

argued that by the enactment of the Warehouse Receipts Act with its repealing clause, the legislature did not intend to repeal a previous act which, having stricter requirements as to validity, made certain fact situations conclusive proof of invalidity. Lack of the notice required by the bulk sales law in transfers of a stock in trade, when not in the ordinary course of business, is conclusive proof of invalidity. Thus, to hold that warehouse receipts issued without such notice on a stock in trade are invalid would not be contrary to the purpose of the Warehouse Receipts Act.¹⁷ It would seem, therefore, that the repealing clause of the act was not designed to deny to creditors the protection afforded by bulk sales laws.¹⁸

Whether or not other courts will follow the rule of the instant case, the problem of legislative policy presented by the 1939 amendment remains. The purpose of bulk sales laws,¹⁹ to protect creditors from secret transfers, is easily defeated when, with no other formality than the pledge of warehouse receipts, the pledgee is given control and the right to dispose of a stock in trade to the exclusion of existing creditors.²⁰ However legitimate the transactions were in the present case, there could hardly be an easier method whereby a debtor, in collusion with a warehouseman and pledgee, could defraud his creditors, thereby resurrecting the old problem of intent to defraud which the conclusive presumption provision of the bulk sales laws was especially designed to solve. A specific exemption of warehouse receipts from a bulk sales law is virtually an amendment of the Warehouse Receipts Act itself, since it covers a case not expressly provided for in the act. The interests of uniformity would not seem to be served, therefore, by the 1939 California amendment.

Taxation—Income Tax—Proceeds from Land Converted by Agreement from Separate into Community Property—[Federal].—The petitioner and his wife, residents of Oregon (a non-community property state), executed a written agreement purporting to convert into community property all property then owned or thereafter acquired by either of them. Relying upon this agreement, they divided, as community income, proceeds derived from land held in Washington and Idaho (community property states) and filed separate income tax returns. Some of the land in Washington was managed by a partnership of the petitioner and his brother who held as tenants in common. Both partners had been Washington residents but had removed to Oregon subsequent to the formation of the partnership. The commissioner's ruling that the entire income was taxable to the petitioner was upheld by the Board of Tax Appeals on the ground that the partnership interest, being personalty, was subject to the law of

¹⁷ It is recognized in the act itself that the act does not cover every conceivable case. § 56.

¹⁸ It should be noted that in those states which, in lieu of the repealing clause of the Warehouse Receipts Act, repealed specific enactments, each of the repealed laws dealt with warehousing or warehouse receipts.

¹⁹ See Billig, *Bulk Sales Laws: A Study in Economic Adjustment*, 77 U. of Pa. L. Rev. 72 (1928).

²⁰ The amendment merely requires that copies of warehouse receipts be kept at the warehouseman's principal place of business within the county in which the goods are stored and be open to inspection on written order of the holder of the receipts. This affords no protection to existing creditors who inspect these copies only to find that a pledgee has authorized the release and disposal of the goods covered by them.

the domicil, Oregon.¹ On appeal, *held*, that the agreement gave the wife a vested community interest in the land and proceeds therefrom, for which income the petitioner and his wife could file separate returns, but that the portion of income attributable to the petitioner's personal services was separate property. Order reversed. *Black v. Com'r of Internal Revenue*.²

Post-nuptial agreements changing the status of property from separate to community have not been expressly recognized in the majority of community property states, Washington being an exception.³ The instant case is complicated by the presence of the following circumstances: (1) the contract was executed by non-residents of the state of the situs; (2) the proceeds were imported into a non-community property state; and (3) some of the Washington land was managed by a partnership. There is no doubt that the effect of a contract on the title to real estate is determined by the law of the situs.⁴ Incidental is the question of the ability of a state to extend the benefits of its community property laws to non-resident spouses owning property within its borders. A construction allowing this extension has ordinarily been given community property statutes couched in general terms and making no reference to the residence of the spouses.⁵ Nor is the consequence of taking proceeds of community property from a community into a non-community property state a source of dispute; the proceeds retain their character as community property.⁶

Virtually conceding these points, the government contended that by virtue of the control over community property vested in him by statute,⁷ the husband had the right to continue management through the partnership, and that the right to the use of the property thus granted the partnership was personalty, a chose in action, which the petitioner and his brother took with them to Oregon. Consequently, the government argued, the petitioner's income was not derived directly from the real estate itself, but from a combination of personal services and use of property; his distributive share was therefore his separate income under Oregon law. This argument admitted that the partnership did not own the land in question. Had the government contended that the partnership owned the land, it would have been obliged to establish an agreement between the brothers to treat the property as partnership property, since the presumption is against the inclusion of real estate among partnership assets.⁸ Had no partnership existed it seems improbable that the present litigation would have arisen. Yet it should make no difference whether the husband exercises his control directly or through a partnership. Thus the government's contention seems anom-

¹ 39 B.T.A. 1068 (1939).

