Volume 52
Issue 1 *Dickinson Law Review - Volume 52, 1947-1948*

10-1-1947

# Community Property in Pennsylvania

William H. Dodd

# COMMUNITY PROPERTY IN PENNSYLVANIA

WILLIAM H. DODD*

Senate Bill 615, known as the Community Property Bill, was approved by Governor James H. Duff on July 7, 1947, and became effective September 1, 1947. In a statement issued at the time the law was signed Governor Duff said: "I am not unaware that such a radical change in the law of Pennsylvania will cause some confusion and will be the cause of considerable litigation. But the fact that $100,000,000 will be saved to the taxpayers of the Commonwealth is such a vast amount of money, particularly at a time the taxes are generally so onerous, that I believe it is in the interest of the people of the Commonwealth to approve the bill and run the risk of the confusion that will be caused by the new legislation."[1] Thus it appears that the act is primarily a tax minimizing measure in the guise of property legislation.

It is the purpose of the writer to make a general examination of the provisions of the statute to determine as far as possible the characteristics of community property as a new species of co-ownership. The significance of this law from the standpoint of its effect upon taxation is considered elsewhere in this number of the Dickinson Law Review.[2]

If this statute were aimed at reforming our property laws, it would mark a drastic change of policy. For a century legislation has been directed at bringing the wife into a position of equality with the husband so far as independent enjoyment and control of her separate property is concerned irrespective of how or when it was acquired by her. By the series of statutes frequently referred to as the Married Women's Property Acts and revision of the laws pertaining to decedents' estates this objective has been almost attained. For those things which either the husband or the wife acquires during the marriage by other than certain excepted means the community property law substitutes the policy of equal and joint ownership of such gains with the right of control generally in the one in whose name title to the thing stands as statutory agent for the marital community.

## COMMUNITY PROPERTY IN THE UNITED STATES

This concept of ownership by the husband and wife of the marital gains, sometimes described as the ganancial system, is said to have been originated by the Germanic tribes one of which — the Visigoths — introduced it into Spain.[3]

*A. B., Dickinson College; L. L. B., Dickinson School of Law; Professor, Dickinson School of Law; Member, Luzerne County Bar.

1 The Bulletin, Wed., July 9, 1947, p. 1
2See p. 1, supra
3DeFuniak, W. Q., Principles of Community Property, (1943), Vol. 1, p. 25

Its recognition in the written code known as the Fuero Juzgo of 693 A. D. is some indication of its antiquity.[4] From Spain it was carried to Spanish territories in North America. In the more thickly settled areas it took root and continued to exist in varying forms after those regions became states. The old community property states were Arizona, California, Idaho, Lousiana, Nevada, New Mexico, Texas and Washington.[5] In California, Nevada and Texas the system was perpetuated by the state constitutions.[6] In the other states it was continued by statutes of different degrees of comprehensiveness and similarity to the Spanish system.

Stimulated by the desire of securing for its citizens the same favorable federal income tax position as that enjoyed by husbands and wives in respect to their community income in neighboring community property states, Oklahoma by statute in 1939 adopted an elective community system.[7] This elective feature resulted in a decision by the United States Supreme Court in the case of *Commissioner vs. Harmon*[8] denying that a husband and wife who had elected to come under the statute could file returns showing half the income produced by the husband as the wife's in accordance with the practice authorized in the original community property jurisdictions. In 1945 the Oklahoma legislature enacted a community property law patterned after the Texas statutes[9] applicable to husbands and wives generally. The Pennsylvania act copied this statute with only minor changes.[10] Michigan, Nebraska and Oregon have also adopted community property by recent statutes.[11] None of these new community property statutes have received judicial interpretation at the time of this writing with the exception of the Oklahoma act of 1939 which received its first and only construction by the Oklahoma Supreme Court in *Harmon vs. Oklahoma Tax Commission*.[12] No precedent is available to determine what will be the result of the impact of a community property statute such as that adopted in Pennsylvania upon the law of a state theretofore following the common law doctrines of property.

