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Community Property in Public Lands

THE statutes of the community property states (except Louisiana) agree substantially in providing that all property of either spouse owned by him or her at the time of marriage, and that "acquired" afterward by gift, bequest, devise, or descent, shall remain his or her separate property. All other property "acquired" after marriage by either spouse (omitting a statement as to the wife's earnings and the income from her separate property) is community property. How do these statutes apply to land acquired from the government, or rather, when is public land "acquired"?

It is well settled that after patent the Federal government is not concerned with the nature of the title acquired by the patentee and the law of the state where the land lies governs.¹

There are several sources of grants of public land; e. g., the homestead and the pre-emption acts; stone and timber, mining, and coal land acts; grants by the Federal government for military services, and similar grants by a state, as in Texas; Texas headright certificates and homestead acts; and the Mexican colonization act.

Grants under the Mexican colonization law were regarded as gifts.² So also were lands regarded when given as a reward by the United States for military services,³ but lands granted by the Republic of Texas for military services were decided to have been acquired by onerous title.⁴

¹ *Krieg v. Lewis* (1909) 56 Wash. 196, 105 Pac. 483; *Curry v. Wilson* (1910) 57 Wash. 509, 107 Pac. 367; *Buchser v. Buchser* (1913) 231 U. S. 157, 58 L. Ed. 166, 34 Sup. Ct. Rep. 46.

² *Noe v. Card* (1860) 14 Cal. 576, where the cases are reviewed and the Texas decisions disapproved. "Compliance with the agreement has all the elements of a contract whether the rights acquired were alienable or not." *Welder v. Lambert* (1898) 91 Tex. 510, 44 S. W. 281.

³ *Hatch v. Ferguson* (1895) 68 Fed. 43, 15 C. C. A. 201.

⁴ *Parker v. Newberry* (1892) 83 Tex. 428, 18 S. W. 815; *Parker v. Chance* (1854) 11 Tex. 513; *Kircher v. Murray* (1894) 60 Fed. 48, 8 C. C. A. 448.

We are concerned here principally with the Federal statutes and cases arising under the homestead and the pre-emption acts, and with the other cases and statutes incidentally.

The question whether land is separate or community arises under varying circumstances as to time of marriage, which circumstances may be grouped as follows:

(1) A married man makes entry upon public land and the marital relation continues until after final proof is made or patent issues.⁵

(2) A married man makes entry and the wife dies or is divorced before final proof, but:

- (a) After the period of residence has been completed;⁶
- (b) Before the period of residence is completed;⁷
- (c) After the period of residence is substantially though not actually completed.⁸

(3) A married man makes entry and the community is dissolved by his death before the period of residence is completed, whether substantially or not.⁹

(4) A single man or woman makes entry and afterwards marries:

- (a) Before the period of residence is completed and final proof made;¹⁰

⁵ Guye v. Guye (1911) 63 Wash. 340, 115 Pac. 731; Eckert v. Schmitt (1910) 60 Wash. 23, 110 Pac. 635; Curry v. Wilson (1910) 57 Wash. 509, 107 Pac. 367; Brown v. Fry (1899) 52 La. Ann. 58, 26 So. 748; Krieg v. Léwis (1909) 56 Wash. 196, 105 Pac. 483; Buchser v. Buchser (1913) 231 U. S. 157, 58 L. Ed. 166, 34 Sup. Ct. Rep. 46.

⁶ Ahern v. Ahern (1903) 31 Wash. 334, 71 Pac. 1023; Crochet v. McCamant (1906) 116 La. 1, 40 So. 474; Baker v. Saxon (1918) 174 Pac. 991 (N. M.).

