North Dakota Law Review

Volume 24 | Number 2 Article 1

1948

Community Property

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COMMUNITY PROPERTY ‡

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PENDING in this State is a proposal which would convert North Dakota from a common law property State to one where husband and wife would hold property acquired after marriage in common under a community property system. Petitions have been circulated by supporters of the plan under the initiative procedure [1] to enable the measure to be acted upon by the voters.[2]

The purpose of this article is to discuss some of the general theories and concepts of the community property principle and to indicate some of the problems that may arise from the enactment of community property laws upon our present method and concept of holding, managing and controlling property, both real and personal.

Holding property under a community concept, or in common, differs fundamentally from the common law notions of ownership. Under the proposed law, only property acquired by husband and wife during marriage would be affected. Section 3 of the proposed enactment provides:

"All property acquired by either husband or wife during marriage and after the effective date of this act, except that which is the separate property of either as hereinbefore defined, shall be deemed the community or common property of the husband and wife, and each shall be vested with an undivided one-half interest therein . . ."

This is a departure from the traditional concept of the wife's rights in property. Under English common law, by marriage the husband and wife become one person [3] and that person for all practical purposes was the husband. By this theory of

‡ This article was written prior to the 1948 changes to the Federal tax laws, providing for tax splitting between husband and wife. The North Dakota proposal for a community property law has been withdrawn by its sponsors between the writing and publication of this work.

Ed. Note: Publication of this article is continued in spite of the above developments because much of its subject matter remains of general legal interest.

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[1] Initiative procedure, Article II Section 25, N. D. Const.

[2] Part of the title of the petition reads: "Petition for the initiation of a law relating to husband and wife and their property; to make provision for a community property law; to provide that the act shall apply to husbands and wives and their property subsequent to the effective date of the act . . ."

This proposal, if there are sufficient signers, of the petition, will be placed on the Primary Ballot for the June 29, 1948, election.

[3] See 26 Am. Jur., Husband and Wife, Sect. 3.

unity of the husband and wife, a married woman was under a complete disability to act as a legal person.[4] By stages she was emancipated from her previous disabilities under so-called "Married Women's Acts" or "Married Women's Property Acts." Today, in most States, a married woman makes her own contracts, acquires and sells property, sues and is sued and may generally be said to be equal under the law with the male of the species [5] and may hold free from any disability of coverture as a feme sole.

According to the common law, the husband upon his marriage was given a freehold estate or interest in the property that the wife was seized of in fee.[6] In addition the husband had a right of curtesy in the estate of the wife.[7]

The wife had no vested interest in her husband's estate. By common law, her right in her husband's property was limited to dower of the real estate.[8] She had no right or interest in the personal property of her husband.[9]

Under common law concepts and under the present system in this State a husband or wife may generally be said to have the right to own real or personal property free of the other.[10] This is subject to the usual qualifications with regard to homesteads.[11] Our constitutional safeguards would seem to protect this vested property right and ability of both spouses to acquire, possess and protect their own property without a right of legal interference by the marital partner.[12]

The idea behind community property is that both the husband and wife contribute equally to the prosperity of the relationship. It is in nature similar to a partnership. However, neither idleness, wasteful habits or physical incapacity will

[4] Thompson v. Thompson, (1910) 218 U. S. 611, 31 S. Ct. 111, 54 L. Ed. 1180, 30 LRA (NS). 1153; See 26 Am. Jur., Husband and Wife, Sect. 3 and cases cited.

[5] 20 Am. Jur., Husband and Wife, Sect. 20 and cases cited. See Fitzmaurice v. Fitzmaurice, (1932) 62 N. D. 191 at 198, 242 N.W. 526 for discussion of North Dakota statutory law touching capacity, rights and obligations of married women respecting property, contracts and torts.

[6] See Bank of America v. Banks, (1880) 101 U. S. 240, 25 L. Ed. 850; 26 Am. Jur., Husband and Wife, Sect. 39, 55 and cases cited.

[7] See 15 Am. Jur., Curtesy p. 269.

[8] 17 Am. Jur., Dower p. 649.

[9] 26 Am. Jur. 20, Husband and Wife, Sect. 40.

[10] Dower as well as Curtesy are abolished in this State. 1943 N. D. Code 14-0709, 56-0102.

[11] 1943 N. D. Code 30-1602, 30-1604.

[12] N. D. Const. Art. I, Sect. 1 provides: "All men are by nature equally free and independent and have certain inalienable rights, among which are those enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation . . . and pursuing and obtaining safety and happiness."

deprive any of the marital partners from an equal share of the property gains during the marriage.[13] There is a difference between holding property in common under a community property act and possessing an estate in common or in joint tenancy as is permitted by North Dakota statutes.[14] If a husband and wife hold as joint tenants or as tenants in common, each has an undivided interest which may be separated from the entire estate by the unilateral act of the parties. Under a community property concept, property acquired during marriage is owned by both by virtue of the fact of marriage alone.[15] The estate created is an incident of marriage not of design or intent of the parties.

