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Community Property: Common Law State Imposes Inheritance Tax on Entire Property Purchased with Community Property Funds

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the plaintiff. When the performance was one of a peculiarly corporate nature, liability was imposed. When the performance was one of peculiarly *sovereign function*, but performed in exchange for some benefit derived, liability has been imposed. But, when the performance was one of a peculiarly sovereign nature, with no benefit derived, no liability is imposed. Admittedly any distinction is difficult of maintenance.[40]

It must be remembered that a state is a sovereign, not a parcel of land with boundaries. It is a personal thing, the successor to the king, the center of all power, which in a complex society must be divided and subdivided. Wherever we find sovereignty functioning, the instrumentality through which it functions is a civil or political division of the sovereign. Thus, the courts, the legislature, the executive, administrative departments, comissions, *private corporations*, and *charitable trusts* authorized by the state to do things which the state would normally do through an executive officer, are exemplifications of sovereignty in action. This to the extent that governmental functions are immune so too should charitable trusts carrying on a like function be immune.

New York is one jurisdiction that has made wise use of this doctrine. In one case[41] the doctrine was extended to the American Museum of Natural History, the Metropolitan Museum of Art, and the New York Public Library. They were such governmental agencies to which public funds could be given. Further, McCaskill points out the application of the doctrine of sovereign function to metropolitan boards of health, metropolitan police commissioners, public boards of education, ward trustees of schools, *commissioners of charity*, and superintendents of county and state insane asylums.[42]

Whether public policy will allow an extension of sovereign immunity to charitable institutions, or, on the other hand, charitable institutions must become "public agencies," will be a matter for the courts in a proper determination of the unexpressed public policy or for the legislatures to express.

Stephen Fisk Steen.

COMMUNITY PROPERTY: COMMON LAW STATE IMPOSES INHERITANCE TAX ON ENTIRE PROPERTY PURCHASED WITH COMMUNITY PROPERTY FUNDS.—A California resident willed his entire estate to his wife. The estate included real property in Montana which had been purchased with community property funds obtained in California.

Montana sought to collect an inheritance tax on the entire property located in Montana. The lower court allowed the tax on one half only. The Supreme Court of Montana allowed the whole amount to be taxed, on the ground that a wife's interest in community property in California is a mere expectancy.[1]

Montana's transfer tax law reads as follows:

> "A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation except the State of Montana, or any of its institutions,

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[40]*Ibid.*, 5 CORNELL L.Q. 409, 413, citing the leading New York case of Maxmilian v. Mayor, 62 N.Y. 160, 164 (1875).

[41]People v. Brooklyn Cooperage Co., 187 N.Y. 142, 156 (1907).

[42]For cases supporting these various agencies, *see* McCaskill, *supra* note 7, 5 CORNELL L.Q. 409, 415.

[1]In re Hunter's Estate, 236 P.2d 94 (Mont., 1951).

county, town, or municipal corporations within the state, for strictly county, town, municipal or other public purposes, and corporations of this state organized under its laws, or voluntary associations, organized solely for religious, charitable, or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state, in the following cases, except as hereinafter provided:

"(1) By a resident of state. When the transfer is by will or by interstate laws of this state from any person dying possessed of the property while a resident of the state.

"(2) Nonresident's property within state. When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a nonresident of the state at the time of his death."[2]

Montana's inheritance tax is not a tax upon property, but upon the right or privilege of succession to the property of a deceased person.[3] Despite the broad language of the Montana tax law which imposes a tax on the transfer of "any interest" in property, it seems that the interest transferred must be a vested interest. Revised Code of Montana 1947 (1951 Cumulative Pocket Supp.), 91-4405, which describes the taxable interest where property is held in co-ownership form (as joint tenants, tenants in common, tenants by the entirety) imposes the tax upon the fractional interest of the decedent, one-half, one-third, one-fourth, or whatever interest the decedent owned.[4]

The question arises as to the theory by which Montana taxes the whole community property of California residents when the husband dies. If the tax were upon the transfer of powers of control and management from the decedent to the survivor, the tax would seem inconsistent because only vested interests are taxed where other forms of co-ownership are involved.[5] The instant case, however, was decided on the theory that under California law the husband has the complete vested interest in community property and the wife a mere expectancy or successive interest. The Court does not question the proposition that because community funds were used in its purchase, the land was community property.

