

OBSERVATIONS ON SOME PENNSYLVANIA COMMUNITY PROPERTY PROBLEMS

PART II

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VI

APPORTIONMENT PROBLEMS

The separate property of a spouse includes all property "owned or claimed" at the start of the community. The determination of the ownership of property presents no problem peculiar to community property. What, however, is property "claimed" by a spouse? Does a right to property have to exist? The answer to these questions may be found in various situations:

A. *Wages*

Where the services have been performed before the start of the community but payment has not been made, such wages are "claimed" by the spouse rendering the service and constitute separate property of that spouse when paid.¹ Whether the spouse is on a cash or accrual method of accounting for income tax purposes is immaterial. The question is what is treated as separate property and as community property under the Pennsylvania Act.

Wages should be apportioned on a per diem basis. For example, if payment was made on September 15 for work done during the preceding thirty days one-half of the amount received would be separate income and one-half community income. If the work is done under an agreement whereby compensation is to be fixed when the work is completed, the amount which would have been payable at the start of

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1. *Asher v. Welch*, D. C. S. D. Cal., 39-1 USTC Par. 9279 (1938); *Houston v. Commissioner*, 31 B. T. A. 188, I. T. 3792 (1934), 1946-1 C. B. 86; cf. *Fooshe v. Commissioner*, 132 F. 2d 686 (C. C. A. 9th 1942).

The Commissioner of Internal Revenue has ruled that a husband and wife who are domiciled in the State of Pennsylvania are entitled to include in their separate federal income tax returns "one-half of their community income received and accrued on and after September 1, 1947 . . ." *Supra*, part I, note 16. The word "received" in the ruling does not indicate that all income received after September 1, 1947, is community income. The ruling stated that "community income" received after that date will be taxable one-half to the husband and one-half to the wife.

the community if the work had then ceased would be separate income. The amount should be determined under the principles applied in actions for quantum meruit.² This rule has been applied to determine what part of executors' commissions allowed after the death of the executor were includible in the gross estate for the purposes of the federal estate tax.³

If the wages have been paid in advance, it can be said that the total amount paid as such wages is owned by the recipient when the amount is paid. On this basis amounts so paid are taxed when received.⁴ However, for the purpose of the Community Property Act, it seems that if the recipient of the wages would be under a duty to refund a part of them were he to cease work on September 1, it could be said that the part of the wages applicable to the period after that date would constitute community income even though received before the effective date of the Act.

B. *Contingent Fees*

If the start of the community takes place after the making of a contingent fee contract but before payment thereunder becomes due, the nature of the payment as community property is to be determined at the time the contingency materializes. Until then, there is clearly no right, present or deferred, in the obligee of such a contract. Such, in effect, was the holding in *Land v. Acadian Production Corporation of Louisiana*.⁵ The husband performed legal services on a contingent fee basis before the dissolution of the community by a separation. The payment on the contingent fee contract was in the form of a mineral lease, the title to which did not vest in the husband until after the dissolution of the community. The court held that only upon the settlement of the action involved was the husband "entitled to full recovery under his contract" and that, being entitled to payment after dissolution of the community, the property in question was separate property.⁶

2. 5 WILLISTON, CONTRACTS § 1459 (Rev. ed.) ; 2 RESTATEMENT, CONTRACTS, 347 (1932).

3. McGlue, 41 B. T. A. 1199 (1940) ; Estate of Robinson, B. T. A. Memo. Op. C. C. H. DEC. 12,253(A).

4. MAGILL, TAXABLE INCOME 200 (1945).

5. 57 F. Supp. 338 (D. C. W. D. La. 1944).

6. In *Land v. Acadian Production Corporation of Louisiana*, *supra*, the court states at p. 349, "the only case holding that the time of entering the land fixes its status as community or separate property is *Crochet v. McCamant*, 40 So. 474 (La.) . . . It is now formally overruled." The court is inaccurate here. There is another Louisiana case which holds to a relation back theory on even thinner grounds than the *Crochet* case. It is *Barbet v. Langlois*, 5 La. Ann. 212 (1850). There the husband, before marriage, by reason of his ownership of certain riparian lands, held, under a statute, the power to purchase the lands in question exclusive of other purchasers for a certain period. His marriage preceded the exercise of this power. The court held that though the legal title vested in him after marriage, the right arose before

An opposite result was reached in *Commissioner v. King*.⁷ In that case the husband entered into a contract for legal services on a contingent fee basis. After a portion of the work on this contract had been done, but before the suit upon which the fee was contingent had been settled, the wife died. The Board of Tax Appeals⁸ held that the fee was community property, one-half of which belonged to wife's estate. The Circuit Court of Appeals upheld the Board, saying that the fee was community property because the basis of the husband's right to the fee was the agreement entered into while the marriage relation existed, the husband's right to the fee being referable to its origin in that contract. The court said that "Texas decisions are to the effect that where property is acquired as a result of compliance with the terms of a contract, the question whether, within the meaning of the above set out statute (concerning the presumption that property acquired during marriage is community property), it is or is not acquired during marriage, depends upon the status existing at the time the contract was entered into; the property being the separate property of the spouse who was a party to such contract if that contract was entered into prior to marriage though the performance under the contract was not completed, and a right to the property was not fixed or consummated until after the marriage . . ." Although the court states the general rule that rights arising during marriage will take their character as community or separate property from the status at the inception of the right, and, if they are based on contract, from the status at the time of the inception of the contract, the rule in Texas is not settled. The principal cases involve contracts for the sale of land. Many of them concern land grants and it is often not possible to decide from the cases whether an actual right to the grant has arisen. All of the other cases involve a present enforceable right in one spouse at the time of marriage.⁹ The decision in *Commissioner v.*

marriage and the lands were his separate property. Of course, if what the court said had been the case, the result would doubtless have been correct. But it is clear that the husband in the *Barbet* case had no right at the time of his marriage. He had a power in the nature of a temporary exclusive option. At the moment of his marriage he held no right or claim against the government, for he had not exercised this power. The right arose when he exercised the power to create a right in himself and a correlative duty in the government. At least as to the federal courts, in any case, the overruling in the *Land* case of the *Crochet* case would seem to put the *Barbet* case in a dubious light.

7. 69 F. 2d 639 (C. C. A. 5th 1934).

8. 26 B. T. A. 1158 (1932).

9. *Welder v. Lambert*, 91 Tex. 510, 44 S. W. 281 (1898) seems to be the earliest Texas case to examine the authorities and the basis for the rule in the Spanish law. The contract in question in this case involved a concession made to the parties by the government by which, in consideration of their stipulating to introduce colonists into the state, they were given the right to a premium in lands, to be selected and granted to them upon their compliance with the agreement. Before he married, a man holding such a contract had introduced some colonists. In 1832 he was married and thereafter, more colonists were introduced. In 1834 lands were set apart for his use. The

King, supra, is, therefore, not supported by the local Texas property rules.

facts do not indicate whether or not, at the time of his marriage in 1832, this individual had a right to demand anything. The court held the property to be separate property of the husband.

The court in the *Welder* case decides from this that choses in action held by either of the spouses before marriage remain the separate property of such spouse. Perhaps this means presently enforceable choses in action. But the court, without citing further authority, goes on to state the rule more broadly: "If the contracts be property, and if all property held by either the husband or wife at the time of the marriage be separate property of the consort who held it, it . . . did not fall into the community."

The court then turned to a consideration of the Louisiana authorities. *Barbet v. Langlois*, discussed *supra*, was cited.

In re Moseman's Estate, 38 La. Ann. 219 (1886), held that the proceeds of an insurance policy purchased by husband before marriage were separate property chargeable, in favor of the community, with premiums which had been paid after marriage with community funds. The court said that on the date the policies were acquired Moseman had a right to receive, at his death, the sums to be paid subject to his payment of premiums. If the contract of insurance provided for the insurance of Moseman's life from the date it was entered into, as it very likely did, then the court's analysis is correct. It is perhaps more accurate to say that Moseman has a power, by paying premiums, to create a right in his estate and a duty on the company to pay the benefit, or that he has a right to the benefits subject to the condition subsequent of the payment of premiums. But the court states the general rule more broadly: "When the condition is accomplished it refers back to the time of the making of the contract." Does this refer to a condition precedent as well as condition subsequent?

The court in the *Welder* case seems to think so and returns to the Texas authorities, citing *Mills v. Brown*, 69 Tex. 244, 6 S. W. 612 (1887), as a decision not in point but in harmony with this idea. But in *Mills v. Brown* the facts and holding rather indicate the opposite conclusion, if they are at all in point. For there an unmarried woman made a survey and paid surveyor's fees on certain land which could be acquired by patent from the government by settling thereon and survey. After her marriage she and her husband settled the land and subsequently the patent was issued. The land was held to be *community* property. At the time of her marriage the wife clearly had no right to the land—this could inure only by settlement. But what happened to the doctrine of relation back to the origin of the title? Was settlement not a condition?

In *Manchaca v. Field*, 62 Tex. 135 (1884), still another test is put forth. This case also involved settlement upon public lands for which husband had a concession during marriage and performed conditions requisite to securing title after marriage dissolved by death. The court said that the concession, having a money value and being the subject of sale was property, ergo wife had an interest in it though condition leading to title was performed after wife's death.

One case seems to base its holdings on the simple issue as to whether, at the time of marriage, the spouse had a *right* or merely a *power* or privilege. *Webb v. Webb*, 15 Tex. 274 (1855). The husband "selected" certain land under a public land grant during marriage and got title after the death of his wife. The land was held separate property and the court said, "the statement of facts shows conclusively that title to the land was not obtained until after the dissolution of the matrimonial relations by the death of the wife. Does it show that anything had been done, before this dissolution, *giving a right in law*, to demand the title that subsequently issued in favor of the husband, on which an equity could be raised . . .?" (italics added).

