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APPLICATION OF FEDERAL INCOME, ESTATE AND GIFT TAX LAWS TO COMMUNITY PROPERTY

*Willard S. Pedersen**

I

INTRODUCTION

THE ganancial or community concept of property ownership, by which husband and wife have equal, vested, undivided, one-half interests in property held by them as tenants in community,[1] has been a thorn in the side of federal tax laws[2] ever since some tax-conscious community income earner decided to report as taxable only one-half of the community income, leaving the other half to be reported by and taxed to his wife upon her separate return. Such procedure first became authorized in community property jurisdictions recognizing the wife's interest as "vested" in 1920.[3] Not long thereafter the realization began to dawn upon "outsiders" that residents of community property jurisdictions were enjoying distinct tax advantages not available to them, and from that moment to the present day, criticism of the tax effect of community property laws has been frequent.[4] That the tax laws have operated favorably upon earners of community income is an indictment of the federal tax statutes rather than of the community property laws. This is especially evident when it is realized that in all jurisdictions except two,[5] community property laws were in force long before the Sixteenth Amendment to the United States Constitution was adopted.[6]

A. *Examples of Savings to Community Property Owners*

Specific illustrations of tax savings available to earners of income in community property states, as contrasted to similar earners of income in non-community property states, are included in a table which

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[1] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, §§ 1, 97, 105, 239 (1943); Poe v. Seaborn, 282 U.S. 101, 51 S. Ct. 58 (1930).

[2] 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION, § 1.09 (1942).

[3] Infra, note 31.

[4] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 238 (1943); Community Property Laws as Determinable Factors in Federal Income Taxation, 40 ILL. L. REV. 136 (1945).

[5] Oklahoma; Territory of Hawaii.

[6] See infra, notes 27 and 28, and discussion pertaining thereto.

is a part of the report of the Senate Committee on Finance on the Revenue Bill of 1941.[7] Reference to it reveals that, using the 1941 Revenue Bill rates, an individual with a net income of $5,000 would save $45 federal income tax solely by reason of being a resident of a community property state; that an individual with an income of $10,000 would save $340; that a person with an income of $30,000 would save $3,351; and that a resident with a $500,000 income would benefit in the sum of $28,701 federal income tax.

While the favored position of the community property owners was most apparent when applied to the income tax, the same concept of property law when applied to estate and gift taxes permitted similar tax economies.[8] However, as is later noted, the Revenue Act of 1942 changed the rule with respect to these latter taxes.[9]

B. *Attempts to Change the Rule as to Income Taxes*

It is not surprising that vigorous efforts to eliminate this preferential income tax position have been made, not entirely without effect.

The attacks on the right of community property spouses to divide their income and report and pay the tax thereon individually have taken both legislative and judicial forms.[10] Suggested legislative changes have embodied both direct attempts to tax community income to the spouse having its management and control, and indirect attempts such as requiring mandatory joint returns by spouses in all states, thus taxing the income of each husband and wife as a unit. Proposals of the former type were made in connection with the Revenue Acts of 1921, 1924, 1934 and 1941, whereas mandatory joint returns were suggested at hearings on the Revenue Acts of 1934, 1937 and 1941. While all such attempts have been unsuccessful thus far, the following excerpt from the report of the Senate Committee on Finance on the Revenue Bill of 1941 may be indicative of future attitudes should the matter again be presented:

> "4. Community Income.—Ever since the advent of the income tax, the disparity in taxation of income in the community-

[7] S. Rep. 673, Part I, 77th Cong., 1st sess. (1941) p. 9 et seq.

[8] Lang v. Commissioner, 304 U.S. 264, 58 S. Ct. 880 (1938); Letter of Deputy Commissioner Bliss regarding gift taxes, infra, note 105.

[9] See discussion commencing on pages 428 and 437.

[10] Ray, "Proposed Changes in Federal Taxation of Community Property: Income Tax," 30 CAL. L. REV. 397 (1942); Latcham, "Invasion of Community Property Income Tax Privileges," 20 WASH. L. REV. 44 (1945); 462 CCH STAND. FED. TAX REP. ¶ 455.061.

property States as compared with that in non-community-property States has caused considerable concern. This situation has become more accentuated as the graduated surtax rates have been increased from time to time. Married persons in community-property States under existing law are able to effect substantial tax savings as compared with married persons in other States. Remedies for this inequitable situation have been frequently recommended to the Congress by the Treasury Department and by various other tax experts. With the substantial increases in the surtax rates contained in the bill, these inequities become more apparent and their termination more desirable. . . .

"Not only does this tax saving benefit only a few individuals in the community-property States, but, less than 1 percent of the total returns filed in the country represent community-property returns."[11]

Along with the proposed legislative changes, judicial criticism of the rule was not infrequent, reaching its climax in the dissenting opinion of Justice Douglas in the case of *Commissioner v. Harmon.*[12] In part, he stated as follows:

"The federal income tax law makes a discrimination in favor of the community property states. . . . That discrimination has become increasingly sharp as surtax rates have increased. The source of that discrimination is to be found in the decisions of this Court.

"Those decisions are best illustrated by *Poe v. Seaborn,* 282 U.S. 101, which involved the community property system of the State of Washington. They held that the husband need pay the federal income tax on only one-half of his salary and other income from the community, since the other half of those earnings from their very inception belonged to his wife. The collector had argued that the control exercised by the husband over the community was sufficient to make him liable for the tax on the full amount. That result had indeed been indicated by Mr. Justice Holmes speaking for the Court in *United States v. Robbins,* 369 U.S. 315, 327. And it has been strongly urged that our recent decisions such as *Helvering v. Clifford,* 309 U.S. 331, and *Harrison v. Schaffner,* 312 U.S. 579—make for the same result. But in *Poe v. Seaborn* and related cases the Court discarded that test. It was

[11] Report of Senate Committee on Finance on Revenue Bill of 1941, S. Rep. 673, 77th Cong., 1st sess. (1941) p. 9.

[12] 323 U.S. 44, 65 S. Ct. 103 (1944). See pages 420, 421 for further discussion of this case.

more concerned with legal doctrine than it was with economic realities. It held that the wife's interest in the community (including the husband's salary) was 'vested' and that therefore the husband need pay the federal income tax on only half of that income.

"I do not mean to defend *Poe v. Seaborn.* I only say that if we are to stand by it, we should not allow it to become a 'vested' interest of only a few of the States. The truth of the matter is that *Lucas v. Earl* and *Helvering v. Clifford* on the one hand and *Poe v. Seaborn* on the other state competing theories of income tax liability. Or to put it another way, *Poe v. Seaborn* has been carved out as an exception to the general rules of liability for income taxes. . . . If we adhere to it, we should apply it without discrimination. If we are not to apply it equally to all States, we should be rid of it. This is the time to face the issue squarely."[13]

In harmony with this dissent, some writers have stated[14] that a decision of *Poe v. Seaborn*[15] today would very likely be against the interests of the community property jurisdictions.

C. *Estate and Gift Tax Amendments*[16]

While attempts to change the rule as to income taxes have proved unavailing—perhaps due to the efforts of "the solid phalanx of sixteen complacent senators"[17] from community property states—success was finally achieved in the fields of federal estate and gift taxes. Section 402(b)(2) of the Revenue Act of 1942,[18] effective on October 22, 1942, added a provision to the estate tax law requiring the inclusion in the gross estate of a deceased spouse, of the value at the time of his death of all property held as community property, except such part as is shown to have stemmed from the personal efforts of the surviving spouse. In all cases, however, there must be included as a minimum, the value of that portion of the community property over which the deceased had power of testamentary disposition. The purpose of this amendment was stated in a Report of the House Committee on Ways

[13] Id. at 49-51, 56.

[14] Altman, "Community Property in Peril," 19 TAXES 262 at 264 (1941); 3 MERTENS, LAW OF FEDERAL INCOME TAXATION, § 19.01 (1942); 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION, § 1.09 at p. 62 (1942); Ray, "Proposed Changes in Federal Taxation of Community Property: Income Tax," 30 CAL. L. REV. 397 at 407 (1942).

[15] 282 U.S. 101, 51 S. Ct. 58 (1930).

[16] See discussion of amendments at pages 428 and 439 respectively.

[17] GRISWOLD, CASES AND MATERIALS ON FEDERAL TAXATION 427 (1940).

[18] I.R.C. § 811(e)(2).

and Means, thus: "This section eliminates special estate tax privileges enjoyed by residents of community property jurisdictions. . . ."[19] Just how successfully this purpose has been achieved is commented upon below.[20]

An amendment to the gift tax law was likewise included in the Revenue Act of 1942. Section 453 of that act,[21] effective January 1, 1943, provides that gifts of community property shall be considered gifts by the husband except to the extent that they may be shown to have been derived from amounts received by the wife as compensation for personal services or from her separate property.

