court when called upon to interpret the state law will, if it is
possible to do so, in the discharge of its duty, adopt and
follow the settled rule of construction affixed by the state
court of last resort to the statute of the state, and thus
conform to the rule of property within the state."

To the same effect are the following cases: DeVaughn v. Hutchinson
(165 U. S. 566); United States v. Crosby (7 Cranch. 115); Middle-
ton v. McGrew (23 Howard 45); Lippincott v. Mitchell (94 U. S.
767); Washington v. Miller (235 U. S. 422); Buchser v. Buchser
(231 U. S. 157); Elmendorf v. Taylor (10 Wheat. 152, 159); Hines
Yellow Pines Trustees v. Martin (268 U. S. 458, 464); Knights v.
Meyer (265 U. S. 30); Bucher v. Cheshire R. R. Co. (125 U. S. 555);

In Ohio v. Agler (280 U. S. 379), the Supreme Court said:

"It has been understood that 'the whole subject of the
domestic relations of husband and wife, parent and child,
belongs to the laws of the states, and not to the laws of the
United States.' (Re Burns, 136 U. S. 586, 593, 594.)"

In the opinion of the United States attorney general, rendered as
long ago as February 26, 1921 (32 Op. Attys. Gen. 435), the attorney
general said:

"In Warburton v. White (176 U. S. 484, 496) the principle
was enunciated that where state decisions have interpreted
state laws governing property or controlling relations that are
essentially of a domestic and state nature the United States
Supreme Court will follow the state decisions if possible to do
so, in the discharge of its duties. Also in DeVaughn v.
Hutchinson (156 U. S. 566, 570) it was held that to the
law of the state in which property is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. In *United States v. Crosby* (7 Cranch. 155) it was held that the title to land can be acquired and lost only in the manner prescribed by the law of the place where the same is situated."

2. **There is no common law of the United States. There is no such thing as a national system of the law of husband and wife or of the property rights of husband and wife. The laws of each state must be looked to to determine any question of that character.**

There is no common law of the United States, in the sense of a national customary law, distinct from the common law, as adopted by the several states, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Smith v. Alabama* (124 U. S. 465). In that case, the same court said:

"It has never been doubted but that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the state, without regard to their pursuits, is subject to change at the will of the legislature of each state, except as that will may be restrained by the Constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs committed upon them. It is the source of all those relative obligations and duties enforceable by law, the observance of which the state undertakes to enforce as its public policy. And it was in contemplation of the continued existence of this separate system of law in each state that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implication."

3. **The Washington statutes defining and regulating community property are clear and are conclusive on the property rights resulting from the marriage contract.**

With the exception of property owned by the spouses before marriage and that acquired afterwards by gift, bequest, devise or inheritance and the rents, issues and profits thereof, all property acquired after marriage in any manner whatsoever by either husband or wife, or both, is community property. *Rem. Rev. Stat.*, Sections 6890, 6891 and 6892.

In *Schramm v. Steele*, 97 Wash. 309, the Washington Court said that the husband's powers with relation to community property are no broader than those employed in general powers of attorney; that the husband is a mere statutory agent for the community; and that there is an absolute equality of ownership and rights in all community
property, both real and personal, there being no distinction whatever so far as concerns the equal property interests of husband and wife.

In Marston v. Rue, 92 Wash. 129, the court decreed the husband to be only the head of the family and that the personal property is as much the wife's as the husband's and that her property right is as great as his.

Other cases establishing the wife's equal ownership with the husband of community property are too numerous to cite. I call attention to a few.

Stewart v. Bank of Endicott, 82 Wash. 106 (holding that the purpose of giving the management and control of the community personal property to the husband is to facilitate the business of the community)
McDonough v. Craig, 10 Wash. 239
Spinning v. Allen, 10 Wash. 570
Fidelity & Deposit Co. v. Clark, 144 Wash. 520
Mabie v. Whittaker, 10 Wash. 656 (holding that the title of the wife is not an equitable one only, but is a legal title equal to that of the husband)
Schneider v. Biberger, 76 Wash. 504
Parker v. Parker, 121 Wash. 24
Olive Co. v. Meek, 103 Wash. 467
Bortle v. Osborne, 155 Wash. 585 (holding that the community is not a distinct entity or juristic person and that all community property is owned by both spouses equally)
Huyvaerts v. Roedts, 105 Wash. 657
Wampler v. Beinert, 125 Wash. 494 (holding that the purpose of the statute giving the husband management and control of the community personal property is only for the purpose of facilitating the business of the community)

4. THE ACTUAL AND DIRECT OWNERSHIP OF COMMUNITY PROPERTY IN EQUAL SHARES BY THE HUSBAND AND BY THE WIFE HAS BEEN DIRECTLY ADJUDICATED BY THE SUPREME COURT OF THE UNITED STATES IN THE COMMUNITY PROPERTY INCOME TAX CASES AND OTHER CASES.