## SEPARATE PROPERTY

The first and second sections of the Pennsylvania community property law define separate property of the husband and wife respectively. Separate property is the same for either spouse and consists of the following: (1) all real and

---

4ibid, p. 72
5ibid, p. 72
6ibid, p. 72
732 Okla. St. Ann. 51 et seq.; DeFuniak, supra n. 3, Vol. 2, appendix V, p. 588
8323 U. S. 44, 65 S. Ct. 103, (1944), reversing 139 F. 2d 211
9Lentz, B. V., Text of the New Community Property Law and an Analysis of the Basic Income Tax Problems Arising Under the Law, (1947), p. 6
10House Bill 218, Twentieth Legislature of the State of Okla., 1945; Fiduciary Review, Aug., 1947, p. 3. Chief differences of the Pennsylvania statute are in section 5 and in absence of provisions of Oklahoma statute dealing with act of 1939.
11Community Property and Federal Income Taxes, Commerce Clearing House, Inc., (September, 1947), sec. 8953, p. 7
12118 P. 2d 205 (1941)

personal property owned or claimed by either spouse prior to marriage or the effective date of the statute whichever is later; (2) all property acquired after marriage or the effective date of the Act by gift, devise or descent; (3) compensation received for personal injuries. Section 6 establishes a presumption that all funds on deposit in any banking institution are the separate property of the spouse in whose name they stand regardless of who made the deposit. Section 9 makes every transfer of community property from one spouse to the other operate to divest the subject transferred of "every claim or demand as community property" and to vest it in the grantee as separate property. Section 10 provides that upon dissolution of the marriage by decree each spouse becomes vested with an undivided one-half interest in the community property as tenant in common. Section 15 contains a similar description of the interest which the surviving spouse has in the community property after community debts have been paid and one-half of the community property remaining has been transferred to the personal representative of the deceased spouse — the interest of the survivor shall be that of a tenant in common. The implication of the two latter sections is that dissolution of the marriage by decree or death transforms the interest of the divorced or surviving spouse into separate property in the form of a tenancy in common.

## COMMUNITY PROPERTY

By section 3 "all property acquired by either the husband or wife during marriage and after the effective date of this act except that which is the separate property of either as hereinabove defined shall be deemed the community or common property of the husband and wife". The word "deemed" may have the connotation of finality or of presumption. It would seem to have been used here in the latter sense. This section also creates a presumption that at the dissolution of the marriage all the "effects which the husband and wife possess . . . . shall be regarded as common effects or gains". The nature and extent of the interest of either spouse in the actual or presumed community property is described as being a vested undivided one-half interest.

## PURCHASES DURING MARRIAGE

Because the act reads that property acquired by either during the marriage shall be "deemed" community property, a question arises as to the status of something purchased during the marriage by a spouse who uses separate property or the funds obtained by the mortgaging or pledging of separate property to pay the purchase price. So long as the purchaser can trace his separate property or its proceeds into the acquisition it is regarded as a transmutation and that which is acquired is separate property.[13] By the same reasoning things purchased through the use of community property become community property.[14] When

[13]DeFuniak, supra n. 3, Vol. 1, p. 204; Huber vs. Huber, 167 P. 2d 708, (Cal., 1946); In re Abdale's Estate, 170 P. 2d 918, (Cal., 1946)

[14]DeFuniak, supra n. 3, Vol. I, p. 205

both community funds and separate funds are used to make the purchase, the thing acquired is owned by the community and the spouse whose separate funds were used in the same proportions as the amount of each type of fund invested bears to the entire purchase price.[15] It has been held that the commingling of separate and community property in such a way that neither can be separated results in the mass being regarded as community property until the spouse claiming part is separate property establishes his claim.[16] Anything purchased with such commingled property likewise becomes community property.[17] These principles accent the importance of each spouse's keeping complete records of his separate property and transactions concerning it.

## EARNINGS AND INCOME FROM SEPARATE PROPERTY

Under the definition of community property in section 3 all earnings of either the husband or the wife which are not owned or claimed prior to marriage or the effective date of the act, whichever is later, become community property. The language of this section is broad enough to include acquisitions in the form of rents, profits, interest and dividends received by a spouse from his or her separate property after marriage and the effective date of the act. That it was the intention to make such gains community property is confirmed by section 4. In allocating the right of control of community property between the spouses, section 4 specifies that the wife's rights of management and control shall extend to the community property consisting of her earnings and income from her separate property. The act makes no mention whatsoever of the status of income from the husband's separate property, but it is unthinkable that any distinction between the husband and wife was intended in this respect.