Community property is not known to the common law. Courts generally say that it is founded on the civil law systems of Europe.[16] Some of our States inherited the system from Spain or Mexico; in others it was adopted.[17] While the origins of the system are not always satisfactorily traced, the best opinion indicates that the idea of the present "marital share" originated among Germanic tribes where the wife was entitled to ⅓ of the gain during coverture. Some authorities seem to think that there were beginnings of this doctrine in England before the Norman Coquest but that under the French invaders, the origins were lost. The community system was introduced into parts of the Roman Empire including what is now Spain and part of France during the fifth century, and was brought into sections of America settled by the colonists from those countries.[18] In California, Louisiana and Texas the system of community holdings was inherited and the States continued with the inherited systems subject to such statutory changes as proved desirable.[19] The system was adopted in Washington, Nevada, Idaho and Arizona. These seven States and New Mexico constituted the original community property States.

In comparatively recent years Oklahoma decided to join its

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[13] 11 Am. Jur., Community Property, Sect. 5.

[14] 1943 N. D. Code 47-0206, joint tenancy defined; Code 47-0208, tenancy in common defined.

[15] 11 Am. Jur., Community Property, Sect. 70; Commr. of Int. Rev. v. Harmon (1944) 323 U. S. 44, 89 L. Ed. 60, 65 S. Ct. 103.

[16] 11 Am. Jur., Community Property, Sect. 3.

[17] See Spreckels v. Spreckels, (1897) 116 Cal. 339, 48 P. 228, 36 L. R. A. 447, 58 Am. St. Rep. 170.

[18] See Wilcox v. Penn. Mut. Life Ins. Co., (1947) 55 A (2d) 521, 524, 11 Am. Jur., Community Property, Sect. 3.

[19] See note 17, supra.

Texas neighbor as a community property holding State, some say to arrest an exodus of Oklahoma millionaires for reasons that will be subsequently explained. During the past year Michigan, Nebraska, Oregon and Pennsylvania joined the community band wagon.

The reason is comparatively simple. *Taxes.*

Income Taxation Under Community Property

The advantage of the community property system from the income tax standpoint is the United States Supreme Court determination that a tax on the net income of every individual is a tax on ownership of that income — and taxation follows the ownership.

Poe v. Seaborn[20] is the leading case enunciating the above doctrine. There in a suit for refund of income taxes by a husband, the Court held that under the community property laws of Washington the wife had a vested property right in community property equal with that of her husband. This right extended to the income of the community including the salary and wages of either even though the husband had broad powers of control. The laws of the State controlled the determination of ownership. Since husband and wife owned half of the earnings they could split the community income between them for tax purposes.

Goodell v. Koch[21] decided that the wife's interest under the Arizona law was vested. Of the same import concerning the Texas community property laws was *Hopkins v. Bacon.* *Bender v. Pfaff* construed the Louisiana system similarly.[23]

U. S. v. Robbins[24] held that the California law (prior to its amendment in 1927) did not qualify to enable a taxpayer to split his income since the wife there had a mere expectancy while living and as such the income from community property could be taxed solely to the husband. By dictum the Court indicated that even if the wife's interest were vested, the husband's power of control over community assets would render him liable for the full tax against his earned income. This dictum was not followed in the later cases. In *U. S. v. Malcolm*[25] the California provisions (after amendment in 1927)

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[20] (1930) 282 U. S. 101, 75 L. Ed. 239, 51 S. Ct. 58.
[21] (1930) 282 U. S. 118, 51 S. Ct. 62, 75 L. Ed. 247.
[22] (1930) 282 U. S. 122, 51 S. Ct. 64, 75 L. Ed. 249.
[23] (1930) 282 U. S. 127, 51 S. Ct. 64, 75 L. Ed. 252.
[24] (1926) 269 U. S. 315, 46 S. Ct. 148, 70 L. Ed. 285.
[25] (1931) 282 U. S. 792, 51 S. Ct. 184, 75 L. Ed. 714.

were held sufficient to permit income tax splitting, since the wife's interest had become vested.

Oklahoma was the first of the non traditional community property States to attempt to foist the community property concept upon its citizens. The 1939 community property laws adopted an optional system. The husband and wife could elect to come under the law or not. The act was held ineffective for income tax splitting purposes[26] under the doctrine that optional features of the law in effect consisted of a contract to assign future income which was not effective to transfer the incidence of a tax.[27] The Court clearly pointed out that in order for the community system to operate effectively for income tax purposes the earned income must be transferred as an incidence of marriage by the inveterate policy of the State and not consent. The Oklahoma act was subsequently changed in 1945 and omitted the consent feature.

