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Community Property and the Federal Income Tax

THE right to divide community income and to file separate returns each for one-half thereof has been claimed by husbands and wives in all of the community-property states. The Treasury Department has had to decide whether community income is wholly the income of the husband or is one-half his income and one-half that of the wife. The federal income-tax laws have furnished it no guidance—each has merely levied a tax on the “net income of every individual”. Nor has the decision in *United States v. Robbins*,¹ rendered by the Supreme Court of the United States on January 4, 1926, solved the problem. The Treasury and its legal adviser, the Attorney General, are still in doubt as to the principles that govern the taxation of community income. It has been announced that no ruling will be made with respect to taxes payable under the Revenue Act of 1926 until the Department of Justice has had an opportunity to consider briefs which representatives of taxpayers in the community-property states have been requested to file. In the meantime, returns made in compliance with Treasury rulings issued under prior Revenue Acts are being accepted subject to reopening in the future.²

The aggregate tax payable if community income is taxable one-half to the husband and one-half to the wife is considerably less than the tax payable if it is taxable wholly to the husband. Each of the federal income-tax laws has imposed a graduated surtax; the higher brackets are avoided if the tax on community income be computed on the basis of two returns rather than one. For example, under the Revenue Act of 1924 the surtax on a net income of \$100,000 was \$17,020, whereas the aggregate surtax on two incomes of \$50,000 was but \$7,080, a saving “to

¹ (1926) — U. S. —, 70 L. Ed., Adv. Ops. 183, 46 Sup. Ct. Rep. 148.

² See *United States Daily*, vol. 1, no. 11 (March 16, 1926).

the community" of nearly \$10,000. It is because of this saving, rather than because of any reluctance on the part of the husband to pay a tax which he thinks that his wife and not he should bear, that taxpayers in the community-property states insist that each spouse is entitled to return half of the community income.

The claim thus made raises a constitutional question as well as a question of statutory construction. The adoption of the Sixteenth Amendment to the federal Constitution has placed upon the Supreme Court the task of expounding the meaning of the word "income" as used therein; so far as direct taxes are concerned, only that which the court holds to be income may be taxed by Congress without apportionment of the tax among the states according to population.³

Whether that which is taxed in a given case is "income" of the person upon whom the tax is imposed may be resolved into two more or less distinct questions: *First*, is what is taxed "income"? *Second*, if so, is it the income of the person upon whom the tax is imposed? Unless both these questions are answered in the affirmative the Sixteenth Amendment affords no justification for the failure of Congress to apportion the tax among the states. A tax upon A, measured by the income of B would not be a tax on income within the Sixteenth Amendment.⁴ Being a direct tax other than an income tax, it would be invalid unless apportioned among the states according to population; moreover even if apportionment were provided for, such a tax would doubtless be held to be so arbitrary as to violate the due process clause of the Fifth Amendment—as not to be a tax in any proper sense.

In a number of cases the Supreme Court has held that accrued gain is not income until it is "realized".⁵ In these cases the first

³ The power of Congress to levy taxes is derived from U. S. Const., Art. 1, § 8, cl. 1. Direct taxes must be apportioned among the several states according to population. U. S. Const., Art. 1, § 2, cl. 3; Art. 1, § 9, cl. 4. A tax on income derived from property is a direct tax. *Pollock v. Farmers' Loan & Trust Co.* (1895) 158 U. S. 601, 39 L. Ed. 1108, 15 Sup. Ct. Rep. 673. The Sixteenth Amendment authorizes Congress "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

⁴ If this be not self-evident, it is deducible from the word "derived" in the Sixteenth Amendment. In *Eisner v. Macomber* (1920) 252 U. S. 189, 207, 64 L. Ed. 521, 40 Sup. Ct. Rep. 189, 9 A. L. R. 1570, Mr. Justice Pitney defines income as a gain "*derived*", that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit, and disposal".

⁵ E. g., *Eisner v. Macomber*, *supra*, n. 4, holding unconstitutional the provision of the Revenue Act of 1916 specifically taxing stock dividends as income.

question alone was involved; it was conceded that if what was sought to be taxed was "income" it was the income of the person upon whom the tax was imposed.

The taxation of community income, on the other hand, raises the second question. Conceding that what is sought to be taxed is "income", whose income is it? Upon whom may Congress, acting under the Sixteenth Amendment, impose an income tax with respect to it? Is it wholly the income of the husband, or is only one-half of it his income and the other half the income of the wife?

Community-property systems exist in eight states — Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. Each of the systems is wholly statutory; no two of them are precisely alike. In each state community property is defined negatively. It consists of the property acquired after marriage by either husband or wife which, under the statutes, is not the "separate property" of either. With some exceptions, the separate property of each spouse comprises the property owned by each at the date of the marriage, the property thereafter acquired by gift, bequest, devise or descent, and the rents, issues and profits of separate property.⁶ In general, then, it may be said that the community income includes the earnings of the husband, the earnings of the wife, and the rents and interest accruing from, and the profits derived from the sale of, community property. In several states the rents, interest and profits from the separate property of each spouse belong to the community and constitute an additional element in the community income.⁷

In each of the states community property (and therefore the community income which, of course, consists of community property) is under the primary management and control of the husband.⁸ But his powers with respect to the community property are not so

⁶ In Idaho (Comp. Stats. § 4659) and in Louisiana (Rev. Civ. Code, § 2402) the rents issues and profits of separate property are community property; the same is true in Texas, except that since 1917 the rents from separate real property are the separate property of the owner of the land (Rev. Stats. § 4621). On the other hand, in Washington (Rem. Comp. Stats. § 6891) the earnings of the wife derived from her personal labor are her separate property; in Arizona (Civ. Code, § 3850) and in California (Civ. Code, § 169) the same is true as to the earnings of the wife while living apart from her husband.

⁷ See n. 6, *supra*.

⁸ In Texas (Rev. Stats. §§ 4621, 4622), however, and in Idaho since 1915 (Comp. Stats. §§ 4666, 4667) the personal earnings of the wife, although community property, are under the control, management and disposition of the wife alone; in Nevada this is true if her earnings are used for the care and maintenance of the family. (Rev. Laws, § 2160.)

great as are his powers with respect to his separate property. In no state may he give it away without his wife's consent; in no state may he dispose of more than half of it by will. Other limitations upon his control vary in the different states.⁹

None of the statutes contains an express declaration as to the ownership of community property. In the past the minute enumeration of the respective rights and powers of the spouses made the question one of no practical importance in most cases. The enactment of a federal income tax law was thought, however, to change this. It was assumed that income is taxable only to the person who, under the applicable state law, owns the funds or other property which comprise that income. The funds which have accrued as, and which constitute, community income are, of course, community property. Husbands and wives have insisted that under the state law they own community property in equal shares and that the Treasury Department must therefore permit them to file separate returns each for one-half of the community income. They have argued that since the husband does not own the whole of the funds which comprise the community income he cannot be required to return and pay taxes upon the whole.