Poe v. Seaborn, 282 U. S. 101, 75 L. ed. 239 (1930; Wash.)
Goodell v. Koch, 282 U. S. 118, 75 L. ed. 247 (1930; Ariz.)
Hopkins v. Bacon, 282 U. S. 122, 75 L. ed. 249 (1930; Tex.)
Bender v. Pfaff, 282 U. S. 127, 75 L. ed. 252 (1930; La.)
United States v. Malcolm, 282 U. S. 792, 75 L. ed. 714 (1931; Calif.)
Lang v. Commissioner, 304 U. S. 264, 82 L. ed. 1331, 118 A.L.R. 319 (1938; Wash.)

In Poe v. Seaborn the court, after holding that "it is clear that the wife has, in Washington, a vested property right in the community property, equal with that of her husband, and in the income of the
community, including salaries or wages of either husband or wife or both," set for the opposing contention of the Commissioner of Internal Revenue (that the management and control of the husband are equivalent to ownership) and said:

"We think in view of the law of Washington above stated this contention is unsound. The community must act through an agent."

The court distinguished all the grantor and donor cases decided by that court where the husband had technically parted with title, saying that in those cases the husband in fact retains the ownership and all its incidents. The court added:

"But here the husband never has ownership. That is in the community at the moment of acquisition."

The court also said that "the powers of partners or of trustees of a spendthrift trust furnish apt analogies."

The Supreme Court of the United States has also established that where the state has enacted a community property system and has given the husband the power of management and control, a subsequent state statute taking away the power of management and control from the husband does not deprive him of any property right. Also, conversely, that a state statute conferring on the husband the management and control of community property (a power not previously possessed by him) does not deprive the wife of her half interest in the community property. She remains the actual legal owner of that half interest and her title is property protected by the Fourteenth Amendment.

The two cases establishing these propositions are Warburton v. White, 176 U. S. 484, 44 L. ed. 555 (a case arising in the State of Washington and decided in 1900) and Arnett v. Reade, 220 U. S. 311, 55 L. ed. 477 (a case arising in New Mexico and decided in 1911).

Yet by the 1942 Act, Congress attempts to treat and tax as property that which the Supreme Court holds is not property, namely, the husband's power of management and control, and to disregard or seriously jeopardize that which the Supreme Court holds is property, namely, the wife's community half interest.

5. The Method Prescribed by the Revenue Act of 1942 for Taxing Community Property in Case of the Death of Husband or Wife is So Capricious, Arbitrary, Discriminatory and Confiscatory as to Violate the Due Process Clause of the Fifth Amendment.

Section 402(b) is a plain example of measuring the tax imposed upon A by the value of B's property. The Supreme Court has condemned such a system as violating the due process clauses of both the Fifth and Fourteenth Amendments to the Constitution of the United States.
A leading case under this head is *Hoeper v. Tax Commission*, 284 U. S. 206, where the court said:

"any attempt * * * to measure the tax on one person's property * * * by reference to the property of another is contrary to due process of law."

In *Heiner v. Donnan*, 285 U. S. 312 (a case involving the federal estate tax), the Court said:

"The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no part of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description. Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the *Schlesinger* and *Hoeper* cases condemn as arbitrary and a denial of due process of law. Such an exaction is not taxation but spoliation. 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of government from his own gains and of his own property.'"

And, as aptly remarked by Judge Learned Hand in *Frew v. Bowers*, 12 Fed. (2d) 625, 630 (C.C.A. 2):

"Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

Under the 1942 Amendment the tax on the community estate varies with the total valuation of the combined separate estate of the deceased spouse and the community estate. On account of the sliding scale of the rate of taxation (rapidly rising with increased valuation) the half interest in the community property owned by the surviving spouse is not taxed at a rate depending on the value of that half interest. On the contrary, the value of that half interest is added to the value of the other half interest and to the value of the separate estate of the deceased spouse and the rate accordingly rises, reaching in many estates very high brackets. The separate property of the surviving spouse is excluded from the valuation, but not the separate property of the decedent, in arriving at the rate percentage bracket.

