11-1-1947

United States Supreme Court and the Wiener Case

William Q. de Funiak

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation
William Q. de Funiak, United States Supreme Court and the Wiener Case, 23 Notre Dame L. Rev. 28 (1947).
Available at: http://scholarship.law.nd.edu/ndlr/vol23/iss1/2

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
THE UNITED STATES SUPREME COURT
AND THE WIENER CASE.

Offhand, one might assume that the subject of marital community of property is of interest to only a handful of states. Yet forty per cent of the territorial area and about thirty-three per cent of the population of the continental United States are now governed, and willingly governed, by the law of community property.¹ And to the foregoing may be added the Territories of Hawaii and Puerto Rico.²

To a reasonably large proportion of the people of our country it becomes important, then, that their laws relative to marital community of property should be properly understood and interpreted and should be given the benefit of the same constitutional safeguards that are enjoyed by the rest of the country, when rights of property are involved.

Since the history of marital community of property shows that it has always developed and existed among those races or those classes of society where husband and wife work together to establish, maintain and preserve the common home, it is much more natural to our American way of life than is any system of marital property rights having its origin in aristocratic societies.³ In brief, it is based on the principle that husband and wife work together in a marital partnership to further and maintain their common interest in their marriage, their home and their family, and that, accordingly, everything acquired or gained during the marriage by the labor of either or both should belong equally to both.⁴ These

¹ Arizona, California, Idaho, Louisiana, Michigan, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania, Texas and Washington.
³ De Funiaq, Principles of Community Property (1943) § 11.
⁴ Ibid., §§66, 95 et seq. The community is not a legal fiction or civil person but a partnership in the sense of a partnership in which each partner acquires the same share in the properties as his copartners. Laurent, Principes de Droit Civil, vol. 21, p. 250.
acquisitions, then, belong equally to both by operation of law at the moment of acquisition.\textsuperscript{5} This is an indefensible position, of course, to the husband who feels that his earnings belong wholly to him and that his wife is a mere chattel or servant who should be grateful that she has the privilege of a roof over her head and sustenance while she does the cooking, washing, ironing and other housework and looks after the children.

Unfortunately for a system which regards the wife as an individual in her own right and as a partner in marriage, the attention of the non-community portion of the country has usually been focused on the community property system only when the spotlight of federal taxation has shone on the system. Because of the fact that the spouses in a community property state are equal owners of all earnings by whichever spouse earned, a division between them of such earnings for tax purposes has brought about a lower rate of taxation than is enjoyed in non-community property states where the earnings of a spouse belong wholly to that spouse, and has resulted in an understandable feeling of hostility to the community property system.\textsuperscript{6} This has been particularly true on the part of the Treasury Department which is naturally interested in getting as much in the way of taxes as it can.

The contest that raged for many years over the right of husband and wife in community property states to divide the community income for purposes of filing separate returns for federal income taxation resulted finally in a recognition by the United States Supreme Court, in *Poe v. Seaborn*,\textsuperscript{7} and allied cases,\textsuperscript{8} that the wife's ownership in community income and earnings, no matter by which spouse

\textsuperscript{5} De Funiax, §§ 66, 97, 105 et seq.
\textsuperscript{6} See, e. g., Lowndes, Taxes, Jan. 1942.
\textsuperscript{7} 282 U. S. 101, 75 L. Ed. 239, 51 S. Ct. 58 (1930).
acquired, is as firmly grounded and complete as the ownership of the husband and that the spouses accordingly may file separate returns.

In 1942, this contest was transferred into the realm of the federal estate tax. Prior to that time the estate tax, which was and still is described in the act as a tax on the transfer of the estate of the decedent, provided in Section 811 (e) for inclusion in the decedent’s gross estate... “to the extent of the interest therein held as joint tenants by the decedent and other person, or as tenants by the entirety by the decedent and spouse... except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money’s worth.” According to the United States Supreme Court the purpose of this section is to include in the decedent’s estate for taxation not merely the value of his interest in the property held jointly or in entirety, but rather the value of all of this property in which he possesses the interest, if the acquisition of the entire property is traceable to him, or the value of so much of it as is traceable to him.

In 1942 the following Paragraph (2) was added to Section 811 (e), to provide for inclusion in the decedent’s gross estate: “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

9 See discussion, de Funfraz §238 et seq.
10 U. S. C., Title 26.
than the value of such part of the community property as was subject to the decedent’s power of testamentary dis-
position.”

