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Community Property: A Guide for Lawyers and Students of Forty States

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COMMUNITY PROPERTY: A GUIDE FOR LAWYERS AND STUDENTS OF FORTY STATES†

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I.

This article is written for lawyers and law students in non-community property states, on the theory that what they need is not an exhaustive knowledge of the various community property laws, nor a detailed knowledge of such laws in a single state, but a notion of the underlying theory and effect of community property jurisdictions, the types of problems and distinctions that may be important, and a means of remembering "which of those western states" have adopted community property.

"Community Property" connotes a Civil Law institution of joint ownership between husband and wife and, in particular, a varyingly similar institution[1] presently in force in eight[2] of the forty-eight United

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†This article in somewhat shorter form will appear in 2 WALSH & NILES, CASES ON PROPERTY (2d ed., Published by Bobbs-Merrill).

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1. General texts on community property includes: DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1943), 2 vols. (hereinafter called DE FUNIAK) (and see vol. 2 for bibliography of books and articles); MCKAY, COMMUNITY PROPERTY (2d ed. 1925); MOYNIHAN, COMMUNITY PROPERTY (in 2 AMERICAN LAW OF PROPERTY, 199-221) (1952) [hereinafter called MOYNIHAN (2 A.L.P.)].

Local texts include: California: *Community Property* (1953), in 10 CALIF. JURISPRUDENCE (2d series). Idaho: JACOB, THE LAW OF COMMUNITY PROPERTY IN IDAHO (2d ed. 1943) (hereinafter called JACOB): Louisiana: DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA (1945) (hereinafter called DAGGETT). New Mexico: [A text may be in prospect. See articles by Prof. Clark on New Mexico community property: 24 ROCKY MT. L. REV. 273 (1925); 25 So. CALIF. L. REV. 149 (1952); 26 TULANE L. REV. 324 (1952).] Texas: SPEER, MARITAL RIGHTS IN TEXAS (3rd ed. 1929); HUIE, THE COMMUNITY PROPERTY LAW OF TEXAS (1951) [reprinted from 13 TEX. CIV. STAT. pp. 7-46 (Vernon, 1951)].

Excellent brief surveys of the system appear in: Comment, *The Community Property System,* 27 BOSTON U.L. REV. 442-459 (1947); Sebree, *Outline of Community Property,* 6 N.Y.U.L. REV. 32-51 (1928) (historical); De Funiak, *A Review in Brief of Principles of Community Property,* 32 KY. L. J. 63-74 (1943); *Marital Property,* 10 ENC. SOC. SCI. 116-122 (comparison with common law and European systems); 3 VERNIER, AMERICAN FAMILY LAWS § 178 (1935). See also Steere, *An Introduction to the Law of Community Property,* 23 IND. L. J. 34 (1947) and a capsule account in 2 TIFFANY, REAL PROPERTY, 237-246 (3d ed. 1939).

No evaluation is made of the inevitable volumes published in each of the "new" adopting states to explain the provisions of its (short-lived) community property statute. In this category, see EAGIN, COMMUNITY PROPERTY LAW IN OKLAHOMA (1940) (the elective statute); WILLIAMS, COMMUNITY PROPERTY PROBLEMS IN NEBRASKA,

States. Although often treated as a subdivision of the law of Persons or Domestic Relations (see *e.g.*, the title Husband and Wife in *American Digest, Corpus Juris Secundum, A.L.R. Digest, The Index to Legal Periodocals,* etc.)[3] or recognized as an independent legal field (see card catalog listings under Community Property and the same title in *American Jurisprudence, California Jurisprudence,* etc.), community property is essentially *a kind of concurrent ownership* of real and personal property by *husband and wife.* It could even be called *tenancy in community,* and in any case is to be distinguished from joint tenancy, tenancy in common, tenancy by entireties, and partnership.

To oversimplify, one might say that under community property statutes:

(1) Everything acquired by either spouse *before* marriage shall *remain separate property.*

(2) All income and earnings of either spouse during the marriage shall belong to both as *community property.*

(3) Property acquired gratuitously by one spouse from a third

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pp.79 (1947); MICHIGAN COMMUNITY PROPERTY ACT WITH EXPLANATION, pp. 31 (National Bank of Detroit, 1947); LOWRY & ROBERT, THE OREGON COMMUNITY PROPERTY LAW (Oregon State Bar, 1947); CLARKE, THE PENNSYLVANIA COMMUNITY PROPERTY LAW, pp. 23 (1947) Of greater importance are the articles and notes written in legal periodicals of such adopting states. Legal periodical material on the "new" laws dealt principally with their tax effects or with the effect or repeal. For two exceptions see Garrett, *Conveyances Under the Community Property Law,* 18 OKL. B. A. J. 1292 (1947); Latta and Cemmill, *Observations on Some Pennsylvania Community Property Problems,* 96 U. OF PA. L. REV. 20, 118 (two parts) (1947). For similar material on the operation of the Oregon statute, see Ganong, *Community Property and Presumptions,* 28 ORE. L. REV. 157 (1949); Coulter, *Extent of Powers of Management and Control of Community Property,* 28 ORE. L. REV. 320 (1949); Coulter, *Limitation on the Power of the Community Manager to Make Gifts from the Community Property,* 28 ORE. L. REV. 210 (1949); and Notes: 28 ORE. L. REV. 58, 61, 70, 72 (1948).

