1924

# Equality of Property Interests between Husband and Wife

M.R. Kirkwood

# EQUALITY OF PROPERTY INTERESTS BETWEEN HUSBAND AND WIFE

By M. R. Kirkwood*

This article is written in response to a suggestion that lawyers in "common law" jurisdictions might be interested in a brief comparison of the property interests of husband and wife under the common law as modified by modern statutes and under the community property system as it prevails in a number of states in this country. Such a discussion may be timely in view of the fact that there is now much agitation for complete equality of property interests as between husband and wife and in view of the further fact that in a number of states this agitation has led to the suggestion that the community property system be more generally adopted because of a supposed greater degree of equality therein. It is, of course, impossible to make any exhaustive study of either system within the limits of a single article. We shall content ourselves, therefore, with a comparison of a few of the salient elements of ownership as they exist under the two systems, and it will be necessary throughout to speak in very general terms.

## I

It is common knowledge that the whole trend of legislation in modern times, in so far as it relates to the property of married women, has been toward an extension and strengthening of her rights and powers resulting in a corresponding limitation of the rights and powers of the husband with respect to her property. Such legislation has not been uniform in the various states, indeed there have been great differences particularly in matters of detail. Further, there has been much difference in the points of view of courts in the interpretation of such legislation. Some courts have proceeded upon the principle that these statutes being in derogation of the common law are to be strictly construed and not extended beyond "what is expressed by their words, or *necessarily* implied from what is expressed."[1] In other states courts have looked upon such statutes as remedial in character

*Dean of the Law School, Stanford University.

[1]Thompson v. Weller, (1877) 85 Ill. 197. Cf. also Junction Railroad Co. v. Harris, (1857) 9 Ind. 184, 68 Am. Dec. 618; Brookings v. White, (1862) 49 Me. 479; Fretz v. Roth, (1904) 68 N. J. Eq. 528, 59 Atl. 676; Bertles v. Nunan, (1883) 92 N. Y. 152, 44 Am. Rep. 361.

and so to be construed liberally.[2] For present purposes we shall concern ourselves with the law in those jurisdictions where the legislation and the interpretation thereof by the courts have been most liberal. The law in such states expressing as it does an advanced view of equality of property interest may be taken as indicative of what can reasonably be expected elsewhere by statutory modification of the common law. For purposes of convenience we shall refer to such states as "modified common law jurisdictions" and the law as so altered by statute as the "modified common law system" as distinguished from the "community property system."

The so-called Married Women's Property Acts recognize the right of the wife to hold property separate and apart from her husband. In general the definition of her separate estate is the same as that of the husband's. Thus all property, real or personal, owned by her at the time of marriage is usually included therein.[3] Gifts inter vivos,[4] bequests[5] and property acquired by descent[6] during marriage; property acquired with separate funds;[7] the rents, issues, profits[8] and proceeds[9] of separate property; earnings,[10] profits made in the conduct of separate busi-

[2]Bucci v. Poppovich, (1921) 93 N. J. Eq. 121, 115 Atl. 95; Kriz v. Peege, (1903) 119 Wis. 105, 95 N. W. 108; Farmers' Bank v. Hageluken, (1901) 165 Mo. 443, 65 S. W. 728; Riggs v. Price, (1919) 277 Mo. 333, 210 S. W. 420; Spencer v. St. Paul Railroad Co., (1875) 22 Minn. 29.

[3]Ilgenfritz v. Ilgenfritz, (1892) 49 Mo. App. 127.

[4]Lyon v. Lyon, (1903) 24 Ky. L. Rep. 2100, 72 S. W. 1102; Ilgenfritz v. Ilgenfritz, (1892) 49 Mo. App. 127; Holthaus v. Hornbostle, (1875) 60 Mo. 439 (equitable separate estate).

[5]Buck v. Ashbrook, (1875) 59 Mo. 200; See v. Zabriskie, (1877) 28 N. J. Eq. 422; Smith v. Whitfield, (1881) 71 Ala. 106; Smith v. Hardy, (1874) 36 Wis. 417.

[6]Robinson v. Payne, (1881) 58 Miss. 690.

[7]Smith v. Whitfield, (1881) 71 Ala. 106; Seay v. Hesse, (1894) 123 Mo. 450, 24 S. W. 1017; Cheuvete v. Mason, (1854) 4 Greene (Ia.) 231; Crump v. Walkup, (1912) 246 Mo. 266, 151 S. W. 709; Smith v. Hardy, (1874) 36 Wis. 417. In some states property purchased on her personal credit is deemed separate. Rankin v. West, (1872) 25 Mich. 195; Hoover v. Carver, (1916) 135 Minn. 105, 160 N. W. 249; Dayton v. Walsh, (1879) 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757.

[8]Chorn v. Chorn's Administrators, (1896) 98 Ky. 627, 17 Ky. L. Rep. 1178, 33 S. W. 1107 (separate estate in equity); Dayton v. Walsh, (1879) 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757 (immaterial that such are due to the efforts of the husband in working the wife's farm); Alsdurf v. Williams, (1902) 196 Ill. 244, 63 N. E. 686; Olson v. O'Connor, (1900) 9 N. Dak. 504, 84 N. W. 359, 81 A. S. R. 595.

[9]Hollenbeck v. Peck, (1895) 96 Ia. 210, 64 N. W. 780, and compare cases cited in note 7.

[10]Arnold v. Buchanan, (1916) 60 Ind. App. 626, 111 N. E. 204; Savage v. Modern Woodmen of America, (1911) 84 Kans. 63, 113 Pac. 802; Booth v. Backus, (1918) 182 Ia. 1319, 166 N. W. 695.

ness;[11] choses in action for personal injuries[12]—are all commonly made a part of her separate estate.

