

AN INTRODUCTION TO THE LAW OF COMMUNITY PROPERTY

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The Origin of the Community Property System

“And we say it shall be the same of men as of women.”¹ This is a direct quotation from the Fuero Juzgo (Book of the Judges), a Visigothic Code attributed to the year 693 A.D. It comes to us by translations which are twice removed from the monkish Latin in which it was originally recorded. While this early code is principally of historic interest, it recognized both separate and community property, and provided that either spouse could leave his share of the common property to his children, or relatives, or to others as he wished. But under it community property instead of being equally owned was divided proportionately depending upon which spouse was richer than the other.

In the five and one-half centuries following, the idea of proportionate division was cast aside, and equality between husband and wife in the ownership of property acquired during marriage became well established as a property system. The following quotation, written almost seven centuries ago, incorporates the basic concept of the community property system as it exists today. Law 1 of the Spanish Fuero Real, 1255 A.D., reads:

“Everything the husband and wife may earn or purchase during union, let them both have it by halves; and if it is a gift of the King or other person, and given to both, let husband and wife have it; and if given to one, let that one alone have it to whom it may have been given.”²

The idea of proprietary equality between the spouses was

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1. From a translation of the Fuero Juzgo as set forth in 2 de Funiak, “Principles of Community Property” 4.
2. From a translation set forth in 2 de Funiak, op. cit. supra, n. 1 at 13. (Originally Law 1, Title 3, Book 3 of the Fuero Real, promulgated in 1255, and continued into the Nueva Recopilacion in 1567, as Law 2, Title 9, Book 5.)

also clear in the Spanish Codes promulgated in 1263, 1348, 1502 and 1567.³ However, as a property system the idea of community property is much older than the Spanish Codes. Historians tell us that it existed in unwritten form among the Germanic tribes and that one of these, the Visigoths, carried it into parts of France and into Spain where it later developed and became an integral part of the written law.⁴

On this continent the establishment of the community property system was but a continuation of the laws of Spanish jurisprudence. California, Louisiana, New Mexico, Texas, Arizona, Idaho, Nevada and Washington are the original community property states. In an early Spanish-Mexican code, community property was defined as all property of whatever nature the spouses acquired by their own labor and industry. However, the fruits and income from separate property became a part of the common gain. In some present day statutes there has been a departure from the original concept, and the income from separate property remains the separate property of the owning spouse. In the Spanish-Mexican Code under consideration separate property was defined much as it is today. It consisted of the property owned by either spouse before marriage and that acquired after marriage "by a gratuitous title, such as inheritance, donation or bequest."

Because colonial Louisiana was both a French and Spanish possession, and derived its law from the Custom of Paris as well as the laws of Spain,⁵ it becomes interesting to know that the community background of the two countries is similar, the Germanic customary law having influenced the Customs of Paris and Orleans which had the principles of a perfect community system; the Code Napoleon being based thereon.⁶

These references to the sources and origin of the community property system illustrate the importance of Spanish concepts in the interpretation of our own laws as they exist today. The community property states have adopted by

3. See "The Modern Problem of the Nature of the Wife's Interest in Community Property—A Comparative Study" 19 Cal. Law Rev. 567-601 (1931).

4. 1 de Funiak, *op. cit. supra*, n. 1, c. 2.

5. 1 de Funiak, *op. cit. supra*, n. 1 at 88, n. 43.

6. Daggett, *supra*, n. 3.

statutes, and in some instances by constitution, patterns of these early codes and in the early cases in this country there are frequent references to the source law.

The Nature of the Wife's Interest in Community Property

While the laws of the eight original community property states have the same origin, there have been marked differences in the interpretation of the Spanish law. One of the most interesting of these controversies has been in relation to the nature of the wife's interest in community property. Based upon reasons of public policy and social economy the husband, from the time of the early codes, has been given broad powers of management and control over the property of the conjugal partnership. His rights as managing partner included the power to sell and dispose of the common property. Under common law concepts the rights of the husband were considered as equivalent to ownership, and the question was often raised in this country as to whether the wife was in fact an effective owner in the common property prior to her husband's death. Those arguing for the Spanish concept claimed that the proprietorship of the husband was but a necessary agency of the community; that he was at all times acting in a representative capacity, and could not sell or otherwise dispose of the community property in fraud of or to the prejudice of the rights of the wife. But on this question even the continental authors were in disagreement.⁷

