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The Modern Problem of the Nature of the Wife's Interest in Community Property--A Comparative Study

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The laying of a Federal income tax once again brought up the ancient and unsettled problem of the nature of the wife's interest in community property. The modern question involves the very practical matter of whether the husband shall make the return for the "community" as a whole, a duty necessarily devolving upon him if the wife's interest is not sufficient to give her the privilege of rendering an individual return for such part of the community as is legally hers.

The decision of this question is far reaching and has many ramifications. It is at once apparent that if the husband makes the return, the tax and surtax of the community will be greater than if two individual returns are made for the same property. Since eight states of the Union, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington have the community property system the decision of this question involved the destination of millions of dollars which were to be either "saved" to the state tax payers or deflected into the coffers of the national government.¹

The question of uniformity was suggested by the representatives of the United States.² If spouses in eight states may retain unto themselves and their states these huge sums, is constitutional faith being kept with

¹From Professor E. G. Lorenzen of the Yale Law School came the first suggestion to the writer of a comparative treatment of the systems of community property employed in the United States, together with many other valuable and interesting aids for which enough acknowledgment and thanks cannot be given.

²Letter from William D. Mitchell, Solicitor General, Acting Attorney General, March 12th, 1926, to each of the counsel who had appeared before him in February, 1926, at the hearing given by him to the representatives of taxpayers in community property states desiring to state their views on the subject.
the spouses of forty states as to corresponding sums which they will have made available for national purposes?

The states' advocates, while highly desiring the retention of the difference in tax moneys, wondered just what effect such a decision would have both socially and legally upon husband and wife and what state constitutional questions might arise as an aftermath. 3

The move for settling this question of the wife's interest, at least insofar as it pertains to Federal income tax took rise in California where, in spite of the Attorney General's opinion 4 and the previous practice of separate returns, 5 the Supreme Court of the United States decided in 1926 6 that since the wife had but an expectancy in the community, she had no right to make a return and the husband having both ownership and control of the community must make the full return, alone. In January, 1931, due to changes in the state law and in line with their taxation policy as shown in the 1930 series of cases 7 on this subject, the Supreme Court decided exactly the opposite so far as income tax is concerned. 8

Since the community property system of all eight states had the same ultimate origin 9 it might have seemed that the first decision would have settled the question for other states but that was far from being the case. Just as the "customs" of the French provinces varied prior to the Code Napoleon 10 so do the systems of the eight states differ and it might well be that in the evolution of the eight species of community regime, the wife's expectancy of California could have developed into a full grown estate in Washington.


4 Attorney General Daugherty March 8, 1924. T. D. 3569.

5 Treasury Department. Regulations No. 65 relating to the Income Tax under the Revenue Act of 1924, art. 31.


9 MCKAY, COMMUNITY PROPERTY (2d ed. 1925) 6; SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO (1851); Lobinger, The Marital Community: Origin and Diffusion (April, 1928) 14 A.B.A.J. 211; Howe, Roman and Civil Law in America (1903) 16 HARV. L. REV. 342.

10 HOWE, STUDIES IN THE CIVIL LAW (1898) 188. Brief for the United States in Robbins case before the Supreme Court of the United States, page 11: "There are radical differences between the community systems in various States. The notion that there is any community system common to the States carved from the former Spanish dominions must be discarded at the outset."
Recognizing this situation and after very exhaustive examinations of the statutes and decisions of the remaining seven states, the Attorney General decided that the previous opinions should be withdrawn and that the matter should be set at rest. Whereupon, at his suggestion, test suits began to be prepared from the seven states and progressed fairly rapidly to the United States Supreme Court where four of them were decided upon November 24th, 1930. An understanding was reached that if the test suits were promptly begun and not permitted to lag, the existing practice of divided returns could be continued unless and until the Supreme Court decided otherwise. Furthermore, the change, if any, was not to be retroactive "with respect to years prior to 1927."

A brief outline of the history of community property may be helpful as an introduction to this problem. The idea seems to have originated as a Germanic custom. In Rome the system did not exist as between husband and wife, the wife simply coming in for a child's share, but in Egypt the regime actually operated. It is thought that it arose as a natural development and indeed was a spontaneous thing in its remotest origins answering practically the needs of the various peoples, wherever found, rather than an importation from any one country to another. However that may be, the present laws may be traced directly to the Gothic origin. Reference is made to the property of the community, the ganancias, the matrimonial gains, in the historic Fuero Juzgo, or Forum Judicum, promulgated in 693, which incorporated to some extent, the laws of the Code of King Euric, in which the laws of the Visigoths had been first reduced to writing by the ruler who had finally subjected the present Spain during the period from 467 to 484. The community idea contained in the Fuero Juzgo was a proportional one, based upon the original contributions made to the unit by the respective spouses. In

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14 Supra note 7.
15 Letter addressed to Hon. John N. Garner, Representative in Congress from Texas, May 1, 1929, from Secretary Mellon.
16 Howe, Studies in the Civil Law (1898) 187; Huenne, History of Germanic Private Law (1918) topic 2 §22, cited in McKay, Community Property (1925) 7; Cole's Widow v. His Executors (1828) 5 La. (7 Martin N. S.) 41, cited in McCurdy, Cases on Domestic Relations 661; Daggett, Comparison of the German Community Property System With That of Louisiana (1929) 4 Tulane L. Rev. 27.
17 McKay, Community Property (1925) §7; See also Pollock & Maitland, History of English Law (2d ed. 1898) 399-402.
18 McKay, Community Property (2d ed. 1925) §7; Walton, Civil Law of Spain 32, 33-42, 43.
19 Fuero Juzgo, Law 16, Title 2, Book IV.
the Spanish Code, the Fuero Real, promulgated in Spain in 1255 by Alphonso the Learned and in the Partitas published in 1263 and "authoritatively promulgated as the law of the land" in 1348, during the reign of Alphonso XI, which are to each other "as the Institutes of Justinian to the Pandects"; the idea of equal division is clear.20 The Laws of Toro, 1505, are a compilation resulting from a revision of the laws of Spain instigated in 1502 by the request of the Cortes of Valladolid.21 The next compilation, the Nueva Recopilacion, was made under the auspices of Philip II and promulgated in 1567.22 Charles IV of Spain committed to Don Juan de la Reguera Valdlomar the task of compiling the Novisima Recopilacion, 1805, made applicable to Spanish America, with a provision that where necessary, due to any inadequacy of this code, the laws of Castille were to be applied. From the Novisima Recopilacion comes the Novisima Sala Mexicana, the law of Mexico,23 today, very similar to that of Spain. From this point it is easy to trace the Spanish law to the states having the community system and this origin is recognized by the court decisions.24

The Germanic customary law became the customary or unwritten law of Northern France. Prior to Napoleon's time the French customs were not uniform and the community system existed in a negative fashion in some of the provinces, if at all, but the Custom of Paris and Orleans had the principles of a perfect community system upon which the Code Napoleon promulgated in 1804 is, in the main, based, as far as this question is concerned.25 While the community system made its way to colonial Louisiana before the adoption of the first code in 1808, which was based on a first draft of the Code Napoleon and about eighty per cent pure, via the Custom of Paris and the laws of Spain, the French law prior to the Code Napoleon influenced the jurisprudence of the State.

21 Robbins, Laws of Community Property (Bienes Gananciales) Laws of Toro 1505 (1929).
22 Schmid, Civil Law in Spain and Mexico (1851) c. V.
23 Ibid. 99.
25 Moreau and Carlton, Partidas, Preface 18-20. Howe, Studies in the Civil Law (1898) 188.
appreciably and the community concepts of this large province spread
in some degrees to other states having this system.

No conclusive help was to be found for settlement of the present
problem for while the laws are most definitely laid down for the purposes
of their time, nothing can be laid hold of by research which satisfactorily
puts to rest even by way of historical approach, the problem of the
wife's interest. In the briefs of opposing counsel prepared after infinite
labor and research, extracts from the Laws of Toro and the other com-
pliations may be found with reference to the passages located by the
other side as "troublesome" together with elaborate explanations and
notes purporting to show why the passage in opposition had occurred.
The reference by Mr. Justice Holmes to the fact that "dominio" had
been variously translated due to its original ambiguity, gave rise to
unlimited examination of translations with the desired result in the
specific case, as might have been expected. The old French law, the fact
that the laws of the provinces varied, are cited extensively for the one
theory, while the concept after the Napoleonic Code is given for anoth-
er. In this maze of ancient statutes and learned annotations, anything
and nothing may be proved about as elusive a thing as the wife's interest
in the community.

From the commentators, both contemporary and otherwise, nothing
conclusive was to be gained. Even during the comparatively early de-
velopment of the community property concept in Spain, the commen-
tators of that country were not in accord as to just what the wife's interest
was. For example, this excerpt may be found in Febrero's remarks:

"To the married woman is imparted and transferred by usage and legal
authority the dominion and possession, revocable and fictitious of the
one-half of the property which during the marriage she gains and acquires
with her husband; but after he dies, the same passes to her irrevocably
and effectively, so that, after his death, she becomes the absolute owner in
possession and property of the one-half which he leaves in the manner
prescribed by law, between conventional partners. For this reason, the wife
is prohibited not only from giving away her dotal and ganancial property

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26 Saul v. Creditors (1827) 4 La. (5 Martin N. S.) 568; Cole's Widow v. His
Executors (1828) 5 La. (7 Martin N. S.) 41; Pecquet v. Pecquet's Executor (1865)
17 La. Ann. 204.
28 See briefs submitted in the United States District Court for the Northern
District of California, Southern Division, in Robbins v. United States, 5 F.
(2d) 690, and in Robbins v. United States (1925) 269 U. S. 315, 46 Sup. Ct. 148.
for both government and taxpayers.
29 ROBBINS, LAWS OF TORO (1929) 14.
31 supra note 28.
32 See Banaud v. Jones (1851) 1 Cal. 488; Fuller v. Ferguson (1864) 26 Cal.
546; Guice v. Lawrence (1847) 2 La. Ann. 226.
during the marriage, but also from giving alms without the license of her husband, except in four cases."

