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SOME GENERAL ASPECTS OF MICHIGAN COMMUNITY PROPERTY LAW

*William E. Burby**

THE common law, in recognition of the fact that one spouse is entitled to some economic security in the property of the other spouse, evolved the interests known as dower and curtesy.¹ These interests, of course, apply only with respect to land. The husband enjoyed an additional economic advantage that came from the management and control of his wife's property. This latter advantage has disappeared with the advent of Married Women's Property Acts that confer upon married women the right to manage their own estates. Statutes have also expanded on the concept of dower and curtesy by providing for a statutory share that one spouse may claim in the estate of a deceased spouse.² But the common law fails to recognize the basic fact that both spouses contribute to acquisitions made during marriage and that both should have a present interest in such acquisitions. Such is the underlying theory of the community property system of concurrent ownership between husband and wife. This concept is of Germanic origin. It was adopted in France and Spain and transplanted to their

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¹ While in most of the community property states the common law interests of dower and curtesy are not recognized, the Michigan Community Property Act, § 1 (a) provides that the husband's separate property is subject to the right of dower. In Oregon, both dower and curtesy may arise with respect to separate property [Oregon Senate Bill No. 210 (1947) § 5].

² See Sayre, "Husband and Wife as Statutory Heirs," 42 HARV. L. REV. 330 (1929). It would seem that the benefits declared under such statutes are more apparent than real. In *Redman v. Churchill*, 230 Mass. 415, 119 N.E. 953 (1918), it is held that the husband had the right to dispose of his personal property during his lifetime without the consent of his wife, and that the wife cannot impeach a gift made by him as a fraud upon her because made to prevent her from acquiring any portion of his estate. In LEACH, CASES ON WILLS, 2d ed. (1947), in discussing statutes of this type the author states, at page 19: "They [legislatures] have passed statutes which make graceful and friendly gestures to the surviving spouse but, despite a flood of litigation, have uniformly failed to protect the statutes against evasion."

colonies in the new world. In a majority of the community property states the system owes its origin to constitutional or legislative enactments. This is true in Michigan, where the Community Property Act was adopted by legislative act, effective as of July 1, 1947.³

While it is quite natural for one to emphasize the tax aspects of this recent legislation, it must be realized that a basic change has been wrought in the law that goes far beyond the field of taxation. The full impact of the change will be reflected in the law of property, torts and contracts. Old rules will have to be re-examined in the field of insurance, persons and probate law. With a mere framework of the community property system established by legislation, attorneys will be called upon to advise clients with respect to important issues without the aid of local decisions. The first inquiry will be, what have the courts held regarding this matter in other community property states? In pursuing this inquiry, one must bear in mind that there are fundamental differences in the theories of community property as developed in the various states. The only helpful decisions will be those from jurisdictions that follow the same general framework as that established in Michigan. It is the object of this discussion to lend some aid in this process of selection.

A. *Nature of Interests and Existence of the Community*

It is now well established in all of the community property jurisdictions that the wife's interest in community property is a present interest and is not to be classified as a mere expectancy. This view is expressed in the Michigan Community Property Act, section 4, which provides: "The respective interests of the husband and the wife in such community property shall be present, existing, and equal interests and shall arise as an incident of marriage." It is not material that title is acquired in the name of one spouse: notwithstanding that fact, the interest of the other spouse is a legal interest.⁴ This is true except in the State of Texas where it is considered that, under such circumstances, the interest of the other spouse is an equitable interest.⁵ In the Texas case of *Mercury Fire Insurance Co. v. Dunaway*,⁶ action was brought

³Senate Bill 156, Mich. Pub. Acts (1947) Act 317. The community theory of concurrent ownership is also followed in the following states: Arizona, California, Idaho, Louisiana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania, Texas and Washington.

⁴*Ewald v. Hufton*, 31 Idaho 373, 173 P. 247 (1918).

⁵*Edwards v. Brown*, 68 Tex. 329, 4 S.W. 380 (1887).

⁶(Tex. Civ. App. 1934) 74 S.W. (2d) 418, noted in 13 TEX. L. REV. 236 (1936).

on a policy of fire insurance. The subject of insurance was community property standing of record in the name of the husband. The policy of insurance was issued to the wife. A clause in the policy provided that in the event the insured was not the sole and unconditional owner of the insured land, the policy would be void. The policy was held to be enforceable upon the ground that the rights of husband and wife in community property are unified and equal. This decision would be of particular value in a jurisdiction, such as Michigan, where the interest of both husband and wife is a legal interest. However, insurance policies should be examined and a provision inserted that would obviate uncertainties in this respect.⁷

According to the common law rule, the right to dower and curtesy is made to depend upon the existence of a legally recognized marriage.⁸ This is also true with respect to the so-called "statutory shares." The civil law rule provides that even though a marriage is null in law, it may nevertheless produce the same civil effects as a legally recognized marriage. Such benefits result to one who enters into the marriage relationship with the *bona fide* belief that the marriage is valid.⁹ This is known as a putative marriage. Not only is the issue of such a marriage considered to be legitimate but property acquisitions during the continuance of such a relationship constitute community property.¹⁰

⁷ A Louisiana statute provides that an insurance policy may be enforced even though the policy is issued to one spouse and the title to the insured property is in the name of the other spouse. See 12 TULANE L. REV. 131 (1937).