D. *What is Community Property?*

It is not the purpose of this paper to consider problems concerning the nature of community property. But, to understand the impact of community property concepts upon federal income, estate and gift taxes, some understanding of the theory of community property ownership is necessary, and a few brief comments are therefore appropriate. de Funiak defines community property as that which husband and wife own in common, by halves,[22] consisting primarily of property earned or received by them during coverture. The recent case of *Fernandez v. Wiener*[23] referred to the community property laws of the state of Louisiana in this language:

> "By the laws of Louisiana, every marital status subject to the laws of the state superinduces a partnership or community of the spouses with respect to property in the state acquired during the life of the community, unless there be at the time of the marriage a stipulation to the contrary. All earnings and all property acquired by the husband or wife during the life of the community becomes community property. . . . It is said that all property acquired by the spouses during the marriage which falls into the community is 'due to the joint or common efforts, labor, industry, economy and sacrifices of the husband and wife,' and that for this reason the husband and wife each has at all times an equal present interest in an undivided half of the whole community."[24]

The most significant characteristics of community property relate

[19] CCH INHERITANCE, ESTATE AND GIFT TAX SERV., FED., 7th ed., ¶ 3448.50.

[20] Infra, page 433, § 2.

[21] I.R.C. § 1000(d).

[22] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 1 (1943).

[23] 326 U.S. 340, 66 S. Ct. 178, CCH INHERITANCE, ESTATE AND GIFT TAX SERV., FED., 7th ed., ¶ 10,239 (1945).

[24] Id. at 348.

to the concept of the wife's ownership. In two respects her rights differ materially from those of a wife in a common law state. First, as noted before, she has a "vested interest" equal to that of her husband, in all community property. Second, her interest is devisable and descendible on her death, just as is that of her husband.[25]

In all community property jurisdictions except Idaho, Louisiana, Texas, Hawaii, and possibly Oklahoma, the income from separate property is the separate property of its owner, regardless of the fact that it was acquired during marriage. In Idaho, Louisiana, and Hawaii, income from separate property becomes community property of the spouses. This would appear to be true also under the Oklahoma statute. In Texas, income from separate property, except increase in lands, is community income.[26]

Community property is not, as facetious comment would lead one to believe, a device designed by the unconscionable to accomplish tax evasion. On the contrary it is as old as, nay even older than, the common law itself! Of civilian origin and very largely a Spanish concept as it developed in the United States, its roots according to de Funiak[27] can be traced back as far as 693 A.D. in Spain, and, according to McKay,[28] traces were found in legislation enacted in the reign of Euric of the Goths, in Spain, A.D. 466 to A.D. 485. Its origin in the United States can be traced to the Spanish possessions which included the territory now comprising the states of Arizona, California, Louisiana, Nevada, New Mexico and Texas. The first Code of Louisiana was said to have furnished much of the material for the codes subsequently adopted in Texas and California, which, in turn, were the models for the Arizona, Idaho, Nevada and Washington codes. New Mexico's code was believed patterned after a later form of the California system.[29]

E. *Community Property Jurisdictions*

At present community property laws are in effect in the following states and territories of the United States: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Oklahoma, Texas, Washington and Territory of Hawaii.

[25] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, ¶ 1 (1943).

[26] See CCH 1946 FED. TAX GUIDE, ¶¶ 8952-8996.

[27] 1 PRINCIPLES OF COMMUNITY PROPERTY, ¶ 2 (1943); see also id., c. 2.

[28] COMMUNITY PROPERTY, § 9 (1925).

[29] Id., § 6.

II

APPLICATION OF FEDERAL INCOME TAX LAWS TO COMMUNITY PROPERTY

A. *In General*

"... It is perhaps unfortunate that the tax law in this field was made in a climate of judicial opinion which has remarkably changed in recent days."[30]

In the interests of clarity, let it be said again that the tax rule currently applied to all community income is that, because the non-earning spouse has therein a present, vested and equal ownership with that of the earning spouse, such income is reportable and income-taxable in halves upon the separate returns of each of the spouses.

Authority for this procedure can be traced to a ruling of United States Attorney General A. Mitchell Palmer on September 10, 1920, wherein he advised the Secretary of the Treasury that "the earnings of husband and wife domiciled in Texas are community income, and such husband and wife in rendering separate income-tax returns may each report as gross income one-half of the total earnings of the husband and wife."[31]

Shortly thereafter official advice was again requested by the Secretary of the Treasury concerning income taxation of community property spouses, this time as to the application of the rule in other community property jurisdictions. Attorney General Palmer ruled[32] that the right to divide and report by halves was applicable to all other community property jurisdictions[33] with the exception of California. The State of California was excluded because, under the decisions of the Supreme Court of that state, the wife had no present, vested interest in community property, but a mere expectancy, receiving her half interest upon the husband's death, as his heir.[34]

The situation remained in this condition until the disturbing case of *United States v. Robbins*[35] was decided on January 4, 1926. There was much in that opinion to indicate that the Supreme Court was not satisfied with the "vested interest" test as determinative of the right of the non-earning spouse to report and pay income tax on one-half of

[30] PAUL, FEDERAL ESTATE AND GIFT TAXATION, § 1.09 at p. 62 (1942).
[31] 32 Op. Atty. Gen. 298 at 308.
[32] February 26, 1921, 32 Op. Atty. Gen. 435.
[33] Arizona, Idaho, Louisiana, Nevada, New Mexico, Washington.
[34] Further discussion, in connection with note 44 infra, relates to this point.
[35] 269 U.S. 315, 46 S. Ct. 148.

the total income of the earning spouse. This opinion could not fail to create indecision on the part of the Treasury Department, and as a direct result, on February 3, 1926, the department requested of the Attorney General a reconsideration of the two previous opinions. The answer was not forthcoming for a year and a half, but on July 16, 1927 a decision was made withdrawing the previous opinions and leaving the way open for the prosecution of "test cases in the courts."[86] The result was the much cited case of *Poe v. Seaborn*,[87] a "'Magna Charta' for community-income division in all the community property states but California."[88] Husband and wife, residents of the State of Washington, had each returned one-half of the total community income as gross income and each deducted one-half of the community expenses to arrive at the net income returned. The commissioner levied an additional assessment against the husband, maintaining that all the income should have been reported in his return. The husband, paying under protest, filed a claim for refund, and on its rejection brought suit for recovery, relying on the theory that the test of taxability of income was ownership; that the husband and wife each had a present, vested one-half interest in community income; and that therefore they could report and pay by halves. The commissioner, on the other hand, asserted a theory advanced in the previously decided case of *United States v. Robbins*,[89] that tax law is not concerned with technical legal titles; that a realistic analysis reveals that the "control" of a husband over community property is tantamount to the "ownership" of a husband in a non-community property state. In support of this theory the commissioner pointed to the husband's managerial powers over community property, so broad, he asserted, as virtually to amount to absolute dominion.

In rejecting the commissioner's argument the Court seized upon what is believed to be the significant fact concerning the husband's right to control, so often overlooked by courts steeped in common law principles. It said:

> "We think . . . this contention [of the commissioner] is unsound. The community must act through an agent. This Court has said with respect to the community property system (Warburton v. White, 176 U.S. 494) that 'property acquired during

[86] 35 Op. Atty. Gen. 265 at 269.

[87] 282 U.S. 101, 51 S. Ct. 58 (1930).

[88] Oliver, "Community Property and the Taxation of Family Income," 20 TEXAS L. REV. 532 at 539 (1942).

[89] 269 U.S. 315, 46 S. Ct. 148 (1926). Case reviewed infra, page 418.

> marriage with community funds became an acquêt of the community and not the sole property of the one in whose name the property was bought, although by the law existing at the time the husband was given the management, control and power of sale of such property.' This right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community."[40]

Thus the Court, rejecting the "control" test as inappropriate, grounded its decision squarely on the wife's "vested property right in the community property, equal to that of her husband." The *Robbins* case was distinguished on the ground that the California community property law "gave the wife a mere expectancy," and that the husband was in fact the owner.

For support of his "control theory" the commissioner also relied on two additional cases—*Corlis v. Bowers*[41] and *Lucas v. Earl*.[42] The former had taxed to the settlor the income of a revocable trust, on the theory well expressed in the following quotation from the opinion: "The income that is subject to a man's unfettered command, and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not."[43] To the *Poe* Court, ownership was the distinguishing factor between the *Corliss* and *Poe* cases, for it declared: "While he has technically parted with title, yet he in fact retains ownership, and all its incidents [speaking of settlor in *Corliss* case]. But here the husband never has ownership. That is in the community at the moment of acquisition [referring to *Poe* case]."[44] In the *Lucas* case a husband and wife had agreed that any property they might acquire should be held by them as joint tenants. Relying on this agreement they attempted to divide their joint income for federal tax purposes, on the theory that the taxing statute seeks to tax income only beneficially received and that the husband's income became the joint property of both spouses the moment it was acquired. The Court, however, refused to permit such division, stating: "There is no doubt that the statute could tax salaries to those who earned them" and that this "was the import of the statute before us."[45] Ownership was again considered the criterion of distinction by the *Poe* Court. "The very

[40] 282 U.S. 101 at 112, 51 S. Ct. 58 (1930).
[41] 281 U.S. 376, 50 S. Ct. 336 (1930).
[42] 281 U.S. 111, 50 S. Ct. 241 (1930).
[43] Id. 376 at 378.
[44] 282 U.S. 101 at 116, 51 S. Ct. 58 (1930).
[45] 281 U.S. 111 at 114, 115, 50 S. Ct. 241 (1930).

assignment in that case [referring to *Lucas v. Earl*] was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate. That case presents quite a different question from this, because here, by law, the earnings were never the property of the husband, but that of the community."[46]

While the *Robbins, Corliss* and *Lucas* cases do support the commissioner's argument in *Poe v. Seaborn* that "right to control" is a proper test of taxability, the Court refused to apply the rule to the husband's control over community property, for, as seen in the quotation from the case, the control of the husband was not for his benefit, but for the benefit of the community.

