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COMMENT

FEDERAL LIEN PROVISIONS AND STATE LAW: THE PROBLEM OF GIVING EFFECT TO BOTH IN THE AREA OF JOINT PROPERTY OWNERSHIP

by Paul T. Mann

Anyone even remotely familiar with the taxing provisions of the Internal Revenue Code is aware of the complexities inherent in the system. But even when the complexities are resolved and a tax liability determined, the difficulties may just be beginning. If the taxpayer refuses to pay, the lien provisions of the Code may be invoked to satisfy the Government's claim. Section 6321 of the Code provides that the amount of the delinquent taxpayer's liability "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."¹ Further, section 7403 provides that to satisfy its lien the Government may "subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability."² The considerable difficulty in carrying these provisions into effect lies in the existence of the various categories of rights and interests that a taxpayer may have in property. Some of these rights and interests are susceptible of having federal liens attached; others are not. This Comment is specifically concerned with some forms of joint ownership, and the rights of the taxpayer that may be exercised or foreclosed by the federal lienor. The treatment herein is centered on two areas: first, in general, the applicability of federal or state law in determining the extent of the "right, title, or interest" to "property" of the taxpayer, and the degree of enforcement allowed to the tax collector; and, second, more specifically, the application of these principles to property held as joint tenancies, tenancies by the entirety, and as joint marital property in community property states, and the conflict among the circuits in this area.

I. FEDERAL OR STATE LAW?

When a federal court entertains a suit under the taxing statutes, one thing at least is clear: the taxing provisions themselves, procedural and substantive, are governed by federal law.³ However, the types of property upon which a tax or tax lien may attach are determined, generally, by state law.⁴ The choice of federal or state law is not in a true sense governed by *Erie*,⁵ however, since the jurisdiction of the federal court is based on its federal-question jurisdiction rather than its diversity jurisdiction.⁶ Further complications have been intro-

¹ INT. REV. CODE of 1954, § 6321.

² *Id.* § 7403.

³ *See, e.g.*, *United States v. American Nat'l Bank*, 255 F.2d 504 (5th Cir. 1958).

⁴ *See, e.g.*, *Aquilino v. United States*, 363 U.S. 509 (1959); *United States v. Bess*, 357 U.S. 51 (1958).

⁵ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

⁶ The rule in *Erie*, stating that the federal court sitting in diversity jurisdiction sits as another state court and applies the law of the state in which the court sits, has of course been widely written about and discussed. A good short discussion of the rule, with citations to additional sources, can be found in C. WRIGHT, *LAW OF FEDERAL COURTS* §§ 54-60 (2d ed. 1970).

duced by the recent United States Supreme Court decision in *Commissioner v. Bosch's Estate*.⁷ That case involved the authority that a federal court was required to give to a will construction of a lower state court, upon which federal taxing incidence depended. The Court stated therein: "This is but an application of the rule of *Erie R. Co. v. Tompkins* . . . where state law as announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for the same reason, *viz.*, the underlying substantive rule is based on state law."⁸ Thus, the individual familiar with federal diversity practice may be able to use his knowledge of *Erie*-type problems—but very cautiously.

Bosch dealt, then, with the issue of which state courts the federal courts must look to in order to find the applicable state law, if such a finding is necessary. It was determined that only the highest state courts are conclusive authorities on matters of state law as applied in internal revenue suits. *Bosch* serves the same function in the taxing area that *King v. United Commercial Order of Travelers*⁹ serves in diversity litigation in federal courts. The precise problem *Bosch* attempted to solve was the frequent occurrence of lower court determinations of state rights based upon consent decrees between the parties involved, and upon which federal taxing consequences were dependent. In certain instances such decrees might be collusive.¹⁰ Obviously these should not have a binding effect on federal taxation application.¹¹ *Bosch* apparently proceeded on the theory that the issuance of a collusive decree from a state's highest court was unlikely.

But suppose the lower court is in good faith applying state laws. Does *Bosch* require that each taxpayer take his case to the state's highest court? Perhaps the answer here is that the Supreme Court has never required the Commissioner to acquiesce in decisions which turned on the application of facts rather than law.¹² This construction may open the way for the Commissioner to contest every state decision on that basis, thereby defeating the state law applicability rule altogether.

At any rate, after first determining that a good faith decision construing state law has been reached, it may be generally stated that a state decision or statute creating an exemption will not be followed by the Commissioner, while state laws protecting property rights will be observed.¹³ A further generalization often made by the courts is that a taxpayer's right or interest in property is determined by state law, but the federal tax liens and their enforcement provisions are applied and construed according to federal authority.¹⁴ Probably

⁷ 387 U.S. 456 (1967).

⁸ *Id.* at 465.

⁹ 333 U.S. 153 (1948). The *King* case sets down guidelines for the federal court to follow when there is no law from the state's highest court.

¹⁰ Bravermean & Gerson, *The Conclusiveness of State Court Decrees in Federal Tax Litigation*, 17 TAX L. REV. 545 (1962).

¹¹ See, e.g., Cardozo, *Federal Taxes and the Radiating Potencies of State Court Decisions*, 51 YALE L.J. 783 (1942); Oliver, *The Nature of the Compulsive Effect of State Law in Federal Tax Proceedings*, 41 CALIF. L. REV. 638 (1953).

¹² In *Lakewood Plantation, Inc. v. United States*, 272 F. Supp. 290 (D.S.C. 1967), the district court was forced to make an independent decision applying its concept of state property laws when the decision in the state court could have been based on incorrect findings of fact.

¹³ See, e.g., *Burnet v. Harmel*, 287 U.S. 103 (1932).

¹⁴ See note 4 *supra*, and accompanying text.

the only way to give some content to these broad generalizations is to consider some specific instances in which the problems have arisen.

In the realm of domestic relations the Government will not abide by a state court's characterization of payments received by a divorced wife as a property settlement, rather than as alimony.¹⁵ A partnership between a husband and wife, not recognized under state law, may be recognized for tax purposes.¹⁶ Interestingly, a state probate court's determination of the existence of a marriage is not binding on the Government,¹⁷ while, at least for the purpose of determining the right to file a joint return, the marital status must be determined by state law.¹⁸ There exists no clear rationale for the differing treatment.

The comprehensive Code provisions dealing with trusts impose many federal rules on the determination of a taxpayer's status in such situations.¹⁹ Nevertheless, the possibility of reversion to the grantor of a trust must be determined by state law.²⁰ The classification of a taxpayer as an heir in a will-compromise agreement is determined by state law; the resultant taxable consequences are determined by federal law.²¹ The treatment of trust beneficiaries and grantors is a confusing admixture of state law and federal supremacy in the taxing area.