Escriche said that the wife had ownership rights only after the death of the husband, but Manresa said that the proprietorship of the wife was not nominal and theoretical but real and effective.⁸ A French author, Troplong, compared the community to a partnership which begins only at the end.⁹

Having in mind the conflicting viewpoints expressed by continental authors, one becomes sympathetic with the different conclusions which were carried forward in the early decisions in the United States. In a Louisiana case, *Guice*

7. *Roberts v. Wehmeyer*, 191 Cal. 601, 218 Pac. 22 (1923). See 2 de Funiak, op. cit. supra, n. 1 at 29; 4 id. at 277, 281.

8. Daggett, supra, n. 3.

9. *Garrozi v. Dastas*, 204 U.S. 64 (1907).

v. *Lawrence*,¹⁰ the views of Febrero were adopted and it was held that the wife's interest was a mere expectancy, the same as that of an heir; that it was not until the death of the husband that the wife became the irrevocable and effective owner. Relying upon Louisiana authority, this view was also carried forward in California.¹¹ But in Texas¹² and in Washington¹³ from the time of the earliest cases, it has been consistently held that the interest of the wife in community property is present, fully vested and equivalent to that of her husband. One of our American textwriters tells us that the writings of men like Febrero were either inaccurate or misinterpreted in translation,¹⁴ and that under Spanish law the wife has at all times been an effective owner of her interest in the community. Mr. Justice Holmes has also made reference to the difficulties encountered in the translation of ambiguous words.¹⁵ Louisiana, however, has overruled the original cases, and it is now settled law in that state that the wife has a present, vested interest in community property equal to that of the husband.¹⁶ Effective July 29, 1927, California, in order to gain income tax advantage for her citizens, changed its law by statute, and in that state also the interests of the husband and wife in property acquired after the statute date are present, existing and equal.¹⁷

The Status of Community Property under Federal Income Tax Laws

This discussion of the nature of the wife's interest in community property furnishes proper background for what

10. *Guice v. Lawrence*, 2 La. Ann. 226 (1847); See *Jacob v. Falgoust*, 90 So. 426 (1922).
11. *Spreckels v. Spreckels*, 172 Cal. 175, 158 Pac. 537 (1916). *Roberts v. Wehmeyer*, 191 Cal. 601, 218 Pac. 22 (1923).
12. *Hopkins v. Bacon*, 282 U.S. 122 (1930); *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925); *Zimpelman v. Robb*, 53 Tex. 274 (1880); *Wright v. Hays*, 10 Tex. 130, 60 Am. Dec. 200 (1853).
13. *Poe v. Seaborn*, 282 U.S. 101 (1930); *Warburton v. White*, 176 U.S. 494 (1899); *Holyoke v. Jackson*, 3 Wash. Terr. 235, 3 Pac. 841 (1882).
101 (1930);
14. 1 de Funiak, op. cit. supra, n. 1 at 281, 294.
15. *Arnett v. Reade*, 220 U.S. 311, 36 L.R.A. (NS) 1040 (1911).
16. *Bender v. Pfaff*, 282 U.S. 127 (1930); *Phillips v. Phillips*, 160 La. 813, 107 So. 584 (1926).
17. Cal. Civil Code (*Deering* 1941), §161a.

in recent years has been the most important development in the law of community property. In the case of *United States v. Robbins*,¹⁸ the Supreme Court, acting on California law, held that the husband's powers of control respecting community property were so comprehensive that they were equivalent to ownership, and that income⁷ from community property was taxable to the husband alone. Prior to the decision in the *Robbins* case, the Treasury Department had concluded that the husband and wife as equal owners had the right to divide community income and file separate returns. Following the decision in the *Robbins* case, all administrative rulings on the subject of community property were withdrawn and test cases were filed in Texas, Washington, Louisiana and Arizona. It was the Government's theory that the powers of the husband in the management of community property afforded him practical if not actual rights of ownership. However, the Supreme Court rejected this contention in *Poe v. Seaborn*,¹⁹ and held that under Washington law the wife has a present, vested interest in one-half of the community property, and regardless of who actually earned the income. The practical advantage afforded by this holding will be readily apparent. By dividing community income, husband and wife in the community property states have been able to compute income tax liability under reduced surtax rates. *Poe v. Seaborn* and the related cases²⁰ were decided in 1930; the original departmental rulings date from 1920, and it seems inexcusable that this inequality in our taxing laws has not been fully adjusted long prior to this date. The attorneys in community property states have pointed out that the community property system is not the only one which gives tax advantage. The following quotation is from Respondent's brief filed in *Hopkins v. Bacon*:²¹