I. THE TREASURY RULINGS

The Treasury at first required all community income to be returned by the husband.¹⁰ This position was abandoned in 1919, but the test then adopted was ownership, by the state law, of the property from which the income had accrued, rather than ownership of the funds or property accruing as income. Thus community income *derived from community property*, it was held in a ruling¹¹ applicable to Texas and Washington, could be divided and returned half by each spouse for the reason that "the legal owners of community property (property acquired after marriage) in the States of Texas and Washington are the husband and wife jointly in

⁹ For detailed accounts of the respective rights and powers of husband and wife under the statutes of the eight community-property states, see Esmond Schapiro, Status of Federal Income and Estate Taxes on Community property in California, 12 California Law Review, 99; 32 Ops. Att'y Gen. 435, reprinted as Treasury Decision 3138 in Cum. Bul. No. 4, p. 238; and Robbins v. United States (1925) 5 Fed. (2d) 690, 695. As to the testamentary power of the wife, see also n. 38, *infra*.

¹⁰ Until the latter part of 1919 none of the Treasury rulings were made public; for that reason references to specific rulings made before that time can not be given.

¹¹ Office Dec. 426, 13-20-815, Cum. Bul. No. 2, p. 198. Italics added.

equal shares, and the income accruing therefrom is the joint income of the husband and wife in which each is entitled to one-half." Separate returns were held to be permissible for the reason stated, "notwithstanding that in law the husband is given the right to manage and control community property the same as his separate estate and that as regards personal property he and he alone may dispose of it." In addition to income derived from community property, however, we have seen that community income includes the earnings of each spouse and, in several states, the rents, issues and profits of the separate property of each spouse. Such income, it was held, could not be divided and reported in separate returns. His salary and "income received by the husband, from property owned by him prior to his marriage, must be reported by the husband after marriage, *even though the wife is given a one-half interest therein [i. e., in the funds accruing as income] by the community property law of the State.*"¹²

This distinction between community income derived from community property and community income derived from the separate property or from the labor of one of the spouses was abandoned in 1920. The Treasury, on the advice of the Attorney General, acceded to the taxpayers' contention that income is taxable only to the person who, under the applicable state law, owns the property which comprises the income. Attorney General Palmer's opinion¹³ dealt only with community property in Texas. Based upon analysis of the state statutes and the decisions of the state courts, it held that in Texas the "community interest attaches [to the earnings of the husband or of the wife] as soon as the right to the wages comes into existence"; that the same is true as to community income accruing from the separate property of either of the spouses; and that the state law recognizes that community property belongs to husband and wife in equal shares. Accordingly, Treasury Decision 3071¹⁴ was issued, announcing that in Texas the spouses might divide the whole of the community income and each report half of it in a separate return.

Advice as to the law of the community-property states other than Texas was next sought by the Treasury. On February 26, 1921, Attorney General Palmer rendered an opinion in which, after an exhaustive consideration of the statutes and decisions in each of the states, he held that except in California the wife is recognized

¹² Office Dec. 285, 21-19-528, Cum. Bul. No. 1, p. 189.

¹³ 32 Ops. Att'y Gen. 298.

¹⁴ 39-20-1218, Cum. Bul. No. 3, p. 221.

to have proprietary rights in community property equal to those of the husband.¹⁵ The California courts, it was found, hold that the wife has a mere expectancy during the life of the husband. Cases from the Supreme Court of the United States were cited as authority for the proposition that the decisions of the state courts are the proper source from which to determine the nature of the wife's interest.¹⁶

In accordance with this opinion, the right to file separate returns was extended to spouses domiciled in each of the community-property states except California. Treasury Decision 3138,¹⁷ so providing, was issued on March 3, 1921. To this decision the Treasury has since adhered. In all the states except California, community income has been treated as one-half the income of the husband and one-half the income of the wife. Article 31 of Regulations 65 relating to the income tax under the Revenue Act of 1924 reads:

"A husband and wife domiciled in Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, or Washington, in rendering separate income tax returns, may each report as gross income one-half of the income which, under the laws of the respective

¹⁵ 32 Ops. Att'y Gen. 435, reprinted in Treas. Dec. 3138, *infra*, n. 17.

Cf. Alvin E. Evans, *The Ownership of Community Property*, 35 *Harvard Law Review*, 47. Mr. Evans concludes from a study of the decisions of the courts in the various community-property states that "in all the states but California the wife has at least a beneficial interest equal to the husband's." But see McKay, *Community Property* (1925 ed.) *passim*.

In Washington, Mr. Evans finds, the courts hold that the spouses constitute an entity, which entity is the owner of the community property; the spouses are equal members in right and interest although the husband is constituted by statute the managing agent.

In Idaho, he concludes, each spouse is held to have a legal title equal to that of the other, without reference to which spouse holds the record title. This theory, he finds, is also adopted by the courts of Arizona, Nevada, and New Mexico.

In Texas the theory of the courts is found to be that the interests of the spouses are beneficially equal but that legal title is in the husband, the wife's interest being vested but equitable; if, however, the record title should chance to stand in the wife's name, she is the legal owner and holds the husband's interest as trustee. This theory, Mr. Evans thinks, is also adopted by the Louisiana courts.

¹⁶ "In *Warburton v. White*, 176 U. S. 484, 496, the principle was enunciated that where State decisions have interpreted State laws governing property or controlling relations that are essentially of a domestic and State nature, the United States Supreme Court will follow the State decisions, if possible to do so, in the discharge of its duties. Also in *De Vaughn v. Hutchinson*, 165 U. S. 566, 570, it was held that to the law of the State in which property is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. In *United States v. Crosby*, 7 Cranch, 115, it was held that the title to land can be acquired and lost only in the manner prescribed by the law of the place where the same is situated." 32 Ops. Att'y Gen. 435, 461; Cum. Bul. No. 4, pp. 238, 252.

¹⁷ 11-21-1515, Cum. Bul. No. 4, p. 238.

States, becomes simultaneously with its receipt community property."

A somewhat similar question had arisen under the federal estate tax. In most of the community-property states a wife takes one-half of the community property on the death of her husband. The Federal estate tax is levied on the transfer of the net estate of the decedent. Is the "wife's share" part of the decedent husband's estate so as to be taxable under the federal statute?¹⁸ In 1917 Treasury Decision 2450¹⁹ had announced that in Texas only one-half of the community property was to be "treated as the estate of the decedent husband." Treasury Decision 3138 now extended this rule to the other community-property states, again excepting California.

About this time, the Treasury, apparently dissatisfied with the situation resulting from Treasury Decision 3138, attempted to have provisions inserted in the Revenue Act of 1921, then under consideration in Congress, purporting to make community income taxable to the "spouse having the management and control of the community property" (i. e., to the husband) and making the half of the community property taken by the wife on the death of her husband taxable as part of the estate of the decedent. These attempts failed.²⁰

¹⁸ Even if the "wife's share" of community property forms no part of the estate of the decedent husband, it is doubtful whether any *constitutional* objection can be urged against a construction of the federal estate tax law which would subject it to the tax. In *Re Moffitt's Estate* (1908) 153 Cal. 359, 95 Pac. 1025, 20 L. R. A. (N. S.) 207, the California court held that the half of the community property taken by the wife upon the death of her husband was taxable under the *state* inheritance tax law. The case was taken on writ of error to the Supreme Court of the United States, it being claimed that the wife had owned half of the community property prior to the husband's death and that consequently to subject her to an inheritance tax violated the federal Constitution. The Supreme Court, in *Moffitt v. Kelly* (1910) 218 U. S. 400, 54 L. Ed. 1086, 31 Sup. Ct. Rep. 79, held that for the purposes of the case it was immaterial whether or not the wife had owned half of the community property before the death of the husband; that even if she had, there was nothing in the federal Constitution to prevent California from imposing a tax "on the share of the wife in the community property on the occasion of the cessation by the death of the husband of his dominion and control over community property and the consequent complete vesting in enjoyment of such share in the wife". The federal government could doubtless impose a like tax, and almost certainly such a tax would be held to be an excise tax and therefore valid though not apportioned among the states according to population. See *Knowlton v. Moore* (1900) 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747.