Under the estate tax laws of both state and nation, as existing prior to 1942, the community interest of the surviving spouse paid no tax whatever on the death of the one first dying, because that death effected no transfer of the survivor's half interest.

Under the arbitrary provisions of the 1942 Amendment, the survivor's half of the accumulated community property will not only be
taxed, but will be taxed at a rate based upon the total valuation of the combined separate estate of the decedent and the entire community property. For this arbitrary tax a personal liability is imposed on the survivor. This falls precisely within the case of *Heiner v. Donnan*, 285 U. S. 312, where the court said:

"Plainly this is to measure the tax on A's property by imputing to it in part the value of the property of B. * * *
Such an exaction is not taxation but spoliation."

Under the express terms of the 1942 Amendment, the test of ownership is abolished,—as to community partnership property only,—and there is substituted, as to the bulk of such property, the conception of *dual, but complete, ownership by both spouses*, so that this bulk is taxed as a part of the gross estate of the first to die, depending (with the aid of a new federal statutory presumption difficult to overcome) not on actual ownership or even on management, but on the sheer accident of which spouse has predeceased the other. And the rate also depends on the value of the separate property of the decedent in which the survivor has no interest.

In analyzing this new Section 402(b)(2), it is evident that the drafters of the act gave little study to the state community property statutes or the state and federal court decisions interpreting them. The language of the section is that the entire community property of both spouses shall be included in the valuation of the (first dying) decedent's estate "except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse." Then follows the requirement that the interest included in the gross estate of the decedent shall not be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. Pretermitting for the present the requirement concerning the power of testamentary disposition, it is to be noted that the surviving spouse is given the opportunity of showing (if possible) that some part of the community estate was "received as compensation for personal services actually rendered by the surviving spouse." It is evident that the word "received" is used in this section rather than the word "acquired" or "earned" or "owned," with the idea of creating a new kind of acquisition of property titles, namely, an acquisition of title for federal taxing purposes different from the acquisition of title fixed by the state community property laws.

As a matter of fact, the personal services giving rise to acquisition of community property are personal services rendered by one spouse or the other or both *in behalf of the community partnership* and the compensation for those services is not *received* by either spouse in his separate capacity but only as agent of the community. When in a community
property state a husband or a wife teaches school or works in a bank or elsewhere, the personal services are actually rendered by the community partnership and the compensation therefor is received by the community as in the case of business partnerships. The compensation belongs to the community (one-half to each spouse) from the very inception of the service. As was said by the U. S. Supreme Court in *Poe v. Seaborn*:

"But here the husband never has ownership. That is in the community at the moment of acquisition."

The attempt of the drafters of the 1942 statute to create a new kind of title to property, a sort of federal title, must fail for the reason that the state law is absolutely controlling on the subject of acquisition of titles to property. If, however, we give to the language of this section the effect which its drafters probably hoped for it, it is invalid and discriminatory and beyond the powers of Congress. It disregards state laws, where such laws prescribe the community partnership system, while in other parts of the federal estate tax code (applicable in all other states) full effect is given to the state laws of the so-called "common-law states" which define marital property rights in terms more nearly approaching common law concepts.

Further, the clause purporting to allow the surviving spouse to show that a part of the community property was received as compensation for personal services actually rendered by the surviving spouse, if effective at all, places upon the surviving spouse an almost impossible burden in many cases, especially after long years of married life and loss and destruction of records.

These considerations show the injustice and discriminatory effect of attempting to create a new federal system of property titles for the taxation of estates of married persons in disregard of state laws.

Under this act, power of testamentary disposition limits the minimum, but not the maximum, amount to be included in the gross estate, so that it cannot be less than the amount over which the decedent had power of testamentary disposition (one-half). But power of testamentary disposition does not control, for, in most cases, property over which the decedent had no power of testamentary disposition is included in his or her gross estate. A shifting of management is not made determinative, for frequently property never managed by the decedent is required to be included in the taxable value of the gross estate.