The real benefit of the community property system is that high surtax rates may be avoided by having husband and wife file separate returns and split their income. However, a return in a community property State may be joint or separate. In general a return having once been filed may not be changed from one basis to the other at the will of the taxpayer after the expiration of the filing period.[28]

Under the 1947 tax rates the following savings are indicated under the community property system.[29]

Taxable Income (Exemptions Deducted)	Income Taxes in States that are not Community Property States	Income Taxes in States that are Community Property States	Savings in taxes for man and wife in Community Property States
$ 3,000.	$ 589.	$ 570.	$ 19.
4,000.	798.	760.	38.
5,000.	1,045.	979.	76.
10,000.	2,508.	2,090.	418.
12,000.	3,230.	2,584.	646.
16,000.	4,940.	3,724.	1,216.
24,000.	9,082.	6,470.	2,622.
30,000.	12,559.	8,987.	3,752.
50.000.	25.579.	19,285.	6,194.
100,000.	63,954.	50,958.	12,996.
200,000.	148,979.	127,908.	21,071.

[26] Commr. of Int. Rev. v. Harmon, (1944) 323 U. S. 44, 65 S. Ct. 103, 89 L. Ed. 60.

[27] Under the doctrine of Lucas v. Earl, (1930) 281 U. S. 111, 50 S. Ct. 241, 74 L. Ed. 731.

[28] Champlin v. Commr. of Int. Rev., (C. C. A. 10th cir. 1935) 78 F (2d) 905; Morris v. Commr. of Int. Rev. (C. C. A. 2nd cir. 1930) 40 F (2d) 504.

[29] Reproduced from Congressional Record, March 3, 1947

High income bracket taxpayers will effect substantial tax savings. A community property law will benefit only a small portion of the taxpayers and does not save income taxes unless a married man without dependents earns over $3,300. per year or one with two dependents earns over $4,400. per year.

THEORIES OF COMMUNITY PROPERTY

Not all community property states are similar nor is the judicial construction of their laws consistent at all times. Apparently there are four different concepts of ownership of community property. Prior to the amendment of its statute, the California theory was that a wife did not have a vested interest in the community but rather her interest was in the nature of an incumbrance on her husband's ownership.[30] Washington on the other hand theorized that the husband and the wife constitute an entity in which both have equal rights and interest, although the husband is constituted by the statute as the managing agent of the community. However, his power of alienation of community property does not cloak him with a larger proprietary interest in the community property than the wife has. His agency is for the entity and not the individuals.[31]

Idaho has a double ownership idea and the interests of the spouses are equal and of the same sort.[32] Whereas in Washington neither spouse alone owns the community property, in Idaho, both own it. Each has an individual one-half of the property. In Texas the trust theory is advocated.[33] The interests of the two spouses are beneficially equal, but the legal title is in the husband, the wife's niterest being vested but equitable.[34]

SEPARATE AND COMMUNITY PROPERTY

Whether property is separate or community under our proposed Act has major importance for tax and other purposes. Where the property involved constitutes income, if it is separate, it is taxed to the owner, while if community it may be split. On divorce or dissolution or death, the characterization of property in either category has important consequences.

[30] Spreckels v. Spreckels, (1897) 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170.
[31] Evans, *Ownership of Community Property*, 35 Harv. L. Rev. 47, 51 (1921).
[32] Id. at 55.
[33] Id. at 62.
[34] Id. at 47.

Separate property under the proposed North Dakota Act is defined as follows:

Of the husband: All property, both real and personal, owned or claimed by him before marriage or before the effective date of this act, whichever is later, and that required afterwards by gift, devise or descent, or received as compensation for personal injuries.[35]

Of the wife: All property, both real and personal, owned or claimed by her before marriage or before the effective date of the act, whichever is later, and that acquired afterwards by gift, devise or descent, or received as compensation for personal injuries.[36] All other property acquired after marriage (or after the effective date of the act, whichever is later) except that which is the separate property of either falls into the community category.

This classification is not as clear and distinct as might appear on first reading. In general property purchased with separate funds remains separate property irrespective of the time of such purchase.[37] On the other hand, if property is separate in its inception, the fact that a mortgage is paid on it from community funds with no intent to change the manner or type of ownership will not make the property community to any extent.[38] As between two community property States, the State where the property is located determines whether rent and income from the land is community or not.[39] States differ on their view of whether income from separate property falls into the community category or not. The older community property States of Arizona, California, Nevada, New Mexico and Washington hold that the rents, issues and profits of separate property constitute separate income.[40] On the other hand, in Idaho, Louisiana, Oklahoma and Texas such income is community and can be split. In Idaho the rents, issues and profits of the wife's separate property will not be community if there is a provision in the deed of conveyance

[35] Sect. 1, proposed Act.

