

# California Law Review

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VOL. X

MAY, 1922

Number 4

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## Primary Sources of Acquisition of Community Property

### I. THE EARNINGS OF THE SPOUSES

IN ALL the community property states the earnings of the spouses belong to the community. Any other rule would violate the fundamental conception of community property: "Whatever is acquired by the joint efforts of the husband and wife shall be their community property."<sup>1</sup> This is the chief source of community income.

Statutes commonly provide that the earnings of the wife or of the wife and children, while living apart from the husband, shall be separate,<sup>2</sup> but no such statute has been passed thus favoring the husband.<sup>3</sup> There are also statutes in the several states which provide that the earnings of the wife shall not be liable for the husband's debts, and shall be under the wife's control.<sup>4</sup>

What is meant by "earnings for personal services" has never been accurately determined and it is not easy to show just what the various legislatures intended to include. If they consist of salary or wages as reward for services performed for another, there is no difficulty. Thus, compensation for services of the wife as nurse,<sup>5</sup> profits derived from engaging in business,<sup>6</sup> keep-

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<sup>1</sup> See Ballinger on Community Property, § 11.

<sup>2</sup> A number of states, like Idaho, § 4663, have embodied the California statute in their codes. See Cal. Civ. Code, § 169.

<sup>3</sup> Merrell v. Moore (1907) 47 Tex. Civ. App. 200, 104 S. W. 514.

<sup>4</sup> Cal. Civ. Code, § 168; Idaho, §§ 4667, 6919; Nevada, § 2167; New Mexico, § 2759; Texas, Art. 4621 (as amended in 1917); Washington, §§ 570, 5920-5921. Cf. Arizona, Par. 3850, Louisiana, Arts. 2402, 2404.

<sup>5</sup> Wren v. Wren (1893) 100 Cal. 276, 34 Pac. 775, 38 Am. St. Rep. 287; Smith v. Furnish (1886) 70 Cal. 424, 12 Pac. 392; Bayless v. Reed (1920) 31 Cal. App. Dec. 1079, 190 Pac. 211. Professor Pomeroy discusses this topic in 4 West Coast Reporter 305.

<sup>6</sup> Sherlock v. Denny (1902) 28 Wash. 170, 68 Pac. 452.

ing boarders,<sup>7</sup> renting rooms,<sup>8</sup> operating a saloon,<sup>9</sup> or the performance of any other services outside the family relations, such as acting as bookkeeper under a promise of reward;<sup>10</sup> or income derived from the care of the children of another by the wife, in payment for which the benefit of a life-insurance policy is assigned her<sup>11</sup> are not separate property. Whether she teaches school,<sup>12</sup> or farms,<sup>13</sup> or acts as agent for a real-estate dealer,<sup>14</sup> or receives commissions as payment for her services as guardian,<sup>15</sup> or engages in the business of selling leases of lodging-houses,<sup>16</sup> it is all one; such income belongs to the community. The fact that the statute may make the wife's earnings not liable for the husband's obligations does not affect their community character.<sup>17</sup> Presumably they would still not be liable for her separate debts, and would pass by will or succession subject to the rules which govern other community property.

Where the occupation of a spouse consists in trading with his or her own stock,<sup>18</sup> or farming a separate farm,<sup>19</sup> or dealing in separate real-estate,<sup>20</sup> whether as a business or casually, or investing, reinvesting and caring for separate property,<sup>21</sup> difficult problems arise. Do "earnings" include accession of labor to separate property resulting in enhancement of the property or in issues from the property? If a husband devotes his entire time and industry to the cultivation, enhancement and maintenance of a nursery farm and to the sale of the stocks grown thereon, there is an accession of labor to separate property. The Spanish law affords here no assistance because the rents, issues, and profits

<sup>7</sup> *Yake v. Pugh* (1895) 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17.

<sup>8</sup> *Finnegan v. Hibernia Sav. & Loan Soc.* (1883) 63 Cal. 390.

<sup>9</sup> *Finnegan v. Hibernia Sav. & Loan Soc.*, *supra*, n. 8.

<sup>10</sup> *Moore v. Crandall* (1913) 205 Fed. 689, 124 C. C. A. 11; *Michael v. Rabe* (1908) 109 S. W. 939 (Tex. Civ. App.).

<sup>11</sup> *Bollinger v. Wright* (1904) 143 Cal. 292, 76 Pac. 1108.

<sup>12</sup> *Barr v. Simpson* (1909) 54 Tex. Civ. App. 105, 117 S. W. 1041.

<sup>13</sup> *Fisher v. Marsh* (1912) 69 Wash. 570, 125 Pac. 951.

<sup>14</sup> *Lilly v. Yearly* (1913) 152 S. W. 823 (Tex. Civ. App.). Cf. *Wells v. Allen* (1919) 38 Cal. App. 586, 177 Pac. 180, as to earnings of a wife by prostitution.

<sup>15</sup> *Scott v. Scott* (1914) 170 S. W. 273 (Tex. Civ. App.).

<sup>16</sup> *Larson v. Larson* (1911) 15 Cal. App. 535, 115 Pac. 340.

<sup>17</sup> *Ahlstrom v. Tage* (1918) 31 Idaho 459, 174 Pac. 605.

<sup>18</sup> *In re Grannis' Estate* (1904) 142 Cal. 1, 75 Pac. 324.

<sup>19</sup> *Lewis v. Johns* (1864) 24 Cal. 98, 85 Am. Dec. 49.

<sup>20</sup> *Austin v. Clifford* (1901) 24 Wash. 172, 64 Pac. 155; *Evans v. Purington* (1896) 34 S. W. 350 (Tex. Civ. App.); *Yesler v. Hochstetler* (1892) 4 Wash. 349, 30 Pac. 398; *Cabell v. Menczer* (1896) 35 S. W. 206 (Tex. Civ. App.).

<sup>21</sup> *Lake v. Lake* (1884) 18 Nev. 361, 4 Pac. 711.

of separate property belonged to the community,<sup>22</sup> save such profits as resulted from natural enhancement.

If "earnings" do not include accession of labor to property, then in many ways the object of the law-givers—that of putting husband and wife on a basis of proprietary equality in respect to acquisitions during marriage—is defeated. They conceived that the wife rendered services to the marital community, different in kind but equal in value to those rendered by the husband, not measurable by a pecuniary standard. A number of cases show that the interpretation of the term "earnings" by the courts makes it more inclusive than mere rewards for personal services, and that it includes, in some cases at least, rewards derived from the application of industry and skill to the continuance and upbuilding of a business already possessed at the time of marriage. This phase of the problem is discussed below under the topic, "Rents, Issues and Profits of Separate Property."

If anything further is required to establish the fact that the term "earnings" includes more than reward for services to others, it may be found in the right of the community to recover for the loss of services arising from personal injuries, as where an injured wife, who formerly had done her own housekeeping, is prevented from continuing so to do because of her injuries. Her services are a part of the "earning power" of the community.<sup>23</sup> In such case evidence is admissible to indicate the nature of the wife's services to the household; and to show whether there are children, and if so whether or not she cares for their physical and other wants in person, or whether such duties are intrusted to a governess or other servants.<sup>24</sup> If the wife is the "man of the family" and operates the husband's business, such services are a part of the "community earning power."<sup>25</sup> Superior management of the household affairs by the wife, her economy and thrift have been alluded to as her earnings.<sup>26</sup> The husband does not neglect his wife and fail to provide for her where he permits her to earn money for self-support.<sup>27</sup>

It would seem, therefore, that where a gift is made to the wife either *inter vivos* or by will, which is expressed to be in

<sup>22</sup> *Fuller v. Ferguson* (1864) 26 Cal. 546.

<sup>23</sup> *Martin v. So. Pac. Co.* (1900) 130 Cal. 285, 62 Pac. 515.

<sup>24</sup> *Redfield v. Oakland C. St. Ry. Co.* (1896) 112 Cal. 220, 43 Pac. 1117.

<sup>25</sup> *Bekins v. Dieterle* (1907) 5 Cal. App. 690, 91 Pac. 173.

<sup>26</sup> *Johnson v. Burford* (1873) 39 Tex. 242.

<sup>27</sup> *Washburn v. Washburn* (1858) 9 Cal. 475.

payment for services rendered by her, such a gift would belong to the community and would be outside the statutory declaration to the effect that all property acquired after marriage by gift, bequest, devise, or descent, shall be separate. Apparently, however, such was not the Spanish law,<sup>28</sup> but the Spanish view would probably not prevail in the community property states.<sup>29</sup>

Among the various examples of the earnings of the husband that may be given, we may note the one-half share of the winnings of a saloon-keeper's partner derived from gambling;<sup>30</sup> income accruing from the exercise of the function of notary public,<sup>31</sup> though the particular exercise was fraudulent; and sick benefits received in lieu of wages.<sup>32</sup>

Earnings of the children are community,<sup>33</sup> including the earnings of the minor children of one of the spouses by a former marriage.<sup>34</sup> But the earnings of a woman who was not a wife though she passed as such for many years, are not community because there is no marital community, and she may sue for them in her own name.<sup>35</sup> Costs recovered by a wife are not earnings and so are not exempt from liability for the husband's debts.<sup>36</sup>

It is commonly held also that the spouses may by agreement inter sese make the earnings of either (as well, of course, as the future profits from whatever source acquired by either), or both separate. Such agreements seem to be fostered by statute in California.<sup>37</sup> Washington holds that such agreements are valid

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<sup>28</sup> *Fiske v. Flores* (1875) 43 Tex. 340.

<sup>29</sup> *Cf. Smith v. Furnish* (1886) 70 Cal. 424, 12 Pac. 392.

<sup>30</sup> *In re Gold's Estate* (1915) 151 Pac. 12, 170 Pac. 621. *Cf. Milne v. Kane* (1911) 64 Wash. 258, 116 Pac. 659 (husband operates an automobile for hire).

<sup>31</sup> *Kangley v. Rogers* (1915) 85 Wash. 250, 147 Pac. 898. *Cf. McGregor v. Johnson* (1910) 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022 (profits made fraudulently by a dealer in real estate).