Companion cases to *Poe v. Seaborn* extended its rule to the states of Arizona,[47] Louisiana,[48] and Texas,[49] and it was thereafter extended by ruling of the Treasury Department[50] to Idaho, Nevada and New Mexico.

B. *California's History*

The net result of the foregoing developments was that in all community property jurisdictions except California, community income was divisible and taxable by halves upon the spouses' individual returns. California had been left by the way-side by reason of the fact that its community property laws had been interpreted to give the wife, during coverture, a mere expectancy[51]—not a present, vested right, as in other community property jurisdictions.

United States v. Robbins[52] was the case that foreclosed the interests of the California spouses, and it is interesting as much for what it said as for its actual holding. A California husband who had been denied the right to divide his income between himself and his wife, sued to recover the amount by which his income tax had been increased by reason of such denial. In affirming the denial, the Court placed its decision on two grounds: (1) that the wife, in California, had no vested interest in community property; and (2) that, irrespective of the char-

[46] 282 U.S. 101 at 117, 51 S. Ct. 58 (1930).

[47] Goodell v. Koch, 282 U.S. 118, 51 S. Ct. 62 (1930).

[48] Bender v. Pfaff, 282 U.S. 127, 51 S. Ct. 64 (1930).

[49] Hopkins v. Bacon, 282 U.S. 122, 51 S. Ct. 62 (1930).

[50] Mim. 3853, 10 INT. REV. BULL. 139 (1931), 313 CCH FED. TAX SERV. ¶ 6032.

[51] Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228 (1897); Estate of Moffitt, 153 Cal. 359, 95 P. 653 (1908); Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22 (1923).

[52] 269 U.S. 315, 46 S. Ct. 148 (1926).

acter of the wife's interest, the husband had such control over community property as to justify the imposition of the tax on him for the whole. Concerning this latter point, the Court commented:

> ". . . Even if we are wrong as to the law of California, and assume that the wife had an interest in the community income that Congress could tax if it so minded, it does not follow that Congress could not tax the husband for the whole. Although restricted in the matter of gifts, etc., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. . . . That he may be taxed for such a fund seems to us to need no arguments."[53]

It was following this opinion that the Attorney General withdrew all previous administrative rulings permitting division of income for tax purposes between community property spouses.[54]

Only one course remained open to California after this decision —that of legislative change. The legislature accepted the challenge, and on July 29, 1927 the following curative amendment became effective:

> "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. . . ."[55]

The income-tax effect of this amendment was interpreted in the case of *United States v. Malcolm*,[56] in a per curiam decision, as bringing community income acquired after the effective date within the rule of *Poe v. Seaborn*, permitting division of income between spouses and taxation thereof by halves.

The effects of California's experiences are still felt today, and practical problems arise in which it is necessary to distinguish between income from "old type" community property (that acquired prior to July 29, 1927) and "new type" (acquired after July 29, 1927). The bureau has ruled[57] that the *Malcolm* case is not applicable to income

[53] Id. at 327. This was the language so vigorously relied upon by the commissioner in the subsequent case of Poe v. Seaborn, but which the Court refused to apply to the facts of that case. To the effect that the control of the husband is not so broad as indicated, see Harper v. Commissioner, 6 T.C. 230, 464 CCH STAND. FED. TAX REP. ¶ 7283 (1946).

[54] See discussion re note 36, supra.

[55] Cal. Civ. Code (Deering, 1941) § 161a.

[56] 282 U.S. 792, 51 S. Ct. 184 (1931).

[57] Mim. 3859, 10 INT. REV. BULL. 140 (1931), 313 CCH FED. TAX SERV. § 6067; Also see COLLINS, COMMUNITY PROPERTY AND TAXES 23 (1945).

from property acquired prior to July 29, 1927, nor to salaries, wages, fees and other compensation earned prior to that date. Suppose *H* and *W*, California spouses, acquired a farm as "old type" community property. Is the current income from the farm taxable exclusively to *H*, or is he entitled to allocate a portion of the income to services and labor currently performed, thus establishing that portion as "new type" to which the *Malcolm* case is applicable? Or, suppose *H* and *W* own and operate an "old type" mercantile or industrial establishment. Is the entire income attributable to a capital investment made prior to the critical date and thus not subject to the "reportable by halves" rule? It has been the practice in California to allocate such income in part to the return on capital and in part to the current endeavor of the spouses, the latter representing "new type" community income divisible for income tax purposes.[58]

C. *Oklahoma's History*

The experiences of the state of Oklahoma with community property and federal taxes have not been entirely satisfactory, due altogether to the type of community property law first enacted by its legislature.

On July 29, 1939 Oklahoma adopted a community property law operative only if and when husband and wife elected to avail themselves of its provisions. Written notice of election by the spouses was required.

Shortly after adoption of the law, an Oklahoma taxpayer and his wife elected to bring themselves within the terms of its benefits and did so by filing appropriate notices. Acting in conformity with the *Poe v. Seaborn* doctrine, they thereafter filed separate income-tax

[58] G.C.M. 1030, 6 INT. REV. BULL. 26 (1926), 462 CCH STAND. FED. TAX REP. ¶ 455.099; G.C.M. 9825, INT. REV. BULL. X-2-146, 462 CCH STAND. FED. TAX REP. ¶ 455.091; Scott, "California Farm Income and Community Property Income Tax Returns," 21 TAXES 145 (1943); Oliver v. Commissioner, 4 T.C. 684 (1945). See 454 CCH STAND. FED. TAX SERV. ¶ 8376 as to the formula of allocation. This same problem exists in other community property jurisdictions, with respect to income which is partially attributable to a capital investment of separate property and partially allocable to compensation for personal services performed after marriage. In a case arising from the state of Washington involving this problem, the Tax Court held that resort to the formula established by G.C.M. 9825 (supra) was unnecessary where taxpayer-husband and his partner (not his wife) had previously agreed upon the amounts to be allowed themselves as compensation and the portion of profits to be allocated as a return on invested capital. Tinling v. Commr., 7 T.C. 826, 474 CCH STAND. FED. TAX REP. ¶ 7225 (1946). In accord, Van Vorst v. Commr., 7 T.C., No. 96, 474 CCH STAND. FED. TAX SERV. REP. ¶7022 (1946).

returns in which they each reported one-half of their income that accrued subsequent to the election, and paid the resulting tax. The commissioner, however, determined a deficiency, asserting that the husband was taxable on all the income derived from his earnings. Both the Tax Court and the circuit court of appeals sustained the husband, relying on *Poe v. Seaborn*, concluding that once an election had been filed, the wife became vested with one-half of all the community income, just the same as she does in other community property jurisdictions. But in the ensuing appeal to the Supreme Court, the opinions of the lower courts were reversed. The Supreme Court held[59] that the husband and wife were not entitled to divide their community income between them for the purpose of the federal income tax. The commissioner had relied heavily on the case of *Lucas v. Earl*,[60] contending that the situation resulting from the creation of community property by the voluntary act of the parties was indistinguishable from that existing in the *Lucas* case where husband and wife had created a joint tenancy by voluntary act. In adopting this argument in toto the Court said:

> "Under *Lucas v. Earl* an assignment of income to be earned or to accrue in the future, even though authorized by state law and irrevocable in character, is ineffective to render the income immune from taxation as that of the assignor. On the other hand, in those states which, by inheritance of the Spanish law, have always had a legal community property system, which vests in each spouse one-half of the community income as it accrues, each is entitled to return one-half of the income as the basis of federal income tax. Communities are of two sorts—consensual and legal. A consensual community arises out of contract. It does not significantly differ in origin or nature from such a status as was in question in *Lucas v. Earl*, where by contract future income of the spouses was to vest in them as joint tenants. In *Poe v. Seaborn*, *supra*, the court was not dealing with a consensual community but one made an incident of marriage by the inveterate policy of the State. In that case the court was faced with these facts: The legal community system of the States in question long antedated the Sixteenth Amendment and the first Revenue Act adopted thereunder. Under that system, as a result of State policy, and without any act on the part of either spouse, one-half of the community income vested in each spouse as the income accrued, and was, in law, to that extent, the income of the spouse."[61]

[59] Commissioner v. Harmon, 323 U.S. 44, 65 S. Ct. 103 (1944).
[60] 281 U.S. 111, 50 S. Ct. 241 (1930).
[61] 323 U.S. 44 at 46, 65 S. Ct. 103 (1944).

Justice Douglas wrote a vigorous dissent, referred to earlier in this paper,[62] in which he criticized the *Poe v. Seaborn* doctrine as representing a "competing theory of income tax liability" with that of *Lucas v. Earl.*

Thus, after the *Harmon* case, Oklahoma was in a position similar to California's position after the *Robbins* case,[63] and it took a similar, though more drastic, way out. It completely repealed its elective community property law, substituting a new law without elective features, effective July 26, 1945.[64] The Bureau of Internal Revenue has since ruled that under this law it is the privilege of Oklahoma spouses to include in their separate federal income tax returns only one-half of their community income received or accrued on and after the effective date of the act.[65]

D. *Oregon*

For a short period of time Oregon had an elective community property law virtually identical with that first enacted by the state of Oklahoma. It adopted the law in 1943[66] but, as it was assumed to be ineffective for federal income tax purposes under the *Harmon* decision, the law was repealed by legislative act effective June 16, 1945.[67] Thus, Oregon is now without the ranks of the community property jurisdictions.