⁷ Wadkins v. Producers Oil Co. (1912) 227 U. S. 368, 57 L. Ed. 551, 33 Sup. Ct. Rep. 380; Creamer v. Briscoe (1908) 101 Tex. 490, 109 S. W. 911; Adams v. West Lumber Co. (1914) 162 S. W. 974 (Tex. Civ. App.); Rogers v. Minneapolis Threshing Mach. Co. (1907) 48 Wash. 19, 92 Pac. 774; Cunningham v. Krutz (1905) 41 Wash. 190, 83 Pac. 109. Cf. Kirby Lumber Co. v. Smith (1916) 185 S. W. 1068 (Tex. Civ. App.).

⁸ Here might possibly be cited Cunningham v. Krutz, and Rogers v. Minneapolis Threshing Mach. Co., supra, n. 7, where the period of community occupancy was about three years.

⁹ Clarkson v. Good Pine Lumber Co. (1920) 84 So. 652 (La.); Richard v. Moore (1903) 110 La. 435, 34 So. 593; McCune v. Essig (1905) 199 U. S. 382, 50 L. Ed. 237, 26 Sup. Ct. Rep. 78. Douglas v. Nicholson (1917) 74 So. 556 (La.) differs in that the husband died after the period of residence was completed and final proof had been made. Cf. Stiles v. Hawkins (1918) 207 S. W. 89 (Commission App. Tex.) and Booth v. Clark (1904) 34 Tex. Civ. App. 315, 78 S. W. 392.

¹⁰ Humbird Lumber Co. v. Doran (1913) 24 Idaho 507, 135 Pac. 66; Kromer v. Friday (1895) 10 Wash. 621, 39 Pac. 229; Teynor v. Heible (1913) 74 Wash. 222, 133 Pac. 1; Card v. Cerini (1915) 86 Wash. 419, 150 Pac. 610; Harris v. Harris (1886) 71 Cal. 314, 12 Pac. 274; In re Lamb's Estate (1892) 95 Cal. 397, 30 Pac. 568.

(b) After the period of residence is completed and before final proof is made;¹¹

(c) After final proof is made and before patent.¹²

(5) Where husband and wife settle upon unsurveyed public land not open to entry, the statute giving actual settlers a preference; or where for some other reason a preference is created, which is later exercised by the survivor after the dissolution of the community.¹³ The cases are considered, however, where the preference was acquired prior to marriage.

(1) There is no doubt nor room for argument that under the first situation the property is community after final proof and before patent.

(2) *A Married Man Enters and the Wife Dies or Is Divorced Before Final Proof Is Made*—In the second situation, the Washington court has recognized in *Teynor v. Heible*¹⁴ that its decisions are irreconcilable. The Washington cases are there reviewed under a somewhat strange six-fold classification. The rule laid down there is that the marital relation must exist at the time of the initiation of title and continue to the time of final proof in order that the land may become community land. *Card v. Cerini*¹⁵ is to the same effect. These cases had been preceded by *Cunningham v. Krutz*,¹⁶ which was almost identical on its facts with the *Teynor* case. The court there expressly followed *McCune v. Essig*¹⁷ and overruled its prior inconsistent decisions. In the *McCune* case, however, it was the husband who died and the Federal statute gave the surviving wife a right to perfect title and obtain patent. The facts not being parallel, the latter case could not be controlling. In the *McCune* case the United States Supreme Court denied that it

¹¹ *Clarkson v. Good Pine Lumber Co.* (1920) 84 So. 652 (La.). Cf. *Phillips v. Palmer* (1909) 56 Tex. Civ. App. 91, 120 S. W. 911.

¹² Here may be cited *Phillips v. Palmer*, supra, n. 11, where the court holds that being reciprocally possessed at time of husband's death, it is presumed that the property is community.

¹³ *Mills v. Brown* (1887) 69 Tex. 244, 6 S. W. 612; *Hawkins v. Stiles* (1913) 158 S. W. 1011 (Tex. Civ. App.); *Carratt v. Carratt* (1903) 32 Wash. 517, 73 Pac. 481; *Delacey v. Commercial Trust Co.* (1909) 51 Wash. 542, 99 Pac. 574; *Labish v. Hardy* (1888) 77 Cal. 327, 19 Pac. 531; *In re Boody's Estate* (1896) 113 Cal. 682, 45 Pac. 858; *Lake v. Lake* (1877) 52 Cal. 428; *Morgan v. Lones* (1889) 80 Cal. 317, 22 Pac. 253; *Barbet v. Langlois* (1850) 5 La. Ann. 212; *Succession of Morgan* (1857) 12 La. Ann. 153; *Reed v. St. Paul M. & M. Ry. Co.* (1915) 234 Fed. 123.