<sup>32</sup> *Doyle v. Doyle* (1919) 30 Cal. App. Dec. 497, 186 Pac. 188.

<sup>33</sup> *Messimer v. Echols* (1917) 194 S. W. 1171 (Tex. Civ. App.).

<sup>34</sup> *Davis v. Campbell-Root Lumber Co.* (1921) 231 S. W. 167 (Tex. Civ. App.). (1921) 201 P. 143.

<sup>35</sup> *Grosse-Becker v. Becker* (1894) 102 Cal. 226, 36 Pac. 433.

<sup>36</sup> *Adams v. Baker* (1898) 24 Nev. 375, 55 Pac. 362.

<sup>37</sup> See Cal. Civ. Code §§ 159 and 164. It is difficult to see how these statutes apply. See *Larson v. Larson* (1911) 15 Cal. App. 535, 115 Pac. 340; *Wren v. Wren* (1893) 100 Cal. 276, 34 Pac. 775, 28 Am. St. Rep. 287; *Von Glahn v. Brennan* (1889) 81 Cal. 261, 22 Pac. 596; *Moore v. Crandall* (1913) 205 Fed. 689, 124 C. C. A. 11; *Kaltschmidt v. Weber* (1904) 145 Cal. 596, 79 Pac. 272. In *Perkins v. Sunset Teleph. & Telegr. Co.* (1909) 155 Cal. 712, 103 Pac. 190, there was a similar gift to the wife of a cause of action for personal injuries. In *Rayburn v. Rayburn* (1921) 35 Cal. App. Dec. 915, 200 Pac. 1064, the gift by the husband of a wife's earnings to her was inferred from his conduct in exercising no control over them. *Cf. also Smith v. Smith*, *infra*, n. 43.

only as to subsequent creditors,<sup>38</sup> as to specific future earnings alone, and that a general gift by the husband to the wife of her future earnings is insufficient to vest in her the property in them so as to enable the wife to sue for them alone.<sup>39</sup> California<sup>40</sup> seems to have held the same way at one time, and such is the law in Texas.<sup>41</sup>

This Texas holding professedly rests on a provision of the statute<sup>42</sup> to the effect that no gift of goods or chattels shall be valid unless made by deed, or unless actual possession shall be taken by the donee. It seems to be a fair criticism of this view to say that such agreements need not be treated as resulting in gifts. There is both a meritorious and even a valuable consideration for such promises, since the wife undertakes tasks which are outside the sphere of her marital duty.<sup>43</sup> Such agreements need not be treated as contracts, resulting as they do in something somewhat similar to the emancipation of a child whereby the parent renounces for the future his right to demand the child's earnings. It has been held that even where a child remains at home, the parent may so treat its future earnings as its own that his creditors cannot take them to satisfy their claims against him.<sup>44</sup>

It is difficult to understand also, why the Washington court should hold that such so-called gifts to the wife may be valid as to subsequent creditors but are not valid as to existing creditors,<sup>45</sup> assuming of course that the husband is solvent at the time the agreement is made. Likewise, if the husband may make a gift to the wife of her future earnings by an agreement relating to a par-

<sup>38</sup> *Fisher v. Marsh* (1912) 69 Wash. 570, 125 Pac. 951. Cf. *Worden v. Worden* (1917) 96 Wash. 592, 65 Pac. 50.

<sup>39</sup> *Greve v. Echo Oil Co.* (1908) 8 Cal. App. 275, 96 Pac. 904; *Yake v. Pugh* (1895) 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17; *Sherlock v. Denny* (1902) 28 Wash. 170, 68 Pac. 452. In *Gage v. Gage* (1914) 78 Wash. 262, 138 Pac. 886, the court seems to uphold a gift of future earnings generally. Cf. *Union Securities Co. v. Smith* (1916) 93 Wash. 115, 160 Pac. 304.

<sup>40</sup> *Read v. Rahm* (1884) 65 Cal. 343, 4 Pac. 111.

<sup>41</sup> *Henry v. Land* (1914) 168 S. W. 994 (Tex. Civ. App.); *First Nat. Bank v. McWhorter* (1915) 179 S. W. 1147 (Tex. Civ. App.). Cf. *Cox v. Miller* (1880) 54 Tex. 16.

<sup>42</sup> *Vernon's Sayles' Texas Civ. Stats.*, Art. 3968.

<sup>43</sup> *Moore v. Crandall*, *supra*, n. 10. See notes in *Ann. Cas.* 1915C 1185, and 46 L. R. A. (N. S.) 240; *Smith v. Smith* (1920) 32 Cal. App. Dec. 36, 191 Pac. 60. See *Revised Laws of Nevada* 1912, § 2169; *Goldsworthy v. Johnson* (1922) 204 Pac. 505 (Nev.).

<sup>44</sup> *Johnson v. Silsbee* (1870) 49 N. H. 543; *Tuckey v. Lovell* (1902) 8 Idaho 731, 71 Pac. 122.

<sup>45</sup> *Fisher v. Marsh*, *supra*, n. 38.

ticular employment,<sup>46</sup> why not for all future employment outside the circle of her duties? All such agreements are valid in California, and seem to be encouraged.

In California it has been held that where the husband is suing the administrator for the value of the services rendered by his wife to the deceased, she is a competent witness to prove the claim,<sup>47</sup> because his interest is not derived from her by assignment, he being entitled to her earnings by virtue of being owner of the community property.<sup>48</sup> The contrary has been held, however, in Washington, where the husband was suing an administrator for professional services as physician to the deceased, the wife being as much interested in the recovery as was plaintiff.<sup>49</sup>

It seems rather clear that where profits arise from the occasional sale of separate property, the element of personal effort is small; that the term "earnings" should not be pressed too closely so as to include all incidental attention to purely separate interests. Such an interpretation would destroy the significance of separate property. If, however, any large portion of the time of either spouse is occupied gainfully with separate interests so that the skill, attention and industry which belong to the community, and which would normally produce community revenues, are devoted to matters outside the community, it is inequitable to the community to hold that enhancement of separate interests by such industry shall not at all redound to the benefit of the community.

## II. RENTS, ISSUES, AND PROFITS, OF SEPARATE PROPERTY

In Idaho, the rents, issues, and profits of separate property belong to the community<sup>50</sup> and until 1917 the same was true in

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<sup>46</sup> *Yake v. Pugh* (1895) 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17.

<sup>47</sup> *Bayless v. Reed* (1920) 31 Cal. App. Dec. 1079, 190 Pac. 211.

<sup>48</sup> See article on the Ownership of Community Property, 35 *Harvard Law Review* 47, where the California theory of ownership is discussed. See also 4 *West Coast Reporter* 390 ff and note in 9 *California Law Review* 489.

<sup>49</sup> *Whitney v. Priest* (1901) 26 Wash. 48, 66 Pac. 108.

<sup>50</sup> *Idaho Compiled Statutes*, 1919, § 4660. If the instrument by which the wife acquires her separate property provides that the rents and profits thereof shall be applied to her sole and separate use, then the wife is given the management and disposition of such property. Section 4666 gives the husband management and control of all the community property "except the earnings of the wife and the rents and profits of her separate estate," thus clearly implying that such income is community. Section 4667 gives the wife control of her earnings and the rents and profits of her separate estate. So whether or not the conveying instrument contains recitals showing that the property is separate, the wife has control of the rents and profits of the conveyed property if it is in fact separate. Section 6919 provides *inter alia* that the rents, issues and profits of the wife's separate property

Texas,<sup>51</sup> and is now save as to the wife's property. In Louisiana the revenues from the husband's separate property, from the dotal property, and from the paraphernal property managed by the husband or by the husband and wife indifferently, are community.<sup>52</sup> Where the wife manages her own paraphernal estate, the income therefrom is separate. In all the other community property states the profits from separate property are separate. At one time in Washington <sup>53</sup> such revenues belonged to the community but this statutory rule continued for only two years. In California the legislature passed a statute making the revenues of separate property of both spouses community, but such legislation was pronounced unconstitutional, so far as it affected the wife's property, being regarded as a taking of property without due process of law.<sup>54</sup> The husband's property seems to have been regarded differently and the statute in that respect was apparently sustained. In Washington such legislation was not regarded as unconstitutional.<sup>55</sup>

It seems clear that if the local statute does not specifically refer to that source of revenue, the income from separate property should be community under the general provision of the

and compensation for her personal services are exempt from execution against the husband. See *Thorn v. Anderson* (1900) 7 Idaho, 421, 63 Pac. 592; *In re Pindel* (1912) 193 Fed. 917 (C. C. App.); *Armstrong v. Turbeville* (1919) 216 S. W. 1101 (Tex. Civ. App.).

<sup>51</sup> *Vernon's Texas Civ. and Crim. Stats.*, 1918, Suppl. Art. 4621; *Maxwell v. Jurney* (1916) 238 Fed. 566, 151 C. C. App. 502. The amendment exempting the wife's rents, interest, dividends on stock, and personal earnings from execution for the husband's debts, including community debts (*Texas L. & L. Co. v. Bank* (1919) 209 S. W. 1101, (Tex. Civ. App.) does not make such profits separate; *Rudasill v. Rudasill* (1920) 219 S. W. 843 (Tex. Civ. App.); *Winters v. Duncan* (1920) 220 S. W. 219 (Tex. Civ. App.). Under the early statutes of Texas the increase of slaves was held to be separate property, and there are dicta that the increase of livestock was separate. See note in 31 L. R. A. (N. S.) 1092. For the meaning of "increase of lands" under the Texas statutes, see *Hayden v. McMillan* (1893) 23 S. W. 430 (Tex. Civ. App.).

<sup>52</sup> *Louisiana Statutes, Arts.* 2384 and 2386; *Pinard v. Holten* (1878) 30 La. Ann. 167; *Miller v. Handy* (1881) 33 La. Ann. 160; *Lambert v. Franchebois* (1840) 16 La. 1; *Succession of Webre* (1897) 22 So. 390 (La.).