She is given the general power of control and the right to possession of such separate property,[13] and, conversely the husband is denied most of his ancient common law rights therein. Thus it is held that he cannot sell or mortgage the wife's separate chattels[14] or real property[15] even to the extent of leasing the latter;[16] her separate property is not liable for the separate debts of the husband.[17] In short the husband is a stranger to the title of such property[18] and can deal with it only in accordance with the usual rules of agency.[19] On the other hand the wife is given broad powers of management and alienation of her separate property. She may mortgage and convey both her chattels and her real property.[20] While in some states the consent of the husband to the alienation of her real property is still

[11]Hoover v. Carver, (1916) 135 Minn. 105, 160 N. W. 249; Hibbard v. Heckart, (1901) 88 Mo. App. 544; Abbey v. Deyo, (1871) 44 N. Y. 343. In the last two cases cited it is held to be immaterial that the wife employed her husband to conduct the business and that the earnings were largely due to his efforts.

[12]Arnold v. Buchanan, (1916) 60 Ind. App. 626, 111 N. E. 204; Libaire v. Minneapolis R. Co., (1911) 113 Minn. 517, 130 N. W. 8; Berger v. Jacobs, (1870) 21 Mich. 215; Fife v. Oshkosh, (1895) 89 Wis. 540, 62 N. W. 541; City of Wyandotte v. Agan, (1887) 37 Kan. 528, 15 Pac. 529.

[13]Quilty v. Battie, (1892) 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521, and see cases in notes following.

[14]Koch v. Salee, (1912) 176 Ill. App. 379; Caylor Lumber Co. v. Mays, (Okla. 1918) 174 Pac. 521; Klein v. Frerichs, (1914) 127 Minn. 177, 149 N. W. 2; Knight v. Beckwith Commercial Co., (1896) 6 Wyo. 500, 46 Pac. 1094.

[15]Prater v. Hoover, (1860) 41 Tenn. 544; Union Stave Co. v. Smith, (1896) 116 Ala. 416, 22 So. 275, 67 A. S. R. 140; Baker v. Brundage, (1915) 131 Minn. 299, 154 N. W. 1086.

[16]Jenney v. Gray, (1855) 5 Oh. St. 45; Van Brunt v. Wallace, (1902) 88 Minn. 116, 92 N. W. 521; Carman v. Fox, (1914) 86 Misc. 197, 149 N. Y. S. 213.

[17]Alsdurf v. Williams, (1902) 196 Ill. 244, 63 N. W. 686; Hoover v. Carver, (1916) 135 Minn. 105, 160 N. W. 249; Hudson v. Wright, (1907) 204 Mo. 412, 103 S. W. 8; Gage v. Dauchy, (1866) 34 N. Y. 293; Cheuvete v. Mason, (1854) 4 Greene (Ia.) 231; Rankin v. West, (1872) 25 Mich. 195; Farmers' State Bank v. Keen, (1917) 66 Okla. 62, 167 Pac. 207.

[18]Mygatt v. Coe, (1897) 152 N. Y. 457, 46 N. E. 949, 57 A. S. R. 521 (covenant for title by husband joining in a deed of wife's separate property is the covenant of a stranger and will not run to later grantees); Agricultural Co. v. Montague, (1878) 38 Mich. 548 (husband has no insurable interest in wife's separate property).

[19]McLaren v. Hall, (1868) 26 Iowa 297; Hoffman v. McFadden, (1892) 56 Ark. 217, 19 S. W. 753, 35 A. S. R. 101.

[20]Edwards v. Schoeneman, (1882) 104 Ill. 278; Low v. Anderson, (1875) 41 Ia. 476; Morrison v. Morrison, (1902) 113 Ky. 507, 69 S. W. 1102, 24 Ky. L. Rep. 786; Hackley Bank v. Jeannot, (1906) 143 Mich. 454, 106 N. W. 1121.

required[21] there are a number of jurisdictions where even this requirement has been abandoned.[22] In many jurisdictions a married woman has been given full testamentary control over her separate property.[23]

The common law interests of curtesy and dower have also been materially modified. Thus the husband's right to curtesy initiate has been limited and in many cases wholly abolished.[24] Dower and curtesy still exist in many states but in almost all such jurisdictions modern legislation has tended toward an equalization of the two interests.[25] In many others both dower and curtesy have been abolished and other interests have been substituted for them, usually by way of succession. The very definite tendency of such legislation has been toward equality of interest between the spouses.[26]

From the above summary it appears that substantial equality of property interest has been secured in many jurisdictions by statutory modification of the common law. Husband and wife have in the most liberal states practically equal interests in the property of each other and practically equal *legal* powers in the acquisition, enjoyment, management, control and disposition of separate property. It is argued, however, that this apparent equality is false in at least one respect, viz., that it fails to

[21]Johnson v. Jouchert, (1890) 124 Ind. 105, 24 N. E. 580; Starkey v. Starkey, (1906) 166 Ind. 140, 76 N. E. 876; White Co. v. Moore, (1921) 190 Ky. 671, 288 S. W. 679.

[22]Owings v. Wiggins, (1896) 133 Mo. 630, 34 S. W. 877 (mortgage); Farmers' Bank v. Hageluken, (1901) 165 Mo. 443, 65 S. W. 728 (deed of trust); Merritt v. Park Bank, (1920) 77 Okla. 148, 187 Pac. 232 (mortgage); Wallace v. St. John, (1903) 119 Wis. 585, 97 N. W. 197; Jordan v. Jackson, (1906) 76 Neb. 15, 106 N. W. 999; Lawler v. Byrne, (1911) 252 Ill. 194, 96 N. E. 892.