"A dissolution of the marriage is not necessary to constitute the husband the real and true owner of the property acquired after marriage, for, during it he has in effect, the irrevocable dominion thereof, and thus he can manage, barter, and even though they be neither military earnings nor quasi-military earnings, can sell and alienate the same at his pleasure in the absence of an intent to defraud his wife, as may be proved by law. Wherefore, while the husband lives, and there is no divorce or dissolution of the marriage, the wife ought not to say that she has any gananciales, nor to hinder him in the lawful use of the property acquired, upon the pretext that the law allows her half of it; because this allowance refers to the cases expressed, and no others."

Escrache also speaks of the wife having ownership only after the death of the husband.\textsuperscript{33} On the other hand, in Manresa's\textsuperscript{34} commentaries may be found this passage:

"The financial properties belonging to the husband and the wife during the marriage, and the proprietorship of the wife is not nominal or theoretical, but real and effective, and as proof of that, are all the limitations put upon the husband."

However, even if the question could be regarded as settled at the time prior to the induction of the system into the United States, as indeed it has been by Chief Justice White and others as will be shown later, such conclusions were not necessarily decisive at the present stage, as the laws have been far from static and in most, if not in all, of the states the concept is now more in keeping with the radically different status of married women.

If the matter was in Febrero's time and continued to be in dispute, certainly it is not surprising at this time to find various theories held as to the nature of the wife's interest, after formations due to different combinations of influences and legal systems which present a most fascinating trail for the historian. Mr. Tiffany indicates that there are but two views, a California-Louisiana view, and a Texas-Washington view.\textsuperscript{35} Mr. Evans lists four theories which he calls respectively "the California or single ownership, the Washington or entity, the Idaho or double ownership, and the Texas or trust theories."\textsuperscript{36}

The community has been compared among other things to a partnership, to a trust, to an estate in entirety, to an inchoate dower right, to the expectancy of an heir, but the analogies are all subject to refutation.\textsuperscript{37}

\textsuperscript{33} Diccionarie Razonado de Legislacion y Juris Prudencia — Tomo page 86 citing Law 14 Toro. Cited in briefs, supra note 28.
\textsuperscript{34} Navarro, Commentaries on the Spanish Civil Code, Vol. 9, page 655, cited in briefs supra note 28.
\textsuperscript{35} Tiffany, Real Property (2d ed. 1920) §195.
\textsuperscript{36} Evans, The Ownership of Community Property (1921) 35 Harv. L. Rev. 47, 48.
\textsuperscript{37} McKay, Community Property (2d ed. 1925) §1179.
Mr. McKay, after summing up, decided that the interest is *sui generis.*\(^8\) A famous French writer describes the community as being a partnership that begins only at the end.\(^9\) Mr. Justice Holmes in *Arnett v. Reade*\(^10\) says:

"It is not necessary to go very deeply into the precise nature of the wife's interest during marriage. The discussion has fed the flame of juridical controversy for many years."

The influence of the common law in the United States and the use by lawyers and judges trained and accustomed to its concepts of terminology which was inaccurate when applied to this institution of the civil law has resulted in even more present day confusion.\(^41\)

The courts have not always been agreed even in the same jurisdictions as to what sort of interest the wife had. To illustrate, observe these excerpts from California decisions:

"Under the statute prior to the addition of the first proviso in 1891, it was the established doctrine in this state that during the marriage the husband was the sole and exclusive owner of all the community property, and that the wife had no title thereto, nor interest or estate therein, other than a mere expectancy as heir, if she survived him.

"The limitation upon the husband's testamentary power contained in the Code was not understood to vest in the wife, during the marriage, any interest or estate whatever in the community property, but merely to constitute a restriction upon the husband's power."\(^42\)

"The words, 'with absolute power to dispose of,' ought not to be extended to a disposition by devise. The husband and wife, during coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest, which becomes absolute at his death."\(^43\)

From Louisiana decisions:

"The wife's half interest in the community property is not a mere expectancy during the marriage; it is not transmitted to her or in consequence of a dissolution of the community. The title for half of the community property is vested in the wife the moment it is acquired by the community or by the spouses jointly, even though it be acquired in the name of only one of them."\(^44\)

"Differently from the wife, whose interest in the community property is residuary, the husband, as head and master of the community, owns its property during its existence, with full power of alienation, and after its

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\(^8\) *Ibid.* §1184.
\(^41\) (1924) 34 Op. ATT'Y. GEN. 395.
\(^42\) Spreckels v. Spreckels (1916) 172 Cal. 775, 780, 158 Pac. 537, 539.
\(^43\) Beard v. Knox (1855) 5 Cal. 252, 256.
dissolution by the death of the wife continues to own one-half with full power of alienation.45

"The wife's title, during the existence of the community, is inchoate. McDonough v. Tregre, 7 Mart. (N.S.) 68; Brassac v. Ducros, 4 Rob. 335. The title remains in the meantime in the husband, as head and master of the community."46

While such entirely contradictory language may not be selected from every community property state, certainly so far as terminology disclose, no clear and definite idea of what the wife has may be traced throughout the entire jurisprudence of any state,47 though some have adhered consistently to their theories. However that may be, terminology might have been thought unimportant at the present stage. To quote from the Attorney General's letter:

"A mere statement or assertion in the opinion of a court or a text writer that a wife has an ownership or interest means little unless we know what rights of ownership she may exercise."48

While the Robbins case, the first California decision, only settled the question in that state49 temporarily, it is the outstanding landmark of this controversy, as the later decision only arrived at the nature of the wife's interest via the California Legislative declaration route. It

46 Jacob v. Falgoust (1922) 150 La. 21, 24, 90 So. 426, 427.
New Mexico: Reade v. de Lea (1908) 14 N. M. 442, 95 Pac. 131; Beals v. Ares (1919) 25 N. M. 439, 185 Pac. 780.
49 It must be understood that the law of California as considered in the Robbins case is the basis for this comparative study. See section 172 and 172a of the California Civil Code giving a form of joint control.

It is noteworthy that in the Robbins case while the opinion says that "The Income Tax came from the community property in California" acquired before 1917, "when some changes were made in the law and from the earnings of Mr. Robbins" which were for 1918 after the Legislative enactments cited above, the opinion does not consider or decide the material question presented in respect to these earnings of Mr. Robbins, made after 1917, and for and during the year 1918. This point is made in the Petition of Respondents for Rehearing in the Supreme Court of the United States, October Term, 1925, in United States v. Robbins.

See also section 161a passed by the California Legislature, in effect July 29, 1927: "The respective interests of the husband and wife in community property during the continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property." Of course the case of United States v. Malcolm (1931) 282 U. S. 792, 51 Sup. Ct. 184, decided upon the edict of section 161a has settled the practical matter of income tax returns for California. See Stewart v. Stewart (1928) 204 Cal. 546, 269 Pac. 439, and Income Tax Unit ruling published March 4th, 1929, reported in Cumulative Bulletin VIII 9-4122; I. T. 2457.
was definitely laid down by the Supreme Court decisions,\textsuperscript{50} by Congressional Act,\textsuperscript{51} and by the administrative department\textsuperscript{52} that the holdings by the state courts were to guide absolutely in the ultimate settlement of the question. Consequently, an analysis of the basis and turning point of the Robbins case together with a study of the decisions of the state courts as applied to that case were thought to be the sign posts for the manner of settlement in each of the remaining seven jurisdictions.

Mr. Justice Holmes says in that case:\textsuperscript{53}

"We can see no sufficient reason to doubt that the settled opinion of the supreme court of California, at least with reference to the time before the later statutes, is that the wife had a mere expectancy while living with her husband."

We have seen that a "settled opinion" is not always an easy thing to find.

The last paragraph of Mr. Justice Holmes' opinion proved to be even more troublesome and it was naturally termed both a "dictum" and a "second line of reasoning."

"Although restricted in the matter of gifts, etc., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. His liability for his wife's support comes from a different source and exists whether there is community property or not. That he may be taxed for such a fund seems to us to need no argument. The same and further considerations lead to the conclusion that it was intended to tax him for the whole. For not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code 167, so that the remedy for her failure to pay may be hard to find. The reasons for holding him are at least as strong as those for holding trustees in the cases where they are liable under the law."\textsuperscript{54}

It was feared that if the court of last resort took the latter view of it then the hopes of state taxpayers who successfully distinguished ownership from control in order to meet the first requirement might fall to the ground because of the irrebuttable fact of the husband's dominion.


\textsuperscript{51} Section 1212 of the Revenue Act of 1926, c. 27; (1926) 44 Stat. 9. "Sec. 1212. Income for any period before January 1, 1925, of a marital community, in the income of which the wife has a vested interest, as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the state law applicable to such marital community for such period."

\textsuperscript{52} (1927) 35 Op. Att'y Gen. 265.

\textsuperscript{53} (1926) 269 U. S. 315, 326, 46 Sup. Ct. 148, 149.