<sup>53</sup> *Guye v. Guye* (1911) 63 Wash. 340, 115 Pac. 731, 37 L. R. A. (N. S.) 186. In 1871 a statute was passed making rents, etc., from separate property community. In 1873 this provision was omitted from the statute, and in 1879 it was specifically provided that such revenues should be separate. It was accordingly thought the omission was sufficient to indicate the legislature's intent to change the law.

<sup>54</sup> *George v. Ransom* (1860) 15 Cal. 322, 76 Am. Dec. 490. In *Lewis v. Lewis* (1861) 18 Cal. 654 the husband had about \$20,000 worth of cattle at the time of marriage and about \$40,000 worth at time of death. It was held that after deducting the original value of the stock from the value at time of death, the remainder belonged to the community.

<sup>55</sup> *Arnett v. Reade* (1910) 220 U. S. 311, 55 L. Ed. 477, 31 Sup. Ct. Rep. 425, 36 L. R. A. (N. S.) 1040.

statutes of all the states that all other property (than that enumerated as separate) acquired after marriage is community.<sup>56</sup>

Accordingly, in Idaho, Louisiana, and, until recently, in Texas, the increase of livestock,<sup>57</sup> crops,<sup>58</sup> rents for the use of premises whether paid in money or in crops,<sup>59</sup> growing grass,<sup>60</sup> interest on money,<sup>61</sup> income from the operation of a ferry,<sup>62</sup> profits from commercial transactions,<sup>63</sup> and from the operation of a ginning plant,<sup>64</sup> and a prize won by the purchase of a lottery ticket,<sup>65</sup> illustrate how income from separate property may become community. In Texas it was held that lumber sawed from timber on the wife's land, in a mill belonging to her, the labor being performed by her slaves, was community.<sup>66</sup> It would be interesting to know how far the courts in these states would go, the situation being similar to the exhaustion of a trust *res*. The common law doctrine of waste might well be applied by analogy. The Idaho court has raised the query without deciding whether or not timber cut from separate land is to be classed as rents, issues, and profits.<sup>67</sup>

<sup>56</sup> *Contra*, *Lake v. Bender* (1884) 18 Nev. 361, 4 Pac. 711.

<sup>57</sup> *Thorn v. Anderson*, *supra*, n. 50; *Barr v. Simpson* (1909) 117 S. W. 1041 (Tex. Civ. App.); *Jordon v. Marcantell* (1912) 147 S. W. 357 (Tex. Civ. App.); *Amend v. Jahns* (1916) 184 S. W. 729 (Tex. Civ. App.); *Cone v. Belcher* (1909) 57 Tex. Civ. App. 493, 124 S. W. 149; *Eastman v. Jones* (1921) 236 S. W. 139 (Tex. Civ. App.).

<sup>58</sup> *Cleveland v. Cole* (1886) 65 Tex. 402. In *State Bank of Commerce v. Cox* (1920) 218 S. W. 82 (Tex. Civ. App.) the husband had rented and prepared the ground before his death; thereafter the wife bought cottonseed and raised a crop; this crop was held to be separate.

<sup>59</sup> *Emerson-Brantingham Impl. Co. v. Brothers* (1917) 194 S. W. 608 (Tex. Civ. App.); *Hanks v. Leslie* (1913) 159 S. W. 1056 (Tex. Civ. App.); *Rudasill v. Rudasill*, *supra*, n. 51; *De Berrera v. Frost* (1903) 33 Tex. Civ. App. 580, 77 S. W. 637.

<sup>60</sup> *Kreisle v. Wilson* (1912) 148 S. W. 1132 (Tex. Civ. App.).

<sup>61</sup> *Cabell v. Menczer* (1896) 35 S. W. 206 (Tex. Civ. App.); *Parrish v. Williams* (1899) 53 S. W. 79 (Tex. Civ. App.).

<sup>62</sup> *Evans v. Kroutinger* (1903) 9 Idaho 153, 72 Pac. 882, 2 Ann. Cas. 691. Strangely enough, the court held that a franchise acquired by prescription (granting that one may be so acquired) was the issue of the boat and cables used, which were separate property of the wife. Of course, such a right acquired by prescription is no more the issue or profit of property than land acquired by adverse possession is the issue or profit of property.

<sup>63</sup> *Mitchell v. Mitchell* (1891) 80 Tex. 101, 15 S. W. 705; *Smith v. Bailey* (1886) 66 Tex. 553, 1 S. W. 627; *Clafin v. Pfeifer* (1890) 76 Tex. 469, 13 S. W. 483.

<sup>64</sup> *Miller v. Fenton* (1918) 207 S. W. 631 (Tex. Civ. App.).

<sup>65</sup> *Dixon v. Sanderson* (1888) 72 Tex. 359, 10 S. W. 535, 13 Am. St. Rep. 801.

<sup>66</sup> *White v. Lynch* (1862) 26 Tex. 195.

<sup>67</sup> *Humbird Lumber Co. v. Doran* (1913) 24 Idaho 507, 135 Pac. 66. In *Hill's Estate* (1914) 167 Cal. 59, 138 Pac. 690, it was held that timber cut from the husband's separate land is separate to the extent that it constitutes rents, issues and profits.



In the other five states, together with Texas (as regards the wife's property), such income would presumably be separate. Thus profits received from a toll-road, and a toll-bridge, and from a hotel,<sup>68</sup> and dividends paid upon mill stock,<sup>69</sup> are separate.

It was observed above that the term "earnings" should not be given a narrow construction as merely the equivalent of salary or wages received for services performed for another, but logically should include the reward for services performed for one's self, or for one's wife or husband, or profits accruing from a general course of dealing, as where one is a broker, or a dealer in real-estate, whether the subject matter of his dealings is his own property or another's. It is here that the difficult problem of accession arises, appearing of course in the five states mentioned and partly now in Texas. Whereas the usual problem, in the case of accession of labor to materials, arises where there has been a wrongful taking of property either innocently or knowingly, here the performance is usually rightful, and we are concerned with the problem of how we may square the resulting profits equitably as between the separate and the community interests.

Thus, in *Pepper's Estate*,<sup>70</sup> at the time of marriage the husband owned a tract of land upon which was a flourishing nursery. After marriage he spent his entire time operating the nursery. On his death it was held that no apportionment could be made so as to determine how much of the income was attributable to the soil and how much to labor and skill. The court said that the business was conducted upon the land and it was not a case of mere purchase and sale of plants nor an incidental use of the ground. The entire gains were held to be separate.

In *Lake v. Lake*,<sup>71</sup> the husband owned \$206,000 worth of property at time of marriage. Thereafter he was occupied in operat-

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<sup>68</sup> *Lake v. Bender*, *supra*, n. 56.

<sup>69</sup> *Folsom v. Folsom* (1919) 106 Wash. 315, 179 Pac. 847.

<sup>70</sup> (1910) 158 Cal. 619, 112 Pac. 62, 31 L. R. A. (N. S.) 1092. In *Estate of Higgins* (1884) 65 Cal. 407, 4 Pac. 389, it was said that all the accumulations after the marriage appeared to be the result of the ordinary use by the husband of the property he owned at the time of marriage. The facts of the case seem to indicate that the court was dealing with acquisitions in a different state and owned at the time of removal to California. In *Bauer's Estate* (1889) 79 Cal. 304, 21 Pac. 759, it is intimated that the income derived from a husband's business, where his separate capital is invested the family expenses having been paid out of it, is separate. The damages recovered for injury to the wife's business credit belong to the community: *Anisa v. Moses* (1907) 100 S. W. 791 (Tex. Civ. App.).

<sup>71</sup> *Supra*, n. 7. This case is criticized by Professor Pomeroy in 4 West Coast Reporter 193. *Accord*, *Walsh v. Walsh* (1890) 84 Cal. 101, 23 Pac. 1099. Cf. *Dieffendorf v. Hopkins* (1891) 95 Cal. 343, 28 Pac. 265, 30 Pac.

ing his toll-road and toll-bridge, and hotel, in lending his money and collecting the interest, renting his farms, selling, purchasing, exchanging and improving his lands and in conducting farming operations. It was held that from none of these did any community profits arise.<sup>72</sup> "She has no vested rights in or lien on his time or labor. If he is indolent and barely supports the family, or if he spends his time in increasing his separate estate, instead of enriching the community, her remedy is an appeal to his better nature."

Of course under that view, if at the time of death of the husband the separate estate is actually smaller than at the time of marriage, no community property would arise where the husband "had earned nothing," his time having been spent in caring for his separate property.<sup>73</sup>

The converse case arises where the husband spends his entire time cultivating and managing his wife's property, as in *George v. Ransom*,<sup>74</sup> The fruits of the soil are the wife's and are not liable for the husband's debts. "The husband cannot acquire an interest in the wife's separate property by any independent act of his own nor by his supervision or labor can he acquire any interest in the increase thereof." Thus the view, which at a later time was taken as the basis of the decision in the *Pereira* case,<sup>75</sup> was repudiated.

In *Buchanan's Estate*,<sup>76</sup> the spouses at marriage had each invested a small sum of money in a lumber company. An incorporation was thereafter effected and the business, under the guidance of the husband, as manager, prospered greatly. He gave his entire time to it and received a salary for his services but the prosperity was due to his skill and activity. At the time of the death of the wife, he held about one-half of the stock in his own

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549. *Contra*, *York v. Hilger* (1905) 84 S. W. 1117 (Tex. Civ. App.). In *Woste v. Rugge* (1912) 68 Wash. 90, 122 Pac. 988, the injury to a customer arising from the negligent maintenance of a trap-door by a husband in his place of business was held to give rise to a claim for damages against the community, but there is no showing whether or not the business was separately owned.

<sup>72</sup> Quoting from *George v. Ransom*, *supra*, n. 54, the court observed: "In the absence of an express agreement to that effect, there is no implied obligation on the part of the wife to compensate the husband for his services, and in either case there would be only an imperfect obligation which neither the husband nor his creditors could enforce."

<sup>73</sup> *In re Cudworth's Estate*, *infra*, n. 80.

<sup>74</sup> *Supra*, n. 54.