This case was distinguished and impliedly overruled by the court in *Manchaca v. Field, supra*, and likewise in the *Welder* case.

The next Texas case was *Creamer v. Briscoe*, 107 S. W. 635 (Tex. Civ. App. 1908). There, the husband and wife settled on land and did everything necessary to get the homestead donation except, during the three years of required residence, the wife died. The court held the property was community property. Here we have everything fulfilled and a present right subject to a condition subsequent.

Stiles v. Hawkins, 207 S. W. 89 (Tex. App. 1918) held that the land was separate property where the settlers on it made survey but no payments for public land, and then conveyed to an unmarried man who, after his marriage made payments and took title. Most all of the preceding cases are cited whether they are actually in point or not.

Bishop v. Williams, 223 S. W. 512 (Tex. Civ. App. 1920); *Jackson v. Jackson*, 258 S. W. 231 (Tex. Civ. App. 1924); and *Evans v. Ingram*, 288 S. W. 494 (Tex.

The theory of the decision of the Board of Tax Appeals in *Estate of Crail*¹⁰ is contrary to the theory of *Commissioner v. King*. The Board in that case held that the gross estate of the decedent did not include a contingent fee which was paid after death where the contingency upon which it was paid occurred after death.

C. Bonuses

If a bonus is paid after September 1 for work done during the year 1947 under a plan which was in existence throughout the entire year, the amount of the bonus should be apportioned between separate and community property. It can be argued that no "right" to any amount exists until the end of the year and hence the entire bonus is community property. *Wrightsmen v. Commissioner*,¹¹ however, compels a different conclusion. In that case the taxpayer was president and manager of a corporation and worked throughout the year with an understanding that he would be compensated at the end of the year in proportion to the corporation's profits. On December 24, 1936 the taxpayer and his wife moved to Texas. On December 30, 1936 the board of directors fixed his salary for 1936. The court held that he had acquired his salary not when it was voted by the board of directors but when "he went about performing the duty and rendering the services he had agreed to perform and render."¹² The court did not adopt the relation back theory of *Commissioner v. King, supra*. If it had it could have decided the case merely by saying that the contract was entered into while the taxpayer was a resident of a non-community property state; therefore, the entire amount which he was paid constituted separate property. The court, however, allowed an apportion-

Civ. App. 1926), all concern contracts for the purchase of land entered into by a husband before marriage. As stated before, the doctrine of equitable conversion removes these cases from the general problem. Due to this fiction it must be conceded that if a contract for the sale of land exists before marriage, the land is separate property. But does such a way of putting the rule add anything to the simple rule that if the spouse has, at time of marriage, an enforceable *right* or a right divestible only upon failure of a condition subsequent, the property will be separate property?

The court, in *Commissioner v. King*, however, also mentions, in order to distinguish them, several cases involving adverse possession. In attempting to distinguish the adverse possession cases from the general rule, the court in the *King* case, *supra*, said, "It appears from the opinions in the just cited cases that the reason for such classification is that prior to the expiration of the period of adverse possession required to confer title, the possessor has no right whatever to the land adversely possessed. The last cited cases (adverse possession cases) are readily distinguishable from the instant one, in that, while the marriage relation existed, respondent, in pursuance of the contingent fee agreement, was performing services in the suit for which he was entitled to be paid in the event of his being successful in the suit." There seems to be no difference. It might more accurately be said that the husband in the *King* case was, during marriage, performing service for which he was entitled to be compensated *only if* the suit was won and that the adverse possessors in those cases were doing something for which they were entitled to land *only if* the possession fulfilled the prescriptive period.

10. 46 B. T. A. 658 (1942).

11. 111 F. 2d 227 (C. C. A. 5th 1940).

12. *Id.* at 229.

ment between the time when the taxpayer was living in a non-community property state and the time when he lived in a community property state. The method to be used in apportioning the bonus should depend upon the method of calculating the bonus under the plan. For example, if the bonus is a fixed amount based upon earnings it could be apportioned, based upon earnings up to September 1 and earnings after that date. Another method of apportionment would be on a daily basis. It would seem that the daily basis should be used only in those cases where an apportionment cannot be made based upon the plan itself.

Would apportionment be required in the case of a bonus which was paid without any obligation on the part of an employer? For example, if without any plan or arrangement the board of directors meets and pays a bonus to the employees after September 1 for the year 1947, can it be said that such a bonus was owned or claimed on September 1, 1947? *Wrightsmen v. Commissioner, supra*, is not controlling because in that case the work was done under an agreement whereby the salary was to be paid at the end of the year. Since in the assumed facts no such agreement exists, the theory which should be adopted is the same as was adopted by the Board of Tax Appeals in *United States Trust Company of New York*¹³ in dealing with the inclusion in the gross estate of wages paid gratuitously after death. In that case it was held that wages paid as a matter of grace after the death of the employee were not property to be included in his gross estate; no part of the wages was owned at the date of death.

D. Dividends

If the date of declaration and the record date precede the start of the community, the dividend would be separate property. Such a dividend is clearly "owned or claimed" at the start of the community.

For federal income tax purposes a dividend is taxable to taxpayers either on the cash or accrual method of accounting when the dividend is actually paid.¹⁴ The federal income tax rule, however, is based on a Treasury regulation of long standing, the ease of checking tax returns, and the technical provisions of the Internal Revenue Code relating to the taxability of dividends; the basis for the rule clearly shows that it would have no effect on a decision as to when a dividend is "owned or claimed".

Will a dividend be separate property if it is declared before the start of the community with the record date after that time? Generally

13. 9 B. T. A. 514 (1947).

14. *Tar Products Corporation v. Commissioner*, 130 F. 2d 866 (C. C. A. 3rd 1942); *American Light and Traction Company*, 156 F. 2d 398 (C. C. A. 7th 1946).

a dividend becomes a debt when it is declared.¹⁵ Therefore, a dividend would be "owned or claimed" when the stockholder became a creditor of the corporation and all dividends declared before the start of the community would be separate property.

What rule should apply to extraordinary dividends and stock dividends paid after September 1, 1947 which represent a distribution or capitalization of surplus acquired by the corporation before September 1, 1947? In Pennsylvania the doctrine of intact value has been applied by the courts in many cases.¹⁶ These cases are based upon the fact that the property which the stockholder has is an interest in the capital and surplus of the corporation on a particular date and that the property should be maintained intact. As we have pointed out under "Meaning of Income", income under the Community Property Act is common law income and all other receipts are capital.¹⁷ Thus, the "intact value" rule should be used to determine the part of the receipt that was separate property and the part that was community property. The intact value of the property at the start of the community or when acquired by gift or devise would have to be maintained.¹⁸

E. Interest

It has long been held that interest accrues from day to day.¹⁹ Although not payable until a specified date, the right to interest is in existence as it accrues. The fixing of a date upon which the payment shall be due is an agreement on the part of the obligee of the interest, for the sake of practical business, to refrain from demanding the interest until a certain date. His right, however, exists.²⁰ Therefore, interest should be apportioned on a day-to-day basis with respect to interest accruing before the start of the community and that accruing after such time.²¹

15. 11 FLETCHER, CYCLOPEDIA CORPORATIONS c. 58, § 5322 (1932).

16. *Earp's Appeal*, 28 Pa. 368 (1857).

17. *Supra*, part I, p. 26.

18. In the case of stock dividends, it may be said that the spouse owning the stock on September 1, 1947, was entitled to the whole dividend. Such was the conclusion of the Circuit Court of Appeals for the Fifth Circuit in *Schofield v. Weiss*, 131 F. 2d 631 (1942), in which the court applied the Texas law. For the reasons given under "Meaning of Income" a different result would probably be reached in Pennsylvania.

19. *Davidson's Estate*, 287 Pa. 354 (1926), held that interest is apportionable because presumed to accrue from day to day, regardless of whether payable at fixed periods, and awarded interest accrued before the death of a life tenant but paid after death to the estate of the life tenant.

20. As to rule in bankruptcy see *Adams v. Napa Cantina Wineries*, 94 F. 2d 694 (C. C. A. 9th 1938).

21. To the same effect for purposes of federal estate tax, *Maass v. Higgins*, 312 U. S. 443 (1941).

F. *Growing Crops*

In Texas crops grown on separate property during coverture are treated as income and therefore as community property rather than being treated as an "increase" of separate property and therefore separate property.²² The Texas cases base their opinions on the fact that the crops were grown through the joint industry and effort of the spouses.²³

However, another rule must be considered. When land is conveyed upon which there are growing crops, the crops pass with the land, in the absence of an agreement to the contrary, which is to say that they are, while growing, considered real property. From this, by analogy, it might be said that if the start of the community takes place while crops are growing they retain their identity as separate property. On the other hand, it may be said that since such crops are in the nature of income acquired during coverture they are community property. At the start of the community the growing crops are analogous to an unmaturing right, and the holder of the land could not realize upon their value because they were unripe and of little or no value if severed at that time. The crops acquired their real value as they matured after coverture and they, therefore, partake of the community property character. Crops standing ripe and ready for harvest at the time of the effective date would pose a more difficult question. Such crops, it can be said, constitute separate property by analogy to the rule applicable to earnings.