¹⁴ Supra, n. 10.

¹⁵ Supra, n. 10.

¹⁶ Supra, n. 7.

¹⁷ Supra, n. 9.

was laying down any property rule for the state of Washington but said it was interpreting a Federal statute. This statute, the court said, gave the property to the wife as her separate estate. The court's argument that "The law of Washington governs the descent of lands lying within the state but the question here is whether there has been a descent of land" seems beside the point.

The homestead statutes were designed to have general operation in all the states to which they applied, community property and common-law states alike, and in a common-law state the homestead would be the separate property of the husband. There is no sufficient reason why in a community property state the land should not be community estate all along, for Congress did not contemplate the enactment of a local property law for such states. The question was not as to the descent of land but rather as to the nature of the interest or estate in land which had been acquired. The court seems to think that as the statute permits the husband only, by the performance of conditions precedent, to secure a patent, the interest acquired up to the time of patent is his separate interest, no matter where the land lies. The interest would seem thus to be separate up to the time the patent issues¹⁸ and the Federal government lets go, but the instant thereafter the state law attaches and the property changes to community under the proper circumstances. In order, however, for this state property law to attach and the title to be in the community, the court says that the marital relation must exist at the time of entry and continue until the time of final proof. This had not been the local law previously. If Congress can pass a statute which, when interpreted, lays down such a requirement, then may it not altogether deny any community property rights to persons holding under a grant from the Federal government? That step also has been taken in Washington with reference to mining locations, to be hereafter discussed.

Land patented under the homestead and pre-emption acts is considered acquired by onerous title.¹⁹ The method of acquisition, therefore, is a sale²⁰ by which an equitable interest or title passes subject to the performance of conditions precedent by the purchaser. It is not like an option, where by the better view, title does not pass until the option is exercised.

¹⁸ *Wadkins v. Producers Oil Co.*, *supra*, n. 9.

¹⁹ *Creamer v. Briscoe*, *supra*, n. 7.

²⁰ *United States v. Ball* (1887) 31 Fed. 667 (Ore.); *United States v. Turner* (1892) 54 Fed. 228 (C. C. S. D. Ala.).

New Mexico followed the Washington rule in a rather extreme case.²¹ A married man settled upon a homestead in 1907 and four years later drove his wife away from home. They were not divorced, however, until 1914. In 1915 final proof was made. The court held that at the time of final proof and patent there was no community for the property to fall into, following the McCune case,²² which, it is submitted, does not apply.

The view of the Supreme Court of Texas is:²³ In a controversy to which the state is not a party, the question whether public land purchased from the state in the name of either husband or wife is community property or not, must be determined by the character of the right by which title thereto has its inception. In *Creamer v. Briscoe*,²⁴ the wife died about a year after settlement upon the land under the state homestead act, but the Supreme Court of Texas, reversing the decision of the Court of Civil Appeals, held that the land was community land. "Whether it is community or not depends on whether there was a marriage at the incipency of the right by which later title is extended."²⁵ The court intimates that a pre-emption right may be a defeasible title as between husband and wife, but as between claimant and state it is a mere inchoate right.²⁶

(3) *A Married Man Enters and Dies Before Final Proof Is Made*—The leading case under this situation is *McCune v. Essig*.²⁷ The husband died and the wife performed the remaining conditions precedent and secured a patent. It was held that the land so patented to the wife was her separate property because the statute specifically provided for the patent to issue to her and to no one else. It is not necessary to consider the general land policy of Congress in enacting the homestead and other acts to see why such a right was given to the wife. A married woman could not make such an entry. It must be made by the husband. But if he dies the family would lose all that had been gained before final proof unless someone were allowed to perform the conditions yet remaining to be performed. The statute simply provides for a situation,

²¹ *Baker v. Saxon* (1918) 174 Pac. 991 (N. M.).