E. *Territory of Hawaii*

The territory of Hawaii has recently joined the fold, by the enactment of community property laws, effective June 1, 1945.[68] This law contains none of the elective features of the former Oklahoma law, and by a recent ruling "the Bureau recognizes that the Hawaiian statute in question satisfies the requirements of a community property system, as laid down by the Supreme Court of the United States in *Poe v. Seaborn* (282 U.S., 101 . . .) and *Commissioner v. Harmon* (323 U.S., 44 . . .) so as to permit a husband and wife, domiciled in Hawaii, to include in their separate Federal income tax returns one-half of their community income."[69]

[62] Supra, note 12.

[63] 269 U.S. 315, 46 S. Ct. 148 (1926).

[64] Okla. Laws (1945) tit. 32.

[65] I.T. 3782, INT. REV. BULL. 1946-4-12237 (p. 6), 464 CCH STAND. FED. TAX REP. ¶ 6131.

[66] Ore. Laws (1943) c. 440 (effective June 9, 1943).

[67] Ore. Laws (1945) c. 270.

[68] Hawaii Laws (1945) Series D-201: Act 273.

[69] I.T. 3784, INT. REV. BULL. 1946-4-12239 (p. 7 at 8), 464 CCH STAND. FED. TAX REP. ¶ 6133; as to treatment for federal income tax purposes of various

F. *Summary and Comments*

1. By way of summary, it is to be noted that in all community property jurisdictions today, community income is divisible and taxable to the spouses by halves. Further, where income is the product of separate capital (or "old type" California community property) and of current effort of either or both spouses, it must be apportioned between capital investment and personal service.

2. Is the rule permitting division of community property for income tax purposes applicable to income from property that was originally separate property, but which, by agreement of the spouses, has been converted to community property? In several of the community property jurisdictions it is possible for the spouses, by agreement, to convert their separate property into community property.[70] Suppose they do. Is the income subsequently accruing subject to the rule permitting its division and separate return by the spouses? The cases seem to so indicate, and the Treasury Department has so ruled.[71] Such a result, while consistent with the rationale of *Poe v. Seaborn*, is a patent illustration of the "competing theories of income tax liability" illustrated by *Lucas v. Earl* on the one hand and *Poe v. Seaborn* on the other, referred to by Justice Douglas in his dissent in *Commissioner v. Harmon.*

The converse of the rule is, of course, also true. Spouses lose the right to divide and report income by halves as to any income from property which by agreement they have converted from community property into separate property.[72]

3. A problem upon which the Ninth Circuit Court of Appeals has reached apparently conflicting results is that concerning the tax status of income accruing during the administration of the estate of a de-

types of income under the Hawaiian Act, see I.T. 3792, INT. REV. BULL. 1946-8-12289 (p. 5), 464 CCH STAND. FED. TAX REP. ¶ 6180.

[70] 3 MERTENS, LAW OF FEDERAL INCOME TAXATION, § 19.20 et seq. (1942); 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 144 (1943).

[71] Black v. Commissioner, (C.C.A. 9th, 1940) 114 F. (2d) 355; Shoenhair v. Commissioner, 45 B.T.A. 576 at 579 (1941); Harmon v. Commissioner, 1 T.C. 40 (1942); G.C.M. 19248, INT. REV. BULL. XVI-46-9036 (p. 2), 373 CCH FED. TAX SERV. ¶ 6675. May California spouses by agreement convert "old type" community property into "new type," the income from which would be taxable by halves? In United States v. Pierotti, (C.C.A. 9th, 1946) 154 F. (2d) 758, and in United States v. Goodyear, (C.C.A. 9th, 1938) 99 F. (2d) 523, such an agreement was held effective for federal estate tax purposes. It would seem to be similarly effective for income tax purposes.

[72] Sparkman v. Commissioner, (C.C.A. 9th, 1940) 112 F. (2d) 774; Helvering v. Hickman, (C.C.A. 9th, 1934) 70 F. (2d) 985.

ceased spouse in a community property jurisdiction. The problem first reached the court in the case of *Commissioner v. Larson,*[73] involving the community property laws of the State of Washington. Larson, domiciled in Washington, died leaving his widow and an estate consisting entirely of community property. Under the laws of Washington, the entire community estate, and not merely the half interest of the decedent, is subject to administration; and in this case all of the community property was accordingly brought into the estate for administration purposes. The executor thereafter reported the entire income from the estate for income tax purposes, and the surviving widow included no part of the income items in her return. The commissioner subsequently levied a deficiency against the widow, asserting that inasmuch as she "owned" a present, vested interest in one-half of the community property—even though it was subject to administration for the purpose of applying it to the payment of community debts—she should be taxable upon such half. The court acknowledged, as stated in *Poe v. Seaborn,*[74] that "ownership" was the proper test of taxability, but explained that in the State of Washington, "the 'ownership' of the income of Community property during administration and liquidation thereof, is in the executor or administrator, and that therefore he should report such income in the income tax return of the estate."[75]

A contra result was reached, under the laws of the State of California, in *Bishop v. Commissioner.*[76] The facts were very nearly identical with those of the *Larson* case. A California husband died leaving his widow surviving. His estate consisted of community property (acquired by the spouses after July 29, 1927). A California statute likewise required that all community property be subject to administration in the estate of the deceased spouse. The surviving widow returned one-half of the estate income in her individual income tax return on the theory that she owned a half. The commissioner, relying on the *Larson* case, assessed a deficiency, asserting that the estate was chargeable for the entire income. He was sustained in this position by the Tax Court. The circuit court, however, reversed, stating:

> "The Tax Court appears to have assumed that, upon decedent's death, petitioner's half of the community property ceased

[73] (C.C.A. 9th, 1942) 131 F. (2d) 85.

[74] 282 U.S. 101, 51 S. Ct. 58 (1930).

[75] 131 F. (2d) 85 at 87. For a criticism of this result, on the grounds that it does not accord with traditional community property concepts, see 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 205 at pp. 585-587 (1943).

[76] (C.C.A. 9th, 1945) 152 F. (2d) 389, 46-1 USTC § 9107.

> to be hers and became part of the decedent's estate. The assumption is incorrect. Petitioner's half, like decedent's half, was subject to administration, but, unlike his half, her half never became part of his estate. . . .
>
> "The Larson case involved community property in the State of Washington. This Court held that, by the law of that State, the 'ownership' of income derived from such property, including that derived from the wife's half, after the husband's death and during administration of his estate is 'in the executor or administrator.' There is no such law with respect to the community property acquired in California after July 29, 1927."[77]

It would seem that the reasoning of the *Bishop* case is in line with basic concepts of community property ownership by husband and wife, whereas the *Larson* case appears to represent an unwarranted departure from both previously and subsequently decided cases interpreting the wife's interest in community property.

4. An interesting case, making a logical application of the "vested interest" theory of the wife in community property, was decided by the Tax Court on February 20, 1946.[78] This case is illustrative of the fact that the husband's managerial powers over community property are not tantamount to ownership.[79] The taxpayers, husband and wife, were domiciled in California, and they filed income tax returns on a community property income tax basis. The commissioner declared a deficiency in the income of each, as a result of a determination to the effect that the income of two trusts created by the husband was taxable to the taxpayers as community income. The trusts had been created by the husband for the benefit of the minor children of the taxpayers, the trust res consisting of community assets. His wife had not given formal consent to the creation of the trusts, although she had orally assented to and acquiesced in their creation. The trusts were purportedly irrevocable. The commissioner took the position that the income from the trusts was taxable to the husband and wife under section 166 of the Internal Revenue Code [also under sections 22(a) and 167], since the trusts were revocable by the wife, a person who did not have a

[77] Id. at 391.

[78] Harper v. Commissioner, 6 T.C. 230, 464 CCH STAND. FED. TAX REP. ¶ 7283 (1946).

[79] Several authors, attempting to justify taxation of the husband for all community income, have given as a reason, the fact that his broad managerial powers are tantamount to ownership. For example see 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION, § 1.09 at p. 61 (1942); 3 MERTENS, LAW OF FEDERAL INCOME TAXATION, § 19.01, p. 6 (1942).

substantial adverse interest in the corpus or income of the trust. Under the California Code a husband cannot make a gift of community personalty without his wife's written consent, and any gift without such consent is voidable at her option. The Tax Court held that the wife had the right to revoke the trusts and to reinstate as part of the community property the gifts held in trust; and further, that the commissioner was correct in determining that the income from the trusts was taxable to the husband and wife as community income under section 166 of the code. The court found it unnecessary to determine taxability under code sections 22(a) and 167.