⁸ In recognition of the hardship incident to an application of the common law rule, in some cases courts have allowed a good faith spouse to recover on the theory of quasi contract. In *Sanguinetti v. Sanguinetti*, 9 Cal. (2d) 95, 69 P. (2d) 845 (1937), a putative spouse was allowed to recover on this theory. But such recovery seems open to question since the general rule is that a promise to pay will not be implied where services have been rendered under conditions indicating that compensation was not expected. Of course a partnership theory under which both parties to the putative marriage would share in the accumulations cannot be applied unless the parties did enter into a partnership agreement. See *Vallera v. Vallera*, 21 Cal. (2d) 681, 134 P. (2d) 761 (1943). For discussion of these various theories, see *Fung Dai Kim Ah Leong v. Lau Ah Leong*, (C.C.A. 9th, 1928) 27 F. (2d) 582, noted in 2 So. CAL. L. REV. 293 (1929); 76 UNIV. PA. L. REV. 439 (1928).

⁹ In determining whether or not one entered into a marriage relationship in good faith, a subjective test of good faith is applied [*Figoni v. Figoni*, 211 Cal. 354, 295 P. 339 (1931), discussed in 20 CAL. L. REV. 453 (1932); 4 So. CAL. L. REV. 159, 244 (1931); *Knoll v. Knoll*, 104 Wash. 110, 176 P. 22 (1918)]. For a general discussion, see Evans, "Property Interests Arising from Quasi-Marital Relations," 9 CORN. L. Q. 246 (1924).

¹⁰ The civil law rule is declared in La. Ann. Civ. Code (Dart, 1945) Art. 117, which provides: "The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith."

The adoption of the community property system in Michigan should carry with it a complete adoption of this civil law rule. The views expressed in the California decisions should be avoided. Those decisions indicate that, while acquisitions during a putative marriage are not community property, they should nevertheless be administered as if they were community property.¹¹ The civil law rule is followed in Texas and Washington where, like Michigan, the common law prevails except to the extent that it has been supplanted by the adoption of the community property system.¹² Where there is both a legally recognized spouse and a putative spouse, the putative spouse is entitled to one-half of the acquisitions made during the continuance of the putative relationship.¹³ Any claims of the legally recognized spouse must be satisfied out of the remaining half.

In a majority of the community property states, there is statutory authorization that husband and wife may enter into an agreement providing that subsequent acquisitions are not to be community property. This is not true in Texas because the Texas constitution defines community property and it is held that even the legislature of that state is without power to declare a different rule with respect to subsequent acquisitions by husband and wife.¹⁴ In a few of the states, such an agreement may be made only prior to marriage or within a limited time after a married couple establishes a domicile within the state.¹⁵ While there are varying formalities prescribed with respect to the execution of such an agreement, all statutes require that it must be in writing.

¹¹ Even though both parties to the purported marriage do not act in good faith, civil effects will result with respect to the spouse who did act in good faith [*Scott v. Brown Paper Mill Co.*, (La. Ct. App. 1937) 174 S. 212]. In a jurisdiction where the disability of a minor to contract is removed by marriage, a putative marriage will suffice [*Barkley v. Dumke*, 99 Tex. 150, 87 S.W. 1147 (1905)]. However, in *Defferari v. Terry*, (Tex. Comm. App. 1936) 99 S.W. (2d) 290, noted in 15 TEX. L. REV. 505 (1937), the court held that a putative marriage is not operative under a legitimization statute. Since a putative marriage is not recognized under the federal law, a putative spouse is not entitled to claim benefits under federal legislation [*United States v. Robinson*, (C.C.A. 5th, 1930) 40 F. (2d) 14, not entitled to benefits under War Risk Insurance; *Beebe v. Moormack Gulf Lines, Inc.*, (C.C.A. 5th, 1932) 59 F. (2d) 319, not entitled to benefits under Federal Employer's Liability Act.]

¹² *Feig v. Bank of Italy Nat. Trust & Sav. Assn.*, 5 Cal. (2d) 266, 54 P. (2d) 3 (1936).

¹³ *Hubbell v. Inkstein*, 7 La. Ann. 252 (1852); *Morgan v. Morgan*, 1 Tex. Civ. App. 315, 21 S.W. 154 (1892). See 9 CAL. L. REV. 243 (1921).

¹⁴ *Myles v. Arnold*, (Tex. Civ. App. 1942) 162 S.W. (2d) 442.

¹⁵ *Ariz. Code Ann.* (1939) § 63-201; *La. Code Ann.* (Dart, 1932) Art. 2329. There is an exception in cases where parties move to the state after marriage; a valid marriage contract may then be made within one year thereafter.

The Michigan statute is silent as to the validity of such an agreement. It seems hardly likely that the court will take the position that such an agreement is contrary to the local public policy. An agreement of this type is to be distinguished from an agreement where husband and wife merely purport to fix the status of presently owned property as being separate or community. An agreement of the latter type has no operative effect with respect to future acquisitions. The means by which husband and wife may change the status of presently owned property will be discussed under a separate heading.