Another illustration of the arbitrary, discriminatory and unjust provisions of this statute is that the federal statute exempting property taxed for estate tax purposes in another estate within five years prior to death is either made inoperative or is left in serious doubt as to the community half interest of the spouse who dies later. This is true
because the statute relating to prior taxed property, Rev. Code, Section 812(c), permits the exclusion from the estate of any property forming a part of the gross estate of any person who died within five years prior to the death of the decedent only where "such property can be identified as having been received by the decedent * * * from a prior decedent by gift, bequest, devise or inheritance." Since the half interest in community property belonging to the surviving spouse is not received from a prior decedent "by gift, bequest, devise or inheritance," it seems probable that even if the surviving spouse dies within five years from the date of the death of the first decedent, the community half interest of the surviving spouse is not protected from double taxation. This is rank discrimination.

Thus the 1942 statute represents a curious and arbitrary inter-mixture of disregard for, and regard of, state laws. The law of the state is recognized in determining the minimum taxable estate by the provision requiring inclusion of the value of all property over which decedent possessed the power of testamentary disposition. The law of the state is entirely disregarded in determining the maximum taxable estate by the provision requiring the inclusion of the portion of the entire community partnership property both of the decedent and of the surviving spouse. The effect of this is only slightly modified by the clause "except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse." This clause entirely ignores the valid state laws under which the community partnership is created. In no other situation is the entire property of a partnership taxable, by presumption or otherwise, to the estate of the partner first dying, putting on the surviving partner the serious burden of proving that he or she was the contributing cause of the accumulation.

Another discrimination results from the fact that in the administration of a community estate, claims known as community debts are allowed as claims against the estate only to the extent of one-half thereof. Lang v. Commissioner, 304 U. S. 764. It must be borne in mind that the 1942 statute requires that the value of the gross community estate be included in the estate valuation for federal estate tax purposes but leaves the administration to proceed as usual under state laws. Under those laws only one-half of the community debts is ordinarily deductible, a proposition expressly held by the U. S. Supreme Court in Lang v. Commissioner, 304 U. S. 764. Revenue Code, Sec. 812(b), allows only the deduction of such claims against the estate as are allowed by the laws of the jurisdiction under which the estate is administered, and even this is qualified by federal limitations stated in the section. Perhaps to avoid this rank injustice the courts might
endeavor to find a way to permit the deduction of the full amount of community debts from the value of the gross community estate if the 1942 Amendment is otherwise recognized as a valid enactment. But will the court find warrant in law for so doing?

As stated in Nichols v. Coolidge, 274 U. S. 531:

"Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend on past lawful transactions not testamentary in character and beyond recall."

It is difficult to understand how the husband's death can be said to be an economic benefit to the wife in any sense of the word. She loses the business manager that she voluntarily selected by the marriage contract. Her husband's death is a disaster and not a benefit. Certainly no one would suppose that a statute which undertook to tax the estate of a trustee at his death on the value of his beneficiary's property, or to tax the estate of an agent at his death on his principal's property or to tax the estate of a managing partner of a partnership at his death with his partner's interest in such partnership property, comported with due process. Something more than mere management must pass. There must be some shifting of economic interest in the whole property to justify an estate tax measured by the whole of that property with the addition of the separate property of the deceased spouse. That the tax must be measured by the shifting of real economic benefits as distinguished from mere agency or trust powers is shown by the case of Reinecke v. Northern Trust Co., 278 U. S. 339, where the court said:

"Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or enjoyment of the property. * * * The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made."

So, in the Wiener case, the economic interest of the wife's half was that of the surviving spouse from the moment the property was acquired during marriage.

The plain fact is that so far as community property states are concerned, Congress by the 1942 Amendment has assumed the power to substitute a sort of federal title for the property laws of the states. It has assumed to create a federal system of property ownership, based upon the question of which partner performed the services or "received" the compensation leading to the acquisition of the property. But even that limitation is made inoperative to the extent that the decedent had the power of testamentary disposition. Under the community law of the state, it is immaterial which spouse rendered the personal services, as in other cases of partnership. If the wife
stayed at home, managed the household affairs and attended to the needs of the children, the state law says that she contributed equally to the acquisition of the accumulations, and by the marriage contract the two spouses formed that kind of a business partnership validated by the valid laws of the only sovereign empowered to legislate. To assert the contrary, by attempting to create a new kind of title, is beyond the power of Congress.