\textsuperscript{54} (1926) 269 U. S. 315, 327, 46 Sup. Ct. 148, 149.
The Attorney General in his call for briefs from the seven states for a hearing before him followed the suggestions of Mr. Justice Holmes and definitely asked for answers from the states to the following questions:

"If our invitation to file briefs with the Department is accepted, I hope they will point out, first just what constitutes the community property, and what is treated as separate property of husband and wife, whether the earnings of either fall into the community, whether the income from separate property remains separate or belongs to the community, etc. Following this, we would like to have it pointed out what management, possession, and control the wife and husband, respectively, exercise; whether the husband has power to spend community income as he pleases, what restrictions there are on his disposition of it; whether the wife has a right to expend it, and whether her creditors have a right to resort to it in payment of her debts; whether the husband's obligation to support the wife is based on the notion that she has an ownership in the community or is a general marital obligation, and whether obligations contracted for her support are payable out of her share of the community, on the theory that she owns it, or whether such debts for necessaries are collectable out of the husband's share of the community or his separate estate; whether the wife may maintain any action respecting the community property during the existence of the community or is a proper party to a suit involving community property; whether on the dissolution of the community the wife has any right of testamentary disposition, etc."  

The briefs for the test suits followed in general that outline so that the question might be presented and, it was thought, decided as it was in the California case of 1926, not upon theories either past or present, nor upon definition or terminology, not necessarily after all, upon just what estate the wife had, if any, in the community, but upon the practical question of whether the wife by virtue of the state laws and court decisions exerted these various acts of ownership. These questions were definitely

56 Supra note 48.
56 Supra note 2.
57 Outline followed in general:
1. What constitutes the community property?
2. What is treated as separate property of husband?
3. What is treated as separate property of wife?
4. Do the earnings of the husband fall into the community?
5. Do the earnings of the wife fall into the community?
6. Does the income from separate property of the husband remain separate or does it fall into the community?

Management, Possession, and Control of Wife and Husband Respectively.

Control: May husband spend the community income as he pleases? What restrictions are there on his disposition of it? May the wife expend it? May her creditors resort to it in payment of her debts?

Support: Is husband's obligation to support the wife based on the notion that she has an ownership in the community or is it a general marital obligation? Are obligations contracted for her support payable out of her share of the community
answerable from the decisions of the various states. Just what degree of ownership would lift whatever the wife might be said to have from the "expectancy" only, of the Robbins case to an estate upon which individual returns might be made or whether the decision would be put upon the degree of not only ownership but control were latitudinous questions answerable only by the Supreme Court itself.

As a starting point in this discussion we will take the law of California as it was at the time of the Robbins decision which gave the wife but an expectancy upon which she might not render a federal income tax separate from that of her husband. We can then proceed by way of the routes outlined by the Robbins case and the suggestions of the Attorney General, with a full privilege reserved to cut new paths and to discard the soundness of any trail, for in this labyrinth of decisions and "because of the exceptionally difficult problems," conclusions may be conscientiously reached as many and various as decisions themselves. Of course in this brief space no comprehensive or detailed comparison can be undertaken of the community property laws of the eight states and it may well be that many important points will be omitted or undertreated. The reason for taking the Robbins case in California as a point of departure for comparative purposes is because at that stage natural evolution stopped and further developments have been of an arbitrary nature based merely upon expediency in taxation.

In California all property of the wife,59 just as all property of the husband,60 owned before marriage "and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof" is the separate property of the spouse owning it. "All other property acquired after marriage by either husband or wife, or both,"61 is community property, the wife's earnings included.

The husband has "absolute power of disposition, other than testamentary, as he has of his separate estate."62 Disregarding the latter statutes, not considered in the decision of the Robbins case, the only restriction upon the husband's disposition of the community property

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58 Supra note 15.
59 CAL. CIV. CODE §162.
60 Ibid. §163.
61 Ibid. §164.
62 (1872) CAL. CIV. CODE §172; (1931) CAL. PROB. CODE §201.
is that he may not give it away, but this restriction does not restrict his right to perform other acts of ownership or interfere with his otherwise complete dominion, possession and control.

The wife may not exercise any dominion or control over the community property, and may not expend it. The community property is liable for the debts of the wife contracted prior to her marriage, due to an apparent common law influence, but the community is not liable for any of her debts contracted during the marriage and, furthermore, the liability of the community property for her debts contracted prior to the marriage is not limited to one-half of it or to any part of it so is clearly not based upon an idea of ownership by her. The whole community is subject to the husband’s debts incurred both prior to and after marriage, as well as is his separate estate.

The husband and wife are mutually obligated for support and the husband may be held for necessaries supplied in good faith to the wife, when he has failed to provide. It is not necessary for community property to exist in order for these collections to be made as the husband’s separate estate is as available as is the community property and the obligation arises out of the marriage and not out of any idea of the wife’s ownership in the community property.

The wife may not maintain any action respecting the community property during the existence of the community and is not a necessary or even a proper party to a suit involving the community property.

The wife has no right of testamentary disposition over the community property should she predecease her husband and if she dies first the entire community remains in the husband with no rights to her heirs.

63 Cal. Stats. 1891, 425; see Robbins case supra note 1; Spreckels v. Spreckels (1916) 172 Cal. 775, 158 Pac. 537; see also Dargie v. Patterson (1917) 176 Cal. 714, 169 Pac. 360; Lahaney v. Lahaney (1929) 208 Cal. 323, 281 Pac. 67.

64 CAL. CIV. CODE §172; 5 CAL. JUR. 335, and cases cited.

65 But see Hulsman v. Ireland (1928) 205 Cal. 345, 270 Pac. 948; Note (1929) 17 CALIF. L. REV. 265.


69 Mott v. Smith (1860) 16 Cal. 533; Barrett v. Te wksbury (1861) 18 Cal. 334; Greiner v. Greiner (1881) 58 Cal. 115; Spreckels v. Spreckels (1897) 116 Cal. 339, 48 Pac. 228; 5 CAL. JUR. 337 and cases cited.
in half of this property.\textsuperscript{70} If the community is dissolved by divorce however, she is entitled to her half, except where the decree was granted because of adultery or extreme cruelty when the distribution of the community between the parties is at the discretion of the court.\textsuperscript{71} After the dissolution of the community by divorce, the wife may sue to establish her right to her one-half of the property acquired during the marriage, even to a specific parcel and against the husband's grantee.\textsuperscript{72}

In the case of a putative marriage in good faith, the wife is protected to the extent of one-half just as in the case of dissolution by divorce of a legal marriage.\textsuperscript{73}

Though there was some conflict of opinion, the wife was forced, prior to a late statute exempting her, to pay an inheritance tax upon the half of the community property which came to her upon the husband's death,\textsuperscript{74} while, strange to some theorists, the Federal courts decided\textsuperscript{75} in her favor as to the payment of the Federal estate tax at the same time that income tax was being demanded from the husband upon the theory that the wife had no claim to the property upon which to base a return, during the existence of the community.

The strongest points upon which the vested theory was based were the limitations against the husband making gifts of the community property; the fact that divorce gave to the wife her half, which it was alleged had vested in her so that divorce could not divest it; the Federal courts' decisions on the estate tax. In spite of these points plus many assertions of the California courts that the wife's interest was vested, the ultimate decision prior to the \textit{Malcolm} case was that the wife had but an expectancy. Mr. Justice Holmes mentioned the restriction on gifts but spoke of the fact that the husband could spend the fund "substantially"\textsuperscript{76} as he pleased and could waste it in debauchery. \textit{Roberts v. Wehmeyer}


\textsuperscript{72} DeGodey \textit{v. DeGodey} (1870) 39 Cal. 158; Griener \textit{v. Greiner} (1881) 58 Cal. 115; Dargie \textit{v. Patterson} (1917) 176 Cal. 714, 169 Pac. 360 (husband had died).

\textsuperscript{73} Schneider \textit{v. Schneider} (1920) 183 Cal. 335, 191 Pac. 533.

\textsuperscript{74} Moffitt \textit{v. Kelly} (1910) 218 U. S. 400, 31 Sup. Ct. 79; \textit{In re Burdick} (1896) 112 Cal. 387, 44 Pac. 734; Sharp \textit{v. Loupe} (1898) 120 Cal. 89, 52 Pac. 134; Cunha \textit{v. Hughes} (1898) 122 Cal. 111, 54 Pac. 535; \textit{In re Moffitt} (1908) 153 Cal. 359, 95 Pac. 653; McDougald \textit{v. First Federal Trust Co.} (1921) 186 Cal. 243, 199 Pac. 11; Chambers \textit{v. Lamb} (1921) 186 Cal. 261, 199 Pac. 33; Badover \textit{v. Guaranty Trust \& Savings Bank} (1921) 186 Cal. 775, 200 Pac. 638.


was cited as having taken an explicit view that the California rule of property was that the wife had but an expectancy. The community regime of the State of Louisiana bears a close resemblance to that of California. Mr. Tiffany in his work on Real Property and Mr. McKay in his work on Community Property, both have that view. The courts of California have cited Louisiana cases in their decisions with some frequency and indeed the case of Roberts v. Wehmeyer which had such a telling effect upon the ultimate settlement of this question in California based its decision largely upon Louisiana cases after making a rather thorough review of them.