²² *Supra*, n. 9.

²³ *McClintic v. Midland Grocery Co.* (1913) 106 Tex. 32, 155 S. W. 1157.

²⁴ *Supra*, n. 7.

²⁵ *Accord, Adams v. West Lumber Co.* (1913) 162 S. W. 974 (Tex. Civ. App.).

²⁶ The view in Washington was once the same: *Cox v. Tompkinson* (1905) 39 Wash. 70, 80 Pac. 1005. Cf. *Hawkins v. Stiles*, *supra*, n. 13.

²⁷ *Supra*, n. 9.

not otherwise provided for, as a matter of justice, and assists in carrying out the public land policy of the government. Of course, to her only could the legal title issue under the statute, for Congress can set its own conditions on the performance of which the land may be acquired. Legal title stands in someone, but that one need not be the only one beneficially interested. Even admitting that the decision is right as an interpretation of the statute, it should not be followed in a case where the statute does not apply. This view was first adopted in Louisiana.²⁸

(4) *A Single Man or Woman Enters and Afterwards Marries*—The decisions are harmonious to the effect that such initiated titles become separate property. This seems of itself to establish the proposition that some sort of interest or estate is acquired by making entry, at least with reference to the parties, let it be what it may with reference to the Federal government. No distinctions are made, such as are suggested as possible in the classification at the beginning of this paper, and rightly so. It is difficult to see why the converse is not also true and to explain why, if a title is initiated by the community, the subsequently perfected title does not become community, even though the community has been dissolved at the time title is perfected.

(5) *The Effect of a Preference Acquired During Marriage but Title Perfected by the Survivor—The Effect of a Preference Acquired Before Marriage and Title Perfected After Marriage*—The distinction between a preference and an initiated title seems sound. The typical case perhaps arises where husband and wife "squat" upon land not yet surveyed and open to settlement. Assuming that the statute gives actual settlers a preference over others in making application for entry, it still seems clear that nothing in the nature of an initiated title has been secured. In *Hawkins v. Stiles*²⁹ it was held that title can have its inception only in the beginning of a contractual relationship. The courts frequently have difficulty in distinguishing between a preference and an initiated title. A preference is like an option and an initiated title arises from something like a contract of sale.

A case, often cited, that has given rise to considerable confusion

²⁸ *Richard v. Moore* (1903) 110 La. 435, 34 So. 593. If the period of residence had been completed and the wife had to make final proofs only, the court would probably hold differently: *Crochet v. McCamant* (1906) 116 La. 1, 40 So. 474.

²⁹ (1913) 158 S. W. 1011 (Tex. Civ. App.).

is *Barbet v. Langlois*.³⁰ At the time of marriage the husband owned land fronting on the Bayou Plaquemine and as such front proprietor, had a preference for a double concession in the rear of his land. After marriage the rear land was acquired and the court held that it also was separate property because the right to obtain it had accrued before the marriage. This was followed by *Succession of Morgan*,³¹ where the facts were substantially similar and the holding the same. It is very difficult to see wherein any title had been initiated prior to marriage. Over against these we may set *Labish v. Hardy*,³² in California, which seems sound. The title is initiated only by the exercise of the option or of the preference.³³

ACQUISITION OF LANDS UNDER MINING, COAL, STONE AND TIMBER ENTRIES

A priori, it would seem that estates created under mining, coal, and stone and timber acts would follow the rules established for land acquired under the homestead and pre-emption acts, since they are acquired by onerous title. The Idaho court has so held in *Jacobson v. Concentrating Company*,³⁴ where a mining claim was said to be community property though this was not essential to a determination of the case. The court observes that a mining location "differs from the Mexican grants, personal in their nature, and that it has never been questioned hitherto that a mining claim held by an United States patent could become community property." In *McAlister v. Hutchinson*³⁵ the New Mexico court held that "The rights, if any, that this said wife had in the mining claim, would be of no avail until after he would have acquired title. Then her right would have attached." Here are two dicta holding that a mining claim may, when matured, become community property although

³⁰ (1850) 5 La. Ann. 212.