¹⁹ 19 Treasury Decisions, Int. Rev. p. 38.

²⁰ The legislative history of the Revenue Act of 1921 is considered in part II of this article.

The Controversy as to California

California husbands and wives were loath to acquiesce in the denial to them of the perquisites of tax minimization which the community-property system had afforded to the residents of the other community-property states. They claimed that in substance and for all practical purposes the wife is in as advantageous a position with respect to community property in California as in Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas or Washington. Some of the decisions of the California courts contain language which seems to recognize the wife as an equal co-proprietor with her husband of community property. It was urged that the state decisions are in conflict upon the point and that a federal court would therefore be justified in reaching its own conclusion from an examination of the substantial rights of the wife recognized by the statutes and decisions of California.

The first attack was upon the estate tax ruling. In *Blum v. Wardell*,²¹ decided in 1920, the federal district court held that in California the half of the community property taken by the wife upon the death of the husband does not form part of the latter's estate and consequently is not subject to the federal estate tax.²² In concluding its opinion the court said:

"The claim of the government is inequitable at best. It is conceded that the interest of the surviving wife in community property in other community-property states is exempt from the estate tax under identical laws, and nothing short of some imperative controlling necessity would justify a court in uphold-

²¹ (1920) 270 Fed. 309.

²² It had been contended that in applying a federal statute a federal court would be justified in disregarding the state-court decisions holding that the wife has a mere expectancy. To this proposition the court refused to accede, saying:

"The federal tax is imposed on the transfer of the net estate and whether there is a transfer upon the death of the husband depends upon the statutes and rules of decision in the state where the parties reside and the property is situate." (270 Fed. 309, 313.)

The court rested its decision on the amendment to section 172a of the California Civil Code, adopted in 1917, which required joinder by the wife in any instrument by which "community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed or encumbered." This amendment the court construed as applicable to community property acquired before its adoption, holding that it:

"... necessarily changes the rule of decision in the State of California, assuming that a fixed or established rule can be gathered from the decided cases . . . if [the amendment] does not recognize a valid, subsisting, vested interest and estate in community property during the life of her husband, language is without meaning and legislation without avail." (270 Fed. 309, 314.)

ing the tax in a single state. I find no such obstacle in the way of administering equal and impartial justice in this case. . . ."²³

In 1921 the decision was affirmed by the Circuit Court of Appeals for the Ninth Circuit²⁴ and in 1922 the Government's petition for certiorari was denied by the Supreme Court.²⁵

There followed another victory for California taxpayers. On March 4, 1924, Attorney General Daugherty advised the Treasury that no definite rule as to the nature of the wife's interest in community property could be deduced from the decisions of the California courts and that therefore the decision in the Wardell case must be viewed as controlling.²⁶ Accordingly, the opinion held, both as to estate and income taxes, residents of California should be treated as are residents of the other community-property states. The Treasury acquiesced, and on March 26, 1924, issued Treasury Decision 3568²⁷ so providing.

The Treasury now turned to Congress once more; again its request for a change in the law was refused. The draft bill embodying the "Mellon plan" purported to make community income in all of the states taxable to the husband. As enacted on June 21, the Revenue Act of 1924 contained no such provision.²⁸

In the meantime, on May 27, 1924, the Daugherty opinion had been withdrawn.²⁹ The victory for California taxpayers which it had represented proved to be short-lived. On October 9, 1924,

²³ 270 Fed. 309, 314-315.

²⁴ Wardell v. Blum, 276 Fed. 227.

²⁵ 258 U. S. 617, 67 L. Ed. 793, 42 Sup. Ct. Rep. 271. On April 7, 1922, the Solicitor General made a motion to revoke the order denying the petition for certiorari and to allow the petition to remain unacted upon until the Supreme Court of California should decide the case of Roberts v. Wehmeyer, then pending before it. In August, 1923, Roberts v. Wehmeyer, 191 Cal. 601, 218 Pac. 22, was decided, the California court holding that the 1917 amendment was not, and because at least prior to 1917 the husband had been the absolute owner of community property in California, could not constitutionally be applicable to property acquired before its enactment. Strangely enough, although this decision showed that Blum v. Wardell had been decided upon an untenable theory, the Solicitor General withdrew his motion. These facts appear in Treas. Dec. 3670, Cum. Bul. IV-1, pp. 19, 21.

²⁶ 34 Ops. Att'y Gen. 376; reprinted as Treas. Dec. 3569, III-13-1465, Cum. Bul. III-1, p. 91.

²⁷ III-13-1463, Cum. Bul. III-1, p. 84.

²⁸ The legislative history of the Revenue Act of 1924 is considered in part II of this article.

²⁹ The Treasury ordered the auditing and closing of both income and estate tax cases in California to be held in abeyance pending further consideration of the matter by the Attorney-General. III-23-1591, Cum. Bul. III-1, p. 101.

Attorney General Stone, while reaffirming the Daugherty opinion in so far as it related to the estate tax, declined to express an opinion as to the principles that govern the taxation of community income and suggested that the Treasury resort to litigation in California.³⁰ The Stone opinion was not published by the Department until March 7, 1925. Treasury Decision 3670,³¹ in which it was then embodied, announced:

"It is the judgment of the Treasury that public interest requires a final determination of the right of the husband and wife each to return separately one-half of the community income. In coming to this decision, the Treasury is not unmindful of the fact that in States other than California having community property laws the practice of permitting, for example, the wife to file a return for one-half of her husband's earnings and the husband to file a return for the other one-half of his earnings has been authorized by the Treasury regulations. It is felt, however, that there is grave doubt of the legality of these regulations, since the husband has complete control of the community income and may dispose of it as he sees fit during his lifetime without the consent of his wife. It is obviously a somewhat strained construction to consider that the husband has received only one-half of his earnings for income tax purposes although he controls for practical purposes the whole."³²

II. THE ROBBINS CASE

It was under these circumstances that a test case was brought in the Federal District Court in California. A Mr. Robbins had been compelled to return and pay the tax upon the whole of the income derived from community property acquired before the adoption of the 1917 amendment to the California Civil Code. His executors sued to recover the sum by which the tax paid exceeded the tax that would have been payable had Mr. and Mrs. Robbins been permitted to file separate returns for one-half each.

Notwithstanding the announced intention of the Treasury Department to secure a judicial declaration of the principles that should govern the taxation of community income in all the community-property states, the Government's briefs dealt only with California. No attempt was made to advance any criterion, by which to determine whether community income is wholly the income of the husband or is one-half his income and one-half the income of

³⁰ 34 Ops. Att'y Gen. 395.