As in California, the Louisiana decisions reveal expressions which show that both views have been entertained by the jurists, though the assertions that the wife has but an expectancy overwhelmingly preponderate in number and in variety of points at issue, as do those of California. There is but one case, however, ninety-nine years old, a "hard facts" case where in order to protect the wife, the court squarely decided necessarily to the issue that under Louisiana laws the wife has a real, present interest in the community during the existence thereof. That is, taking the view of the brief of the government in the Robbins case, that no concern on the question need be taken as to decisions dealing with the situation after the dissolution of the community when of course the wife’s interest, whatever it is during the existence of the community, undeniably vests. If the view is taken that the decision regarding whether or not a wife has to pay an inheritance tax necessarily involves the settlement of whether or not the interest was vested during the existence of the community, then clearly more than one case may be found where it was held as well as said that the wife has a vested interest and this is apparently the view of Mr. Evans. It does not seem clear that a decision having to do with the vesting in the wife by the dissolution of the community because of death should be any more forceful on the question of the wife’s interest during the existence of the community than decisions having to do with the vesting in the wife of her half by dissolution of

77 Only one other California case was cited, that of Rice v. McCarthy (1925) 73 Cal. App. 655, 239 Pac. 56.
78 Tiffany, Real Property (2d ed. 1920) 195.
79 McKay, Community Property (2d ed. 1925) 44.
80 Van Maren v. Johnson (1860) 15 Cal. 308; Morrison v. Bowman (1865) 29 Cal. 337.
81 (1923) 191 Cal. 601, 218 Pac. 22.
82 Dixon v. Dixon’s Executors (1832) 4 La. 188.
83 The doctrine regarding retroactive legislation in matters of this kind, invoked to protect the interest of the wife in the Dixon case, was not later adhered to in a similar case. Deshautels v. Fontenot (1861) 6 La. Ann. 689.
84 Evans, The Ownership of Community Property (1921) 35 Harv. L. Rev. 47, 63.
the community because of divorce, and the latter argument did not sway the Supreme Court in the California decision, though the opinion of Mr. Justice Field, in *Maynard v. Hill* was cited, the words of the Supreme Court being these:

"A divorce ends all rights not previously vested. Interests which might vest in time, upon a continuance of the marriage relation, were gone."

This argument, however, would be entirely inappropriate to Louisiana because of the special provisions and decisions in regard to dissolution of community by divorce, which will be discussed later.

However that may be, the community property law of Louisiana is certainly not identical with that of California. In the composition of the community there are important differences. All of the property of the wife owned by her before marriage and that acquired afterwards by gift made to her alone or by inheritance or acquired with separate funds, is her separate property but as to the income, the administration determines where it falls. If the wife permits the husband to administer her separate property then these accruals fall into the community and the presumption is that he administers it. If she administers it herself or by appointing her husband as an agent only, then she may reserve these amounts to her separate estate. By a statute of 1912, the earnings of the wife, even when living with her husband unless made in a "reciprocal industry" are made her separate property. A late decision which makes no reference to this statute and cites only an early code article and cases interpreting it, gave to the community profits made by the wife from advantageous sales of real estate. This decision is clearly wrong as it flies in the face of an unbroken line of decisions from the beginning of Louisiana jurisprudence in failing to preserve intact for the wife her separate property bought in her name with her funds apart entirely from the question of earnings, though some mention is

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85 See brief for taxpayers; and DeGodey v. DeGodey (1870) 39 Cal. 158.
86 (1888) 125 U. S. 190, 216; 8 Sup. Ct. 723, 732.
87 CIV. CODE LA. (Merrick 1926) art. 2334. See Daggett, *Comparison of the German Community Property System With That of Louisiana* (1929) 4 TULANE L. REV. 27, 38
90 CIV. CODE LA. art. 2386.
92 Art. 170 of 1912; CIV. CODE LA. art. 2334.
93 CIV. CODE LA. art. 2402.
made of her being in the "real estate business." However, it has temporarily beclouded the otherwise unquestionably clear law on the subject and since it fails to mention the statute on the destiny of the wife's earnings, if these accruals could be so classed, it leaves that statute as yet really uninterpreted. Damages "for offenses and quasi offenses" are also the separate property of the wife.96

The separate property of the husband differs from that of the wife in three items. The income of the separate property of the husband falls unpreventably into the community,97 as do his earnings98 and damages "resulting from offenses and quasi offenses unless he is living apart from his wife through fault of hers sufficient to give him a separation of bed and board or divorce."99 The difficulty of preserving to himself his separate property is infinitely greater than in the case of the wife, as she is permitted to testify to the effect that certain property was in fact her own and not the property of the community,100 while, unless the husband has stated in the deed that he has purchased for his separate estate and with his separate funds, words which are practically sacramental, the title is irrevocably in the community though a debt will be owed by it at dissolution, to his separate estate.101

The husband may spend the community income as he pleases with the restriction similar to that of California102 though not as strong, that he may not give away the real estate, except to the wife or in settlement upon their children at marriage, without her consent nor may he give away the "whole" or a "quota" of the movables.103 These words have never been definitely interpreted. The limitation against the husband's gratuitous disposal is valueless until the dissolution of the community and even then is not given except in the cases mentioned above, a confessedly valueless limitation from a practical standpoint, as full power to convert immovables is present and full power of gift of movables but for the uninterpreted check suggested.104 A gift by the husband to a

97 Crouch v. Richardson (1925) 158 La. 822, 104 So. 728.
99 Ibid. art. 2334.
102 Cal. Stats. 1891, 425.
THE WIFE'S INTEREST IN COMMUNITY PROPERTY

sectarian educational institution has been upheld in an action by the wife after the husband's death, upon the theory that consideration was had by the husband (certainly not by the community) because of the use of the property for a purpose in which he was interested.\(^\text{105}\) Whether a wife may use this limitation to her advantage during the existence of the community in California has not been adjudicated.\(^\text{106}\)

The husband may not sell or otherwise dispose of the community by fraud to injure his wife and she has her action against the heirs of her husband in support of her claim in one-half of the property, upon satisfactorily proving the fraud.\(^\text{107}\) The relief is not available however, until the dissolution of the community has occurred or begun "however suspicious the transaction may appear."\(^\text{108}\) This provision is similar to the California\(^\text{109}\) safeguards though perhaps stronger, as an injunction may be had by the wife to prevent disposal, after proceedings for divorce are filed but before final decree.\(^\text{110}\) The fraudulent disposal prevention was not mentioned in Mr. Justice Holmes' opinion in the Robbins case except indirectly by the statement that the husband "may spend it [the community] substantially as he chooses and if he wastes it in debauchery the wife has no redress." In regard to the article prohibiting gifts of real estate and preventing fraudulent disposal under the conditions outlined above, the Louisiana Supreme Court has said:

"The proviso of Art. 2375\(^\text{111}\) cannot be construed as giving or recognizing a title to or in the wife. As well might it be said that children have a title in the property of their father, because he is prohibited from disposing of it in fraud of their legitime."\(^\text{112}\)

The obligation to support is very similar to that of California.\(^\text{113}\) The Code speaks of the husband and wife owing "to each other mutually fidelity, support and assistance."\(^\text{114}\) The wife may in some instances pro-

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\(^{106}\) Spreckels v. Spreckels (1916) 172 Cal. 775, 158 Pac. 537; Winchester v. Winchester (1917) 175 Cal. 391, 165 Pac. 965; Dargie v. Patterson (1917) 176 Cal. 714, 169 Pac. 360.


\(^{108}\) Tourne v. Tourne (1836) 9 La. 452.

\(^{109}\) Van Maren v. Johnson (1860) 15 Cal. 308; Greiner v. Greiner (1881) 58 Cal. 115; Cummings v. Cummings (1887) 2 Cal. Unrep. 774, 14 Pac. 562.


\(^{111}\) Code of 1825, now art. 2404, Merrick's Code of 1925.

\(^{112}\) Quive v. Lawrence (1847) 2 La. Ann. 226, 228.

\(^{113}\) Supra note 68.

\(^{114}\) Civ. Code La. art. 119.
cure necessaries at the expense of the husband\textsuperscript{115} if she can find some one to credit her or she may prosecute him under the statute.\textsuperscript{110} This support has no relation, clearly, to the wife's interest in the community and the husband's obligation is not so based, as the husband is responsible by virtue of the marriage relation and there is no discrimination made as to whether his separate property or community property, if any, is assailed for this support.

In Louisiana the wife's creditors whether before or after marriage may not resort to community property for payment,\textsuperscript{117} so that there is not even the protection afforded them by California\textsuperscript{118} when they are premarital ones. The husband's creditors both before and after marriage may avail themselves of the community property and the community creditors may resort to the husband's separate estate.\textsuperscript{110}

The wife has absolutely no control over the community property or income during the existence of the community. She may not alienate or expend it in any way. The husband is indeed "head and master"\textsuperscript{119,120} of the community as the Code expresses it, in fact as well as word. Indeed, the expression of the Supreme Court of the United States\textsuperscript{121} regarding the system in Porto Rico, as would be expected, is a very fitting one for the Louisiana concept of the regime.

"The very foundation of the community and its efficacious existence depends on the power of the husband, during marriage, over the community, and his right, in the absence of fraud or express legislative restriction, to deal with the community and its assets as the owner thereof."

The wife is not a necessary or proper party to a suit involving community property and she may maintain no action respecting the community during its existence,\textsuperscript{122} except that she may file suit\textsuperscript{123} to protect her interests prior to final decree of divorce, which was not permitted her in California. Divorce or separation must be imminent, however, for no protection as to gifts or fraud is available during the existence of the community.