In the area of property and rights to property, the split among the courts has been along the "exemption—property right" distinction mentioned above.²² Some of the issues that have been determined by state law are: property rights dependent on the existence of a partnership or joint venture;²³ the nature of a right as vested or nonvested;²⁴ and the period during which a taxpayer "owns" a piece of property.²⁵ State laws are inoperative to determine the incidence of federal taxation in the following situations: a New Jersey statute which exempts from creditors' claims insurance proceeds to the extent of premiums paid thereon;²⁶ classification of a bonus payment from an oil lease as an asset;²⁷ and the determination of whether a long-term lease is in fact a lease or an installment sale.²⁸ It has been generally stated that the classification of property is a federal question, while the existence of rights in that property is to be determined by state law.²⁹ Again it can be seen that there is no understandable basis for the different treatment in the cases of the distinction between certain rights as property or as an exemption.³⁰

The Commissioner may also avoid state law by the familiar practice of

¹⁵ Rev. Rul. 58-192, 1958-1 CUM. BULL. 34.

¹⁶ Rev. Rul. 58-243, 1958-1 CUM. BULL. 255.

¹⁷ *Stark v. United States*, 351 F.2d 160 (6th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966).

¹⁸ *Sullivan v. Commissioner*, 256 F.2d 664 (4th Cir. 1958).

¹⁹ INT. REV. CODE of 1954, §§ 641-92.

²⁰ *Helvering v. Stuart*, 317 U.S. 154 (1942).

²¹ *Lyeth v. Hoey*, 305 U.S. 188 (1938).

²² See note 4 *supra*, and accompanying text.

²³ *Tate v. Knox*, 131 F. Supp. 514 (D. Minn. 1955).

²⁴ *City of New York v. United States*, 283 F.2d 829 (2d Cir. 1960). Federal tax liens can be levied only on vested rights.

²⁵ *O'Brien & Co. v. United States*, 51 Am. Fed. Tax R. 1249 (Mass. 1956).

²⁶ *United States v. Bess*, 357 U.S. 51 (1958).

²⁷ *Burnet v. Harmel*, 287 U.S. 103 (1932).

²⁸ *Weiss v. Weiner*, 279 U.S. 333 (1929).

²⁹ *Fidelity & Deposit Co. v. New York City Housing Authority*, 241 F.2d 142 (2d Cir. 1957).

³⁰ See section II *infra* for a complete discussion of jointly owned property and federal tax liens.

looking to "substance over form." In this way an arrangement that is perfectly valid under state law may be ignored as a sham transaction or a tax avoidance scheme by the Government, and taxed instead on its realities. It is unimportant to analyze any such cases in the present context. Exemplary of such situations, however, is *Burk-Waggoner Oil Ass'n v. Hopkins*,³¹ in which an unincorporated joint stock association, a partnership under state law, was taxed as a corporation because it was used as a device for particular federal tax avoidance.³²

An important policy underlying situations in which federal law preempts state law is the desire to secure as much uniformity as possible in the enforcement of the provisions of the Internal Revenue Code in the states. The United States Supreme Court has expressed the policy in the following manner:

The exertion of that power [to tax] is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of any language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nationwide scheme of taxation. . . . State law may control only when the federal taxing act, by express language or necessary implication, makes its own law dependent upon state law.³³

It is readily apparent that differing laws in the various states will at times cause diverse tax consequences on taxpayers in identical situations. A policy of too much state influence on federal taxing matters results in legislative attempts by the states to gain for their own citizens the preferential tax treatment accorded some forms of property ownership in other states. The most notable example is the scramble among many states to adopt community property systems after the Supreme Court in *Poe v. Seaborn*³⁴ allowed separate tax returns for spouses in community property states.³⁵

On the other hand, there are arguments in favor of respect for state property laws, rather than a system of complete uniformity. There is, first of all, a traditionally strong feeling among state citizens toward home state lands and the laws and customs surrounding them.³⁶ It should be noted here that neither

³¹ 269 U.S. 110 (1925).

³² Some of the language used in *Burk-Waggoner* is indicative of the rationale offered by the courts in such instances. The Court states:

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 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.

269 U.S. at 114.

³³ *Burnet v. Harmel*, 287 U.S. 103, 110 (1932).

³⁴ 282 U.S. 101 (1930).

³⁵ During the period of 1939-1947 six states enacted some version of a community property law in order to enable their married citizens to split their incomes by filing separate tax returns. They were Oklahoma, Oregon, Hawaii (not a state at the time), Nebraska, Michigan, and Pennsylvania. These attempts became unnecessary with the passage of the Revenue Act of 1948 and the provisions for income-splitting enacted therein. See discussion and citation to authority in Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1103-11 (1948).

³⁶ As the Supreme Court put it:

We think the Congressional purpose can best be accomplished by application of settled state rules as to what constitutes "real property" so long as it is plain . . . that the state rules do not effect a discrimination against the Gov-

the taxpayer nor the tax collector has furthered any kind of consistent application of the revenue laws. This is to be expected from the taxpayer, who wants to get all the tax advantages possible under even the most remote or minor state-created exemption or right. The tax collector, with an eye toward application of consistent standards, *could* work toward a situation of more certainty. Instead, the Commissioner often invokes state law when it is to his benefit, and refutes it when it works against him.³⁷

At this point a conclusion is in order, encompassing concrete tests and rules on which to base a discussion of the applicability of state laws in the tax area on jointly owned property. Unfortunately, it is doubtful that a satisfactory one can be drawn.³⁸ Generalizations are inadequate to clarify other generalizations, but of necessity some summary statements must be made. First, state law will prevail when the Code expressly requires it,³⁹ or when by necessary implication it must apply.⁴⁰ State law is never consulted in construing the federal statutes,⁴¹ although it may be when applying the enforcement provisions of the Code⁴² when a "right" or "interest" of the taxpayer in property is foreclosed, if state law purports to protect that right from foreclosure. This latter rule obtains despite some broad language to the contrary.⁴³ The interest must be a right and not simply an exemption; but the distinction is unclear.⁴⁴

ernment, or patently run counter to the terms of the [Revenue] Act. Concepts of real property are deeply rooted in state traditions, customs, habits, and laws.

Finance Corp. v. Beaver County, 328 U.S. 204, 210 (1946). It was similarly stated in *United States v. Brosnan*, 363 U.S. 237, 241-42 (1960):

[W]hen Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law. . . . We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule.

³⁷ See, e.g., Cahn, *Local Law in Federal Taxation*, 52 YALE L.J. 799 (1943).

³⁸ After a lengthy discussion of some of the problems discussed in this first section, an eminent writer in the field of federal income taxation concluded:

Such a cinematic survey of the many flickering local-law features of the huge kaleidoscope of federal taxation leaves an impression of the difficulty of discerning broad legal trends in a wilderness of isolated instances. . . . It may be said that two sorts of limitations are imposed by state law upon federal taxation—one horizontal and the other vertical. Vertically, it appears that in many cases that federal taxation may not, consistently with the Constitution, trespass beyond the line drawn by local law in demarcation of the legal limits of property interests owned by the taxpayer. Horizontally, interests admittedly owned by the taxpayer under local law may be subjected to or relieved from the incidence of federal taxation by the interpretation placed upon the language of the federal statutes.