It was the rule under the Spanish system that all income and profits from separate property of either spouse received during the marriage was community property. However, all the original community property states except Idaho, Louisiana and Texas have abandoned this view and have treated income from separate property as separate property.[18] It is significant that under the Texas law and the Oklahoma act of 1939, both of which are worded almost exactly as the Pennsylvania act, the conclusion has been that the income from separate property during the marriage is community property.[19] But it should be remembered that Texas has always followed the rules of the Spanish community system, and that the Oklahoma act of 1939 was thought to be constitutional because of elective provisions.[20]

---

15ibid., p. 207; Woodrome vs. Burton, 154 S. W. 2d 665 (Tex., 1941)

16Walker Smith Co. vs. Coker, 176 S. W. 2d 1002, (Tex., 1944); Buehler vs. Buehler, 166 P. 2d 608, (Cal., 1946)

17Walker Smith Co. vs. Coker, supra n. 16; McElyea vs. McElyea, 163 P. 2d 635, (N. M., 1945); King vs. Prudential Ins. Co., 125 P. 2d 282, (Wash., 1942)

18DeFuniak, supra n. 3, Vol. 1, p. 181

19Harmon vs. Oklahoma Tax Commission 118 P. 2d 205 (Okla., 1941); Texas Constitution of 1876, Art. XVI, sec. 15; DeFuniak, supra n. 3, Vol. 2, Appendix V, p. 599

20Harmon vs. Oklahoma Tax Commission, supra n. 19

Constitutional objections are apparent to the construction that the rents, profits and income from separate property of either spouse received during marriage are community property. The Pennsylvania courts have stated that the grant of the right to income and profits of a thing is the grant of the thing itself.[21] Although as the sovereign the state has the power to regulate the incidents of the marital relationship,[22] it has been pointed out that the right to income from property does not depend on marital status.[23]

## APPRECIATION OF SEPARATE PROPERTY

The Pennsylvania statute contains no specific provision governing the status of increases in value of separate property during marriage. The Oklahoma act of 1939[24] like the Texas prototype[25] awarded the increase of all lands which were separate property to the spouse who owned them, but this provision does not appear in the Oklahoma act of 1945. Under the Spanish system increases in the value of separate property belonged to the spouse whose property it was.[26] The Texas courts have distinguished increases in value of both land and personalty due to community resources, i.e. the employment of community property or labor and industry of either spouse, from increases due to other causes.[27] If the increase is not the result of the application of community resources it has generally been held to be separate property. When community property is used for the purpose of making an improvement upon separate realty of one of the spouses or to discharge a lien upon such separate property, the title to the improvement follows the realty and is separate property, but the community obtains the right to be reimbursed from the separate property of the spouse thereby benefited.[28] In *Harmon vs. Oklahoma Tax Commission* the court held the profit realized by the sale of an oil and gas lease which was the husband's separate property was his separate income and taxable as such.[29]

---

[21]Caldwell vs. Fulton, 31 Pa. 475, (1858)

[22]Fearon vs. Treanor, 5 N. E. 2d 815, (N. Y. 1936); Act of 1935 P. L. 450, (48 P S 170) et seq., abolishing actions for breach of promise and alienation of affections held constitutional in McMullen vs. Nannah, 49 D. & C. 516, (1943)

[23]Fiduciary Review, August, 1947, pp. 3, 4

[24]supra n. 7

[25]Vernon's Texas Revised Civil Statutes, 1936, Art. 4613, 4614; DeFuniak, supra n. 3. Vol. 2, Appendix V, p. 607

[26]DeFuniak, supra n. 3, Vol. 1, p. 187

[27]ibid., p. 189. See cases and comment in note 67

[28]Brown vs. Brown, 119 P. 2d 938, (Ariz., 1941); Wheeland vs. Rodgers, 124 P. 2d 816, (Cal., 1942), 77 A. L. R. 1015, Annotation: Right of Community to Reimbursement for Community Property Applied to Improvement of or Discharge of Liens on Separate Property of One of the Spouses, at p. 1021

[29]Supra n. 12

## ADMINISTRATION AND CONTROL

### a. Separate Property

Section 4 of the Pennsylvania community property law provides that each spouse shall have the right of management and control and power of disposal of his or her separate property. But section 5 states that all real estate which is the separate property of either shall not be sold, encumbered or otherwise disposed of except in the manner provided by law prior to the effective date of this act. The only change made by the statute so far as separate property is concerned is that the income therefrom is apparently conceived to be community property.

### b. Community Property

In most community property systems the husband is the one who has the management and control of all the common property during the marriage.[30] This is the rule under the Texas law.[31] The Pennsylvania act departs materially in this respect by investing the wife with the management, control and power of disposition of the part of the community property consisting of her earnings, the income from her separate property and all common property the title to which stands in her name.[32] The husband is given corresponding rights and powers over the community property not subject to the control of the wife. This would include his earnings, income from his separate property, and community property the title to which stood in his name or in their joint names. According to section 5 community realty "shall not be sold, encumbered or otherwise disposed of except in the manner provided by law prior to the effective date of this act". This provision appears curious inasmuch as there was no prescribed mode in Pennsylvania for disposing of community realty prior to this act.

