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FEDERAL TAXATION AND COMMUNITY PROPERTY: THE WIFE'S RIGHTS IN HER EARNINGS

Ottis Jan Tyler

Article 4616¹ of the Texas Revised Civil Statutes provides as follows:

Neither the separate property of the wife, her personal earnings, nor the revenue from her separate property shall be subject to the payment of debts contracted by the husband nor claims arising out of the torts of the husband.

What is the nature of this statute? Does it merely make the earnings and revenues of the wife exempt from execution by the husband's creditors? Or does it create a special property right for the married woman in her personal earnings and revenues from her separate property? In other words, is there a classification of matrimonial property in Texas distinct from the community and separate property estates?²

To the practicing lawyer the answers to such questions may seem on first impression to be, and indeed in the usual debtor-creditor relationship are, largely academic. Any creditor of the husband attempting to garnish or levy upon the revenues of the wife's separate property or upon her wages will be thwarted by the provisions of article 4616. However, in one situation the questions concerning the nature of that article become of extreme importance. That situation develops when the federal government seeks an attachment on the wife's wages or separate property in order to collect federal revenues. This circumstance, of course, throws one into the seemingly never-ending conflict between federal supremacy and the substantive property laws of the several states. The federal government, not being bound by the state exemption statutes, naturally takes the position that article 4616 is merely an exemption. On the other hand, a wife fighting to retain her personal earnings will contend that the statute

¹ Tex. Rev. Civ. Stat. Ann. (1958). The statute is captioned "Wife's Separate Property Protected." Obviously this is not an accurate heading since the statute is by no means limited to the wife's separate property. Furthermore, the caption appears to have been supplied by a compiler rather than by the Legislature. See S.B. 382, 39th Leg., 22 G.L. 282 (1925); "An Act to Revise the Civil Statutes of Texas," 39th Leg., Final Title, §§ 22, 23 (1925).

² It should be pointed out that many commentators in discussing the wife's personal earnings and revenues from her separate property have identified such as "special community property." See commentaries cited note 53 *infra*. It seems this term was devised merely as a mode of expression and was not designed to indicate the creation of substantive property rights. Moreover, the phrase "reserved community property" is more descriptive if the provision is purely an exemption statute. Whether property rights have been created or merely an exemption provided by the Legislature is one of the principal points to be covered by this Comment.

defines her property rights and, therefore, that the federal government is unable to attach the property protected by the article.

A federal district court for the northern district of Texas has recently decided this issue. In a significant decision concerning the collection of federal taxes, Judge Sarah Hughes in *Helm v. Campbell*³ issued a permanent injunction against the District Director of Internal Revenue prohibiting him from seeking to levy upon the wages of a wife to pay a community tax debt of her husband. No opinion was written, but findings of fact and conclusions of law were issued.⁴ In the conclusions of law the court ruled that article 4616 was not an exemption statute but created a special property right in the wife. It is the purpose of this Comment to analyze the wife's right in her earnings, vis-à-vis the federal tax authorities, through the vehicle of the factual situation presented in the *Helm* decision.

I. THE HELM CASE

A. *The Facts*

Several years prior to the suit under discussion, the wife commenced employment with her only employer; she was married a few years later. During the years 1953 through 1956 her husband operated a cabaret in Dallas. The cabaret was conducted as a proprietorship, with the wife having no part in its management or operation. During that period the husband failed to collect any of the so-called "cabaret tax."⁵ However, the District Director determined that the

³Civil No. 9043, N.D. Tex., Sept. 6, 1962.

⁴The conclusions of law filed by the court were as follows:

1. Section 7421(a) of the Internal Revenue Code does not apply against a person not owing the tax involved.
2. Where the District Director levies upon property belonging to one person to satisfy the tax liability of another, the true owner is entitled to an injunction to prevent the seizure.
3. State law controls in determining the nature of the legal interest which the taxpayer had in property levied on by the District Director.
4. A married woman in Texas has a vested interest in her own wages and the right to manage and control such wages.
5. The Texas statute providing the earnings of the wife are not subject to the payment of the debts of the husband establishes property rights and is not a mere exemption.
6. The property laws of Texas do not grant the husband the right to control the wife's wages or to subject them to his debts.
7. Under Texas laws the property interest of a husband in his wife's wages is not sufficient to satisfy the requirements of sec. 6321 in order to justify seizure thereof to satisfy the husband's unpaid taxes.
8. Under Texas property laws the seizure of the wife's wages would destroy the rights of the wife and such seizure by the District Director to satisfy the husband's unpaid taxes will not be permitted.

⁵This tax is imposed by section 4231(6) of the Internal Revenue Code of 1954. That section presently reads:

(6) Cabarets.—A tax equivalent to 10 percent of all amounts paid for ad-

operation of the cabaret was within the taxing statute and made an assessment for a deficiency in the tax. The husband maintained that he did not owe the tax but failed to contest the issue administratively or in the courts.⁶

In 1959 the District Director secured a general tax lien upon all of the property of the husband.⁷ In 1960 when the Director levied upon the wages of the husband to satisfy the tax debt, the husband promptly quit work. Not being able to collect any of the tax due from the husband, the Director on January 26, 1962, gave notice to the wife's employer of a levy upon her wages in order to satisfy the tax obligation of her husband. The employer was, from the date of the notice until the tax debt was fully paid, to make all payments of funds to which the wife was entitled to the District Director. The Director in his notice of levy stated that the tax debt, being incurred in the production of community income, was a community debt. Therefore, the wages of the wife, likewise being community income, could be garnished to pay the community debt.