R. PAUL, *SELECTED STUDIES IN FEDERAL TAXATION* 49 (1938).

³⁹ See, e.g., INT. REV. CODE OF 1954, § 1371(c)(1).

⁴⁰ *Burnet v. Harmel*, 287 U.S. 103 (1932).

⁴¹ See, e.g., *United States v. American Nat'l Bank*, 255 F.2d 504 (5th Cir. 1958).

⁴² See, e.g., *Aquillino v. United States*, 363 U.S. 509 (1959); *United States v. Bess*, 357 U.S. 51 (1958).

⁴³ Some courts have a tendency to overstate the independence of the enforcement provisions of the lien statutes from state law. They seem to indicate that there are no restrictions on the power of the Government in this field; what they usually mean is that federal procedure is free of state rules. See especially in this connection the broad language in *United States v. Speers*, 382 U.S. 266 (1965). See also *Walker v. Paramount Eng'r Co.*, 353 F.2d 445 (6th Cir. 1965); *United States v. American Nat'l Bank*, 255 F.2d 504 (5th Cir. 1958).

⁴⁴ See note 13 *supra*, and accompanying text.

II. FEDERAL TAX LIENS AND STATE JOINT PROPERTY CONCEPTS

*Tenancy by the Entirety.*⁴⁵ This form of joint property ownership is of old common-law derivation; it is founded on the ancient concept of the unity of husband and wife.⁴⁶ It can only exist between husband and wife.⁴⁷ While it originally related only to real property, the majority rule now is that it can apply to personal property also.⁴⁸ In states which recognize this form of ownership, any conveyance to husband and wife which does not expressly state a contrary intent creates a tenancy by the entirety.⁴⁹ Originally the husband had complete management and control of the property,⁵⁰ but with the passage of married women's acts in most jurisdictions the spouses now have equal management rights.⁵¹ Normally a tenancy by the entirety cannot be subjected to an involuntary partition.⁵² This feature stems from the idea that property owned in entirety is owned *per tout et non per my* (by the whole and not by the part).⁵³

The facet of the concept of tenancy by the entirety that is of most concern here is the degree to which creditors may attach the interests of either spouse. Under the common-law interpretation separate creditors of the husband could attach liens to his possessory rights in the property, but could not enforce liens on the property itself.⁵⁴ A principal reason for this rule was that the tenant by the entirety had a right of survivorship, so that the surviving spouse acquired full title by operation of law. At this point a lien could attach to the property for the debts of the then full title owner.⁵⁵ Under modern law the jurisdictions have split on the attachability of one spouse's interest in a tenancy by the entirety.⁵⁶

At present twenty states and the District of Columbia recognize tenancies by the entirety.⁵⁷ In those that do, the Commissioner has had mixed success in

⁴⁵ See generally 4 R. POWELL, REAL PROPERTY 663 (1967) [hereinafter cited as POWELL]. The reliance upon the above authority for the general incidents of the various forms of property interests is obvious. The primary purpose of this Comment is to analyze the interaction of federal tax liens with state property law. With this limited scope in mind, unnecessarily repetitious footnoting has been avoided in discussing the essential character of the property concepts themselves.

⁴⁶ POWELL 683.

⁴⁷ See, e.g., *Byrd v. Patterson*, 229 N.C. 156, 48 S.E.2d 45 (1948). POWELL 686 n.4 states that when the tenants are not described as being husband and wife in the deed, that relationship can still be proved. *American Cent. Life Ins. Co. v. Whitlock*, 122 Fla. 363, 165 So. 380 (1936).

⁴⁸ Annot., 32 A.L.R.3d 570 (1970).

⁴⁹ This presumption was very strong at early common law. See, e.g., *Welch v. Harvey*, 281 Mo. 684, 219 S.W. 897 (1920). While it is still a characteristic of the estate, some states which recognize it have diluted its strength. POWELL 686.

⁵⁰ See, e.g., *Lewis v. Pate*, 212 N.C. 253, 193 S.E. 20 (1937).

⁵¹ See Annot., 141 A.L.R. 179 (1942). See also POWELL 697.

⁵² See, e.g., *Naurison v. Naurison*, 132 So. 2d 623 (Fla. 1961).

⁵³ POWELL 683.

⁵⁴ See, e.g., *Moore v. Shore*, 208 N.C. 446, 181 S.E. 275 (1935).

⁵⁵ See, e.g., *Klopfenstein v. Chadbourne*, 105 Pa. Super. 530, 161 A. 642 (1932), cited in POWELL 699.

⁵⁶ See Annot., 75 A.L.R.2d 1172 (1961).

⁵⁷ See Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24 (1951). The following authorities are among those listed in the Phipps article and elsewhere, and can be used as keys to get into the particular jurisdiction: ALASKA STAT. § 22.01.06 (1949); *Union & Mercantile Trust Co. v. Hudson*, 147 Ark. 7, 227 S.W. 1 (1921); *Ciconte v. Barba*, 19 Del. Ch. 6, 161 A. 925 (1932); *Flaherty v. Columbus*, 41 App. D.C. 525 (1914); *Bailey v. Smith*, 89 Fla. 303, 103 So. 833 (1925); *Koehring v. Bowman*, 194 Ind. 433, 142 N.E.

enforcing his lien upon such property when the lien is a separate obligation of one of the spouses. Conflicting decisions are understandable when they involve state laws that are different; but, as will be shown, even when the state laws being considered are substantially identical, the courts have come to different conclusions.

In *Pilip v. United States*⁵⁸ a federal district court in Alaska (Ninth Circuit) had the following question before it: "[W]hether or not, under Alaska law, a lien for unpaid federal income taxes owing by a husband, as his separate obligation, under separate returns filed by him, attaches to real property owned by the husband and wife as tenants by the entirety, or to the income therefrom."⁵⁹ The court pointed out the split among the states on whether one spouse's interest in rents and profits from property held by the entirety is attachable by separate creditors. The court noted that Alaskan law was not settled on the subject, and consequently that it felt itself at liberty to construe the Alaska statute in accordance with general legal principles. The court stated: "The first portion of the Alaska statute appears to have been drawn from the Oregon law In fact, most of the Alaskan civil code was originally adopted from the Oregon law. Therefore, decisions of that state are controlling here."⁶⁰ This reasoning resulted in the attachment of the federal tax lien on one-half the rents and profits from the property. This was done in spite of the fact that the court recognized that the weight of authority in other jurisdictions would be against this conclusion.