Under the following circumstances the husband or wife may by petition to the Court of Common Pleas of the county in which they reside (no provision is made for the case where husband and wife reside in different counties) to be substituted for the other spouse in the management, control and disposition of the community property then under the control of the other spouse: when the other is *non compos mentis,* has been convicted of a felony, has been sentenced to imprisonment for a period of more than one year, is an habitual drunkard or for any other reason is incapacitated to manage the community property. In addition the wife may so petition whenever the husband has abandoned her and left her without support.[33] Service shall be had as in actions of assumpsit.[34] When judgment is entered awarding management and control of the community property to the petitioner, it shall be recorded in the office of the prothonotary

---

30DeFuniak, supra n. 3, p. 322
31Vernon's Texas Revised Civil Statutes, 1936, Art. 4619, sec. 1, DeFuniak, supra n. 3, Vol. 2, Appendix V, p. 608
32Pennsylvania Community Property Act of 1947, No. 550, sec. 4
33ibid., sec. 11
34ibid., sec. 12

of the court of Common Pleas of the county where the community property affected thereby is situated which record shall be notice.[35]

The husband and wife each holds a vested undivided one-half interest in the community property irrespective of in whose name the title stands. If this ownership exists more than in name only, the non-managing spouse should be enabled to institute legal proceedings for the protection of his interest against unreasonable or wasteful acts by the managing spouse which threaten its destruction. The statute imposes no limits on the exercise of the power of disposition or management. Yet as to the other spouse the one authorized to act for the community must be regarded as a statutory agent or trustee. No provision is made for the removal of this statutory agent or trustee even though he acts wantonly or maliciously. One spouse may petition to be substituted as manager when the other has been convicted of a felony or other of the enumerated grounds exist, but both will have to suffer losses resulting from incompetence of the managing spouse. The determination of the rights and duties in this vital matter has been left to the courts.

In other community property systems it has been recognized that the spouse having the power of management and disposition of the community assets must not exercise the power in fraud of the rights of the other spouse although the passive spouse must share the losses from the other's management so long as no bad faith is involved.[36] The burden of proving the fraudulent intent rests upon the spouse questioning the exercise of the power,[37] but fraud has been implied from the nature of the disposition when the transfer was for inadequate consideration or was a large gift made without good reason.[38]

A further question in connection with the rights of the passive spouse arising out of an improper disposition of community property by the managing spouse is against whom the remedy should be sought. Should the injured spouse be compelled to exhaust remedies against the managing spouse and his separate property before proceeding against the transferee, or may the injured spouse elect to proceed against either? The Spanish law required the wife (the husband always being the manager) to resort to the husband first when the subject matter improperly disposed of was fungibles or intangibles, but in other instances she could proceed first against the transferee.[39] Assuming the action is instituted against the other spouse, will this be an authorized proceeding between husband and wife within the act of 1893 as amended?[40] It would be possible to hold that the spouse's interest in community property under the community property act is "separate property" under the act of 1893.

---

[35]ibid., sec. 14
[36]DeFuniak, supra n. 3, Vol. 1, pp. 339, 340
[37]ibid., p. 367
[38]ibid., p. 338
[39]ibid., p. 363
[40]1893 P. L. 344, sec. 3 as amended by act of 1913 P. L. 14, (48 P S 111)

Until there have been judicial interpretations of the Pennsylvania statute gifts of community property by the managing spouse without the other's consent will be highly questionable. There is no provision concerning this subject in the Pennsylvania law. The California statute, though it vests the power of disposal over all community personalty exclusively in the husband, provides that no gifts shall be made by him without the written assent of the wife. If such gifts are made the wife may have them set aside in their entirety during marriage but only as to one-half after the death of the husband.[41] This is the view of Washington in absence of statute.[42] However, it has been held that reasonable gifts of community property by the spouse having the power of disposition may be made so long as they are not pursuant to a design to defraud the other spouse. This appears to be the rule in Arizona, Louisiana, Nevada and Texas.[43] The adoption of this latter view in Pennsylvania would permit either spouse to make gifts of community property under his control.