Since the salary of the wife was the sole means of support for her and her two minor children, she petitioned the court for a temporary restraining order against the Director. The Director consented not to make the levy until the issue had been fully litigated. On September 6, 1962, the court issued a permanent injunction restraining the Director from levying upon the salary of the wife to pay the cabaret tax debt of the husband.

B. *The Government's Defense*

In response to the wife's complaint, the government moved to dis-

mission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The tax imposed under this paragraph shall be returned and paid by the person receiving such payments; except that if the person receiving such payments is a concessionaire, the tax imposed under this paragraph shall be paid by such concessionaire and collected from him by the proprietor of the roof garden, cabaret, or other similar place.

This section was amended by Congress in 1958. See 72 Stat. 1286 (1958). The only material change, however, from the old provision was the amount of tax which was reduced from 20% to 10%.

⁶ Many others did contest the cabaret tax. This issue was finally settled by the Fifth Circuit in *Stevens v. United States*, 302 F.2d 158 (5th Cir. 1962), and *Luna v. Campbell*, 302 F.2d 166 (5th Cir. 1962), which held adversely to the taxpayers.

The husband in the present case had been assessed with taxes totaling more than \$45,000. However, at the time of the filing of the petition, this amount had grown to better than \$52,000 due to the accruing of interest.

⁷ The husband apparently never filed any excise tax return. The Director upon finding the deficiency filed one for the husband. Only the husband's name and the name of the cabaret appeared on the return and on the assessment notice. Only the name of the husband appeared on the notice of general lien. The name of the wife did not appear on any of the notices save the one ordering the levy upon her wages.

miss, relying upon two theories which mitigated against granting the injunction. The first theory was that the action was a suit to enjoin the collection of a tax levied by the District Director and that such action was expressly prohibited by section 7421(a)⁸ of the Internal Revenue Code of 1954. The second theory was that article 4616 was actually just a state statutory exemption and that under the Supreme Court case of *United States v. Bess*,⁹ state law is ineffective to exempt property from subjugation to the federal revenue laws.

C. *The Wife's Reply*

The wife's answer to the federal statute prohibiting the injunctions was simple. She was not seeking to enjoin the collection of a tax she owed but was attempting to enjoin the trespass upon her property attempted by federal agents in satisfaction of a tax debt owed by another. Furthermore, she argued, article 4616 was a statute providing for the wife's property rights and was not merely an exemption statute.

If she in fact were not the taxpayer, the wife's argument was valid. It seems that all courts faced with this problem have held that the injunction prohibition in section 7421(a) does not apply in an action by a non-taxpayer.¹⁰ As the Tenth Circuit Court of Appeals has said:

If the Government sought to levy on the property of A for a tax liability owing by B, A could not and would not be required to pay

⁸ Section 7421(a) reads as follows: "Except as provided in section 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The exceptions referred to are the provisions of the income, estate, and gift tax laws authorizing an injunction against assessment or collection of taxes without the issuance of a 90-day letter or during the period in which assessment or collection is prohibited, after the sending out of the 90-day letter.

The Supreme Court has recently spoken on the effect of section 7421(a). In *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1 (1962), the Court held that an injunction was prohibited notwithstanding the fact that the tax "would destroy its [taxpayer's] business, ruin it financially and inflict serious loss for which it would have no remedy at law." 370 U.S. at 6. The Court, however, did say the injunction could be maintained in the face of the statute. The Court stated:

[I]f it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the *Nut Margarine* case [*Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932)] the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in "the guise of a tax." 370 U.S. at 7.

It cannot be said in the present case that the government's claim of liability was without foundation. See note 6 *supra*.

⁹ 357 U.S. 51 (1958).

¹⁰ See *Holland v. Nix*, 214 F.2d 317 (5th Cir. 1954); *Shelton v. Gill*, 202 F.2d 503 (4th Cir. 1953); *Raffaele v. Granger*, 196 F.2d 620 (3d Cir. 1952); *Jones v. Kemp*, 144 F.2d 478 (10th Cir. 1944); *Tomlinson v. Smith*, 128 F.2d 808 (7th Cir. 1942); *Rothensies v. Ullman*, 110 F.2d 590 (3d Cir. 1940); *Hubbard Inv. Co. v. Brast*, 59 F.2d 709 (4th Cir. 1932); *Sistrunk v. Director of Internal Revenue*, 119 F. Supp. 78 (E.D. Tex. 1954); *National Iron Bank v. Manning*, 76 F. Supp. 841 (D.N.J. 1948); *Tower Prod. Co. v. Jones*, 45 F. Supp. 593 (W.D. Okla. 1942); *Long v. Rasmussen*, 281 Fed. 236 (D. Mont. 1922).

the tax under protest and then institute an action to recover the amount so paid. His remedy would be to go into a court of competent jurisdiction and enjoin the Government from proceeding against his property.¹¹

Thus, in a common law state, if the husband owes a tax as the taxpayer, the government cannot levy upon the wages of his wife, since she is not the taxpayer and he has no interest in her personal earnings.¹² This is especially true where the husband in the operation of a business as a proprietorship is the one solely liable for a tax, such as the excise tax involved in the *Helm* case. However, since Texas is one of the eight¹³ states having a community property system, the premise that the wife is a non-taxpayer must be questioned.

II. THE WIFE AS A TAXPAYER IN COMMUNITY PROPERTY STATES

The law is quite clear in Texas that irrespective of which spouse operates a business as a proprietorship, the income from its operation is community property and all debts incurred in its operation are community debts.¹⁴ Moreover, under the Supreme Court's holding in *Poe v. Seaborn*,¹⁵ for federal tax purposes at least, all income earned and all expenses incurred during coverture are to be split equally be-

¹¹ *Adler v. Nicholas*, 166 F.2d 674 (10th Cir. 1948). The Fifth Circuit has likewise taken this position in *Maule Indus., Inc. v. Tomlinson*, 244 F.2d 897 (5th Cir. 1957), where it said:

There is no longer any doubt but that where a District Director of Internal Revenue has levied upon property belonging to one person in order to satisfy the tax liability of another, the true owner may obtain from the United States district court an injunction against the District Director to prevent the sale of such property, and that, as the owner is not the taxpayer involved, such relief is not prohibited by 26 U.S.C.A. § 7421.