As I read these two paragraphs together, which I understand is the proper method of statutory construction, it is apparent that Congress has intended to include in the de-
cedent’s estate for the purpose of taxing its transfer, the value of everything earned by the decedent on the basis of the fact alone that he earned it. These earnings or acquisi-
tions Congress has determined, as the statute and its com-
mittee reports 12 show, to treat as belonging to the decedent, regardless of what the local state law may consider the ex-
tent of his ownership in such earnings or acquisitions. So far as these earnings are community property and belong half to the wife from their acquisition or from the acquisi-
tion of the right to them, so that her half does not pass to her by inheritance upon the husband’s death but already belonged to her, Congress has determined to ignore that fact and to insist that its view must prevail that the entire com-

munity property is in effect to be considered as belonging to the decedent. Nevertheless, if it should result that less than half of the community property was earned by the decedent, Congress performs an abrupt about face and insists on rec-
ognition of the community property law that half of the property is in effect to be considered as belonging to the decedent for purposes of inclusion in his or her estate for the purpose of evaluating the estate tax.

This very inconsistency in the statute itself, as well as the fact that the share of the community property belonging to the surviving spouse is to be included in the decedent’s estate for the purpose of evaluating the tax, has led to the contention in the community property states that the statute is invalid and unconstitutional. It has long been held in the community property states that the share of the com-

---

munity property belonging to the wife does not pass to her through the death of the husband so as to be subject to an inheritance tax,\(^{13}\) and prior to 1942 the federal courts recognized this principle as applicable to the federal estate tax.\(^{14}\) The first questioning of the validity and constitutionality of the federal enactment of 1942 arose in Louisiana. One Sam Wiener, Jr., had died bequeathing to his three sons his half of the community property of which his surviving wife owned the other half. The sons sought from the state tax collector the fixing of the amount of the inheritance tax due the state of Louisiana on the property bequeathed them. Under La. Act No. 119 of 1932, sec. 2, it was provided that the tax to be levied should be at least eighty per cent of the estate tax payable to the United States under the federal law. The tax collector asserted that under the federal law the sons owed to the United States an inheritance tax on the entire community property rather than on the one-half interest bequeathed to them and, accordingly, fixed the amount of their state liability on that basis. The sons then directly challenged the constitutionality of the federal enactment and their contention was upheld by the trial court. Upon appeal, the Supreme Court of Louisiana,\(^{15}\) in an excellent opinion by Mr. Justice Fournet, pointed out that in Louisiana the marital community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired and that this state law is determinative of the interest owned by a spouse and left by the spouse upon death; that the attempt by the state tax collector to include in the tax imposed on the sons

\(^{13}\) Kohn v. Dunbar, 21 Ida. 258, 121 Pac. 544, Ann. Cas. 1913D 492, 39 L. R. A. (N. S.) 1107 (1912); In re Williams' Estate, 40 Nev. 241, 161 Pac. 741, L. R. A. 1917C 602 (1916); Jones v. State, --Tex. Civ. App.--, 5 S. W. (2d) 973 (1928). Conversely, the husband, upon the death of the wife, is not liable for inheritance tax upon his own half of the community property. Green v. W. G. Ragley Co., 154 La. 965, 98 So. 544 (1923). As to California, see infra, text and notes 41, 42.

\(^{14}\) See Ray, PROPOSED CHANGES IN FEDERAL TAXATION (1942) 30 Calif. Law Rev. 527, 529; de Funiak § 251.

\(^{15}\) Succession of Wiener, 203 La. 649, 14 So. (2d) 475 (1943).
a tax on that half of the community estate owned by the surviving wife was violative of the due process clause of the Fourteenth Amendment in that it measured the tax in part by property comprising the estate of another; that the applicable section of the federal statute was similarly unconstitutional under the similar due process clause of the Fifth Amendment placing limitations on the federal government; and that the United States Supreme Court has previously stated the unconstitutionality of such measuring of the tax on one person by the property of another, both in relation to state and federal governments. The court then proceeded to differentiate between cases dealing with estates by entireties or joint estates and those dealing with community property, pointing out that community property has its genesis in the civil law.