G. *Constitutionality of Legislative Proposals to Change the Rule*

A number of articles have been written concerning the constitutionality of proposals aimed at the abolition of the right of spouses to divide their community income and pay taxes thereon by halves upon separate returns.[80] Their very number suggests that there is at least an apparent hurdle to overcome, and such a hurdle is found in the decision of the Supreme Court of the United States in the case of *Hoeper v. Wisconsin*.[81] There the Court had before it a statute of Wisconsin which provided that in computing the amount of state income taxes payable by persons residing together as members of a family, the income of the wife should be added to that of her husband and assessed to and payable by him. It was held that, since in law and in fact the wife's income was her separate property, the state was without power to measure the husband's tax in part by the income of his wife. "We have no doubt" the court said, "that, because of the fundamental conceptions which underlie our system, 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 of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income."[82]

[80] For illustrative comments see: Altman, "Community Property and Joint Return," 19 TAXES 588 (1941); Altman, "Community Property in Peril," id. 262; Community Property Laws as Determinable in Federal Income Taxation, 40 ILL. L. REV. 136 (1945); Latcham, "Invasion of the Community Income Tax Privileges," 20 WASH. L. REV. 44 (1945); Magill, "The Federal Income Tax on the Family," 20 TEXAS L. REV. 150 (1941); 3 MERTENS, LAW OF FEDERAL INCOME TAXATION § 19.01 (1942); Oliver, "Community Property and the Taxation of Family Income," 20 TEXAS L. REV. 532 (1942); Ray, "Proposed Changes in Federal Taxation of Community Property: Income Tax," 30 CAL. L. REV. 397 (1942).

[81] 284 U.S. 206, 52 S. Ct. 120 (1931).

[82] Id. at 215.

This language stands directly in the way of proponents of attempts to tax community income to the earner or to the spouse having its management and control, for the decisions are legion to the effect that the non-earning spouse actually "owns" one half of all community property, from the very moment of its inception. A proposal to require compulsory joint returns by spouses, with a tax determination measured by their combined aggregate income, may not constitute a tax on the husband measured by his wife's income; still, that element is involved, and the applicable rate is certainly influenced by the fact that income other than the husband's has been given consideration. So, opponents to the proposals contend, even this form is unconstitutional under the *Hoeper* decision.

There is much to be said on behalf of the proponents' position, however. If the interest of the non-earning spouse had been created by voluntary transfer of the husband, clearly the entire income would have been taxable to the husband.[83] Should the tax incidents be different merely because the shift occurs, not by voluntary act of the husband, but by reason of the operation of the law? To so state certainly makes the incidents of taxation turn "upon elusive and subtle casuistries"[84] and ignores economic realities. Further, taxation is concerned more with the practical application of facts as they exist than with legal subtleties.[85] It is a fact that the husband does have broad managerial control over community income. Should not this fact, this power of management and control, be sufficient justification for imposing on him a tax on its whole? Illustrations are not lacking in related fields where the Supreme Court has thought that the element of control has been an operative fact, or where one person's tax has been measured in part by another's income. For example: the element of control was held sufficient in *United States v. Robbins;*[86] a donor has been taxed on income received from renewal contracts which he had previously assigned to his wife;[87] a donee's tax has been measured by the donor's cost basis;[88] and a donor's tax has been measured by income from a bond coupon previously given to a donee.[89] Perhaps one of the most significant

[83] Lucas v. Earl, 281 U.S. 111, 50 S. Ct. 336 (1930).

[84] Justice Frankfurter in Helvering v. Hallock, 309 U.S. 106 at 118, 60 S. Ct. 444 (1940).

[85] Corliss v. Bowers, 281 U.S. 376, 50 S. Ct. 336 (1930); Burnet v. Guggenheim, 288 U.S. 280, 53 S .Ct. 369 (1933).

[86] 269 U.S. 315, 46 S. Ct. 148 (1926).

[87] Helvering v. Eubank, 311 U.S. 122, 61 S. Ct. 149 (1940).

[88] Taft v. Bowers, 278 U.S. 470, 49 S. Ct. 199 (1929).

[89] Helvering v. Horst, 311 U.S. 112, 61 S. Ct. 144 (1940).

cases in this field is that of *Helvering v. Clifford*,[90] in which a settlor was taxed on income of a five-year irrevocable family trust. The fact that the settlor had retained wide powers of control over the trust res definitely influenced the court. An interesting comparison of the powers of control over the trust res retained by the settlor in the *Clifford* case with those of the husband over the community property in *Poe v. Seaborn* has been made by Altman, who concludes:

> "Not a single power—not even one—was reserved by the husband as grantor or trustee in the Clifford case which the husband in the Seaborn case did not have as manager of the community property."[91]

That certain elements of control are alone sufficient to justify taxing a settlor on income from a trust, regardless of its duration, is the position of the Treasury Department in its recent decision interpreting the *Clifford* case.[92]

Undoubtedly the "climate of judicial opinion"[93] has changed in recent times; and it is entirely possible that under the doctrines of these more recent cases cited, and others of similar import, the Court could find constitutional justification for legislation that eradicates a doctrine which rests differences in tax treatment of husbands and wives on nothing more than the contingency of their domicile under either a ganancial or a common law system of marital ownership. An oft-quoted phrase of Justice Holmes has pointed the way: ". . . Taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid."[94]

III

APPLICATION OF FEDERAL ESTATE TAX LAWS TO COMMUNITY PROPERTY

A. *Statutory Amendments*

As previously indicated,[95] prior to the adoption of the Revenue Act of 1942, the application of community property concepts to federal

[90] 309 U.S. 331, 60 S. Ct. 554 (1940).

[91] Altman, "Community Property in Peril," 19 TAXES 262 at 265 (1941).

[92] See T. D. 5488, INT. REV. BULL. 1946-2-12210, 461 CCH STAND. FED. TAX REP. ¶ 86A.

[93] 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION, § 1.09 at p. 62 (1942).

[94] Corliss v. Bowers, 281 U.S. 376 at 378, 50 S. Ct. 336 (1930).

[95] See discussion pertaining to note 18, supra. On February 26, 1921, United States Attorney General Palmer ruled that in the states of Washington, Arizona, Idaho,

estate taxes resulted in the rule that only one-half of community property was includible in the estate of a deceased spouse, the remainder being exempt due to the fact that it belonged to the surviving spouse and had never been the property of the deceased.

Unlike experiences in the income tax field, however, efforts to change the rule as to the estate tax (and gift tax also) culminated in success with the passage of the Revenue Act of 1942. The act amended the Internal Revenue Code, with respect to community interests and estate taxes, in three particulars. The first, relating to revocable transfers, is found in section 811(d)(5), of the code which reads as follows:

> "For the purposes of this subsection and subsection (c), a transfer of property 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, shall be considered to have been made by the decedent, 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."

The second amendment—Internal Revenue Code, section 811(e)(2)—relates to the inclusion in the estate of the deceased spouse of community property, and provides that the estate value shall be determined by including the value at the time of decease of all property:

> "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 third amendment to the estate tax concerns the proceeds of life insurance. It is found at section 811(g)(4) of the Code, and reads thus:

> "For the purposes of this subsection, premiums or other con-

New Mexico, Louisiana and Nevada, there should be included in the gross estate of a deceased spouse, one-half only of community property. 32 Op. Atty. Gen. 435.

sideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, 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; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community."

B. *Constitutionality*

As might be expected the constitutionality of these amendments was promptly challenged, and two cases involving the question reached the Supreme Court of the United States. Opinions upholding their constitutionality were handed down December 10, 1945.[96] As both cases had arisen on appeal by the government from decisions declaring the amendments unconstitutional, the final outcome was awaited with much anticipation.

Wiener Case. In the *Wiener* case, the commissioner, proceeding under section 811(e)(2) of the code, had levied an estate tax on the termination of the marital community by the death, after the effective date of the 1942 act, of a husband domiciled in Louisiana, the tax being measured by the value of the entire community property. Also, acting under section 811(g)(4), he had included in decedent's gross estate the entire proceeds of insurance policies on decedent's life.

Children of the deceased, his sole heirs, brought suit in the district court against the collector to recover, as an overpayment, so much of the tax as was attributable to the inclusion in decedent's gross estate of his wife's share of the community property, and of all, rather than half, of the insurance proceeds.

The facts indicated that decedent had married his wife in Louisiana and lived with her in that state until his death, his wife surviving. During the marriage he carried on various kinds of business, and with the exception of certain Massachusetts real estate (not in dispute) all the property held by decedent at his death was community property. At no time during the marriage was the wife employed, nor was any part of the community property derived originally from any separate property of her own.

[96] Fernandez v. Wiener, 326 U.S. 340, 66 S. Ct. 178 (1945); United States v. Rompel, 326 U.S. 367, 66 S. Ct. 191, CCH INHERITANCE, ESTATE AND GIFT TAX SERV., FED., 7th ed., ¶ 10,240 (1945).

Included in the community property were the proceeds of fifteen insurance policies all of which had been taken out during the marriage, which named the wife as beneficiary and reserved to the insured the right to change the beneficiary.

Plaintiffs had returned an estate tax based on the value of one-half of decedent's community property, plus one-half of the insurance proceeds. The commissioner assessed a deficiency based on the failure to include in the gross estate the entire value of all community property and the entire proceeds of the insurance policies. The tax was paid, claim for refund filed, and upon its rejection, this suit was begun.

Plaintiffs made a number of specific contentions of unconstitutionality, all based on the familiar concept of the wife's vested one-half interest in community property, arguing from this that the taxing amendments were a denial of due process because the death of neither spouse operated to transfer, relinquish or enlarge any legal or economic interest in the property of the other spouse.