¹² This is assuming that no joint return was filed. See note 67 *infra* and accompanying text.

¹³ The states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington have the community property systems. Hawaii makes a pretense at being a community property state to some extent. Also, Puerto Rico has always been a community property jurisdiction.

¹⁴ See *Colden v. Alexander*, 141 Tex. 134, 171 S.W.2d 328 (1943); *Hardee v. Vincent*, 136 Tex. 99, 147 S.W.2d 1072 (1941); *Walker-Smith Co. v. Coker*, 176 S.W.2d 1002 (Tex. Civ. App. 1944—Eastland) *error ref.*; Tex. Rev. Civ. Stat. Ann. arts. 4619, 4620 (1958).

¹⁵ 282 U.S. 101 (1930). The Court held that the question of who was taxable on the income in community property states was determined by state law. The test established was: Did each spouse have a vested interest in the income? If each did, the income could be split for tax purposes; if not, the person earning and having control of the income had to report all of it. On the same day the Court decided *Hopkins v. Bacon*, 282 U.S. 122 (1930), which declared that

the interest of a wife in community property in Texas is properly characterized as a present vested interest, equal and equivalent to that of her husband, and that one-half of the community income is therefore income of the wife. She and her husband are entitled to make separate returns, each of one-half of such income. 282 U.S. at 126, 127.

tween the husband and wife. Accordingly, the husband and wife are each liable for one-half of the taxes on community income. This would seem to be true whether the taxes involved were income or excise. Thus in accordance with the reasoning of the *Seaborn* case, the wife in *Helm* would be liable for at least one-half of the cabaret tax. If this is correct, the wife truly is a taxpayer to the extent of one-half of the tax.¹⁶ Regardless of the nature of article 4616, the Director can then levy upon the wages of the wife to the extent of one-half of the amount due.¹⁷

Since the tax debt is community, there is some merit in recognizing that the wife's entire salary may be subject to levy. This could follow from the fact that normally all community property is liable for community debts.¹⁸ In any event, under the doctrine of the *Seaborn* case, it seems that the wife is truly a taxpayer in a community property state where she has a present vested interest in the community property.

This reasoning may possibly have influenced the court in the *Helm* case. If the court had thought that the wife was not the taxpayer, the conclusions of law¹⁹ could have ended after the court so held. The wife not being the taxpayer could, therefore, prevent the Director from levying upon her property to pay the tax debt of another. However, the court obviously did not choose to limit the conclusions of law in this manner.

III. ARTICLE 4616—PROPERTY RIGHTS V. EXEMPTION

It is hornbook law that the federal government in its collection of internal revenue is not bound by state exemption statutes.²⁰ The only property exempt from execution by the federal government is that

¹⁶ Cf. *Flores v. Bailey*, 341 S.W.2d 473 (Tex. Civ. App. 1960—El Paso) *error ref. n.r.e.* Here the wife sought to restrain a payee of a note executed by both husband and wife from execution upon the one-half community share of the wife in a certain tract of land purchased in 1958. The note was issued in 1952 and the payee secured a judgment thereon in 1955. However, in 1957 the husband was adjudged bankrupt and all claims discharged or released. The court held that the community interest of the wife in the land was subject to execution and the wife's liability was not discharged by the husband's bankruptcy. See also *Durian v. Curl*, 155 Tex. 377, 286 S.W.2d 929 (1956).

¹⁷ As will be noticed article 4616 does not exclude the wife's own debts. But with respect to what "the wife's own debts" are, see *Humbles v. Hefley-Stedman Motor Co.*, 127 S.W.2d 515 (Tex. Civ. App. 1939—Austin) *no writ. hist.*; cf. *Poe v. Seaborn*, 282 U.S. 101 (1930).

¹⁸ Tex. Rev. Civ. Stat. Ann. art. 4620 (1958).

¹⁹ See note 4 *supra*.

²⁰ *United States v. Bess*, 357 U.S. 51 (1958); *Fink v. O'Neil*, 106 U.S. 272 (1882); *Knox v. Great West Life Assur. Co.*, 212 F.2d 784 (6th Cir. 1954); *United States v. Heffron*, 158 F.2d 657 (9th Cir. 1947); *Shambaugh v. Scofield*, 132 F.2d 345 (5th Cir. 1942); *Smith v. Donnelly*, 65 F. Supp. 415 (E.D. La. 1946).

which is expressly made exempt by Congress.²¹ However, where the question involves property rights instead of exemption laws, the federal government's actions are governed by the substantive laws of the particular state in which the action is to be taken. For

in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property sought to be reached by the statute. Thus . . . Section [6321] [which grants a lien upon all property of the taxpayer for unpaid taxes] creates no property rights but merely attaches consequences, federally defined, to rights created under state law. . . .²²

In the *Helm* case in order to avoid the federal levy on her wages, it was necessary that the wife show that article 4616 was not merely an exemption statute but was actually a statute creating property rights in the married woman in Texas. Cognizant of this, she argued that a wife has a present vested interest in her own wages under article 4619, which specifies that all property acquired during the marriage is common property.²³ However, under that statute the husband would also have a vested interest in his wife's wages. To counter that argument, the wife asserted that article 4616 prevented the husband from having a vested interest in her wages until those wages had been converted into other property.²⁴ Only upon conversion did the husband receive such an interest as to permit his creditors to attach the property. Thus, under the wife's theory, the statute: (1) creates property rights in the wife; (2) limits corresponding property rights in the husband; and (3) exempts the wife's wages from the husband's debts.