² 114 F. (2d) 355 (C.C.A. 9th 1940).

³ *Volz v. Zang*, 113 Wash. 378, 194 Pac. 409 (1920). For discussion see 3 *Vernier*, *American Family Laws* 230-31 (1935); 120 A.L.R. 264 (1939).

⁴ 2 Beale, *Conflict of Laws* § 346.6 (1935).

⁵ *Gratton v. Weber*, 47 Fed. 852 (C.C. Wash. 1891); see discussion in *Hammonds v. Com'r*, 106 F. (2d) 420, 423 (C.C.A. 10th 1939).

⁶ *Edwards v. Edwards*, 108 Okla. 93, 223 Pac. 477 (1925); *Rest.*, *Conflict of Laws* §§ 291-92; 2 Beale, *Conflict of Laws* § 292.1 (1935).

⁷ Wash. Rev. Stat. Ann. (Remington, 1932) § 6893.

⁸ *Adams v. Blumenshine*, 27 N. M. 643, 204 Pac. 66 (1922); *Picetti v. Orcio*, 57 Nev. 52, 58 P. (2d) 1046 (1936), *aff'd* on rehearing 57 Nev. 65, 67 P. (2d) 315 (1937).

alous: if a husband shared his control with a partner and later moved to a common law state, title to all proceeds, at least for income tax purposes, would vest in him; but if he alone exercised control, the character of the proceeds as a community income would not be altered.⁹

It is well settled that in all community property states husband and wife may file separate income tax returns, dividing equally between them income derived from community property and from the earnings of each.¹⁰ This rule is based on the court's construing the word "of" in the phrase "net income of every individual"¹¹ to denote ownership.¹² Under community property law the interest of the wife is equal to that of the husband; it follows that each may be taxed for but one-half of the community income. The respective interests of the spouses depend upon state law.¹³ By changing its law,¹⁴ a state may gain for its married taxpayers advantages enjoyed by spouses in community property states.¹⁵

The instant case is significant as a new application of the doctrine of *Poe v. Seaborn*,¹⁶ although separately each of the questions involved has been decided. The case accords with each of these decisions. In *Hammonds v. Com'r of Internal Revenue*¹⁷ the plaintiff wife and her husband, Oklahoma residents, were upheld in dividing, as community income, proceeds from the sale and assignment of Texas oil and gas leases (which under Texas law are interests in real estate) originally acquired by the wife as direct compensation for personal services (property acquired in Texas in this fashion being community property), although by Oklahoma law the wife's earnings are her separate property.¹⁸ Furthermore, for the purposes of determining taxable income, the

⁹ Cf. *Rucker v. Blair*, 32 F. (2d) 222, 224 (C.C.A. 9th 1929).

¹⁰ *Poe v. Seaborn*, 282 U.S. 101 (1930) (Washington); *Goodell v. Koch*, 282 U.S. 118 (1930) (Arizona); *Hopkins v. Bacon*, 282 U.S. 122 (1930) (Texas); *Bender v. Pfaff*, 282 U.S. 127 (1930) (Louisiana); *United States v. Malcolm*, 282 U.S. 792 (1931) (California). The resultant benefits are two-fold: each spouse is taxed individually at a lower rate, provided that the total family income is sufficiently large so that division into two returns avoids the advancing rates; together the spouses may treat as "earned income" an amount double that allowed an individual taxpayer, for even though the husband be the sole earner, the wife, in making a return for one-half of his earnings, may treat them as "earned income" and thus benefit from the lower rates imposed upon that category. *McLarry v. Com'r*, 30 F. (2d) 789 (C.C.A. 5th 1929); *Graham v. Com'r*, 95 F. (2d) 174 (C.C.A. 9th 1938). The gains from the application of this doctrine of community property to income taxation are confined to a relative few. *Labovitz, The Community Property System—Its Relation to Income, Estate, and Inheritance Taxation*, 9 Tax Magazine 286, 328 (1931).

