

"California Family Law"—A Review

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ACCORDING to the celebrated dictum of Sir Henry Maine, in all progressive societies the law develops "from Status to Contract." "Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals."¹

Whatever one may think of this statement as a formula purporting to explain all legal history, support for it can be found even in the relatively brief history of American law. The successive statutes enacted in this country to remove the common law disabilities of married women have greatly minimized, if not completely eliminated, the legal significance of the marital status of the parties to a contract and of the actors in a transaction allegedly constituting a tort or a crime. Also, the widespread abolition of common law dower and curtesy has greatly reduced the significance of marital status in connection with the ownership of property and transactions relating thereto. This latter trend, of course, has not been evident in those states which have adopted the civil law community property system.

However, in relation to the number of people directly affected and the significance to their lives, the importance of the field of family law is certainly still considerably greater than one would suppose from the emphasis given to that subject in most law schools. Many persons have direct contact with the law only in this field. It is also regrettable, but undoubtedly true, that in many cases the rules and practices which they observe are not such as to inspire respect and admiration for the legal profession.²

For many years an outstanding exception to the general neglect of this field of law by the majority of American law schools has been the University of California, where the profound scholarship of Professor Barbara N. Armstrong, combined with her deep interest in this subject, has offered the students an opportunity for a knowledge and understanding of family law available to those of few other schools. Professor Armstrong has now put the entire Bar of California equally in her debt by the publication of her definitive work on "California Family Law."

Although I was happy to respond to the invitation of the editors to review this work, I should state at the outset that I do not pretend to be

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¹ MAINE, *ANCIENT LAW* 180-81 (Pollock ed. 1930).

² See 1 ARMSTRONG, *CALIFORNIA FAMILY LAW* 128 (1953). [Hereafter this work is cited by italicized page number only.]

qualified to criticise this book in the sense of pointing out alleged errors or omissions. Since all of my legal experience to the present has been in states other than California, I cannot claim any special knowledge of California family law. However, the selection of the editors may not have been as capricious as it at first appears. After studying this work I should be surprised if anyone in the California Bar could pretend to approach the encyclopedic knowledge of Professor Armstrong with respect to more than a fraction of the subjects treated in this book.

The work consists of two volumes of some 1,560 pages of text and has been written specifically, and almost exclusively, for the practicing lawyer in California. By this I mean that the author has sought to present clearly and fully the controlling statutes and judicial decisions, with any criticism of established rules or programs for judicial reform relegated to a decidedly secondary role. This approach unquestionably was a wise one in view of the basic purpose of the book as a working tool for the practicing lawyer. In a field such as this, where even the most elementary principles are the subject of frequent and often extreme divergencies of opinion, any attempt at a systematic criticism of the rules of law on sociological grounds would soon cause the book to degenerate into a sociological tract rather than a legal treatise.

This is not to say that the author occupies the role of a merely passive recorder of statutes and judicial decisions. In connection with all major questions where the California rule has not been authoritatively settled, the user of these volumes will find extremely valuable comments by the author not only pointing out the pertinent analogies from decisions of related questions and the logical arguments which might be made from them, but also considering the policy factors which may influence the ultimate resolution of such problems. The only complaint which might be made in this connection is that perhaps the author has exercised too great a restraint in expressing her own views and opinions.

In scope the book ranges over all of the legal problems arising from the status of a married person and the status of an infant or minor and from the relationships of husband and wife and parent and child, including, of course, the extremely important subject to a California lawyer of Community Property and the manifold problems arising in connection therewith. The one major omission which I noticed in reading the book was the omission of any discussion of the effect to be given in California to foreign divorce decrees and the related problems of *res judicata* and *estoppel*.

It would be impossible to attempt to discuss here all of the subject matter of this book, even were I competent to do so, and the mere cataloguing or listing of the various topics covered would serve little purpose. Therefore, I shall comment on certain problems of California law and

certain suggestions of Professor Armstrong which particularly interested me during my reading of this work.