"It is by no means certain that the community system gives any tax advantages to taxpayers in these states. In the forty states of the Union not having the community system, their own systems have been so changed by Statutes, have become modernized, individualistic systems, have adapted to their social needs such civil law and common law conceptions

18. 269 U.S. 315 (1926). See C.C.H., Fed. Tax Rep., ¶9951-53.

19. 282 U.S. 101 (1930).

20. *Goodell v. Koch*, 282 U.S. 118 (1930). *Hopkins v. Bacon*, 282 U.S. 122 (1930). *Bender v. Pfaff*, 282 U.S. 127 (1930).

21. 282 U.S. 122 (1930).

as joint estates, tenancies by entireties, equitable trusts, marriage agreements and settlements, gifts inter vivos, wage agreements, and the like, as automatically to create separations of incomes between husbands and wives. Collectively, they may be of more significance and influence in a particular State in dividing the gross gains of husbands and wives between them, and to make the principle of divided returns of more effective application in them, than the simpler and more uniform community systems existing in the community property states. At all events, there is as much reason for the Courts to say that the property arrangements in the forty states which have not the community system are aimed at tax evasion as to say that the simpler, more uniform, Statute regulated, two thousand years old community systems were designed for tax evasions."²²

Five States have recently adopted the community property system. The quoted argument is unique and has merit, but respecting earned income at least, a definite tax advantage appears to exist; and five states, impatient of Federal delay, have recently adopted the community property system. Oklahoma was the first to act. Its proximity to Texas together with overlapping interests in oil were the factors which combined to make Oklahoma doubly conscious of the income tax advantage enjoyed by husband and wife in community property states. Oklahoma's first community property law became effective July 29, 1939,²³ but the Supreme Court in *Commissioner of Internal Revenue v. Harmon*²⁴ disapproved it because husband and wife were given the right to elect whether they desired to come under its terms. At the next session of the Oklahoma legislature a new law, effective as to all citizens, was substituted.²⁵ It was approved by the Treasury Department. Professor de Funiak has said that the Oklahoma law is a good one.²⁶

During the present year, Pennsylvania, Nebraska and Oregon have adopted community property laws modeled on the Oklahoma Act of 1945, but the Michigan statute, also enacted this year, is different in many respects and appears to have been independently drafted.

22. Brief for Respondent, p. 60; *Hopkins v. Bacon*, supra n. 24.

23. Okla. Session Laws, 1939, pp. 356, 360.

24. 323 U.S. 44 (1944).

25. Okla. Session Laws, 1945, pp. 118-121.

26. de Funiak, "The New Community Property Law" 16 J. Okla. Bar Ass'n, 1123, 1124.

Those who follow legislative matters know that a community property bill, copied almost verbatim from the Oklahoma law, was introduced in the 85th Indiana General Assembly;²⁷ but the bill was not ready for vote until the closing days of the session, and the final vote, which was one of postponement, seems to indicate that the legislature felt that such a major change in established property laws was a step deserving of further study and review.

Under Spanish Law the Rents and Revenues from Separate Property Became a Part of the Common Gain.