[23]Kelly v. Alred, (1888) 65 Miss. 495, 4 So. 551; Hamilton v. Rathbone, (1899) 175 U. S. 414, 44 L. Ed. 219, 20 S. C. R. 155, (dealing with the law of the District of Columbia); Schull v. Murray, (1869) 32 Md. 9; Allen v. Little, (1831) 5 Oh. St. 66; Grubb's Estate, (1896) 174 Pa. St. 187, 34 Atl. 573; see statutes collected in 1 Woerner, American Law of Administration, 3rd Ed., 32.

[24]Loyd v. Planters Mutual Insurance Association, (1906) 80 Ark. 486, 97 S. W. 658; Teckenbrock v. McLaughlin, (1912) 246 Mo. 711, 152 S. W. 38; Mathews v. Glockel, (1908) 82 Neb. 207, 117 N. W. 404; Albany Bank v. McCarty, (1896) 149 N. Y. 71, 43 N. E. 427.

[25]Compare, Heisen v. Heisen, (1893) 145 Ill. 658, 34 N. E. 597 (curtesy as such is abolished but the husband is given an interest in the wife's property equal to her interest in his, both of such interests being called "dower"); Downey v. King, (1909) 201 Mass. 59, 87 N. E. 468; see the statutes collected in 1 Woerner, the American Law of Administration, 3rd Ed. 331, 411.

[26]1 Burns, Annotated Statutes of Indiana, 1908, sec. 3013, 3014, 3016; Kansas, General Statutes, 1909, sec. 2961; Connecticut, Statutes, 1918, sec. 5055; Minnesota, General Statutes, 1913, sec. 7238; Nebraska Statutes, 1922, sec. 1220, 1223; see also 1 Woerner, op. cit. 334, 412, 192, 195.

recognize the contribution made to the family life by the services of the wife in the performance of her domestic duties as equal to the services of the husband in the accumulation of wealth. It is largely because of a supposed recognition of such equality in the community system that the adoption of the latter is urged. Let us then turn our attention to a brief consideration of the salient features of this latter scheme of marital interests.

II

The community property system is derived from the civil law and exists only in those states where there was a predominance of settlers familiar with Spanish or French law and in a few other states that have copied this legislation from the former. The system prevails in the eight states of Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas and Washington. It is generally held that the rights of husband and wife are to be determined solely by construction of the statutes and this is usually done without reference to the system as it actually existed in Spanish or French law. It will serve no useful purpose at present therefore to delve into the ancient history of the system. Where in force, the community system displaces entirely the common law system of marital property interests. Thus there is no recognition of dower,[27] curtesy[27] or tenancy by the entirety.[28] On the other hand, all non-marital common law forms of ownership are possible. For example, husband and wife may hold property as tenants in common or as joint tenants.[29]

[27]See, for example, California, Civil Code, sec. 173; Idaho, Compiled Statutes 1919, sec. 4668; Nevada, Revised Laws 1912, sec. 2161; New Mexico, Statutes 1915, secs. 2763, 2757; Washington, Remington's Statutes 1919, secs. 6897, 1343.

[28]Swan v. Walden, (1909) 156 Cal. 195, 103 Pac. 931. This form of ownership has been materially altered in the modified common law jurisdictions also. While a majority of such jurisdictions continue to recognize the existence of the tenancy, Way v. Root, (1913) 174 Mich. 418, 140 N. W. 577; Matter of Klatzl, (1915) 216 N. Y. 83, 110 N. E. 181; Davis v. Clark, (1866) 26 Ind. 424, 89 Am. Dec. 471; Chase v. McKenzie, (1916) 81 Ore. 429, 159 Pac. 1025, others hold that the married women's property acts have abolished it, Wilson v. Wilson, (1890) 43 Minn. 398, 45 N. W. 710; Wallace v. St. John, (1903) 119 Wis. 585, 97 N. W. 197; Lawler v. Byrne, (1911) 252 Ill. 194, 96 N. E. 892, or that it is "repugnant to our institutions . . . and therefore not the common law of this state." Kerner v. McDonald, (1900) 60 Neb. 663, 84 N. W. 92. In states still recognizing the existence of such tenancy the married women's property acts are frequently held to modify many of its common law incidents, for example, the power of the husband to convey an estate for his own life, Hiles v. Fisher, (1895) 144 N. Y. 306, 39 N. E. 337, his right to appropriate the rents and profits, Rezabek v. Rezabek, (1917) 196 Mo. App. 673, 192 S. W. 107, liability of the property for the debts of the husband, Shinn v. Shinn, (1889) 42 Kansas 1, 21 Pac. 813; Davis v. Clark, (1866) 26 Ind. 424.

[29]See, for example, Cal. Civ. Code, sec. 161.

Community property is usually defined in terms of separate property. In California the separate property of the wife is defined as follows:

"All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues and profits thereof, is her separate property."[30]

The separate property of the husband is defined in the same way.[31] Community property is defined:

"All other property acquired after marriage by either husband or wife, or both, . . . is community property. . . ."[32]

Subject to some variations, with which we need not now concern ourselves, similar definitions will be found in other states adopting this system.[33]

There are some differences in the statutes as to the content of the separate property of each spouse and there are further differences in matters of detail in the judicial decisions of the different states. In a general article of this kind it is impracticable to note all of these differences. For present purposes the content of the separate estate of each spouse as set forth above will be sufficiently accurate.