G. *Trust Income*

In the case of income from a distributable trust, the income should be accrued to September 1 on the basis of the rule applicable in cases of apportionment between successive life estates. It would seem that the property owned or claimed by the life tenant on September 1, will be the property which his estate would receive if he had died on that date. Thus, the rules for apportionment between successive life tenants would apply and under those rules income would be apportioned as follows: (a) dividends which were of record prior to the start of the community would be separate property;²⁴ (b) interest would be apportioned on a

22. *Hanks v. Leslie*, 159 S. W. 1056 (Tex. Civ. App. 1913).

23. *Krause v. Kessler*, 112 S. W. 2d 342 (Tex. Civ. App. 1937).

24. Principal and Income Act of 1947 (Act No. 516), § 4 and § 5(6). Here the problem is one of apportionment, rather than allocation, and hence there would seem to be no reason why the rules laid down in the Principal and Income Act should not be applied. The objection to applying the Act to community property *allocation* problems are discussed at 96 U. of PA. L. Rev. 25 (1947).

day-to-day basis,²⁵ and (c) rent would also be apportioned on a day-to-day basis.²⁶

As to income from a discretionary trust collected before September 1 but distributed in the discretion of the trustees after September 1, such income would be community income. Where the beneficiary can in no wise participate in the decision as to the time of distribution of the income, it cannot be said that the beneficiary owned or claimed any of the income on September 1. If the beneficiary were the sole trustee, then it might be said that all of the income was separate income. If the beneficiary were one of several trustees, then such income should not be separate income but community income. The foregoing applies to those trusts where the beneficiary is not entitled to the income at all events. For example, there are discretionary trusts where the beneficiary would be entitled to the accumulated income if he died at any particular time. In such cases the income which had been collected but not distributed by September 1 should constitute the separate income of the beneficiary when distributed. Problems of allocation would arise; unless the income distributed can be identified, the rule of first in, first out should apply.

In the case of an estate in the process of administration, the residuary beneficiaries are entitled to income from the date of death.²⁷ If this rule is applied, the income accumulated by the estate to the start of the community would constitute separate income of the beneficiary and income received by the estate after that date would constitute community income. The rules for determining whether any particular distribution of income is out of the income accumulated before or after September 1 would be the same as those for the discretionary trust mentioned above. However, the Tax Court has held that under the Texas law income collected in an estate before the marriage of the beneficiary and distributed later constitutes community income.^{27a} This rule is easy to apply and should be followed in Pennsylvania.

H. *Rent*

Although rent did not accrue from day to day at common law, it has been held to accrue in that way in Pennsylvania.²⁸ Hence, rent accrued before the institution of the community would be separate property no matter when collected.

25. Principal and Income Act of 1947 (Act No. 516), § 4.

26. *Ibid.*

27. *Brown's Estate*, 190 Pa. 464 (1899).

27a. *Dargan v. Commissioner*, Dkt. No. 10,317, C. C. H. Dec. 16,066(M) (1947).

28. *Borie v. Crissman*, 82 Pa. 125 (1876); *cf. Archambault's Estate* (No. 2), 232 Pa. 347 (1911).

I. *Adverse Possession*

The court in *Commissioner v. King*²⁹ distinguished adverse possession cases from the case of a contingent fee contract. However valid this distinction may be, the rule is that in cases of property acquired by adverse possession the character of the property is determined by the status of the acquiring spouse at the time such a title became mature, regardless of the length of the adverse possession before marriage. This is the rule in Texas.³⁰ It would seem that this conclusion is logically inescapable. It is very hard to find in the adverse possessor any right or matured interest until the prescriptive period has run.

J. *Royalties*

Royalties which are based upon sales would constitute separate income to the extent that they were paid on sales occurring before September 1 and community income to the extent that they were based on sales after that date. This should be the rule in the case of royalties on patents or ideas of the spouse receiving the royalties. However, if a royalty contract has been purchased before September 1 the spouse purchasing the contract would have a capital investment in the contract and would be entitled to recover that capital investment as his or her separate property. Thus, the amount paid for the contract which had not been recovered before September 1 could be recovered after that date. Whether each payment would be considered as part capital and part income, or whether each payment would be considered capital until the full purchase price had been recovered is not clear. The better rule would be to permit the recovery of capital before any income results.

K. *Partnerships*

In the case of a mercantile partnership, income derived up to September 1 should constitute the separate income of the partners. Income derived after that date would constitute community income.³¹ It can be argued that no income (and hence no claim) arises until the end of the year, since losses after September 1 could offset the profits before that time. This argument has been rejected by the Tax Court.^{31a} Moreover, if a partner retired, resigned or died on September 1, he or his estate would be entitled to a share of profits

29. *Supra* note 7.

30. *Sauvage v. Wauhup*, 143 S. W. 259 (Tex. Civ. App. 1912); see *Creamer v. Briscoe*, 101 Tex. 490, 109 S. W. 911 (1908).

31. I. T. 3792, 1946-1 C. B. 86; *Commissioner v. Harmon*, 323 U. S. 44 (1944).

31a. *Dargan v. Commissioner*, Dkt. No. 10,317, C. C. H. Dec. 16,066(M) (1947).

to that date regardless of subsequent losses.³² It would, therefore, be necessary to compute the income of the partnership up to September 1. If such a partnership is on the accrual basis no problem arises as to the items to be included in income. However, if the partnership computes its income on a cash basis, the computation should be made on the accrual basis because items might be sold and not yet collected and claims would exist on September 1 for such items. Those claims existing on that date would constitute separate property. In the case of a personal service partnership, such as a law firm or accounting partnership, the rules applicable to the determination of whether compensation for personal services is separate income or community income would be applicable.

If the books of the partnership were not closed at the start of the community, the income for the years must be apportioned. The method of apportionment will depend on each case, but a monthly basis would appear acceptable.³³

L. *Miscellaneous Property*

A claim for refund of a federal tax paid before September 1 would be separate property when recovered. However, suppose the refund arises out of a carry-back of a loss occurring after September 1. Can it be said that the refund is community property because it arose due to a loss incurred by the community? It would seem that the refund would be community property because it was not owned or claimed on September 1. The right to the refund arose only when the loss occurred and since this occurred after September 1, 1947 the amount recovered would be community property.

Suppose a bad debt which has been deducted for federal income tax purposes before September 1 is recovered in a year subsequent to 1947. Under the federal income tax law such recovery constitutes income. Since the debt was in existence on September 1, the amount recovered on that debt would be separate property and thus if income arises under the federal income tax law by reason of the recovery, the income would be taxed to the person recovering the debt.

VII

THIRD-PARTY TRANSACTIONS

A. *Scope of the Discussion*

Suppose that a husband deals with community property under his control and in so doing exceeds his managerial authority, that an

32. Assuming the partnership agreement made no provision as to this point.

33. Compare INT. REV. CODE § 711(a)(3) (1940) with U. S. Treas. Reg. 112, § 35.711(a)-4 (1944). INT. REV. CODE § 22(b)(12) (Supp. 1946).

outsider participates in the transaction, and that later the wife disavows the transaction and seeks redress from the outsider. What general rule should be applied in passing on the wife's claim? To suggest an answer to this question is the purpose of this part of our article.

B. *Nature of Community Ownership*

The first step towards solution of our problem is to determine the exact nature of community property ownership under the Pennsylvania statute.

Section 3 of the Pennsylvania Community Property Act provides that each spouse "shall be vested with an undivided one-half interest" in all community property. This, however, does not mean that each spouse will necessarily have legal title to one-half of the property; for other sections of the Act (*e. g.* Sections 4, 7, and 8) recognize that legal title may stand in the name of one spouse alone. Therefore, having in mind that under the Pennsylvania Act ownership and title do not necessarily coincide, we shall examine the four theories of community property ownership that have prevailed from time to time in the old-line community property states and shall attempt to select the one that best fits the Pennsylvania Act.³⁴

One of the four theories is known as the single ownership theory, which formerly prevailed in California.³⁵ Under this theory the husband owns the community property, during his lifetime his wife has a mere expectancy, and this expectancy ripens into a vested interest only if the husband predeceases the wife. Plainly, this view does not comport with the Pennsylvania Act: Section 3 states specifically that each spouse is "vested with an undivided one-half interest".

Another theory is called the double ownership theory. It now prevails in California, Idaho, Nevada, and New Mexico.³⁶ This theory is that, regardless of how record title stands, each spouse has an undivided one-half interest in all community property and each has legal title to one-half of the property. Since the Pennsylvania Act recognizes that title to community property may stand in the name of one spouse alone, it is clear that the Act and the double ownership theory are incompatible.

A third theory, known as the entity theory, is that the husband and wife are an entity, that this entity holds legal title to all community property (no matter who holds record title), and that the managing

34. For a full discussion of the four theories see Evans, *The Ownership of Community Property*, 35 HARV. L. REV. 47 (1921).

35. *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228 (1897).

36. *McDaniel v. McDaniel*, 134 Cal. App. 597, 25 P. 2d 843 (1933); *Ewald v. Huffon*, 31 Idaho 373, 173 Pac. 247 (1918); *In re Wilson's Est.*, 56 Nev. 353, 53 P. 2d 339 (1936); *Beals v. Ares*, 185 Pac. 780 (N. M. 1919).

spouse is simply the agent of the entity. Washington is the chief follower of this theory.³⁷ Here again, the theory conflicts with the notion, inherent in the Pennsylvania statute, that legal title may be in one spouse alone.

The fourth theory, which was developed in Texas, is called the trust theory. According to this theory, the spouse in whose name the property stands holds the legal title as trustee and the equitable ownership of the property is vested in both spouses equally. Here is a typical statement of the theory:³⁸

“. . . when land belonging to the community of husband and wife is deeded to both, each has legal title to it, but when the conveyance is made to one only the legal title is vested in that one, and the other has an equitable title . . . That one in whose name the title is conveyed holds as trustee for the other.”