THE DOCTRINE OF RECRIMINATION

Although, as previously stated, Professor Armstrong does not generally agitate for reform of the law in this book, one subject upon which she does express a rather decided opinion is the subject of the defense of "recrimination" in a divorce action. This is the doctrine that if both the plaintiff and the defendant in a divorce action have been guilty of conduct constituting grounds for divorce, then a divorce can not be granted to either one, or, as it has been expressed, "If the pot successfully calls the kettle black both must remain dirty."³

Professor Armstrong quotes extensively from the decision of the House of Lords in *Blunt v. Blunt*,⁴ which held that it was within the discretion of the trial court, under the English divorce statutes, to grant a divorce to either or both of the parties despite the fact that each had engaged in conduct constituting a ground for divorce, and that this discretion should be liberally exercised. This decision had been cited with apparent approval by the California Supreme Court in a case involving another question, and the author suggested that it might be possible and desirable for a California court to reach the same conclusion.⁵ At the time that statement was written, however, such a result was problematical, in view of the provision of the California Civil Code that "Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce,"⁶ and the further provision that "Divorces must be denied upon showing . . . Recrimination"⁷

The author's judgment was vindicated, however, even before the publication of the book. While this book was still in the press, but in time for appropriate references to the case to be inserted, the California Supreme Court handed down its decision in *De Burgh v. De Burgh*,⁸ in which that court completely adopted the approach of the House of Lords to this problem in *Blunt v. Blunt*. The court held that the denial of a divorce was not mandatory merely because the evidence showed that both parties had been guilty of conduct constituting grounds for divorce, but that the court in its discretion should decide whether to grant a divorce to one party or to both parties despite the existence of mutual fault, having regard to the

³ HERBERT, UNCOMMON LAW 451 (1948).

⁴ [1943] A.C. 517, discussed at pp. 201-04.

⁵ P. 201, 204.

⁶ CAL. CIV. CODE § 122, quoted at p. 199.

⁷ CAL. CIV. CODE § 111, quoted at p. 183.

⁸ 39 Cal.2d 858, 250 P.2d 598 (1952). Followed in *Phillips v. Phillips*, 41 Cal.2d 869, 264 P.2d 926 (1953). See also Comment, 41 CALIF. L. REV. 320 (1953).

prospect of reconciliation, the effect of the marital conflict upon the parties, the effect of the marital conflict upon third parties and the comparative guilt of the parties.

Whatever one may think of the technique of statutory construction employed by the court in the *De Burgh* case, there would appear to be little ground for dispute that the philosophy underlying that decision is more in accord with modern conceptions than the philosophy underlying the decision in *Conant v. Conant*,⁹ which the *De Burgh* case refused to follow. In the earlier case, the court said, quoting Lord Stowell:¹⁰

. . . if he, who has first violated his marriage vow, should be barred of his remedy, the parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt.

On the other hand, the court in the *De Burgh* case stated:¹¹

But when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted. "Public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed." . . . It is a degradation of marriage and a frustration of its purposes when the courts use it as a device for punishment.

This decision by the supreme court will undoubtedly have extensive repercussions in the entire field of divorce law. It has already been cited by a District Court of Appeal in connection with a decision as to whether certain conduct constituted cruelty so as to furnish a ground for divorce,¹² and it is probable that the underlying philosophy of the decision will be of considerably more importance than the specific ruling on the issue of recrimination.

AGREEMENTS BETWEEN SPOUSES

In connection with the subject of community property, one of the things which is most distinctive in the California law, as compared with the law of the other community property states, is the complete freedom of husband and wife to transform their property from separate to community and *vice versa* by the most informal types of agreements. The California rule appears to be that a husband and wife may at any time, by an entirely oral agreement, transform either real or personal property from the separate property of one of the spouses to community property or *vice versa*, and that such transformation will be given effect not only between themselves but as against the heirs, creditors and transferees of either or both of them.¹³ In

⁹ 10 Cal. 249 (1858).

¹⁰ *Id.* at 255, quoted at pp. 126-27.