As is said in deFuniak on Principles of Community Property, at Section 54:

"There can be no more justification for Congress saying that such an inherent principle of the law of the community property states shall be ignored and the income considered as separate property of the one earning it than there would be for Congress declaring that for purposes of taxation it will ignore the law of non-community property states and consider all earnings of one spouse as belonging equally to both." (Section 255, at page 719)

6. The provision in the 1942 Act purporting to permit the surviving spouse to show that he or she actually rendered the personal services which resulted in the accumulation of community property is (1) an attempted avoidance of valid state laws, and (2) an unconstitutional attempt to evade constitutional requirement by the creation of a presumption.

After many years of marital relationship, it is an evident hardship to call upon either spouse to trace through a long period of years the relative value of his or her personal services forming their respective contributions to the common property, which has belonged to both spouses by legal title from its inception. Such a presumption is invalid as an attempt to evade the Constitution.


Certainly, the presumption attempted by this statute that two persons at the same time own in its entirety the same property is much more capricious, arbitrary and unsupported than the two-year presumption, declared invalid in Heiner v. Donnan, 285 U. S. 312, and even the six-year presumption invalidated in Schlesinger v. Wisconsin, 270 U. S. 230.

7. Section 402(b) is lacking in geographic uniformity in violation of Article I, Sec. 8, Clause 1, of the United States Constitution, requiring that all excise taxes be uniform throughout the United States.

This clause of the Constitution prohibits the levying of duties imposed or excised upon a particular subject in one state, and a differ-
ent duty imposed or excised on the same subject in another state. It requires that whatever plan or method Congress adopts for laying the tax in question, the same plan or method must be made operative throughout the United States, and that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate. *Knowlton v. Moore*, 178 U. S. 41.


By its general plan the estate tax is imposed "upon the transfer of the net estate of every decedent" (Section 810, Internal Revenue Code) and the property subject to the tax is limited "to the extent of the interest therein of the decedent at the time of his death." (Section 811[a]).

Thus, the federal plan (as enacted in the acts prior to 1942) is to impose a tax upon the "transfer" of property at death, measured by the value of the decedent's interest in such property. The "subject" of the tax is this privilege of transfer by death. This was the "subject" of the tax in the community property partnership states until the passage of the 1942 Amendment in question. This amendment adopted a new plan of taxation for the community property partnership states only, leaving undisturbed the original plan in all other states.

The 1942 Amendment, by its terms, relates only to community partnership property held "under the law" of the community property partnership states. It has no operative effect in other states. It is self-evident that the plan or method laid down for community property states is not the same as the plan or method prescribed for other states of the Union. It is likewise evident, in the express terms of the statute, that the subject of the tax is valued and taxed differently in these states from the method still in force for the other states of the Union.

(a) In a community property partnership state the ownership of the property is disregarded and the decedent's estate is taxed with respect to property which he or she never owned and which he or she could not transfer at death.

(b) It is only in the community property partnership states that significance is given to the origin of the property. In the community property partnership states the mere fact that the decedent performed the services leading to the acquisition of the estate's wealth is alone sufficient to tax the decedent on the entire property, even though at his death he owned only a half thereof and never owned the other half.

(c) It is only in the community partnership property states that a presumption is adopted (often difficult to rebut under the terms of the
statute) to the effect that a man and wife shall both be deemed at one and the same time to be the owner of all of the same property (that is, that both are presumed to be the owner of the other's property) and that each is taxed on the other's property and the amount of the tax is made to depend on the sheer accident of which spouse may happen to die first.

(d) It is only in the community property partnership states that a bare concession of management over property administered for another is professedly made the occasion of the tax. In the other states the death of a partner, though he be the managing partner, does not result in the inclusion of his surviving partner's interest in his taxable estate, nor does the death of an agent result in taxing the principal's property.

(e) Not only is uniformity denied because property rights (in the surviving spouse) are subjected to the tax, while essentially identical rights (in the surviving spouse) in non-community property states go free; it is even more flagrantly denied in the respect that while denying reality to the wife's rights in those cases where conceding their substantiality would result in exemption, the statute concedes their substantiality where the concession results in additional taxation. For example on the wife's death, her one-half of the community property is made subject to the federal estate tax in all cases because of her power (under state law) of testamentary disposition thereof, and the surviving husband is not permitted to reduce the taxable valuation by showing that all of that half (in the language of the 1942 Amendment) was "received as compensation for personal services actually rendered" by him.