[36] Sect. 3, proposed Act.

[37] Noble v. Commr. of Int. Rev., (C. C. A. 10th cir. 1943) 138 F (2d) 721.

[38] In re Lissner's Estate, (Cal. App. 1938) 81 P (2d) 448, payments of an obligation on separate property with community funds; see Rogan v. Delaney (C. C. A. 9th cir. 1940) 110 F (2d) 336; cf. Walker v. Fowler (1930 Wash.) 285 P. 649; wife paid ¼ of mortgage on community property with separate funds, held, she owned ¼ of the property separately and the balance remained community property.

[39] Commr. of Int. Rev. v. Skaggs, (C. C. A. 5th cir. 1941) 122 F. (2d) 721.

[40] Discussed in 3 Mertens, Law of Federal Income Taxation, Sect. 19.16.

that they are for her separate use and benefit.[41] Apparently under the North Dakota proposed act, income from separate property would be community. This would be apparent from Section 4 of the proposed North Dakota act since the wife has control over that portion of the *community property* consisting of rents, interest, dividends and other income from her separate property. The Pennsylvania Supreme Court, in construing that State's enactment, indicated that the legislative intent was that income from separate property was community since otherwise the avowed purpose of the statute to reduce the amount of federal income taxes payable by married persons would be largely frustated.[42]

To be distinguished, however, is income from separate property and gains from separate property. The latter is separate.[43] Profits from toil and talent is to be distinguished from mere subdivision of property into lots. Spontaneous output or natural growth of the land as trees and hay, etc., are not community and segregation from the soil does not make them so unless done with community funds or labor.[44]

Assuming the above doctrine to be true, if the community property law were to be enacted on September 1 of this year, only three months of the income acquired after the law became effective could be split.[45]

In States where income from separate property remains separate, there are sometimes difficult problems in the apportionment of income between that arising from the fruits of the labor of one of the marital partners and that arising from the invested capital as separate property.[46]

In general separate property is that acquired from separate funds, gains on separate property, gifts, legacies and compensation for personal injury. All other property is community.[47]

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41 Ibid.

42 See Wilcox v. Penn. Mut. Life Ins. Co., (1947) 55 A (2d) 521.

43 See Commr. of Int. Rev. v. Skaggs, (C. C. A. 5th cir. 1941) 122 F (2d) 721; McFaddin v. Commr. of Int. Rev., (C. C. A. 5th cir. 1945) 148 F (2d) 570. Welder v. Commr. of Int. Rev. (C. C. A. 5th cir. 1945) 148 F (2d) 583.

44 See Welder v. Commr. of Int. Rev., (C. C. A. 5th cir. 1945) 148 F (2d) 583. McFaddin v. Commr. of Int. Rev., (C. C. A. 5th cir. 1945) 148 F (2d) 570.

45 See Wrightsman v. Commr. of Int. Rev., (C. C. A. 5th cir. 1940) 111 F (2d) 227.

46 See Todd v. Commr. of Int. Rev., (C. C. A. 8th cir. 1945) 153 F (2d) 553; In Pereira v. Pereira, (Cal. 1909) 103 P 488 the Court indicated that where income from separate property remains separate the capital contribution to the earnings should be computed according to the usual terms of interest on long term obligations. 3 Mertens, *op. cit. supra* note 40, sec. 19.16.

47 Section 3, proposed Act.

In addition under the proposed Act

". . . all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains unless the contrary be satisfactorily proved." [48]

It would appear from the latter clause that a rebuttable presumption is created as to the status of property as between husband and wife at the dissolution of the marital status.

In *Welder vs. Commr. of Int. Rev.*[49] the Court held that the character of separate property never leaves but follows it through all of its mutations so long as it can be traced. But where separate and community property are commingled so that the identity cannot be traced and it is impossible to distinguish one from the other, the whole will then be considered community.[50] The Court will presume that all property acquired after marriage is community and this is true irrespective of the opinion of either spouse that the property was separate or community.[51]

Trust income may also be split even though the trust is created and managed in a non-community property State provided that the beneficiary is a resident of a community property State.[52] An interest in a trust is an equitable right in rem and the income received therefrom is community property. This is true in the case of a spendthrift trust also.[53]

If property is purchased partially with community and partially with separate funds, the ownership is apportioned between the separate and community estate.[54]

MANAGEMENT AND CONTROL

Under the proposed North Dakota law, the wife is to have the *management* and *control* and may dispose of her separate property, both real and personal, and that portion of the *community* property consisting of her earnings; all rents, interest, dividends and other income from her separate property, and

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[48] Ibid.