B. *Community Property Defined*

With exceptions to be noted, all property acquired after marriage, other than by gift, devise, bequest or descent, is community property. Under the French and Spanish law, the rents, issues and profits from separate property constitute community property. This view is followed in Idaho, Louisiana (with some variations), Nebraska, Oklahoma, Oregon, Pennsylvania and Texas.¹⁶ By force of express statutes, the rents, issues and profits from separate property constitute separate property in Arizona, California, Nevada, New Mexico and Washington.¹⁷ This same view is declared in Michigan where the statute provides: ". . . and all property of every kind, character, or description derived originally (from separate property) shall be . . . separate property."¹⁸

The above definition of community property raises three major questions with respect to the status of property. *First*: Was the property in question acquired during the continuance of the marriage? *Second*: If the property was acquired during the continuance of the marriage, was it acquired by gift, devise, bequest or descent? *Third*: Can the property in question be classified under the general heading of rents, issues or profits from separate property?

Considering the first question, as to whether or not the property

¹⁶ Idaho Code Ann. (1932) §§ 31-903, 31-907; La. Civ. Ann. Code (Dart, 1945) Art. 2386; Neb. Leg. Bill 410, § 4, Neb. Laws (1947) c. 156, p. 426 at 427; Okla. Stat. Ann. (1945 Supp.) tit. 32, §§ 66, 67; Ore. Sen. Bill No. 210, Ore. Laws (1947) c. 525; Pa. Community Property Law (1947) § 4; Tex. Civ. Stat. Ann. (Vernon, 1925) Arts. 4613, 4614 [as amended Tex. Acts (1929) c. 32, p. 67]. The Pennsylvania act was declared unconstitutional in *Wilcox v. Penn. Mutual Life Insurance Co.*, (Pa. 1947) 55 A. (2d) 521.

¹⁷ Ariz. Code Ann. (1939) § 63-302; Cal. Civ. Code (Deering, 1941) §§ 162, 163; Nev. Comp. Laws (Hillyer, 1929) § 3355; N. M. Stat. Ann. (1941) § 65-304; Wash. Rev. Stat. Ann. (Remington, 1932) §§ 6890, 6891.

¹⁸ Michigan Community Property Act, §§ 1, 2.

was acquired during the continuance of the marriage, difficulty is presented in cases where the acquisition is referable to an inchoate right that originated prior to marriage and was consummated during the continuance of the marriage or, conversely, originated during the continuance of the marriage and was consummated after the dissolution of the marriage. For example, in *Commissioner of Internal Revenue v. King*,¹⁹ during the continuance of his marriage, King, a lawyer domiciled in Texas, agreed to represent a railway company on a contingent fee basis. Some five years thereafter he received a fee of \$52,000. His wife died two years prior to the payment of this fee. The court follows the view that the crucial date is the time when the right had its inception. Since King was married at that time, the acquisition constituted community property.²⁰ Under practically the same set of facts, the Arizona court reached the conclusion that such an acquisition constituted separate property upon the ground that the crucial date is the time when the right is consummated.²¹ A third view is followed in California. In *Estate of Webb*,²² Webb paid the first year's premium of an endowment policy prior to his marriage. He paid the second year's premium after his marriage and died shortly after making a payment on the third year's premium. The court held that the proceeds derived from the policy should be considered as community property to the extent that community funds were used in paying the premiums. This apportionment rule is followed in *Vieux v. Vieux*,²³ where the contract involved the purchase of land. It may be contended that, where one enters into a specifically enforceable contract for the purchase of land prior to the time of his marriage, he thereby becomes the owner under the doctrine of equitable con-

¹⁹ (C.C.A. 5th, 1934) 69 F. (2d) 639.

²⁰ *Accord*: *Bishop v. Williams*, (Tex. Civ. App. 1920) 223 S.W. 512. In *Wrightsmen v. Comm. of Internal Revenue*, (C.C.A. 5th, 1940) 111 F. (2d) 227, prior to December 24, 1936, Wrightsmen was domiciled in Oklahoma. He was president of a company but had no express or definite agreement as to salary. There was a general understanding that his compensation for the year would depend upon the net earnings of the company. On December 24, 1936, he established a domicile in Texas. On December 30, 1936, a salary resolution of the company awarded him \$50,000 for the year. The court held that this constituted a part of his separate estate according to Oklahoma law and that Oklahoma was his domicile when the right to the salary had its inception. The absence of an express contract was not controlling because there was an understanding that such compensation would be paid. At the time of this acquisition Oklahoma had not adopted the community property system.

²¹ *In re Monaghan's Estate*, 60 Ariz. 342, 137 P. (2d) 393 (1943).

²² Cal. Myr. Prob. (1875) 93.

²³ 80 Cal. App. 222, 251 P. 640 (1926). That the apportionment rule may be applied in an attorney fee case, see *Waters v. Waters*, 75 Cal. App. (2d) 265, 170 P. (2d) 494 (1946), noted in 20 So. CAL. L. REV. 281 (1946).

version. Accordingly, the land should be considered as a part of his separate estate because it was acquired before marriage. However, there are reasons for denying an application of the doctrine of equitable conversion where an adjustment of the property right as between husband and wife is involved. The apportionment theory affords a means by which a fair and equitable adjustment of property rights can be accomplished. An acquisition should be considered as community property to the extent that community funds contribute to the purchase price.²⁴

The second question pertains to the manner of acquisition. Assuming that the property was acquired during the continuance of the marriage, was it acquired by gift, devise, bequest or descent? If so acquired, it constitutes separate property, otherwise it is community property. An exception to this rule is found in the statutory declaration that damages recovered for personal injuries suffered by either the husband or the wife constitute a part of his or her separate estate. Such a provision is found in the Michigan Community Property Act, sections 1 and 2.