The trust theory and the Pennsylvania Act fit together perfectly. Both recognize that each spouse has a vested interest in one-half of the community property, and both recognize that title to the property may stand in the name of either spouse or in the names of both. This being so, it seems clear that the Pennsylvania legislature intended to adopt the Texas theory; and if there were any doubt about this, it would be dispelled by the fact that Pennsylvania's Act was copied from Oklahoma's, which in turn was patterned after the law of Texas.

C. *The Texas Rule as to Transferees*

As a corollary to the trust theory of community property ownership, it is the rule in Texas that if one spouse makes an unauthorized transfer of community property to a third person, the transferee gets a good title unless it appears that he either had notice or knowledge of the lack of authority or else did not pay a valuable consideration for the property. Moreover, the injured spouse (or the successor to the interest of that spouse) has the burden of proving that the transferee had notice or knowledge or that there was not a valuable consideration. This is settled by a long line of cases.³⁹

37. *Warburton v. White*, 176 U. S. 484 (1900); *Osthiller v. Spokane, etc., Rwy. Co.*, 107 Wash. 678, 182 Pac. 630 (1919); *Olive v. Meek*, 103 Wash. 467, 175 Pac. 33 (1918).

38. *Mitchell v. Schofield*, 106 Tex. 512, 514, 171 S. W. 1121, 1122 (1915). To the same effect, see *Burnham v. Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139 (1917); *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909 (1891).

39. *E. g.*, *Strong v. Strong*, 128 Tex. 470, 98 S. W. 2d 346 (1936); *Howard v. Commonwealth B. & L. Assn.*, 127 Tex. 365, 94 S. W. 2d 144 (1936); *Burnham v. Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139 (1917); *Mitchell v. Schofield*, 106 Tex. 512, 171 S. W. 1121 (1915); *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909 (1891); *Johnson v. Masterson Irr. Co.*, 217 S. W. 407 (Tex. Civ. App. 1920); *Kirby Lumber Co. v. Smith*, 185 S. W. 1068 (Tex. Civ. App. 1916).

A typical example of the application of the Texas rule is *Johnson v. Masterson Irr. Co.*⁴⁰ There the husband held title to community land. The wife died and her interest passed to her children. Thereafter the husband remarried, and he and the bride executed a deed of trust by which the land was pledged as security for a loan. On the husband's default in repaying the loan, the trustee sold the land. Later the children of the first wife brought suit against the purchaser at the trustee's sale and asserted a claim to ownership of a one-half interest in the land. The court rejected the claim and in so doing said:

" . . . it is now well settled that the title which passed to the children of Johnson's first wife upon her death was an equitable title, and the record in this case shows, without contradiction, that the legal title to the tract of land in controversy stood in the name of J. F. Johnson at the time of the execution of said deed of trust, as well as at the time of the sale by the trustee and purchase by the appellee; and, this being true, the burden of proof rested upon appellants (the children) to show that appellee was not an innocent purchaser of their equitable title or interest in this tract of land."⁴¹

D. *The Texas Rule as to Disinterested Participants in Unauthorized Transactions*

Having found the Texas rule fixing the liability of third persons who receive the benefit of an unauthorized transfer of community property, let us now look for the rule that applies where a third person participates in an unauthorized transaction by one of the spouses but does not derive any real benefit from it.

As far as we know, the only Texas case dealing with the exact problem is *Grebe v. First State Bank*.⁴² There a widow, having paid all community debts, withdrew community funds from the bank and lent them to her brother. When the bank paid over the funds, it knew that the widow intended to make the loan, that she had no right to do so, and that the husband left a minor child who had an interest in the funds. Later the minor brought suit against the bank and recovered. One judge dissented on this ground:

"From now on no bank can pay to a survivor in community any part of a community bank account without running the risk of having to pay again to the heirs. This must be true, because in the very nature of the transaction the bank would assume the burden of proving that it was necessary to pay such account to

40. 217 S. W. 407 (Tex. Civ. App. 1920).

41. *Id.* at 410.

42. 136 Tex. 226, 150 S. W. 2d 64 (1941).

the survivor in order for him to pay community debts. Under the rule announced by the majority, no debtor of the community can afford to pay his debt to the survivor for the same reason.”⁴³

The decision in the *Grebe* case seemingly conflicts with a line of Texas cases holding that where an outsider takes part in a trustee's breach of trust but gets no benefit from it, the outsider is not liable to the victim.⁴⁴ Since the spouse who holds title to community property is a trustee, the rule laid down in this line of cases should apply to unauthorized community property transactions.

Of all the cases in the line just mentioned, the case of *Interstate National Bank v. Claxton*⁴⁵ is most enlightening because it accentuates the importance of one's benefiting or not benefiting from taking part in a breach of trust: the bank, which occupied the role of the third person, was held liable for its participation in a breach of trust that benefited it but was not held liable for other breaches that did not benefit it. The facts were as follows. Tamblin & Tamblin, acting as factors, sold some livestock belonging to Claxton and, pursuant to authority from him, deposited the proceeds of sale in their account at the bank. When the bank received the deposit, it knew that the money did not belong to the depositor (Tamblin & Tamblin) and it also knew that the depositor was insolvent. Thereafter the bank applied part of the funds so deposited against a claim that it had against the depositor and used the balance of the funds to pay checks drawn by the depositor to the order of others. After the depositor was adjudged bankrupt, Claxton asserted a claim against the bank for the entire amount of the deposit. Because the bank benefited by the application of part of the deposit in payment of its claim against its depositor, it was held liable for the amount so applied; but because it did not benefit by the payment of the checks, it was excused from liability for the amount used to pay them even though when it paid them it knew that its action would result in a misapplication of trust funds. In holding that the bank was entitled, indeed bound, to honor the check, the Supreme Court of Texas said:⁴⁶

“ . . . it is clear that a depositor, although holding money in a fiduciary capacity, may draw it out of the bank ad libitum. The bank is bound to honor his checks and incurs no liability in so doing as long as it does not participate in any misapplication of funds or breach of trust. The mere payment of money to, or upon

43. *Id.* at 237, 150 S. W. 2d at 70.

44. *E. g.*, *Wichita Royalty Co. v. City National Bank*, 127 Tex. 158, 93 S. W. 2d 143 (1936); *Silisbee State Bank v. French Market Groc. Co.*, 103 Tex. 629, 132 S. W. 465 (1910); *Interstate National Bank v. Claxton*, 97 Tex. 569, 80 S. W. 604 (1904).

45. 97 Tex. 569, 80 S. W. 604 (1904).

46. *Id.* at 576, 80 S. W. at 606.

the checks of, the depositor does not constitute a participation in an actual or intended misappropriation by the fiduciary, although his conduct or course of dealing may bring to the notice of the bank circumstances which would enable it to know that he is violating his trust. Such circumstances do not impose upon the bank the duty or give it the right to institute an inquiry into the conduct of its customer in order to protect those for whom it may hold the fund, but between whom and the bank there is no privity."

The Court then proceeded to quote from *Gray v. Johnson*⁴⁷ and thus made it doubly clear that a stranger who participates in a breach of trust incurs no liability unless the breach inures to "his own personal benefit." ⁴⁸

If the doctrine of the *Claxton* case is blended with the Texas trust theory of community property ownership, the result would seem to be that where a title-holding spouse engages in an unauthorized transaction involving community property and an outsider participates in the transaction but derives no benefit from it, the outsider is not liable to the injured spouse even though he may have had notice or actual knowledge of the whole story. However, in the face of the *Grebe* case⁴⁹ it can hardly be said that this is the law of Texas.

E. *The Suggested Rule for Pennsylvania*

If Pennsylvania should adopt the rule of the *Grebe* case, business transactions with married persons will be hopelessly snarled. If banks, insurance companies, and other financial or commercial institutions are to be required to police the activities of their married customers, they quite properly will refuse to take any step where there is the slightest room for doubt or suspicion; and the result will be that married persons will be subjected to red tape and delays, and the courts will be flooded with interpleader proceedings. All of this trouble can be avoided by rejecting the rule of the *Grebe* case and adopting a rule such as this:

Where a spouse who holds title to community property enters into a transaction involving that property and in so doing exceeds his managerial powers, an outsider who participates in the transaction but does not derive any direct and substantial benefit from it incurs no liability to the injured spouse—and this even though the outsider has notice or knowledge of all the facts; and even where the outsider derives direct and substantial benefit from the trans-

47. L. R. 3 Eng. & Ir. App. Cas. 1 (1868).

48. 97 Tex. at 577, 80 S. W. at 607.

49. *Supra*, note 42, and discussion pertaining thereto.

action, he still has no liability unless the injured spouse (or the successor to the interest of that spouse) proves either that the outsider had notice or knowledge of all the facts or else that he did not put up a valuable consideration for the benefit that he received.

This rule would enable married persons to deal freely with their property and would go a long way towards eliminating the widespread dissatisfaction caused by Pennsylvania's sudden shift to the community property system.

The suggested rule could not justifiably be criticized on the ground that it gives too little protection to the interest of the non-managing spouse. In the first place, most people are honest; and it is better to make it possible for the few dishonest ones to cheat their spouses than to make it impossible for the innumerable honest ones to deal freely with their property. In the second place, the only reason why the Community Property Act gives the non-managing spouse an interest is that the tax savings at which the Act is aimed could not be obtained without the gift of the interest. Obviously, there would be no merit to a complaint that an interest created as a by-product of a tax-saving measure does not come packaged in armor plate.

F. Section 6

Section 6 of the Pennsylvania Act provides:

"Any funds on deposit in any bank or banking institution, whether in the name of the husband or wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary it shall be governed accordingly in honoring checks and orders against such account."