The law of the situs of the land governs the incidence of inheritance tax on the death of the owner,[6] but property rights are not lost simply because property is transported into another state and exchanged for other property;[7] and community property retains its community character upon removal to a common law state.[8] Montana, therefore, has the right to tax property located in Montana but is obliged to respect California law as it applies to ownership of the property. Without discounting other criteria upon which the tax levied in the instant case might be based, it is submitted that the court erred in calling the California wife's interest in community property a mere successive interest.

California community property law is an outgrowth of the Spanish and Mexican community property system which gave the wife a vested interest in the community.[9]

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[2]Rev. Code Mont., 1947, § 91-4401.

[3]Gelsthorpe v. Turnell, 20 Mont. 299, 51 Pac. 267 (1897); In re Touhy's Estate, 35 Mont. 431, 90 Pac. 170 (1907); State v. Jones, 80 Mont. 574, 261 Pac. 356 (1927); State v. Walker, 70 Mont. 484, 226 Pac. 894 (1924).

[4]In re Kuhr's Estate, 123 Mont. 593, 220 P.2d 83 (1950); Petition of Hanson, 232 P.2d 342 (Mont., 1951).

[5]*Ibid.*

[6]Frick v. Commonwealth of Pennsylvania, 268 U.S. 473 (1923); *see* RESTATEMENT, CONFLICT OF LAWS, § 245, p. 329 (1934).

[7]Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905 (1944); *see* In re Thornton's Estate, 1 Cal.2d 1, 33 P.2d 1 (1934).

[8]Depas v. Mayo, 11 Mo. 314, 49 Am.Dec. 88 (1848); Edwards v. Edwards, 108 Okla. 93, 233 Pac. 477 (1924).

[9]*See* NOVISIMA RECAPILACION, Book 10, Title 4, Law 8. Translated in DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, APPENDIX III, J. (1st ed., 1943).

However, the first California case[10] misinterpreted the Spanish law and called the wife's interest an expectancy.[11] In 1891 an amendment to section 172 of the California Civil Code required the wife's consent in writing to all gifts and voluntary transfers of community property made by the husband;[12] and in 1917 the wife was required to join in any instrument by which the community real property was conveyed, encumbered, or leased for a longer period than one year;[13] and a married woman with cause for divorce was enabled to secure a division of the community property without a dissolution of the marital relation;[14] and the wife's interest was exempted from the California inheritance tax upon the death of the husband.[15] In 1923 the California Civil Code was amended to provide that upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the decedent's disposition, and in the absence thereof goes to the surviving spouse.[16] During the period from 1851 to 1926 the decisions of the California courts were in conflict; some held the wife's interest to be vested,[17] while the majority called it an expectancy.[18] In 1927 the California Legislature attempted to clarify the nature of the wife's interest by enacting section 161a of the California Civil Code:[19] "The respective interests of the husband and wife in community property during the continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property." In the instant case the court quoted a comment on section 161a taken from 23 So.Cal.L.Rev. 237, 238, where the court, after admitting that the United States Supreme Court had determined the wife's interest to be vested by virtue of California Civil Code section 161a,[20] stated, "But, in spite of this holding, it was soon discovered that the wife's interest was vested only so far as income tax purposes were concerned. For all other purposes, the wife's interest was not considered to be vested, but merely 'present, equal and existing' with that of the husband." The text writers take a different view of the effect of section 161a[21], and the cases construe the wife's interest

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[10]Panaud v. Jones, 1 Cal. 488 (1851).

[11]*See* 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 107.

[12]Calif. Stats. 1891, p. 425, Calif. Civ. Code, § 172.

[13]Calif. Civ. Code, § 172a, added by Calif. Stats. 1917, pp. 829, 830.

[14]Calif. Civ. Code, § 137, as amended by Calif. Stats. 1917, p. 35.

[15]Calif. Stats. 1917, p. 881.

[16]Calif. Stats. 1923, pp. 23, 30, now Calif. Prob. Code, § 201.

[17]Beard v. Knox, 5 Cal. 252, 63 Am.Dec. 125 (1855); Smith v. Smith, 12 Cal. 216, 73 Am.Dec. 533 (1859); Bone v. Dwyer, 48 Cal.App. 137, 240 Pac. 796 (1925); cases are collected in 1 DE FUNIAK, *supra* pp. 307, 308.

[18]Panaud v. Jones, 1 Cal. 488 (1851); Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228 (1897); Stewart v. Stewart, 199 Cal. 318, 249 Pac. 197 (1926); 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 107.

[19]Calif. Stats. 1927, p. 484.