In Louisiana the wife has always had the right of testamentary dis-

\textsuperscript{115} Van Horn v. Arantes (1906) 116 La. 130, 40 So. 592.
\textsuperscript{116} Act 34 of 1902.
\textsuperscript{118} Supra note 66.
\textsuperscript{120} Civ. Code La. art. 2404.
\textsuperscript{121} Garrozi v. Dastas (1906) 204 U. S. 64, 79, 27 Sup. Ct. 224, 227.
\textsuperscript{123} Supra note 110.
position of her half of the community and upon her decease prior to that of her husband, her half vests in her legal heirs in absence of a will, or if forced heirs, their legimate vests in any event.124

The Louisiana courts have uniformly held that the wife is not liable for inheritance tax on her half of the community, when the husband dies first125 and the Federal courts have not charged her an estate tax,126 though of course estate taxes are excises levied under the original taxing power conferred by the Federal Constitution and have no reference to the income tax authorized by the Sixteenth Amendment.127 As a matter of common knowledge as well as from many conflicting decisions, it is clear that taxation being "eminently practical"128 is simply a policy of the sovereign and in instances pertinent to this discussion, it makes no difference whether the estate taxed at death was vested or not.129 If Louisiana had wished to favor the wife as she does in all of her jurisprudence wherever possible, she could have done so without declaring in conflict with every statute and decision in the state, that the wife's interest was vested when the statutes show that it only vests upon the happening of the dissolution of the community, an event certain to happen, but not certain to happen while the estate is in existence.130 Louisiana could have relieved the wife of the payment as has been done in some states as to dower by stating simply that the property went to her by right by virtue of the law.131

Upon a divorce, the court has no discretion but to divide the community equally between the spouses,132 though until quite recently133 the wife's failure to claim her half upon divorce, regardless of whose fault, within thirty days after the final decree would be considered a renunciation upon her part134 of any interest in the community. This was never the case with the husband, because already having the estate, there was naturally no need for him to claim it and if the wife did not assert her right upon dissolution of the community, the title and estate simply stayed where it had always been, in the husband. If the wife had a vested estate during the existence of the community, then how could she

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125 Succession of Marsal (1907) 118 La. 212, 42 So. 778; Coreil's Estate (1915) 137 La. 702, 69 So. 145.
129 Infra notes 211-214.
130 Tiffany, REAL PROPERTY (2d ed. 1920) 136.
131 Infra note 208.
134 Civ. Code La. art. 2420.
be denied the right to her own simply by the lapse of as brief a period
as thirty days with no penalty present or anything of the kind? This
would undeniably have been lack of due process and fought on that
ground or some other basis during a period of one hundred and twenty
years as it would have been an intolerable situation. If the wife’s right
was vested then her mere silence for thirty days could not leave the title
in the husband to be passed on incontestably.

Again, if the wife has a vested estate during the existence of the
community, how can she be said to “accept” what is already hers? Since
1926, the divorced wife is undeniably in the same situation as a widow. She
may renounce her portion whatever the means of dissolution of
the community, if she sees fit and so escape all liability, or she may
accept with benefit of inventory and so protect her separate estate
from the debts of the community should it prove to be insolvent as
well as prevent any loss by “confusion” if she was a creditor of the
community. The act says:

“That at the dissolution for any cause of the marriage community
it shall be lawful for the wife to accept the community of acquets and gains
under the benefit of inventory, in the same manner and with the same
benefits and advantages as heirs are allowed by existing laws to accept a
succession under the benefit of inventory.”

If the interest of the wife is already in her as a present estate, how
can she be said upon renunciation to simply leave it in the husband
where it has always been, yet the court has decided this after the inheri-
tance tax decisions as well as before. How can it be that the wife can
have a period of deliberation in order to decide whether she will accept,
to take an inventory, to accept with benefit of inventory just as does
the heir, if the estate is already vested in her? On the contrary, the court
clearly states that this is a period of suspension, while the interest stays
in the husband at divorce, or his estate, before vesting irrevocably in the
wife. More conclusively, do the wife’s heirs get the half of the com-
munity when she renounces? The court has decided in forceful language
that they do not. In a case of renunciation by the wife or her heirs should
not the husband pay an inheritance tax?

A putative wife has the same benefit that California gives in that
she too is awarded half of the acquets and gains, just as would have been
the case had there been a legal establishment of community.

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137 Act 4 of 1882; Davie v. Carville (1903) 110 La. 862, 34 So. 807.
139 Larose v. Naquin (1922) 150 La. 353, 90 So. 676.
140 Fabre v. Hepp (1852) 7 La. Ann. 5; Jacob v. Falgoust (1922) 150 La. 21,
90 So. 426.
141 Civ. Code La. art. 117.
The only penalty in division, for misbehavior, is the extreme one meted to the husband who is a bigamist when his half of the community is given to the putative wife in good faith, the legal wife receiving the other half. This law is taken directly from the Spanish.\textsuperscript{142}

The wife in Louisiana has a privilege denied to the husband\textsuperscript{143} of bringing the community to an end, without altering the marriage relations by means of an action for separation of property\textsuperscript{144} but this privilege may only be exerted when the husband's affairs\textsuperscript{145} are in disorder and her dotal or separate property\textsuperscript{146} or future\textsuperscript{147} acquisitions would be endangered. As a matter of fact, when the action is allowed, usually there is no solvent community and hence virtually no community property so that the action seems to have been given particularly for the use of wives whose husbands were administering their property, who owed them, and for women who were conducting an industry the proceeds of which were falling into an insolvent community. In one instance a wife applied to have the community dissolved because of the fact that the husband was gambling to the extent of ten thousand a year by maintaining a racing stable. The court refused her, saying that this was but his recreation which he could afford.\textsuperscript{148} There is no case where this action was brought to protect rights in a solvent community which was being dissipated.

At the dissolution of the community by the judgment for a separation of property, the presumption is that the wife intends to renounce the community. "A suit for separation of property implies relinquishment of the community."\textsuperscript{149} She may, however, "accept . . . if it be to her interest so to do."\textsuperscript{150} Here again it is clearly shown that there can be no vested right in the wife to the property of the community or why the necessity to "accept." By virtue of what does the husband retain owner-
ship and title if there was a vested right in the wife? The wife may not maintain an action for waste nor for an accounting.\(^{151}\)

The outstanding differences in the law of Louisiana from that of California as considered in the *Robbins* case which might be urged to put Louisiana in a different class as to the nature of the wife's interest are that the wife may dispose by testament of her share, that it will vest in her heirs at dissolution without a will, that the state does not require inheritance taxes.

The point has been discussed previously, regarding inheritance taxes. Both states divide the community equally when dissolved by divorce, except in the case of penalties, which in California may be exacted of the guilty spouse, in Louisiana only of the bigamous husband; both states divide the community equally when dissolved by death of the husband and both states prevent testamentary disposal by the husband dying first of the wife's share of community property but in California the wife's half does not become the property of her heirs either by testament or otherwise when the community is dissolved by the death of the wife, while in Louisiana it does. This point is probably the unimpeachable difference, irrebuttable upon any theory, which stands out for the wife's ownership in Louisiana.

In considering the second line of reasoning of the *Robbins* case, if that case really decided not the nature of the wife's interest, unless incidentally, but that the laying of income tax depends upon the husband's complete possession and control except for California's limitation upon the making of gifts, which Louisiana has only to a lesser degree, the husband's dominion in Louisiana is equal to if it does not exceed that of California.

The Supreme Court of the United States decided on November 24th, 1930,\(^{152}\) that inasmuch as the wife in Louisiana had a "present vested interest in community property equal to that of her husband," the spouses are entitled to file separate returns in paying their income taxes. In reaching that decision Mr. Justice Roberts, the writer of the opinion, states that "ownership of the community income" is the test and that "the decisions of the Supreme Court of Louisiana clearly recognize the wife's 'ownership of one-half of the community income' and that 'they unequivocally declare that the wife's half interest in such community property 'is not a mere expectancy during the marriage'." One case is cited for substantiation of these broad statements, namely, the *Phillips* case, the dictum of which has been discussed in this paper. The only other Louisiana cases cited deal with the matter of the right of the wife

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\(^{151}\) Succession of Boyer (1884) 36 La. Ann. 506; Frierson v. Frierson (1927) 164 La. 687, 114 So. 594.

to get a separation of property which dissolves the community which may only be done as we have seen when the husband is financially embarrassed and which was instituted for the purpose of protecting the wife's separate property. There are no cases where this action has been allowed because as Mr. Justice Roberts expresses it the husband has proved himself to "by reason of financial difficulties or the like" to be an "unfit manager" of the community. The only time the action is allowed is when the husband is practically insolvent and since his assets and those of the community are available for his debts just what bearing this has upon the wife's present interest in community income does not reasonably appear. Mr. Justice Roberts says further: 153

"In conclusion it may be noted that the Supreme Court of Louisiana has cited our own decisions in Warburton v. White, 176 U. S. 484, 20 S. Ct. 404, 44 L. Ed. 555, and Arnett v. Reade, 220 U. S. 311, 31 S. Ct. 425, 55 L. Ed. 477, 36 L. R. A. (n.s.) 1040, indicating that the exposition of the wife's rights and of the nature of the community therein contained correctly states the Louisiana doctrine."

In what connection the Louisiana court cited these cases does not appear. In the first case cited, a Washington controversy, Louisiana's own Chief Justice White, who has so convincingly expressed himself as believing that the wife in Louisiana did not have a vested interest 154 wrote the opinion and in the second, from New Mexico, Mr. Justice Holmes, the author of the opinion of the Robbins case, spoke for the Court.

The very superficiality of the treatment of the problem of the nature of the wife's interest suggests a "policy" decision in conformity with that of the three others decided of even date. 155 While Louisiana legal history and precedent were denied in the writer's opinion, unquestionably the trend of economic and social life was followed and for that reason the decision for Louisiana may be gratifying but so far as the old academic problem of the nature of the wife's interest is concerned certainly this opinion adds nothing to the solution.