¹¹ "The language has been the same in each act since that of February 24, 1919, 40 Stat. 1057." *Poe v. Seaborn*, 282 U.S. 101, 109 n. 1 (1930). The provision at present is contained in Int. Rev. Code §§ 11 and 12(a) (1939).

¹² *Poe v. Seaborn*, 282 U.S. 101, 109 (1930).

¹³ This was conceded by the commissioner in *Poe v. Seaborn*, 282 U.S. 101, 110 (1930).

¹⁴ See discussion in *United States v. Malcolm*, 282 U.S. 792 (1931).

¹⁵ Compare *Com'r v. Hart*, 76 F. (2d) 864 (C.C.A. 6th 1935), with *Cooley v. Com'r*, 75 F. (2d) 188 (C.C.A. 1st 1935), cert. den. 295 U.S. 747 (1935) (tenancy by the entirety cases).

¹⁶ 282 U.S. 101 (1930).

¹⁷ 106 F. (2d) 420 (C.C.A. 10th 1939).

¹⁸ Cf. *Johnson v. Com'r*, 88 F. (2d) 952 (C.C.A. 8th 1937).

courts have recognized agreements between husband and wife converting community into separate property.¹⁹

The holding in the principal case presents again the question of the wisdom of maintaining what the dissenting judge termed "this patent discrimination against the great majority of citizens of the United States." *Poe v. Seaborn*, the dissent argued, did not decide that the law of the state of the taxpayer's residence or of the situs of the income must be applied in determining the question as to whom community income was taxable, since the commissioner had *conceded* that the answer was to be found in state law. The dissenting judge then urged that the word "of" in the phrase "net income of every individual" be so interpreted as to give "a uniform application to a nation-wide scheme of taxation."²⁰

But these considerations are not strictly pertinent to the instant case, however forceful they may be as criticisms of the application of the community property doctrine to income taxation in general. There is present in this case no element of "patent discrimination," since married couples in all states can so arrange their property as to enable division of the proceeds for tax purposes. Nor is the instant case an example of lack of uniformity in the application of the tax statute; in fact the only significant difference between this and a similar transaction involving land in a common law state lies in the name of the tenure created by the voluntary act of the parties. Discrimination and lack of uniformity are flagrant only in regard to the treatment of current earnings, which may be divided for income tax purposes by spouses in community property states and not elsewhere.²¹ It is primarily in relation to this aspect of the problem that the issues raised by the dissent are of significance.

Torts—Negligence—Used Car Dealer's Liability for Injury to Third Party—[Illinois].—A person bought a low-priced used car on conditional sale. He failed in two attempts to pass an ordinance-required safety test² because of unequalized brakes, and each time returned the car to the dealer for repair. Subsequently, in a collision the purchaser lost control of the car which ran onto the sidewalk, killing a bystander. In an action for death damages against the purchaser and the dealer, it was alleged that the latter had failed to equip the car with proper brakes or to repair them after being informed of their faulty condition. The action against the purchaser was voluntarily dismissed. Upon appeal from a directed verdict for the defendant dealer, *held*, that where a used car purchaser has notice of a mechanical defect in the car, the used car

¹⁹ Income tax cases involving agreements converting property from community to separate property: *Helvering v. Hickman*, 70 F. (2d) 985 (C.C.A. 9th 1934); *Marshall v. United States*, 26 F. Supp. 474 (Ct. Cl. 1939), cert. den. 308 U.S. 597 (1939); *Van Every v. Com'r*, 108 F. (2d) 650 (C.C.A. 9th 1940), cert. den. 309 U.S. 689 (1940). Cf. *United States v. Good-year*, 99 F. (2d) 523 (C.C.A. 9th 1938) (estate tax case).

²⁰ *Burnet v. Harmel*, 287 U.S. 103, 110 (1932).

²¹ Compare the cases distinguishing between an assignment of future income and a transfer of a property interest from which income is derived. *Lucas v. Earl*, 281 U.S. 111 (1930); *Burnet v. Leininger*, 285 U.S. 136 (1932); *Hall v. Burnet*, 54 F. (2d) 443 (App. D.C. 1931), cert. den. 285 U.S. 552 (1932); *Nelson v. Ferguson*, 56 F. (2d) 121 (C.C.A. 3d 1932), cert. den. 286 U.S. 565 (1932).

² Chicago Rev. Code (1939) § 27-83.