³¹ (1857) 12 La. Ann. 153.

³² *Supra*, n. 13.

³³ There is a similar confusion in *Lake v. Lake* (1877) 52 Cal. 428, and in *Morgan v. Lones* (1889) 80 Cal. 317, 22 Pac. 253, though in the latter case the court had previously held the other way, (1888) 78 Cal. 58, 20 Pac. 248. These are opposed to *Labish v. Hardy* (1888) 77 Cal. 327, 19 Pac. 531, reaffirmed in (1889) 23 Pac. 123. See *McKay on Community Property*, Chapter V.

³⁴ (1891) 3 Idaho 126, 28 Pac. 396.

³⁵ (1904) 12 N. M. 11, 75 Pac. 41. Cf. *Brown v. Lockhart* (1903) 12 N. M. 10, 71 Pac. 1086, where mining property acquired by wife or husband was held to be community property.

one holds that before patent it may be alienated by the husband only.³⁶

The Washington court has, however, taken the view that mining entries cannot by any means whatever become community property under any circumstances³⁷ and holds that coal and stone and timber land entries are analogous to the mining locations rather than to homestead and pre-emption entries.³⁸ The reasoning is not satisfactory. Reliance for this conclusion is had partly upon the requirement by the government of an affidavit by the entryman to the effect that he is acquiring for his own "sole and exclusive use" and partly upon the fact that the wife is also allowed to make a location. There is not, however, in this legislation the slightest indication that Congress intended to establish a different kind of title in the one case from that in the other. Nor is it probable that Congress intended to enact local property law for any state. The Washington view rests upon the holding in *Black v. Elkhorn Mining Company*,³⁹ which decided that a mining claim prior to patent was not subject to dower and could be transferred to a bona fide purchaser for value, without consent of the wife. Under this rule, what becomes of the Washington statute which provides substantially as other community property statutes do, that "all other property" "acquired" after marriage by either spouse, etc., is community property? The Washington court must regard these statutes as enacting local property law.

In conclusion it seems important to distinguish between an interest initiated and a preference which vests no interest. Secondly, no consideration should be given to the individual above that given to the community. If an interest is initiated by the community, it should remain a community interest by the same reasoning that an interest initiated by an individual remains an individual interest. There is no logical reason for holding that the community must continue to exist all the time from the initiation of title till final proof in order to make the property community. On the other hand, if the Washington view, that no title is acquired until final

³⁶ See also the recent case of *Cole v. Ralph* (1919) 252 U. S. 286, 40 Sup. Ct. Rep. 324, holding that under the laws of Nevada an unpatented mining claim is community property of which the husband has the "entire management and control" and the "absolute power of disposition."

³⁷ *Phoenix Min. and Mill. Co. v. Scott* (1898) 20 Wash. 48, 54 Pac. 777.

³⁸ *Guye v. Guye*, supra, n. 5; *Gardner v. Port Blakely Mill Co.* (1894) 8 Wash. 1, 35 Pac. 402; *James v. James* (1908) 51 Wash. 60, 97 Pac. 1113.

³⁹ (1896) 163 U. S. 445, 41 L. Ed. 221, 16 Sup. Ct. Rep. 1101.

proof is made, is sound, then if, at the time final proof is made, there is a community, the land should be community land. Thirdly, mining, coal, and stone and timber entries should be treated the same as homestead and pre-emption entries. A failure to make the necessary distinctions is partly responsible for the confusion that has resulted.

Alvin E. Evans.

Law School, University of Idaho
Moscow, Idaho