Under Spanish law the rents and revenues from separate property became a part of the common gain, but there has been a departure from this concept in some of the present day statutes. In California²⁸ the rents, issues and profits from separate property remain the separate property of the owning spouse. Similar statutes have been adopted in Washington,²⁹ Arizona,³⁰ New Mexico,³¹ and Nevada,³² but in Louisiana, Texas and Idaho the original concept still prevails.³³

It has been suggested that the California statute was adopted because the legislature did not want the creditors of the husband to be able to reach the rents and revenues from the separate property of the wife,³⁴ but Texas has protected the wife without changing the original idea that rents and revenues from separate property are a part of the connubial

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27. Senate Bill 352 was introduced February 10, 1947. It was reported out of Committee February 25, without recommendation. It passed the Senate on March 6, by a vote of 28 to 15. Later in the day, the House stripped Senate Bill 309 of its original contents, and amended it so as to include the community property law as set forth in Senate Bill 352 plus two amendments. On March 7, Engrossed Senate Bill 309 passed the House 67 to 16. It was sent back to the Senate on March 8, for concurrence in the House amendments, and was made a special order of business on March 10; at which time a motion for indefinite postponement prevailed.
 28. Cal. Civil Code (Deering, 1941), §§162, 163.
 29. Wash. Rev. Stat. Ann. (Remington, Supp. 1943) §§6890, 6891.
 30. Ariz. Code Ann. (1939) §63-302.
 31. N.M. Stat. (1929) §§68-302, 68-303.
 32. Nev. Comp. Laws (Hillyer, 1929) §3355.
 33. *Commissioner v. Wilson*, 76 F.2d 766 (1935); *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925); *Laughlin v. Laughlin*, 49 N.M. 20, 155 P.2d 1010, 1013, 1014.
 34. 1 de Funiak, op. cit. supra n. 1 at 182-184.

estate.³⁵ Under Texas law the rents from the wife's separate real estate, interest from her bonds and notes, dividends on her stocks, and her personal earnings constitute community property; but by special statute this portion of the community enjoys special immunity, and cannot be made subject to the payments of debts contracted by the husband, nor does liability exist for his torts.

The California type statute has been criticized on the ground that the wife can be left penniless where the husband at the time of marriage owns a considerable estate, but after marriage does nothing more than manage it, and collect the revenues. This results because the rents and profits from his separate property do not become a part of the conjugal estate.³⁶ There is, however, a further difficulty which has arisen from alteration of the Spanish law, and the courts recognize that it has caused "no end of complications."³⁷ What brings this about is that in many businesses the income thereof is as much attributable to the skill and labor of the owner as it is to invested capital; and the courts have been faced with the problem of attempting to effect an equitable separation of these two items so that that portion of the profit which is attributable to personal services can be brought into the community estate.³⁸ Nevada and Arizona have attempted to solve the problem in the manner hereinafter set forth:

"If profits come *mainly* from the property, rather than the joint efforts of the husband and wife, or either of them, they belong to the owner of the property, although the labor and skill of one or both may have been given to the business. On the contrary, if profits come *mainly* from the efforts or skill of one or both, they belong to the community."³⁹

In illustration of this rule, Arizona holds that the success of a restaurant or a clothes cleaning business is principally

35. Tex. Stat., Rev. Civ. (Vernon, 1936) Art. 4616. See *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925).

36. *McKay*, "Community Property" (1925) c. 4, §74, quoting from *In Re Cudworth's Estate*, 133 Cal. 462, 65 Pac. 1041, 1044 (1901).

37. *Laughlin v. Laughlin*, 49 N.M. 20, 155 P.2d 1010, 1014 (1944).

38. *Katson v. Katson*, 43 N.M. 214, 89 P.2d 524, 526 (1939); *Shea v. Commissioner of Internal Revenue*, 81 F.2d 937, 939 (1936).

39. *In Re Torrey's Estate*, 54 Ariz. 369, 95 P.2d 990, 993 (1939), quoting from *Lake v. Lake*, 18 Nev. 361, 4 Pac. 711, 728, 7 Pac. 74 (1884).

attributable to the individual toil and application of the owning spouse, and that the income is community property.⁴⁰

Other methods of meeting the problem have been devised. Where the owning spouse takes a salary from the business, that sum has sometimes been used as a measure of the value of personal services rendered. Other courts have approached the problem by attempting to determine what is a proper interest return computed upon the basis of invested capital, the remaining profit being treated as community property under the theory that it is attributable to labor and skill.⁴¹

Oklahoma which was the first non-community state to adopt a community property law, provided in its statute that the rents, interest, dividends, and other income from the separate property of the wife are community property,⁴² but for some reason the Oklahoma statute does not specify whether rents and profits from the separate property of the husband remain separate property or become a part of the common gain. So if the Oklahoma law is to be treated as a model, it seems that it should more clearly define the rights of the parties in this respect, and in drafting a new statute, the issue as to whether the Texas or California rule is the proper one should be clearly met.