The status of gifts is of the utmost importance in regard to life insurance. Payment of premiums on insurance policies issued to the husband or the wife in which other persons are named beneficiaries out of earnings or other community property after the effective date of the act may lead to claims by the surviving spouse to a share of the proceeds as community property.[44]

## TESTAMENTARY DISPOSITIONS

The powers of management, control and disposition which each spouse is given over community property by section 4 do not extend to making dispositions by will. The will of either spouse may affect only the half interest in the community assets remaining after all community debts have been paid and the community affairs settled by the surviving spouse. When the deceased is intestate, half of the community assets so remaining shall be transferred by the survivor to the personal representative of the decedent who shall distribute them as other property of the decedent's estate "under the laws of descent and distribution".[45]

## TRANSFERS OF COMMUNITY PROPERTY

### a. To Third Persons

It would seem that community personalty will be transferable in the same manner as separate personalty of the same kind by the spouse exercising the power of disposition. But the act provides in section 5 that community realty "shall

41 Lynn vs. Herman, 165 P. 2d 54, (Cal., 1946)

42 Occidental Life Ins. Co. vs. Powers, 74 P. 2d 27, 114 A. L. R. 531, (Wash., 1937); Small vs. Bartyzell, 177 P. 2d 391, (Wash., 1947); Hanley vs. Most, 115 P. 2d 933, (Wash., 1941)

43 DeFuniak, supra n. 3, Vol. 1, p. 354

44 Small vs. Bartyzell, supra n. 42; 114 A. L. R. 531. See annotation at p. 545: Application of Community Property System to Problems Arising in Connection with Life Insurance Policy. Supplemented 168 A. L. R. 342; 64 A. L. R. 466 at 495 Gift by Husband as Fraud on Wife.

45 Pennsylvania Community Property Law, Act of 1947, No. 550, sec. 15

not be sold, encumbered or otherwise disposed of except in the manner provided by law prior to the effective date of the act." This must signify the community realty shall be mortgaged, leased, aliened in the same way individual or separate realty was prior to this statute since no community realty existed in Pennsylvania prior to this act. If this inference is correct, community realty standing in the husband's name may be leased, conveyed or mortgaged to third persons without the joinder of the wife. Community realty standing in the wife's name will require the joinder of the husband in conveyances to third persons to pass valid title.[46] Under the act of 1945[47] it would not be necessary that the husband join in a mortgage given by the wife upon community realty standing in her name. Failure to secure the joinder of the husband in a conveyance of community realty standing in the wife's name to a third person would pass a voidable title in view of the language appearing in the decision of *Haines Trust*.[48] Further, it would seem that the failure to obtain the joinder of the other spouse in any conveyance of community realty would cause the grantee to take subject to the non-joining spouse's inchoate statutory dower or curtesy in the granting spouse's undivided one-half. The Pennsylvania community property law does not contemplate any inheritance or distribution of the deceased spouse's community realty different from that of the deceased spouse's separate realty. The surviving spouse's share in community realty aliened without his or her joinder presumably will be the same as the share in the realty of which the other died separately seised. In the community property states which follow in the Spanish tradition no rights comparable to common law dower or curtesy or their statutory equivalent are recognized.[49]

### b. Transfers Between Husband And Wife

Section 9 specifically covers transfers of community property by either spouse to the other. Either may give or sell his existing community property directly to the other. The effect of every conveyance from one to the other of community assets is to divest the property of every claim or demand as community property and make it the separate property of the transferee except as to equities existing in favor of the creditors of the transferor at the time of the transfer.

A problem arises when either transfers community property to himself and the other. Because this is not within the letter of the act, it is arguable that the transfer does not divest the subject matter of every claim and demand as community property. If it does not, does it remain community property in their joint names and under the control and disposition of the husband? Or is the effect a gift to the other of one-half of the transferor's undivided one-half interest which becomes the separate property of the other as a tenant in common

---

[46]Act of 1893, P. L. 344, sec. 1, 2, as amended by Act of 1945 P. L. 625, sec. 1, 2, (48 P S 31, 32)
[47]supra n. 46
[48]356 Pa. 10 (1947) and cases cited therein
[49]DeFuniak, supra n. 3, Vol. 1, p. 568

with the community as to the other three quarters in which the husband has only a one-quarter interest? Another possibility is that the transfer from either to himself or herself and the other converts the interest into a tenancy by the entireties.

## TRANSFER OF SEPARATE PROPERTY TO COMMUNITY

No express provision is made for converting separate property into community property. Either spouse may receive for the community, but for that which is received to be considered community property it must be acquired other than by gift, devise, descent. Any separate property which either transfers to the other gratuitously would be separate property still. Any separate property which either transfers gratuitously to himself and the other would be separate property in whatever cotenancy was created. One method available for converting separate property into community property appears to be that of using separate property of one spouse to purchase community property from himself or the other. That which is purchased becomes separate property and that which was consideration for the purchase becomes community property.