<sup>75</sup> *Infra*, n. 77.

<sup>76</sup> (1916) 89 Wash. 172, 154 Pac. 129. See note in 4 California Law Review, 329.

name and claimed that he held it as separate property. His salary was of course the property of the community. It was decided that his personal efforts contributed to the gains more than did the original investment and the entire acquisition was found to be community property. It was not possible to distinguish between original capital and accrued profits.

Still a third result was reached in certain other cases. In *Pereira v. Pereira*,<sup>77</sup> at the time of his marriage the husband owned a saloon business, the stock and fixtures being valued at \$15,500, and the annual income therefrom being about \$5,000. He later acquired the premises where the business was conducted, paying for them \$40,000, \$5,000 in cash and the balance on credit. At the time when the wife sued for a divorce these premises had been paid for and he had a net balance in the bank of \$12,000. At this time his net income per annum was \$11,000. The court decided that these profits were not to be credited entirely either to capital as rents, issues, and profits, nor to efforts, i. e., earnings; that an apportionment should be made between the husband and the community. The court said: "The probable contribution of the capital to the income should have been determined from all the circumstances of the case, and as the business was profitable it would amount at least to the usual interest on a long-time investment well secured."

This suggestion seems to have been taken from Professor Pomeroy and from cases<sup>78</sup> in common-law states in which the husband does business on his wife's capital where large profits

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<sup>77</sup> (1909) 156 Cal. 1, 103 Pac. 488, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880. There seems to be no sufficient reason why the rule applied in the *Pereira* case should not have been adopted in *Austin v. Clifford* (1901) 24 Wash. 172, 64 Pac. 155. Here the husband at the time of marriage was engaged in the business of buying and selling property. "He just bought and sold property and then bought and built houses, and sold again, using his own money all the time." He continued in the same business after marriage. It was held that all acquisitions from this employment after marriage were separate, nothing being allowed to the community on account of his skill and acumen. As said by Mr. F. T. Post (Proceedings of the Washington State Bar Association, 1907), "... the brain force and energy of the husband may be given to himself without compensation. He may have a few thousand dollars as his separate property and may devote time, labor and ability after marriage in investing the same profitably, and all the proceeds of such investments, no matter how large, will be separate property." Probably the rule of the *Pereira* case was never suggested or thought of by the court. Thus it may well be a disadvantage to a woman that her husband have separate property at the time of marriage.

<sup>78</sup> *The Husband's Separate Estate*, 4 West Coast Reporter 493; *Bogges v. Richards* (1894) 39 W. Va. 576, 20 S. E. 599, 45 Am. St. Rep. 938, 26 L. R. A. 537.

accrue. It was held in one case that a court of equity will apportion the profits between the wife and the husband's creditors. The terms of this rule, if we may call it such, are so ample, not to say vague, that it scarcely helps us in a case that varies from these facts. How large should the net profits be when we apply the rule? Suppose they are small,<sup>79</sup> or there are none at all?<sup>80</sup> Are all the gross profits to be attributed to capital in that event? If so we seem to require the community to guarantee to the separate interest that there shall be no loss so long as any profits whatever accrue. It is difficult to see why the community should protect the individual against loss, rather than the individual the community. In the principal case, interest at seven per cent was allowed on the \$15,500 separate capital during the marriage period: "The husband has shown no reason why his capital was entitled to a larger return than reasonable interest." It was also said that it was allowable for the wife to show that the capital earned a smaller proportion of the profits than legal interest. This rule was ostensibly followed in *McDuff v. McDuff*,<sup>81</sup> where the interest on the original investment brought it up to more than the property sold for, "allowing nothing for natural enhancement."

*VanCamp v. VanCamp*<sup>82</sup> combines certain features of the cases just discussed. At the time of marriage the husband was the manager of a corporation engaged in the canning of sea-foods and was receiving a salary therefor of \$1,000 per month, which was thereafter increased to \$1,500 per month. He had promoted the corporation and was owner of a large majority of the stock, which paid enormously large dividends. The success of the business was due to his skill and capacity and he devoted his entire time to it. The court said that he was paid an adequate salary for which another with equal capacity could have been secured, but finds, however, that the prosperity, and therefore the income

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<sup>79</sup> *McDuff v. McDuff* (1920) 32 Cal. App. Dec. 552, 191 Pac. 957.

<sup>80</sup> *In re Cudworth's Estate* (1901) 133 Cal. 462, 65 Pac. 1041. In *Succession of Ferguson* (1920) 146 La. 1010, 84 So. 338, it is said that where separate funds are invested in business and the profits therefrom are likewise invested, thereby enhancing the value of the capital and stock in trade, if a loss should arise there would be no presumption that the loss was a community loss. If at a given time the husband had \$50,000 separate property and on his death left just that much, this could not be presumed to be separate. In *re Dargie's Estate* (1918) 179 Cal. 418, 177 Pac. 165, the profits were large, the estate having increased from \$100,000 to \$933,900. The court observed that it might be very difficult to determine what portion of this increase arose from rents, issues and profits.

<sup>81</sup> *Supra*, n. 79.

<sup>82</sup> (1921) 35 Cal. App. Dec. 301, 199 Pac. 885.

on the stock, was largely due to himself. It then concludes that the salary received was the only thing that was community income. It follows the Pepper rather than the Periera case. The husband had received \$69,000 in salary during the period of the marriage and had expended \$60,000 for community purposes, which amount the court deducted from the first sum to show that the community assets were, on the ground that community earnings, rather than separate income, are chargeable with family support. During this time he had received as dividends from the corporation stock the sum of \$141,000 and in addition had made large profits from the sales of stocks in the said corporation. All such income was held to be separate because it did not amount to earnings. But surely it was not all rents, issues and profits of separate property, nor was it the natural enhancement of separate property as spoken of in *Guye v. Guye*.<sup>83</sup> Thus again the statute was construed as strongly as possible against the community and in favor of the individual.

In other cases attempts have been made to distinguish between the issues of separate property, and services or earnings. Thus in *Lenninger v. Lenninger*,<sup>84</sup> the wife at the time of marriage owned a rooming-house. It was held that not all the profits belonged to the community, but no rule for apportionment was announced. On the other hand, it was held in *Merrick v. Appenzeller*<sup>85</sup> that the profits of a rooming-house owned by the wife were separate, it being observed that the husband was for the most of the time outside the state. But how does the latter fact bear on the matter? In *Youngsworth v. Jewell*<sup>86</sup> the wife had taken over the operation of a restaurant formerly run by the husband. It was held that if she carried on the business bona fide in her own name, and employed her husband and paid him a salary but did not permit him to control the business, the profits were separate, but if it were a case of commingling of their mutual industry, *sans* an agreement to compensate him, the business being

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<sup>83</sup> (1911) 63 Wash. 340, 115 Pac. 731.

<sup>84</sup> (1914) 167 Cal. 297, 139 Pac. 679.

<sup>85</sup> (1921) 196 Pac. 629 (Wash.).

<sup>86</sup> (1880) 15 Nev. 45. In *Dieffendorff v. Hopkins* (1891) 95 Cal. 343, 28 Pac. 265, 30 Pac. 549, the wife operated her separate premises as both a boarding-house and rooming-house. The profits were held to be separate. In *Schwarze v. Mahoney* (1893) 97 Cal. 131, 31 Pac. 908, where the wife brought an action for the rent of apartments which she had let to defendant, it was held that it was too late, on appeal, to raise the objection that the rent belonged to the community. Presumably the husband could not later have recovered for the community on the same cause of action.

conducted in the same manner as before the change of owners, the profits belonged to the community. The result under the first alternative would be that the wages received by the husband for his labor would belong to the community, but the income from the services of the wife as manager, which services were superior perhaps, but not greatly dissimilar in character, would be separate. Under the second alternative, nothing seems to be attributed to capital. Undoubtedly the separate capital used was small.

The diversity in results as well as the injustice in some of the cases suggests that no satisfactory rule has been worked out so far. It does not seem difficult to suggest a convenient way out in such situations as the Pepper case presents. The amount attributable properly to rents, issues, and profits is the mesne profits, or perhaps the reasonable rental value of the premises.<sup>87</sup> While this might not be wholly accurate, it is approximately so, and would be all that could be recovered from a disseisor.

A like approximation should be made where the husband devotes his time to cultivation and improvement of his wife's property. Two courses may be open: one, to determine the reasonable value of his labor and industry, the other to subtract the reasonable rental value from the actual income from produce. Whichever course were adopted, the result should approximate the community interest. How the family and other expenses should be apportioned would depend on the facts of each particular case.

In cases where there have been small or no net profits or even losses in the aggregate, over a period of years, there should be no presumption that the losses were on the side of industry as compared with capital but the result should depend on the actual facts, as to the value and productiveness of the separate property as well as of the labor expended. The husband being the manager of the community property should exercise the highest good faith toward the community interests. He is a sort of fiduciary. Louisiana<sup>88</sup> puts the burden of proof on him, in the cases of this kind, to show that a part of the profits arises from separate property and how large that part is.

### III. BORROWED MONEY AND PURCHASES ON CREDIT

Borrowed money and purchases on credit are neither rents, issues, and profits, nor earnings, but are somewhat similar to both.

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<sup>87</sup> *Worthington v. Hiss* (1889) 70 Md. 172, 16 Atl. 534, 17 Atl. 1026.

<sup>88</sup> *Succession of Ferguson*, *supra*, n. 80. Cf. *York v. Hilger* (1905) 84 S. W. 1117 (Tex. Civ. App.).

As there is no statutory provision expressly declaring the nature of such acquisitions, they seem clearly to come within the provision that "all other property acquired after marriage . . . is community property."