A. Legislative Intent

In proving that article 4616 grants more than an exemption, a logical argument may be made based upon legislative intent. Indeed, in *Helm* counsel for the wife stated:

The exemptions under Texas law which are designed to protect an unfortunate debtor are found in Title 57 of the Revised Civil Statutes. Title 57 is entitled "Exemptions". Article 4616, which deals with the property rights of the husband and wife, is found in Chapter 3 of Title 75 of the Revised Civil Statutes. It is important to note that

²¹ *United States v. Bess*, *supra* note 20. Section 6334 enumerates the only exemptions provided by Congress. The items of wearing apparel, school books, fuel, provisions, furniture, personal effects, and books and tools of a trade, business, or profession are listed. Int. Rev. Code of 1954, § 6334. Salaries and wages are not listed.

²² *Aquilino v. United States*, 363 U.S. 509, 513 (1960).

²³ See Tex. Rev. Civ. Stat. Ann. art. 4619 (1958); see also *Poe v. Seaborn*, 282 U.S. 101 (1930), discussed note 15 *supra* and accompanying text.

²⁴ See *Strickland v. Wester*, 131 Tex. 23, 112 S.W.2d 1047 (1938), discussed note 58 *infra*.

said Title 75 has been entitled "Husband and Wife" and Chapter 3 thereof, which contains Article 4616, has been entitled "Rights of Married Women". The point of this discussion is that Article 4616 is not found among the exemption statutes, but rather is found among statutes which deal with the basic property rights of a husband and wife in Texas. This factor is highly indicative of legislative intent regarding the very nature of Article 4616. If the legislators of the State of Texas intended for Article 4616 to be regarded as an exemption, then Article 4616 would have been placed among those statutes under Title 57 which deal with the matter of exemptions.²⁵

Other factors tend to justify such a conclusion. First, the word "exemption" is noticeably absent from the language used in article 4616. Second, the Supreme Court of Texas has defined "exemption" as "a right given by law to a debtor to retain a portion of his property free from the claims of creditors."²⁶ However, in article 4616, the words "debtor" and "creditor" are absent. Third, the statute is silent as to the debts incurred by the wife herself; and, finally, debts of the wife are in fact expressly covered by article 4623,²⁷ where her personal earnings are made liable for her obligations. Thus, an apparent conclusion is that the Legislature intended that article 4616 create a special property right in the wages of the wife and not merely make her wages exempt from the husband's creditors.²⁸

On the other hand, a careful historical review will show clearly

²⁵ Brief for Petitioner, pp. 10, 11, *Helm v. Campbell*, Civil No. 9043, N.D. Tex., Sept. 6, 1962.

²⁶ *Pickens v. Pickens*, 125 Tex. 410, 83 S.W.2d 951 (1935).

²⁷ Tex. Rev. Civ. Stat. Ann. art. 4623 (1958).

²⁸ In the *Helm* case, the brief for the wife concluded:

What, then, is the relationship between Art. 4616 and Art. 4623, and what is the concept set forth by these provisions? One is forced to the conclusion that these two provisions, which are found among other statutory provisions setting forth the basic property rights of husband and wife, must be looked to to determine the nature and definition of a husband's property interest or "rights to property" in his wife's personal earnings. To use an old law school expression, these two provisions describe the "bundle of sticks" of the husband in contrast to his wife vis-a-vis the wife's personal earnings. In defining the husband's property interest in his wife's wages, the Texas legislature has seen fit to omit some very important sticks from his "bundle of sticks." The legislature, through Art. 4616, has provided that the husband has no property interest in his wife's wages which is capable of being seized in satisfaction of his debts. The wife's "bundle of sticks," however, does include the very important right to subject her wages to the claims of her creditors. Brief for Petitioner, p. 13.

Somewhat similar arguments have been made with respect to the wife's interest in the community homestead. See *Shambaugh v. Scofield*, 132 F.2d 345 (5th Cir. 1943); *Morgan v. Moynahan*, 86 F. Supp. 522 (S.D. Tex. 1949); *Paddock v. Siemoneit*, 147 Tex. 571, 218 S.W.2d 428 (1949). However, there appears to be a clear distinction between these cases and those involving the wife's personal earnings, since the homestead right is usually considered to be an estate in land. *Woods v. Alvarado State Bank*, 118 Tex. 586, 19 S.W.2d 35 (1929).

that the arrangement of the statutory compilations is completely irrelevant in the ascertainment of the Legislature's intention concerning article 4616.

In 1848 the Second Texas Legislature passed what is now basically covered under the title of "Husband and Wife" in the civil statutes.²⁹ At that time there was no systematic arrangement of the statutes. All laws enacted by the Legislature were merely printed in the "Texas Acts" as they were passed. These acts were compiled in chronological order and bound.³⁰ Hartley published in his commercial digest in 1850 the first compilation of the Texas statutes gathering all acts on related subjects under one heading.³¹ This arrangement was also adopted by Pascal in his digests of 1866³² and 1870,³³ since the lawyers of Texas had become intimately acquainted with the procedure.³⁴

The Legislature has revised the civil statutes on four occasions. The first, in 1879, was almost identical to the pattern followed by Pascal. The same order was carried forward in the revisions of 1895, 1911, and 1925. Thus, it seems that the Legislature had nothing to do with grouping the statutes. Even the classification employed today is a continuation of the plan devised by Hartley, a commercial publisher. Surely his classifications are not indicative of legislative intent concerning a statute, since it appears that the Legislature has preserved the present plan merely as a matter of convenience for members of the bar. Therefore, the juxtaposition of article 4616 in the section "Rights of Married Women" means little, if anything, regarding its intended effect.³⁵

Furthermore, the mere presence or absence of certain words such as "exemption," "debtor," or "creditor" is not persuasive. The Legislature drafted the statute to be all-inclusive in order to embrace all persons holding claims against the husband. To have used the words

²⁹ Texas Acts 1848, 3 G.L. 77 ("An Act Better Defining the Martial Rights of Parties").