A few words as to the legal meaning of "separate property." The supreme court of California in an early case thought that such term meant the same in the community system as in the modified common law system. The California constitution of 1849 provided that:

"All property, both real and personal, of the wife owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property."

The legislature declared that the rents and profits of the separate estate of either husband or wife should be community property, which latter was placed under the exclusive management and control of the husband. In holding this part of the

[30]Cal. Civil Code, sec. 162.
[31]Cal. Civil Code, sec. 163.
[32]Cal. Civil Code, sec. 164.
[33]Arizona, Civil Code, secs. 3848, 3850; Idaho, Statutes of 1919, secs. 4656, 4659 (but the rents, issues and profits of separate property belong to the community unless, in case of the wife, the instrument conveying the property to her provides that such rents, etc., are to be held for her sole and separate use, "in which case the management and disposal of such rents and profits belong to the wife, and they are not liable for the debts of the husband." Ibid. secs. 4656, 4660); Louisiana, Marr's Ann. Rev. St. 1915, secs. 4449, 4450, 4451; New Mexico, Statutes 1915, secs. 2757, 2758, 2764; Nevada, Statutes of 1912, secs. 2155, 2160; Texas, Vernon's Sayles' Civil Statutes 1914, Art. 4621; Washington, Remington's Compiled Statutes 1922, secs. 6890, 6891, 6892, 6896.

statute unconstitutional as regards the rents, issues and profits of the wife's separate estate the court said:

"This term 'separate property' has a fixed meaning in the common law, and had in the minds of those who framed the constitution, the large majority of whom were familiar with, and had lived under that system. By the common law, the idea attached to separate property in the wife, and which forms a portion of its definition, is, that it is an estate, held as well in its use as in its title, for the exclusive benefit and advantage of the wife."[34]

Under the earlier legislation in several community property states the term "separate property" can hardly be said to have been given such a broad meaning. Thus (there being no constitutional obstacles) the rents, issues and profits of the separate property of both husband and wife were frequently made a part of the community property.[35] The husband was often given powers of management and control over the wife's separate property, such powers ranging from a mere necessity for his joinder in conveyances of her land and certain of her personal property[36] up to a practically complete power of management and control in him. The tendency of recent legislation has been toward the abolition of such interference by the husband and as a general rule the wife now has entire control of her separate property. This is expressed in sweeping terms in the statutes of some states,[37] while in others it is to be gathered from enactments relating to specific powers. Thus she is usually given express power to convey her separate property;[38] she is ordinarily not liable for the debts of the husband,[39] but is liable for her own

[34]George v. Ransom, (1860) 15 Cal. 322, 76 Am. Dec. 490.

[35]This is still true in Idaho, and in Texas the interest on her bonds and notes and dividends on her stock are part of the community property. Presumably the same is true of other income from her separate personal property. See statutes cited in note 33, supra.

[36]This is still required in Texas. Vernon's Sayles' Civil Statutes 1914, sec. 4621.

[37]See, for example, Arizona, Civil Code, sec. 3851. ("Married women shall have the sole and exclusive control of their separate property, and the same shall not be liable for the debts, obligations or engagements of the husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by them in the same manner and with like effect as if they were unmarried.") Idaho, Compiled Statutes 1919, sec. 4657; Washington, Remington's Compiled Statutes 1922, sec. 6890.

[38]California, Civil Code, sec. 162; Nevada, Revised Laws 1912, sec. 2163; New Mexico, Statutes 1915, sec. 2757; Texas, Vernon's Sayles' Civil Statutes 1914, sec. 4621 (subject to qualification pointed out in note 36). See also statutes cited in note 37.

[39]Arizona, Civil Code, secs. 3851, 3853; Idaho, Compiled Statutes 1919, sec. 4665; Nevada, Revised Laws 1912, sec. 2167, 2171; New Mexico, Statutes 1915, sec. 2762; Texas, Vernon's Sayles' Civil Statutes 1914, sec. 4621; Washington, Remington's Compiled Statutes 1922, sec. 6890.

debts.[40] In the matter of disposition of her separate property at death she is placed upon the same footing as is her husband in regard to his property. As previously pointed out, dower and curtesy are abolished. The wife has full power to pass her separate property by will[41] and in case she dies intestate her property goes to her husband and her descendants in the same manner in which under similar circumstances the husband's separate property goes to his window and his descendants.[42] It seems clear, therefore, that today her separate property is such in the fullest meaning of the term. It is needless to add that the husband's ownership of his separate estate is equally full.

In considering the nature of community property we shall first note the respective rights and powers of husband and wife in its management, control and disposition and then discuss the legal theory of ownership of such property. Recognizing the impracticability of joint control, the legislatures of all community property states have placed the management of such property largely in the hands of the husband. As to both real and personal property he usually has approximately the same powers of management and control as he has of his separate property.[43] Conversely, the wife has no powers of management and control.[44] As to liability of the community property for debts there is some difference of opinion. Subject to a few exceptions it is not liable for debts incurred by the wife. In most states it is liable for both community and separate debts incurred by the husband. Again the husband's separate property is usually

[40]See statutes cited in note 38.

[41]Arizona, Civil Code, sec. 3851; California, Civil Code, sec. 1273; Idaho, Compiled Statutes 1919, sec. 7809; Nevada, Revised Laws, 1912, sec. 6203; Texas, Vernon's Sayles' Civil Statutes 1914, secs. 7855, 7856; Washington, Remington's Compiled Statutes 1922, sec. 6891.