2. Washington, Idaho, Nevada, California, Arizona, New Mexico, Texas, and Louisiana. This list might profitably be learned. Mnemonic aid: Oregon is *not* a community property state. If Oregon were gone (*i.e.* beneath the waters of the Pacific), a line drawn from Puget Sound southerly through the *then* coastal and border states to the Mississippi River mouth, would pass exclusively through the eight community property states.

Concerning the derivation of these community property statutes, see Kirkwood, *Historical Background and Objectives of Community Property in the Pacific Coast States,* 11 WASH. L. REV. 1 (1936), reprinted in SELECTED ESSAYS ON FAMILY LAW 514 (1950).

3. *Cf.* TEX. CIV. STAT. vol. 13, tit. *Husband and Wife,* ch. 3 "Rights of Married Women" (Vernon, 1951) (containing the community property sections).

person (whether by gift, by will or by intestacy) is separate property, *even though acquired during the marriage.*[4]

(4) In a few community property states[5] the income derived during the marriage but from separate property (e.g., from interest on capital, or as rent) is itself community property, but the greater number of community property jurisdictions treat it as separate property. The proceeds from the sale (although during marriage) of separate property retain separate property status. Where such proceeds represent a *profit* over the value of the *res* at the time acquired, a further inquiry must be made. Ideally, the portion of the profit resulting from the labor or enterprise of a spouse during marriage should be community property; the portion representing enhancement of value due to extrinsic factors (neighborhood growth, increased demand, or inflation) should *a fortiori* be separate property in states so treating the *rent* from separate property, and *might* be separate property even in other community property states.[6]

II.

Lawyers are understandably prone to think of the "community property system" as constituting a unit, operating exactly alike in the eight states. In reality, however, the system includes an infinite variety of problems, not all solved the same way in each community property state. Typical of such problems are the following:

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4. The Civil Law makes a distinction between "pure donations" and "remuneratory gifts". DE FUNIAK § 70. Again, what if the gift, devise, bequest or (where the spouses were parents of the intestate) inheritance was to *both* spouses? That it is community property, see DE FUNIAK § 69; that it is separate property except in Louisiana, see MCKAY, COMMUNITY PROPERTY §§ 200, 260 (2d ed. 1925); 3 VERNIER, AMERICAN FAMILY LAWS § 178 (1931); that it is separate even in Louisiana if made to each spouse "particularly" rather than to the spouses jointly, See *id.* at p. 210.

If the gift were from one spouse to the other, would the result be affected by whether the attempted gift was made from community property or the donor's separate property? See DE FUNIAK §§ 140-144.

5. Idaho (except as to such of wife's separate property as came by an instrument specifying otherwise), Louisiana (except as to paraphernal property administered by the wife and, since 1944, only if in addition a recorded instrument so reserved the power to manage), and Texas. Frame v. Frame, 120 Tex. 61, 36 S.W. 2d 152, 73 A.L.R. 1512 (1931) voided a contrary statute as violative of the definition of separate property in the Texas Constitution. Conversely, George v. Ransom, 15 Cal. 322, 76 Am. Dec. 490 (1860) invalidated, as violative of the California constitutional definition of separate property, an 1850 statute which declared that the rents and profits of separate property of either spouse should be community. See CALIF. CIV. CODE §§ 162, 163 (Deering 1949); CALIF. CONST. ANN. Art. XX, § 8 (Mason, 1953).

6. DE FUNIAK § 73; JACOB, 47-49; Kultgen, *Profits From Sale of Separate Property in Texas: Community or Separate?* 28 TEX. L. REV. 576 (1950).

Where money is derived from sale of timber, or leasing of mineral rights, in real property held as separate property, should such money be treated as income or as proceeds of a (pro tanto) sale? May the two be treated differently?