Another possible way of making separate property into community property and vice versa is that of agreement between the spouses. Pennsylvania has enforced antenuptial[50] and postnuptial[51] agreements varying property rights of the spouses. Most of the "old" community property states have by statute recognized the validity of antenuptial and postnuptial agreements which provide for ownership by the spouses different from that under their rules of community property.[52] These agreements may convert the separate property of either into community property[53] or community property into separate property[54] although there is some difference of opinion whether the agreement of the spouses will itself work the transmutation of separate property into community property.[54a] The Washington statute authorizes agreements between the spouses at any time concerning the status of community property owned or to be acquired to take effect upon the death of either.[55] Texas sanctions only antenuptial contracts.[56] It has been held under the Texas provision that community property cannot be changed into separate property by virtue of antenuptial agreements before the property comes into existence.[57] The Pennsylvania act is silent on the subject of agreements. The

[50]Coanes Est., 310 Pa. 138, (1933); Clark's Est., 303 Pa. 538, (1931); Holwig Est., 348 Pa. 71, (1943); Groff's Est., 341 Pa. 105, (1941)

[51]Fennell's Est., 207 Pa. 309, (1904); Haendler's Est., 81 Pa. Super. 168, (1923); Mary Ann Slagle's Appeal, 294 Pa. 442, (1928); Inskipt's Estate, 324 Pa. 406, (1936); Zlotziver vs. Zlotziver, 355 Pa. 299 (1946)

[52]DeFuniak, supra n. 3, Vol. 1, p. 391, note 44

[53]ibid., pp. 404, 405; Marvin vs. Marvin, 116 P. 2d 151, (Cal., 1941)

[54]Gage vs. Gage, 138 P. 886, (Wash., 1914); Volz vs. Zang, 194 P. 409, (Wash., 1920)

[54a]McDonald vs. Lambert, 85 P. 2d 78, (N. M., 1938), 120 A. L. R. 264

[55]Remington's Revised Statutes, 1932, sec. 6894, DeFuniak, supra n. 3, Vol. 2, Appendix V, p. 615

[56]Vernon's Texas Revised Civil Statutes, 1936, Art. 4610; DeFuniak, supra n. 3, Vol. 2, Appendix V, p. 606

[57]DeFuniak, supra n. 3, Vol. 1, p. 391

fact that the interest of each spouse in community property under the Pennsylvania law is a vested undivided one-half interest suggests no reason for the adoption of a different rule concerning the validity of antenuptial and postnuptial contracts between the spouses. The husband and wife may contract as they desire concerning their separate property as such. They should be able to do likewise concerning their community property. The income of property which has become community property by agreement, assuming such agreements are valid, may not have the tax advantages of that received from community property which becomes such by operation of law.[58]

## LIABILITY OF COMMUNITY PROPERTY TO CREDITORS

Sections 7 and 8 contain the provisions for liability of the community property to creditors. The vital consideration is who has control. That portion of the community property under the management and control of the wife is "liable for debts contracted by the wife and for torts of the wife committed in the course of acquiring, holding or managing such community property but not otherwise."[59] Exactly the same wording is used to describe the liability of that portion of the community property under the control of the husband. A presumption exists that "all debts created" by either after marriage and after the effective date of the act shall be regarded as community debts.

Internal evidence seems to indicate that the word "contracted" as it is used in section 7 is not used in the technical sense limiting the liability for debts arising on express or implied agreements but rather in the sense of "incurred" or "acquired". The reference to "debts created" in the latter part of this section and in section 8 seems to support this view.

The statute is ambiguous as to whether community property shall be liable for individual or separate debts "contracted" by the husband or the wife. In this connection great importance is attached to the rebuttable presumption that all debts created by either after marriage and after the effective date of the act are community debts. It seems rather pointless to presume all debts are community debts if the liability of the community property extends to separate debts.

Greater clarity exists concerning the scope of the liability of the community property for torts although the test proposed may be somewhat difficult to apply. It is to be liable for torts of the spouse in control which were "committed in the course of acquiring, holding or managing such community property".[60] This is suggestive of respondeat superior. This intent to circumscribe the tort liability of the community property strengthens the inference that the liability for debts was intended to be similarly limited.

---

[58]See remarks concerning "consensual communities" in Commissioner vs. Harmon, 323 U. S. 44, 65 S. Ct. 103, (1944)

[59]Pennsylvania Community Property Law of 1947, No. 550, sec. 7

[60]ibid

After stating the community property shall be liable for debts and torts as above mentioned comes the significant clause — "but not otherwise". Has the act created a novel immunity for debtors and tortfeasors? It appears, if the above conclusions as to its meaning are correct, that it has and that this immunity is partial and temporary for community debts and for liability for torts committed in the course of acquiring, holding or managing the community property.