At first sight, this section seems to cover, so far as banks are concerned, the problem we have been discussing. However, a close examination of the section will show that it falls short of the problem.

Suppose, for example, that a husband deposits community funds in a bank account in his name, that he proposes to withdraw some of the funds for a non-community purpose (*e. g.* to make a gift to his mistress), and that the bank knows the purpose of the withdrawal. Should the bank permit the withdrawal? Section 6 supplies the answer as long as the bank is not on notice that community funds are in the account. In the absence of such notice, the bank may assume that the funds are the husband's separate property; and since he has the right to give his separate property to his mistress, the bank would incur no risk by permitting the withdrawal. But suppose that the

bank gets notice that the funds belong to the community. Then it knows that the husband is about to misapply community funds and thus is faced squarely with the problem we have been discussing. To get the answer, the bank will have to look beyond Section 6.

One situation where Section 6 might come into play is this. Suppose that a wife desposits her earnings in a bank account in her husband's name. Under Section 4 the power to manage and control the earnings is vested in her; and because that section does not say that the husband shall have management and control of community property standing in his name [in this respect the section treats husband and wife differently], the deposit of the earnings in the husband's account would not shift control from the wife to the husband. In this situation Section 6 would protect the bank in honoring checks drawn by the husband as long as the bank does not receive notice that the wife's earnings are in the account.⁵⁰ But once the bank gets such notice, it will be faced with a dilemma: which one, the husband or the wife, is entitled to sign checks? Here again, Section 6 does not supply the answer.

There is another type of situation where Section 6 might afford limited help to a bank. Suppose that a husband deposits community funds in his own bank account and then dies. If the bank has no notice that community property is in the account, presumably Section 6 would entitle it to pay over the entire balance to the husband's executor or administrator.⁵¹ If, however, the bank has notice of the true composition of the balance, then Section 6 does not help. The bank will have to wrestle with the problem of whether to turn over the funds to the widow or to the executor or administrator.

50. The origin of the language of Section 6 indicates that this is the type of situation at which the section is really aimed. The prototype of the section is to be found in TEXAS ACTS OF 1913, ch. 32, p. 61, TEX. CIV. STAT., Art. 4622 (Vernon, 1914). The probability is that Texas adopted the provision in order to circumvent the decision, handed down one year earlier, in *Waggoner Bank & Trust Co. v. Warren*, 152 S. W. 691 (Tex. Civ. App. 1912), to the effect that the husband, being vested by statute with the power to manage and control his wife's separate estate, was entitled to withdraw her separate funds on deposit with the bank despite the fact that the account stood in the wife's name and the bank had agreed that the funds would be subject to withdrawal only by the wife. Nine years after the decision and eight years after the statute, the decision was reversed: 111 Tex. 318, 234 S. W. 387 (1921). For an explanation of the purpose of the statute, see *Winters v. Duncan*, 220 S. W. 219 (Tex. Civ. App. 1920).

51. In a situation of this sort, the presumption created by Section 6—that the deposit is separate property—appears to conflict with the presumption created by Section 3—that on death all property belongs to the community. In Texas, where there is the same conflict, it has been held that the statutory presumption concerning bank accounts "was meant for the guidance of the bank in its dealings with the deposit or account of the spouse in whose name it is, and was also meant to apply to dealings of creditors generally with the spouse in whose name it is. 'It was never meant to supplant, even as to such deposit itself, the general presumption' of community estate": *Rippy v. Rippy*, 49 S. W. 2d 494, 496 (Tex. Civ. App. 1932). To the same effect, see *Callaway v. Clark*, 200 S. W. 2d 447 (Tex. Civ. App. 1947); *Winters v. Duncan*, 220 S. W. 219 (Tex. Civ. App. 1920).

One question raised by the language of Section 6 is whether an informal notice is enough to deprive a bank of the presumption created by the section. It has been suggested that notice by itself is not enough to destroy the presumption. The basis for this suggestion is paragraph A of Section 905 of the Pennsylvania Banking Code,⁵² which provides that a notice of an adverse claim to a bank deposit shall not be effective unless the claimant procures either an attachment or a restraining order. However, paragraph B of Section 905 would seem to enable the claimant to substitute an affidavit in place of the attachment or restraining order; for paragraph B provides that the Section shall not apply "where the person to whose credit the deposit stands is a fiduciary for such adverse claimant" and all of the pertinent facts are supplied to the bank in an affidavit. Under the trust theory of community property ownership, which appears likely to be adopted in Pennsylvania, the title-holding spouse is a fiduciary and hence the case should come squarely within paragraph B. Even if adverse claims to deposits in community funds were held to come under paragraph B, rather than paragraph A, of Section 905, the section would at least have the effect of prescribing the form of notice to be given under Section 6 of the Community Property Act and thus would clear up uncertainty whether a bank must pay attention to information that it picks up in a casual way.

In conclusion, while Section 6 of the Act affords limited protection to banks, it does not go far enough to solve their problem and the deficiency should be met by a court-made rule such as that suggested above.

VIII

GIFTS

The extent to which a spouse may make a gift of community property in Pennsylvania is one of the questions involved in the case of *Willcox v. Penn Mutual Life Insurance Co.*,⁵³ which is now pending in the Supreme Court of Pennsylvania. In view of the prospect of a decision in the near future, we shall discuss the question of gifts only to the extent necessary to explain certain decisions relating to life insurance policies.⁵⁴

A. *The Washington Rule*

The courts of the State of Washington have adopted the rule that the husband has practically no power to give away community property

52. 7 PA. STAT. ANN. § 819-905 (Purdon, 1940).

53. The Supreme Court of Pennsylvania (W. D.) Misc. Dkt. No. 1490.

54. For an excellent analysis of the scope of a spouse's power to give away community property, see 18 TEX. L. REV. 121 *et seq.* (1940).

without his wife's consent; only trifling gifts within the rule of de minimis are excepted.⁵⁵

B. *The California Rule*

By statute California has deprived the husband of all power to give community property to third persons unless he obtains the written consent of his wife.⁵⁶

C. *The Texas Rule*

The Texas courts have not yet fully determined the extent of a husband's power to give away community property. In the recent case of *Allen v. Brewster*⁵⁷ the Court of Civil Appeals stated that although the husband is given authority to dispose of community property, he cannot ". . . make gifts of his wife's interest in the community estate to third persons . . ." ⁵⁸ The case was reversed by the Supreme Court of Texas,⁵⁹ but, in reversing, the higher court did not refer to the quoted statement. Therefore, the rule, as stated by the Court of Civil Appeals in *Allen v. Brewster*⁶⁰ cannot be considered the settled law of Texas today.

The earlier Texas cases hold that the husband has some power to donate community property to third persons,⁶¹ but that his power is subject to limitations. The first is that the size of the gift must not be unreasonable in relation to the amount of community property remaining after the gift is made, and the second is that the husband may not make a gift, even of a moderate amount, with intent to defraud his wife.⁶² The Texas courts have not clearly defined what they mean by "intent to defraud", but it has been suggested that, in determining the meaning of this phrase, they may apply the defrauded-creditor rule by analogy.⁶³

The foregoing discussion shows that the Texas courts have not yet adopted a clear rule concerning the husband's power to make a gift of community property to a third person. However, this discussion has outlined the pertinent aspects of the Texas rule in sufficient detail for us to turn to an analysis of some important cases relating to life insurance policies.

55. *Id.* at 123.

56. *Id.* at 125.

57. 172 S. W. 2d 192 (Tex. Civ. App. 1943).

58. *Id.* at 196.

59. *Allen v. Brewster*, 142 Tex. 127, 176 S. W. 2d 311 (1943).

60. *Supra* note 56.

61. 18 TEX. L. REV. 126 (1940).

62. *Id.* at 128 *et seq.*

63. *Id.* at 132.

IX

LIFE INSURANCE POLICIES AND THE PROCEEDS THEREOF

A. *General Considerations*

1. *Nature of Life Insurance*: Modern life insurance policies⁶⁴ are to an overwhelming proportion based on level premium calculations, under which each premium has two elements: one to cover the cost of carrying the risk of death in that particular year, and the other to go toward gradually building up the "reserve" which in later years prevents the premium cost from growing to impossibly high proportions. In life insurance the risk insured against is death, which is bound to happen at some time, while in other types of insurance there is no such certainty of occurrence, and, therefore, no such urgent need of a steadily increasing reserve. The life insurance reserve, growing larger year by year, causes a corresponding decrease in the amount which must be covered by the first of the two portions of the premium referred to above (which amount is the maturity value of the policy less the amount already accumulated in the reserve).

The usual life insurance policy today has two aspects:

(a) The payment of the proceeds ("death benefit" or "face value" of the policy) at the occurrence of the risk insured against. In this aspect the life insurance policy resembles other types of insurance. However, in the case of life insurance (contrary to the situation in other types of insurance) the payee of such matured policy (except in Texas)⁶⁵ need not have an insurable interest still existing, provided that he had such an insurable interest when the policy was taken out, and he does not need ever to have had an insurable interest, if the policy was paid for the beneficiary designated by the person whose life is insured, who, of course, is said to have an unlimited insurable interest in his own life. It should be noted that such person is called "the insured" in life insurance, although he may have no connection with the particular policy in question except to furnish the measuring rod through the means of his life span. In other types of insurance, the "assured" or the "insured" is understood to be the person who will receive payment under the policy to indemnify him against loss in case of the happening of the risk insured against.

64. For an excellent general discussion of life insurance problems in community property jurisdictions, see W. O. Huie, *Community Property Laws as Applied to Life Insurance*, 17 TEX. L. REV. 121 (1939) and 18 TEX. L. REV. 121 (1940).