(a) *Necessity of marriage.* The rule hereon is analogous to that applicable to dower. Generally, no community property arises under a null marriage. A few community property states permit common law marriage;[7] the majority do not,[8] but in both groups of states the primary inquiry is whether the marriage was valid where it occurred.[9] If a voidable marriage is not avoided, a community exists; where the voidable marriage is annulled, no community property arises *thereafter* but existing community interests should not be divested.[10] A further qualification exists, moreover, under the doctrine of *putative marriage* in Louisiana,[11] and Texas,[12] and to a lesser extent in a few other states by analogy or estoppel[13] or under an express or implied joint venture.[14]

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7. Idaho, Nevada and Texas. 1 VERNIER, AM. FAM. LAWS § 26; Huff v. Huff, 20 Idaho 450, 118 Pac. 1080 (1911); State v. Zichfeld, 23 Nev. 304, 46 Pac. 802 (1896); Ormachea v. Ormachea, 67 Nev. 273, 217 P. 2d 355, 359 (1950); and see Cornell v. Mabe, 206 F. 2d 514, 517 (5th Cir. 1953) (citing Texas cases). Common law marriages may not be contracted in Oregon: Huard v. McTreigh, 113 Ore. 279, 232 Pac. 658 (1952); Note, 4 ORE. L. REV. 308 (1925). Nor, since 1923, in Nebraska. Annotations, 60 A.L.R. 541 (1929); 94 A.L.R. 1000 (1935); Harrison v. Cargill Comm. Co., 126 Neb. 185, 252 N.W. 899 (1934). For the prohibitory Nebraska statute, see 3 NEB. REV. STAT. § 42-104 (1943).

8. Arizona, California, Louisiana, New Mexico, and Washington. 1 VERNIER, AMERICAN FAMILY LAWS § 26 (1931); *In re* Gabaldon's Estate, 38 N.M. 392, 34 P. 2d 672, 94 A.L.R. 980 (1934) (two judges dissenting), noted in 35 COL. L. REV. 947 1935); 5 ARIZ. CODE ANN. § 63-111. For the earlier Arizona view, see United States v. Tenney, 2 Ariz. 127, 11 Pac. 472 (1885).

9. Re Gallagher's Estate, 35 Wash. 2d 512, 213 P. 2d 621 (1950) (recognizing Michigan common law marriage); State v. Brem, 51 N. M. 63, 178 P. 2d 582 (1947) (Texas marriage).

10. Coats v. Coats, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N.S.) 844 (1911). *Cf.* DE FUNIAK, § 226.

11. McCaffrey v. Benson, 40 La. Ann. 10, 3 So. 393 (1888).

12. Texas originally recognized the property effects of putative marriage but after adopting in 1840 the English common law as a rule of decision, properly recognized the doctrine only as to relationships antedating 1840. Note, 1 TEX. L. REV. 469 (1923); Ft. Worth & R.G. Ry. v. Robertson, 103 Tex. 504, 131 S. W. 400 (1910) [memorandum, adopting the dissenting opinion from intermediate court, 121 S.W. 202 (Tex. Civ. App. 1909)]. In Lee v. Lee, 112 Tex. 392, 247 S.W. 828 (Tex. Comm. App. 1923), Texas reverted to the putative marriage doctrine. New Mexico has been cited as possibly recognizing putative marriage. MCKAY, COMMUNITY PROPERTY 191 (1st ed. 1925); Schneider v. Schneider, 183 Cal. 335, 191 Pac. 533 (1920).

13. In California, Coats v. Coats, 160 Cal. 671, 118 Pac. 441, 36 L.R.A. (N.S.) 844 (1911), although insisting that lawful marriage was indispensable to technical community property, applied the concept by analogy to give the woman half of the property acquired by the parties' joint efforts before their voidable marriage was annulled. Later, however the same court expressly applied the putative marriage doctrine to allow a full community share to a bona fide woman whose "marriage" was absolutely void because of her own undissolved prior marriage. Schneider v. Schneider, 183 Cal. 335, 191 Pac. 533, 11 A. L. R. 1386 (1920), noted approvingly, 9 CALIF. L. REV. 68 (1920), *Accord:* Vallera v. Vallera, 21 Cal. 2d 681, 134 P. 2d 761 (1943).

Where putative marriage exists, or is applied by analogy, what distribution would be made of property derived from the earnings of a married man who fraudulently "married" two additional unsuspecting women, then died survived by all three "wives"? *Cf.* Note, 9 CALIF. L. REV. 243 (1921); MOYNIHAN (2 A.L.P.) § 7.7, nn. 10, 11.

(b) *Termination of community.* Death or absolute divorce *ends* the community, preventing *later* acquisitions from becoming community property, but permitting a division of the existing community holdings according to the applicable statute.[15]

(c) *Workman's Compensation and Tort Claims.* If one spouse loses a limb and recovers therefor under Workmen's Compensation or by judgment against a tort-feasor, is such recovery community or separate?[16] What of a recovery, during marriage, for defamation of the plaintiff occurring before the marriage?[17]

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14. Washington, although insisting that it is not community property, has also allowed the innocent woman a full half of gains arising from the parties' combined efforts during the void marriage. Knoll. v. Knoll, 104 Wash. 110, 176 Pac. 22, 11 A.L.R. 1391 (1918). For the rule where the parties always knew they were not lawfully married, see Note, 20 CALIF. L. REV. 453 (1932). Cf. Hynes v. Hynes, 28 Wash. 2d 660, 184 P. 2d 68 (1947); Poole v. Schrichte, 39 Wash. 2d 558, 236 P. 2d 1044 (1951).