[49] (C. C. A. 5th cir. 1945) 148 F (2d) 570.

[50] Fellows v. Fellows, (Cal. App. 1930) 289 P 887. Parker v. Parker, (Wash. 1922) 207 P 1062.

[51] In re Wilson's Estate, (Nev. 1936) 53 P (2d) 339; Welder v. Commr. of Int. Rev., (C. C. A. 5th cir. 1945) 148 F (2d) 583.

[52] Commr. of Int. Rev. v. Porter, (C. C. A. 5th cir. 1945) 148 F (2d) 566; Commr. of Int. Rev. v. Snowden, (C. C. A. 5th cir. 1945) 148 F (2d) 569.

[53] Commr. of Int. Rev. v. Terry, (C. C. A. 5th cir. 1934) 69 F (2d) 969; Commr. of Int. Rev. v. Wilson, (C. C. A. 5th cir. 1935) 76 F (2d) 766.

[54] Walker v. Fowler, (Wash. 1930) 285 P. 649.

all other common or community property, the title to which stands in her name. The husband shall have the *management* and *control* and may dispose of his separate property, both real and personal, and *all community property*, the management, control and disposition of which is not conferred upon the wife under the provisions of the act.[55] The act leaves unsaid the extent of such powers of control that either spouse may exercise over that segment of the community property under their separate control, or the remedies of either spouse for the wrongful act of the other in dealing with the community holdings.

The spouse controlling and managing the community estate is only the statutory agent for the community.[56] While as a general rule it may be stated that the husband as the head of the community has broad powers of management and control of the community estate and in many respects may act with respect to the community property as though it were his very own,[57] this doctrine is not without its limitations. The husband as agent of the community may not act in fraud of his wife's vested rights.[58]

This particular phase of the law has been fraught with difficulties and problems and the answers have varied in states by reason of the difference in theory of community holdings and applicable statutes. In *Garrazi v. Dastas* [59] the Court held there was no liability nor responsibility upon the husband to the wife for his having squandered the community assets. The Court pointed out that the very foundation of the community and its efficacious existence depends on the power of the husband during the marriage over the community. In the absence of fraud or express legislative restriction the husband may deal with the assets as the owner.

In *Occidental Life Ins. vs. Powers,*[60] a Washington case, a husband had secured a life insurance policy on his own life with a right to change the beneficiary at any time. Originally the wife was listed as the beneficiary. Subsequently the husband named his mother and his private secretary. The pre-

55 Sect. 4, proposed Act.

56 Occidental Life Ins. Co. v. Powers, (Wash. 1937) 74 P (2d) 27; Commr. of Int. Rev. v. Harmon, (C. C. A. 10th cir. 1943) 139 F (2d) 211, reversed on other grounds, 323 U. S. 44, 65 S. Ct. 103, 89 L. Ed. 60.

57 11 Am. Jur., community property, Sect. 50, 53, 55.

58 See Goodell v. Koch, (1930) 282 U. S. 118, 75 L. Ed. 247, 51 S. Ct. 62.

59 (1906) 204 U. S. 64, 27 S. Ct. 224, 51 L. Ed. 369 (Puerto Rico).

60 (1937) 74 P. (2d) 27.

miums were paid with his earnings, community funds. Following his death, the wife claimed the proceeds as against the named beneficiaries, maintaining that since the policy was paid for with community funds, it was fraud for the husband to give community assets away without the wife's consent. The Court held that the husband was the manager but not the owner of the community funds and could not give the community property, even to his mother, without the consent of the wife. The freedom of control as statutory agent was limited to a freedom to act ony for the benefit of the community. The wife was awarded all of the proceeds of the policy. In California it was held that a similar gift was valid as to the ½ of the husband's interest in the community gift.[61] Under the doctrine of the above cases, at least under the rule in Washington, there may not be a valid gift of community property to the members of the family of either spouse without the other's consent.

What can be done about a wrongful gift prior to dissolution of the marriage? A dictum in *re Coffey's Estate*[62] indicates that the husband may be restrained in his transactions with community property which are inimical to the economic welfare of the community.[63] Generally, however, there is no accounting between the husband and the wife for dissipation or fraudulent conversion of the community assets until the community's dissolution by divorce or death.[64] Where the husband having control of community funds, fraudulently invests a portion in his own separate property, he will be held to account to the community for such misappropriation on divorce. The Court may award an innocent party to the divorce a greater share of the community assets.[65]

From a practical standpoint, problems in control and management or mismanagement, as the case may be, will not be decided by the Courts in the well ordered household. Where the marriage is headed for divorce community property rights may only serve to increase misunderstanding and complicate the respective rights of each spouse upon settelement.