[42]Arizona, Civil Code, sec. 1092; California, Civil Code, secs. 1386, 1400; Idaho, Compiled Statutes 1919, secs. 7793, 7802; Nevada, Revised Laws 1912, secs. 6116, 6125; New Mexico Statutes 1915, secs. 1842, 5894; Texas, Vernon's Sayles' Civil Statutes 1914, sec. 2461; Washington, Remington's Compiled Statutes 1922, secs. 1341, 1364.

[43]California, Civil Code, secs. 172, 172a; Idaho, Compiled Statutes 1919, secs. 4666, 4667; Louisiana, Revised Civil Code, sec. 2404; Nevada, Revised Laws 1919, sec. 2160; New Mexico, Laws of 1915, ch. 84; Washington, Remington's Compiled Statutes 1922, secs. 6892, 6893.

[44]There are a few exceptions to this, for example, in New Mexico if the husband is incapacitated by insanity, drunkenness, etc., the wife may petition the proper court to appoint her to manage the community property, Statutes 1915, sec. 2767. In Idaho where the rents and profits of separate property belong to the community, the wife is given power to manage such rents and profits of her separate property and she is given similar power over her earnings. Idaho, Compiled Statutes 1919, sec. 4667. Compare also a similar rule as to her earnings in Nevada. Nevada, Revised Laws 1919, sec. 2160. See, too, in Texas, Vernon's Sayles' Civil Statutes 1914, sec. 4622.

liable for community debts incurred by him but he cannot so charge the wife's separate property.[45]

The wife has no power, other than testamentary, to dispose of the community property by her sole act.[46] Conversely, the husband usually does have such power so far as the community personal property is concerned.[47] In some states the husband apparently has equally broad powers of disposal over the community real property.[48] The usual rule, however, is that he cannot convey or mortgage real property, with minor exceptions, unless the wife joins in the instrument.[49]

In a majority of states at the present time the husband and the wife each have power to devise one half of the community property, the other half enuring to the benefit of the survivor.[50] In case the deceased dies intestate his or her share goes to descendants, if there be such, in some states[51] while in others the

[45]For a detailed discussion of this matter and a collection of the statutes and decisions dealing therewith, see an article by Prof. A. E. Evans entitled Community Obligations in 10 Cal. L. Rev. 120.

[46]Except as to that part which is under her control. See note 44.

[47]Arizona, Civil Code, sec. 3850; California, Civil Code, sec. 172 (but it is also provided in this state that "he cannot make a gift of such property, or dispose of the same without a valuable consideration or sell, convey or encumber the furniture, furnishings or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife"); Idaho, Compiled Statutes 1919, sec. 4666 (except as to wife's earnings and rents and profits of her separate property); Louisiana, Revised Civil Code, sec. 2404 (but he cannot dispose of the whole of such property without the wife's consent); Nevada, Revised Laws 1919, sec. 2160; New Mexico, Laws 1915, ch. 84; Texas, Vernon's Sayles' Civil Statutes 1914, sec. 4622 (except that he cannot dispose of wife's earnings, interest on bonds and notes and dividends on stock belonging to wife's separate property); Washington, Remington's Compiled Statutes 1922, sec. 6892. But compare note 46.

[48]Compare First National Bank of Ely v. Meyers, (1916) 39 Nev. 235, 150 Pac. 308; Paschall v. Brown, (Tex. Civ. App. 1911) 133 S. W. 509.

[49]Arizona, Civil Code, secs. 3850, 2061; California, Civil Code, sec. 172a; Idaho, Compiled Statutes 1919, sec. 4666; New Mexico, Laws 1915, ch. 84; Washington, Remington's Compiled Statutes 1922, sec. 6893.

[50]Arizona, Civil Code, sec. 1100; California Civil Code, sec. 1401; Idaho, Compiled Statutes 1919, sec. 7803 (but it can only be devised to "his, her or their children or to a parent of either spouse," and in the latter case only one-half of deceased's one-half may be devised); Louisiana, Revised Civil Code, sec. 915; Washington, Remington's Compiled Statutes 1922, sec. 1342. In Nevada (Revised Laws 1912, secs. 2164, 2165) and New Mexico (Statutes 1915, secs. 1840, 1841) the husband may devise one-half but the wife ordinarily has no power of devise. In Texas neither can devise (cf. Vernon's Sayles' Civil Statutes 1914, sec. 2469).

[51]Arizona, Civil Code, sec. 1100; Louisiana, Revised Civil Code, sec. 915; Nevada, Revised Laws 1912, secs. 2164, 2165 (this is the rule on the death of the husband. If the wife dies first the husband takes the entire community property); New Mexico, Statutes 1915, sec. 1840 (rule similar to Nevada except that on the husband's death, one-quarter of his share goes to the wife and balance to his children); Texas, Vernon's Sayles' Civil

entire community property under such circumstances belongs to the survivor.[52]

Coming now to the legal nature of the respective interests of husband and wife in the community property, we must note some marked differences of decision in the various community property states. Here again it will not be our purpose to consider this problem in great detail but simply to outline the differing views for the purpose of comparing the relative positions of husband and wife under the two systems.[53]

In California there was some conflict in the language (usually dicta) of the earlier cases as to the nature of the wife's interest in the community property. Thus in one case[54] the court speaks of husband and wife as being "jointly seised of the property" and says that the wife's interest "is a present, definite and certain" one. And again,

"It belongs to the matrimonial community, not less to the wife than to the husband . . . her mere right in the community property is as well defined and ascertained in contemplation of law, even during the marriage, as is that of the husband."[55]

However in the leading case of *Packard v. Arellanes*[56] the doctrine which has come to be accepted in California was thus stated:

"The title to such property rests in the husband, and for all practical purposes he is regarded by law as the sole owner. It is true, the wife is a member of the community, and entitled to an equal share of the acquests and gains; but so long as the community exists her interest is a mere expectancy, and possesses none of the attributes of an estate, either at law or in equity."