15. The effect (on the husband's managerial powers, the status of later acquisitions, and the right to a present division of community property) of limited divorce, judicial separation, an interlocutory decree not becoming final before one spouse died, abandonment (desertion) by one spouse of the other, and separation by mutual consent need not be considered here. DE FUNIAK §§ 224-227; Note, 25 WASH. L. REV. 284 (1950). If the spouses have separated, the "earnings and accumulations" of the wife and her minor children living with her, are often expressly declared by statute to be her separate property. DAGGETT, p. 10; DE FUNIAK §§ 57, 68 n. 4; Lorang v. Hays, 69 Idaho 440, 209 P. 2d 733 (1949) (recovery for false arrest and false imprisonment, the action accruing while plaintiff lived separately and apart from her husband, was her separate property).

16. Traditionally, the recovery was community property. DE FUNIAK § 82; Zaragosa v. Craven, 33 C.A. 2d 315, 202 P. 2d 73 (1949); 37 CALIF. L. REV. 318 (1949); 22 So. CALIF. L. REV. 455 (1949); 113 F. Supp. 892 (E.D. Tex. 1953). Dissatisfaction with this result prompted a Texas statute (later declared unconstitutional) to provide that compensation for personal injuries sustained by the wife should be her separate property. Arnold v. Leonard 114 Tex. 535, 273 S.W. 799 (1925); *but cf.* Nickerson v. Nickerson, 65 Tex. 281 (1886). Louisiana enacted a parallel statute. All six of the recent tax-inspired community property statutes specified that compensation received for personal injuries sustained by *either* spouse should be separate property of that spouse. Money damages recovered by the father from a third person because of the death or injury of the child is held to be community property, as are the minor child's wages. Both results are criticized in 1 DE FUNIAK §§ 68.1, 85. And see Carver v. Ferguson, 254 P. 2d 44 (Cal. App. 1953), that a wife may recover against her husband for injuries received while riding in his car before their marriage, and such recovery is her separate property. (This case was later dismissed June 4, 1953.)

Considerable confusion arose as to whether proceeds of life insurance policies were community property, and the importance to be attached to the fact that the policy was taken out before marriage or that all or some of the premiums were from community funds. Huie, *Community Property Laws as Applied to Life Insurance,* 17 TEX. L. REV. 121 (1939), 18 *Id.* 121 (1940); Annotation, 168 A.L.R. 342. *Cf.* Wissner v. Wissner, 338 U.S. 655 (1950), *rehearing denied,* 339 U.S. 926 (1950) (National Service Life Insurance); *In re* Foy's Estate, 109 Cal.A. 2d 329, 240 P. 2d 685 (1952) (premiums paid by employer); Kemp v. Metropolitan Life Ins. Co., 205 F. 2d 857 (5th Cir. 1953); Note, 28 WASH. L. REV. 236 (1953); Note, 25 So. CALIF. L. REV. 466 (1952). Some statutes sought only to protect the insurance company that paid the named beneficiary in good faith, leaving unchanged the rights of the spouses *inter se.* IDAHO CODE § 41-1402 (1948).

17. See DE FUNIAK § 82 for a suggestion that recoveries for defamation of a

(d) *Title by Adverse Possession.* If, when marrying, the man had been in adverse possession for less than the statutory period, and thereafter completed that period without interruption, would the title acquired by adverse possession be separate or community property?[18] Do Texas and the Arizona statutes (and the short-lived statutes of the "new" community property states) obviate this problem by declaring to be separate property all that was "acquired or *claimed*" before marriage?[19]

(e) *Control and disposition of community interests.* In general, the husband has the sole power of management, control and disposition of community property, but this is subject to various qualifications.[20]

In Idaho,[21] for example: (1) the wife has the sole management, control and disposition of community non-exempt personal property derived from her own earnings or from the rents and profits of her separate property (such rent and profits *are* community property in Idaho, however). As to similarly derived community *exempt* personalty the wife cannot mortgage without the "joint concurrence" of both spouses. Community *realty* acquired in the wife's name with the wife's earnings or from the rents and profits of her separate property, although subject to

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married person should be community property to the extent they replace expense, loss of personal earnings, and depreciation of community properties, but separate property to the extent they compensate for personal humiliation and depreciation of separate property holdings. If the defamation antedated marriage, recovery during marriage would presumably be separate property. See St. Louis & S.W. Ry. v. Wright, 33 Tex. Civ. App. 80, 75 S.W. 565 (1903); Morrissey v. Kirkelle, 5 C.A. 2d 183, 42 P. 2d 361 (1935). See Note, 24 So. CALIF. L. REV. 191 (1951).