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[61] N. Y. Life Ins. Co. v. Bank of Italy, (1923 Cal. App.) 214 P. 61; Traveler's Ins. Co. of Hartford v. Fancher, (Cal. 1933) 26 P (2d) 482.

[62] (Wash. 1938) 81 P (2d) 283.

[63] See Johnson v. Nat'l Surety Co., (Cal. App. 1931) 5 P (2d) 39. Under Calif. code the wife may have a remedy to protect the community property against the inconsiderate and fraudulent acts of the husband.

[64] Daniel v. Daniel, (Wash. 1919) 181 P 215, cf. Garazi v. Dastos note 59.

[65] Falk v. Falk, (Cal. App. 1941) 120 P (2d) 715.

Should the proposed community property law be enacted, the husband may be placed in the anomolous situation of being sued by his wife for misappropriating community property but finding himself without a remedy for his wife's fraudulent dealings with the community property under her control. It is settled that a married woman may sue her husband in tort in North Dakota but still undecided is the question whether the husband may have a similar action against his wife.[66]

HOMESTEAD

Section 5 of the proposed Act provides:

"The homestead, whether the separate property of the husband or wife, or the community or common property of both shall not be sold, encumbered or otherwise disposed of, except in the manner provided by law prior to the enactment of this act."

Apparently while the method of disposal is not intended to be affected, the manner of holding the homestead property will be governed by the other provisions of the act.

BANK DEPOSITS AND LIFE INSURANCE

Section 6 of the proposed act states:

"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 the said banks or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account."

Section 7 of the proposed act relating to life insurance provides that,

"notwithstanding the provisions of this act, when the proceeds of, or payments under a policy or contract issued by a life insurance company become payable and the company makes payment thereof in accordance with the terms thereof, or in accordance with the terms of any written assignment thereof if the policy or contract has been assigned, such payment shall fully discharge the company from all claims under such policy or contract unless, before such payment is made, the company has received, at its home office, written notice by or on behalf of some other person that such other person

[66] Fitzmaurice v. Fitzmaurice, (1932) 62 N. D. 191, 242 N. W. 226.

claims to be entitled to such payment or interest in the policy or contract." [67]

Apparently the effect of these provisions will be to relieve banks and life insurance companies from a wrongful payment made in good faith and according to the policy contract or bank deposit arrangement. These sections do not change the relative rights of the spouses in that type of property.

Where a husband takes out a policy of life insurance payable to his wife on his death, and paying the premiums during his life from community funds, the wife receives an inchoate gift from the husband of the proceeds of the policy which become complete upon his death. The proceeds are her separate property and upon her death immediately thereafter, her heirs, and not the husband's, are entitled to share in this portion of the estate.[68]

DEBTS

Section 8 of the proposed enactment provides as follows:

"That portion of the community property under the management, control and disposition of the wife or which stands in her name shall be liable for debts contracted by the wife, and for torts of the wife committed in the course of acquiring, holding or managing such community property, but not otherwise. That portion of the community property which is under the management, control and disposition of the husband shall be liable for debts contracted by the husband and for torts of the husband committed in the course of acquiring, managing, holding or disposing of the community property, but not otherwise. The husband and wife, each of them, shall be entitled to the exemptions to which they, or either of them, are entitled under existing laws. All debts created by the husband or wife after marriage or after the effective date of this act, whichever is later, shall be regarded as community debts, unless the contrary is satisfactorily proved."

Section 9 reads as follows:

"No creditor shall have recourse to the community property for the payments of debts or liabilities created by either the husband or the wife, except as provided in section 8 of this act: *Provided,* that any creditor may satisfy his claim or demand out of the community property which was under the management, control and disposition of the spouse incurring the indebtedness or liability at the time the debt or liability

[67] For an example of the insurer's refusal to pay upon being notified that the premiums were paid from community assets, see Wilcox v. Penn. Mut. Life Ins. Co. (1947) 55 A (2d) 521.

[68] In re Lissner's Estate, (Cal. App. 1938) 81 P (2d) 448.

was controlled or created, and which has been subsequently conveyed or transferred to the other spouse and is under the management, control and disposition of said other spouse, without proof that said creditor relied upon said community property in advancing said credit, but without prejudice to the rights of the third party purchasers, encumbrances, or other creditors or grantees; and provided further, that the husband or wife on paying community debts shall, as between themselves, charge the same against community property."