It would seem that a federal court deciding whether the federal government should be allowed to satisfy its fiscal needs is an inappropriate forum for determining an important aspect of state property law. The court's reasoning in thus construing the estate was that although the estate itself may be indivisible, the rents therefrom are easily divisible, and attachment on them does not affect the nature of the estate itself. Further, the court concluded, a contrary conclusion would afford immunization from creditors' claims for the husband, a result contrary to public policy.⁶¹ A like ruling was made by the Treasury Department applying a similar Oregon law.⁶²

In applying Virginia law a federal district court in the Fourth Circuit reached a decision contrary to that of *Pilip*. In *Moore v. Glotzbach*⁶³ the court stated that "the question presented is whether rents, which are derived from

117 (1924); *Francis v. Vastine*, 220 Ky. 431, 17 S.W.2d 419 (1929); *Baker v. Baker*, 123 Md. 32, 90 A. 776 (1914); *Splaine v. Morrissey*, 282 Mass. 217, 184 N.E. 670 (1933); *Scholten v. Scholten*, 238 Mich. 679, 214 N.W. 320 (1927); *Schwind v. O'Halloran*, 346 Mo. 486, 142 S.W.2d 55 (1940); *Aubrey v. Schneider*, 69 N.J. Eq. 629, 60 A. 929 (1905); *In re McKelway's Estate*, 221 N.Y. 15, 116 N.E. 348 (1917); *Turlington v. Lucas*, 186 N.C. 282, 119 S.E. 366 (1923); *Webb v. Woodcock*, 134 Ore. 319, 290 P. 751 (1930); *Blummer v. Metropolitan Life Ins. Co.*, 362 Pa. 7, 66 A.2d 245 (1949); *Quinn v. Drummond*, 47 R.I. 215, 132 A. 439 (1926); *Campbell v. Campbell*, 167 Tenn. 77, 66 S.W.2d 990 (1934); *Citizens' Sav. Bank & Trust Co. v. Jenkins*, 91 Vt. 13, 99 A. 250 (1916); *Allen v. Parkey*, 154 Va. 739, 149 S.E. 615 (1929); *Peters v. Dona*, 49 Wyo. 306, 54 P.2d 817 (1936). This list of jurisdictions is up-to-date. See Annot., 32 A.L.R.3d 570 (1970).

⁵⁸ 186 F. Supp. 397 (D. Alas. 1960).

⁵⁹ *Id.* at 400-01.

⁶⁰ *Id.* at 402; see ALASKA STAT. § 22.01.06 (1949).

⁶¹ 186 F. Supp. at 402.

⁶² G.C.M. 1310, VI-I CUM. BULL. 101 (1927).

⁶³ 188 F. Supp. 267 (E.D. Va. 1960).

realty held by husband and wife as tenants by the entirety, are subject to a judgment creditor's levy against the lessee of said property for the debt of the husband only."⁶⁴ The parties conceded that property held in a tenancy by the entirety could not be sold to satisfy the husband's separately incurred tax lien. The Government argued that the rents and profits from the realty were personal property, and thus the law of Virginia which protected the realty did not extend to the rents and profits. The court rejected this argument, stating that "logic dictates the same rule should apply to the rents"⁶⁵ and the realty, and stressed the unity implicit in a tenancy by the entirety. The court held that not even one-half the rents and profits could be levied upon.

A situation involving a right similar to the wife's right of survivorship in a tenancy by the entirety arose again in the Fourth Circuit in *Washington v. United States*.⁶⁶ The right was the common-law dower under Virginia law. A Virginia Supreme Court decision apparently called for preservation from forfeiture of a wife's dower rights because of a husband's liability, when such foreclosure was to be accomplished by a judicial sale.⁶⁷ Dower rights include the right in the lawful widow of a deceased husband to a one-third estate in her husband's property.⁶⁸ During his lifetime her right is inchoate; that is, it is contingent on her surviving her husband. In a similar manner the right of a wife to full title to property held as a tenancy by the entirety is contingent upon her surviving her husband. It is this contingency that prohibits the sale of property held in a tenancy by the entirety for separate obligations of one spouse. The court in *Washington* required the husband's property to be sold to satisfy the Government's lien for excise tax deficiencies, plus penalty and interest, under federal wagering tax statutes.⁶⁹

It would appear that the analogy between a wife's inchoate dower and her right of survivorship in a tenancy by the entirety is sufficiently close to justify a criticism of the two cases as being inconsistent. Both concepts are well-settled, common-law property interests, and respect for state property laws would require that both be observed strictly. This approach would also result in the protection of innocent third parties.

District courts or courts of appeals in other circuits have held, under laws similar to those involved in the *Pilip* and *Washington* cases, that no part of the interest of tenants by the entirety is susceptible to attachment by creditors of individual tenants. In *Pettengill v. United States*⁷⁰ the husband incurred tax liens in his business activities. The court ruled that "Mr. Pettengill's interest in the particular property . . . owned by him and his wife as tenants by the entirety, is not property which is available for his sole debts."⁷¹ The same con-

⁶⁴ *Id.* at 268.

⁶⁵ *Id.* at 269.

⁶⁶ 402 F.2d 3 (4th Cir. 1968).

⁶⁷ *Harmon v. Peery*, 145 Va. 578, 134 S.E. 701 (1923).

⁶⁸ *See, e.g., Brenkworth v. Lanier*, 260 N.C. 279, 132 S.E.2d 623 (1963).

⁶⁹ This case is interesting in another respect, in that it was continued until such time as the United States Supreme Court handed down its decisions on the applicability of the right against self-incrimination in claiming income and paying taxes on illegal bookmaking operations. *Grosso v. United States*, 390 U.S. 62 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968).

⁷⁰ 205 F. Supp. 10 (D. Vt. 1962).

⁷¹ *Id.* at 13.

clusion was reached in the Third Circuit in *Rotbenties v. Ullman*.⁷²

In the remaining circuits in which the problem has arisen the courts have based their decisions on general common-law concepts of the nature of a tenancy by the entirety.⁷³ Regardless of whether such an approach is permissible in light of the material discussed above,⁷⁴ it is used. "The federal courts in tax cases, as in other fields of law, exercise a wide measure of judgment and discretion in their ascertainment of state law and are by no means bound to a mechanical or imitative technique. Actually, the net result is frequently in terms of general common law concepts with local cases thrown in for appearance and good measure."⁷⁵ These courts have applied this understanding to the exemption-property right distinction already observed.⁷⁶

For example, in *Shaw v. United States*⁷⁷ the court aligned itself "with what appears to be the majority rule to the effect that no portion of an estate by the entireties may be subjected to a lien for the individual indebtedness of either spouse."⁷⁸ The court classified the right as one peculiar to this form of property ownership, and not a mere exemption.

In a recent Fifth Circuit decision the court spoke of a tenancy by the entirety as "an almost metaphysical concept which developed at the common law from the Biblical declaration that a man and his wife are one."⁷⁹ Although throwing in Florida law for good measure,⁸⁰ the court implied it felt that the attachment of a federal tax lien on a "metaphysical concept" strained the reason, and, thus, the Government could not reach property so held.⁸¹

The Eighth Circuit became almost poetic in expressing its general feeling toward tenancies by the entirety and their susceptibility to attachment by separate creditors. In *United States v. Hutcherson*⁸² the court described the individual spouse's rights in the estate as "like the rainbow in the sky or the morning fog rising from the valley, not such an estate as may be subjected to the grasp of an attaching creditor or which will permit the adherence thereto of a tax lien."⁸³ A few years later the Fifth Circuit in *United States v. American National Bank*⁸⁴ concurred in the *Hutcherson* holding, "[w]hile refraining from concurrence in dicta regarding rainbows and fogs."⁸⁵ Instead, the Fifth Circuit cited the "tender solicitude"⁸⁶ with which estates by the entirety are regarded in states recognizing them.