³⁰ Before the compilations were published, searching for statutes was a difficult and trying task. A researcher had to read every act of the Legislature to assure himself of not missing any relevant statutes. Furthermore, to be assured that the statute found had not been overruled, it was necessary to review all subsequent acts.

³¹ Hartley, *Digest of the Laws of Texas* (1st ed. 1850). In this respect Hartley said, "The alphabetical arrangement is employed, the heads which are most familiar to the *Profession*, in Texas, being preferred." *Id.* at 1.

³² Pascal, *Ann. Digest* (1st ed. 1866).

³³ Pascal, *Ann. Digest* (2d ed. 1870).

³⁴ Pascal, in the preface to his second edition, with respect to Hartley's classifications, stated: "The plan of presenting each section of our laws as a distinct article, when the Legislature had made no such distinction, was a bold conception."

³⁵ It should be pointed out that all exemptions are not found in title 57. Exemptions from inheritance taxes, for example, are found under title 122. Might it not be argued that article 4616 possibly refers only to ordinary creditors and not to the taxing authorities since the tax exemptions are specifically provided for elsewhere?

"exemption," "debtor," and "creditor" might have placed a restriction on the scope of the statute. Such factors are, therefore, of little significance in ascertaining the Legislature's intent.

B. *The Case Law*

A federal court in applying state law must apply that law as it exists.³⁶ Even though a federal court believes the state courts have either incorrectly stated the law or misapplied it,³⁷ it must nevertheless apply that law in federal cases involving state property rights.³⁸ Thus the availability of the wife's personal earnings as a source of funds for the payment of the husband's community tax debts is governed by the local law as far as substantive property rights are concerned. In other words, the federal tax authorities are bound by the state courts' determination of whether a statute defines property rights or merely provides for exemptions. Once that determination is made, federal rights attach.³⁹

In Texas, a court⁴⁰ has said with respect to article 4616 and the wife's earnings:

This is an exemption statute. It exempts the wife's separate property and the income therefrom of the character stated from being subjected to the payment of debts contracted by the husband and or the husband's torts.⁴¹

In the case of *Arnold v. Leonard*⁴² the same statute was thoroughly analyzed and discussed by the Texas Supreme Court. Throughout the entire discussion of the statute the court repeatedly referred to it as an exemption statute.⁴³ Apparently, it is Texas law that article 4616 is an exemption statute. Hence, in federal tax proceedings it cannot acquire any other character.⁴⁴

Assuming, however, that the statute does not merely create an exemption, a further question arises as to the power of the Texas Legislature to create special property rights in the wife and so to limit the

³⁶ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

³⁷ For an indication of the personal views of the judge in the *Helm* case see Hughes, *Legal Status of Women in Texas*, in *The Texas Observer*, Nov. 27, 1959, p. 4.

³⁸ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

³⁹ See note 22 *supra* and accompanying text.

⁴⁰ *Illich v. Household Furniture Co.*, 103 S.W.2d 873 (Tex. Civ. App. 1937—El Paso) *error ref.*

⁴¹ *Id.* at 874.

⁴² 114 Tex. 535, 273 S.W. 799 (1925).

⁴³ For an example see note 45 *infra* and accompanying text.

⁴⁴ It should be pointed out that none of the Texas cases discussed above were brought to the court's attention in the *Helm* case.

property rights of the husband. In this respect the Texas Supreme Court has stated:

We see no escape from the deduction that, if the Legislature may rightfully place such portions of the community as it may deem best under the wife's separate control, and make same subject to disposition by her alone, it may likewise *exempt* the same from payment of the husband's debts, without the *exemption* being open to successful constitutional attack by either the husband or his creditors.

...
But the Legislature could not divest the husband of all interest in and to property which, under the Constitution, was guaranteed either to the community or to the husband's separate estate, and use the same to enlarge the wife's separate estate beyond its constitutional limits.⁴⁵ (Emphasis added.)

The Texas Constitution declares that all property owned before marriage and that received after marriage by gift, devise, or descent shall be the separate property of the wife.⁴⁶ By the above language the Texas Supreme Court has declared that this cannot be expanded by the Legislature. The Legislature does have the power to define the rights of the wife, *i.e.*, to *exempt* her property from the husband's debts; but it *cannot divest* the husband of his property rights.

Therefore, apparently only one conclusion can be reached from the foregoing: article 4616 cannot create a new class of property rights in the wife. The court of last resort in Texas, by approving a holding that the statute is an exemption statute, has in effect placed it in the category of state statutory restrictions not effective to prevent federal revenue collections. Accordingly, the wife's salary, being community property, is subject to levy by the District Director to pay community tax debts of her husband.

IV. THE RIGHT TO CONTROL PERSONAL EARNINGS OF THE WIFE

The court in the *Helm* case also ruled that the wife, not the husband, had control over the wife's personal earnings.⁴⁷ The validity of this holding is important for two reasons. First, if in Texas the husband has no control over the wages of his wife, a strong argument can be made that the husband does not have any property rights in the wife's personal earnings. Second, the quantity of control is of paramount importance in controversies involving federal taxation

⁴⁵ *Arnold v. Leonard*, 114 Tex. 535, 545, 547, 273 S.W. 799, 804, 805 (1925).