Of course a change in the form of property does not change its status. In *Estate of Clark*,²⁵ some two weeks after the death of his son by his first marriage, Clark married Eliza Simpson. He then instituted proceedings to contest his son's will and the case was compromised by the payment to Clark of an amount in excess of \$150,000. After Clark's death, his widow claimed that this money was community property. Her argument was that all property acquired after marriage other than by gift, devise, bequest and descent, and the rents, issues and profits therefrom, constituted community property. The court held that the money formed a part of the separate estate of the deceased Clark. Prior to his marriage, he had a valuable property right, that is, a right to contest his son's will, and this right was a part of his separate estate. Consequently, the money received in settlement of this right was his separate property. Even if the son had died after Clark's re-

²⁴ In *Gelfand v. Gelfand*, 136 Cal. App. 448, 29 P. (2d) 271 (1934), the husband secured policies of life insurance at a time when he was domiciled in a non-community property state. Thereafter, he established a domicile in California and paid premiums amounting to \$24,000, using community funds for this purpose. In divorce proceedings it became necessary for the court to determine the status of the policies. Unlike most insurance policy cases, apportionment of the proceeds derived from the policies was not involved. The court held that, since such apportionment was not possible, the policies should be awarded to the husband as a part of his separate estate and the community should be reimbursed to the extent that community funds had been used to pay premiums.

²⁵ 94 Cal. App. 453, 271 P. 542 (1928).

marriage, the acquisition would be his separate estate because it was referable to an inheritance.²⁶ Similarly, if a spouse secures a judgment under a wrongful death statute for the death of a child, parent, or other relative, it would seem that the acquisition would be a part of his or her separate estate.²⁷

The third question involves a determination as to whether or not designated wealth can be classified as income from separate property. A typical problem in this respect was raised in *In re Torrey's Estate*.²⁸ At the time of his marriage the husband owned two restaurants appraised at \$3,035. His widow claimed that the income from these restaurants that accrued after the marriage was community property. Under the local law, as in Michigan, the rents, issues and profits from separate property constituted separate property. The husband, after marriage, had devoted his entire time to the management of the restaurants. Thus, the income in question was traceable to two contributing factors. To some extent it represented income from the husband's separate property. On the other hand, the effort and skill of the husband was a community contribution. The court held that the entire income constituted community property because the chief contributing factor to the acquisition was the effort and skill of the husband.²⁹ However, the separate estate of the husband would be entitled to reimbursement to the extent that the separate estate contributed to the acquisition. This is determined on the basis of a reasonable rate of return on the value of the investment involved.³⁰ There is no reason in the nature of things why such income could not be apportioned. For example, it may be assumed that the net income from the restaurants for a given year amounted to \$10,000. Assuming further that, at a reasonable rate of return on the value of the husband's investment, his separate contribution for the year would amount to \$1,000, and the value of his service, as manager of the restaurants, would amount to \$4,000. One-fifth of the income would be a part of the husband's separate estate, and four-fifths would be community property.³¹

There is a difference of opinion as to the rule to be followed in

²⁶ See *Lyeth v. Hoey*, 305 U.S. 188, 59 S.Ct. 155 (1938).

²⁷ See *Abos v. Martyn*, 10 Cal. App. (2d) 698, 52 P. (2d) 987 (1935).

²⁸ 54 Ariz. 369, 95 P. (2d) 990 (1939).

²⁹ *Accord*: *Estate of Gold*, 170 Cal. 621, 151 P. 12 (1915). See Le Sourd, "Community Property Status of Income from Business Involving Personal Services and Separate Capital," 22 WASH. L. REV. 19 (1947).

³⁰ It was so held in *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488 (1909).

³¹ This formula has been accepted as a basis for computing federal income taxes. See 20 So. CAL. L. REV. 113 (1946).

the case of income from land. The California court, in *Estate of Pepper*,³² declares the rule that rents, issues and profits from land follow the status of the land, regardless of contributing factors such as effort and skill. In that case the husband, at the time of his marriage, owned land and conducted a nursery business. After his marriage he devoted his entire time and skill to the cultivation of the land and considerable profit resulted therefrom. The court held that this income constituted a part of his separate estate. It was considered that the land, a separate asset, was the chief contributing factor to the acquisition. A more reasonable rule is expressed by the New Mexico court in *Laughlin v. Laughlin*.³³ In that case the court points out that the same rule should be followed whether the case is one involving land or chattels. It was concluded that the owner of land is entitled to its rental value, and the community is entitled to the balance of the income produced from the land by the labor, skill and management of the spouse.

An increase in the intrinsic value of land or chattels separately owned does not constitute community property. If the increase is due to an expenditure of community funds, however, the community is entitled to a lien to assure reimbursement. This is the usual view in a case where the husband uses community funds to erect improvements upon his separately owned land.³⁴ While the improvement itself becomes a part of the land under the rules respecting fixtures, the community is entitled to reimbursement and a lien to assure payment.³⁵ There is authority for the view, however, that if the husband uses community funds to erect improvements upon land owned by the wife, there is a rebuttable presumption that he intended to make a gift to the wife of the community funds so expended.³⁶

A similar problem may be involved in the case of chattels. For example, in *Van Camp v. Van Camp*,³⁷ at the time of his marriage the husband owned stock in the Van Camp Sea Food Company. After his marriage he devoted his entire time and skill to the management of the business and through his efforts the stock increased tremendously

³² 158 Cal. 619, 112 P. 62 (1910).