Upon further appeal to the United States Supreme Court, the latter court refused to consider the constitutional questions raised below and dismissed the appeal for want of jurisdiction. However, the litigation was then brought directly into the federal courts, the federal district court in Louisiana pointing out that the federal estate tax was not one on property but on the transmission of property and that the only property transmitted upon which a tax could validly be imposed was the deceased husband’s share of the community property. Insofar as the statute attempted to impose a tax on the surviving wife’s half of the community property, the federal statute was held to be unconstitutional as violating due process of law in attempting to measure the tax on one person’s property by reference to the property of another person.

The constitutionality of the federal enactment was also brought directly in question in a case before the federal district court in Texas, wherein Judge Hannay strongly as-

---

asserted the unconstitutionality as denying due process of law under the Fifth Amendment as well as violating the uniformity provision of Art. I, sec. 8, clause 1.

Both the Wiener Case from Louisiana and the Rompel Case from Texas were appealed to the United States Supreme Court. To judges, lawyers and legal writers in the community property states it seemed clear that the Supreme Court could not do otherwise than decide in consonance with the law as previously expressed by itself and as unanimously expressed by the courts, both state and federal, in regard to the particular instance. To their astonishment, the Supreme Court without a dissenting voice, gave vent to an opinion that is a perpetual source of amazement.¹⁹

If one seeks the reason why everyone is out of step except the United States Supreme Court, one may find it from an over-all survey of the Court's opinion from which one ill-disguised fact peeps forth. That fact seems to be that the justices considered it unfair that community property law gave an advantage in tax matters to inhabitants of the community property states. This fact is even more readily apparent in the concurring opinion of Mr. Justice Douglas in which Mr. Justice Black joined, although it may also be seen in the opinion handed down by Chief Justice Stone. Having this view and presumably being determined to give it positive effect, the Court resorts to the most startling maneuvers to find reasons to support it. It departs from the formerly established fact that the estate tax is a tax upon the transfer of property of the decedent; it ascribes to Congress intentions which must now come as a considerable surprise to the members of Congress, however welcome to some members, and it misconstrues and misinterprets the law and principles of community property to such an extent that one must suspect the court of either intellectual dishonesty or woeful lack of knowledge and research.

To escape the contention that the effect of the act is to add the value of the wife’s property to that of the deceased husband and unconstitutionally measure the tax on his estate by the inclusion of the value of the property of another, the Court, while stating that “It is true that the estate tax as originally devised and constitutionally supported was a tax on transfers,” now declares that the tax is one upon the surrender of old incidents of property by the husband and the acquisition of new incidents of property by the surviving wife. These incidents it denominates on several occasions as the possession, control and enjoyment of the property. Accordingly, it holds that since the wife now obtains these incidents through the husband’s death, the tax is appropriately measured by the value of the property to which these incidents attach. It stresses the fact that Congress has the power to tax the receipt of such incidents and thereby implies, of course, that that is what Congress intended to do and did do pursuant to its intention.

In its additions to or amendments of the estate tax act, where does Congress indicate that the tax is no longer one on transfers of property on death but is now one on the transfer of alleged incidents of property? Does the tax still constitute one on transfers of other property than community property but on community property only is now on the transfer of the alleged incidents of that property? Or in respect to community property alone, in prescribing that the tax must be laid as a minimum on at least one-half the value of the community property, is Congress taxing here the transfer of the property itself? And if, by using its device of resorting to whether the decedent did the earning, Congress can include more than half of the community property for valuation, does it shift over and declare that it is now taxing the transfer of incidents of the property and not the transfer of the property itself? Is the tax supposed to be based on the decedent’s share of the community property, and as to the rest on the incidents of ownership?
None of the answers to these questions can be determined from the act or from the decision of the Court. So far as the Court is concerned it is interested in sustaining the tax in the case in question, and in its desperate anxiety to do so it has produced a fine mess and a lot of puzzling questions. It is perfectly plain from the act and from reports of the senate and house committees that Congress has always considered the estate tax to be one laid upon the actual transfer of property owned by the decedent, and not one upon incidents of property already owned. Congress plainly designed an estate tax, i.e., upon the privilege of leaving property, and provided in Section 811(e) as to what property should be included in the decedent's gross estate for the purpose of determining the amount of the tax on the property left at death. In its effort, by virtue of Paragraph (2) of that section, to include community property among this gross estate, the reports of the senate and house committees clearly show that Congress was obsessed entirely with ownership not "incidents" of ownership, and was trying to substitute its ideas of ownership of community property for those ownership principles set up by state law. The committee reports speak of state law as being merely "local rules" which should not be regarded and, again as "state presumptions" and "therefore not operative against the commissioner." These expressions certainly represent an effort by Congress to pretend that the state law does not establish equal ownership in the spouses but only sets forth a rule of apportionment or a presumption which Congress can brush aside if it does not meet Congress' idea of what constitutes real ownership of community property. Moreover, Congress attempts to eat its cake and have it too, by insisting on its view of who earns the property as constituting the basis of ownership if that will obtain the inclusion of more than half the community property, but promptly abandoning that view if it would

21 See Note 22 supra.
not obtain the inclusion of at least half the property and thereupon insisting on an inclusion of at least half the community property.