It is a partial immunity for community debts and for what for brevity may be called community liabilities because the community creditors or claimants are permitted to resort to only that portion of the community property under the control of the spouse who is the debtor or tortfeasor. Section 8 seems to reinforce this interpretation by the following words: "No creditor shall have recourse to the community property for the payment of debts or liabilities created by either the husband or the wife except as provided in section seven of this act". It is submitted that this language is broad enough to embrace community creditors and tort claimants. The word "creditor" is nowhere defined in the statute.

In the event of the death of one of the community proprietors there is a provision in section 15 that the survivor in settling community affairs "shall pay out of the community property except exempt property *all debts of the community whether created by the husband or the wife.*"[61] This language is capable of being construed that the survivor shall pay the community debts (tort claims may be debts for this purpose) out of the community property subject to his control as well as that which was subject to the control of the decedent. For this reason the immunity is characterized as being temporary — its duration is limited to the joint lives of the marital partners. There is no direction concerning the payment of community debts in the event of dissolution of the marriage other than by death of one of the spouses.

Confronted with this temporary immunity concerning the community property under the control of the other spouse may a claimant asserting a community claim resort to the separate property of the spouse who created the debt or liability? There is nothing in the act which forbids this, and some provisions appear to contemplate it. Section 8 concludes with the provision that either spouse on paying community debts "shall as between themselves charge the same against community property". This would authorize either spouse to pay a community debt out of community property under his control or out of his separate property. If the payment is made out of community property, the interest of each is equally and automatically depleted in the community property and no further charge will be necessary as between them. If the payment is made out of separate property, the one making the payment is authorized to adjust the matter as between themselves by charging it against the community property. It is not clear whether the one making the payment out of separate property would be entitled to appropriate

[61] Italics supplied

from the community property as his separate property a thing or sum equal to the amount of his payment. Possibly only bookkeeping charges are contemplated.

The provision permitting either spouse to charge payment of community debts against community property may be construed as authorizing a creditor to subject community property under the control of the spouse not creating the debt. However, the statute is explicit that the liability of the community property should not be otherwise than as stated in section 7.

Notwithstanding the creditor is a community claimant it would seem that he should be able to resort to the separate property of the spouse incurring the debt for his satisfaction. The fact that the spouse in creating the debt may have been acting for the benefit of the community, i.e. for himself and the other, should not render his separate property less liable than it would have been if he were acting for the exclusive benefit of the other spouse or any third person at the time the indebtedness arose but not under the control or direction of the other or the third person. If the debtor spouse is compelled to pay out of his separate property the means of adjustment as between the spouses is provided by the statute.

May a community creditor reach the separate property of the spouse who did not participate in the creation of the debt or liability? The act specifically provides for this in one situation. By section 8 "any creditor may satisfy his claim or demand out of the community property which was under the management . . . of the spouse incurring the indebtedness or liability at the time the debt or liability was contracted or created and which has been subsequently conveyed or transferred to the other spouse . . . without proof that the said creditor relied upon said community property in advancing said credit. . . ." It should be recalled that any community property transferred from one spouse to the other thereby becomes the separate property of the transferee. This right is given to "any creditor" which would apparently include community creditors. Third party purchasers, encumbrancers, creditors or grantees from the spouse to whom the community property was transferred will prevail over the creditor seeking to reach the property according to the act.[62] Thus, this right may be a very insubstantial one. The act is so worded that this right would not extend to community property acquired subsequently by the spouse creating the debt or liability and thereafter transferred to the other spouse. Despite this it would seem that the creditor's right to follow the property would exist if the transfer were fraudulently made.[63] Another circumstance under which a community creditor may resort to the separate property of the spouse not creating the debt is when that spouse's separate property has been improved with community funds. There is some authority that the community creditor may reach the separate property of one spouse

[62]Pennsylvania Community Property Law of 1947, No. 550, sec. 8
[63]Uniform Fraudulent Conveyance Act 1921 P. L. 1045, (39 P S 351 et seq.)

to the extent of the community's claim for reimbursement from that spouse for the improvement of the separate property.[64]

A further question is, may a separate creditor or tort claimant satisfy his demand out of the community property during the marriage? Again the language of section 7 should be recalled: "That portion of the community property under the management, control and disposition of the wife (husband) . . . . shall be liable for debts contracted by the wife (husband) and for torts of the wife (husband) committed in the course of acquiring, holding or managing such community property *but not otherwise.*"[65] Assuming that "debts" means community debts, for the reasons mentioned previously, the answer to this question appears to be that he cannot.