⁷² 110 F.2d 590 (3d Cir. 1940).

⁷³ *Shaw v. United States*, 94 F. Supp. 245 (W.D. Mich. 1939) (Sixth Circuit); *United States v. Gurley*, 415 F.2d 144 (5th Cir. 1969); *United States v. Hutcherson*, 188 F.2d 326 (8th Cir. 1951).

⁷⁴ See section I of this Comment, *supra*.

⁷⁵ Cahn, *Local Law in Federal Taxation*, 52 YALE L.J. 799, 816-17 (1943).

⁷⁶ See note 13 *supra*, and accompanying text.

⁷⁷ 94 F. Supp. 245 (W.D. Mich. 1939).

⁷⁸ *Id.* at 246.

⁷⁹ *United States v. Gurley*, 415 F.2d 144, 149 (5th Cir. 1969).

⁸⁰ 415 F.2d at 149.

⁸¹ In *Gurley* a tax lien of the husband was advanced as a claim on the property after the husband's death. The wife won on the basis of her right of survivorship in the property; nothing of the husband's interest was left.

⁸² 188 F.2d 326 (8th Cir. 1951).

⁸³ *Id.* at 331.

⁸⁴ 255 F.2d 504 (5th Cir. 1958).

⁸⁵ *Id.* at 507.

⁸⁶ *Id.* at 508.

Because of the nature of a tenancy by the entirety, a good argument can be made for approval and even extension of the holdings in this last line of cases. It is undisputed that at common law the concept was one of unity of person; to divide it for outside obligations is like taking from different parts of a single-celled entity—a self-contradictory statement. The advantages of uniformity of application of the revenue laws have already been discussed.⁸⁷ In this particular area the goal of uniformity could be attained without sacrificing vested state property interests.⁸⁸ The incidents of tenancies by the entirety all spring from the same common-law source. But because a state has created certain exemptions to a common-law concept does not mean the tax collector must be bound by them. Hence, all that the taxpayer need observe are the traditional concepts of this particular estate.

*Joint Tenancy.*⁸⁹ Each tenant in a joint tenancy is considered to be the full owner of the property and also of an undivided part.⁹⁰ An incident of the estate is a right in the surviving tenants to a deceased tenant's undivided interest by operation of law.⁹¹ Any joint tenant has the right to demand partition, or if that is impossible, sale of the entire property and proportionate division of the proceeds.⁹² The substitution of another person in place of an original joint tenant terminates the joint tenancy, and by operation of law a tenancy in common is formed.⁹³ Ordinarily the interest of a joint tenant is subject to his creditors' claims.⁹⁴ Of course, if a creditor with a lien on a joint tenant's interest—in this context a federal tax lien—forecloses on the interest of the joint tenant, a new party has been substituted and a tenancy in common formed.⁹⁵ When that new party seeks subsequent division of the property, preference is given for a division in kind, rather than a judicial sale.⁹⁶

The circuits are again split on the proper manner of enforcement of a separately incurred federal tax lien on one joint tenant's interest. This is especially true when an equitable division of the property cannot be made, and the court is faced with the decision of whether to require the sale of the entire property and division of the proceeds, to the possible harm of innocent third parties.

*Folsom v. United States*⁹⁷ is perhaps the most frequently cited case in this field. It is ardently urged on the courts by its proponents, the taxpayers; it is adamantly resisted by the federal revenue collector. *Folsom* is cited for the proposition that when property held in a joint tenancy cannot be equitably partitioned, it cannot be sold to satisfy a federal tax lien separately incurred by one joint tenant. In *Folsom* there were six joint tenants who owned seven different parcels of property. It was determined that the properties could not

⁸⁷ See note 34 *supra*, and accompanying text.

⁸⁸ See note 37 *supra*, and accompanying text.

⁸⁹ See POWELL 663. See also note 45 *supra*.

⁹⁰ See POWELL 663, citing 2 BLACKSTONE, COMMENTARIES 180 (Lewis ed. 1897).

⁹¹ See, e.g., *In re Hanson's Estate*, 77 S.D. 474, 93 N.W.2d 606 (1958).

⁹² See, e.g., *Jackson v. O'Connell*, 23 Ill. 2d 52, 177 N.E.2d 194 (1961).

⁹³ See, e.g., *In re Polizzo's Estate*, 308 N.Y. 517, 127 N.E.2d 316, *cert. denied*, 350 U.S. 911 (1955).

⁹⁴ See, e.g., *Eloff v. Riesch*, 14 Wis. 2d 519, 111 N.W.2d 578 (1961).

⁹⁵ See note 93 *supra*, and accompanying text.

⁹⁶ See, e.g., *Folsom v. United States*, 306 F.2d 361 (5th Cir. 1962).

⁹⁷ 306 F.2d 361 (5th Cir. 1962).

be divided evenly among the tenants. Accordingly, the district court ordered all the properties sold and the proceeds, as well as the costs, divided evenly.

The co-owners naturally objected to such a procedure.⁹⁸ The Fifth Circuit sustained their objections, stating that this was a decision of first impression at the federal appellate level.⁹⁹ The court's decision was based on an interpretation of that part of section 7403¹⁰⁰ which gives the Government the right "to subject any property, of whatever nature, of *the delinquent*, or in which he has any *right, title, or interest*, to the payment of such tax liability."¹⁰¹ The terms "of the delinquent" and "interest" were construed as restrictions. The Government's rights did not extend to property other than that of the delinquent, and the "interest" acquired by the Commissioner in the taxpayer's interest in the property did not justify compelling a judicial sale of the property. The court said:

The law does not authorize the Government, . . . in its dispute, to force a public sale of the property of other joint owners, deny them the right to seek a partition in kind, and to tax them with the costs incurred by the Government in pursuing the delinquent taxpayer. The Government is not a joint owner or a tenant in common and does not have the property rights incident to such a relationship.¹⁰²

There are, however, two points in the court's opinion which tend to weaken its precedential value.¹⁰³ First, the court seemed to be influenced by an evidentiary insufficiency. The court felt that there had been insufficient findings of whether the property could have been equitably partitioned in kind. Secondly, the court said that if and when the Government did foreclose its lien and obtain *all* the taxpayer's rights to the property, the Government could then compel partition. If an adequate finding was then made that the property could *not* be equitably partitioned in kind, the Government could compel the sale of the entire property. In light of the tenor of the rest of the court's opinion this last statement is both inconsistent and undesirable. If the court holds that the law does not permit the Government to require a sale of the property, the revenue collector should not be allowed to accomplish procedurally¹⁰⁴ what must be substantively avoided.¹⁰⁵ If the Government is to prevail on the law, in the interest of judicial economy the Government should not be required to institute two lawsuits in order to satisfy its claims.