The Court, in its interpretation of what Congress meant to do and allegedly did do, is careful to refrain from consideration of the reports of the committee proceedings which might show that the intention of Congress was other than that attributed to it by the Court. Moreover, the Court is careful to avoid explaining the inconsistency whereby Congress at one second relies on community property law to get at least half of the property included but abandons that very promptly if a different plan will get more than half included. For the Court to pretend that Congress was not continuing to base the federal estate tax on the transfer of property actually owned by the decedent and that Congress intended something quite different than shown by its own deliberations and its own expressed language in the act indicates, at the least, a mistaken method of statutory construction.

Among its repeated assertions that the wife obtains certain incidents of ownership which she did not have before, the Court observes: "Receipt in possession and enjoyment is as much a taxable occasion within the reach of the federal taxing power as the enjoyment of any other incident of property. The taking of possession of inherited property is one of the most ancient subjects of taxation known to the law. Such taxes existed on the European Continent and in England prior to the adoption of our Constitution." The Court would have been better off if it had stopped with the first sentence quoted above. As soon as it attempts to add the additional sentences to buttress its position, it stumbles into the realm of *non sequiturs*. The Court is concerned with the question of property which it acknowledges, however half-heartedly, is already the wife's and the fact that it is the alleged receipt of possession and enjoyment of her own property which is taxable. Is any weight added to the matter by stating that the "taking of possession of *inherited*
property" is an ancient subject of taxation? The Court is not concerned with any question of inherited property. Such payments or taxes for the privilege of taking possession of or succeeding to inherited property were merely forerunners of our inheritance or succession taxes which are paid by one upon succeeding to property he or she never owned before but obtains through the death of a relative or testator. We have here no question of the wife's not owning her share of the community property. The Supreme Court itself has on numerous occasions admitted her ownership. Obviously, the Court is desperately casting about for some respectable authority in support of its decision.

Similarly out of place is the Court's strained effort to rely as authority upon cases dealing with joint tenancies and tenancies by entireties. These tenancies are those in which the survivor has a definite accession of property that he or she did not have before. It has frequently been pointed out by the courts of the community property states, whose pronouncements should be authoritative as to what the law is, that community property is not the same as such tenancies. It is a species of partnership and in the law of most of our community property states and in the Spanish law on which that of our states is based, each spouse has complete testamentary disposition of his or her share.

And if the Court is going to resort to European law to sustain its decision, why not examine that European law which is actually pertinent and not just that which it considers gives respectability to its contentions? If the Court had examined the community property law of the civil law countries it would have discovered that just as the wife does not

---

receive ownership of her share of the community property by inheritance upon her husband's death, also she does not receive or obtain possession of her share upon the death of the husband. *She has possession equally with the husband during the existence of the marriage.*

Marital community of property in this country is of civil law genesis and is to be judged and gauged by concepts and principles of the civil law, not by principles of the English common law. Specifically, the community property system as continued or as adopted in our states is the Spanish or Spanish-Mexican system, as has been recognized time after time by the various state courts in considering the nature of community property, the extent of the wife's rights therein and the principles applicable. In the Spanish system not only was it recognized that "the wife is owner even during marriage of the share which belongs to her", but that "ownership and possession of a moiety of the property acquired during marriage passes *ipso jure* to the wife without delivery", that "just as the husband is the owner and pos-