³¹ IV-8-2032, Cum. Bul. IV-1, p. 19.

³² *Ibid.*

the wife, other than the one which the Treasury on the advice of Attorney General had in the past accepted—*viz.*, ownership by the state law, as recognized by the decisions of the state courts, of the funds or property which comprise the income in question. The Government's position, in the Supreme Court as in the district court, was merely that the California courts hold that the husband is absolute owner of community property acquired before 1917, and that the Treasury's action in requiring him to return the whole of the community income was therefore justified.

The district court held³³ that in California the wife is equal co-proprietor with her husband of community property and that therefore separate returns should have been permitted; the decisions of the California courts were said to be conflicting. The case was taken directly to the Supreme Court on writ of error and in *United States v. Robbins*,³⁴ decided on January 4, 1926, the judgment against the Government was reversed. The opinion of the court was rendered by Mr. Justice Holmes; Mr. Justice Sutherland dissented without opinion; Mr. Justice Stone took no part in the case.

Agreeing with the Government rather than with the district court, Mr. Justice Holmes finds that on the whole the California courts have adopted the notion that a wife has a mere expectancy while the husband is alive. But, notwithstanding the failure of the Government to advance any criterion of income other than ownership recognized by state-court decisions, Mr. Justice Holmes does not rest the decision upon this ground. He states that if such is the doctrine of the California courts it is the duty of the Supreme Court to follow it; but to this statement he attaches the caveat, "*so far as material.*" He then impliedly condemns the action of the Treasury in permitting husband and wife each to return one-half of the community income in the states in which the wife is conceded to have more than a mere expectancy, saying:

"Elaborate argument was devoted to the question whether the interest of a wife in community property has the relatively substantial character in California that it has in some other states. That she has vested rights has been determined by this court with reference to some jurisdictions, *Warburton v. White*, 176 U. S. 484; *Arnett v. Reade*, 220 U. S. 311; and the Treasury Department has carried those rights to the point of allowing a division in the return of community income in other states where the community system prevails. Regulations 65 relating to the Income Tax under the Revenue Act of 1924,

³³ *Robbins v. United States* (1925) 5 Fed. (2d) 690.

³⁴ (1926) 46 Sup. Ct. Rep. 148.

Art. 31. Its adoption of a different rule for California was based, we presume, upon the notion that in that State a wife had a mere expectancy while the husband was alive."³⁵

To this he adds, pointing out that the husband can spend the community income about as he likes, that "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 so minded" yet the intent of the Revenue Act of February 24, 1919 (under which the taxes sought to be recovered had been collected) was to tax the whole community income to the husband and that so construed the act is constitutional.

The assumption thus made, upon which the case was decided, places California in the same category with the seven other community-property states and the decision is, therefore, in effect an invitation (or a command) to the Treasury to reconsider its action in permitting husband and wife each to return half of the community income in these other states.

United States v. Robbins definitively decides that community income from community property acquired under the laws of California as they existed prior to 1917 is taxable wholly to the husband. In so far as it suggests that in the past community income in the seven other community-property states should have been reported not, as it was reported, in separate returns by husband and wife (to each of whom one-half of it belonged by the applicable state law) but in a single return by the husband, the decision has been nullified by Section 1212 of the Revenue Act of 1926, which reads:

"Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the state law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse."

The last sentence of this curious provision seems to indicate that its primary purpose was to preclude wives who have paid the tax on one-half of the community income from claiming a refund on the ground that under the Robbins case the whole community income should have been taxed to the husband in Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington as well as in Cali-

³⁵ 46 Sup. Ct. Rep. 148-149.

fornia. It is inconceivable that many such claims for refunds would have been made; a reopening of the return of the claimant's husband and an assessment against him of an additional tax, greater in amount because of the graduated surtax than the sum refunded to the wife,³⁶ would have been an inevitable concomitant of each such refund. Each refund would have resulted in a loss to the community. The provision is so phrased, however, that it will prevent the Treasury from making such a refund to a wife on its own initiative, and then reopening the return of her husband in order to collect from him an amount larger than the amount refunded to the wife.

Except for this provision, the Act of 1926 contains no reference to community property. As have its predecessors, so does it merely levy a tax on the "net income of every individual."

What of the future? Community income in California accruing from sources other than community property acquired prior to the adoption of the 1917 amendment to the Civil Code³⁷ may actually be in the same category with community income acquired under the laws of the other states; there is a strong probability that the 1917 amendment, or in default of that the amendment of 1923,³⁸ will be held by the California courts to have constituted the wife co-proprietor with her husband of community property acquired after its enactment. And apart from this, if the Treasury requires husbands in Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington to pay the tax levied by the Revenue Act of 1926 upon the "net income of every individual" on the whole of the community income, taxpayers in those states will claim their day in court, prejudiced though it will be by the decision in *United States v.*

³⁶ See p. 351, *supra*.

³⁷ See n. 22, *supra*.

³⁸ Cal. Civ. Code, §§ 1401, 1402. This amendment, presumably like that of 1917 only to property acquired after its adoption, confers upon the wife power of testamentary disposition over one-half of the community property. If she dies before her husband, her will divesting him of all title to and control over one-half of the community property will be immediately effective.

Like testamentary power is enjoyed by wives in Arizona (Civ. Code, § 1100), Idaho (Comp. Stats. § 7803), Louisiana (Rev. Civ. Code, §§ 915, 916), and Washington (Rem. Comp. Stats. § 1342). In Texas the wife has not this power of testamentary disposition, but if she predeceases the husband one-half of the community property goes to her children and only in default of children to the surviving husband. (Rev. Stats. § 2469.) This is the rule of distribution applicable in Arizona, Idaho, Louisiana and Washington if the wife dies intestate; in California in that event the husband takes to the exclusion of the children. (Civ. Code, § 1401.) In Nevada (Rev. Laws, § 2164) and in New Mexico (Code, § 1840) on the death of the wife the whole community property belongs to the husband; this is probably true in California as to community property acquired before the adoption of the amendment of 1923.

Robbins. Will they be able to persuade the Supreme Court that the Revenue Act of 1926 should be given a construction different from that which in the Robbins case the court gave to the Act of 1918? Will they be able to induce the court to disavow the reasoning in the Robbins case and to hold that case to be authoritative only upon the narrow point which it presented for decision, namely, that the husband must pay the tax upon the whole of community income acquired under the laws of California prior to 1917, in which the California courts have held that the wife has a mere expectancy? And if not—if the court adheres to its reasoning and holds, in a case in which it is necessary to the decision so to hold, that income may constitutionally be taxed to a person who is not, under state-court decisions, the owner of the funds which comprise that income—what theory will the court spell out in order to support its position? These are the questions which we must next consider.

III. CONSTITUTIONAL THEORY IN UNITED STATES *V.* ROBBINS

No question of statutory interpretation can exist unless, under the Sixteenth Amendment, half of community income is "income" of the wife and, rather paradoxically, at one and the same time the whole of it is "income" of the husband. Unless this be true, the Treasury was not justified in asking Congress to insert in the Revenue Acts a provision specifically taxing the whole of community income to the husband. The existing statutes levied a tax on the "net income of every individual." The Attorney General had advised the Treasury that in states in which the wife is recognized to be an equal co-proprietor of community property one-half of the community income is her income.³⁹ If he was wrong, the husband could have been taxed for the whole without any change in the statute. If he was right, Congress would have power to tax the husband for the whole only if the fact that half of community income is "income" of the wife is not inconsistent with its being at one and the same time wholly "income" of the husband. For the Sixteenth Amendment authorizes the imposition of direct taxes without apportionment among the states only in so far as the taxes imposed are taxes on "incomes".