The Intrinsic Increase of Separate Lands is Distinguishable from the Rents and Profits which are Derived Therefrom.

Under Spanish law, the intrinsic increase of separate lands as distinguished from rents and profits was not shared with the other spouse.⁴³ Examples of intrinsic increase include the spontaneous growth and output of land, uncut meadows of hay, standing timber, undug sand and gravel, unquarried stone and unmined minerals.⁴⁴ Texas, however, is the only state which has included such a stipulation in its statutes. Under the Texas statutes, separate property includes "the increase of all lands" owned or claimed before marriage and "the increase of all lands" acquired afterwards by gift,

40. *Anderson v. Anderson*, 177 P.2d 277 (Ariz. 1947).

41. See *infra*, n. 37, 38.

42. Okla. Session Laws of 1945, p. 118, Tit. 32, §4.

43. 1 de Funiak, *op. cit. supra* n. 1, §73, making reference to the work of three Spanish writers.

44. Speer, "Law of Marital Rights in Texas" §411, pp. 500-01. *Welder v. Commissioner of Internal Revenue*, 148 F.2d 583, 585 (C.C.A. 5th 1945).

devise or descent.⁴⁵ The word "increase" has never been supposed to include rents.⁴⁶ I do not know why Texas stands alone in this statutory emphasis of what has always been the Spanish law.

Dissolution of the Community by Death

Another of the basic concepts of the community property system is that upon dissolution of the marital partnership by death, the surviving spouse does not inherit his or her share in the community. This follows from the fact that each spouse has been the owner of an equal one-half interest in the marital property from the time of its original acquisition.

However, apart from and in addition to the one-half interest which the survivor holds in his or her own right, the laws of intestate succession often recognize the survivor as an heir in the administration of the interest of the deceased spouse. These statutes follow a widely divergent pattern. Under California law, in the absence of testamentary disposition, the entire share of the deceased spouse passes to the survivor so that the survivor becomes the owner of all of the community.⁴⁷ But under the statutes of Texas, Arizona and Washington, if there are children, they, rather than the survivor, inherit the entire share of the deceased spouse.⁴⁸ The survivor, however, is the only heir if the deceased leaves no children or descendants of deceased children. In Louisiana, if there are no children, the parents of the deceased spouse have rights which prime those of the surviving husband or wife. The wife, however, has a usufruct where there are issue surviving.⁴⁹

Under Oklahoma law, the one-half interest of the deceased spouse is subject to the ordinary laws of intestate succession. A surviving wife and one child share the husband's one-half interest, equally, so that the wife receives in all three-fourths of the community and the child one-fourth. If there is more than one child surviving, the wife takes one-

45. Tex. Stat., Rev. Civ. (Vernon, 1936) Art. 4613, 4614.

46. Commissioner v. Wilson, 76 F.2d 766 (C.C.A. 5th 1935); Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925).

47. Cal. Prob. Code (Deering 1944) §§201-3.

48. Tex. Stat., Rev. Civ. (Vernon, 1936) Art. 2578; Ariz. Code Ann. (1939) §39-109; Wash. Rev. Stat. Ann. (Remington, 1939) §1342.

49. La. Civ. Code (Dart, 1945) §§915, 916.

third of the husband's share in addition to her one-half interest already owned, the remaining two-thirds of the husband's one-half going to the children.⁵⁰

McKay,⁵¹ in his textwork, has said that the most glaring disadvantage of the community property system is the requirement that on the dissolution of the marriage, the gains shall at once be divided.

My own reaction is that the disadvantages exist more in theory than in fact. Where the deceased spouse dies testate, the surviving spouse and the children of the marriage are the usual devisees; the same ownership usually results under the laws of intestate succession. Except in isolated cases, the children and the surviving parent experience no practical difficulty in liquidating the property of the marital partnership. Moreover, in states like Oklahoma and in Texas, the position of the surviving spouse is improved by statutes which recognize in the surviving spouse special rights of administration.