The Court did not view the situation in this light, however. As in previous cases its approach involved an analysis of the incidents of ownership released upon the death of the spouse, not of those which the survivor may have had in the property prior to the death. This is evident from the following language of the opinion:

> "... As we have seen, the death of the husband of the Louisiana marital community not only operates to transfer his rights in his share of the community to his heirs or those taking under his will. It terminates his expansive and sometimes profitable control over the wife's share, and for the first time brings her half of the property into her full and exclusive possession, control and enjoyment. The cessation of these extensive powers of the husband, even though they were powers over property which he never 'owned,' and the establishment in the wife of new powers of control over her share, though it was always hers, furnished appropriate occasions for the imposition of an excise tax....
>
> "... Since the levy is an excise and not a property tax, the case is not one of taking the survivor's property to pay the tax on decedent's estate. As the tax is upon the surrender of old incidents of property by the decedent and the acquisition of new by the survivor, it is appropriately measured by the value of the property to which these incidents attach."[97]

[97] 326 U.S. 340 at 355-356, 358, 66 S. Ct. 178 (1945). This decision has not escaped criticism. For example: "Every so often a case such as the Wiener Case in the United States Supreme Court focuses public attention upon the field of community property law. Perhaps to the average layman, politician, and tax specialist, community

Rompel Case. The *Rompel* case was decided upon the authority of the *Wiener* decision, and on the identical theory. The facts were quite similar. A husband and wife in Texas had accumulated community property through the operation of a livestock ranch on which they lived and from which sprang, either directly or indirectly, all their earnings. Neither spouse had ever been employed for wages. The husband died, and the problem arose as to what portion of the community estate should be included in his gross estate for federal estate tax purposes, the amendments previously quoted being in effect. The Court said:

> "On the death of the husband, in Texas, as in Louisiana, the wife's share of the community is freed from the restrictions of his exclusive management and control, and the wife acquires exclusive possession and enjoyment of the property constituting her share, as well as important new powers of control and disposition over it. . . .
>
> "The death of either the husband or the wife of a Texas community thus effects sufficient alteration of the spouses' possession and enjoyment and reciprocal powers of control and disposition of the community property as to warrant the imposition of an excise tax measured by the value of the entire community."[98]

C. *Hypothetical Cases*

The constitutionality of these amendments thus having been finally established, some comment as to the manner of their operation seems appropriate.

1. Where the community property consists solely of earnings of one spouse, who predeceases the non-earner, the tax incidence appears to be the same in a community as in a non-community property state. The entire value of the community property is includible in the gross estate of the deceased earning spouse under section 811(e)(2) of the code. Had the spouses been residents of a non-community state—for instance, Illinois—the result would have been identical. Here, then, the amendment seems to have achieved its purpose, viz., the elimina-

property is a subject that only achieves interest or importance through the momentary glare of the federal tax spotlight. And even that consideration of community property is liable to be a highly distorted one, if viewed in the light of the Supreme Court's decision in the Wiener Case. This decision, in fact, displays such an astounding lack of knowledge and understanding of community property as to convict the justices of either lack of capability or intellectual dishonesty." de Funiak, "Community Property and Law Schools," 20 CAL. ST. B. J. 398 (1945).

[98] United States v. Rompel, 326 U.S. 367, 66 S. Ct. 191 (1945).

tion of the advantage formerly held by residents of community property jurisdictions.

2. But suppose the non-earning spouse predeceases the earner. What happens then to the advantage formerly accorded the community property residents? The amendment seems not only to have removed it from the community property residents, but to have transferred it to those of non-community property jurisdictions. Note the last sentence of section 811(e)(2) which requires the inclusion in the estate of any deceased spouse of at least that portion of the community estate over which he or she had the power of testamentary disposition. In all community property jurisdictions except two, each spouse has the right to dispose by will of his or her share of community property,[99] that share being one-half thereof.

Suppose that *H* and *W*, residents of a community property state in which they each have power of testamentary disposition, have accumulated community property, all traceable to wages paid for personal services of *H*. *W* dies, leaving *H* surviving. Under section 811(e)(2), one-half of their community property must be included in her gross estate, since she had power to dispose of this share by will. Had *H* and *W* been residents of a non-community property state the result would have been different, however. Nothing would have been taxable in *W's* estate, since she would have had no power of testamentary disposition over the survivor's earnings; further, she did not own any property at death.[100]

Another result of a more extreme nature may possibly arise under the amendment. Suppose the existence of the same facts as those stated in the last example, except that the community property owned by the spouses on *W's* death was traceable, not to "wages" paid for personal services of *H*, but to "profits" of a community property farm which he operated. In such case may not it be plausibly argued that the income which *H* received was not "compensation for personal services" but was, rather, "earnings" from farming operations? If so, the "en-

[99] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 198 (1943). (In Idaho and Louisiana the power of testamentary disposition of the wife is somewhat limited in the amount that can be left to others than lineal heirs. In Nevada and New Mexico the wife has no right of testamentary disposition, except in cases of separation. In other community property jurisdictions the wife's power to dispose of her share of the community property by will is absolute, as is her husband's.)

[100] Freeman and Mueller, "Federal Taxation of Community Property," 34 CAL. L. REV. 398 at 407 (1946); Friedland, "Community Estates—Problems Raised by the Decision in Wiener and Herbst," 24 TAXES 194 (1946); Winstead, "Aftermath of Herbst and Wiener Decisions," 24 TEXAS L. REV. 439 (1946).

tire" community property owned by *H* and *W* on the latter's death would be includible in her estate, rather than merely one-half, as in the previous example. This interpretation—that "compensation for personal services" means only "wages" received for such services—seems unduly restrictive in view of the reports of the House and Senate Committees that considered section 811(e)(2) prior to its enactment. They each reported that "the amendments make due provision for the exclusion from the gross estate of that portion of the community property which is economically attributable to the survivor." But, the words "economically attributable" do not appear in the amendments. Rather, a different legislative standard was set up, and whether or not there will be accorded to it the same meaning as that reported by the committees awaits a further ruling of the bureau and possibly a decision of the courts.

Thus, it seems that in attempting to remove an advantage formerly held, another has been created. Concerning this discrimination, one writer has recommended: "In order to effect the purpose of the amendments which was to equalize taxation in community and non-community states, it is submitted that a further amendment to 812(c) should be made so that the estate of the surviving earner is permitted a deduction for the value of the community property taxed in the estate of a prior decedent when that property has gone to the survivor. This deduction should be applicable irrespective of the length of time elapsing between the deaths of the two spouses."[101]

3. *Insurance proceeds.* Section 811(g)(2), dealing with the taxability of proceeds of life insurance receivable by beneficiaries other than the estate of the insured, defines two situations in which such proceeds are includible in the gross estate of the insured. If the insured either (a) paid the premiums, or (b) possessed at his death incidents of ownership, the proceeds are includible in his estate even though pursuant to the policy the proceeds are payable to third persons.

Section 811(g)(4) relates these two provisions to estates containing community property in the following manner: (a) it provides that premiums paid with community property of the insured and surviving spouse "shall be considered to have been paid" by the insured, unless the surviving spouse shows that the payments were made from funds

[101] Professor McAllister's comment, "The Estate and Gift Tax Amendments, Revenue Act of 1942," 31 CAL. L. REV. 60 at 71 (1942). (For a suggestion that this tax may be avoided by inter vivos transfer of wife's interest to her husband, even in contemplation of death, see discussion infra, relating to note 114.)

received by the survivor as compensation for personal services rendered or from separate property of the survivor; (b) it defines the term "incidents of ownership" to include those incidents owned by deceased at his death as manager of the community.

Under the first part of section 811(g)(4) it is apparent that proceeds of insurance policies on the life of the earning spouse, paid for with community funds, must be included in this estate, no matter who the beneficiary is, unless paid with funds economically attributable to the surviving spouse. A similar result would follow on the same facts if the spouses were residents of a non-community property jurisdiction, for where the premiums are paid by the deceased, the proceeds are includible in his estate.

The "incidents of ownership" test, however, indicates that a different result might follow in a community property jurisdiction than would occur in a non-community property state. Suppose *H* and *W* are residents of the State of Washington, a community property jurisdiction. A life insurance policy is written on *H's* life, naming *W* as beneficiary. *W* pays all premiums from community salary which she has earned, and *H* assigns all interest in the policy to her, so that he has none of the normal incidents of ownership, i.e., he cannot change the beneficiary, he cannot borrow on the policy, nor assign it as collateral. *H* dies. Are the proceeds includible in his estate for estate tax purposes? The "payment of premiums" test does not require such result because the premiums were paid with funds "received as compensation for personal services actually rendered by the surviving spouse." And *H* had none of the normal incidents of ownership as that term is used in section 811(g)(2)(B). But he did have the management and control of community personalty at his death under the laws of the State of Washington. Does this management and control constitute "incidents of ownership" sufficient to require the inclusion of the proceeds in his estate, as that term is defined in section 811(g)(4)? Not only do the words of the statute so indicate, but also the Regulations[102] lend support to that conclusion. But if exactly the same set of facts existed with reference to a husband and wife who were residents of a non-

[102] TREAS. REG. 105, § 81.27 (1942). "Insurance receivable by other beneficiaries. . . . (a) . . . in case of decedent dying after October 21, 1942. . . . For the purposes of this section, the term 'incidents of ownership' is not confined to ownership in the technical legal sense. . . . [It] includes incidents of ownership possessed by the deceased as manager of the community where the insurance policy is property held as community property by the decedent and spouse. . . ."

community property state, it is believed that an opposite result would be reached: the proceeds would not be includible in deceased's estate because (a) he did not pay the premiums, and (b) he did not possess any "incidents of ownership."