At the present time *Folsom* appears to stand alone. The reported cases on this point since *Folsom* have disagreed with the holding. In a Kansas district court case (Tenth Circuit) a husband's separate federal tax lien had been

⁹⁸ *Id.* at 364.

⁹⁹ *Id.* at 367.

¹⁰⁰ INT. REV. CODE of 1954, § 7403.

¹⁰¹ Emphasis by the court, 306 F.2d at 367.

¹⁰² 306 F.2d at 367.

¹⁰³ See text following note 97 *supra*.

¹⁰⁴ The court implies, in fact states expressly, that had the Government gone ahead and foreclosed its lien, then it would be standing in the shoes of the taxpayer, having all the rights and incidents thereto. 306 F.2d at 367. Thus, on the one hand, the court holds that the Government cannot substantively accomplish what it intends. On the other hand, the substance of what the Government wants can be accomplished if a different procedural plan is followed.

¹⁰⁵ *I.e.*, the unnecessary invasion of the rights of third parties. See note 151 *infra*.

placed on marital property held in joint tenancy.¹⁰⁶ The court allowed execution on the wife's interest as well, even after a divorce decree terminated the joint tenancy and created separate property rights in the wife. A district court in California has concluded that when partition in kind is impossible, the separate tax lien of one joint owner may require sale of the entire property.¹⁰⁷

The only other circuit to consider this exact problem rejected the *Folsom* rationale. In *United States v. Trilling*¹⁰⁸ the Ninth Circuit declared that *Folsom* was premised on an incorrect application of section 7403.¹⁰⁹ *Trilling* rejected the restrictive interpretation of *Folsom*. "The express language of the statute negates any design or intent on the part of Congress to limit the reach of the statute to the 'interest' of the taxpayer as distinguished from the 'property' in which he has such 'interest.'"¹¹⁰ In *Trilling*, notwithstanding the fact that the lien had attached to the property prior to the formation of the joint tenancy, the entire property was ordered sold, with the Government receiving as much as, but no more than, half the proceeds.

When a variant of this problem was presented to the Fourth Circuit in *Washington v. United States*,¹¹¹ the court considered and quoted at some length from both *Folsom* and *Trilling*, but decided to follow *Trilling*.¹¹²

Although the *Folsom* decision may be internally inconsistent, it seems, to this writer at least, to be the better fundamental approach, since it attempts to protect the rights of innocent third parties. This is a basic principle of the law in many fields and has been stated to be so in the tax field.¹¹³ In the section on tenancies by the entirety it was suggested that a general common-law approach best satisfied the dual needs of uniformity of application of revenue laws and respect for traditional state property laws.¹¹⁴ In the joint tenancy field this same suggestion would accomplish an identical result. When the Government forces a sale of property owned in joint tenancy, the practical effect can be easily seen: the innocent joint tenants will buy in the land at the foreclosure sale in order to protect their property interests. Thus, in effect, the innocent joint tenants are paying the delinquent taxpayer's tax bill. Although the same result may not obtain when a separate premarital tax debt is foreclosed on the joint tenancy property of a husband and wife, still the innocent spouse is deprived of preferred property interests (usually considered better than money) and of his or her contingent right of survivorship.

*Community Property.*¹¹⁵ The ownership of property between spouses is classified as "community" in eight states,¹¹⁶ subject to various exemptions which may

¹⁰⁶ *Edwards v. United States*, 215 F. Supp. 382 (D. Kan. 1963).

¹⁰⁷ *United States v. Borcia*, 58-1 U.S. Tax Cas. ¶ 9119 (S.D. Cal. 1957); *United States v. Beggerly*, 52-1 U.S. Tax Cas. ¶ 9304 (S.D. Cal. 1951).

¹⁰⁸ 328 F.2d 699 (7th Cir. 1964).

¹⁰⁹ INT. REV. CODE of 1954, § 7403.

¹¹⁰ 328 F.2d at 703.

¹¹¹ 402 F.2d 3 (4th Cir. 1968).

¹¹² *Id.* at 7: "We are disposed to follow the holding in *United States v. Trilling* . . . which is in conflict with *Folsom*."

¹¹³ See, e.g., *Stuart v. Willis*, 244 F.2d 925 (9th Cir. 1957), and authorities cited therein.

¹¹⁴ See text accompanying note 88 *supra*.

¹¹⁵ POWELL 735-50. See also note 45 *supra*.

¹¹⁶ ARIZ. REV. STAT. ANN. §§ 25-211 to -217 (1956); CAL. CIV. CODE §§ 162-64

pertain within a state. Community property is usually classified negatively—*i.e.*, whatever property is not separate is presumed to be community.¹¹⁷ Whatever either spouse acquires by his own efforts during marriage belongs to each spouse in equal halves.¹¹⁸ Property owned before marriage remains separate, unless it is commingled beyond traceability in community property.¹¹⁹ Property acquired during marriage by gift, descent, or devise, or by judgment for personal injury is separate.¹²⁰

The question of the liability of the community estate for a separately incurred (thus, usually antenuptial) federal tax lien has caused some confusion among those circuits which must deal with community property.¹²¹ It is not clear whether the interest of one spouse will be deemed substantial enough to require preservation from separate creditors of the other. As one commentator has stated, "There are few aspects in the law of community property as to which there are so many significant variables as in the rules governing the rights to reach community assets."¹²²

The conflict in this area reveals itself clearly in the different results reached in a line of district court cases arising in the Fifth Circuit (and undisturbed by the court of appeals in that circuit),¹²³ and two recent Ninth Circuit decisions.¹²⁴ The first Fifth Circuit district court decision on the issue came in 1962 in an unpublished opinion.¹²⁵ There it was found that the husband's separate liability for a federal cabaret tax lien could not be satisfied out of the wife's separate earnings.

The roots of the community property system are set in the concept that all personal earnings of either spouse during marriage become community property. Texas has engrafted an exception to this rule to the effect that the wife's personal earnings are her "special community."¹²⁶ Under the statute the separate debt of the husband cannot be satisfied out of even one-half these earnings, unlike the result with respect to "regular" community earnings. It is difficult to see how this could be classified as anything but a state exemption; even Texas cases have classified it as such.¹²⁷ Under a fair interpretation of Texas law it would seem the federal court erroneously considered the wife's earnings as anything but community property as it is traditionally understood.¹²⁸ Thus, the case must stand for the principle that at least in the Fifth Circuit there is a *property* aspect of a wife's individual earnings which are a part of

(1954); IDAHO CODE ANN. §§ 32-901 to -920 (1963); LA. CIV. CODE ANN. art. 2334 (West Supp. 1967); NEV. REV. STAT. § 123.030 (1959); N.M. STAT. ANN. §§ 57-4-1 to 57-4-9 (1962); TEX. FAM. CODE ANN. tit. 1, § 5.01 (1970); WASH. REV. CODE § 26.16.030 (1958).

¹¹⁷ See, e.g., TEX. FAM. CODE ANN. tit. 1, § 5.10 (1970).

¹¹⁸ See, e.g., *id.* § 5.42.