65. *Wilke v. Finn*, 39 S. W. 2d 836 (Tex. 1931). *But cf.* *Castillo v. Canales*, 141 Tex. 479, 174 S. W. 2d 251 (1943), where it was held that a member of a fraternal benefit society can name in a benefit certificate anyone as beneficiary, regardless of whether such beneficiary has an insurable interest in the member's life.

(b) The rights relating to the reserve fund prior to maturity. These rights of course include control of the surrender value, the loan value, of the so-called "dividends" representing refunds of unused portions of the previous year's premiums, and of the privileges to convert the policy into a paid-up one, to elect the extended insurance feature, and to exercise other life-time options under the policy.

It must be remembered that in community property jurisdictions an item of property is deemed to be community property if it was acquired by payment from community funds or by exchange for other community property.⁶⁶ Therefore, if during marriage one spouse acquires legal title to an asset in his or her own name by use of community property, such asset becomes part of the community estate. The question to which this section of the article is addressed is the extent to which this principle affects life insurance policies of which all or part of the premiums were paid from community funds. The answer sometimes must be given by the courts after the death benefit has become payable (at which time all the rights under the life-time aspect referred to above have ceased to exist); sometimes the answer must be given before maturity, when the investment features of the policy are still important.

2. *Public Policy Aspects Involved in Life Insurance*: The rights of the spouses in a life insurance contract and the right of the insurance company to pay out the proceeds or other benefits to the persons named in the contract present two separate problems. Public policy demands that insurance proceeds be paid out promptly. The insurance company should be protected in paying the persons named in the contract even if it has notice that premiums have been paid from community property and without its having the duty to investigate the source of premium payments. After payment by the insurance company, the spouses or those taking from them, can apportion the proceeds. Under our discussion of third-party transactions we have suggested how banks and insurance companies should be protected in dealing with the persons named in the agreements of the companies.

In view of the investment features involved in the lifetime aspect of a life insurance policy, it might be assumed that the use of community funds to pay life insurance premiums by one spouse without the approval of the other would automatically give to the non-assenting spouse the right to assert as to the insurance company that the policy itself is community property in the proportion that the premiums were paid from community funds.

66. *Love v. Robertson*, 7 Tex. 6 (1851).

However, before any such view is accepted consideration must be given to the public interest involved in making it possible for life insurance companies to act promptly upon requests for loans and surrender values and upon other life-time requests, as well as in paying death benefits. The life insurance companies in most instances have no knowledge as to the nature of the funds tendered in payment of premiums and no ability to maintain accounting records as between community property payments, payments by a spouse from separate property, and payments by third persons. It would be intolerable to the public if rules of community property law should force life insurance companies to file interpleader proceedings or other legal actions every time a married policy-holder is involved in a request for action under a policy both before maturity and after the death benefits become payable.

Often, of course, such litigation could be avoided where the request for action comes from the record holder of legal ownership of the policy and such person under the community property law is granted powers of management over community property of which title stands in his name. Thus a surrender of the policy by the husband would be within his management powers; if the other spouse had a community property interest in the policy before surrender, that interest would be transferred to the cash fund received by the husband as a result of the surrender. However, the management power does not remove practical difficulties if the question concerns payment of the death benefit to a third person upon the death of the insured husband, nor are they removed if in his life-time the insured husband (being the record owner of a policy under which premiums were paid from community funds) attempts to assign a policy to someone who is a stranger to the community, or is indeed a person to whom the wife would unquestionably object. Additional practical difficulties arise when the management power itself terminates upon the dissolution of the community by divorce or by death of a spouse. Frequently upon such termination the insurance company is faced with conflicting claims to a policy or its proceeds.

The administrative difficulties above mentioned are somewhat lessened, as to proceeds of matured policies, by statutes and decisions⁶⁷ in some community property states which absolve the life insurance company of any risk of liability to the complaining spouse if before notice of any use of community funds to pay premiums it has paid the death benefit to the beneficiary or assignee entitled according to the documents on file with the company. Several of the old community

67. *Blethen v. Pacific Mut. Life Ins. Co.*, 198 Cal. 91, 243 Pac. 431 (1926).

property states, such as Texas⁶⁸ and California,⁶⁹ have such a statute. All community property statutes enacted so far in 1947, except Pennsylvania's, contain a similar provision.⁷⁰ On the other hand, the Oklahoma law lacks any such provision.

Statutory provisions such as those just mentioned do not, however, aid in prompt settlements when the complaining spouse gives notice of her or his community property claim before payment of the death benefit. Interpleader of the record beneficiary or assignee with the complaining spouse, with its attendant costs, delays and complications, is the usual course for the life insurance company in the face of such a conflict (even if the spouse's claim is actually without any basis) because the life insurance company has in most cases no means of itself determining the merits of the two claims with certainty.

Furthermore, such statutory provisions dealing with death benefits carry no protection to the life insurance company in dealing with the record owner of its policies prior to maturity—as in the case of divorce or of assignment to a stranger. Here again the company should be protected in dealing with the record holder of title in the absence of notice of facts as to an adverse claim by his or her spouse, but it might be questioned as to whether a mere notice of divorce or a formal statement by a spouse that a certain premium was paid from community funds would be enough to put the insurance company in a position where it could no longer safely deal with the record title holder without joinder by the other spouse (or ex-spouse).

The considerations referred to above have no doubt been responsible for the reluctance of some courts of community property states to hold that mere payment of certain premiums from community cash by one spouse who holds record ownership of a life insurance policy gives to the other spouse such a property right or interest in the policy as would arise if the money needed to pay premiums, instead of being used for that purpose had been deposited in the separate bank account of the first spouse or otherwise mingled with his property. There is no question that in case of dissolution of the community by death or divorce the spouse who made such payments might be held personally liable from his own separate property for the amount of value arising from such premium payments (if the payment is held to be outside the management power). But the Texas courts have declined, after maturity, to allow the complaining spouse to recover any part of the death benefit payable on the record to a third party as beneficiary,

68. TEX. CIV. STAT., Art. 4736a (Vernon, 1931).

69. CAL. CIV. CODE, § 10172 (Deering, 1941).

70. MICH. COMM. PROP. ACT § 16, effective July 1, 1947; NEBR. COMM. PROP. ACT. § 7, effective Sept. 7, 1947; ORE. COMM. PROP. ACT § 14, effective Sept. 7, 1947.

leaving such spouse to assert the claim as a money one in the settlement of the interest of the deceased spouse in other community or separate property.⁷¹

Even where, before maturity of the policy, the courts have used language indicating that the complaining spouse gained a "property interest" in the policy, it has been accompanied on occasion by language like that in *Locke v. Locke*⁷² which dealt with a settlement after divorce. There the court said that the "property" interest of the complaining spouse could not be enforced by a decree requiring the husband to surrender the life policy which stood in his ownership and upon which the premiums had been paid from community property, but that such interest merely gave rise to a right in the complaining spouse to collect half the surrender value at the time of divorce from other property belonging to her ex-husband. It might well be doubted whether Texas treats such a right as a property interest in the policy itself were it not for the later decision of the same court in *Berdoll v. Berdoll*,⁷³ where the surrender of such a policy for its cash value was directed. Furthermore, the Supreme Court of Texas in *Womack v. Womack*⁷⁴ cited both the *Locke* and *Berdoll* cases in writing:

"The courts of this State have held that the 'cash surrender value' of a policy is property and may be considered and treated as community property."⁷⁵

3. *Pertinent provisions of Pennsylvania Act.* The pertinent provisions of the Pennsylvania Community Property Act have already been quoted in this article. However, certain sections are particularly important with respect to problems relating to life insurance. Section 3 of the Act arrives at a definition of community property by the process of exclusion. This section states that all property acquired during marriage, which is not the separate property of either spouse, shall be deemed to be community property. Section 4 gives the wife the power of management, control and disposition of all community property, the title to which stands in her name. The same section gives the husband similar powers over all other community property. These provisions of Sections 3 and 4 are, with one exception, substantially the same as the equivalent provisions in the Texas statute.⁷⁶ The exception is that the Texas statute gives the power of disposition of all community property to the husband alone during coverture, whereas

71. *Volunteer State Life Ins. Co. v. Hardin*, 197 S. W. 2d 105 (1946).

72. 143 S. W. 2d 637 (Tex. Civ. App. 1940).

73. 145 S. W. 2d 227 (Tex. Civ. App. 1940), expressly approved in *Chapman v. Chapman*, 172 S. W. 2d 127 (1943).

74. 141 Tex. 299, 172 S. W. 2d 307 (1943).

75. *Id.* at 308.

76. TEX. REV. CIV. STAT., Art. 4619, § 1 (Vernon, 1936).

Section 4 of the Pennsylvania Act permits the wife to dispose of that part of the community property, the title to which is in her name. Because of these statutory similarities, it is believed that the Texas decisions will in most cases be followed by the Pennsylvania Courts when questions involving life insurance are submitted to them. Obviously, there will be exceptions, and an example would be a case where the wife is the record owner of a life insurance policy and wishes to dispose of it. The Pennsylvania statute appears to give her the necessary power to do so but under the Texas statute she would be unable to do so without her husband's joinder. Instances where we believe that the Pennsylvania Courts may not follow the Texas decisions will be specifically referred to in the following discussion.