All property purchased during the existence of the marriage is presumed to be community,<sup>89</sup> but if property is taken in exchange for separate property, or is purchased with funds acquired by the sale of separate property, such acquisitions are separate, since they take the place of that which was surrendered. Such alteration of form of separate property is a matter of indifference to the community. Of course, separate funds of a spouse may be loaned or given to the community and thus the property acquired with them would be community.<sup>90</sup> The usual view however, even where there is no recital or other evidence of intent, is that the use of separate funds in the purchase of property makes the property separate to the extent of separate funds used.<sup>91</sup>

There is no difference logically between money borrowed by the wife or her purchases on credit, and those of the husband, and the statutes indicate none. The chief difficulty, as pointed out by Mr. McKay,<sup>92</sup> is that the wife has no general contractual power to borrow money and bind the community therefor, or to purchase property on credit and bind the community for the deferred payments. It is therefore somewhat more difficult to account for the result where she is the actor than where such transactions are undertaken by the husband. This difficulty is overcome practically by holding the community liable, either on

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<sup>89</sup> *Nilson v. Sarment* (1908) 153 Cal. 524, 96 Pac. 315. In 1889, Cal. Civ. Code § 164 was amended, and the presumption thereafter is that property conveyed to the wife is separate. *Douglas v. Douglas* (1912) 22 Idaho 336, 125 Pac. 796.

<sup>90</sup> *Pool v. Clifford* (1889) 78 Cal. 371, 20 Pac. 857. The court said: "We think it must be held that the wife loaned the money to the husband and that the horses were his property." It is not clear whether the court meant that the horses were community or the separate property of the husband. Since the husband is the owner of the community property it seems probable that by "his property" community property was intended. In *Booth Mercantile Co. v. Murphy* (1908) 14 Idaho 212, 93 Pac. 777, the wife mortgaged her separate property for the purchases which seem rather clearly to have become community property of herself and her husband, being used exclusively for community purposes. No recovery was sought against the community, however. The transaction amounted to a borrowing by her of money which became separate, and a lending to the community. See also *Title Ins. Co. v. Ingersol* (1908) 133 Cal. 1, 94 Pac. 94.

<sup>91</sup> See *infra*, n. 97.

<sup>92</sup> *MacKay on Community Property*, Chap. XL.

the theory of quasi-contract, or of implied agency.<sup>93</sup> Where money is borrowed, the amount of the recovery would normally be the exact sum borrowed, whichever theory were followed. Where purchases are made on credit the amount of the recovery would be determined by the increase in community assets, if one adopts the theory of quasi-contract. Of course the statutory manager of the community property, the husband, may decline advantages from the contracts of the wife and thus avoid a community liability, but during such period as may be open to him to elect, his present creditors should, under the statutes, be able to claim the advantage of such purchases *cum oncre*.

Naturally, money borrowed on the security of community property would be community, and property purchased partly with community funds, for which credit was extended for the remainder of the purchase price, either without security or by pledge of the property so acquired, or even by the pledge of separate property, would be community.<sup>94</sup>

The ownership of borrowed money may be determined by the circumstances under which the money was borrowed, classified as follows:

1. Funds borrowed on the security of separate property of either spouse, or to be used for the unmistakably separate purposes of either.<sup>95</sup>

2. Funds borrowed on separate credit, without pledge of property save of the property acquired with them, but with an agreement between the spouses that such funds shall be separate.<sup>96</sup> This situation may arise where either spouse makes the contract.

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<sup>93</sup> See paper by the writer on Community Obligations, 10 California Law Review 120. If the husband refuses the article purchased by the wife on credit, no community obligation arises: *Roullard v. Gray* (1916) 30 Cal. App. 757, 159 Pac. 457.

<sup>94</sup> *Ives v. Connacher* (1912) 162 Cal. 174, 121 Pac. 394; *Bollinger v. Wright* (1904) 143 Cal. 292, 76 Pac. 1108; *Schuster v. Bauman Jewelry Co.* (1890) 79 Tex. 179, 15 S. W. 259, 23 Am. St. Rep. 327.

<sup>95</sup> *Hall v. Johns* (1909) 17 Idaho 224, 105 Pac. 71; *Dyment v. Nelson* (1913) 166 Cal. 38, 134 Pac. 988; *Yesler v. Hochstetler* (1892) 4 Wash. 349, 30 Pac. 398; *Graves v. Columbia Underwriters* (1916) 93 Wash. 196, 160 Pac. 436; *Dobbins v. Dexter, Horton & Co.* (1911) 62 Wash. 423, 113 Pac. 1088; *Finn v. Finn* (1919) 106 Wash. 137, 179 Pac. 103; *Somes v. Ainsworth* (1902) 67 S. W. 468 (Tex. Civ. App.); *Cavil v. Walker* (1894) 26 S. W. 854, (Tex. Civ. App.); *Sparks v. Taylor* (1906) 90 S. W. 485 (Tex.), 6 L. R. A. (N. S.) 381; *Heidenheimer v. McKeen* (1885) 63 Tex. 229; *Harris v. Harris* (1886) 71 Cal. 314, 12 Pac. 274; *Armstrong v. Turbeville* (1919) 216 S. W. 1101 (Tex. Civ. App.); *Overland Nat. Bank v. Halveston* (1921) 33 Idaho 489, 196 Pac. 217; *Carle v. Heller* (1912) 18 Cal. App. 577, 123 Pac. 815.

<sup>96</sup> *Gooding etc. Co. v. Lincoln etc. Bank* (1912) 22 Idaho 468, 126 Pac. 772; *Flourney v. Flourney* (1890) 86 Cal. 286, 24 Pac. 1012 (wife borrows



3. Funds borrowed by the husband without pledge of property (other than that purchased with such funds) and without agreement between the spouses as to the ownership of such funds or of the nature of the obligation incurred.<sup>97</sup>

4. Funds borrowed by the wife similarly.<sup>98</sup>

5. Funds borrowed by both spouses either without security, or with pledge community property, and without agreement as to the ownership of the funds.<sup>99</sup>

With slight changes in expression, the circumstances under which purchases on credit are made may be similarly grouped:

1. Purchases made wholly or partly on credit secured by the pledge of separate property.<sup>100</sup> In such cases a mortgage is usually given on the property purchased; or a mortgage already thereon is assumed; the deed of conveyance is delivered in escrow; a vendor's lien is retained; or there is simply a contract of sale entered into. Where no part payment is made the purchase obligation may be secured by the pledge of other separate property.

2. Purchases made on separate credit without pledge of separate property but with an agreement between the spouses that

from husband); *Heinz v. Brown* (1907) 46 Wash. 387, 90 Pac. 211, 123 Am. St. Rep. 937; *Canfield v. Moore* (1897) 16 Tex. Civ. App. 472, 41 S. W. 718; *Schuster v. Bauman Jewelry Co.*, *supra*, n. 94; *Heney v. Pesoli* (1895) 109 Cal. 53, 41 Pac. 819 (wife later mortgaged her separate property to enable her to repay the borrowed money); *Emerson-Brantingham Impl. Co. v. Brothers* (1917) 194 S. W. 608 (Tex. Civ. App.).

<sup>97</sup> *Pool v. Clifford*, *supra*, n. 90; *Aultman, Miller & Co. v. George* (1896) 34 S. W. 652 (Tex. Civ. App.); *Siverd v. Dumestre* (1918) 78 So. 969 (La.); *Worthington v. Craspe* (1911) 63 Wash. 380, 115 Pac. 849; *Clark v. Eltinge* (1902) 29 Wash. 215, 69 Pac. 736; cf. *Evans v. Welborne* (1889) 74 Tex. 530, 12 S. W. 230; *In re Estate of Holbert* (1881) 57 Cal. 257; *Perry v. Ross* (1894) 104 Cal. 15, 37 Pac. 757, 43 Am. St. Rep. 66; *Northern Bank & Trust Co. v. Coffin* (1920) 113 Wash. 326, 194 Pac. 404.

<sup>98</sup> *Chaney v. The Gauld Co.* (1915) 28 Idaho 76, 152 Pac. 468; *Northwestern Bank v. Rauch* (1898) 7 Idaho 152, 61 Pac. 516, 8 Idaho 50, 66 Pac. 807; *Althof v. Conheim* (1869) 88 Cal. 230, 99 Am. Dec. 363; *Loring v. Stuart* (1889) 79 Cal. 202, 21 Pac. 651; *Wilkerson v. Aven* (1914) 26 Idaho 559, 150 Pac. 14; *Schuyler v. Broughton* (1886) 70 Cal. 282, 11 Pac. 719; *Davis v. Green* (1898) 122 Cal. 364, 55 Pac. 9; *Moulton v. Moulton* (1920) 182 Cal. 185, 187 Pac. 421; *Main v. Scholl* (1898) 20 Wash. 201, 54 Pac. 1125; *Finn v. Finn*, *supra*, n. 95; *Parker v. Coop* (1883) 60 Tex. 111; *Hirschfeld v. Howard* (1900) 59 S. W. 55 (Tex. Civ. App.); *Fielding v. Ketler* (1915) 86 Wash. 194, 149 Pac. 667; *People v. Swalm* (1889) 80 Cal. 46, 22 Pac. 67, 13 Am. St. Rep. 96. In *Booth Mercantile Co. v. Murphy* (1908) 14 Idaho 212, 93 Pac. 777, money was borrowed by the wife on the security of separate property, but it was used for a community purpose. See also *Fallon v. Sockolov* (1921) 202 Pac. 909 (Wash.).

<sup>99</sup> *Katterhagen v. Meister* (1913) 75 Wash. 112, 134 Pac. 673; *Union Securities Co. v. Smith* (1916) 93 Wash. 115, 160 Pac. 304; *Goddard v. Reagan* (1894) 8 Tex. Civ. App. 272, 28 S. W. 352.

<sup>100</sup> *In re Deschamps' Estate* (1914) 77 Wash. 514, 137 Pac. 1009; *Cavil v. Walker*, *supra*, n. 95; *Dyment v. Nelson*, *supra*, n. 95.

deferred payments shall be made from separate funds and that such acquisitions shall be separate,<sup>101</sup> or purchases made for an unmistakably separate use.