¹¹⁹ See, e.g., *Mumm v. Mumm*, 63 Wash. 2d 349, 387 P.2d 547 (1963).

¹²⁰ See statutes cited in note 116 *supra*.

¹²¹ The Fifth, Ninth, and Tenth Circuits.

¹²² POWELL 741. A general discussion of most of the community property concepts outlined here can be found in that source.

¹²³ These cases begin in 1962 and end in 1966. They are discussed *infra*.

¹²⁴ This is a 1969 case. It is discussed immediately *infra*.

¹²⁵ *Helm v. Campbell*, noted in Comment, *Federal Taxation and Community Property: The Wife's Rights in Her Earnings*, 16 Sw. L.J. 643 (1962).

¹²⁶ Law of June 6, 1957, ch. 407, § 2, [1957] Tex. Laws 1233 (repealed 1967).

¹²⁷ See, e.g., *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925).

¹²⁸ For discussion on this point, see generally Comment, note 125 *supra*.

the whole community property system in Texas and are free from liability for the husband's debts.

The Fifth Circuit has continued to apply this principle. In *Bice v. Campbell*¹²⁹ the tax collector levied on income from separate property of the wife for a premarital tax liability of her husband. Such income in the traditional view of community property clearly belongs to the community. Here again the court was forced to determine if the special provision of the Texas statutes¹³⁰ was a property right or an exemption. With no apparent reasoning, the court followed a quotation of the statute with the following statement: "Thus it is made clear under the law of Texas, Article 4616, that it determines and defines property instead of creating exemptions or giving the right by law to a debtor to retain a portion of his property free from the claims of his creditors."¹³¹ The same result was reached in *Mulcahy v. United States*¹³² and *Preston v. Campbell*.¹³³ In two decisions the court of appeals was presented with the opportunity to speak on this issue, but in neither instance did it take advantage of the opportunity.¹³⁴

One year after the *Helm* case and one year before the *Bice* case a Washington district court (Ninth Circuit) had occasion to follow the same line. The question before the court in *Stone v. United States*¹³⁵ was whether, under the law of Washington which precluded creditors for a husband's separate antenuptial debt from enforcing their claims on community property,¹³⁶ community property could be reached to satisfy the debt. It was determined that the privilege was an inherent characteristic of Washington community property, not an exemption, and no part of the community could be reached for the husband's debt.

Two years later another district judge in the same district of Washington reached an opposite conclusion. In *Draper v. United States*¹³⁷ the court recognized the Washington law which exempted the community from separate debts of either spouse. However, the court created an exception to this rule:

It is the opinion of this court that the plaintiffs are not entitled to the relief sought for the reason that the Washington courts have judicially created exceptions to such rule of immunity, which exceptions are based on grounds of public policy, and this court finds as to the facts of this case that public policy requires such an exception here also.¹³⁸

¹²⁹ 231 F. Supp. 948 (N.D. Tex. 1964).

¹³⁰ TEX. REV. CIV. STAT. ANN. art. 4616 (1960).

¹³¹ 231 F. Supp. at 951.

¹³² 251 F. Supp. 785 (S.D. Tex. 1966).

¹³³ 67-1 U.S. Tax Cas. ¶ 9163 (N.D. Tex. 1966).

¹³⁴ *Mulcahy v. United States*, 388 F.2d 300 (5th Cir. 1968); *Moore v. Hanson*, 325 F.2d 784 (5th Cir. 1964).

¹³⁵ 225 F. Supp. 201 (W.D. Wash. 1963).

¹³⁶ At this time the only exception to the rule was that the community could be reached for obligations of alimony or child support from former marriages.

¹³⁷ 243 F. Supp. 563 (W.D. Wash. 1965). The judge here recognized the conflict within his own district. He stated: "*Stone v. United States* . . . held that the immunity of the community property from seizure for a separate premarital debt of a spouse is an inherent characteristic of the particular type of property interest involved. With the utmost respect for the erudition of my friend and colleague, I regrettably dissent from this conclusion." *Id.* at 565.

¹³⁸ *Id.* at 565. The court at this point stressed the burden that might be put on the collection of federal revenue if the *Stone* rule were to be adopted.

Recently the Court of Appeals for the Ninth Circuit resolved the conflict between these two cases by accepting the argument of *Draper*. *United States v. Overman*¹³⁹ expressly disapproved the *Stone* decision. However, the holding in *Overman* is not couched in terms of public policy. In fact, *Draper* is not even mentioned. Rather, the decision seems to rest on two grounds: (1) that the Washington rule against attaching any part of the community for separate debts of one spouse is not a property right, but an exemption; and (2) that, even granting that the Washington rule creates a property right, section 7403¹⁴⁰ contemplates the sale of *all* property in which a taxpayer has an interest, and that, in any event, the United States is not bound by Washington law regulating the rights of creditors generally.¹⁴¹ The same court in a companion case¹⁴² reached the same conclusion in a situation arising out of Arizona, its being conceded that the two states' community property laws were substantially the same.

One point the *Overman* court seems to have ignored is that an immunity from creditors' rights in a situation like this one may not be because of rights of debtors in the state, but because of an inherent characteristic in the property involved. That is, the immunity is created by the property itself, and not by operation of laws regulating creditors' rights.

It is difficult to concur completely in either court's approach to this problem. The Texas situation ignores the fact that the immunity created is not based on the traditional community property concept. Further, it ignores decisions of the home state characterizing the right as an exemption. In the Washington and Arizona situations the court attempts a general common-law approach, which is probably good. However, it may be criticized on two grounds. First, in allowing the sale of all of the property it thereby defeats the property rights of the innocent spouse. These include the right of support therefrom, and the right to pass one-half of the property (not the less desirable money) by testamentary disposition. Second, it classifies as an exemption something *traditionally* treated by state property law as an inherent characteristic of the estate involved.

Since the Fifth Circuit decisions discussed above were decided, the Texas Legislature has repealed the statute involved.¹⁴³ The new provision in the recently enacted Family Code¹⁴⁴ continues the rule under which the previous decisions were made, except that the wife's earnings are no longer classified as "special community" property. These earnings are now community property subject to a spouse's "sole management, control, and disposition." It is doubtful that a mere failure to classify the property in the same way will cause any changes. However, to this writer the new provision sounds even more like a simple state exemption than did the old statute.

Quite recently the Supreme Court of the United States has had occasion to discuss the interrelation of community property laws (or exemptions) with federal taxing provisions. In *United States v. Mitchell*¹⁴⁵ the Court was called upon to classify a characteristic of the community property law of Louisiana

¹³⁹ 424 F.2d 1142 (9th Cir. 1970).

¹⁴⁰ INT. REV. CODE of 1954, § 7403.

¹⁴¹ *Overman v. United States*, 424 F.2d 1142, 1145 (9th Cir. 1970).

¹⁴² *In re Ackerman*, 424 F.2d 1148 (9th Cir. 1970).

¹⁴³ Act of May 27, 1967, ch. 309, § 6, [1967] Tex. Laws 741.