4. *Time of acquisition as test.* It is well settled that the status as community or separate property of the proceeds of a policy insuring a married person is not governed by the marital status of the insured at the time of his or her death.⁷⁷ In some community property jurisdictions, such as Louisiana and New Mexico, the time of the issuance of the policy controls such status of the proceeds, so that the other spouse is held to have no community property interest in proceeds of a policy having its inception before marriage, even though community funds are used in payment of premiums after marriage.⁷⁸

5. *Character of funds used to pay premiums as test.* Other community property jurisdictions, notably California,⁷⁹ Washington⁸⁰ and Texas,⁸¹ have held in some cases that where the common property has contributed to the premiums which give rise to the fund representing the proceeds of the policy, the community should receive such proportion of the proceeds as the premiums paid from community property bear to the total amount of premiums. The balance of the proceeds, representing the proportion paid with premiums from separate property, is held to be the separate property of the deceased spouse, payable to the beneficiary or assignee named by the deceased spouse. The California courts have, however, shown some sympathy for the Louisiana rule based upon the status of the insured at the time of inception

77. *In re Castagnola's Est.*, 68 Cal. App. 732, 230 Pac. 188 (1924).

78. *Succession of Farrell*, 200 La. 29, 7 So. 2d 605 (1942); *Succession of Lewis*, 192 La. 734, 189 So. 118 (1939); *Berry v. Franklin State Bank & Trust Co.*, 186 La. 623, 173 So. 126 (1937); *In re White's Estate*, 43 N. M. 202, 89 P. 2d 36 (1939). Where the proceeds of the policy are separate property, the community estate is entitled to a credit for premiums paid out of it; *Succession of Lewis*, *supra*.

79. *McBride v. McBride*, 54 P. 2d 480 (Cal. 1930); *Modern Woodmen of America v. Gray*, 113 Cal. App. 729, 299 Pac. 754 (1931); *New York Life Insurance Co. v. Bank of Italy*, 60 Cal. App. 602, 214 Pac. 61 (1923).

80. *In re Coffey's Est.*, 81 P. 2d 283 (Wash. 1938).

81. *Berdoll v. Berdoll*, 145 S. W. 2d 227 (Tex. Civ. App. 1940).

of the policy. In the case of *In re Castagnola's Estate*,⁸² the court wrote as follows:

" . . . We are satisfied, upon the authority of the cases cited from Louisiana, and upon principle, that the status of the parties at the time the insurance contract was executed, or at least throughout the period of the payment of the premiums, is the controlling feature in the determination of whether the policy is community or separate property."⁸³

It is suggested that this rule of proportionate ownership is the proper one for the Pennsylvania courts to follow.

6. *Factual situations (assuming policy is issued during marriage and the premiums entirely paid with community property).*

(a) *Where insured names own estate as beneficiary.* Where the husband during marriage insures his own life, making the proceeds payable to his own estate, and the premiums are paid out of community funds, all community property jurisdictions hold that the proceeds arising as a result of such premium payments belong to the community.⁸⁴ In Pennsylvania the result should be the same if the wife insures her life for the benefit of her own estate. In effect this means that one-half of the proceeds is payable to the estate of the insured and one-half to the surviving spouse. Sometimes the courts justify their conclusion by stating that a husband cannot validly make a gift to himself of community property, and thereby, as a result of his own act alone, change the status of community property into separate property of his own. Perhaps a more satisfactory explanation is that since the chose in action (represented by the policy) is community property because it was acquired during marriage with community funds, the proceeds belong to the community. This explanation is in accordance with the general rule that where community property is used to acquire additional property, the latter assumes the same character as the property utilized in its acquisition. Since in the facts here assumed, we have no interests of third persons involved, it is easy to apply the customary rule as to tracing funds.

(b) *Where insured names other spouse as beneficiary.* All community property states are in agreement that where the husband insures his own life during marriage, naming his wife as beneficiary, and pays the premiums with community funds, the proceeds are the

82. 68 Cal. App. 732, 230 Pac. 188 (1924).

83. *Id.* at 190.

84. *In re Castagnola's Est.*, 68 Cal. App. 732, 230 Pac. 188 (1924); *Succession of LeBlanc*, 142 La. 27, 76 So. 223 (1917); *In re Brown's Est.*, 124 Wash. 273, 214 P. 10 (1923); *Martin v. Moran*, 11 Tex. Civ. App. 509, 32 S. W. 904 (1895).

separate property of the wife.⁸⁵ The converse of this situation should hold true in Pennsylvania if the wife insured her life and named her husband as beneficiary. The result in other jurisdictions is explained on the grounds that the husband is presumed to have made a gift to his wife of his interest in the community funds used to pay the premiums and therefore of the proceeds arising therefrom. If the husband reserves the right to change the beneficiary under such a policy, the gift to his wife does not become fully effective until his death. Assuming that the husband reserved such a right with respect to the policies involved, *Blackmon v. Hansen*⁸⁶ follows this rule. That case came before the Supreme Court of Texas as a suit by the wife against the Texas tax collector to recover a portion of the state inheritance tax paid on her husband's estate. The question of whether there was an over-payment depended on whether the total or only one-half of the proceeds collected from insurance policies on the husband's life were to be included in his gross estate. The policies were issued during marriage at the application of the insured and upon his own life, and the wife was named as beneficiary. All the premiums were paid from community funds. The opinion of the supreme court does not expressly state whether the husband reserved the right to change the beneficiary or not. In the earlier opinion of the Court of Civil Appeals,⁸⁷ the court seemed to assume that the right to change the beneficiary was reserved because it wrote as follows:

“ . . . if there was a privilege in the policies to change the beneficiary, its exercise could have defeated her interest. But even if there was such a power, he did not choose to exercise it and left her money invested for her benefit.”⁸⁸

This case originally was referred to a special commissioner and in his report⁸⁹ he stated that the stipulation did not disclose whether the husband had reserved the right to change the beneficiary or any other incidents of ownership. In affirming the decision, the supreme court held that only one-half of the proceeds should be included as part of the husband's gross estate. The decision seems correct on the ground that since the husband's gift to his wife would not be completed until his right to change the beneficiary was terminated by his death, his

85. *Davis v. Magnolia Petroleum Co.*, 134 Tex. 201, 134 S. W. 2d 1042 (1940); *San Jacinto Bldg., Inc. v. Brown*, 79 S. W. 2d 164 (Tex. Civ. App. 1935); *Evans v. Opperman*, 76 Tex. 293, 13 S. W. 312 (1890); *In re Miller's Est.*, 23 Cal. App. 2d 16, 71 P. 2d 1117 (1937).

86. 169 S. W. 2d 962 (Tex. 1943).

87. *Hansen v. Blackmon*, 169 S. W. 2d 955 (Tex. Civ. App. 1942).

88. *Id.* at 959.

89. *Id.* at 961.

half interest in the community property asset represented by the policy was properly includible in the amount on which his estate was subjected to inheritance tax.

The same result as that pointed out above will no doubt occur if the husband should name his wife's own estate as beneficiary of a policy which he takes out on her life. As in the case of his using community funds for premiums on a policy on his own life under which he has named his wife as beneficiary, so in this case his act in naming her estate as beneficiary must be deemed as a gift or waiver of any community property claim he might otherwise have to the proceeds when she dies.

A somewhat similar problem may arise in Pennsylvania which would not occur in most community property states. The older community property jurisdictions generally place the management and control of all community property in the hands of the husband alone. However, under Section 4 of the Pennsylvania Act, the wife has the management and control of that part of community property, the title to which stands in her name. Under this provision, it would be possible for the wife to use such community property to pay the premiums on a policy insuring the life of her husband (or her own life), under which she herself had named as beneficiary the husband's estate (or the husband himself, as to the policy on her own life). Under these circumstances, it is suggested that the proper rule for the Pennsylvania courts to apply is that which is applied in the other jurisdictions when the husband has been the active force in naming the wife (or her estate) as beneficiary.

(c) *Where husband insures the life of wife for his own benefit.* *Martin v. McAllister*,⁹⁰ a Texas decision, is an anomaly unless it is assumed that the wife consented by joining in the application for insurance or by submitting to a medical examination. In it the court held that when the husband insured the life of his wife, naming himself as beneficiary, and the premiums were paid from community property, the proceeds were not community property but were part of the husband's separate estate.⁹¹ This holding is an unusual one and appears to be inconsistent with the situations already discussed. The better

90. 94 Tex. 567, 63 S. W. 624 (1901).

91. The Court simply stated that the proceeds belonged to the person named as payee and became that person's property upon the death of the insured. The court reasoned that since the proceeds were received by the husband after the death of the insured, they could not be community property. This reasoning ignores the fundamental nature of insurance, namely, that the contract right evidenced by the policy is property. The decision cannot be justified on the theory that there was a gift to the husband because the court assumed that the wife did not consent to the issuance of the policy on her life nor to the payment of premiums out of community property. Since the wife could not have made a gift to the husband under these circumstances, the proceeds should have been held to be community property.

view would be that such proceeds were community property because they arose from community funds and no rights of third persons were involved.

(d) *Where third party is beneficiary.* The various community property jurisdictions are not in agreement concerning the disposition of the proceeds in cases where the husband has paid the premiums on a policy on his life with community funds and has named a third party as beneficiary.

California has had a statute since 1891 which deprives the husband of the power to give community personal property to third persons unless his wife gives her written consent.⁹² The California court held in *Beemer v. Roher*,⁹³ in a contest between the wife and the named beneficiary, that half the proceeds due on the husband's death were payable to his wife and that the balance went to the third party who on the record was beneficiary of the whole proceeds. Washington does not have the equivalent of California's statutory limitation on gifts, but the rule in Washington is even more limited, because the designation of a third party as beneficiary by the insured husband without the wife's joinder is ineffective even as to half of the proceeds when the premiums have been paid from community funds. Washington under such circumstances treats the entire proceeds of the policy as community property.⁹⁴

Neither Louisiana⁹⁵ nor Texas⁹⁶ have such a positive prohibition against gifts being made by the husband (without his wife's approval) from community property under his management. In Texas a recent case⁹⁷ held that the beneficiary named by the husband was

92. CAL. CIV. CODE § 172 (Deering, 1937).

93. 30 P. 2d 547 (Cal. App. 1934).