Thus again, it seems that the community property amendments to the code have gone beyond their supposed goal of eliminating the previously existing preferential position of the community property states, and have created another inequity equally unjustifiable. This problem was not before the Court in the *Wiener* decision,[103] and was not commented on, although there were fifteen insurance policies on the life of the deceased husband, payable to the wife as beneficiary. However, the insured possessed the right to change the beneficiary of these policies, and that this was the ground relied upon by the Court is implicit in the following quotation from its opinion:

> "But it is sufficient for present purposes that the tax is laid upon the amount receivable by the wife as a beneficiary of the policies on the death of her husband, and that the husband possessed at his death an incident of ownership, the power to change the beneficiaries."[104]

D. *Resumé of Estate Tax Developments*

1. Prior to the Revenue Act of 1942, the application of community property principles to federal estate taxes resulted in savings to owners of community property, for on the death of one of the spouses, only one-half of the community property was includible in the gross estate of the deceased.

2. The Revenue Act of 1942 changed this by requiring the inclusion in the estate of the deceased spouse of the full value of all community property, except that portion of it that is economically attributable to the survivor. However, regardless of this exception, there must be included as a minimum, the value of that portion which is subject to the testamentary disposition of the deceased, which share, we have seen, is one-half of the community property in all jurisdictions except Nevada and New Mexico.

3. In certain situations, the amendments appear not only to remove the advantage formerly held by residents of community property jurisdictions, but actually to place them at a distinct disadvantage.

[103] 326 U.S. 340, 66 S. Ct. 178, CCH INHERITANCE, ESTATE AND GIFT TAX SERV., FED., 7th ed., ¶ 10,239 (1945). Case reviewed supra, commencing page 430.

[104] Id. at 363.

IV

APPLICATION OF FEDERAL GIFT TAX LAWS TO COMMUNITY PROPERTY

A. *Statutory Amendment*

Prior to January 1, 1943, community property concepts affected federal gift tax laws in precisely the same manner as they did federal income and estate taxes. Gifts of community property were considered to be half from the husband and half from the wife.[105] Thus, community spouses were given a distinct advantage over spouses resident in non-community property states, since they were able to take advantage of the tax rates in the lower brackets.

However, as previously noted,[106] the Revenue Act of 1942 contained a provision amending the federal gift tax law and purporting to eliminate this preferential treatment.

By section 1000(a) of the code, a tax is imposed "upon the transfer during such calendar year by any individual . . . of property by gift. . . ." This is the basic gift tax provision. Its applicability to gifts of community property is determined by the 1942 Revenue Act amendment, found at section 1000(d) of the code, which provides:

> "All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife."

The amendment was made applicable only to gifts made in 1943 and succeeding calendar years.[107]

B. *Constitutionality*

No case has been found in which the constitutionality of this amendment has been challenged. It is a part of the same act that was sustained by the Court in the *Wiener* and *Rompel* decisions, however, and the motivating purpose behind it was the same as that involved in the

[105] Letter of Deputy Commissioner D. S. Bliss, dated November 22, 1935, CCH INHERITANCE, ESTATE AND GIFT TAX SERV., FED., 7th ed., § 3935.175.

[106] Supra, note 16, discussion re.

[107] Revenue Act of 1942, § 455, 56 Stat. L. 953.

amendments there under consideration. The objections to taxing the husband for the value of community property which has been transferred by gift (other than such as is economically attributable to the wife) do not seem any greater than those advanced to taxing the husband's estate for the full value of community property owned by the spouses at his death.[108]

C. *Hypothetical Cases*

1. *Taxability of gifts by husband which are voidable by wife.* In the states of California and Washington, a husband has no power to make a gift of community property without the consent of the wife.[109] The wife has the power to reclaim to the community any such gifts made without her consent. It was recognition of this fact that recently led the Tax Court to hold that income from community property given by the husband to a trustee in trust for his children was properly taxable to the husband and wife as community income.[110] Suppose a husband in California or Washington makes a gift of community personalty in trust for the benefit of his son. His wife fails to join in the gift. Is it taxable as a gift under section 1000(d)? In the *Sanford* case[111] the Court had before it a problem similar in principle, although it was sufficiently different on its facts to preclude its citation as controlling authority. The facts were these. In 1913, before the enactment of the first gift tax statute, which was enacted in 1924, decedent created a trust for the benefit of named beneficiaries, reserving the power to terminate the trust, or to modify it. In 1919 he surrendered the power to revoke, but reserved the power to modify. In 1924, after the effective date of the gift tax statute, he relinquished his remaining power to modify the trust. It was contended by the commissioner that the gift did not become complete until the donor's final relinquishment in 1924 of the power to modify, and that, as this occurred after the passage of the gift tax law, a taxable gift was at that time consummated. The contrary contention upon behalf of the donor's estate was that the gift was complete upon the relinquishment of the donor's power to revoke the trust, which since it occurred before the passage of the gift tax law, resulted in no tax liability. In affirming the position taken by the commissioner, the Court gave two reasons: (1) that under the statute there was no intent to tax gifts before the donor had fully parted

[108] Winstead, "Aftermath of Herbst and Wiener Decisions," 24 TEXAS L. REV. 439 at 444 (1946).

[109] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 122 (1943).

[110] Supra, note 78.

[111] Sanford Estate v. Commissioner, 308 U.S. 39, 60 S. Ct. 51 (1939).

with his interest in the donated property; and (2) that the gift tax is supplementary to the estate tax; that the two are in *pari materia* and must be construed together; and that the completeness of gift for gift tax purposes was to be determined by applying the test used in deciding whether the donor had retained an interest such that it became subject to the estate tax upon its extinguishment at death. Concerning the first reason given, the Court said:

> "There are other persuasive reasons why the taxpayer's contention cannot be sustained. By § 315(b), § 324, and more specifically by § 510 of the 1932 Act, the donee of any gift is made personally liable for the tax to the extent of the value of the gift if the tax is not paid by the donor. It can hardly be supposed that Congress intended to impose personal liability upon the donee of a gift of property, so incomplete that he might be deprived of it by the donor the day after he had paid the tax. Further, § 321 (b)(1) exempts from the tax, gifts to religious, charitable and educational corporations and the like. A gift would seem not to be complete for purposes of the tax, where the donor has reserved the power to determine whether the donees ultimately entitled to receive and enjoy the property are of such a class as to exempt the gift from taxation. Apart from other considerations we should hesitate to accept as correct a construction under which it could plausibly be maintained that a gift in trust for the benefit of charitable corporations is then complete so that the taxing statute becomes operative and the gift escapes the tax even though the donor should later change the beneficiaries to the non-exempt class through exercise of a power to modify the trust in any way not beneficial to himself."[112]

In the *Sanford* case, power to modify the gift was retained in the donor. In the hypothetical case above stated, power to revoke was not in the donor-husband, but was in the wife of the donor. However, the effect of a revocation, whether it be by the donor-husband or by the wife, would be exactly the same. The property would have thus been reclaimed for the benefit of the community. This appears, therefore, to be an even stronger case for holding the gift incomplete and nontaxable than the *Sanford* case, for in that case the property could under no circumstances be reclaimed to the donor's estate. The above quoted language from the *Sanford* case appears applicable *in toto* to a gift by the husband of community property, voidable by the non-consenting wife.

[112] Id. at 46.

2. *Changing separate property into community property by gift.* The Regulations specifically provide that no gift tax results from a transfer of separate property of either spouse into community property.[113]

3. *Release of non-earning spouse's interest in community property to the earning spouse.* One method of avoiding the discrimination which the estate tax amendment causes in the event of the death of the non-earning spouse leaving the earning spouse surviving, is for the non-earning spouse to make an inter vivos release to the earning spouse of his or her interest in the community property. As pointed out in the section discussing this problem with reference to the estate tax,[114] one-half of the community property is, because of the power of testamentary disposition, taxable to the estate, whereas in a similar situation in a non-community property state, there would be no estate tax. Suppose the non-earning spouse, in anticipation of death, were to make an inter vivos transfer of his or her interest in the community property to the earning spouse. What would be the tax incidence?

(a) There appears to be no basis for inclusion of the transferred property in the gross estate of the transferor on death, either under section 811(c) of the code as a gift of community property in contemplation of death, or under section 811(d) as a transfer subject to a power of revocation. Section 811(d)(5) excepts from the operation of section 811(c) and section 811(d) such part of any transferred property "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." By definition this hypothetical case is one in which the interest transferred was to the spouse who earned it, and is thus clearly within the terms of the exception quoted.

(b) No estate tax would accrue under code section 811(e)(2), for the transferor would have no remaining interest in any community property, having made an inter vivos transfer of his or her entire interest. Thus, he would have no power of testamentary disposition over any property.[115]

(c) Likewise there would seem to be no gift tax under the terms of code section 1000(d), as interpreted by the Regulations.[116] What

[113] TREAS. REG. 108, § 86.2(c), infra, note 116.