The argument against subjecting the community property, whether it be under the control of the spouse creating the debt or not, to liability for the individual debt or tort of the spouse is the injustice of using the innocent spouse's community property for the satisfaction of the other's debt or wrongdoing. On the other hand is the consideration that one should not be permitted to accumulate assets and keep them immune from claims of his creditors, whether they are contract or tort claimants.[66] The Spanish rule was that community property was not chargeable for separate debts of a spouse during the marriage.[67] Several of the original community property states including Texas have taken the position that the community property is liable for the husband's separate debts but not for separate debts of the wife.[68] In California and Texas it has been held the entire community property is liable for antenuptial debts of both the husband and wife on the theory that marriage should not be permitted to become an escape for debtors.[69] Arizona and Washington have held the community property is not liable for separate torts of the husband[70] nor for separate debts of the husband.[71] To the suggestion that the community property should at least be liable for the separate debt or claim to the extent of that spouse's undivided one-half interest it has been answered that there is no way of knowing what that interest is until the community is dissolved and the community debts have been paid. Further it is said the welfare of the family requires the keeping of the common property intact during the marriage.[72] However, the separate creditor of either

---

[64]Conley vs. Moe, 110 P. 2d 172, (Wash., 1941), 133 A. L. R. 1089. See annotation p. 1097: Right of trustee in bankruptcy, or creditors, of marital community in respect of separate property of one spouse, which has been improved wholly or in part by use of community property. Compare People's National Bank of Pittsburgh vs. Loeffert, 184 Pa. 164, (1898); John Curtis & Co. vs. Olds, 250 Pa. 320 (1915)

[65]Parentheses and italics supplied

[66]Note 25 Texas Law Review 534, Liability of Community Property for Separate Tort of Spouse

[67]DeFuniak, supra n. 3, Vol. 1, p. 436

[68]ibid., pp. 456, 457

[69]ibid., p. 440

[70]25 Texas Law Review 534, supra

[71]Harry L. Olive Co. vs. Meek, 175 P. 33, (Wash., 1918); Snyder vs. Stringer, 198 P. 733, (Wash., 1921); Tway vs. Payne, 101 P. 2d 455, (Ariz., 1940)

[72]DeFuniak, supra n. 3, Vol. 1, pp. 454, 455

would be able to reach that spouse's interest after the marriage has been dissolved by death and the status of the survivor and the decedent's estate has become that of tenants in common in the community assets remaining after satisfaction of community debts.[73] A judgment entered for a separate debt of the husband is not a lien upon the community realty in the meantime in Arizona and Washington.[74] But each spouse has an expectant interest in the community property of becoming a tenant in common by survivorship or upon dissolution of the marriage. It is arguable that this is a vested interest which could be the subject of a lien.[75] If this view were adopted, a judgment for a separate debt would be a dormant lien pending the dissolution of the marriage and would be enforceable against either interest when it becomes separate after dissolution of the marriage by death or decree. The community creditors have been held to be entitled to priority over the separate creditors in the distribution of community assets following dissolution of the marriage.[76] Under such a ruling the lien for a separate debt, if recognized, would be subordinated to the claims of community creditors. Since the Pennsylvania statute presumes that all debts created by either spouse after the effective date of the act are community debts, any judgment against either would be presumptively a valid lien against community property.[77]

A qualification of the rule that community property is not liable for separate torts is recognized in the case of a tort committed by one of the spouses which benefits the marital community. The community property is liable under these circumstances.[78] Such a situation may be within the definition of a "community tort" under the Pennsylvania act — a tort committed in the course of acquiring, holding or managing the community property.

---

[73]Pennsylvania Community Property Law of 1947, No. 550, sec. 15; Tway vs. Payne, supra n. 71

[74]Tway vs. Payne, supra n. 71; Stafford vs. Stafford, 117 P. 2d 753, (Wash., 1941). In Tway vs. Payne the Arizona statute concerning the lien of a judgment provided that a judgment should become a lien upon real property of the judgment debtor later acquired. The court held that the judgment for the separate debt did not become a lien upon the separate interest of the debtor after his death because it was not acquired by him but passed to his estate.

[75]Beihl vs. Martin, 236 Pa. 519, (1912)

[76]DeFuniak, supra n. 3, pp. 481, 604

[77]Act of 1947, No. 550, sec. 7. Cosper vs. Valley Bank, 237 P. 175, (Ariz., 1925)

[78]Beakley vs. City of Bremerton, 105 P. 2d 40, (Wash., 1940)