United States *v.* Robbins⁴⁰ holds that Congress did have power to change the law. True, it holds that without such a change the

³⁹ See pp. 355-6, *supra*.

⁴⁰ *Supra*, n. 34.

Treasury should have interpreted the Revenue Act of 1918, which levied a tax on the "net income of every individual," as imposing a tax upon the husband for the whole of the community income. But a choice in the matter is conceded to Congress by Mr. Justice Holmes. He holds that even if half of the community income is "income" of the wife within the Sixteenth Amendment, it does not follow that it is not also "income" of the husband. After stating that the California courts seem to have adopted the notion that a wife has a mere expectancy during the life of her husband, he says:

"Even if we are wrong as to the law of California and assume that the wife had an interest in the community income *which Congress could tax if so minded*, it does not follow that Congress could not tax the husband for the whole."⁴¹

In other words, in states in which the wife is recognized to be an equal co-proprietor with her husband of community property, Congress in its pleasure may either tax to each spouse his or her interest in the community income or tax the husband for the whole.

The notion as to the nature of the wife's interest which has been adopted by the state courts, Mr. Justice Holmes tells us, will be followed by the Supreme Court "so far as material." His position is that the doctrine of those state courts which hold that the wife is co-proprietor of community property with her husband is material, and would be followed by the Supreme Court to the extent of permitting Congress to tax the wife for her interest in the community income; but is not material, and will not be followed, to the extent of preventing Congress from taxing the husband for the whole. If Congress had expressly imposed a tax upon the wife for one-half of the community income, the court, upholding the tax, would have held that half of the community income is her "income" within the meaning of that word as used in the Sixteenth Amendment on the theory that "income" means property the ownership of which, according to the applicable state law as declared by the state courts, is acquired by the taxpayer during the tax period. The statute which Congress did enact, however, merely levied a tax on the "net income of every individual"; in *United States v. Robbins* the court holds that within the meaning of such a statute community income is wholly the income of the husband and that the word "income" as used in the Sixteenth Amendment is susceptible of a like interpretation. Such a holding invites the inquiries: Upon what theory may community income, half of the funds comprising which is

⁴¹ 46 Sup. Ct. Rep. 148, 149. (Italics added.) See n. 44, *infra*.

owned, under the state decisions, by the wife, be said to be wholly the income of the husband? And how could Congress, by expressly taxing the wife, convert half of what under the Sixteenth Amendment is the husband's income into income of the wife?

The Analogy of Income from a Trust Estate

The income of a trust estate, to which Mr. Justice Holmes refers,⁴² is not a satisfying analogy. It is true that Congress in its pleasure may direct the tax on such income to be paid by either the trustee or the cestui que trust. But even when the tax is assessed to the trustee, the trust income is taxed *qua* the income of the cestui. Thus if Mr. Jones is a trustee he is not required to file a single return pooling his personal income with the income from the trust property. He files one return, for his own income, as plain Mr. Jones; as Mr. Jones, Trustee, he files a distinct return for the income of the trust property. The tax on each return is computed separately.⁴³ Thus the higher brackets of the graduated surtax are avoided.

This is not the way in which the husband was held for the tax on the whole of the community income in *United States v. Robbins*. The husband objected, not at having to pay the taxes on the "wife's share" in addition to those upon his own, but at having to pay the taxes upon the whole community income upon the basis of a single return which rendered part of the income taxable at a higher rate than would have been the case had separate returns been permitted.

No case has held that Congress could require a trustee to file a single return, including therein both his personal income and the income from the trust property, and to pay a tax computed on that basis. Congress has never attempted so to do. Such a tax might be constitutionally permissible because of the historical fact that a trustee is at law, as distinguished from in equity, the owner of the trust property. But if the wife is recognized by the law of the appropriate state to be co-proprietor with her husband of community property, it can not be said that either at law or in equity the husband is the owner of the whole of the community income.

Husband's Power of Disposition Deemed Controlling

This analogy was not greatly relied upon. Mr. Justice Holmes's

⁴² 46 Sup. Ct. Rep. 148, 149. See n. 44, *infra*.

⁴³ See, e. g., Revenue Act of 1924, § 225; Reg. 65, Art. 421.

opinion shows clearly that what the court deemed controlling was the husband's power of disposition.⁴⁴ It was thought that a fund which the husband can spend about as he likes is sufficiently "his" to justify an income tax upon him with respect to the whole of it.

Taxing the husband for such a fund is clearly not like taxing A upon the income of B;⁴⁵ the existence of the husband's power of disposition in the one case is a difference which makes fair and reasonable what would be unfair and unreasonable and therefore lacking in due process in the other case. The question, however, is not whether taxing the husband for such a fund is reasonable, but whether such a fund is his "income" within the meaning of that word as used in the Sixteenth Amendment. If it is not his "income" not only is there no statute which purports to tax him with respect to it, but if such a statute did exist it would probably be invalid unless it provided for apportionment of the tax among the states according to population.

Theories of Income-Tax Liability

We start with the proposition that under the state law as declared by the state courts half of the fund taxed is owned by the wife. It follows that the fund can be wholly the income of the husband only if ownership as recognized by the decisions of the state courts be rejected as the sole criterion of income-tax liability. In holding

⁴⁴ After concluding that the California courts, rightly or wrongly, did hold that the wife has a mere expectancy while living with her husband, the court disposed of *United States v. Robbins* in the following paragraph:

"But the question before us is with regard to the power and intent of the Revenue Act of February 24, 1919, c. 18, Title II, Part II, §§ 210, 211; 40 Stats. 1057, 1062. 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 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. See *Garrozi v. Dastas*, 204 U. S. 64. His liability for his wife's support comes from a different source and exists whether there is community property or not. That he may be taxed for such a fund seems to us to need no argument. The same and further considerations lead to the conclusion that it was intended to tax him for the whole. For not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code, § 167, so that the remedy for her failure to pay might be hard to find. The reasons for holding him are at least as strong as those for holding trustees in the cases where they are liable under the law. §219. See Regulations 65, Art. 341." (46 Sup. Ct. Rep. 148, 149.)

⁴⁵ See p. 352, *supra*.

that community income is wholly the income of the husband for the reason that he can spend it about as he likes, it would seem that the court must have proceeded upon one or the other of the following theories: (1) that in applying a federal statute a federal court has the right to disregard state-court decisions and to determine for itself, by inference from the power of disposition conferred upon the husband by the state statutes, that the husband is the owner, under the state statutes, of the funds constituting the community income;⁴⁶ or (2) that beneficial ownership, i. e., the possession of power of disposition, is in and of itself a proper test of income-tax liability—that legal ownership under the state statutes (whether as recognized by state-court decisions or as determined independently by a federal court in applying the federal statute) is not the sole test.