In view of the acceptance of this theory that the husband is the owner of the community property the following results, among others, have naturally been held to follow. Upon the death of the husband, the wife surviving, the community property is to be administered in its entirety as a part of his estate and the widow takes her share *by succession*.[57] Consequently, she must pay an inheritance tax thereon under a statute taxing

Statutes 1914, sec. 2469; Washington, Remington's Compiled Statutes 1922, sec. 1342. In most of these states the survivor takes all if the deceased spouse leaves no descendants.

[52]California, Civil Code, sec. 1401; Idaho, Compiled Statutes 1919, sec. 7803.

[53]A detailed discussion of The Ownership of Community Property by Prof. Evans will be found in 35 Harv. L. Rev. 47.

[54]Beard v. Knox, (1855) 5 Cal. 252, 63 Am. Dec. 125.

[55]De Godey v. Godey, (1870) 39 Cal. 157. See also Harrison's opinion in In re Burdick, (1896) 112 Cal. 387, 397, 44 Pac. 734.

[56](1861) 17 Cal. 525.

[57]In re Burdick, (1896) 112 Cal. 387, 44 Pac. 734.

"all property passing by will or by the intestate laws."[58] Upon the death of the wife, the husband surviving, no part of the community property is to be administered as a part of her estate[59] and the husband does not take by succession.[60] A defendant who carries away community property in the form of jewelry is guilty of larceny of the husband's property though it has been delivered to the defendant by the wife whom he has seduced.[61] Under a statute providing that "Parties . . . to an action . . . or persons on whose behalf an action is prosecuted against an executor as to any claim arising before the death of the deceased" are not competent witnesses, a wife who cared for the deceased in illness may testify in an action by her husband to recover for the value of her services, her earnings being community property.[62] The amendment to the California code adopted in 1891 providing that the husband cannot give away community property without the written consent of the wife, must be construed as not applying to community property owned at the time of its passage, otherwise it would be unconstitutional as constituting a deprivation of property without due process.[63]

It should be noticed that the above theory of the ownership of community property was established at a time when by statute the husband was given complete powers of management, control and disposition inter vivos equal in all respects to similar powers over his separate property. Whether the theory will continue to be held as to community property acquired since the statutory changes[64] restricting his powers of alienation and giving the wife equal power of devise is as yet unsettled.[65]

The theory of ownership outlined above has received recognition at times in other states[66] but unquestionably the view now generally prevailing is that the wife has a vested interest equal

[58]Re Moffitt's Estate, (1908) 153 Cal. 359, 95 Pac. 653. See, too, Moffitt v. Kelly, (1910) 218 U. S. 400, 54 L. Ed. 1086, 31 S. C. R. 79. This has now been altered by a change in the inheritance tax act; Cal., Laws 1917, p. 881.

[59]California, Civil Code, sec. 1401 (prior to amendment of 1923).

[60]Estate of Klumpke, (1914) 167 Cal. 415, 139 Pac. 1062.

[61]People v. Swalm, (1889) 80 Cal. 46, 22 Pac. 67, 13 A. S. R. 96.

[62]Bayless v. Read, (1920) 47 Cal. App. 139, 190 Pac. 211. Cf., too, Badover v. Guaranty Bank, (1921) 186 Cal. 775, 200 Pac. 638.

[63]Spreckels v. Spreckels, (1897) 116 Cal. 339, 48 Pac. 228; Scott v. Austin, (1922) 58 Cal. App. 643, 207 Pac. 710. Compare also Roberts v. Wehmeyer, (1923) 218 Pac. 22.

[64]For the present state of legislation see supra, at notes 47, 49, 50.

[65]Compare Roberts v. Wehmeyer, (Cal. 1923) 218 Pac. 22; Blum v. Wardell, (1920) 270 Fed. 309.

[66]Hall v. Johns, (1909) 17 Ida. 224, 105 Pac. 71; Succession of Boyer, (1884) 36 La. Ann. 506; Jacob v. Falgoust, (1922) 150 La. 21, 90 So. 426; Reade v. De Lea, (1908) 14 N. M. 442, 95 Pac. 131.

in legal dignity to that of the husband.[67] In the opinion of courts adopting this latter view the greater power of management and control vested in the husband is not to be attributed to any exclusive ownership by him but rather to his position as "statutory agent" of the community. While at least six of the eight community property states thus recognize an equality of ownership between husband and wife, they are not altogether agreed upon the exact legal form which such ownership is to take. In an early Washington case,[68] the court speaks on this subject as follows:

"This creature is sometimes, though inaccurately, denominated a species of partnership. It probably approaches more nearly to that kind of partnership called *universal* than to any other business relationship known to the civil or common law.

"A *conventional* community, in a state where statutes would permit, might be contrived which would be substantially a partnership; but an ordinary *legal* community is, in many important particulars, quite distinct. It is like a partnership, in that some property coming from or through one or other or both of the individuals forms for both a common stock, which bears the losses and receives the profits of its management, and which is liable for individual debts; but it is unlike, in that there is no regard paid to proportionate contribution, service, or business fidelity; that each individual, once in it, is incapable of disposing of his or her interest, and that both are powerless to escape from the relationship, to vary its terms, or to distribute its assets or its profits. In fixity of constitution, a community resembles a corporation. It is similar to a corporation in this, also, that the state originates it, and that its powers and liabilities are ordained by statute. In it, the proprietary interests of husband and wife are equal, and those interests do not seem to be united merely, but unified; not mixed or blent, but identified. It is sui generis —a creature of the statute."