---

24 See Note 25 infra.

25 "Our whole system by which the rights of property between husband and wife are regulated and determined is borrowed from the civil and Spanish law, and we must look to those sources for the reasons which induced its adoption and the rules and principles which govern its adoption and effect." Packard v. Arellanes, 17 Cal. 525, 527 (1861). "It is not expressly declared (in the state Constitution) what right or title she shall possess in the common property, nor is common property defined; but at the time of the adoption of the Constitution, it was a term of well-known signification in the laws then in force, and a right on the wife's part in property of that nature was recognized by the Constitution." Dow v. Gould & Curry Silver Mining Co., 31 Cal. 629 (1867). "The jurisprudence of Spain came to us with her laws ... except in so far as the genius of our government, or our positive legislation has changed it, ... and what is settled as law in Spain cannot be considered as unsettled here." Saul v. His Creditors, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212 (1827). "In Louisiana, ... the civil law prevails." Succession of Wiener, 203 La. 649, 14 So. (2d) 475 (1943). It is the civil law of Spain and Mexico "which furnishes the historical background for our community property system." Estate of Chavez, 34 N. M. 258, 280 Pac. 241, 69 A. L. R. 769 (1929). "Texas, with just a few other states of the Union, has adopted as the basis of its laws relating to estates held by husband and wife the principles of the civil law, and our statutes are in large measure declaratory of those principles. This is particularly true with reference to the laws relating to community property." Lee v. Lee, 112 Tex. 392, 247 S. W. 828 (1923).

26 **Matienzo, Commentaria, etc.** (see de Funtak, vol. 2, p. 146).

27 **Matienzo, Commentaria, etc.** (see de Funtak, vol. 2, pp. 145, 156).
essor of his half share, so is the wife, too.” In regard to
the provision of the Spanish statute that as to everything
earned during the marriage the spouse should have it by
halves, it was pointed out that the word “have” was a general
word of present effect, including ownership, possession, de-
tention and even rights of action. Such possession by the
wife was, under the civil law, a real and not a constructive
possession which passed to her ipso jure just as it did to the
husband upon acquisition of the marital property. This is
equally true in our community property states today. If
the husband attempts to or does dispose of the community
property in fraud of the wife’s rights, she can avail herself
of whatever remedies are needed to restore the community
property to the possession of the marital community, that is,
to herself and her husband. Has the Supreme Court the
right in honesty to accept the ownership of the wife but deny
the possession by the wife, just because it does not suit its
purpose at the moment?

As in the case of “possession”, the Court’s reliance on the
alleged fact that the wife comes into the “enjoyment” of
her half of the property upon the husband’s death is also

28 Gutierrez, Practicarum Questionum, etc. (see de Funiax, vol. 2, p. 190); Azvedo, Commentariorum Juris Civiis, etc. (see de Funiax, vol. 2, p. 177).

29 Gutierrez listed, with appropriate citations to their works, the array of Span-
ish jurisconsults and commentators who upheld the view that ownership and pos-
session of half the goods acquired during marriage passed straight to the wife,
amatically, without formal delivery, so that she was owner during marriage of
that part, viz., Palatius Rubeus, Roderic Suarez, Antonio Gomez, Covarruvias,
Gregorio Lopez, Gaspar Baezar, Quemada, Matienzo, Burros de Paz, and
Velasquez, de Funiax, vol. 1, § 97, n. 41. To these may be added the eminent
jurist and writer of the late 18th and early 19th centuries, Llamas y Molina.

30 Civil law possession, which is transferred without any act, actual or
constructive, is called real and not constructive. From which it may be inferred
that the wife is entitled to all the possessory interdicts in respect of her moiety
of the property acquired during marriage, viz., to acquire, retain, and to recover
possession. Matienzo (see de Funiax, vol. 2, p. 160). That the above matters
are true under the modern Spanish civil code, see Manresa, Commentaries on

31 See, e. g., Britton v. Hammell, 4 Cal. (2d) 690, 52 P. (2d); 221 (1936);
Vanasek v. Pokonney, 73 Cal. App. 312, 238 Pac. 798 (1923); Cutting v. Bryan,
206 Cal. 254, 274 Pac. 326 (1929); de Funiax, § 126.
THE WIENER CASE

fallacious. What does the court mean by "enjoyment"? What "enjoyment" of her share does the wife obtain that she did not have before? The husband's duty, as it has always been under the community property system, is to manage the property for the benefit of both himself and his wife. Every benefit, every enjoyment, every profit from his management inures or accrues equally to both spouses. This is a basic principle of community property law, which the Court itself has previously acknowledged. The minute the husband attempts to enjoy or benefit from the community property to the exclusion or partial exclusion of the wife, he is acting in fraud of her rights for which she may hold him accountable, even during the marriage. The Court, despite this, tries to infer that the husband's management carries with it some benefit that inures to him and not to the wife. Indeed, it speaks at one point of the husband's death as terminating "his expansive and sometimes profitable control over the wife's share", etc. There is absolutely no profit that can accrue to him from his management that is not equally to the wife's benefit also. This fact the Court, in common honesty, has no right to distort.