¹⁴⁴ TEX. FAM. CODE ANN. tit. 1, art. 5.61 (1970).

¹⁴⁵ 91 S. Ct. 1763 (1971).

as a property right or an exemption. For five years during their marriage, a Louisiana husband and wife had failed to file a federal income tax return, from 1955 to and including 1959. In 1960 the couple began living apart; prior to divorce the wife renounced her community interest pursuant to Louisiana law. The law provided that upon such an election by the wife she would be absolved from all "debts contracted during the marriage."¹⁴⁶ When the Commissioner assessed a deficiency against the wife for one-half the community income during the years for which no return was filed, the wife contended she was exempt from levy by virtue of her renunciation of the community.

The tax court held for the Government. The Fifth Circuit reversed.¹⁴⁷ In effect, the court of appeals found that because the right of renunciation was exercised a property right was erased, which admittedly existed during coverture. The Court reasoned that since tax law in this regard followed state property law, there remained nothing to which the federal tax liability could attach.

The Supreme Court reversed. The Court recognized that in some instances state law must be observed, but felt this was not such an instance. The Court stated: "The results urged by the petitioners might follow, of course, in connection with a tax or other obligation the collection of which is controlled by state law. But an exempt status under state law does not bind the federal collector. Federal law governs what is exempt from federal levy."¹⁴⁸

Arguably *Mitchell* does not touch the issues involved in separate tax obligations enforced on jointly owned property. The taxpayer in this situation is merely being held liable for one-half of a *community* debt, not a separate debt. The Court has classified the right of renunciation in Louisiana as an exemption rather than a property right. But in dictum the Court does indicate how it might rule if a situation analogous to those involving jointly owned property and separately incurred tax liens is presented to it. Approving *Overman*, the Court said: "As a consequence, state law which exempts a husband's interest in community property from his premarital debts does not defeat collection of his federal income tax liability for premarital tax years from his interest in the community. . . . The result as to Mrs. Mitchell . . . is no different."¹⁴⁹

Obviously this case does not touch the issue of whether the whole of a community asset should be sold to satisfy a separate debt out of one-half the proceeds. However, by its approval of *Overman* the Court implicitly approves the holding in that case that section 7403 would allow attachment of the whole of a community asset, in order to sell it and collect half the proceeds. This approach, as has already been noted, may be injurious to obligations of support and the interests of innocent third parties.

Having herein disapproved of holdings by both circuits, and dictum supporting the Ninth Circuit in *Mitchell*, a suggestion for a rule satisfying both uniformity of application and preservation of state superiority in the field of community property law is in order. It is suggested that the traditional concept of community property that *all* income during marriage is community be applied consistently by the federal court in a tax case, an approach not inconsis-

¹⁴⁶ LA. CIV. CODE ANN. art. 2410 (West Supp. 1967).

¹⁴⁷ *Mitchell v. Commissioner*, 430 F.2d 1 (5th Cir. 1970).

¹⁴⁸ 91 S. Ct. at 1771.

¹⁴⁹ *Id.* at 1772.

ent with *Mitchell*. This would allow attachment of one-half of all income of either spouse for an antenuptial debt of either. However, two important exceptions should be observed. One is that such income not be attached to the extent that it would interfere with an obligation of either spouse to support either the other spouse or the children of the marriage. The other is that, consonant with the protection of innocent third parties advocated in the previous discussion of tenancies by the entirety and joint tenancies, the whole of a community asset (as distinguished from earnings) should not be subjected to sale for the separate debt of one spouse, even if only one-half of the proceeds of that sale are to be taken and applied against the debt.

III. CONCLUSION

Separate conclusions have been drawn at the end of each section dealing with a form of joint ownership. All of them are aimed at achieving one goal—simplification of the revenue gathering process through uniformity of application, while preserving the sovereignty of the states in their own property law. In each of the estates discussed there are some basic rights about which there could be substantial agreement. In each separate area all the states involved have taken their law from the same source. The mutations each state has developed must be regarded, at least by the federal tax collector, as mere state exemptions, even though they may have become engrafted on the estate through long usage.

It is the opinion of this writer that the courts have generally taken a very shallow approach to the problems discussed herein. Arguably, the tax collector should either respect state law completely, or set his own standards. The former ignores the need of the Government to collect revenues; the latter ignores the right of the states to establish their own property systems. Both do remove the doubt from a taxpayer in situations such as those discussed herein. A better approach would be an in-depth approach; *i.e.*, each particular state law involved should be examined to determine if it is really an integral part of the property concept being considered. In order to do this the legislative and judicial history of the law must be studied. Although this would initially involve some scholarly research, once settled the courts would have concrete rules on which to base their decisions. The Supreme Court should take the lead.

The result of this should be as follows: Reconciling the twin aims of uniformity and preservation of state laws, the unity concept of a tenancy by the entirety must be respected. Thus, the only attachable interest of a tenant by the entirety for his separate debt is the survival contingency. The lien cannot attach until the contingent event occurs.

In the area of joint tenancy the individual tenant has a present vested right to half the rents and profits from the jointly held property. This interest is attachable, provided no duty of support to a third party is thereby abrogated. Sale of one tenant's proportionate part should be allowed when it can be done without damaging the estate of the remaining tenants. If it cannot be equitably divided, for the protection of the innocent third parties it should not be sold.

The separate debt of one spouse in a community property system must be satisfied, for federal tax debts at least, out of his or her one-half participation in the community, inclusive of *all* income of both the spouses. Again, this is provided a duty of support is not thereby abrogated. If half of some piece of community property can be sold without doing damage to the other part, it should be done when necessary. The whole of a community asset should not be sold and half the proceeds taken to satisfy a separate debt.

As long as there are fifty independent jurisdictions in this country complete uniformity of application of the revenue laws is impossible. This is not necessarily a denial of the equal protection of the laws.¹⁵⁰ With regard to the particular problems dealt with in this Comment, it is believed that the above conclusions represent an equitable solution, since they would allow the Government to plan its fiscal policy, preserve the integrity of deep-rooted state property concepts, and protect the interests of innocent third parties.¹⁵¹

¹⁵⁰ Colorado Title Guar. Co. v. Allan, 212 F. Supp. 341 (D. Colo. 1962).

¹⁵¹ As the Supreme Court noted in *Mitchell*, it may be the only remedy to the inequities caused by an approach along the *Overman* lines is in legislation. As the Court notes in *Mitchell*, Congress took measures to protect an innocent spouse in P.L. 91-679 (Jan. 12, 1971), 84 Stat. 2063. This legislation added subsection (e) to section 6013 and the last sentence in section 6653(b) of the Internal Revenue Code. Under these new enactments a spouse who is a party to a joint return in which income is understated or fraud is committed is exonerated from liability if that spouse is innocent of any wrongdoing with respect to these errors. This kind of legislation is the type of protection of third parties espoused in this Comment. It is the feeling of this author that similar legislation is needed in the area of separate federal tax liens which are enforced on jointly owned property to the detriment of innocent joint owners.