18. DE FUNIAK § 65 cities Texas and California cases in accord with the Civil Law rule that title by adverse possession begun prior to the marriage but perfected after the marriage gives rise to community property if the possession was without color of title, separate property if under color of title. The rule that the property is separate or community according to the marital status when adverse possession was begun, is favored in 2 TIFFANY, REAL PROPERTY § 439 (3d ed. 1939) (citing McKAY, §586 (2d ed.). What if divorce antedated completion of the statutory period?

19. Coats v. Coats, 160 Cal. 671, 118 Pac. 441, 36 L.R.A. (N.S.) 844 (1911). See MOYNIHAN (2 A.L.P.) § 7.11.

As to property acquired partly with community funds and partly with separate funds, see *id.* § 7.12; as to property acquired in whole or in part on credit, see *id.* § 7.14. For an elaborate discussion of the Louisiana law, see Huie, *Separate Ownership of Separate Property Versus Restitution from Community Property in Louisiana,* 30 TEX. L. REV. 157 (1951), slightly revised in 26 TULANE L. REV. 427 (1952); Huie, *Separate Claims to Reimbursement from Community Property in Louisiana,* 27 TULANE L. REV. 143 (1953).

20. In addition to statutes providing for situations where the husband is insane or otherwise disabled, several statutes restrict his ability to give away the community property. Independently of statute, a leading case voided his substantial gift of community property to his paramour. Marston v. Rue, 92 Wash. 129, 159 Pac. 111 (1916).

21. See JACOB, 21-23.

her sole management and control, cannot[22] be conveyed or encumbered without the signature and acknowledgment of *each* spouse to the deed, contract, mortgage or other instrument.

(2) Community realty that is subject to the sole control of the husband cannot be conveyed or encumbered by him[23] unless both spouses sign and acknowledge the operative instrument. Community exempt personalty, similarly under his sole control, cannot be mortgaged (but *can* be *sold*) without the concurrence of his wife. The Idaho statute similarly restricts the encumbering of exempt *separate* property by the owning spouse.

(3) If one spouse is adjudged insane, the other may, with court approval, sell community realty.[24]

(f) *Amenability of community property to judgment creditors.*[25]

(1) ANTENUPTIAL DEBTS are, in Spanish community property law, enforceable only against the separate property of the debtor spouse, the separate property of the other spouse and the latter's share of the community property both being exempt, and even the debtor's share of community property being exempt from seizure therefor until the dissolution of the marriage.[26]

American community property states agree that *separate* property of one spouse is not liable for *antenuptial* debts of the *other*.[27] About half of such states exempt all or most of the community property from being reached, during the existence of the marriage, for antenuptial separate debts, but allow the debtor's half of the community property to be reached therefor after dissolution of the marriage.[28] California and Texas expose substantially all the community property to liability for

22. Except to the other spouse. IDAHO CODE § 32-906 (1948).
23. *Ibid.*
24. IDAHO CODE § 15-2001 (1949). Upon husband's adjudication as insane, wife may sell community personalty without court order. *Id.* § 15-2011.
25. Mechem, *Creditor's Rights in Community Property*, 11 WASH. L. REV. 78 (1936), reprinted in SELECTED ESSAYS ON FAMILY LAW 550 (Foundation Press, 1950).
26. DE FUNIAK § 156.
27. *Id.* § 157. MOYNIHAN (2 A.L.P.) § 7.30 lists Texas as *contra* but this is error. See 13 TEX. CIV. STAT. Art. 4613 (Vernon, 1951).
28. But *cf.* MOYNIHAN, COMMUNITY PROPERTY § 7.30 (2 AMERICAN LAW OF PROPERTY, at p. 192).

antenuptial debts of *either* spouse.[29] Louisiana and Idaho subject community property to the antenuptial debts of the husband, not the wife.[30]

(2) POSTNUPTIAL SEPARATE DEBTS (i.e., debts incurred during the marriage but for a non-community purpose) are enforceable in Spanish law in the same way as antenuptial debts. The majority of American community property states, however, hold community property liable not only for community debts but also for the separate debts of the husband, nor is the latter liability limited to one half the community property. Washington is a leading exponent of the non-liability of the community for any separate debts, including postnuptial debts of the husband.[31]

(3) COMMUNITY DEBTS (i.e., debts validly created for community purposes by either or both spouses) are enforceable in Spanish law first against all the community property and thereafter against the separate property of the spouse who contracted them.[32] The majority American view permits community creditors to reach both the community assets and the separate property of the contracting spouse, but there are various conflicting views and exceptions. In several states the items of community property of which the wife has the sole management, are immune during the marriage from seizure for community debts created by the husband, but are liable for her separate debts.[33]

(g) *Variation of community property by express agreement.*[34] Seven

29. DE FUNIAK § 158. The California statute exempts the husband's earnings and his separate property, but all other community property is liable for wife's antenuptial debts. CAL. CIV. CODE §§ 167, 170 (1949).