Possibly the next step in community systems, toward a real present estate for the wife is the regime of Texas. The laws on this subject from that state are more of a hybrid, are patch worked to a greater degree and are harder to analyze than either group of the previously outlined provisions.

Texas secured to her people the benefits of a community property regime by incorporating a provision for it in the first constitution 156 of

153 Ibid.
154 Infra note 242.
155 Supra note 7.
156 Adopted March 17th, 1836.
the Republic and later in the first constitution of her statehood\textsuperscript{157} thus carrying on the Spanish law brought into the territory from Mexico.\textsuperscript{158} With unsubstantial constitutional changes and necessary legislative elaboration the provisions for community property down to 1917 were as to the composition of that fund that the property of the respective spouses acquired before marriage and that after marriage (together with the increase, not income) by "gift, devise or descent" was separate and all other acquisitions, naturally including earnings and income were to be community property.\textsuperscript{159} "The Texas statutes, during the period of more than seventy years, committed to the husband exclusive control and management of the wife's separate property and deprived her even of the right to dispose of the same, except with his joinder in the conveyance."\textsuperscript{160}

In accord with the general trend to emancipate married women, Texas, in a series of acts,\textsuperscript{161} then gave to the wife the power to manage and dispose of her separate property, a right which she had from the beginning in Louisiana if she desired it.\textsuperscript{162} Texas still\textsuperscript{163} requires joinder by the husband in conveying real estate belonging to the wife, a disability long since removed in Louisiana.\textsuperscript{164} Since the income from her separate property fell into the community fund, the wife's emancipation resulted in giving her the control of a part of the community property inadvertently or otherwise. This was fought as derogating from the right of the husband to control community funds but was upheld under a theory of agency which had given the husband statutory control which being taken away did not injure any rights of ownership in him. The legislation of 1917 and 1921 which went to greater lengths and attempted to give to the spouses respectively as their separate property the income from their separate estates was found to interfere with the constitutional provisions regarding community property previously referred to, as to the wife's income. While the similar provision dealing with the income of the husband was not passed upon, it would seem impossible without radical reversal for any other conclusion to be reached.\textsuperscript{165}

\footnotesize{\textsuperscript{157}Tex. Const. (1845) art. 7, §19.}
\footnotesize{\textsuperscript{158}Schmid, The Civil Law of Spain and Mexico (1851).}
\footnotesize{\textsuperscript{159}See Act of March 13th, 1848, §§2, 3; Tex. Civ. Stat. art. 4613, 4614, 4619.}
\footnotesize{\textsuperscript{160}See brief as to community incomes in Texas and the income tax liability to which such incomes are subject under the revenue laws of the United States before the Attorney General of the United States, April 15, 1926, by Baker, Botts, Parker & Garwood, Fullbright, Brooker & Freeman, Thompson, Knight, Baker & Harris.}
\footnotesize{\textsuperscript{161}Act, March 13, 1911; Act, March 21, 1913; Act, April 4, 1917.}
\footnotesize{\textsuperscript{162}Civ. Code La. art. 2384. See art. 2361 Code of 1825; Code Napoleon art. 1576.}
\footnotesize{\textsuperscript{163}See Tex. Civ. Stat. art. 4614.}
\footnotesize{\textsuperscript{164}Acts of 1855; see Civ. Code La. arts. 127, 128, 129; Act 94 of 1916; Act 244 of 1918; Act 219 or 1920; Act 34 of 1921; Act 132 of 1926; Act 283 of 1928.}
\footnotesize{\textsuperscript{165}Arnold v. Leonard (1925) 114 Tex. 535, 273 S. W. 799; see Tex Const. art. 16, §15.}
The obvious intent of the complete legislation was to segregate the estates with their earnings to each spouse and to give each the control of his own, with a third fund, community, still in the complete power and control, as it had always been, of the husband. The upholding of a part of the legislation, that dealing with control, and the negativing of the part which purported to increase the separate estates resulted in giving the wife control of such part of the community fund, the income from her estate, as had been intended to actually become a part of her separate estate. Since June 10th, 1925, or the decision of Arnold v. Leonard, the Robbins case being decided in January of 1926, the income from the wife's separate estate as a portion of the community property is within the control of the wife. Through the same process, with a view to protecting the wife's separate property, the income of the wife's estate, together with her earnings is not subject to the husband's debts. On the other hand, his separate property and the community property, except the wife's earnings and income from her separate estate is not subject to her debts except for necessaries for herself and children and as for those, both his separate estate as well as the community property are subject. Damages for personal injuries are the separate property of the wife.

But for the timely decision of Arnold v. Leonard then, the wife would have been able to bind the community property only for necessaries, for which the husband's estate would also have been liable, with a further protection for her creditors in her earnings if any.

There is no restriction upon the husband's power to make gifts as found in California and Louisiana but the courts will protect her, as is usual, in flagrant cases of fraud, as in the other two states.

Since the husband's separate estate as well as the community is liable for the satisfaction of those crediting the wife with necessaries the liability for support, as in the other two states, is in fact based upon the marital relation rather than upon the wife's present ownership of community property.

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166 Speer, Law of Marital Rights in Texas §112.
167 Whitney Hardware Co. v. McMahon (1921) 111 Tex. 242, 231 S. W. 694; see Gohlman v. Whittle (1923) 114 Tex. 548, 273 S. W. 808; Cauble v. Beaver (1925) 115 Tex. 1, 274 S. W. 120.
169 Ibid., 4613.
170 Ibid., 4623.
171 Ibid., 4615.
"The community property and the separate estate of the husband may also be made liable for necessaries for the wife, if anyone can be found to furnish them, but this at best uncertain means of relief wholly fails where no such property exists."\(^{174}\)

The husband's creditors both before and after marriage may resort to the community property for payment except as to the two items mentioned above.\(^{176}\)

Since the wife cannot contract in regard to community property, she is not a necessary person to a suit against it, except when necessaries to herself and children are involved, though she may sue to protect her interest when divorce is imminent, as in Louisiana and when the income of her separate property is incidental to her contract regarding her separate estate.\(^{176}\) In both of these cases the husband and wife must be joined.\(^{177}\) While *Arnold v. Leonard*\(^{178}\) actually decided that the income from the wife's estate could be exempted from liability for payment of the husband's debts though still remaining a part of the community property, the effect of the decision seems to be that as to that item of community property the wife takes control of these sums, though she must share this control with her husband because of the other un repealed statutes so as to this item they have a sort of joint control.

Furthermore, in spite of the upholding of the exemption of the wife's income from debts of husband, the court on the same day held her to her contract in regard to a cotton transaction, her husband acting as her agent, thus virtually carrying out the intent of the legislature to simply segregate her estate, its income, and its obligations.\(^{179}\)

On dissolution of the community by divorce, the assets are divided equally except for certain equitable discretion left to the court,\(^{180}\) as was found in California and to a limited degree in Louisiana.\(^{181}\)

"Upon the dissolution of the community by death, all property belonging to the community estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased, or their descendants; but if there be a child or children of the deceased or descendants of such child or children, then the survivor shall be entitled to one

\(^{174}\) Dority v. Dority (1903) 96 Tex. 215, 225, 71 S. W. 950, 955.
\(^{176}\) Arnold v. Leonard (1925) 114 Tex. 535, 273 S. W. 798; Gohlman, Lester & Co. v. Whittle (1925) 114 Tex. 548, 273 S. W. 808.
\(^{178}\) (1925) 114 Tex. 535, 273 S. W. 799.
\(^{179}\) Gohlman, Lester & Co. v. Whittle (1925) 114 Tex. 548, 273 S. W. 808.
\(^{181}\) Supra notes 71, 142.
half of said property, and the other half shall pass to such child or chil-
dren, or their descendants.”

This provision is unlike that of California as in the event of the
husband's prior decease the wife gets the entire estate, while in California,
she would get one-half, while should she die first, the husband would get
it all.

The last point is an outstanding difference in the law of Texas from
that of California. As to control, if the late legislation and Arnold v.
Leonard is considered, the wife has at least a joint control over one
element of the community property.

The case of Hopkins v. Bacon also decided upon November 24th,
1930, announced that in Texas the wife has a vested interest in com-
munity property and is entitled to make separate returns for one-half of
the community income. The opinion by Mr. Justice Roberts is very brief
and is based principally upon Arnold v. Leonard and upon the cases
holding that if the husband as agent for the community acts in fraud
of the wife's rights, she is "not without remedy in the courts." The court
seemed less certain perhaps of the logic in what they found the state
courts to have decided, as Mr. Justice Roberts said:

"The statutes provide, as is usual in States having the community
system, that the husband shall have power of management and control such
that he may deal with community property very much as if it were his
own. In spite of this, however, it is settled that in Texas the wife has a
present vested interest in such property."

The laws of Nevada necessary for this comparison are practically
identical with those of California, some of the provisions having been
"copied" as the court points out from the California provisions so
that a reiteration would be but repetition. To arrive at a different
conclusion then by deductions from the statutes would be impossible.
However, as early as 1916, at a time "not suspicious" the Supreme Court
of Nevada decided that a wife did not have to pay an inheritance tax on
the half of the community estate coming to her of right at the husband's
death and they decided this with the California decisions before them
and especially upon the theory that the wife's interest "while it should
remain in a sense indistinguishable during the existence of the community
was nevertheless a property interest of which she was, all the time,
possessed," feeling that California was wrong in her theory as to the
nature of the wife's interest. An interesting thing about the decision is
that much of the argument is placed upon the fact that even dower

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185 In re Williams' Estate (1916) 40 Nev. 241, 161 Pac. 741.
interests do not in some jurisdictions necessitate the paying of an inheritance tax by the wife, which the widow takes "by operation of law."