³³ 49 N. M. 20, 155 P. (2d) 1010 (1944).

³⁴ *Estate of Chandler*, 112 Cal. App. 601, 297 P. 636 (1931); *Comm. of Internal Revenue v. Burke*, (C.C.A. 9th, 1932) 62 F. (2d) 7.

³⁵ A lien was denied in *In re Woodburn's Estate*, 190 Wash. 141, 66 P. (2d) 1138 (1937), because it was not clearly established that the improvements had been erected with community funds.

³⁶ *Shaw v. Bernal*, 163 Cal. 262, 124 P. 1012 (1912).

³⁷ 53 Cal. App. 17, 199 P. 885 (1921).

in value. The wife claimed that this increase should be considered as community property. This claim was denied by the court. It is true that the effort and skill of the husband contributed to the increase in the value of the stock but the value of the husband's services was reflected in the salary that he received from the company, and this salary constituted community property.³⁸

There is a rebuttable presumption that all property acquired during the continuance of the marriage is community property.³⁹ This presumption may be overcome by a showing that the property in question was acquired with separate property. It may also be overcome by a showing that the husband and wife consented to the acquisition of title as joint tenants or as tenants by the entirety. The characteristics of these two forms of concurrent ownership are inconsistent with those of community ownership.⁴⁰ For example, one joint tenant may cause a

³⁸ *Accord*: *Katson v. Katson*, 43 N. M. 214, 89 P. (2d) 524 (1939). See *Comm. of Internal Revenue v. Skaggs*, (C.C.A. 5th, 1941) 122 F. (2d) 721, cert. den., 315 U.S. 811, 62 S.Ct. 796 (1942). In *In re Winston's Will*, 40 N. M. 348, 59 P. (2d) 904 (1936), a claim involved an attorney's fee for the probate of the husband's estate. The widow objected to the inventory on the basis that property constituted community property and not the separate estate of the deceased husband. It was established that the deceased husband had inherited \$27,650. In computing the amount of his estate, the court held that presumptively he had paid the family expenses from community property and not from his separate estate. *Accord*: *In re Binge's Estate*, 5 Wash. (2d) 446, 105 P. (2d) 689 (1940). See *Title Insurance & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 P. 360 (1910).

³⁹ Some authorities also express the view that all property possessed by either spouse at the time of the dissolution of the community is presumed to be community property. See *In re Jolly's Estate*, 196 Cal. 547, 238 P. 353 (1945); *State ex rel. Marshall v. Superior Court*, 119 Wash. 631, 206 P. 362 (1922), discussed in *Mechem, "Progress of the Law in Washington Community Property,"* 7 WASH. L. REV. 367 (1933) and 8 WASH. L. REV. 1 (1933). This presumption does not extend to property possessed by either spouse during the continuance of the marriage. Thus in *Fidelity & Casualty Co. of N.Y. v. Mahoney*, 71 Cal. App. (2d) 65, 161 P. (2d) 944 (1945), the husband, two months after marriage, paid \$1.00 for an airplane-travel accident insurance policy and named a son by a former marriage as beneficiary. The husband was killed and the wife claimed that the proceeds derived from the policy constituted community property. This claim was denied. While the court recognized the rule that property acquired after marriage is presumed to be community property, there was no evidence in this case that the husband acquired the \$1.00 after marriage.

⁴⁰ In *Siberell v. Siberell*, 214 Cal. 767, 7 P. (2d) 1003 (1932), husband and wife acquired title to land taking title as joint tenants. The court held that the acquisition constituted a part of their separate estates. This is true, of course, only in a case where both spouses consented to the use of the community funds for the acquisition of title as joint tenants. In California, the courts go even further. It is held that even if husband and wife own property as joint tenants, it will be considered as community property if the parties did not intend to hold title as joint tenants [*Tomaier v. Tomaier*, 23 Cal. (2d) 754, 146 P. (2d) 905 (1944); *Sears v. Rule*, 27 Cal. (2d) 131, 163 P. (2d) 443 (1945)].

partition without the consent of the other joint tenant. This is not true in the case of community property. Community property may be partitioned only by mutual consent of husband and wife or by operation of law, such as in the case of the death of one spouse, divorce or sale on execution to satisfy the claim of a creditor (assuming that the creditor can satisfy his claim out of community property). Thus, community ownership is much like ownership of husband and wife as tenants by the entirety. The chief differences are the right of survivorship in property held by the entireties and the fact that the husband has management and control of such property while, in the case of community property, management is given to the spouse in whom the title is vested.⁴¹ There are also differences with respect to the claims of creditors. In most of the community property states, there is a rebuttable presumption that property is community if it is acquired by an instrument of conveyance to husband and wife. The Michigan statute provides that, while there is a presumption that all property acquired after marriage is presumed to be community, this presumption is overcome " . . . in any instrument of conveyance of real property where the grantees therein are described as husband and wife."⁴² Presumably, in such a case the title is acquired by the spouses as tenants by the entirety.⁴³