⁴⁶ Tex. Const. art. 16, § 15.

⁴⁷ In the conclusions of law the court in the *Helm* decision stated that "a married woman in Texas has . . . the right to manage and control" her own wages, Conclusion of Law No. 4, note 4 *supra*, and that the "property laws of Texas do not grant the husband the right to control the wife's wages." Conclusion of Law No. 6, note 4 *supra*.

matters, since in many cases control is a more decisive factor than technical legal title.⁴⁸ It is, therefore, necessary to examine the quantity of control which the husband has over the wages of the wife in Texas. This, of course, throws one into the inevitable legalistic maze of the statute revisions of 1925,⁴⁹ *Arnold v. Leonard*,⁵⁰ *Pottorff v. J. D. Adams Co.*,⁵¹ and *Bearden v. Knight*.⁵²

Although the commentators cannot seem to reach a common opin-

⁴⁸ Cf. the following statement from *Helvering v. Horst*, 311 U.S. 112 (1940): "The power to dispose of income is the equivalent of ownership of it." 311 U.S. at 118. Although no case has been found where the argument has been made, it would seem that the federal tax authorities could possibly levy upon the wages of the wife for the tax debt of the husband because of the control factor. Such a theory might be developed out of the doctrine of the cases of *Burnet v. Wells*, 289 U.S. 670 (1933), *Corliss v. Bowers*, 281 U.S. 376 (1930), and *Lucas v. Earl*, 281 U.S. 111 (1930).

⁴⁹ Prior to 1913, the husband had the control and management of all the property of both spouses. These powers of management extended to both community and separate properties of him and his wife (to a limited extent). In 1913, however, the Legislature divided the power of control and management between the spouses. The wife received the right to manage her own separate property, the revenues from her separate property, and her personal earnings. The husband was entitled to continue his management rights over the remaining community property and his separate property. Similarly the rights of creditors were so divided. All creditors of the husband could get satisfaction only out of the property which he controlled.

In 1917 the Legislature attempted to make the revenues from the separate property of the wife her separate property. However, the laws were later held to be invalid as in conflict with the Texas Constitution. See *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925). In the 1925 revision of the Texas statutes, the provisions giving the wife the control and management of the income from her separate property and her personal earnings were not reenacted although the provision exempting them from the debts of the husband was. This of course opened a controversy as to whether the wife still had the right to control and manage her personal earnings. See commentaries cited note 53 *infra*.

⁵⁰ 114 Tex. 535, 273 S.W. 799 (1925). The court declared the Legislature's attempt to make the revenues from the wife's separate property her separate property unconstitutional. By this time the 1925 statute revision had been completed. The general understanding seems to be that the Legislature saw no need in saying that the revenues from the wife's separate property would be under her control since other provisions gave her the right to manage her separate property. See *Bearden v. Knight*, 149 Tex. 108, 228 S.W.2d 837 (1950). However, this does not explain the omission of the right to control her personal earnings, which were never made the wife's separate property in the 1913 or 1917 enactments.

⁵¹ 70 S.W.2d 745 (Tex. Civ. App. 1934—El Paso) *error ref.* The court held that the omission by the Legislature in 1925 of the express provision giving the wife control and management of her personal earnings was significant and that with the omission the law after the 1925 revision was as it existed prior to 1913. The wife, accordingly, did *not* have the right to control and manage her personal earnings.

There seems to be no doubt as to who had control of the wife's wages before 1913. For as was stated by the Texas court in *Martin v. Hays*, 36 S.W.2d 796, 799 (Tex. Civ. App. 1931—El Paso) *error ref.*, "[A] married woman had no right at common law to contract, and in Texas any authority of a married woman to contract must be given by the Constitution or statutes. . . ." See note 49 *supra* for a discussion of the statutory provisions.

⁵² 149 Tex. 108, 228 S.W.2d 837 (1950). The court held that the wife nevertheless maintained the right to control and management over the revenues from her separate property even though the Legislature had omitted in the 1925 revision the provision expressly giving the wife this right. See note 56 *infra*. Personal earnings were not involved in the case and the court did not overrule the *Pottorff* case.

ion,⁵³ this much is clear. Prior to 1913 the wife had no rights of management or control over her personal earnings, this right being expressly placed by statute in the husband.⁵⁴ In 1913, by statute, the wife was given the right to manage and control her personal earnings.⁵⁵ However, in 1925 this statute was not reenacted,⁵⁶ and a Texas court in 1934 in the *Pottorff* case⁵⁷ held that such omission was significant and that the wife no longer had control over her salaries and wages. Not only has that case not been overruled, but it has been tacitly approved.⁵⁸ Furthermore, the statutes dealing with the rights of married women were amended in 1957,⁵⁹ and no statutory provision was added expressly giving the wife any rights of management or control in her earnings. Surely it is difficult to assume the Legislature was not aware of the decisions of the Texas courts which in effect deny the wife the right to control her earnings. In short, a federal court properly viewing the Texas law with respect to the rights of the wife to control her personal earnings would have to conclude that such rights were in the husband and not in the wife.⁶⁰

⁵³ Professor Huie thinks the Legislature did not mean to take away the wife's right to manage her personal earnings and that the *Pottorff* case is wrong and should be overruled. See Huie, *Commentary on the Community Property Law of Texas*, 13 Tex. Rev. Civ. Stat. Ann. 1 (1959). Judge Speer, on the other hand, thought the *Pottorff* case was correct. See Speer, *Marital Rights in Texas* § 169 (1929); see also Comment, *Control and Disposition of Special Community Property*, 4 Sw. L.J. 88, 98 (1950). For a view that the *Pottorff* case should be limited see Comment, *Legal Rights of Married Women in Texas*, 13 Sw. L.J. 84, 95 (1959). See also Blevins, *Recent Statutory Changes in the Wife's Managerial Powers*, 38 Texas L. Rev. 55, 75 (1959).