Under the Oklahoma statute,⁵² the surviving spouse administers community property in the same 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 one of the partners. When community debts have been satisfied, the survivor transfers and conveys to the personal representatives of the deceased, the deceased's share of the community, whereupon the community interest along with other property of the deceased's estate is administered and distributed either subject to the terms of the will of the deceased or under the laws of descent and distribution, as the case may be. Texas protects the survivor through detailed statutes providing for a short form community administration. These statutes require the community survivor to file a good and sufficient bond, conditioned that he will faithfully administer the community estate and pay one-half thereof to the person or persons entitled to receive the same.⁵³

50. Okla. Stat. (1941) §84-213.

51. McKay, "Community Property" §74 (1925).

52. Okla. Session Laws, 1945, pp. 120, 121, §15.

53. Tex. Stat., Rev. Civ. (Vernon, 1936) Art. 3667. *Fidelity Union Ins. Co. v. Hutchins*, 134 Tex. 268, 133 S.W.2d 105, 109, 110 (1939).

Texas also holds that the community survivor need not qualify under the administration statutes in order to sell property to pay community debts.⁵⁴

This discussion of what happens when the community estate is dissolved by death of one of the spouses should give emphasis to two points: first, that a new state adopting the community property system has considerable choice available in determining whether the existing laws of the intestate succession should be altered, and, second, that there is precedent for both formal and informal administration of the community estate.

Community Property and Federal Estate Taxes

With the passage of the Revenue Act of 1942 amending Secs. 811(e)(2) and 811(g)(4) of the Internal Revenue Code, Congress attempted to eliminate preferential treatment enjoyed by those living in community property states respecting the burdens of Federal Estate Taxes. The claim that the tax load had been unevenly distributed results from the community property concept that the surviving spouse does not inherit his or her one-half interest in the community estate, having owned it from the time of original acquisition as a matter of right. Accordingly, only the one-half share owned by the deceased spouse is properly subject to Federal Estate Taxes. However, the Revenue Act of 1942 measures the tax by the value of the entire community excepting only such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. Immediate question was raised as to its constitutionality. In the cases of *Fernandez v. Wiener*⁵⁵ and *United States v. Rompel*⁵⁶ the validity of the statute was upheld. The holding of the Court, however, appears to be at variance with community property concepts and results in the taxation of one person for property owned by another.

There are many community property attorneys who feel

54. *Kinard v. Sims*, 53 S.W.2d 803 (Tex. 1932); *Davis v. Magnolia Petroleum Co.*, 134 Tex. 201, 134 S.W.2d 1042 (1940).

55. 326 U.S. 340 (1945).

56. 326 U.S. 367 (1945).

that the basic concepts of the community property system have been successfully attacked in the 1942 amendments to the Internal Revenue Code and dissatisfaction with the holdings of the Supreme Court in the *Wiener* and *Rompel* cases has been general.⁵⁷

The Husband's Power to Make Gifts of Community Property

From the time of the Spanish law, there have been differences of opinion respecting the husband's power to make gifts of community property. In a Nevada case⁵⁸ the conclusion is expressed that the husband may make a voluntary disposition of a portion of the community property provided the gift is reasonable with reference to the whole amount of the community estate, and provided the gift has been made with no intent to defraud the wife or defeat her claims. But in the State of Washington in a life insurance case, *Occidental Life Insurance Co. v. Powers*,⁵⁹ it was held that a husband was without power to make gifts of the community without the wife's consent. In the case referred to, the Washington Court was asked to decide whether a married man could name his mother and his secretary as beneficiaries of a life insurance policy paid for with community funds.