Assuming that an acquisition by husband and wife constitutes community property, it is generally agreed that its status can be changed

⁴¹ The better view seems to be that the right of the husband to manage and control land held as tenants by the entirety has remained unaffected by the adoption of Married Women's Property Acts, which give the wife the right to manage and control her separate estate. The right of the husband to manage and control land held as tenants by the entirety is considered as an incident of such tenancy [*Childs v. Childs*, 293 Mass. 67, 199 N.E. 383 (1935); *Arrand v. Graham*, 297 Mich. 559, 298 N.W. 281, 300 N.W. 16 (1941)]. In *Dombrowski v. Gorecki*, 291 Mich. 678, 289 N.W. 293 (1939), defendants, husband and wife, owned land as tenants by the entirety. Plaintiff suffered injuries which were caused by the defective condition of the sidewalk in front of defendants' land. The court held that the wife would not be liable because the exclusive control over the land was in the husband.

⁴² Mich. Community Property Act, § 5.

⁴³ Since this type of concurrent ownership arises as a result of the unity of husband and wife, a tenancy by the entirety should result, in the absence of language in the conveying instrument indicating a contrary intention, if the grantees are, in fact, husband and wife [*Ohio Butterine Co. v. Hargrave*, 79 Fla. 458, 84 S. 376 (1920), described in the deed as husband and wife]. In most of the community property states, tenancy by the entirety is not recognized. See *Swan v. Walden*, 156 Cal. 195, 103 P. 931 (1909). Husband and wife may own property as tenants by the entirety in Michigan (Mich. Community Property Act, § 5) and Oregon [Senate Bill No. 210, § 10, Ore. Laws (1947) c. 525, at p. 913].

to separate property if the husband and wife so will.⁴⁴ There is a difference of opinion as to the manner in which such a change can be accomplished. According to the California decisions, such a change can be brought about by a mere declaration that the husband and wife desire that result. Thus, in *Estate of Watkins*,⁴⁵ during the continuance of their marriage, the husband and wife accumulated an estate of some \$300,000. It was all community property at the time of acquisition but its status was changed to the separate estates of husband and wife because it was held by them as joint tenants. Before the death of the husband, the parties executed joint and mutual wills in which it was declared that all property owned by the parties was community property. The court held that this declaration was sufficient to change the status of both land and chattels from separate estates to community property. While this case involved a change from separate to community, it would seem that under California laws the same informality will suffice to change the status of property from community to the separate estate of either the husband or the wife. In view of the fact that any change in the status of property constitutes a conveyance, it would seem that all formalities required for such a conveyance should be required. The weight of authority in the community property states is in accord with such view.⁴⁶

C. *Management of Community Property and Liability for Debts*

In most of the community property states, the management of community property is placed in the hands of the husband. However, the right is not absolute. In order to safeguard the wife's interest, it is usually provided by statute that the husband cannot make a gift of community property without the wife's consent. Statutes also provide that, except in the case of short term leases, the wife must join in any conveyance or encumbrance of community real property. Serious complications arise where the rights of *bona fide* purchasers or mort-

⁴⁴ This is expressly authorized in Michigan Community Property Act, § 8.

⁴⁵ 16 Cal. (2d) 793, 108 P. (2d) 417 (1940).

⁴⁶ That a conveyance is essential, see *Taylor v. Hollingsworth*, 142 Tex. 158, 176 S.W. (2d) 733 (1943); *Davies v. Metropolitan Life Ins. Co.*, 191 Wash. 459, 71 P. (2d) 552 (1937). This requirement is also indicated in Mich. Community Property Act, § 8, for conversion from community to separate property, but no provision is made for conversion to community property. There are three possible interpretations of this section. Either (1) conversion from separate to community property is impossible, or (2) no formalities are required for such conversion, or (3) the situation was inadvertently omitted from the statute and the requirement must therefore be worked out on the basic analogy to the requirements in other community property jurisdictions.

gagees are involved. These complications are obviated under the Michigan statute. Restrictions respecting management are imposed, but they do not apply with respect to any person dealing with the spouse vested with management if such person is without actual knowledge that the spouse has exceeded his or her authority.⁴⁷

In connection with the management of community property, Michigan has adopted a split management rule. The wife has the right to manage and control community property that stands in her name.⁴⁸ She also has the right to manage and control that portion of the community property which consists of her earnings for personal services.⁴⁹ All other community property is under the management and control of the husband.⁵⁰ There is probably dual management and control where the title to community property stands in the name of both husband and wife.⁵¹ The restrictions on management of community property, operative as between the husband and wife and persons with actual knowledge, are: (1) Neither the husband nor the wife shall dispose of or encumber community real property or encumber any community property that is exempt by statute, or lease community real property for a longer period than one year unless the other shall join in the execution of the instrument; (2) Neither the husband nor the wife shall make any gift of community property or dispose of or encumber the same without adequate consideration, without the consent of the other; (3) Neither the husband nor the wife shall dispose of or encumber the furniture, furnishings or fittings of the home, to the extent that the same constitutes community property, without the consent of the other.⁵² In case of any violation by the husband or the wife of these limitations on management, the spouse aggrieved shall be entitled to appropriate relief against the other spouse at law or in equity.⁵³

As a basic proposition, the adoption of the community property system has not changed the rules respecting the liability of separate

⁴⁷ Mich. Community Property Act, § 6 (d) (e).