⁵⁴ Texas Acts 1848, § 3 G.L. 77.

⁵⁵ Texas Acts 1913, 16 G.L. 61.

⁵⁶ See the repealing clause of the 1925 statute revision, Tex. Rev. Civ. Stat. Ann. Final Title, § 2 (1956): "That all civil statutes of a general nature, in force when the Revised Statutes take effect, and which are not included herein, or which are not hereby expressly continued in force, are hereby repealed."

⁵⁷ *Pottorff v. J. D. Adams Co.*, 70 S.W.2d 745 (Tex. Civ. App. 1934—El Paso) *error ref.*

⁵⁸ See *Strickland v. Wester*, 131 Tex. 23, 112 S.W.2d 1047 (1938), where the court held that a creditor of the husband could reach personal earnings of the wife when they had been invested in land. "Her management powers were not discussed but such a limitation on the exemption statute [article 4616] negatives any effectual control or use of her earnings." Comment, *Legal Rights of Married Women in Texas*, 13 Sw. L.J. 84, 95 (1959). (Emphasis added.)

⁵⁹ See Texas Acts 1957, 55th Leg., ch. 407, § 2, at 1233.

⁶⁰ In this respect it is interesting to compare the court's holding in the *Helm* case with statements made earlier by Judge Hughes. In the conclusions of law the court held that "a married woman in Texas has a vested interest in her own wages and the right to manage and control such wages," Conclusion of Law No. 4, note 4 *supra*, and that "the property laws of Texas do not grant the husband the right to control the wife's wages or to subject them to his debts," Conclusion of Law No. 6, note 4 *supra*. In an article written in 1959, then state Judge Hughes wrote:

It has been said that Texas community property laws are generous to married women in that a wife is entitled to one-half of all the community property. That is true, but it is something like having money in the bank without being able to take it out. Money becomes valuable only if it can be withdrawn and used. Thus it is with community property. Even though the

V. A TECHNICAL "OUT" FOR THE WIFE IN TAX CASES

In cases arising with facts similar to those in the *Helm* case, the wife may be able to invoke the protection of the detailed procedures Congress has established in collection of federal revenue. The Commissioner has the power to make assessments of taxes upon determining that a taxpayer is delinquent.⁶¹ The Supreme Court⁶² has stated that these assessments have the same force and effect as a judgment; and if the amount assessed is not paid when due, the administrative officials are authorized to seize the taxpayer's property or rights to property in satisfaction of the tax debt. However, as conditions precedent to seizure, the taxpayer must be given notice of the assessment and payment demanded.⁶³ Accordingly, if the wife has not been given notice of the assessment and payment demanded, she possibly may be entitled to have the Director restrained from attaching her property to pay the community tax debt of her husband. This would follow from the Director's failure to follow the statutory steps as provided by Congress.

It seems that the court in the *Helm* case could possibly have granted the injunction on the theory that the wife was not given notice of the assessment. Although it is most likely that the wife had actual knowledge of all the Director's prior actions against the husband, there is no showing that the formal notice of assessment and demand for payment were ever given to her. The only notice apparently ever served on her was the notice of levy.⁶⁴ If the requirement of giving formal notice and the making of a formal demand are truly conditions precedent, as stated in the *Bess* case,⁶⁵ then the Director did not follow the statutory procedure in perfecting his lien and in executing the levy. Nevertheless the court did not so limit its findings of fact and conclusions of law.

wife owns one-half, she has control of none of it except the homestead, which can be disposed of or encumbered only by the joint signature of husband and wife. With regard to all other community property the husband has sole control. He may sell it, give it away, or spend it in riotous living.

.
 In the early days when most of the community property was derived from the husband's earnings, the law giving the wife half of the community property seemed generous, but today with many wives working and owning considerable property in their own right, the income from which is community, there is nothing fair about giving the husband the right to control her earnings and the income from her separate property. Hughes, *Legal Status of Women in Texas*, in *The Texas Observer*, Nov. 27, 1959, p. 4.

⁶¹ See Int. Rev. Code of 1954, § 6212.

⁶² *Bull v. United States*, 295 U.S. 247 (1935).

⁶³ Int. Rev. Code of 1954, §§ 6303, 6321; see *United States v. Bess*, 357 U.S. 51 (1958).

⁶⁴ See discussion note 7 *supra*.

⁶⁵ 357 U.S. 51 (1958).

VI. PROBLEMS RAISED BY HELM

The final determination of whether article 4616 creates property rights or merely provides an exemption may be a question which will have to be resolved exclusively by the federal courts. In Texas under article 3832(5),⁶⁶ salaries and wages are not subject to attachment. Furthermore, in an action in state court by a party other than the federal government, articles 4616 and 3832(5) will be a defense to an attempted levy upon the wages of the wife to pay a debt of the husband. However, should the federal authorities desire to have a state court rule upon the nature of article 4616, the federal government could file an action in the state court against the wife asking for a declaratory judgment concerning the nature of the statute. The final determination by the state courts would then be controlling on any action in a federal court.