What does lie behind the Court's frequent assertions as to the husband's loss of and the wife's acquisition of possession, enjoyment, and control of her share of the community property? It is obvious that the Court is desperately deter-

---

32 "The receipts, however, from any disposition that may be made of the property, still remain community property, and the wife's interests in the receipts from any sale of community property are just as great as they were in the original community property which was thus sold or transferred." Kohny v. Dunbar, 21 Ida. 258, 121 Pac. 544, Ann. Cas. 1913D 492, 39 L. R. A. (N.S.) 1107 (1912).

33 "It is a common misconception of that system to suppose that because power was vested in the husband to dispose of the community property acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the common ownership would attach to the result of the sale of the property." Warburton v. White, 176 U. S. 484, 44 L. Ed. 555, 20 S. Ct. 404 (1900).

34 See DE FUMARE, §§126, 151.
mined to find something to denominate a property right or incident of property on the transfer of which the tax can be tagged. Accordingly, the Court ignores everything it has said in the past about the nature of the spouses' rights in the community property and the nature of the management of that property, which was in consonance with community property principles and deliberately adopts the misconception so frequently unknowingly indulged in by the common law lawyer. Because at the common law the husband took over ownership and control of the wife's personalty and control of her realty and used it, if he wished, to suit himself and for his own entire advantage and benefit, it has been of frequent occurrence for the lawyer trained in the common law to assume that the husband's management or "control" of the community property is of like nature. This definitely is not true and never has been true in the community property system. The management or administration must be equally for the benefit and profit of both, and the husband (or the wife where she has management) is an administrator with all the obligations of any fiduciary. The Supreme Court has in the past been quite aware of this. Why does it now conveniently forget this and assume to judge the matter by common law standards? Patently, for the purpose of finding some reason for sustaining a decision it is determined to give, regardless of law and fact. In White v. Warburton the Court recognizes that the husband, in performing his duty of administering the community property is a mere agent of the marital community, that where he disposes of community property the proceeds of such disposal belong to the community, and that the husband holds them

---


86 See note 32 supra; also, Arnold v. Leonard, 114 Tex. 535, 273 S. W. 799 (1925), that the statutes empowering the husband to manage the community assets makes him essentially a trustee accountable as such to the community.

87 176 U. S. 484, 44 L. Ed. 555, 20 S. Ct. 404, (1900).
on trust. Again, in Poe v. Seaborn,\textsuperscript{38} the Court, referring repeatedly to White v. Warburton, reiterates that the administration of the community property by the husband is merely that of an agent of the marital community which gives him no rights in the property exceeding those of the wife, and that such agency is neither a contract nor a property right vested in him.

Yet in the face of the above cases and others, such as Arnett v. Reade,\textsuperscript{39} in which the Court recognizes the actualities of the community property principles, it now makes a complete about-face and professes to believe that management of the community property gives the managing spouse some superior right of enjoyment and profit, a right which is profitable to the managing spouse and not to the other. All of this finagling by the Court is designed, of course, to sustain its insistence that there is a transfer of a profitable incident of property which is taxable.

The Court makes one of its most glaring errors in trying to sustain its position by a reliance on its former case of Moffitt v. Kelly,\textsuperscript{40} which it ignorantly misinterprets. In that case the facts were that the State of California had enacted an inheritance tax act. A husband died, purporting to bequeath to his wife the entire community property. The taxing officials insisted on basing the inheritance tax against her on the entire value of the community property. She contended that she did not inherit her share of the community property by the death of her husband, but already owned it, and that the tax was not properly laid upon her half of the community property. The California Supreme Court, misinterpreting the law of community property (this has since been rectified in that state),\textsuperscript{41} declared that the wife had no estate in the community property during the