[114] See discussion pertaining to footnotes 99 to 101 inclusive, supra.

[115] Professor McAllister's comment, "The Estate and Gift Tax Amendments, Revenue Act of 1942," 31 CAL. L. REV. 60 at 71 (1942).

[116] TREAS. REG. 108, § 86.2(c) (1943). This section provides in part: ". . . The entire property comprising the gift is prima facie a gift of the husband, but any portion

would be the value of such a gift? The value of the interest of the husband in the property after the property has been given to him is 100 per cent. Hence there would be no gift by him. None of the property was economically attributable to the wife. Therefore there was no gift by her.

This would seem, therefore, to be one way in which community property spouses might mitigate the discriminatory effects produced by the estate tax amendment, when it appears that the wife, a non-earner, will predecease her husband. Admittedly, however, not a "satisfactory" manner of procedure for the tax-conscious person seeking to act with foresight of result!

4. *Transfer of community interest to non-earning spouse.* A transfer to the non-earner of the community interest of the earning spouse would result in a taxable gift under the Regulations, regardless of whether the earner was husband or wife. In each such case, the application of the Regulations would result in the assessment of a gift tax against the transferor.

5. *Transfer by spouses to third person.* A gift of community property to a third person is the precise situation to which section 1000(d) of the code was designed to apply. Such a gift "shall be considered" the gift of the husband, unless the wife shows that she was the earner of the donated property, or that the gift res was the proceeds of her earnings or of her separate property.

6. *Conversion of tenancy in community to tenancy in common.* Suppose a husband and wife possess, as community property, the sum

thereof which is shown to be economically attributable to the wife as prescribed in the preceding sentence constitutes a gift of the wife.

"The rule stated in the preceding paragraph applies alike to a transfer, by way of community property to a third party or third parties, to a division of such community property between husband and wife into separate property of each, and to a transfer by the husband and wife of any part of such community property into the separate property either of the husband or of the wife, or into a joint estate or tenancy by the entirety of both spouses. In all of such cases the value of the property so transferred or so divided, as the case may be, is a gift by the husband to the extent that it exceeds the aggregate amount of the value of that portion which is shown to be economically attributable to the wife, as prescribed in the preceding paragraph, and of the value of the husband's interest in such property after such transfer or division. The value of the property so transferred or so divided, as the case may be, is a gift by the wife to the extent that the portion of such value which is shown to be economically attributable to her, as prescribed in the preceding paragraph, exceeds the value of her interest in such property after such transfer or such division. . . . No gift tax results from a transfer on or after January 1, 1943, of the separate property of either spouse into community property."

Also see Taylor, "Comments on the Federal Estate & Gift Tax Provisions Re Community Property," 19 CAL. ST. B. J. 106 (1944).

of $100,000, which they wish to donate to son *D*. It has been seen that a direct transfer of the entire sum would result in a taxable gift assessed to husband. Could the gift tax rates in the higher brackets be avoided by carrying out a plan under which the husband and wife would convert their $100,000 community funds into funds held by them as tenants in common, thus permitting them to make separate gifts to *D* of $50,000 each? In other words, does a conversion of community property into property held by the same spouses as tenants in common result in a taxable gift? The Regulations state that section 1000(d) applies "to a transfer by the husband and wife of any part of such community property . . . into a joint estate or tenancy by the entirety of both spouses." However, when an attempt is made to determine the value of the gift for tax purposes, one finds it difficult to apply the provisions of the Regulations to the case. The difficulty is inherent in the fact that the spouses own exactly the same percentages and interests in the property after the conversion as before. No property changed hands; merely the form of tenancy was changed. Admittedly this is a formalistic approach, and an undesirable result, for it permits by indirection that which is prohibited directly. Certainly it would constitute an "evasion" of the spirit and purpose of the amendment were husband and wife permitted to make such a conversion prior to giving the $100,000 to *D;* and one may safely assume that the courts would look with disfavor upon such an attempt. However, the suggestion has been made by one writer that this may be possible,[117]

[117] Altman, "Community Property and the Gift Tax," 21 TAXES 429 (1943). The author states, id. at 431: "There are 1,000 shares of stock, all community property. By agreement husband and wife convert them into 1,000 shares of stock held by them as tenants in common. Is there a gift within the meaning of the gift tax provisions?

"The wife has in effect received 500 shares freed of the husband's community property interest, management and control. So also has the husband received 500 shares freed of the wife's community property interest. . . . The only provision under which the transaction could be considered would be that under which a transfer for less than adequate and full consideration in money or money's worth is deemed for gift tax purposes to be pro tanto a gift.

"From the standpoint of that provision what is the transaction? The husband has released to the wife his community property interest, plus the right of management and control, in 500 shares. The consideration he has received is a release of the wife's community property interest in the other 500 shares. Thus as far as the community property interests are concerned the transaction cancels out. The excess of the transfer by the husband over the consideration received is therefore the management and control of 500 shares. . . .

"The next problem is that of valuation. Property as such can be valued. But what is the value of the right of management and control taken alone . . . ?

"There may be a solution, but it is one for Congress and not for the courts. It

and it appears to be a situation requiring further clarification in the Regulations.

D. *Resumé of Gift Tax Developments*

1. Prior to the Revenue Act of 1942 the rule became established that gifts of community property were considered to be one-half from each spouse. This was an extension of the same principles that had been applied to income taxation of community earnings and estate taxation of community property on the death of one of the spouses.

2. (a) As a part of a movement to eradicate the advantage formerly held by residents of community property jurisdictions, there was included in the 1942 Revenue Act an amendment providing that all gifts of community property were to be considered gifts of the husband unless the gift res was shown to be economically attributable to the wife.

(b) According to the Regulations, this rule is applicable alike to transfers to third parties, and to various transfers or divisions between husband and wife, except that it is specifically provided that no gift tax results from a transfer of separate property of either spouse into community property.

V

CONCLUSIONS

1. The application of community property concepts to the federal taxation of incomes has resulted in an advantage to spouses who are fortunate enough to be residents of jurisdictions in which community property is recognized. As the situation now stands, two married couples with equal incomes and otherwise identically situated, will pay different taxes if one lives in the city of Vancouver, Washington and the other in the city of Portland, Oregon, less than a dozen miles distant. That the incidence of federal taxation in the United States should not depend upon the accident of residence in a particular locality seems patent from a mere statement of the proposition.

While it appears possible to remove this inequality either by legislation or judicial decision, the former way appears to involve fewer difficulties. Specific amendatory legislation would eliminate problems of retroactivity and avoid the necessity of overruling previous decisions, always a distasteful task to the Courts. Furthermore, legislative ac-

does not lie in the present form of the community property provision of the federal gift tax laws."

ceptance of a proposal for mandatory joint returns by husband and wife would not only solve the community property problem, but since it would act on husband and wife as a unit, would eliminate other forms of tax minimization by spouses such as family partnerships.[117a]

Judicial change seems possible, however. On occasion the Supreme Court has overruled previously controlling decisions[118] and murmurings of discontent with the now leading case of *Poe v. Seaborn*[119] have been noted. To the objection that judicial change brings about bothersome problems of retroactivity, may be interposed a suggestion that judicial repeal, like legislative amendment, may be made to apply only prospectively by the court.[120] Approval of this doctrine may be found in the decisions of two of our state courts,[121] and its application to the problem at hand would be a complete answer to the objection of retroactivity.

2. The estate tax amendments applicable to community property seem to have achieved their purpose of eliminating the previously existing inequality in favor of community spouses; but a new inequality has been created in those situations where the non-earning spouse predeceased the earning spouse. If, in the application of the federal revenue laws, geographical equality of result is desirable, is not a further amendment indicated.[122]

3. In the gift tax sphere specific situations can be assumed in which the application of existing Regulations appears difficult; however, as experience with this amendment is gained it is to be assumed that these problems will be clarified. They do not appear to be of sufficient magnitude to warrant legislative attention.

[117a] As this article goes to press, legislative relief is being sought in Congress. There is now pending in the United States Senate a bill described as follows: "A bill granting to married persons living in non-community property states who file joint returns the same income tax treatment as if they lived in community property states." S.B. 649, introduced February 24, 1947, by Senator Tydings.

[118] Helvering v. Hallock, 309 U.S. 106, 60 S. Ct. 444 (1940).

[119] 282 U.S. 101, 51 S. Ct. 58 (1930).

[120] Shartel, "Stare Decisis—A Practical View," 17 AM. JUD. SOC. J. 6 (1933); see also an article by the editors entitled "Sensible View of Stare Decisis Gains Ground," 23 AM. JUD. SOC. J. 32 (1939); Green, "The Development of the Doctrine of Stare Decisis and the Extent to Which it Should Be Applied," 40 ILL. L. REV. 303 at 323 (1946).

[121] Montana Horse Products Co. v. Great Northern Ry. Co., 91 Mont. 194, 7 P. (2d) 919 (1932), [sustained in Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145 (1932)]; Payne v. City of Covington, 276 Ky. 380, 123 S.W. (2d) 1045 (1938).

[122] See suggestion discussed in connection with footnote 101, supra.