The *Helm* case dealt with the cabaret tax, which is an excise tax upon the act of selling and collecting admissions and not a tax upon earned income. The question thus presented is whether or not the result should be any different when income taxes are involved. In the case where the husband and wife file a joint return the answer is easy. Here the wife definitely has no defense, for under the 1954 Code both husband and wife are jointly and severally liable for the tax due.⁶⁷ Therefore, if the husband fails to pay, the Director has the power to levy upon the wages of the wife, since she is directly liable, and article 4616 will not prevent levy upon her wages.⁶⁸

The situation is not so clear, however, when the husband and the wife file separate returns. For instance, suppose the husband and wife have voluntarily separated but have not secured a divorce.⁶⁹ The couple have two minor children which are permitted to live with

⁶⁶ Texas expressly prohibits a levy upon wages by creditors. See Tex. Rev. Civ. Stat. Ann. arts. 3832(5), 3835(5) (1958).

⁶⁷ Int. Rev. Code of 1954, § 6013(d)(3): "If a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several."

⁶⁸ See notes 17 and 27 *supra* and accompanying texts.

⁶⁹ This is assuming that the husband and wife upon separation did not enter into an agreement whereby all acquisitions of property by each would be separate property and not community. For the validity of these agreements see *Corrigan v. Goss*, 160 S.W. 652 (Tex. Civ. App. 1913—El Paso) *error ref.*; *accord*, *Selby v. Selby*, 148 S.W.2d 854 (Tex. Civ. App. 1941—Amarillo) *no writ hist. Contra*, *George v. Reynolds*, 53 S.W.2d 490 (Tex. Civ. App. 1932—Eastland) *error disp.* However, in absence of such a separation agreement, "abandonment of the wife by the husband does not deprive him of his interest in the community property, even though he should thereafter live in adultery with another woman. . . ." *King v. King*, 41 Tex. Civ. App. 473, 477, 91 S.W. 633, 635 (1906) *no writ hist.* See also *Carter v. Barnes*, 25 S.W.2d 606 (Tex. Comm. App. 1930), where the court held abandonment of the wife by the husband did not divest the husband of a community share in the wife's earnings.

the wife. The wife, in a desperate effort to support herself and the children, works and earns taxable income. The husband, having only himself to support, likewise is gainfully employed to the extent that he has taxable income. Neither the husband nor the wife receives any benefit from the other's wages. Each files a separate return. The husband reports one-half of his wages and one-half of the wife's as income and pays the tax due thereon. The wife, however, reports only her income in the entirety and none of the husband's. The Director determines a deficiency in the taxes of the wife and now attempts to levy on her wages.⁷⁰ A question immediately arises: Is the *Helm* case authority for seeking an injunction to restrain the Director from collecting the wages?

Assuming that the *Helm* case is correct, because it involved an excise tax, the question must still be answered "no" when an income tax is involved. Under the doctrine of *Poe v. Seaborn*,⁷¹ the wife has a present vested interest in the community income. It would then necessarily follow that the wife is liable for her portion of the tax on that income, notwithstanding the strong equities in her favor.⁷²

VII. CONCLUSIONS

It is the opinion of this writer that article 4616 is an exemption statute and that the federal government can, therefore, levy on the wages of the wife to pay a community tax debt of her husband. The judgment rendered in the *Helm* case is of a most questionable nature.

⁷⁰ Such a situation must necessarily assume that the husband is earning much more than the wife. For instance, assume that the husband is earning \$7,500, the wife \$3,500. The husband reports one-half of his income or \$3,750 and one-half of his wife's income or \$1,750 for a total gross income of \$5,500. Using the standard deduction, the husband's tax is about \$930.

The wife files her separate return reporting her \$3,500 salary as income and the two children as dependents. She pays \$270 tax. The Director determines a deficiency in her tax for failure to pick up one-half of the husband's income of \$3,750. She has then failed to report additional income in the amount of \$2,000 (\$3,750 less \$1,750) which means an additional tax of approximately \$400. The wife, because of the burdens of supporting herself and the two minor children, cannot pay the additional tax. The Director then attempts to levy on the wife's salary.

⁷¹ 282 U.S. 101 (1930).

⁷² See Jackson, *Community Property and Federal Taxes*, 12 Sw. L.J. 1, 5 (1958); Wren, *Tax Problems Incident to Divorce and Property Settlement*, 49 Calif. L. Rev. 665, 678 (1961). In his article Mr. Jackson stated:

In 1930 the United States Supreme Court recognized that the interest of a wife in community property in Texas is properly characterized as a present vested interest, equal and equivalent to that of her husband; that one-half of the community income is therefore income of the wife, and consequently she and her husband are entitled to make separate federal tax returns, each of one-half of such income.

Cf. Harrold v. Commissioner, 232 F.2d 527 (9th Cir. 1956); Elvina Ratto, 20 T.C. 785 (1953).

The conclusions of law as issued by the court are not substantiated by existing law, federal or state. In summary, my conclusions are:

(1) Section 7421(a) of the Internal Revenue Code of 1954 applies only to taxpayers and does not prevent non-taxpayers from obtaining injunctions against the District Director.

(2) An injunction may be maintained against the Director when he attempts to collect the tax by levying on the property not that of the taxpayer.

(3) State law determines whether article 4616 of the Texas Revised Civil Statutes creates property rights or merely provides an exemption.

(4) The Texas courts have said that article 4616 is an exemption statute.

(5) The husband and wife each have a vested interest in the earnings of the wife to the extent of their community one-half share. However, in Texas the wife is not given the right to control and manage her personal earnings.

(6) The District Director is not subject to state exemption statutes, and in Texas he can levy on the wife's earnings to the extent of satisfying the husband's one-half share of a community tax debt. Furthermore, the wife is a taxpayer to the extent of at least one-half of any community tax debt. Consequently, the District Director can levy on the wife's earnings to satisfy her one-half share of that debt.