\begin{footnotes}
\item[38] 282 U. S. 101, 75 L. Ed. 239, 51 S. Ct. 58 (1930).
\item[40] 218 U. S. 400, 54 L. Ed. 1086, 31 S. Ct. 797 (1910).
\item[41] See, Estate of Coffee, 19 Cal. (2d) 248, 120 P. (2d) 661 (1914).
\end{footnotes}
marriage, that she possessed a mere expectant interest, and that she took her half of the community property on the death of the husband as an heir. Since, according to the California court, she inherited her share of the community property, her share was held subject to the inheritance tax. She appealed to the United States Supreme Court, contending, naturally, that she had a vested right as an equal owner during the marriage. The latter Court stated that "the nature and character of the right of the wife in the community for the purpose of taxation was peculiarly a local question which we have no power to review." Feeling bound to accept the California court's view that the wife took, on the husband's death, the enjoyment and possession of property which she had not owned before his death, the Supreme Court recognized the right of California to levy an inheritance tax on the passing of that property to her. Naturally, on then becoming owner of it, she then obtained the possession and enjoyment of it. Yet the Supreme Court, in the Wiener case, declares that the Moffitt v. Kelly decision is authority for the proposition that there is a transfer of possession and enjoyment in a case where the wife is definitely recognized as having been an equal owner during the marriage and does not take such ownership through the death of the husband. And the Court adds in a footnote:

The force of Moffitt v. Kelly, supra, as an authority controlling the taxation of community property in Louisiana where the wife's interest is vested before the death of the husband, is not impaired by the fact that the California courts later held that the wife's interest in community property in the state is not so vested... The Moffitt case was decided upon the assumption that the wife's interest was "vested". (Emphasis mine).

The most surface examination of the California court's decision in the Moffitt case shows that at that very time, in that very case, and not at some "later" time, the

---
42 Estate of Moffit, 153 Cal. 359, 95 Pac. 653, 20 L. R. A. (N. S.) 207 (1908).
wife's interest was not considered "vested" during the marriage. It is patent that the United States Supreme Court has been so grossly negligent as not to read the California court's decision or else to have read it carelessly. To represent so negligently that the situation in California at that time and that the cases decided under that situation were the converse of what was actually true, and to do so in order to obtain some authority to support itself, is certainly subject to criticism, to put it mildly. An attorney making the same error before the Court would certainly be castigated for his carelessness.

What is the result of the Supreme Court's decision in the Wiener case? If one subscribes to the assertion of the Court that what is taxed is the transfer of the incidents of ownership passing to the wife, i.e., "possession, control and enjoyment" of her share of the community property, what happens when this is transferred to her during the lives of the spouses? In many of the community property states, the spouses can make any arrangement they wish respecting the community property. The management of all or any part of it can be placed in the wife's hands, by agreement of the spouses. In most of those states, in cases of mismanagement by the husband, insanity of the husband, desertion on the part of the husband, and other varied causes, the wife can, by order of court, bring about a division of the community property and the placing of the management of her share in her hands, or secure the placing of the management of all

---

48 Cal. Civ. Code (1937) § 159; Nev. Comp. Laws (1929) § 3373 et seq.; N. M. Stats. Ann. (1941) sec. 65-206; Okla. Acts (1945), H. B. 218, §4. In fact, the New Mexico Supreme Court asserts that as to community realty both husband and wife have equal voice as to its disposal and that as to such disposal of the realty there is no "head of the community." Frkovich v. Petranovich, 48 N. M. 382, 151 P. (2d) 337, 155 A. L. R. 295 (1944). In New Mexico, as to community realty, what would the wife obtain in the way of control, on the husband's death, that she did not have before?

44 In California, the wife, upon the same grounds for which a divorce is obtainable but without obtaining a divorce, may obtain a division of the community property. Cal. Civ. Code (1937) § 137. Somewhat similarly, in Louisiana the wife may obtain a division of the community property upon showing that
of the community property in her hands.\textsuperscript{45} Plainly, in any of the foregoing situations the so-called "incidents" of ownership would not pass to her by reason of subsequent death of the husband, so as to come within the Court's definition of taxability.

Would the Court describe one of these matters or arrangements a "device" to evade the estate tax? They are all matters that have long been sanctioned by the law of the various community property states. To what extent can the Court reach into the law of the states, lay its hands upon that law, and disfigure it or disapprove it? Apparently, the Court feels that it and Congress have no restrictions upon them whatever, where it is a matter of raising taxes. According to Mr. Justice Douglas: "Congress need not be circumscribed by whatever lines are drawn by local law." One need not be an ardent advocate of "states' rights" to see that the Court has amended the Federal Constitution so as to remove all limitations on the power of the federal government.

\textit{William Q. de Funiak.}