Neither of these theories is explicitly put forward in the opinion. And while either of them, if adopted, would account for the *decision*, neither one in and of itself would seem adequately to explain the *dictum* that Congress, if so minded, could have imposed a tax upon the wife with respect to the interest in the community income attributed to her by the state courts. Before considering that question, however, let us attempt to discover which of the two theories is the more consistent with prior decisions. There is little likelihood that the soundness of the *dictum* in the Robbins case will ever be questioned in the courts; if Congress taxes half of the community income to the wife, taxpayers will not object to the saving "to the community" which such a tax effects. But if the Treasury construes the Revenue Act of 1926, as the Supreme Court construed the Act of 1918, to impose a tax upon the husband for the whole of the community income, taxpayers are sure to attack the constitutionality of the act as so construed. If the Supreme Court then adheres to the reasoning of the Robbins case, it will doubtless feel called upon to make that reasoning more explicit. In that event it would seem that it must declare specifically that it has rejected ownership recognized by state-court decisions as the sole criterion of income-tax liability and that it must chose one or the other of the theories above suggested.

The Unincorporated Association Case

In *Burk-Waggoner Oil Association v. Hopkins*,⁴⁷ decided November 16, 1925, the Supreme Court *may* have impliedly rejected

⁴⁶ None of the state statutes contains an express declaration as to the ownership of community property.

⁴⁷ — U. S. —, — L. Ed., Adv. Ops. —, 46 Sup. Ct. Rep. 48.

(as it must have done in *United States v. Robbins*) the criterion of ownership recognized by state-court decisions as the sole test of liability for income taxes. It did not do so explicitly and the decision can be rested on other grounds. A rehearing has been granted,⁴⁸ but, since this is the only case in which income-tax liability has been held not to be dependent upon ownership recognized by state-court decisions, an examination of the opinion first rendered seems justified.

The decision is to the effect that a Texas association in the nature of a Massachusetts trust, held by the Texas courts to be a partnership and therefore not a legal entity, is taxable as a corporation under the Revenue Act of 1918 which provided in section 1:

"That when used in this act— . . . The term 'corporation' includes associations, joint-stock companies and insurance companies."

It was unsuccessfully contended that the Burk-Waggoner Association was not an "association" within the meaning of this provision. And, to quote from the opinion:

"The association further contends that, while Congress may classify all recipients of income upon any reasonable basis for the purpose of imposing income taxes at different rates, or for other purposes connected with the levying and collection of such taxes, it cannot tax the income of the association, for that would make out of a business group, whose property under the law of the state is owned by the members individually, an entity capable of owning property and receiving income; that to attempt this would constitute, not classification, but an unlawful invasion of the state's exclusive power to regulate the ownership of property within its borders . . ."⁴⁹

After disposing of the question of statutory interpretation, Mr. Justice Brandeis, speaking for a unanimous court, dealt with this contention:

"The claim that the act, if so construed, violates the Constitution is also unsound. It is true that Congress cannot make a thing income which is not so in fact. But the thing to which the tax was here applied is confessedly income earned in the name of the association. It is true that Congress cannot convert into a corporation an organization which by the law of its state is deemed to be a partnership. But nothing in the Constitution precludes Congress from taxing as a corporation an association which, although unincorporated, transacts its business as if it were incorporated. The power of Congress so to

⁴⁸ "Leave to file petition for rehearing" granted on February 1, 1926. *New York Times*, Feb. 2, 1926.

⁴⁹ 46 Sup. Ct. Rep. 48, 49.

tax associations is not affected by the fact that, under the law of a particular state, the association cannot hold title to property, or that its shareholders are individually liable for the association's debts, or that it is not recognized as a legal entity. Neither the conception of unincorporated associations prevailing under the local law, nor the relation under that law of the association to its shareholders, nor their relation to each other and to outsiders, is of legal significance as bearing upon the power of Congress to determine how and at what rate the income of the joint enterprise shall be taxed."⁵⁰

Here again, as in the opinion in *United States v. Robbins*, the court tells us upon what liability for income taxes is not dependent, rather than upon what it is dependent.

Compare with the *Burk-Waggoner* case the decision of the Supreme Court in *United Mine Workers v. Coronado Coal Company*.⁵¹ The *United Mine Workers* had been sued as an entity, for a violation of the Sherman Anti-Trust Act, in a federal district court sitting in Arkansas. Under the decisions of the Arkansas courts, the union, being an unincorporated association, was not suable as an entity. The Conformity Act, requiring procedure in federal courts to conform "as near as may be" to the procedure in state courts, was held not to be controlling. Placing its decision, in part at least, upon the fact that "the persons who may be sued under Sec. 7 [of the Sherman Act] include 'corporations and associations . . .,'" the Supreme Court held that the *United Mine Workers* had properly been sued as an entity.⁵²

The *Coronado Coal Company* case holds that Congress, in order more effectively to carry out its power over interstate commerce, may make suable as entities associations which are not entities under the state law. Does the *Burk-Waggoner* case do more than hold that, under the right to classify incidental to its power to tax, Congress may treat as entities for income-tax purposes associations which are not recognized to be entities for other purposes by the applicable state law?

Furthermore, the court may have meant to sustain the tax in *Burk-Waggoner v. Hopkins* as a tax imposed upon the members individually and collected from the group. It was contended that so considered the tax would be void "both because it is a direct tax, not imposed upon income, and not apportioned among the states, and because it is so arbitrary and variable in its rates and application

⁵⁰ *Ibid.*

⁵¹ (1922) 259 U. S. 344, 66 L. Ed. 975, 42 Sup. Ct. Rep. 570.

⁵² 259 U. S. 344, 392.

as to conflict with the due process clause.”⁵³ The court did not trouble to answer these contentions categorically; each of them seems obviously unsound. Such a tax would be one on income of the members notwithstanding the fact that their shares therein were yet undistributed; they claimed to be partners and it is conceded by all that partners are taxable upon their undistributed shares of the partnership income. And once a power to classify is admitted, as it must of course be admitted, the due process objection becomes frivolous.

It appears, then, that if (or in so far as) the Supreme Court in *Burk-Waggoner v. Hopkins* rejected the criterion of ownership recognized by state-court decisions as the sole test of liability for income taxes, the rejection is to be explained on grounds not present in the case of community property. The opinion which will be rendered on the reargument may, but the opinion already rendered does not, shed light upon the question whether the court holds community income to be wholly the income of the husband (1) because it is of opinion that in applying a federal statute it has the right to disregard state-court decisions and to determine for itself, by inference from the power of disposition conferred upon the husband by the state statutes, that the husband is the owner, under the state statutes, of the funds constituting the community income; or (2) because it is of opinion that beneficial ownership (i. e., the possession of power of disposition), rather than legal ownership, is in itself a proper test of income-tax liability.

IV. MAY FEDERAL COURTS DISREGARD STATE-COURT DECISIONS AS TO OWNERSHIP?

In the opinion rendered by Attorney General Stone to the Secretary of the Treasury on October 9, 1924, in which it was suggested that the Treasury resort to litigation in order to determine the principles which govern the taxation of community income, the following passage occurs:

“In determining the incidence of a Federal tax it [a federal court] is entitled to form its own judgment of the legal nature and character of the subject of the tax, although this subject matter is the creation of State law. Neither State courts nor legislatures by giving that subject matter a particular name or by the use of some form of words can take away from the

⁵³ 46 Sup. Ct. Rep. 48, 49.