In a thought-provoking dissent, the Washington Court has said:

"However laudable may have been the desire of the court to prevent the husband from leaving the wife penniless, it should have treated the community property consisting of insurance just as the law treats all other kinds of community property because there is no basis for a legal distinction between them. It should have recognized the right of each spouse to provide for the disposal of one half of the community property after the termination of the community, rather than to have invoked a rule not applicable to the situation. Had it done so, the wife would have received one half of the avails of the insurance as her share just the same as in the case of any other community property for the reason that, since it belonged to her, the husband had no right to dispose of it. Thus, as pro-

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57. Problems of community property taxation have been covered by Pedersen, Note, 45 Mich. Law Rev. 409-444 (1947).
 58. *Nixon v. Brown*, 46 Nev. 439, 214 Pac. 524 (1923). This case contains detailed references to Spanish authorities.
 59. *Occidental Life Insurance Co. v. Powers*, 192 Wash. 475, 74 P.2d 207, 114 A.L.R. 531 (1937).

vided by our community property system, she would not have been 'left penniless.'

"It frequently happens that a widower with dependent children remarries, takes out insurance for their benefit, and thereafter dies during their dependency. The rule of the *Powers* case prevents one from doing this even to the amount of one half the proceeds and hence created a greater evil than the one it attempted to correct."⁶⁰

The view contended for in the dissenting opinion aforesaid is settled law in California.⁶¹

In a recent Washington case, the husband changed the beneficiary of four insurance policies from the wife to his executor in trust for a minor son,⁶² but in contrast to the holding in the *Powers* case, the Court gave effect to the change of beneficiary to the extent of one-half of the proceeds of the policies upon the theory that one-half belonged to the wife in her own right, the other half being subject to the husband's disposition.⁶³

To sum up, three views have been definitely expressed. One state says that the husband may make no gift of the community. Another says that he may give away his one-half interest but may not interfere with the one-half interest which belongs to the wife. In the third state, gifts are valid if reasonable in proportion to the community estate and are made with no intent to defraud.⁶⁴

Certain gifts made from moral duty might well be considered as within the sphere of ordinary and regular administration. Where no fraud exists and the action of the husband seems reasonable in relation to the field of his entire responsibilities, gifts to a dependent mother or father or to the children of a first marriage should be upheld. Particularly should this be so where the remaining community estate

60. *Small v. Bartyzel*, 177 P.2d 391, 393, 394 (Wash. 1947).

61. *N.Y. Life Ins. Co. v. Bank of Italy*, 60 Cal. App. 602, 214 Pac. 61 (1923); *McBride v. McBride*, 143 Kan. 245, 54 P.2d 480 (1936).

62. *In Re Towey's Estate*, 22 Wash.2d 212, 155 P.2d 273 (1945).

63. In the dissenting opinion, *Small v. Bartyzel*, n. 60 supra, the Court makes detailed comparison of the *Powers* and *Towey* cases, concluding that no substantial difference exists. In the *Powers* case the beneficiary change was to the husband's mother and secretary. In the *Towey* case the change was to an executor in trust.

64. On the question of when the wife can complain of the husband's gifts of community property to third persons by means of life insurance, there is an excellent article by Huie in 18 *Tex. Law Rev.* 121-150 (1940). This article also contains references to the Spanish authorities.

contains sufficient property to protect the one-half interest of the wife.

Bank Accounts and Life Insurance

The community property laws are also effective as to items of personal property. Two of the most important are bank accounts and policies of life insurance. In the Oklahoma Act of 1945⁶⁵ there is the following provision:

"Bank Deposits.

"Section 6. 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."

This provision is also common to the statutes of Texas⁶⁶ and to the new laws recently adopted in Oregon, Nebraska and Pennsylvania. It appears fully justifiable under the theories of the law merchant.

Similarly, laws designed to facilitate the payment of policy proceeds by life companies have been enacted in a number of states. These special statutes are intended to absolve the insurer from further liability if payment is made in accordance with the contract terms before notice of a claim of community interest by a surviving spouse.⁶⁷ These statutes have had the effect intended, and have speeded up payment of death claims in community property states, but it has been

65. Okla. Session Laws, 1945, pp.118, 119.

66. Tex. Stat., Rev. Civ. (Vernon, 1936), Art. 4622.

67. The following provision appears in the Nebraska, Michigan and Oregon laws:

"Notwithstanding the provision of this act, when the proceeds of, or payments under, a policy or contract issued by a life insurance company becomes 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 claims to be entitled to such payment or some interest in the policy or contract."