3. Credit purchases made by the husband either with or without part payment, there being no recital in the conveyance and no agreement between the spouses as to the ownership of such property.<sup>102</sup>

4. Credit purchases made by the wife under similar circumstances.<sup>103</sup>

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<sup>101</sup> *Gooding etc. Co. v. Lincoln etc. Bank* (1912) 22 Idaho 468, 126 Pac. 772; possibly *Stewart v. Weiser Lumber Co.* (1912) 21 Idaho 340, 121 Pac. 775; *Carle v. Heller* (1912) 18 Cal. App. 577, 123 Pac. 815 (statutory presumption that property conveyed to the wife is separate); *Flourney v. Flourney* (1890) 86 Cal. 286, 24 Pac. 1012, 21 Am. St. Rep. 39; *Corbett v. Sloane* (1909) 52 Wash. 1, 99 Pac. 1025; *Aultman, Miller & Co. v. George* (1896) 34 S. W. 652 (Tex. Civ. App.); *McBride v. Banguss* (1885) 65 Tex. 179. In *Sparks v. Taylor*, supra, n. 95, it was said that the intention of the spouses at the time of purchase determines the character of the property purchased. *Ullman v. Jasper* (1888) 70 Tex. 446, 7 S. W. 763; *Parker v. Fogarty* (1893) 4 Tex. Civ. App. 615, 23 S. W. 700; *Schuster v. Bauman Jewelry Co.* (1890) 79 Tex. 179, 15 S. W. 259, 23 Am. St. Rep. 327; *McClintic v. Midland Grocery Co.* (1913) 106 Tex. 558, 154 S. W. 1157; *Amend v. Jahns* (1916) 184 S. W. 729 (Tex. Civ. App.); *Purinton v. Gunter* (1893) 3 Tex. Civ. App. 525, 22 S. W. 1008; *Emerson-Brantingham Impl. Co. v. Brothers* (1917) 194 S. W. 608 (Tex. Civ. App.); *Mattson v. Mattson* (1902) 29 Wash. 417, 69 Pac. 1087 may perhaps reach the right result but not in the right way; *Hall v. Decherd* (1910) 62 Tex. Civ. App. 426, 131 S. W. 1133; *Jones-Rosquist-Killeam Co. v. Nelson* (1917) 98 Wash. 539, 167 Pac. 1130.

<sup>102</sup> *Pereira v. Pereira*, supra, n. 77; *Hirsch v. Howell* (1900) 60 S. W. 887 (Tex. Civ. App.); *Strnad v. Strnad* (1902) 68 S. W. 69 (Tex. Civ. App.); *Love v. Robertson* (1851) 7 Tex. 6, 56 Am. St. Rep. 41; *Letot v. Peacock* (1906) 94 S. W. 1121 (Tex. Civ. App.); *Guest v. Guest* (1919) 208 S. W. 547 (Tex. Civ. App.); *McDaniel v. Harley* (1897) 42 S. W. 323 (Tex. Civ. App.); *Allen v. Allen* (1908) 101 Tex. 362, 107 S. W. 528; *Burns v. Thompson* (1887) 39 La. Ann. 377, 1 So. 913; possibly *Worthington v. Crasper* (1911) 63 Wash. 380, 115 Pac. 849; *Ullman v. Jasper*, supra, n. 101; *Pool v. Clifford*, supra, n. 97; *Bank v. Scott* (1893) 6 Wash. 499, 33 Pac. 434; *Oregon Improv. Co. v. Sagmeister* (1892) 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233; *Henrickson v. Smith* (1920) 189 Pac. 550, 12 A. L. R. 833 (Wash.) (income by misappropriation of funds); *Hughes v. Robertson* (1919) 214 S. W. 946 (Tex. Civ. App.).

<sup>103</sup> *Chaney v. The Gauld Co.* (1915) 28 Idaho 76, 152 Pac. 468; *Northwestern Bank v. Rauch* (1898) 7 Idaho 152, 61 Pac. 516; 8 Idaho 66, 66 Pac. 807; *Wilkerson v. Aven* (1914) 26 Idaho 559, 150 Pac. 14; *Althof v. Conheim*, supra, n. 98; *Davis v. Green* (1898) 122 Cal. 364, 55 Pac. 9; *Schuyler v. Broughton* (1886) 70 Cal. 282, 11 Pac. 719; *Loring v. Stuart* (1889) 79 Cal. 202, 21 Pac. 651; *Moulton v. Moulton* (1920) 182 Cal. 185, 187 Pac. 421; *Fidelity Co. v. Lee* (1910) 58 Wash. 16, 107 Pac. 870; *Finn v. Finn* (1919) 106 Wash. 137, 179 Pac. 103; *Rhoades v. Lyons* (1917) 34 Cal. App. 616, 168 Pac. 385; *Parker v. Coop* (1883) 60 Tex. 111; *Jackson v. Torrence* (1890) 83 Cal. 521, 23 Pac. 695; *Nilson v. Sarment* (1908) 153 Cal. 524, 96 Pac. 315, 126 Am. St. Rep. 91; *Morris v. Waring* (1916) 22 N. M. 175, 159 Pac. 1002; *Balkema v. Grolimund* (1916) 92 Wash. 326, 159 Pac. 127; *Neighbors v. Anderson* (1901) 62 S. W. 417 (Tex.); *Walling v. Hanig* (1889) 11 S. W. 547 (Tex.); *Richburg v. McIlwaine, Knight & Co.* (1910) 131 S. W. 1166 (Tex. Civ. App.); *Epperson v. Jones* (1886) 65 Tex. 425; *Jones v. Millinery*.

5. Credit purchases made by both spouses, either with or without part payment, and either unsecured, or secured by the pledge of community property, there being no recital or agreement as to the ownership of such property.<sup>104</sup>

*a. Funds Borrowed and Purchases Made on the Security of Separate Property*

Such funds and purchases should always be regarded as separate whether the transaction is by the husband or the wife, because they represent what the statute declares to be separate property. There was no idea on the part of the various legislatures that property would not change its form. We start however with the presumption that all acquisitions are community unless they can be shown to be separate.<sup>105</sup> Where the evidence shows that the acquisitions were made with separate funds, or credit purchases are made by the encumbering of separate property, that presumption is overcome. Husband and wife are free in most community property states to make gifts and to contract *inter sese*, consequently agreements made at the time of acquisition may convert borrowed funds or credit purchases made by either spouse into separate property. Thus there are three ways in which such acquisitions may become separate, namely: by mortgaging sepa-

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Co. (1910) 53 Tex. Civ. App. 197, 132 S. W. 864 (where there was no profit to the community); Sweeney v. Taylor (1906) 92 S. W. 442 (Tex. Civ. App.); Barrie v. Carolan (1901) 111 Fed. 134 (C. C. App. Cal.); Travers v. Barrett (1900) 30 Nev. 402, 97 Pac. 126 (where the view expressed above is rejected); Bexar Bldg. & Loan Ass'n v. Heady (1899) 50 S. W. 1079 (Tex. Civ. App.). See Fallon v. Sockolov, *supra*, n. 98, where the wife purchased stock in a hotel solely on her own credit, without security other than the stock. See also Adams v. Blumenshine (1922) 204 Pac. 66 (N. M.).

<sup>104</sup> Goddard v. Reagan (1894) 8 Tex. Civ. App. 272, 28 S. W. 352; Moore v. Moore (1902) 28 Tex. Civ. App. 600, 68 S. W. 59; Union Securities Co. v. Smith (1916) 93 Wash. 115, 160 Pac. 304; Rawlings v. Heal (1920) 111 Wash. 218, 190 Pac. 237; Matlock v. Glover (1885) 63 Tex. 231; Knoblock & Rainold v. Posey (1910) 126 La. 610, 52 So. 847; Grippin v. Benham (1893) 5 Wash. 589, 32 Pac. 555; Mertz v. Conrad (1906) 45 Wash. 119, 87 Pac. 1118, 122 Am. St. Rep. 889. In Winchester v. Winchester (1917) 165 Pac. 965 (Cal.) the deed recited a consideration, and the real consideration was an agreement by the grantee to pay the grantor or his wife the sum of \$300 annually during their joint lives and the life of the survivor. Such an acquisition is by purchase and the property becomes community. It is a purchase on credit rather than for a present consideration fully paid. Evidence was not admissible to show that the deed was intended to have a different legal effect from that of passing an absolute title for a valuable consideration.

<sup>105</sup> Hill v. Gardner (1904) 35 Wash. 529, 77 Pac. 808; Goldberg v. Zellner (1921) 235 S. W. 870 (Tex. Crim. App.).

rate property as security;<sup>106</sup> by agreement;<sup>107</sup> and by borrowing and using the funds for an unmistakeably separate purpose.<sup>108</sup>

With few exceptions it is now generally agreed that acquisitions are separate where separate property is placed in jeopardy in order to acquire on credit. The early case, *Yesler v. Hochstettler*,<sup>109</sup> held that money borrowed on security of separate property was community, but in *U. S. Fidelity Co. v. Lee*<sup>110</sup> the court rejected this view and went a long way toward holding that all money borrowed by the wife is separate. The court said: "If we apply the rule of that [the *Heinz*] case to the facts of this case we must hold that married persons may not purchase property as separate property except for cash, and may not make contracts and incur liabilities to the same extent as if unmarried, which is squarely in the face of the statutes above quoted." The test applied as to whether acquisitions were separate or community was, "Were they acquired with community funds and community credit, or separate funds and separate credit."

Besides the sections of the code relative to community property, the following sections were quoted:

"Every married person shall hereafter have the same right and liability to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued, as if he or she were unmarried."<sup>111</sup>

"Contracts may be made by a wife and liabilities incurred, and the same may be enforced against her to the same extent and in the same manner as if she were unmarried."<sup>112</sup>

The court concludes that these sections enable a woman to purchase on credit without reference to her married state and that purchases made on her separate credit, when she has assets sufficient to protect the purchase, are separate. But they would not be separate if likewise made by the husband. These sections are capable of being harmonized with the statute, which states "Property not owned or acquired as above stated [the separate property] but acquired after marriage, is community property."<sup>113</sup> The first

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<sup>106</sup> See cases cited in notes 95 and 100, *supra*.

<sup>107</sup> See cases cited in notes 96 and 101, *supra*, and see note in 2 *California Law Review* 53; *Goldberg v. Zellner*, *supra* n. 105.