⁴⁸ Mich. Community Property Act, § 6 (a).

⁴⁹ Mich. Community Property Act, § 6 (a).

⁵⁰ Mich. Community Property Act, § 6 (b).

⁵¹ The statute is not clear on this point. Under such circumstances it would seem that the title to such property stands in her name within the meaning of Mich. Community Property Act, § 6 (a).

⁵² Mich. Community Property Act, § 6 (c). Household goods do not cease to be furnishings of the home within the meaning of such a statute merely because they are stored in a warehouse [Matthews v. Hamburger, 36 Cal. App. (2d) 182, 97 P. (2d) 465 (1939)].

⁵³ Mich. Community Property Act, § 6 (c) sub. (4).

property for the payment of debts. The separate property of the wife is liable for her own debts incurred either before or after marriage. This liability attaches even though the debt is contracted or liability incurred in connection with the management of community property, or in furtherance of the community interest.⁵⁴ The separate estate of the husband is likewise liable for his own debts incurred either before or after marriage or in connection with his management of community property or in furtherance of the community interest.⁵⁵ The really important question pertains to the liability of community property for debts contracted and liabilities incurred by the husband or the wife. An answer to this question is somewhat simplified when it is considered that Michigan has adopted, in part at least, the theory that the community is a *quasi*-legal entity. Under such a view, community property can be held liable only for community obligations.⁵⁶ An examination of a few cases from jurisdictions following this same view should be helpful. In *Stafford v. Stafford*,⁵⁷ a divorce decree awarded alimony to the wife for the support of herself and the minor son of the parties. Thereafter, the husband remarried and acquired land that belonged to the second community. The court held that, since the judgment did not arise out of a community obligation of the second marriage, the land could not be held liable for its payment.⁵⁸ Thus, the general rule is that community property cannot be held liable for debts contracted or obligations incurred by either the husband or the wife prior to marriage.⁵⁹ This is the rule in Michigan with one exception. The

⁵⁴ Mich. Community Property Act, § 9 (a).

⁵⁵ Mich. Community Property Act, § 9 (b).

⁵⁶ Mich. Community Property Act, § 9 (c).

⁵⁷ 10 Wash. (2d) 649, 117 P. (2d) 753 (1941).

⁵⁸ The same rule is declared in *Forsythe v. Paschal*, 34 Ariz. 380, 271 P. 865 (1928), where it is held that the community is not liable for an indebtedness of the wife incurred prior to marriage. In *Katz v. Judd*, 108 Wash. 557, 185 P. 613 (1919), prior to their marriage, the husband and wife both became liable on an indebtedness. It was held that the community property was not liable for the indebtedness because it was not a debt of the community. *Contra*: *Hirales v. Boegen*, 61 Ariz. 210, 146 P. (2d) 352 (1944). In *Mountain v. Price*, 20 Wash. (2d) 129, 146 P. (2d) 327 (1944), the husband was domiciled in Washington. While driving in Oregon he was involved in an automobile accident and the plaintiff secured an Oregon judgment against him for personal injuries. Action was brought in Washington on the Oregon judgment. The court held that under the Oregon law this constituted a separate obligation of the husband. Accordingly, the community property could not be reached for its satisfaction.

⁵⁹ A different rule prevails in those jurisdictions where the *quasi*-legal entity theory is not recognized. For instance, in California, with some exceptions, the community property is liable for the debts or obligations incurred by either the husband or wife prior to marriage. See *Van Maren v. Johnson*, 15 Cal. 308 (1860).

statute provides that the earnings of the husband for personal services, whether prior to or subsequent to the inception of the community, shall be liable for all debts contracted and liabilities incurred by the husband prior to the inception of the community.⁶⁰ Similarly, the earnings of the wife for personal services may be held liable for debts contracted and liabilities incurred by the wife prior to her marriage.⁶¹

There is some departure from the *quasi*-legal entity theory with respect to debts contracted and liabilities incurred by the husband and wife after marriage. All community property, whether under the management and control of the husband or the wife, is liable for all debts contracted or liabilities incurred by the husband. It is not material whether or not the liability arose out of management of community property by the husband or whether it arose out of conduct that was in furtherance of the community interest.⁶² But the *quasi*-legal entity theory is followed with respect to debts contracted or liabilities incurred by the wife. The community property shall be liable only for those debts contracted or liabilities incurred by the wife in connection with her management of the community property or from her conduct in furtherance of the community interest.⁶³ As to whether or not the conduct of the wife was in furtherance of the community interest, the case of *Werker v. Knox*⁶⁴ is instructive. In that case the wife, while on a household errand, negligently parked her car. Plaintiff suffered injuries as the result of this negligence. Since the tort occurred while the wife was engaged in a community enterprise, the community property was held liable.⁶⁵

D. *Dissolution of the Community*

Where the community is dissolved by divorce, the community property is divided between the parties as the court deems just. In the absence of division by the court the parties continue to own the property as tenants in common.⁶⁶ Matters are much more complicated where the community is dissolved by death. At the outset it is to be observed that there is nothing in the Michigan act affecting the right of the surviving spouse to elect against the will of the decedent as

⁶⁰ Mich. Community Property Act, § 9 (f).