Federal court the duty to consider its real nature. See *Iowa Loan and Trust Co. v. Fairweather*, 252 Fed. 605; *C. O. & G. Co. v. Harrison*, 235 U. S. 292.⁵⁴

When it decided *United States v. Robbins*⁵⁵ on the ground that a fund which the husband can spend about as he likes is sufficiently "his" to justify an income tax upon him with respect to the whole of it, did the Supreme Court proceed upon some such theory as this? Did the court believe that (as we have phrased the theory) in applying a federal statute a federal court has the right to disregard state-court decisions and to determine for itself, by inference from the power of disposition conferred upon the husband by the state statutes, that the husband is the owner, under the state statutes, of the funds constituting the community income? If so, if this be the explanation of the decision, strong arguments against its soundness can be addressed to the court when the question again comes before it.

In the first place, this theory does not account for the dictum in the *Robbins* case that while a state court's recognition of the wife as equal co-proprietor of community property does not prevent Congress from taxing the husband for the whole of the community income, it permits Congress, if so minded, to tax the wife for her interest. For if a federal court in determining the incidence of the federal tax can look behind ownership as recognized by state-court decisions in one case, it would seem that it is under a duty so to do in all cases. If in truth community income is wholly the income of the husband, a Congressional mandate to the court to look no further than the decisions of the state courts would be a request that it uphold a tax upon the wife for reasons of form and not of substance. What it considered to be just such a request, the Supreme Court refused to accede to in the second *Stock Dividend* case.⁵⁶

More important, however, is the fact that prior decisions of the Supreme Court not only furnish no support for the proposition that "in determining the incidence of a Federal tax" a federal court "is entitled to form its own judgment of the nature and character of the subject of the tax, although this subject matter is the creation of State law," but are opposed to it.

The Cases Cited in the Opinion of the Attorney General

Neither of the two cases cited in the opinion of the Attorney

⁵⁴ 34 Ops. Att'y Gen. 395; reprinted in Cum. Bul. IV-1, pp. 19, 25.

⁵⁵ *Supra*, n. 34.

⁵⁶ *Eisner v. Macomber* (1920) 252 U. S. 189, 206, 213, 64 L. Ed. 521, 40 Sup. Ct. Rep. 189, 9 A. L. R. 1570.

General in support of this proposition involved a *federal* tax. In each case a *state* tax was held invalid because the state was deemed to have attempted to do indirectly what it had no power to do directly. In *Choctaw, Oklahoma & Gulf Railroad Co. v. Harrison*,⁵⁷ the state had imposed what it called a gross receipts tax upon a government lessee of coal mines owned by an Indian tribe. It had been settled by prior decisions that a federal instrumentality could not be subjected to an occupation or privilege tax by a state. The Supreme Court held that the lessee was a federal instrumentality and that the tax, although called something else, was in reality an occupation or privilege tax. It was in this connection that the court announced that neither state courts nor state legislatures by giving a *tax* (not the "subject of the tax") a particular name, can take away from a federal court the duty to consider its real nature and effect. In *Iowa Loan and Trust Company v. Fairweather*⁵⁸—which decision was overruled completely in 1920,⁵⁹ a fact not mentioned in the opinion of the Attorney General—a federal district court held invalid an Iowa statute levying a tax on stockholders in national banks, which provided that in ascertaining the value of each share of stock the whole of the assets of the bank including tax-exempt Liberty Bonds should be considered. Even had the case not been overruled, its reasoning has no relevancy to the proposition for which it is cited. The court held, quoting from the opinion of the Supreme Court in *Home Insurance Company v. New York*,⁶⁰ that the constitutional inhibition upon a state's taxing obligations of the federal government may not

"... be evaded by any change in the mode or form of the taxation, provided the same result is effected—that is, an impediment is thereby imposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached, and, if that would trench upon a power of the government, the law creating it will be set aside, or its enforcement restrained."⁶¹

It seems self-evident that these two cases, holding that a federal court may determine for itself the real nature and effect of a *state tax* in order to ascertain whether a federal instrumentality is unduly burdened thereby, or an obligation of the federal government indi-

⁵⁷ (1914) 235 U. S. 292, 59 L. Ed. 234, 35 Sup. Ct. Rep. 27.

⁵⁸ (1918) 252 Fed. 605.

⁵⁹ In *Hanan v. First Nat. Bank* (1920) 269 Fed 527 (C. C. A., 8th Circ.).

⁶⁰ (1890) 134 U. S. 594, 33 L. Ed. 1025, 10 Sup. Ct. Rep. 593.

⁶¹ 252 Fed. 605, 608.

rectly taxed, have no bearing upon the question whether, in determining who is the owner of community income, a federal court may disregard the rule of property deductible from state-court decisions. It can not be said that either the community-property system or the state-court decisions recognizing the wife as half-owner of community property constitute an attempt to evade the Sixteenth Amendment. Both the community-property statutes and the decisions interpreting them long antedate the adoption of that amendment.

Ownership a Question of State Law as Declared by State Courts.

The theory now being discussed—that suggested in the opinion of the Attorney General—retains ownership as the test of income-tax liability; it denies, however, that state-court decisions are the conclusive source from which to determine, for federal income-tax purposes, who owns community income. But whether property is owned by one person or by another is, under our federal system of government, a question solely within the competence of state law. In the Sixteenth Amendment (under which alone income may be taxed without apportionment among the states) "income" refers to a subject which, so far as the question who owns it, is therefore the "creation of State law." When the federal Constitution authorizes the taxation of a subject which is the "creation of State law", there being no question of evasion, by what test other than the law of each state as declared by its courts can it be determined what may be taxed under that authorization? The ownership of property under the common law of a state, and *a fortiori* under state statutes such as the community-property laws, is a question to which the rule of *Swift v. Tyson*⁶² has never been applied.⁶³

If community income be "income" of the husband within the Sixteenth Amendment only to the extent that he owns the funds which comprise it, *Warburton v. White*,⁶⁴ decided in 1900, would seem to be direct authority for the proposition that only one-half

⁶² (1842) 16 Pet. 1, 10 L. Ed. 865. Under the doctrine of this case, state-court decisions as to certain matters of commercial law or "general jurisprudence" are held not to be binding upon the federal courts.

⁶³ *De Vaughn v. Hutchinson* (1897) 165 U. S. 566, 41 L. Ed. 827, 17 Sup. Ct. Rep. 461; *Walker v. Railway Co.* (1897) 165 U. S. 593, 41 L. Ed. 837, 17 Sup. Ct. Rep. 421; *St. Anthony Co. v. Board of Water Com'rs* (1897) 168 U. S. 349, 42 L. Ed. 497, 18 Sup. Ct. Rep. 157; *Beauregard v. New Orleans* (1855) 59 U. S. (18 How.) 497, 15 L. Ed. 469; *Green v. Neal's Lessee* (1832) 31 U. S. (6 Pet.) 291, 8 L. Ed. 402; *Thatcher v. Powell* (1821) 19 U. S. (6 Wheat.) 119, 5 L. Ed. 221.