"We are unwilling to accept what we deem an inconsistency which would hold that, while on the one hand, the husband could not deprive the wife of her interest by testamentary disposition, and that, as illustrated in the case at bar, no provision or mention need be made in a will or testament as to the disposition of that one-half of the community property which, under the law, goes to the wife, yet, on the other hand, she can be regarded as taking this property only as an expectant heir."187

If the United States Supreme Court will indeed accept the theory of ownership of the wife as enunciated by the same court, as of course it will in the light of the decisions of 1930, then Nevada will certainly get into the "vested interest" category. The Nevada court in the same case, however, admitted the husband's control, concluding that it was not adverse to the wife's ownership, and the control is absolute, except for a homestead restriction and a reserving to the wife of the control of her "earnings and accumulations" together with those of her minor children living with her,188 when they are "used for the care and maintenance of the family." Nevada tax payers then will win on a different theory and interpretation of the same law, as the "second line of reasoning" of Mr. Justice Holmes' opinion in the Robbins case will evidently not be disturbing since the four decisions of November, 1930.

In New Mexico189 the composition of the community is virtually the same as that of California, as considered in the Robbins case. The provisions regarding disposition of the community at the dissolution by death are also practically the same.190 There is the usual limitation upon the husband's disposal by gift. The homestead is protected,191 and fraudulent disposition is prevented.192 In 1919 the Supreme Court of New Mexico decided that that state was not governed by the old Spanish-Mexican law except in so far as it had definitely been adopted by statute so the wife did not lose her one-half of the community because of her adultery and took her part as of right when the community was dissolved by divorce. In order to arrive at this decision they interpreted the laws as giving the wife an "existing, present interest" during the existence of the matrimonial status; for, says the court, "if she had no interest in the property during the existence of the community, but simply an expectancy which would ripen into an interest only upon the death of the husband, and which expectancy continued only during the exist-

187 In re Williams' Estate (1916) 40 Nev. 241, 261, 161 Pac. 741, 747; see Wright v. Smith (1885) 19 Nev. 143, 7 Pac. 365.
190 Ibid. §1841.
191 Ibid. §2766; but see amendment of 1915 to §2766.
ence of the marital status, this expectancy interest would be cut off by
the divorce decree" and this the statutes provide against.\textsuperscript{103} This argu-
ment was urged unavailingly in the brief for the California tax payers.

So far, as to ownership on the basis of the Robbins decision, New
Mexico is not in a distinguishable position but despite the fact that the
decision of Arnett v. Reade by the Supreme Court of the United States
was not noticed in the Robbins case which was decided solely upon state
decisions, it will certainly be important in the New Mexico test suit on
the income tax for the wife's interest could hardly be vested as to the
due process clause and not vested in regard to income tax purposes. How-
ever vague are Mr. Justice Holmes' statements as to just what interest
the wife had in New Mexico in Arnett v. Reade and despite the fact that
the case really decided only that limitations upon the husband's control
could be further extended, he definitely refers to this decision in the
Robbins case as having accorded a vested interest to the wife.

The second line of reasoning, even if it were considered, as to control,
is met at least to an extent in New Mexico by the amendment of 1915
which requires the wife to "join in all deeds and mortgages affecting
real estate" that is community property and making "any transfer or
conveyance attempted to be made of the real property of the community
of either husband or wife alone . . . void and of no effect."\textsuperscript{104} A joint
control is thus achieved as to real estate anyway which together with
the decision of Arnett v. Reade should put New Mexico in even a more
favored position from the standpoint of the taxpayers.

In Arizona the composition of the community is virtually the same
as in California with a reservation to the wife of her earnings while living
apart from her husband.\textsuperscript{105}

The limitation upon the husband's control, however, is like that of
New Mexico, with an exception from the joint control of certain mining
claims.\textsuperscript{106}

Prior to 1913,\textsuperscript{107} the provision for disposition of the fund when the
community was dissolved by death was that of survivorship in the
absence of issue and while this provision was in force the Supreme Court
of Arizona in arriving at a decision that the wife took her one-half by
right at the husband's death and did not have to "elect" under a will
which left her one-half, based this holding upon the theory that the
wife has not an expectancy but a vested right in her share of the com-
community during its existence. While they reached this decision in direct

\textsuperscript{103} Beals v. Ares (1919) 25 N. M. 459, 185 Pac. 780.
\textsuperscript{105} Ariz. CIV. Code (1913) art. 3850.
\textsuperscript{106} Ibid. arts. 2061, 3850.
\textsuperscript{107} Ibid. art. 2124.
opposition to the California conclusion so far as the disposition at death was concerned, an additional basis for the decision, lacking in California law, was the joint control of real property which was considered with due weight, as were the comparisons made by Reeves to a tenancy by the entirety and a tenancy in common.\textsuperscript{198} Since 1913, Arizona has provided that but one-half of the community shall go to the wife by right upon the husband's prior decease, which is the California method.\textsuperscript{199} Regardless of the effect of this change, the decision of the test suit\textsuperscript{200} in the district court went in favor of the taxpayers, as however, was to be expected. Because of the legislative addition of 1913 and the lack of a decision as weighty as \textit{Arnett v. Reade}, Arizona could scarcely be said to have been in as favorable a situation for the ultimate conclusion as is New Mexico, but she had the advantage of a definite long standing adherence to the vested theory on the part of her courts and the very persuasive element of joint control. In \textit{Goodell v. Koch}, the Supreme Court of the United States, readily found that the wife had a vested interest in the community, but based their decision upon the likeness of Arizona laws to those of Washington.

In Idaho the composition of the community differs from that of California only in that the rents and profits of the separate estates of the spouses fall into the community\textsuperscript{201} but the control is more definitely "joint" even than in New Mexico\textsuperscript{202} and Arizona,\textsuperscript{203} as in Idaho, not only is the limitation on disposal of real estate without joint concurrence found\textsuperscript{204} but to the wife is also given the management and control of her earnings for her personal services and of the rents and profits of her separate estate.\textsuperscript{205} While the older statute as to disposition at death was patterned on the law of California so that a decision similar to those of California was reached in the case of \textit{Hall v. John},\textsuperscript{206} since 1907, at the dissolution of the community by death, one-half goes to the survivor\textsuperscript{207} as is the case in Louisiana.\textsuperscript{208} The Supreme Court of Idaho in the case of \textit{Kohny v. Dunbar}\textsuperscript{209} in deciding that the wife did not have to pay

\textsuperscript{198} \textit{La Tourette v. La Tourette} (1914) 15 Ariz. 200, 137 Pac. 426.
\textsuperscript{201} Idaho Comp. Stat. (1919) arts. 4655, 4659.
\textsuperscript{202} Supra note 194.
\textsuperscript{203} Supra note 196.
\textsuperscript{204} Idaho Comp. Stat. (1919) art. 4666.
\textsuperscript{205} Idaho Comp. Stat. (1919) art. 4667, enacted 1915.
\textsuperscript{206} (1909) 17 Idaho 224, 105 Pac. 71; see Glover v. Brown (1919) 32 Idaho 426, 184 Pac. 649.
\textsuperscript{207} Idaho Comp. Stat. (1919) art. 7803.
\textsuperscript{208} Supra note 124.
\textsuperscript{209} (1912) 21 Idaho 258, 121 Pac. 544.
inheritance tax on the half which came to her of right under this statute, based their decision on the theory that the wife had a vested interest during the existence of the community and hence did not take as heir. This was the position of the Louisiana court in reaching the same conclusion under their similar statute in the matter of state inheritance tax. Again it might be said that the surviving wife could be relieved of the payment of an inheritance tax without the finding of a present, real interest in the wife during the existence of the community, which does not necessarily follow because one-half definitely vests at the happening of the event of dissolution of the community. Even a dower interest which certainly is not vested during marriage does not always necessitate an inheritance tax, though such a tax may be imposed. One who takes as survivor in an estate held by tenants by entirety may be taxed as death is the "generating source."

Idaho, like New Mexico, more consistently bases the right to the half upon divorce on a present vested interest during marriage, not divested by divorce, not admitted by California nor by Louisiana.

Idaho occupies a better position as to wife's ownership than California because of her statute on disposition of the community at dissolution by death and than Louisiana because of the absence of such conclusive statutes as to "acceptance" and "renunciation."

As to control she is in a better position, as was pointed out, even than New Mexico and Arizona, and is in of course an entirely different category from California and Louisiana, where control is in the husband. In the light of the late decisions the issue on income tax is, of course, a foregone conclusion.

Washington has always conceded given the most definite interest to the wife and has been the most consistent in doing so of any of the community property states.

The community is composed of the earnings of both husband and wife, except for the earnings of the latter for her personal labor when living apart from the husband, the accumulations thereof, and the proceeds of the investment of community property. The separate property of each spouse is such pecuniary rights as were owned before

210 Supra note 125.
211 Randall v. Kreiger (1874) 90 U. S. (23 Wall.) 137.
212 In re Sanford (1912) 91 Neb. 752, 137 N. W. 864; Estate of Strahan (1913) 93 Neb. 828, 142 N. W. 678; In re Williams' Estate (1916) 40 Nev. 241, 161 Pac. 741; In re Weiler (1910) 122 N. Y. Supp. 608; Avery's Estate (1859) 34 Pa. 204; Ross, Inheritance Taxation 83.
213 Billings v. People (1901) 189 Ill. 472, 59 N. E. 798.
216 (1921) 32 Or. ATT'Y GEN. 435.
marriage, such property as is acquired after marriage by gift, bequest, devise or descent. The income from the separate estate belongs also to the spouse owning it.\textsuperscript{218} The composition then, of the community is practically the same as is that of California.\textsuperscript{219}

The husband is prevented from giving away the community property,\textsuperscript{220} as in California and furthermore is limited in his expending of the community personalty in debauchery, at least to the extent of not being permitted to present a mistress with an automobile.\textsuperscript{221} As for control of real estate, the wife must join in the instrument making the conveyance or creating a lien or encumbrance\textsuperscript{222} as is the case in New Mexico, Idaho, and Arizona\textsuperscript{223} and was clearly not the case in California as far as the Robbins case is concerned.