It would appear that community property managed by the wife would be liable for her contracted debts and torts committed in the course of holding or managing such property. Community property under management or control of the husband is liable for the husband's contracted debts and torts committed in the acquisition or management of the community property. While all debts acquired after marriage are presumed community debts there is no specific statutory provision enabling the creditor to satisfy his claim out of community assets, irrespective of who controls the property. Presumably the assets to be reached would depend on whether the husband or the wife incurred the debt. It would seem that from the statutory language community property is not liable for tort liabilities of either the husband or wife not incurred in the management of community property. If the above be the rule with regard to debts, creditors will have their rights severely curtailed. In this respect it may be asked, What will be the effect of our judgment lien statutes[69] as affecting real property standing in the name of either the husband or the wife which forms part of the community holding?

Sections 8 and 9 are not clear in their effect or application.

The rules regarding the liability of community property and separate property for obligations and torts vary in states with the community property system depending on the particular provisions of the statutes and the court's determination of the applicable rule. In general creditors' rights have not been materially affected. Ordinarily community property is liable for community debts.[70]

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[69] N. D. Rev. Code, 1943, 28-2013.

[70] For a general discussion of this problem see 11 Am. Jur., Community Property, Sect. 64-69; Bortle v. Osborne, (Wash. 1930) 285 P 425; Fidelity & Deposit Co. v. Clark, (Wash. 1927) 258 P 35.

TRANSFERS OF PROPERTY

Section 10 of the proposed act provides as follows:

"The husband may give, grant, bargain, sell or convey directly to his wife, and a wife may give, grant, bargain, sell or convey directly to her husband, his or her community property in esse. Every deed and conveyance made from the husband to the wife or from the wife to the husband shall operate to divest the property therein described of every claim or deemed as community property to the extent herein provided, and shall vest the same in the grantee as the separate property of the grantee: provided, that the deeds, conveyances or transfers hereby authorized shall not affect any existing equity in favor of creditors of the grantor at the time of such transfer, gift or encumbrance."

In general it would appear that the community property may be converted into separate property. In a number of the older community property states, separate property of one spouse may be converted by contract or deed into community property or visa versa.[71] And if community property is transmitted by agreement of spouses into separate property of one of the spouses, the income is taxable solely to the latter.[72] In *McDonald v. Lambert*,[73] a New Mexico case, it was held that an oral agreement was insufficient to change separate property into community by mere will. Under the rule of that jurisdiction, the marital partners are powerless to change the status of the separate estate into community property. (Actually under the proposed enactment, the proposition whether separate property may be converted into community is not covered.) Under the California rule, it is well settled that the spouses' separate property may be changed into community property by an executed oral agreement that all property owned by them at the time of marriage and subsequently acquired shall be community property.[74] In Washington the rule seems to be that the husband and wife may by proper agreement or conveyance, change their separate property into community property and community property into separate property, but whether it in fact has been changed depends on four rules: (1) the status of the property is to be determined

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[71] See Commr. of Int. Rev. v. Harmon, (1944) 323 U. S. 44, 54, 89 L. Ed. 60, 66, 65 S. Ct. 137 and cases cited; Stewart v. Commr. of Int. Rev., (C. C. A. 5th cir. 1938) 95 F (2d) 821.

[72] Sparkman v. Commr. of Int. Rev., (C. C. A. 9th cir. 1940) 112 F (2d) 774; Helvering v. Heckman (C. C. A. 9th cir. 1934) 70 F (2d) 985.

[73] (1938) 85 P (2d) 78.

[74] Kenny v. Kenny, (Cal. 1934) 30 P (2d) 398.

as of the date of acquisition; (2) the rule applies to real as well as personal property; (3) if the property is once shown to have been separate property, the presumption is that it continues separate property until that presumption is overcome by evidence; (4) property continues to be separate property through all its changes and transitions as long as it can be clearly traced and identified; (5) the rents, issues and profits of separate property remain separate (in that state).[75]

With regard to the transfer of real property without the joinder of the other spouse, this is handled by statute in a number of jurisdictions where both are required to sign the instrument.[76] In absence of a statutory restriction, the husband as head of the community and as general manager may sell or dispose of the real property without the authority of the wife. A deed from the husband where he holds the record title is sufficient in most community property states except as to homestead. The wife, however, has no such authority even though the property be in her name, except as she may act as the agent for her husband. In purchasing from a woman, the buyer is bound to ascertain at his peril that the property is her separate estate unless recitals appear in the conveyance to her.[77] The latter proposition may be questioned in North Dakota in view of the provisions of Section 4 previously considered in the text at note 55.

DIVORCE

Section 11 of the proposed act reads:

"In the event of the dissolution of marriage by decree of any Court of competent jurisdiction, the husband and wife shall each be vested with an undivided one-half interest in the community property as tenants in common, but nothing herein shall prevent the Court from having the same powers with respect to said property as to other property of either husband or wife. This section apparently does not interfere with the powers of the Court over the property of married persons, but does change the community estate into a tenancy in common upon divorce."