And in a later Washington case[69] the theory of ownership accepted in that state is thus expressed:

[67]La Tourette v. La Tourette, (1914) 15 Ariz. 200, 137 Pac. 426; Kohny v. Dunbar, (1912) 21 Ida. 285, 121 Pac. 544; Peterson v. Peterson, (1922) 35 Ida. 470, 207 Pac. 425; In re Williams, (1916) 40 Nev. 241, 161 Pac. 741; Arnett v. Reade, (1910) 220 U. S. 311, 55 L. Ed. 477, 31 S. C. R. 425 (reversing the decision of the supreme court of the territory of New Mexico in Reade v. De Lea, (1908) 14 N. M. 442, 95 Pac. 131); Beals v. Ares, (1919) 25 N. M. 459, 185 Pac. 780; Edwards v. Brown, (1887) 68 Tex. 329, 4 S. W. 380, 5 S. W. 87 (and see also cases cited post note 73); Holyoke v. Jackson, (1882) 3 Wash. Terr. 235, 3 Pac. 841; Warburton v. White, (1899) 176 U. S. 484, 44 L. Ed. 555, 20 S. C. R. 404; Ostheller v. Spokane and Inland Empire Ry. Co., (1919) 107 Wash. 678, 182 Pac. 630.

[68]Holyoke v. Jackson, (1882) 3 Wash. Terr. 235, 3 Pac. 841.

[69]Ostheller v. Spokane, etc., R. Co., (1919) 107 Wash. 678, 182 Pac. 630.

"The community of husband and wife is, under our laws, a legal entity in which the individuality of both spouses is merged, in so far as ownership of property acquired by either after marriage is concerned, subject to certain exceptions of no moment in our present inquiry; and title to property so acquired vests in such legal entity."

On the other hand it is looked upon in other states as a form of co-ownership. Frequently it has been likened to a partnership but invariably important points of difference have been noted as in the quotation above from *Jackson v. Holyoke.* In Arizona[70] it has been said:

"From its nature and origin this particular estate arising during the existence of the marriage relation may not be defined with such precision as will comprehend all its phases, but in its devolution and descent this species of ownership bears a striking resemblance to two kinds of estates, that of an estate or tenancy by the entirety and a tenancy in common."[71]

The truth seems to be that as a form of co-ownership it is sui generis and nothing is to be gained by attempting to assimilate it to any form of common law co-ownership. In a majority of the community property states this theory of co-ownership seems to prevail. In most states it seems to be assumed that the interests of both husband and wife are legal in character, and this is true though the deed or other instrument by which the property is acquired runs in the name of one spouse only.[72] In Texas, however, if the instrument of acquisition runs in the name of one spouse only, his or her interest is legal while the interest of the unnamed spouse is equitable and subject, therefore, to be cut off by a conveyance of the legal title to a bona fide purchaser.[73]

## III

Having thus briefly sketched the outlines of the two schemes of marital ownership, we may now briefly note some comparisons between them.

[70]La Tourette v. La Tourette, (1914) 15 Ariz. 200, 137 Pac. 426.

[71]The likeness to tenancy by entirety, the court points out, arises from the fact that in Arizona in case one spouse dies leaving no children, the surviving spouse takes the whole. But if the decedent leaves children the surviving spouse retains only his or her half and the children take the decedent's half, thus resembling a tenancy in common.

[72]Ewald v. Hufton, (1918) 31 Ida. 373, 173 Pac. 247. So, too, in California the legal title to community property is none the less in the husband because the conveyance of it runs only in the name of the wife. Mitchell v. Moses, (1911) 16 Cal. App. 594, 117 Pac. 685; Peiser v. Griffin, (1899) 125 Cal. 9, 57 Pac. 690.

[73]Edwards v. Brown, (1887) 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; Mitchell v. Schofield, (1915) 106 Tex. 512, 171 S. W. 1121; Burnham v. Hardy Oil Co., (1917) 108 Tex. 555, 195 S. W. 1139.

First as to property which under the community system is recognized as separate. Speaking generally, such property, if owned by the wife, is also recognized as her separate property under the modified common law system. Her powers of management, control, disposition inter vivos and at death do not differ substantially in the two systems with respect to such property. The same may be said of the husband. There seems, therefore, to be no substantial difference between the two systems in the degree of equality of husband and wife with regard to such property.

Let us turn, then, to property which under the community system is community in character. It is obvious that all such property will be the separate property of either the husband or the wife under the modified common law system. Since it is the alleged unequal and inferior position of the wife which usually creates concern it may be sufficient to consider whether under the community system her position is any better than under the modified common law.

Probably the most important single source of such property is earnings. Under the modified common law system these are the separate property of the spouse through whose efforts they are acquired. Indeed, as pointed out heretofore, this is one of the chief grounds of complaint against such system. In many cases the earnings of the spouse constitute a large part, if not all of their assets. It is still true that the husband is usually more active in business and in the direct accumulation of wealth than is the wife, though few will deny that she contributes in an equally important manner to the welfare of the family by the performance of her duties in the home. In view of the fact that the husband receives full and direct benefit from the rendition of such service by the wife, and in view of the further fact that by rendering such service she ordinarily foregoes the opportunity to accumulate property by her own efforts, it is argued that she should share equally with the husband in the product of his toil. Under the common law system of marital interests it is difficult, if not impossible, to provide for such equality. What, then, is the situation with reference to this problem under the community system?