30. Davis v. Compton, 13 La. Ann. 396 (1858); Stafford v. Sumrall, 21 So. 2d 83 (La. App. 1945), criticized in Note, 20 TULANE L. REV. 136 (1945). *Cf.* Note, 21 TULANE L. REV. 125 (1946). See Holt v. Empey, 32 Idaho 106, 178 Pac. 703 (1919). For a minor exception to this rule in Idaho, see note 33, *post.*

31. DE FUNIAK, § 162.

32. *Id.* § 159.

33. See JACOB, 37 that the husband's creditors cannot reach the rents and profits of the wife's separate property, nor the earnings "due and owing" the wife for her personal services, but can reach such earnings after she receives them [correctly citing McMillan v. United States Fire Ins. Co., 48 Idaho 163, 280 Pac. 220 (1929)], but that these items of community property *are* liable for the wife's separate debts.

34. Seven community property states permit prenuptial agreements enlarging or reducing the types of acquisitions during marriage which shall be community property. In Texas, however, this power of variation by prenuptial agreement is insubstantial. HUIE, COMMUNITY PROPERTY LAW OF TEXAS § 9; and see Frame v. Frame, 120 Tex. 61, 36 S.W. 2d 152, 155 (1931) (citing earlier case). There is less uniformity as to the validity, permissible scope, and effect of such agreements when made *during* marriage. See *Infra* n. 35.

community property states permit antenuptial agreements to vary the normal applicability of the community property statutes. Postnuptial agreements may in most community property states change the status (as separate or community) of existing separate or community holdings, but some jurisdictions do not permit such change as to future acquisitions.[35]

(h) *Distinction between community property and other co-tenancies.* Community property, like tenancy by the entirety, exists only between two persons, and those two must be husband and wife. Tenants in community have *equal* beneficial interests. Unlike common law tenancy by the entirety,[36] community property may exist also in personal property. Unlike all the common law co-tenancies except that of entireties, community property is normally under the sole management and control of the husband (and, unlike entireties, some community assets may be under the sole control of the wife). Unlike all the other co-tenancies, community property may be reached not merely for community debts, but (in most jurisdictions) for the separate debts of the spouse having sole management and control (and, in some instances only, for the separate debts of the other spouse).

Unlike joint tenancy and tenancy by entreties, community property does not give rise to a jus accrescendi. If one spouse dies, the other is entitled to his own half of the community holdings, but this is not strictly a taking by survivorship. The same effect would occur where the parties were divorced and the community holdings were evenly divided between them. Moreover, the first dying spouse has a power of testation regarding his share of community holdings, the surviving spouse taking only as devisee, or under intestacy, or according to some other specific statutory provision.[37]

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35. See Notes: 171 A.L.R. 1336 (1947); 8 So. CALIF. L. REV. 327 (1934); 28 TEX. L. REV. 275 (1949); 4 S.W.L.J. 218 (1950). See also Clark, *Transmutations in New Mexico Community Property Law,* 24 ROCKY MT. L. REV. 273 (1952); Chavez v. Chavez, 56 N. Mex. 393, 244 P. 2d 781, 30 A.L.R. 2d 1236 (1952) (community funds may be transmuted into a joint tenancy between the spouses; expressly overruling contrary holding of McDonald v. Lambert, 43 N. Mex. 27, 85 P. 2d 78, 120 A.L.R. 250 (1938); Ogden, *Joint Tenancies,* 1952 PROCEEDINGS, American Bar Assn. Section of Real Property, Probate and Trust Law, 17 21; Report of the Committee on Community Property and Jointly Held Titles to Real Property, 1952 PROCEEDINGS, *supra* 33, 1953 PROCEEDINGS 59.

36. See 2 AMERICAN LAW OF PROPERTY § 6.6, nn. 28, 29 (1952).

37. Dower and curtesy do not exist in community property states, being less advantageous to the survivor than is the half of the community. Homestead exemptions, however, do exist. Half of the community property states permit testamentary

III.

Theorists have attempted to classify the community property system,[38] particularly as it existed in a given state, as involving:

1. The community as a separate entity from either spouse.
2. The husband as trustee for, and co-cestui with, the wife.
3. Simply a *manner* of property holding, each spouse having

an equal present half interest, though one spouse (usually the husband) may have power to manage or convey.[39] This concept is in many respects the most satisfactory and is currently the most widely held, viewing the community accumulations as the joint product of the combined (though possibly dissimilar) talents and labors of both spouses.

4. The husband as sole owner, with the wife having merely a *spes successionis*. This view, now obsolete, existed in Louisiana and California prior to the rise of the Federal Income Tax.[40] It prevented the spouses from obtaining the advantage of lower tax brackets since they could not "split" the community income by each reporting half of it.[41] Accordingly, Louisiana and California

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disposition of all the deceased's half, either to or away from the surviving spouse. DE FUNIAK § 198. *Cf.* Note, 25 So. CALIF. L. REV. 464 (1952). JACOB, pp. 24-25 details the evolution of the Idaho statute hereon. See also IDAHO CODE § 14-113 (1949) and MOYNIHAN (2 A.L.P.) § 7.34.