⁶¹ Mich. Community Property Act, § 9 (e).

⁶² Mich. Community Property Act, § 9 (c) sub. (2).

⁶³ Mich. Community Property Act, § 9 (c) sub. (1).

⁶⁴ 197 Wash. 453, 85 P. (2d) 1041 (1938), noted in 14 WASH. L. REV. 228 (1939).

⁶⁵ *Accord*: *Selaster v. Simmons*, 39 Ariz. 432, 7 P. (2d) 258 (1932).

⁶⁶ Mich. Community Property Act, § 12.

to separate property. As in most of the community property states, each spouse has the power of testamentary disposition with respect to one-half of the community property. In the absence of testamentary disposition, one-half of the community property continues in the surviving spouse and the other one-half is distributed to the heirs at law and distributees of the deceased spouse.⁶⁷

In most of the community property states, upon the death of either spouse all of the community property is subject to administration. This does not mean, of course, that the share of the surviving spouse in community property constitutes a part of the estate of the deceased spouse. Administration of all community property is essential to determine the share of the surviving spouse. The extent of that interest is made to depend upon the indebtedness that is to be satisfied out of the community property. Thus, the task of the probate court is twofold in nature. *First*: It must determine the status of property as being either the separate property of the deceased or community property. *Second*: It must determine the extent to which the community property may be subjected to the payment of debts.⁶⁸ The determination as to status of property applies not only to property standing in the name of the deceased spouse but also to property standing in the name of the surviving spouse as well as to property standing in the joint names of the deceased spouse and the surviving spouse. The property found to be the separate property of the surviving spouse is free from administration.

Claims payable out of community property are charged equally against the half of the community property which belongs to the surviving spouse and the half disposed of by testamentary disposition or the rules of intestacy. In the New Mexico case of *Langhurst v. Langhurst*,⁶⁹ after the death of the husband, it was claimed that the funeral expenses involved did not constitute a proper charge against the share of the surviving spouse in the community property. The court sustained this contention, applying the rule that funeral expenses should be charged against either the separate estate of the deceased spouse or his share in the community. The basis for this view is that, upon the death of one spouse, the community ceases to exist and no obligation thereafter incurred could properly be considered as a community debt. A different view is expressed in the Washington case of *Wittwer v.*

⁶⁷ Mich. Community Property Act, § 13 (a).

⁶⁸ Mich. Community Property Act, § 13 (c).

⁶⁹ 49 N. M. 329, 164 P. (2d) 204 (1945).

Pemberton,⁷⁰ where the community is considered as a *quasi*-legal entity. In that case the court held that the community is under an obligation to provide a decent funeral and monument for a deceased spouse. Accordingly, it was held that for the purpose of computing the state inheritance tax, the amount of such expense should be deducted from the entire estate and not merely from the one-half thereof which passes by inheritance.

When all claims and administration expenses chargeable to the community estate have been satisfied, the probate court is required to make an appropriate order authorizing the executor or administrator to execute and deliver such instruments as are necessary to transfer and convey one-half of the remainder of the community property to the surviving spouse. In spite of the fact that the probate court has jurisdiction to determine the status of property standing in the name of the surviving spouse or standing in the name of both spouses, third parties may rely upon the right of the surviving spouse to manage and control property standing in his or her name or property standing in the name of both where, but for the community property law, there would be a right of survivorship.⁷¹

As has already been indicated, each spouse has the power of testamentary disposition with respect to one-half of the community property. There are two lines of authority, however, as to what constitutes a testamentary disposition within the meaning of this rule. For example, let it be assumed that the husband secures life insurance policies on his own life and pays all of the premiums with community funds. His mother is named as beneficiary under the policies. After the death of the husband, his surviving wife claims the entire proceeds from the policies upon the ground that the alleged benefits accruing to the mother constituted a gift of community funds and that such a gift may be set aside because the wife did not consent thereto. The California decisions would sustain the gift to the mother to the extent of one-half the face value of the policies. It is considered that the naming of the mother as beneficiary under the policies constituted a testamentary disposition within the meaning of the rule.⁷² According to the Washington decisions, however, the mother could claim nothing under the policies. Those decisions follow the rule that a testamentary disposition is a disposition by will and does not include gifts accomplished by life

⁷⁰ 188 Wash. 72, 61 P. (2d) 993 (1936).

⁷¹ Mich. Community Property Act, § 13 (e).

⁷² *New York Life Insurance Co. v. Bank of Italy*, 60 Cal. App. 602, 214 P. 61 (1923).

insurance policies.⁷³ It is believed that the results reached in the California cases are more in accord with the testamentary disposition rule than are the results reached by the Washington decisions. In brief, a gift of community property by either spouse should be sustained to the extent of one-half if the validity of the gift is not brought into question until after the dissolution of the marriage by death.⁷⁴

⁷³ *Occidental Life Ins. Co. v. Powers*, 192 Wash. 475, 74 P. (2d) 27 (1937), noted in 19 ORE. L. REV. 384 (1940). The Michigan Community Property Act, § 16, provides that an insurance company discharges its obligations by making payment according to the terms of its insurance contract unless it receives written notice that another asserts a claim to the proceeds thereof.

⁷⁴ This is the rule followed in California [*Trimble v. Trimble*, 219 Cal. 340, 26 P. (2d) 477 (1933)].