In the first place it is frequently provided that the earnings of the wife and minor children living with her while she is living apart from her husband shall be her separate property.[74] In other

[74]Arizona, Civil Code, sec. 3849; California, Civil Code, sec. 169; Idaho,

states she and not the husband is given the power of management and control over her own earnings even though such be community property.[75] Apparently the husband's earnings are always community and nowhere is the wife given any powers of control over them. Her legal interest therein is an interest wholly separated from all management and control subject only to certain veto powers, such, for example, as the occasional requirement that he can make no gift without her consent.[76] The husband during his lifetime can deal with his earnings in much the same fashion as he deals with his separate property. Again in many states the wife's earnings, in so far as they are a part of the community property are thereby removed from her own control and made subject to that of the husband.

A similar comparison may be made in regard to other property interests arising through the agency of the wife. Thus rights of action growing out of personal injuries sustained by her and the damages, when recovered, are commonly community property.[77] As such they are under the control of the husband and it has been held that, if the cause of action is based on the negligence of the defendant, and the negligence of the husband contributed, recovery is barred.[78] But under the modified common law system such choses in action in so far at least as they relate to her suffering, pain, loss of earning power, etc., are the separate property of the wife. Not only may she sue thereon in her own name[79] but her right to recover will not be affected by the contributing negligence of the husband.[80]

Compiled Statutes 1919, sec. 4663; New Mexico, Statutes 1915, sec. 2760; Nevada, Statutes 1912, sec. 2168.

[75]Idaho, Compiled Statutes 1919, secs. 4666, 4667; Nevada, Revised Laws 1919, sec. 2160 (when such are used for the care and maintenance of the family); Texas, Vernon's Sayles' Civil Statutes 1914, sec. 4622.

[76]California, Civil Code, sec. 172; Louisiana, Revised Civil Code, sec. 2404.

[77]Moody v. Southern Pacific Co., (1914) 167 Cal. 786, 141 Pac. 388; Labonte v. Davidson, (1918) 31 Ida. 644, 175 Pac. 588; Harkness v. Louisiana & N. W. Ry. Co., (1903) 110 La. 822, 34 So. 791 (subsequently changed by statute, making damages for the wife's personal injuries her separate property); Ezell v. Dodson, (1883) 60 Tex. 331; Hynes v. Colman Dock Co., (1919) 108 Wash. 642, 185 Pac. 617.

[78]Basler v. Sacramento Gas & Electric Co., (1910) 158 Cal. 514, 111 Pac. 530; Ostheller v. Spokane R. R. Co., (1919) 107 Wash. 678, 182 Pac. 630.

[79]Little Rock Gas & Fuel Co. v. Coppedge, (1915) 116 Ark. 334, 172 S. W. 885; Anderson v. Friend, (1874) 71 Ill. 475; City of Portland v. Taylor, (1890) 125 Ind. 522, 25 N. E. 459; McGovern v. Inter Urban Ry. Co., (1907) 136 Ia. 13, 111 N. W. 412; South Covington Ry. v. Bolt, (1900) 59 S. W. 26, 22 Ky. L. Rep. 906; Boyle v. Saginaw, (1900) 124 Mich. 348, 82 N. W. 1057; Libaire v. Minneapolis & St. Louis Ry. Co., (1911) 113 Minn. 517, 130 N. W. 8; Chadron v. Glover, (1895) 43 Neb. 732, 62 N. W. 62; Fife v. Oshkosh, (1895) 89 Wis. 540, 62 N. W. 541.

The same is true of "accumulations" of the wife. Such term seems to cover property interests acquired by a variety of means, for example, acquisition by adverse possession.[81] Such property commonly belongs to the community and again the wife's power of management, control and disposition is thereby rendered more restricted than in a modified common law jurisdiction where it would be her separate property.

What of the wife's position in case of death? If the husband dies first she will receive at least one half of the community property, including, therefore, a share in the husband's earnings.[82] But under the modified common law she is frequently as well provided for by statutes of succession giving her an interest which cannot be defeated by any will of the husband and such interest affects property which in a community state would be separate as well as that which would belong to the community.[83]

In case the wife dies first, she does have a testamentary advantage in a community state. She may be desirous of providing for the support of her children or her parents or other persons. Under the common law system there is no way in which she may do this out of property acquired by the husband's efforts. But in most of the community states she is given power to devise her half of the community property without reference to the source of its acquisition and usually without restriction as to the persons named as devisees.[84]

The foregoing discussion would seem to show that the greater equality between husband and wife under the community system is largely theoretical, at least during the joint lives of the two, and that, while the wife does have enlarged powers of devise over property acquired by the efforts of her husband during marriage, on the other hand she has less extended powers of management, control and disposition over the property acquired by her own efforts during marriage than has her sister who lives under the modified common law regime. It does not seem at all clear that the latter would secure any net gain by a substitution of the community for the modified common law system of marital ownership.

[80]Louisville Ry. Co. v. McCarthy, (1908) 129 Ky. 814, 112 S. W. 925; Moon v. St. Louis Transit Co., (1911) 237 Mo. 425, 141 S. W. 870; Bailey v. Centerville, (1901) 115 Ia. 271, 88 N. W. 739; Lammers v. Great Northern Ry. Co., (1901) 82 Minn. 120, 84 N. W. 728.

[81]Union Oil Co. v. Stewart, (1910) 158 Cal. 149, 110 Pac. 313.

[82]See supra at notes 50, 51 and 52.

[83]Compare supra at notes 25 and 26.

[84]Compare supra at note 50.