In United States v. Merrill, 211 F. 2d 297 (9th Cir. 1954), it is pointed out that, although Washington law subjects the entire community property to administration on the death of one spouse, an undivided half of such community property nevertheless remained the present property of the survivor, hence only half of the income from the community property while under administration was taxable to the decedent's estate, the other half being taxable to the survivor, and an executor's fee earned by the survivor was payable half from the decedent's estate and half from the survivor's, hence only the former half of the fee constituted income.

38. Mechem, *op, cit.* note 25 *supra,* classifies community property theory as either "entity" or "aggregate". *Cf.* Evans, *Ownership of Community Property,* 35 HARV. L. REV. 47 (1921). Note, 3 ALA. L. REV. 238 (1952).

39. Occasionally the marital community is referred to as a "partnership", the latter term used loosely, rhetorically, or by way of suggesting a common law analogue. There are many obvious differences, such as the way the relationship is created or terminated, who and how many persons may be included, the disproportionately greater power of one "partner" to dispose of or encumber the firm assets and the subjection of those assets to the claims third persons have against that individual.

40. See Daggett, *Nature of Wife's Interest in Community Property—Comparative Study,* 19 CALIF. L. REV. 567-601 (1931), reprinted in DAGGETT, LEGAL ESSAYS ON FAMILY LAW 101-148 (1935). *Cf.* Theriot v. Comm'r. Internal Revenue, 197 F. 2d 13 (5th Cir. 1952). As to the complications flowing from California rulings that statutes enlarging the wife's interest could not be retro-active, see MOYNIHAN (2 A.L.P.) §7.20; Note, 27 TULANE L. REV. 116 (1952) (criticizing a Montana construction of the California law).

41. United States v. Robbins, 269 U.S. 315, 70 L.Ed. 285, 46 Sup. Ct. 148 (1926).

both adopted the view that the wife had an equal present vested interest in community property. As a result of the latter view, which prevailed also in other community states, a married person with a high income paid less *federal* income tax if domiciled in a community property state[42] than another married person having the same income but domiciled in a non-community state.

As tax rates increased, a nation-wide clamour arose for abolition of this obvious tax inequality. Congressional inertia prompted various curative measures. First, it became apparent that contract agreements between husband and wife in non-community states that their income should be equally owned, were ineffective for federal tax purposes.[43]

Then the Oklahoma legislature (followed shortly by Oregon) adopted an elective community property system. After this device was held ineffective for federal tax purposes,[44] it was repealed in both states and followed by a compulsory system. Compulsory community property systems were also adopted in Michigan, Nebraska, Pennsylvania and Hawaii'[45] and many other states were considering similar legislation.

The Internal Revenue Act of 1948 permitted "income-splitting" between spouses even in non-community states,[46] thus removing the

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42. United States v. Malcolm, 282 U.S. 792, 75 L.Ed. 714, 51 Sup. Ct. 184 (1931) (California taxpayers); Poe v. Seaborn, 282 U.S. 101, 75 L.Ed. 239, 51 Sup. Ct. 58 (1930) (Washington taxpayers); Goodell v. Koch, 282 U.S. 118, 75 L.Ed. 247, 51 Sup. Ct. 62 (1930) (Arizona taxpayers); Hopkins v. Bacon, 282 U.S. 122, 75 L.Ed. 249, 51 Sup. Ct. 62 (1930) (Texas taxpayers); Bender v. Pfaff, 282 U.S. 127, 75 L.Ed. 287, 51 Sup. Ct. 64 (1930) (Louisiana taxpayers).

43. Lucas v. Earl, 281 U.S. 111, 74 L.Ed. 731, 50 Sup. Ct. 241 (1930) (California couple, contracting in 1901 to own "jointly" all income either earned thereafter, sought unsuccessfully to split *his* 1920 and 1921 salaries); Blumenthal v. Comm'r. of Internal Revenue, 60 F. 2d 715 (2d Cir. 1932) *cert. den.* 287 U.S. 662, 77 L.Ed. 571, 53 Sup. Ct. 220 (1932).

44. Commissioner of Internal Revenue v. Harmon, 323 U.S. 44 (1944), *rehearing den.* 323 U.S. 817 (1944).

45. For a comparative analysis of these statues, see Comment, *Creditors' Rights in the Community Property States*, 48 COL. L. REV. 743 (1948).