<sup>108</sup> See *Hall v. Johns*, *Graves v. Columbia Underwriters*, *Dobbins v. Dexter*, *Horton & Co.*, *Harris v. Harris*, and *Armstrong v. Turbeville*, all *supra* n. 95.

<sup>109</sup> See *supra*, n. 95.

<sup>110</sup> *Supra*, n. 103.

<sup>111</sup> *Ballinger's Ann. Codes and Stats.*, § 4502.

<sup>112</sup> *Ibid.*, § 4504.

<sup>113</sup> *Ibid.*, § 4490.

section quoted enables a married woman (and man) to acquire separate property in the ways that are consistent with the section relating to community property, and the following section makes a married woman absolutely liable on the contracts which she enters into. In such case, though the property may be community, she is separately liable. The community also, but not the husband, becomes liable for the benefit received. So, too, the community and the husband are liable for contracts entered into by him for the benefit of the community, the community being directly liable contractually, because he is its managing agent.

Similar comments on the Washington statutes removing common-law disabilities of married women were made in the first hearing in *Main v. Scholl*,<sup>114</sup> but the conclusion following therefrom was expressly rejected on rehearing, the court observing that such an acquisition by the husband would be community and there "was no reason discoverable in the legislative enactment for regarding it differently because the wife instead of the husband was the operator." "It was the evident purpose of the legislature to place the spouses on a footing of equality as nearly as practicable." Whether the wife is possessed of separate property or not is clearly of no consequence under the statute. The motives which lead one person to lend money to another or to sell on credit to him or her are infinite, and where there is no pledge of property as security it is hard to say that the credit was extended on the faith of existing separate property. Such acquisitions do not represent separate property, but the ability and credit of the individual, all of which are the proper assets of the community and are one illustration of his or her earning capacity.

In *Heidenheimer v. McKeen*<sup>115</sup> it was held, as in the *Yesler* case, that money borrowed by the wife on the security of her separate property belonged to the community and that goods purchased therewith for the mercantile business in which her husband was engaged were community and that she could not be a partner of her husband. There are several pertinent mercantile cases from Texas<sup>116</sup> which hold that a wife cannot be her husband's business partner and incur partnership obligations with him. They

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<sup>114</sup> (1898) 20 Wash. 201, 54 Pac. 1125; on rehearing, 57 Pac. 800.

<sup>115</sup> *Supra*, n. 95.

<sup>116</sup> See *Mitchell v. Mitchell* (1891) 80 Tex. 101, 15 S. W. 705, 84 Tex. 307, 19 S. W. 477; *Schuster v. Bauman Jewelry Co.* (1890) 79 Tex. 179, 15 S. W. 259, 23 Am. St. Rep. 327; *Middlebrook v. Zapp* (1889) 73 Tex. 29, 10 S. W. 732. Cf. *Clafin v. Pfeifer* (1890) 76 Tex. 469, 13 S. W. 483.

seem to hold also that when her separate funds are invested in such business they belong to the community, with perhaps a claim on her part against the community for repayment. This is another way of saying that where the wife enters or attempts to enter into a partnership with her husband and furnishes funds, she will be regarded as lending her money to the community. In *Somes v. Ainsworth*<sup>117</sup> the wife borrowed money on the security of her separate land and loaned the money so acquired. Of course the note given therefor was her separate property.

In *Dyment v. Nelson*<sup>118</sup> the wife borrowed money with which to purchase a yacht and the arrangement had been made but not completed for a mortgage upon her separate property to secure the repayment of the borrowed money, and the yacht was purchased and registered in her name. It was held that the yacht was separate property. So in *Sparks v. Taylor*,<sup>119</sup> the wife mortgaged her separate land to procure money with which the husband was to pay for land for which he had already contracted and the latter was to take the conveyance to the wife. He fraudulently took conveyance to himself. It was held that in equity the land belonged to the wife. In *Finn v. Finn*<sup>120</sup> one of the tracts of land involved was purchased by the wife for \$1320. Of this sum she borrowed \$420 without giving security and the balance was purchased with funds borrowed on separate security. The court reviewed the *Yesler*, *Main*, *Heinz*, and *U. S. Fidelity* cases, particularly the latter, and concluded that this land was separate because there was no intent on the part of the wife to involve the community with liability for the repayment of the sums borrowed. Thus no distinction was there made between the sums borrowed by the wife when secured and when unsecured. There is no evidence of an agreement between the spouses as to the ownership of the money borrowed or of the land acquired. Whether the community was liable for the sums borrowed, it is submitted, is not the proper test because if the land became community the community would be liable quasi-contractually. Where property is so acquired it is in an equivocal position and the determination of its character is dependent on the conditions at the time of purchase.

Of course where money is borrowed by the wife for an obvi-

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<sup>117</sup> (1902) 67 S. W. 468 (Tex. Civ. App.). Cf. *Sherlock v. Denny* (1902) 28 Wash. 170, 68 Pac. 452.

<sup>118</sup> *Supra*, n. 95.

<sup>119</sup> (1906) 99 Tex. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381.

<sup>120</sup> *Supra*, n. 95.

ously separate purpose, a stranger being surety thereon, as in *Hall v. Johns*,<sup>121</sup> the money being used for the settlement of an inheritance interest, or to relieve her separate property from a tax lien as in *Graves v. Columbia Underwriters*,<sup>122</sup> or to improve her separate land,<sup>123</sup> or to make payments on the purchase price where the purchase was made before marriage,<sup>124</sup> such borrowed funds are separate, whether or not there is a pledge of separate property.

*b. Acquisitions on Credit, Separate by Agreement*

The spouses are able in general freely to make gifts and to contract *inter sese*,<sup>125</sup> fixing for the future the nature of their respective acquisitions.<sup>126</sup> Thus they may agree that all property, from whatever source acquired, shall be the separate property of the spouse so acquiring it.<sup>127</sup> It frequently happens that the husband renounces all claim to the earnings of his wife and thus makes them her separate property.<sup>128</sup> In a similar way the spouses may agree that acquisition on credit shall be the separate property of the one who conducts the transaction.<sup>129</sup> That does not seem to be what is meant by the expression frequently found in decisions, to the effect that property purchased on credit, or money borrowed, is separate because the vendor or lender looked to the separate credit of the spouse conducting the transaction.<sup>130</sup> The objection to that formula is that such parties have no right to determine the rights of spouses *inter sese*, nor can the secret intent of a spouse govern, since such transactions are controlled by the community property law. The law expressly determines what property is community and it also permits gifts and agreements between the spouses which may make separate what would otherwise be community property. Thus in *Gooding v. Lincoln Bank*,<sup>131</sup> the husband gave the wife her earnings and disclaimed all interest in the property acquired by the wife with borrowed funds. The court

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<sup>121</sup> *Supra*, n. 95.

<sup>122</sup> *Supra*, n. 95.

<sup>123</sup> *Dobbins v. Dexter Horton Co.*, *supra*, n. 95.

<sup>124</sup> *Harris v. Harris*, *supra*, n. 95.

<sup>125</sup> *Powers v. Munson* (1913) 74 Wash. 234, 133 Pac. 453.

<sup>126</sup> *Kaltschmidt v. Weber* (1904) 145 Cal. 596, 79 Pac. 272; *Calhoun v. Leary* (1893) 8 Wash. 17, 32 Pac. 1070; *Wren v. Wren* (1893) 100 Cal. 276, 34 Pac. 775, 38 Am. St. Rep. 287; *Yoakam v. Kingery* (1899) 126 Cal. 30, 58 Pac. 324.

<sup>127</sup> *Union Securities Co. v. Smith*, *supra*, n. 104.

<sup>128</sup> *Wren v. Wren*, *supra*, n. 126.

<sup>129</sup> *Union Securities Co. v. Smith*, *supra*, n. 104.

<sup>130</sup> *U. S. Fidelity Co. v. Lee*, *supra*, n. 103.

<sup>131</sup> *Supra*, n. 96.

said that, although the borrowed money was primarily community, there was no reason why under such circumstances it should not become separate. In *Flourney v. Flourney*,<sup>132</sup> there was an understanding between the spouses that the wife should pay back the money borrowed and the deferred payments from her separate estate. The court rightly held that, as between spouses, the rule laid down in *Schuyler v. Broughton*,<sup>133</sup> "property bought by the wife with borrowed money is community unless the money is borrowed on faith of existing separate property which she mortgages or pledges as security for payment or against which her contracts may be enforced," did not apply. The property was purchased for \$4750. Something over \$4000 of this was a credit transaction and a cash payment was made from borrowed funds without a pledge of property. The fact that she had separate property to the amount of something over \$7000 seems to the writer to be without significance save perhaps as evidence of an understanding between the spouses. In *Heney v. Pesoli*<sup>134</sup> likewise, the husband had agreed that the credit acquisitions should belong to the wife and she had later mortgaged her separate property to secure the deferred payments and the mortgage which she had assumed.

*Canfield v. Moore*<sup>135</sup> holds that, where land is conveyed to the separate use of the wife and the intent is that the property shall be hers, she having made the initial payment with separate funds and having borrowed the balance by giving a mortgage on the said land as security, the funds borrowed are community, and so the land is proportionately community. This holding, however, is opposed to the other Texas cases, especially to *Amend v. Jahns*,<sup>136</sup> and is probably not the law in Texas at this time.

In *McClintic v. Midland Grocery Co.*<sup>137</sup> the wife bought certain public lands, making part payment with separate funds, and it was understood between the spouses that the deferred payments would be made from gifts later to be made to the wife.

The great weight of authority as well as reason now seems to be that acquisitions are separate, where the spouses agree at the time of borrowing or purchase that they shall be separate.

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<sup>132</sup> *Supra*, n. 96.

<sup>133</sup> *Supra*, n. 103.

<sup>134</sup> *Supra*, n. 96.

<sup>135</sup> (1897) 41 S. W. 718 (Tex. Civ. App.).

<sup>136</sup> *Supra*, n. 101.

<sup>137</sup> *Supra*, n. 96 and 101.