The husband as is true everywhere has in general the management and control of the community real property and “the management and control of community personal property with a like power of disposition as he has of his separate personal property except that he shall not devise by will more than one-half thereof”\textsuperscript{224} with the limitations above mentioned so that in fact the wife may not expend the community property and her creditors may not resort to it.\textsuperscript{225}

Support for the wife and family and the education of the children is indiscriminately chargeable against the property of “both husband and wife, or either of them” so there is no necessary connection between this sort of provision and the nature of the wife’s ownership in the community.\textsuperscript{226} Separate obligations of neither may be satisfied out of the community property.\textsuperscript{227}

With the limitation upon the husband’s power to dispose of community realty, it would naturally follow that the wife is a necessary party to a suit involving real property.\textsuperscript{228} As to personality, the wife is in some cases joined with the husband in order to estop her from later asserting that the property was her separate property.\textsuperscript{229}

\textsuperscript{218} \textit{Ibid.} §§6890, 6891.
\textsuperscript{219} \textit{Supra} note 60.
\textsuperscript{220} Stewart v. Bank of Endicott (1914) 82 Wash. 106, 143 Pac. 458; Schramm v. Steele (1917) 97 Wash. 309, 166 Pac. 634.
\textsuperscript{221} Marston v. Rue (1916) 92 Wash. 129, 159 Pac. 111.
\textsuperscript{222} \textit{WASH. COMP. STAT.} (Remington 1922) §6893.
\textsuperscript{223} \textit{Supra} notes 191-201.
\textsuperscript{224} \textit{WASH. COMP. STAT.} (Remington 1922) §6892.
\textsuperscript{225} But see Fielding v. Ketler (1915) 86 Wash. 194, 149 Pac. 667.
\textsuperscript{226} \textit{WASH. COMP. STAT.} (Remington 1922) §6906.
\textsuperscript{227} Crawford v. Morris (1916) 92 Wash. 288, 158 Pac. 957; Olive v. Meek (1918) 103 Wash. 467, 175 Pac. 33; Coles v. McNamara (1924) 131 Wash. 691, 231 Pac. 28.
\textsuperscript{228} Littel & Smythe Mfg. Co. v. Miller (1892) 3 Wash. 480, 28 Pac. 1035.
\textsuperscript{229} Brotton v. Langert (1890) 1 Wash. 73, 23 Pac. 688; McDonough v. Craig (1894) 10 Wash. 239, 38 Pac. 1034; Allen v. Chambers (1897) 18 Wash. 341, 51 Pac. 478; Day v. Henry (1914) 81 Wash. 61, 142 Pac. 439; Wilson v. Stone (1916) 90 Wash. 365, 156 Pac. 12.
Upon the dissolution of the community by death, the survivor takes half as of right just as in Idaho and Louisiana and pays no inheritance tax. Naturally the wife has testamentary disposition of her share.

Upon dissolution of the community by divorce each spouse ordinarily takes half, though the court has discretionary powers in this division, and "the title does not remain in abeyance" as it may in Louisiana. While by statute Washington was not to any substantial extent in any more favorable a position than the other states which give negative control to the wife, plus half to the survivor, she had the advantage of a long line of consistent decisions declaring that the wife has a present interest in the community during its existence, the theory being that of an "entity", the ownership being in neither husband or wife but in this fictitious being, the community, and like New Mexico she had the advantage of a United States Supreme Court decision, *Warburton v. White*, holding that under the state's laws and decisions the statute of 1871 limiting the husband's hitherto absolute right of disposal of real estate did not deprive him of property without due process, as it did not increase the estate of the wife, or deprive the husband of any estate, as each had always had one-half, and only the manner of conveyance had been changed.

As was to have been expected, the Supreme Court of the United States in *Poe v. Seaborn*, decided on November 24th, 1930, that the wife had an interest equally vested with that of the husband. The contention that control of the husband in Washington is "indistinguishable from ownership" was met with the reply that "public policy demands that in all ordinary circumstances, litigation between wife and husband during the life of the community should be discouraged" and that "power is not synonymous with right." The "uniformity" contention was answered by the statement that "constitutional requirement of uniformity is not intrinsic, but geographic." This opinion gives evidence of real consideration of the question and is the least disappointing in the four of the series. It may be that the Washington matter was really weighed on the basis of the nature of the wife's interest and that since it was first presented the court failed to make any distinction in the following cases.
because of policy and press of time and knowing that California had already acted in the matter it was easier for administrative purposes and otherwise to lump all community property states in the same category.

In those states where a joint control of sorts is in the wife, the court might still have asserted without danger of serious rebuttal that this control is of a purely negative variety, and worth little more than the limitations against gifts and fraud unavailing in California. In the case of Garrozi v. Dastas\textsuperscript{238} which went to the Supreme Court of the United States for consideration of the rights of a wife in community property, after dissolution of the community by divorce, the Court said:

"True it is that in the Porto Rican Code of 1902 there was inserted a provision, previously commented on (Sec. 1328) limiting the power of the husband to dispose of the immovable property of the community without the consent of the wife. But this express limitation as to one particular class of property, by inverse reasoning, is a reaffirmance of the power of the husband as head and master of the community in all other respects."

In the case of Chase National Bank v. United States\textsuperscript{239} the Court said that the power to dispose of property and to subject it to his debts was by no means the least substantial of the legal incidents of ownership.

If in the interest of uniformity as well as of governmental sources of revenue the Court had been looking for loopholes, there were yet two in Mr. Justice Holmes' opinion in the Robbins case. First, since in the majority of cases the community property is not available for the community debts of the wife, except in rare cases of an equitable nature\textsuperscript{240} and for necessaries based as everywhere largely on the marital relation and the wife's position socially and economically therein, how is the wife's tax to be collected? If, in Washington the community is truly an entity of which the husband is the acting manager in general will he still not have to pay the tax for this entity, not for the wife or himself as individuals?

Second is this statement: "The reasons for holding him are at least as strong as those for holding trustees in the cases where they are liable under the law." Granting that the community is not in fact a trust,\textsuperscript{241} this comment by Mr. Justice Holmes only mildly suggests that the reasons are "at least as strong." Since it would have been so easy then for the Court to have decided the other way in any or all of these cases, it is very comforting and reassuring from the taxpayer's viewpoint that the policy as evidenced by the four cases discussed has been announced.

\textsuperscript{238} (1907) 204 U. S. 64, 82, 27 Sup. Ct. 224, 232.
\textsuperscript{239} (1929) 278 U. S. 327, 49 Sup. Ct. 126.
\textsuperscript{240} Knobloch & Rainold v. Posey (1910) 126 La. 610, 52 So. 847; Nance v. Woods (1914) 79 Wash. 188, 140 Pac. 323.
a contribution to the old question of the nature of the wife's interest which will undoubtedly rear its head again in the not distant future, the four cases offer little.

No conclusion is ventured as to what the nature of the wife's interest is in any jurisdiction with such excellent treatises extant rebutting almost every theory; nor is any opinion advanced in the face of so much conflict of opinion and authority, except as to the state of Louisiana, for to feel enough assurance as to the true inwardness of a community property system, one must be “born and bred” in a knowledge of its peculiarities. As to that state, as outlined in the paragraphs dealing specifically with its laws and decisions, the writer regretfully but conscientiously believes with Chief Justice White, one of Louisiana's greatest lawyers, that the wife has, like former California marital partners, but an expectancy so far as the laws, jurisprudence, and historical background disclose. However, in view of the social, economic and financial interests of Louisiana married women it is gratifying that the trend of present day events has reflected itself in the settling, at least for income tax purposes, of this disturbing question by giving to the wife, if she had it not already, a present, vested estate, which is a true “community” settlement and should rebut in part the assertions that the term is a misnomer.

Harriet S. Daggett.

242 Chief Justice White's opinion in Garrozi v. Dastas (1907) 204 U.S. 64, 81, 27 Sup. Ct. 224, 231: “The practical identity of the husband's general authority, as head and master of the community, under the law of Louisiana, the Code Napoleon and the Spanish law was clearly expounded by the Supreme Court of Louisiana, in Guice v. Lawrence, 2 La. Ann. 226, where it was said: 'The laws of Louisiana have never recognized a title in the wife during marriage, to one-half of the acquets and gains . . . The ownership of the wife . . . is revocable and fictitious during marriage. . . .’ The provisions of our Code on the same subject are the embodiment of those of the Spanish law, without any change.”

243 “In Louisiana the civil law theory that the husband is owner during marriage is the accepted theory, and the conception of ownership adopted is that of the civil, not the common law.” McKay, COMMUNITY PROPERTY (2d ed. 1925) §1182.

244 “From the best evidence obtainable it seems reasonably certain that under the Spanish law the husband, during marriage, held the full proprietary right in common property and that the wife had no actual proprietary right whatever.” Ibid. §287.

“California, Louisiana and New Mexico have adhered to the Spanish doctrine that until the dissolution of the community the wife has no proprietary right.” Ibid. §11.

245 4 Pomeroy, WEST COAST REPORTER 380.