94. *Small v. Baktyzel*, 177 P. 2d 391 (Wash. 1947); *In re Towey's Est.* 22 Wash. 2d 212, 155 P. 2d 273 (1945); *Occidental Life Ins. Co. v. Powers*, 192 Wash. 475, 74 P. 2d 27 (1937).

95. *Pearce v. National Life & Acc. Ins. Co.*, 12 La. App. 608, 125 So. 776 (1930). The value of the case may be questioned because there is no statement in the opinion concerning the source of the premiums; the wife merely alleged that the proceeds belonged to the community.

96. *Jones v. Jones*, 146 S. W. 265 (Tex. Civ. App. 1912); *cf. Moore v. California-Western States Life Ins. Co.*, 67 S. W. 2d 932 (Tex. Civ. App. 1934). In *James v. United States of America*, 12 Life Cases 739, which was decided on June 16, 1947, by the District Court of the United States for the Southern District of California, it was held:

1. That under the community property laws of the State of Texas, where there is no intention on the part of the husband to defraud his wife, the proceeds of a policy on the husband's life vest in the beneficiary named in the policy upon the husband's death even though the policy was taken out by the husband during coverture and the premiums were paid out of community funds.

2. That the disposition of the proceeds of insurance issued pursuant to the National Service Life Insurance Act of 1940 is not subject to and cannot be controlled or governed by the community property laws of any state.

97. *Volunteer State Life Insurance Co. v. Hardin*, 197 S. W. 2d 105 (Tex. 1946).

entitled to the full proceeds of a policy on the husband's life under which premiums were paid by the husband from community property, prior to his wife's death, which occurred before the insured husband died. The death of the insured terminates the group of life-time rights, and matures the right of the named beneficiary to the proceeds. The Texas court held that such interest in the policy as the wife might have had before the insured's death related to the surrender value only, and upon the insured's death the wife's estate had no rights to the proceeds themselves. Any right against her husband's estate in the community settlement is based upon the amount of the cash value prior to maturity and not upon the amount of the proceeds after maturity.

B. *Rights and Liabilities of the Spouses*

1. *Right to surrender policy for cash.* It has been suggested⁹⁸ that a new theory is being developed by the Texas Courts concerning the rights of the spouses prior to maturity in policies under which premiums have been paid out of community property. This theory is based upon the fact (already noted above) that the usual life insurance policy today is composed of two elements: the annual sum paid for current protection and the amount going into the reserve to keep the premium level in later years. The amount accumulating in the reserve is subject to withdrawal as a loan or to surrender under the terms of the policy. In cases where this amount has been built up by premiums paid from community property, the general rule relating to purchases made with community property would preserve to the community partners a claim based upon the amount of the cash surrender value, or perhaps make the right to the surrender value itself a community asset, at least until that right is extinguished as a separate right by the maturing of the policy through death.

*Locke v. Locke*⁹⁹ is one of the first cases in Texas to recognize this theory. At the time Mr. and Mrs. Locke were divorced, there were life insurance policies on his life having a cash surrender value of approximately \$3600. All the premiums had been paid out of community funds. The court awarded to Mrs. Locke from her husband a sum equal to one-half of the cash surrender value at the time of divorce. It was conceded in the opinion that the wife had no right to control the policies and that the court was without authority to compel the husband to surrender the policies for cash. Nevertheless, the court held that their cash surrender value was an asset acquired through the payment of the premiums from community funds. The opinion dis-

98. The Philadelphia Legal Intelligencer, August 29, 1947, p. 1, col. 1.

99. 143 S. W. 2d 637 (Tex. Civ. App. 1940).

cussed the nature of the cash surrender value of the policies and the duty of the husband to account for it in the community settlement in the following words:

"A cash surrender value of life insurance policy such as here involved accumulates by reason of the payment of amounts in excess of those required to provide the life insurance alone. In the present case the cash surrender value of the policies was acquired during marriage by purchase with community funds, and not by 'gift, devise or descent'. At the time of the divorce, the cash surrender value of the policies was property. Such property clearly did not come within the classification of the separate property of either spouse and therefore must be deemed to have been property of the community estate of appellant and appellee . . . This being so, appellant should account to appellee for the value of her half interest in the cash surrender value of the policies." ¹⁰⁰

The Supreme Court of Texas arrived at the same conclusion in the case of *Womack v. Womack*,¹⁰¹ where the sole question presented to the court was whether the amount of the cash surrender value of certain life insurance policies had to be accounted for as community property. In that case, the husband and wife were divorced but the divorce decree made no disposition of four policies on the life of the husband under which his wife was named beneficiary and of one policy on the wife's life under which the husband was named as beneficiary. All of the premiums had been paid from community funds. Since the divorce decree did not cover the disposition of these policies, it was proper under Texas law for a determination to be made in a separate proceeding as to the rights of the parties based upon the cash surrender value of the policies at the time of divorce. The court in the *Womack* case directed the husband, because of the community property premium payments, to pay to the former wife one-half of the difference between the cash surrender value of the policies on his life and the cash surrender value of the policy on the wife's life. This case expressly overruled *Whiteselle v. Northwestern Life Ins. Co.*¹⁰² The *Whiteselle* case held that after divorce the husband was not liable to account to his wife for any part of the cash value of a policy on his life, under which he had (after naming his wife as beneficiary) paid the premiums with community funds. In the *Whiteselle* case it had been held that the payment of premiums from community funds did not give the wife any community claim, even though the policy was on the record under the control of the husband alone.

100. *Id.* at 638.

101. 141 Tex. 299, 172 S. W. 2d 307 (1943).

102. 221 S. W. 575 (Tex. App. 1920).

A very recent Texas case on the subject is *Volunteer State Life Ins. Co. v. Hardin*,¹⁰³ where the son, as heir of the wife, claimed the right to share in the proceeds of two life insurance policies issued on the life of the father and payable to the father's sisters. During the marriage all premiums had been paid from community funds, and at her death before the insured's death the wife had been the primary beneficiary of both policies. The husband had reserved the right to change the beneficiary and after his wife's death exercised such right by naming his sisters in place of his wife. The heir of the wife claimed he was entitled to one-half of the proceeds of the policies because he inherited one-half of the community estate from the wife (his mother), or, alternatively, that he was entitled to recover one-half of the cash surrender value of the two policies calculated as of the date of his mother's death. The trial court held that the son was not entitled to any part of the proceeds, but the Court of Civil Appeals reversed the trial court and upheld the son's claim to one-half of the surrender value existing on the date of his mother's death. In reversing the intermediate court, the Texas Supreme Court, after pointing out that there was no evidence of the husband's having defrauded his wife, stated that it need not determine whether at the time of dissolution of the marriage by the wife's death the son might have had a right to have the cash surrender value of these policies taken into account in a partition of the community estate because he had failed to show both that he had sought such a partition and that he had not received his full share of such estate. By its decision in this case, the Supreme Court of Texas does not appear to have limited the recently developed doctrine that each spouse has the right to have the cash surrender value of life insurance policies taken into account in a community property settlement if the premiums have been paid with community funds.

This line of Texas cases does not affect the right of the husband to surrender for its cash value a policy of which he is the record owner, nor to take any other action consistent with his position as manager of the community property. Of course, any right which the wife might have with respect to the amount of the cash value before surrender would thereafter exist with respect to the amount of cash received by the husband from the surrender.

2. *Right to borrow and to assign a policy for value.* The husband as record owner of the policy is able to borrow upon it or assign it for value without obtaining the consent of his wife since he is the manager of such policy, even though the premiums have been paid out of community funds. In Pennsylvania it will (as pointed out

103. 197 S. W. 2d 105 (Tex. 1946).

above) also be possible for the wife to be the manager of an insurance policy which is a community asset. Section 4 of the Pennsylvania Act makes her the manager of that part of the community property, the title to which stands in her name. Therefore, where she is the record owner of a policy she will be able to exercise the normal rights accruing to the owner of an insurance policy, to the same extent that her husband can when he is the owner.

3. *Right to change beneficiary of the proceeds due at maturity.* It has been held in Texas that a husband is not deprived of the right to change the beneficiary under a policy payable to his wife and insuring his life when he has expressly reserved such right under the provisions of the policy, even though the premiums have been paid out of community funds.¹⁰⁴

C. *Conclusions Concerning Life Insurance*

It cannot be stated with certainty what position will be taken by the Pennsylvania courts in a particular situation relating to life insurance policies. It is probable that the courts will rely heavily upon the decisions of Texas because so many sections of the Pennsylvania Act have been derived from the Texas Community Property Law. It is to be hoped that the Pennsylvania courts will give appropriate weight to the public policy considerations which require the enunciation of simple rules that will permit insurance companies to act promptly on the various requests that come to them from the owners of policies desiring to exercise the usual life-time rights or from the beneficiaries whose primary concern is to obtain prompt payment upon the death of the insured.

[EDITORIAL NOTE: On November 26th 1947, in *Willcox v. Penn Mutual Life Ins. Co.*, the Pennsylvania Supreme Court held the Pennsylvania Community Property Act unconstitutional in its entirety. In view of the current interest in community property in other jurisdictions, the Board of Editors deemed it advisable to publish this second installment by Messrs. Latta and Gemmill in order to present a more complete discussion of community property problems.]

104. *Ibid.*