The Congressional Committee report, in submitting the 1942 Revenue Bill, avers that in adopting this amendment to the estate tax law, the Congress was attempting to remove what is declared to be an advantage to the owners of estates in the community property states. However, far from equalizing the death tax, Congress, in this amendment, has seriously discriminated against the citizens of community property states and has made the burden of estate taxes heavier in those states than in other states.

As the Supreme Court of Louisiana has said in the Wiener case, 14 So. (2) 475:
"It is obvious, therefore, that the wife's interest in the community property in Louisiana does not spring from any fiction of the law or from any gift or act of generosity on the part of the husband, but, instead, from an express legal contract of partnership entered into at the time of the marriage."

A test of discrimination is a comparison between how marital partners are taxed in community property partnership states and how they are taxed in other states. When so examined, it clearly appears that
the 1942 Amendment did not remove, but actually created, discrimination based only on geographic location. For example, husbands and wives in many so-called common law states may by contract voluntarily form a partnership substantially similar to the community partnership. In most states, the husband, by donating half of his property to his wife, and obtaining an appointment from the wife as managing agent of her property, brings about a legal relationship with regard to marital property similar to the community partnership. *Tracy v. Commissioner* (C. C. A. 6th Cir.), 70 Fed. (2d) 93; *Verden v. Commissioner*, 6 B. T. A. 1123; *Wright v. Commissioner*, 26 B. T. A. 21; Commerce Clearing House Income Tax Service, see rulings set out in Section 1169. (Business partnerships by husband and wife.)

The common law system of marital property rights was a barbarous system. Every state of the Union, without exception, has made changes to get away from those barbarities. The changes are still going on. The common law system was grossly favorable to the husband. Everything was his, including his wife. Every departure from this ancient concept has been in the direction of increasing the wife's property rights. Every such statutory change has diminished the property of which the husband might die possessed; consequently, it has diminished the tax which could be levied on his estate according to common law ownership.

The short answer to all of the claims that a special privilege has hereafter been enjoyed by owners of estates in the community states is that neither Congress nor any other branch of the federal government has any power over the marital property systems in force in the various states. Where these systems have a bearing upon the incidence of a federal tax, the extreme limit to which any branch of the federal government can go is to examine them as they are construed and applied by the respective state courts to determine whether the spouse declared by state law to be the owner of property is actually such. Where the incidence of the tax is controlled by ownership, this may vary in the different states and cannot be called a tax advantage. Compare *Florida v. Mellon*, 273 U. S. 12.

It is obvious that mathematical uniformity cannot be obtained by having Congress, in the form of a discriminatory legislative act, disregard the fundamental laws of some states of the Union and at the same time recognize the local law of all the other states of the Union as a guide and basis for the application of the Federal Estate Tax Law.

8. **THE 1942 AMENDMENT TO THE ESTATE TAX LAW IMPOSES ON THE SURVIVING SPOUSE A DIRECT TAX AND IS, THEREFORE, VOID UNDER THE CONSTITUTION OF THE UNITED STATES BECAUSE THE TAX IS NOT APPORTIONED AMONG THE SEVERAL STATES IN ACCORDANCE TO POPULATION.**

The third clause of Section 2 of Article I and the fourth clause of Section 9 of Article I of the Constitution of the United States require
that direct taxes shall be apportioned among the several states accord- 
ing to their respective numbers and that no direct tax shall be laid 
unless in proportion to the census directed by the Constitution to be 
taken.

The Sixteenth Amendment to the Constitution of the United States 
amended those constitutional requirements, but only so far as concerns 
incomes. The Sixteenth Amendment effective in 1913 authorizes 
Congress to levy taxes on incomes without regard to census or enum- 
eration. It is limited to taxation of incomes. The original constitutional 
provisions remain in full force and effect so far as concerns direct 
taxes other than those on incomes. It was for this reason that the 
Supreme Court has consistently held that Congress has no power to 
tax stock dividends as income. The court said:

"It is manifest that the stock dividend in question cannot 
be reached by the Income Tax Act, and could not, even though 
Congress expressly declared it to be taxable as income, unless 
it is in fact income." Towne v. Eisner, 245 U. S. 418.

The meaning of the Sixteenth Amendment to the effect just stated 
is emphasized by the later case of Eisner v. Macomber, 252 U. S. 189.