PROCEDURE UPON DEATH

"Upon the death of the husband or wife, the surviving spouse shall administer all community property in the same

[75] State v. Sailors, (Wash. 1934) 39 P (2d) 397.
[76] See Arnett v. Read, (1911) 220 U. S. 311, 31 S. Ct. 425, 55 L. Ed. 477.
[77] Patton on Titles, (1938) Sect. 248.

manner and with the same duties, privileges and authority as are vested in a surviving partner to administer and settle the affairs of a partnership upon the death of the other partner. The surviving husband or wife shall not be disqualified from acting as executor or administrator of the estate of the deceased husband or wife. The survivor of the husband or wife shall pay out of the community property, except the homestead and exempt property, all debts of the community, whether created by the husband or the wife. When all debts of the community shall have been fully satisfied the survivor shall transfer and convey to the administrator or executor of the deceased one-half of the community property remaining to be administered and distributed as other property of the estate, either subject to the terms of the will of the deceased or under the laws of descent and distribution as the case may be, and thereafter all the interest of the surviving partner in said community shall be that of a tenant in common. Any interest in a homestead so conveyed shall not be subject to administration under the laws of this State, except in the manner provided by law at the time of the enactment of this act." [78]

It would appear from this section, that the surviving spouse shall first pay off the community debts. The community estate remaining is to be equally divided. Presumably the laws of intestate succession or the provisions of the will of the deceased spouse would thereupon apply upon that aliquot portion transferred to the administrator or executor. In intestacy the amount of inheritance of the children would be materially decreased. On the other hand, a surviving wife would materially benefit by this community property division. She would secure one-half the community property, and her rights of succession [79] would not be affected with resptct to the husbands separate property, the homestead or the balance of the community estate.[80]

Some Constitutional Aspects

Constitutional objections were raised and sustained in a common law state that engrafted the principles of community property upon its common law property doctrines. In *Wilcox vs. Penn. State Mut. Life Ins. Co.*,[81] the Pennsylvania community property act, similar to the proposed North Dakota enactment, was held void.

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[78] Sect. 16, proposed Act.

[79] See N. D. Rev. Code 1943, 56-0104.

[80] Neither spouse has any rights by dower or curtesy. N. D. Rev. Code, 1943. 14-0709, 56-0102.

[81] (1947) 55 A (2d) 521.

The Pennsylvania law was found wanting on three primary grounds.

(a) The intent of the act was to make income taxes separate estate community property. The right to ownership of separate property includes the right to the fruits of that property. Ownership and the profits from the land are one and the same. The statutory provision making the profits community property violated the state constitutional concept that "All men . . . have certain inherent and indefeasible rights, among which are those . . . of acquiring, possession and protecting property." It may be noted that the North Dakota Constitution has a similar provision.[82]

(b) As a second ground the Court found the statute so vague, indefinite and uncertain in its terms as to render the act incapable of being executed. The Court pointed out that as community property each spouse is vested with an undivided one-half interest in the property according to the tenor of the act, but all other provisions are inconsistent therewith since each spouse has unrestricted control over the same property which they would have owned had there been no community property doctrine enacted. As owner of part of the community property, one spouse may have no real incidents of ownership at all where the control is in the other spouse, and therefore in effect have only an illusory title or interest.

(c) As a final blow the Court pronounced the act nugatory because under the existing Pennsylvania law the wife could have no remedy against her husband for wrongful disposition or misappropriation of the community assets under his control.

The Court stated, "The community property law is not only 'vague, indefinite and uncertain' but so 'incomplete, conflicting, and inconsistent in its provisions' that it is incapable either of rational interpretation or of judicial enforcement and consequently it must be held to be inoperative and void."

CONCLUSIONS

Community property will provide substantial tax savings to upper income groups and will materially increase the woman's rights to share in the gains made during matrimony. On the other hand, it must be recognized that the community property system is exotic with respect to both our substan-

[82] N. D. Const., Art. 1, Sect. 1.

tive and procedural law. It represents "a concept of property that is entirely alien and foreign to that of the common law as to the conjugal relationship and the marital rights in property." [83]

The proposed community property act leaves many questions unanswered and needs much clarification. Uncertainty with respect to property rights, and litigation with respect to the solution of those problems will certainly arise.

It is submitted that if tax equality is desired, that solution lies with our Congress. If a change is desired in the property rights of husband and wife, then the matter should be given careful study and our statute law changed and revised *in all details* to accomplish the desired result.

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[83] de Funiak, Principles of Community Property, (1943) Vol. 1, p. 4, Sect. 2.