*c. Community Credit Acquisitions, By the Husband*

Contracts entered into by the husband presumably create community rights and obligations.<sup>138</sup> Contracts whereby money is borrowed are like other contracts and the money is presumably borrowed for a community purpose. It is thought by Mr. MacKay<sup>139</sup> that acquisitions on credit by the husband are on a different footing from those of the wife, the latter being always separate. This view is based mainly on the fact, asserted by him, that the wife cannot bind the community, therefore her contracts should not inure to its benefit. The most immediate answer to this view would seem to be that the statutes of no state indicate such a distinction. The husband like the wife may borrow and acquire on credit where his separate property is pledged, or where there is an understanding that his acquisitions shall be separate, or where the acquisition is unmistakably separate, being used for a separate purpose.

Accordingly, where the husband borrows funds and builds a house with them to house his family, these funds are community.<sup>140</sup> In *Hirsch v. Howell*<sup>141</sup> the husband purchased land on credit, making a part payment with his wife's funds, and it was held that the land was community to the extent that funds were borrowed to pay for it. If land is purchased wholly on credit it is community.<sup>142</sup>

*d. Community Credit Acquisitions By the Wife*

It has already been pointed out that the statutes make all property acquired by gift, bequest, devise, or descent, by either spouse after marriage, separate property and all other, community. The statutes make no distinction between acquisitions whether by the husband or by the wife. When, as in *U. S. Fidelity Co. v. Lee*,<sup>143</sup> the court holds that money borrowed by the wife or credit purchases made by her are separate, it simply adds to the statute what the legislature did not see fit to do, to the effect that "Where the wife borrows money or purchases on credit, such property is separate if she has sufficient property liable to levy of execution

<sup>138</sup> *Peacock v. Ratliff* (1911) 62 Wash. 653, 114 Pac. 507; *Reed v. Loney* (1900) 22 Wash. 433, 61 Pac. 41.

<sup>139</sup> MacKay on Community Property, Chap. XL.

<sup>140</sup> *Clark v. Eltinge* (1902) 29 Wash. 215, 69 Pac. 240.

<sup>141</sup> (1900) 60 S. W. 887 (Tex. Civ. App.).

<sup>142</sup> *Hughes v. Robinson* (1919) 214 S. W. 946 (Tex. Civ. App.).

<sup>143</sup> *Supra*, n. 103.

to make compensation therefor." But if that position is taken for the wife it should also be taken for the husband. The result would be disastrous so far as community interests are concerned. The statutes removing certain common-law contractual disabilities of the wife certainly do not give her greater freedom than the husband has. She has equal but not superior right to acquire property.

Thus, in *Chaney v. The Gauld Co.*,<sup>144</sup> money borrowed by the wife from her father and used to purchase land, the land being mortgaged to the father to secure the loan, was held to belong to the community. In *Northwestern Bank v. Rauch*<sup>145</sup> the sum borrowed by the wife to make payment of the purchase price was held to make the land proportionately community, though there was a different holding in *Wilkerson v. Aven*,<sup>146</sup> decided the year before the *Chaney* case. In the *Wilkerson* case the court found that there were inconsistent holdings in Idaho and did not follow the *Rauch* case. The cases which it does purport to follow may perhaps be reconciled with the *Chaney* case and distinguished on the ground of an understanding between the spouses. *Schuyler v. Broughton*,<sup>147</sup> criticized by Mr. McKay, seems to be right. The court held that, in order that property purchased on credit by the wife may be separate, she must have mortgaged her existing separate estate to secure the debt. The court does not take account of the right of spouses to agree *inter sese* that such property shall be separate, but that situation was not before the court. The creditor has his remedy against the wife and also against the community, where he can show that the latter has profited by the transaction.

In *Davis v. Green*<sup>148</sup> the wife rented land, and bought barley seed to sow on it, gave her note for the barley seed and paid the rent in grain. It was held that, in the absence of an understanding between the spouses otherwise, the barley grown was community. *Rhoades v. Lyons*<sup>149</sup> seems in conflict with the current of authority in California. It was there held that an automobile purchased by the wife on a conditional sale contract was separate, the contract calling for monthly payments by her. The opinion

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<sup>144</sup> *Supra*, n. 103.

<sup>145</sup> *Supra*, n. 103.

<sup>146</sup> *Supra*, n. 103.

<sup>147</sup> *MacKay on Community Property*, § 218.

<sup>148</sup> *Supra*, n. 103.

<sup>149</sup> *Supra*, n. 103.

does not show that there was evidence of an agreement between the spouses that the article should be separate property. The reason for the holding, as given, was that the wife had so far made all the payments that had been made, with separate funds. It should be remembered that the status of the property is fixed at the time the contract is entered into.<sup>150</sup> In *Moulton v. Moulton*<sup>151</sup> the wife borrowed a large sum at the bank but allowed her husband to deposit it to his credit, and he shortly thereafter expended it for land. There was neither pledge of property nor agreement between the spouses shown. The loan was not passed upon by the regular committee of the bank on loans but by the husband, who was its president. It was held that the loan was not made upon her separate credit. Thus there is an implication that if property is borrowed on the faith of separate credit, it is separate. Such would obviously not be true if the acquisition were by the husband. While there is more or less authority for such a position<sup>152</sup> it does not seem to be defensible.

*e. Acquisitions By Both Spouses On Credit*

To be logical, those who hold that credit acquisitions made by the wife should be separate should also hold that where credit acquisitions are made by husband and wife jointly they become joint community and separate property. But such is not the

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<sup>150</sup> *In re Sanderson's Estate* (1922) 203 Pac. 677 (Wash.); *Morse v. Johnson* (1915) 88 Wash. 57, 152 Pac. 677; *Rawlings v. Heal* (1920) 111 Wash. 218, 190 Pac. 237.

<sup>151</sup> *Supra*, n. 103.

<sup>152</sup> See especially *Fidelity Co. v. Lee*, *supra*, n. 103. *Overland Nat. Bank v. Halverson* (1921) 33 Idaho 489, 196 Pac. 217, holds that the wife is estopped from denying the community character of the property. The case is somewhat similar to a purchase by the wife on credit. The wife had given her negotiable note to pay assessments on shares of stock in a corporation, which shares had been carried in the wife's name. On being sued on her note she averred the community character of the property purchased, and claimed that the debt was a community debt for which she was not personally liable. To the writer this seems to be another illustration of the overworking of the doctrine of estoppel. In the *Murphy* case (*supra*, n. 90, and see case discussed under "Community Obligations," 10 *California Law Review* 120) the same defense was made. It was held, however, that "a contract made by a married woman by which she secures the property for which the contract was executed is for her own use and benefit, and that such use and benefit is a fact resulting from the contract itself." So in the *Halveston* case the wife was not liable because of "estoppel," there being no fact appearing in the opinion which should, in good conscience, prevent her from setting up the exact truth regarding the transaction. She was liable because she made a contract and received that for which she contracted. It was further held that she was liable on a note given in part for money borrowed to pay for medical attendance upon herself. This latter was likewise a community obligation, and necessary, but she bound herself therefor. See valuable note in 2 *California Law Review* 53.

result. In *Katterhagen v. Meister*<sup>153</sup> property was purchased partly with separate funds of the husband and partly on credit, a note being given by husband and wife jointly. The court, arguing backward rather than forward, said that that interest in the property purchased which was represented by the credit extended, was community because the note represented a community debt. But the property acquired belonged to the community under the statutes. In *Goddard v. Reagan*<sup>154</sup> the facts are similar save that the part payment was made from the wife's separate funds and the balance with funds borrowed by the spouses on their joint note. The court here said that the money borrowed was community funds and the note given a community debt and, although the note was subsequently paid from the wife's separate funds, yet the property purchased was community to the extent of the borrowed money. Of course, if money is borrowed or purchases on credit are made by both jointly, as in *Union Securities Co. v. Smith*,<sup>155</sup> with an agreement at the time that the acquisitions shall be separate and not community, then the husband's interest is separate as well as that of the wife.

#### IV. CONCLUSION

The earnings of the spouses are closely intertwined with income arising from rents, issue, and profits of separate property, and with borrowings on credit and credit purchases of either spouse. The possession of separate property invariably involves more or less attention of the owner. If his entire time is devoted to the care of his own property, or to the management of a corporation by which he is paid a salary and of a majority of the stock of which he is the owner, and the prosperity of which is dependent on his intelligent oversight, the courts seem to be unable to work out a plan whereby the community may be credited with a part of the profits in the absence of legislative action. California has worked out a rule whereby the owner of a profitable business at the time of marriage, which continues profitable thereafter, is apportioned a reasonable interest on his investment, the remainder of the subsequent acquisitions being credited to the community. This rule is not applied, however, where the husband received a salary, although the increase in the value of the separate property

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<sup>153</sup> *Supra*, n. 99.

<sup>154</sup> *Supra*, n. 99.

<sup>155</sup> *Supra*, n. 99.

is due to his intelligence and skill and not to "natural enhancement." Likewise, if the husband applies his whole energy in buying and selling real estate on his own capital, Washington attributes the entire profits to rents, issues and profits of his separate property and nothing to earnings.<sup>158</sup>

There is also a noticeable tendency to treat all the credit purchases by the wife, from which profits result, as being her separate property, making a distinction between transactions of the wife and those of the husband. Without going quite so far in that direction as Arizona has gone, still California and Washington speak of acquisitions of the wife "on her separate credit," where there was no pledge of separate property, as separate, where under similar circumstances such acquisitions by the husband would be community. It is believed by the writer that there is no sufficient justification for this distinction and that the statutes should be construed liberally in favor of the community rather than strictly against it. Here is certainly a field for intelligent legislation based upon a thorough understanding of the problems involved. It should also be remembered that although statutes may give the wife full emancipation from common-law contractual disabilities, they cannot make it possible for her to contract exactly as a *feme sole* may do, because she cannot be a *feme covert* under the community regime and be exactly like a *feme sole*. The community statutes contemplate a contribution to the community by each spouse.

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<sup>158</sup> Austin v. Clifford, *supra*, n. 77.