46. See Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097 (1948).

A strictly different provision in the Revenue Act of 1942 [§ 402 (b) (2)], removing a similar inequality in the federal estate tax, was held constitutional in Fernandez v. Wiener, 326 U.S. 340 (1945) (Louisiana decedent) and United States v. Rompel, 326 U.S. 367 (1945) (Texas decedent). See Jackson, *Taxation of Community Property—The Wiener Case*, 18 TULANE L. REV. 525 (1944); Winstead, *Aftermath of the Herbst and Wiener Decisions*, 24 TEX. L. REV. 439. (1946). *Cf.* COLLINGS, COMMUNITY PROPERTY AND TAXES (1945). This provision was repealed by the Act of 1948. Surrey, *supra* 61 HARV. L. REV. at 1118-1125. For a later article, see Adams, *Estate and Gift Taxation of the Marital Community: Integration or Disintegration?*, 28 WASH. L. REV. 100 (1953).

pressure for the adoption of the community system.[47] Unfortunately, however, the elimination of tax inequality did not itself annul the new community property acts. Pennsylvania had fortunately declared its act void,[48] so had no problem, but the other states,[49] all of which repealed their acts, were faced with the constitutional objection of divesting the wife of the half interest which she had been given in property acquired during the life of the act. A variety of presumptions, recording requirements, and limitation statutes, was resorted to in an effort to minimize the confusion and clouding of titles which the short-lived community property acts might otherwise engender.[50]

Distinguishing between community and separate property is aided by various presumptions, including a rebuttable presumption that all property possessed by a spouse at the dissolution of the marriage was acquired *during* the marriage (rather than before), and a rebuttable presumption that all property acquired during the marriage is community.[51] In most community property jurisdictions, an inventory may be filed which lists the separate property of the wife and serves both as constructive notice of her rights and as prima facie evidence that the listed property is actually her separate property.[52]

The necessity that lawyers in other states be aware that community property laws exist is dramatically emphasized by the not-so-funny

47. 1947 ANNUAL SURVEY OF AMERICAN LAW, 863, n. 81 (New York agitation).

48. Willcox v. Penn Mutual Life Ins. Co., 357 Pa. 581, 55 A. 2d 521 (1947). This decision was criticized in 1947 ANN. SURV. AM. LAW 865.

49. Miller v. Stolinski, 149 Neb. 679, 32 N.W. 2d 199 (1948) affirmed a dismissal of a petition seeking a declaration of unconstitutionality of the Nebraska Act, but did not decide that question. In Oklahoma, since Harmon v. Oklahoma Tax Commission, 189 Okla. 475, 118 P. 2d 205 (1941) had upheld the validity of the elective community property statute, judicial nullification of the compulsory act was hardly possible. The latter act was upheld in Swanda v. Swanda, 207 Okla. 186, 248 P. 2d 575 (1952), in an opinion which distinguished and rejected the contrary Pennsylvania ruling. See Note, 6 OKLA. L. REV. 190 (1952).

50. See 1949 ANN. SURV. AM. LAW 747-751 (and authorities cited); Note, 50 COL. L. REV. 332 (1950). *Cf.* Davis v. Okla. Tax Comm., 206 Okla. 644, 246 P. 2d 318 (1952); Note, 6 OKLA. L. REV. 190 (1953).

51. The California statutory presumption that real or personal property acquired by a married woman by an instrument in writing is her separate property is discussed in *In re* Walsh's Estate, 66 C.A. 2d 704, 152 P. 2d 750 (1944); Pacific Tel. & Tel. Co. v. Wellman, 98 C.A. 2d 151, 219 P. 2d 506 (1950). *Cf.* IDAHO CODE § 32-906 (1948) (as amended by L. 1943, c. 23 § 1): "Real property conveyed by one spouse to the other shall be presumed to be the sole and separate estate of the grantee and only the grantor spouse need execute and acknowledge the deed". *Cf.* MOYNIHAN (2 A.L.P.) § 7.14. On the effect in Texas of filing (or failing to file) a schedule of the wife's separate property, see Note, 5 BAYLOR L. REV. 325 (1953).

52. DE FUNIAK § 60 (citing statutes); 5 BAYLOR L. REV. 325 (1953) (Texas law).

defeat of the dying wishes of comedian W. C. Fields, whose attempted separation agreement, entered into in New York City nearly forty years before his death, failed to prevent his decades-separated wife from obtaining half of the proceeds of insurance policies purchased by Fields with money he earned in California many years after their parting.[53]

53. Fields v. Fields, 178 F. 2d 200 (9th Cir. 1950), discussed in 1950 ANN. SURV. AM. LAW, 599-602. *Cf.* Prudential Ins. Co. of America v. Quay, 115 F. Supp. 63 (S.D. Cal. 1953). See also King v. Bruce, 145 Tex. 647, 201 S.W. 2d 803 (1947) *cert. den.* 332 U.S. 769 (1947), 60 HARV. L. REV. 1155 (1947), 31 TEX. L. REV. 340 (1948) (Texas spouses in New York purported to assign to each other a separate half-interest in the community personalty situate in New York).