Somewhat similar provisions appear in the general life insurance laws of California, Texas and Washington.

suggested that they do not go far enough. There are many transactions involving a life policy other than the disbursement of policy proceeds, such as policy loans, surrenders, trust agreements, assignments, and beneficiary changes, to name but a few. Some of these are similar to the ordinary commercial transactions handled by banks, and again on the theories of the law merchant it is submitted that a new state adopting a community property system might properly give to each spouse the full management and control over policies of life insurance issued in their respective names. Such statutes would not prevent subsequent accounting between the spouses, but it is believed that they would avert much of the litigation involving life policies in community property states. Moreover, in the drafting of new statutes special consideration should be given to the problems arising upon divorce because in many instances, possibly through inadvertence, the rights of the spouses respecting existing policies of insurance are not determined by the divorce decree or by separate property settlements. This field also has been a fertile one for litigation in community property states.

There are many points of life insurance law respecting community property which are yet to be settled.⁶⁸ This results in part from the fact that life insurance was unknown in the Spanish law and is in its widely accepted use a product of the past century. Some concepts, however, are well settled. If the husband is the insured and his estate the designated beneficiary and community funds have been used in the payment of premiums, the policy proceeds belong to the community.⁶⁹ The fact that the insurance proceeds in such a case are received after termination of the marriage does not make the moneys the separate property of the husband, the chose having been created and acquired during marriage.

Conversely, where the husband is the insured and the wife is the designated beneficiary, the policy proceeds are the separate property of the wife even though community funds have been used for the payment of premiums. The

68. Community property laws as applied to life insurance are fully discussed by Huie in 17 *Tex. Law Rev.* 121, 151 (1939). Detailed annotations respecting life insurance cases are set forth in 114 *A.L.R.* 545 (1938), 168 *A.L.R.* 342 (1947).

69. *Hardin v. Volunteer State Life Ins. Co.*, 193 *S.W.2d* 554 (Tex. 1946). This is the Court of Civil Appeal's opinion. It was reversed by the Texas Supreme Court in 197 *S.W.2d* 105, 168 *A.L.R.* 337 (1946), but on another point. *Martin v. Moran*, 11 *Tex. Civ. App.* 509, 32 *S.W.* 904 (1895).

uniform theory is that the husband has made a gift to the wife and the policy proceeds in such a case are not subject to community debts unless the husband has acted fraudulently, nor does right of reimbursement in favor of the community exist.⁷⁰ Under the set of facts aforementioned where the right to change the beneficiary has been reserved, the gift is imperfect during the husband's life and if he changes the beneficiary from his wife to his estate, the policy proceeds become community. If he should attempt to change the beneficiary to a third person, the question of whether the third party may receive the policy proceeds depends upon the extent of the husband's power to make a gift of community funds without the consent of his wife. These cases have been discussed in the preceding section of this paper.

In conclusion, the idea of common property in the home gives legal emphasis and encouragement to the family's position as a social unit. This is a conservative force which seems worthy of preservation and deserving of general recognition, and while the following quoted statements may be considered idealistic in nature, I believe that they incorporate the basic concepts of the community property system:

"Marriage is a joint enterprise between equals, in the nature of a partnership, for the accomplishment of economic as well as social objectives, all of which are as important to one spouse as to the other . . .

"Both spouses should, and ordinarily do, contribute their full efforts to the attainment of all of the objectives to which their endeavors were pledged . . .

"One field of marital activity is as important as the other, so that the spouses share equally, each as of right, in the economic gains . . .

"This system takes nothing which originally belonged to one spouse and gives it to the other, but rewards each equally for his or her equally valuable contributions to the common enterprise."⁷¹

I do not pretend to believe that any property system is able to accomplish all of its ideals, but speaking generally people who live under the community system like it.

70. *San Jacinto Building, Inc. v. Brown*, 79 S.W.2d 164 (Tex. 1935); *Evans v. Opperman*, 76 Tex. 293, 13 S.W. 312 (1890); numerous authorities from other states in support of these propositions are contained in Prof. Huie's article and in the A.L.R. annotations, *supra*, n. 68, 69.

71. Appellee's Brief. *United States v. Rompel*, *supra* n. 55 at 21.