[20]United States v. Malcolm, 282 U.S. 792 (1931).

[21]"Surely the words 'present, existing and equal interests' shows a legislative intent to 'vest' an interest in the wife." Kirkwood, Ownership of Community Property in California, 7 So. CALIF. L. REV. 1, 12 (1933).

"This section appears to solve the problem for the future; it would seem clear that the wife now has a vested interest in the community property, equal to that of the husband." 2 WITKIN, SUMMARY OF CALIFORNIA LAW, p. 1443 (6th ed., 1946).

"There are at least two kinds of Community Property in California, that acquired prior to 1927 in which the wife has only an expectant interest, and that acquired after 1927, in which

to be vested,[22] but the section was held not to apply retroactively so as to affect vested rights of the husband in property previously acquired,[23] and today there are at least two kinds of community property in California; that acquired prior to 1927, in which the wife has only an expectant interest, and that acquired after 1927, in which the wife has a complete and existing half share.[24]

The incidents of vested ownership now enjoyed by a California wife in community property include: the right to make a gift causa mortis of one half of the community funds without the husband's consent;[25] the right to devise her half share;[26] the right to split the income from community property when paying the federal income tax;[27] the right to pay the federal estate tax on only one half of the community property when one spouse dies;[28] the right to have the wife's one half share of community property exempt from the state inheritance tax when husband dies;[29] the right to bring an action in her own name for restoration to the community of community property or reimbursement of the community for its value where community property has been given away or otherwise wrongfully disposed of by the husband;[30] the right to veto conveyances of community real property contemplated by the husband.[31]

But there are incidents of the wife's interest in community property which are not consistent with vested ownership of a one-half share. The community is not liable for the wife's debts;[32] and is not subject to partition or division during marriage if the wife becomes bankrupt;[33] and perhaps not liable for the wife's torts;[34] while the community is liable for all the husband's debts or liabilities, even though they may be his separate obligations.[35]

The question arises as to what interests the wife acquires in her half share of the community property when the husband dies and this prompts the further question as to whether or not these transfers are taxable. The wife acquires the right to manage and control, and of course, the property becomes subject to her debts and liabilities.

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the wife has a complete and existing half share." 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, p. 309.

"The wife's interest today, however, is vested since a statute enacted in 1927 providing that the wife's interest was to be considered a present existing one." COMPTON, CASES ON DOMESTIC RELATIONS, p. 438 (1951 edition).

[22]Sanderson v. Niemann, 17 Cal.2d 563, 110 P.2d 1025 (1941); Brooks v. United States, 84 F.Supp. 622 (1949); Sampson v. Welch, 23 F.Supp. 271 (1938); Myers v. Tranquility Irr. Dist., 26 Cal.App.2d 385, 79 P.2d 419 (1938).

[23]Stewart v. Stewart, 204 Cal. 546, 269 Pac. 439 (1938); *see* 2 WITKIN, SUMMARY OF CALIFORNIA LAW, 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 107.

[24]1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 107.

[25]Odona v. Marzocchi, 34 Cal.2d 431, 211 P.2d 297 (1949).

[26]Calif. Prob. Code, § 201 *supra.*

[27]United States v. Malcolm, 282 U.S. 792 (1931).

[28]Int. Rev. Code, § 811(e)(2), repealed April 2, 1948, c. 168, title III, 351(a), 62 Stats. 116. For application of federal estate tax to community property *see* P-H 1951 FED. TAX SERV. ¶ 23,744, 23,757, 24,230-D.

[29]Note 15 *supra.*

[30]Mathews v. Hamburger, 36 Cal.App.2d 182, 97 P.2d 465 (1939); Fields v. Michael et al., 91 Cal.App.2d 443, 205 P.2d 402 (1949); *see* Calif. Civ. Code, § 172.

[31]Strong v. Strong, 22 Cal.2d 540, 140 P.2d 386 (1943); *see* note 13 *supra.*

[32]Smedberg v. Bevilockway, 7 Cal.App.2d 578, 46 P.2d 820 (1935), noted in 9 So. CAL. L. REV. 270; Grace v. Carpenter, 42 Cal.App.2d 301, 108 P.2d 701 (1941) (suit for support by wife's mother); Calif. Civ. Code, § 167.

[33]Smedberg v. Bevilockway, *supra.*

[34]*See* 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, p. 521 n.

[35]Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719 (1886); Bechtel v. Axelrod, 20 Cal. 390, 125 P.2d 836 (1942); Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641 (1941).