⁶⁴ (1900) 176 U. S. 484, 44 L. Ed. 555, 20 Sup. Ct. Rep. 404.

of it is income of the husband. For it is there held that when there are invoked clauses in the federal Constitution which presuppose the existence of state laws regulating property rights, the Supreme Court in determining the effect to be given to those clauses will follow the decisions of the state courts as to whether, under the state community-property statutes, the husband is or is not owner of the whole of community property.

The facts were these: In 1877 a Mr. Bacon bought some land in Washington with community funds. The Washington statutes then provided that all property acquired after marriage by either husband or wife, except such as might be acquired by gift, bequest, devise or descent should constitute the "common property", of which the husband should have the entire management and control "with the like absolute power of disposition as of his own separate estate"⁶⁵ and that upon the death of either spouse the whole of the "community property" should go to the survivor.⁶⁶ In 1879 a statute was enacted providing that one-half of the community property should be subject to the testamentary disposition of each spouse and that in default of such disposition the share of a deceased spouse should go to the issue of the marriage or, if no issue, to the survivor.⁶⁷ In 1880 Mr. Bacon's wife died intestate leaving issue. In 1895 one Warburton recovered judgment against Mr. Bacon (on a debt contracted in 1892) and on execution acquired by sheriff's deed the interest of Bacon in the land in question. Warburton sued to quiet title; the defendants, the children of Mr. and Mrs. Bacon, claimed an undivided one-half interest in the land as heirs of their mother under the statute of 1879. The state court gave judgment for the defendants, construing the statute to operate retrospectively as well as prospectively. It held that the husband had never been the absolute owner of community property and that therefore there was no constitutional objection to such a construction.⁶⁸

⁶⁵ Terr. Laws Wash., 1873, p. 450.

⁶⁶ Terr. Laws Wash., 1875, p. 53.

⁶⁷ Terr. Laws Wash., 1879, p. 77.

⁶⁸ Cf. *Spreckles v. Spreckles* (1897) 116 Cal. 339, 48 Pac. 228. The California Civil Code had been amended in 1891 so as to provide that the husband could not make a gift of community property without the written consent of the wife. Husband and wife sued to recover community property which the husband, without the wife's consent, had given to the defendant. The community property involved had been acquired before 1891. The California court held that prior to the adoption of the amendment the husband was the absolute owner of community property, the wife having a mere expectancy therein; that the amendment must be construed prospectively, as affecting only community property acquired after the date of its enactment; that to construe it as applicable to community property acquired before its

In the Supreme Court the plaintiff in error contended that the effect of the law in force at the time the land was purchased by Bacon was to make him the owner of the whole of the property; that to construe the Act of 1879 as applicable to property acquired before its enactment was to impair the obligation of the contract of purchase made by the husband and to deprive him of property without due process of law.

In affirming the decision of the state court, Mr. Justice White first cited and discussed decisions of the courts of Washington holding that under the statutes as they existed before 1879 the wife was equally with the husband co-proprietor of community property. These decisions, he concluded, showed that the purpose of the legislature as evinced by the statutes in existence when the land in question was bought by Mr. Bacon had been

"... to adopt the features essentially inhering in what is denominated the community system—that is, that property acquired during the 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."⁸⁹

Plaintiff in error had relied on the doctrine that where a contract is asserted to be impaired by a subsequent statute, it is the duty of the Supreme Court to determine for itself the nature and extent of the contract when, by the decision of the state court, the subsequent legislation has been held operative upon or enforced against the alleged contract rights; pointing out that all the decisions of the Washington courts had been made after the contract of purchase by the husband, and arguing that therefore they did not relieve the Supreme Court of the duty of interpreting for itself, as matter of first instance, the laws of the state in existence when the land was bought. To this contention Mr. Justice White replied:

"Whilst abstractly considered the proposition is conceded, it is not apposite to the controversy here presented. The rule is subject to a limitation, which is, that where state decisions have interpreted state laws governing real property or controlling relations which are essentially of a domestic and state nature; in other words, where the state decisions establish a rule of

enactment would be to render it unconstitutional as depriving the husband of property without due process of law.

⁸⁹ 176 U. S. 484, 494.

property, this court when called upon to interpret a state law will, if it is possible to do so, in the discharge of its duty, adopt and follow the settled rule of construction affixed by the state court of last resort to the statutes of the State and thus conform to the rule of property within the State. It is undoubted that this rule obtains, even although the decisions of the state court, from which the rule of property arises, may have been for the first time announced subsequent to the period when a particular contract was entered into. *Burgess v. Seligman*, 107 U. S. 20, 34; *Miller v. Ammon*, 145 U. S. 423.⁷⁰

The implication is clear that if the state-court decisions had been rendered after the acquisition of the rights in question, the Supreme Court would have followed them as a matter of course. In holding that it felt itself bound to follow them even though rendered before those rights had been acquired, the court showed the importance it attached to the principle that in such matters it should not indulge in an independent inquiry.

Thus we are given an authoritative criterion by which to determine whether or not the husband owns the whole of community property; and this in a case in which such a determination was necessary in order that a clause of the federal Constitution might be applied. The plaintiff in error claimed that property rights acquired by him under a contract were taken from him by a Washington statute subsequently enacted; that this both impaired the obligation of a contract and deprived him of property without due process of law in violation of the federal Constitution. Applying the contract clause, the court expressly held that the doctrine of the state courts was the criterion by which it would determine whether the plaintiff in error had become, under the contract of purchase, the owner of the property which he claimed was taken from him by the subsequent statute. And by necessary implication the court held that when a husband claims to be the owner of the whole of community property within the protection of the due process clause of the Fourteenth Amendment, the question whether or not he owns the whole of it is to be determined by the doctrine of the courts of the appropriate state. If community income be "income" of the husband within the Sixteenth Amendment only to the extent that he owns the funds which comprise it, the question whether or not he owns the whole of those funds must equally, it would seem, be determined by reference to the decisions of the courts of the appropriate states.

⁷⁰ 176 U. S. 484, 495-496.

Must we not conclude that the decision in *United States v. Robbins*, that the husband can be made to pay the tax upon the whole of the community income although the wife is recognized by state-court decisions to be an equal co-proprietor of community property, can not be supported on a theory that in applying a federal statute a federal court may disregard state-court decisions and determine for itself who is the legal owner of the funds which comprise the community income?

Moreover, even if the authorities were consistent with the proposition that in determining who is the owner of community income a federal court may disregard the rule of property deducible from state-court decisions, there would still remain the question whether in the *United States v. Robbins* the Supreme Court had, as the result of its independent inquiry, reached the correct conclusion. The Supreme Court has held in the past that ownership of the community property by the husband should not be inferred from the power of disposition conferred upon him by the state statutes. The husband's powers, it has said, are bestowed upon him so that, as managing agent of the community, he may effectively conduct its affairs. If this be so, not only would it be improper to infer from those powers that the husband is the legal owner of the community income; it would also be improper to infer that he is the beneficial owner. For that reason, we shall reserve this point until, in the next few pages, we discuss the consonance with authority of the theory that the whole of community income is "income" of the husband because, as possessor of the power of disposition over it, he is the beneficial owner of the whole of it, beneficial ownership being viewed as in and of itself a proper test of income-tax liability.

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(To be concluded)