Among other things the court said in that case:

"A proper regard for its genesis, as well as its very clear 
language, requires also that this Amendment shall not be 
extended by loose construction, so as to repeal or modify, 
except as applied to income, those provisions of the Consti-
tution that require an apportionment according to popula-
tion for direct taxes upon property, real and personal. This 
limitation still has an appropriate and important function 
and is not to be overridden by Congress or disregarded by 
the Courts."

The limitations of this paper do not permit me to discuss this 
branch of the present question at length. Many authorities on this 
point might be cited and doubtless will be cited in the briefs that 
will be filed from time to time in the attacks upon the 1942 Amend-
ment. I have already pointed out that by Section 827(b) of the 
Internal Revenue Code, as amended by the 1942 Act, the personal lia-
bility for the tax imposed upon the valuation of the gross community 
estate is expressly imposed upon the surviving spouse who "has" on the 
date of the decedent's death, property included in the gross estate, to 
the extent of the value at the time of the decedent's death. It would 
be hard to find an instance of a direct tax more explicit or positive 
than this. The draftsmen of the Act must have overlooked the hold- 
ings of the Supreme Court concerning direct taxation in the stock 
dividend cases, though as late as March 1, 1943, the Supreme Court 
refused to reconsider those cases. Helvering v. Griffiths, 318 U. S. 371; 
87 L. ed. 843. Those cases had been recognized as effective by the
Treasury Department, the Commissioner of Internal Revenue and by Congress itself ever since their rendition approximately 24 years ago.

9. The 1942 Statute Cannot Be Justified by the Tyler and Jacobs Cases

The Congressional Committee reports show that reliance, as to the constitutionality of the 1942 statute, was placed upon the Tyler case, 281 U. S. 497 (Estates by Entirety), and the Jacobs case, 306 U. S. 363 (Joint Tenancy). But these cases do not support the amendment. The statute involved in those cases concerned transfers by the decedent, either mediately or immediately, to his wife or to others as a tenant by the entirety or as a joint tenant with him. It dealt only with property which had originally belonged to the decedent. It dealt with such property only when the decedent in his lifetime had made a transfer thereof by gift or without consideration, retaining the right of survivorship attached to such estates. That particular statute was adopted to stop loop-holes and prevent estate tax avoidance. Thus, in the cases the Committee cited, the Court had before it merely the question of including in the decedent's estate a gift or transfer by the decedent, which did not ripen into completion until his death. The transfer was to take full effect in possession and enjoyment only on death. By gift or transfer, the decedent had created an estate which, if his joint tenant died first, would return in full to him and which required his prior death to confer on his transferee the full possession, use or enjoyment of the property. Thus, the statutory provisions dealing with joint tenancy and tenancy by entirety were directed at and reached transfers testamentary in character, in which substantial economic rights were retained in the donor for his life. The decisions in the Tyler and Jacobs cases are based upon grounds which do not apply in the case of community partnership property.

1. In the Tyler and Jacobs cases, all of the property came mediately or immediately to the tenancy as a pure gift from the decedent. Manifestly, this is not true of community partnership property. The character of community attaches to the property at the moment of acquisition and not because of a gift or the voluntary choice of either or both husband and wife.

2. In the Tyler and Jacobs cases, the statute (there dealt with) was a means appropriate to the legitimate aim of Congress of preventing tax avoidance, in whole or in part, by inter vivos donation of the property of one to another. This was a just basis for the decisions, but it has not the remotest application to community partnership property.

Conclusion

We live in a fortunate country where power and authority are divided between nation and state,—an indissoluble Union of indestructible states. It was so ordered by the fathers in 1787. The Congress
of the United States has no power to legislate concerning domestic relations. As the U. S. Supreme Court said in *Smith v. Alabama*, hereinbefore quoted,

"It was in contemplation of the continued existence of this separate system of law in each state that the Constitution of the United States was framed and adopted."

Congress within its limited powers may enact uniform laws. Their result upon the owners of property in many cases must vary with the varying laws of the states. This variance is especially true when federal taxation acts upon a relationship so definitely domestic as marriage. It is a principle of mathematics, as well as of law, that the product of a constant and a variable is and must be a variable.

So far as concerns the "take-up 80 per cent estate tax" of the State of Washington, it is noted that the Attorney General of Washington and the Board of Governors of the Washington State Bar Association have put on record declarations in favor of adhering to the time-honored community property system until it is repealed or modified by the legislature that enacted it. Like officials in seven other states have taken similar action.