¹¹ 39 Cal.2d 858, 864, 250 P.2d 598, 601 (1952).

¹² *Kirsch v. Kirsch*, 119 Cal. App.2d 271, 259 P.2d 444 (1953).

¹³ Pp. 541-60.

addition, the agreement itself does not have to be made in so many words, but can be spelled out as an "understanding" arising from the most general expressions of marital solidarity¹⁴ or even from conduct without any express statement of any kind.¹⁵

The possible injustices which might arise from this doctrine are guarded against, to some extent, by the rule that the trial court is free to reject even the uncontradicted testimony of husband or wife that such an agreement was made. The courts have frequently repeated the statement in *Market Street Ry. Co. v. George*¹⁶ that "courts and juries are not bound by mere swearing no matter how positive, unless it be credible swearing." Also, in cases where the rights of creditors would be prejudiced by giving effect to the alleged oral agreement transforming property from community to separate or *vice versa*, the courts have viewed such allegation with a healthy skepticism and on occasion have refused to find that such an agreement was made even in the face of uncontradicted testimony of both husband and wife that it was.¹⁷

It is, of course, dangerous for one who has not observed the practical operation of a rule of law to attempt to predict what its consequences may be and perhaps no opportunity for fraud or invitation to perjury is offered by this doctrine. However, it is difficult to be wholly convinced of this.

When the disposition by the court in a divorce action of property owned by the spouses may depend upon its character as community or separate, to permit testimony by the husband and wife as to the existence or non-existence of an alleged oral agreement transforming the original character of the property would appear to offer at least some inducement to exaggeration, if not outright falsification of the facts, especially in the atmosphere in which such contests are usually conducted. It is true that occasionally there may be independent evidence supporting one contention or the other. In *Heck v. Heck*¹⁸ the wife contended that there was an oral agreement converting the income from a business in which the husband's separate capital was invested into community property. In support of this contention, the wife introduced the income tax returns of the husband reporting all of such income as community income. But even here, although one may admire the poetic justice by which the husband was hoist on

¹⁴ See *Estate of Helm*, 6 Cal. App.2d 752, 45 P.2d 250 (1935), discussed at p. 545, in which one of the items of evidence apparently relied upon by the court to support the conclusion that the deceased wife had agreed with her husband to convert her separate property into community was her statement to third parties that she and her husband were "pals in everything."

¹⁵ Pp. 547-49.

¹⁶ 116 Cal. App. 572, 576, 3 P.2d 41, 43 (1931).

¹⁷ Pp. 470-72.

¹⁸ 63 Cal. App.2d 470, 147 P.2d 110 (1944), discussed at pp. 562-63.

his own petard,¹⁹ some doubt surely must remain as to whether the tax returns evidenced anything more than an overzealous desire to minimize income taxes.

Similarly, to permit one spouse, after the death of the other, to defeat the decedent's will or to alter the course of intestate succession by self-serving testimony as to an alleged oral agreement with the deceased²⁰ would seem to be equally opposed to the policy, although perhaps not the letter, of the Statute of Frauds and of the Dead Man's Statute.²¹

These considerations suggest that some legislative regulation of the evidence necessary to establish such agreements would be in the public interest. Even though such legislation might prevent proof of some genuine oral agreements, it is difficult to see how any great injustice would arise since that would merely mean that the rules of law applicable to the original character of the property would be applied. Those rules of law cannot be said to be manifestly unjust to either spouse.

SECTION 161A OF THE CIVIL CODE

One of the most interesting subjects discussed in "California Family Law" is the question of the effect to be given to Section 161a of the Civil Code, which was enacted on July 29, 1927. That section provides: "The respective interests of the husband and wife in community property during the continuance of the marriage relation are present, existing and equal interests . . . "

The problem of the meaning and effect of this provision has been the subject of lively discussion ever since its enactment. There can, of course,

¹⁹ One's admiration for the decision is somewhat tempered by the later case of *Hopkins v. Detrick*, 97 Cal. App.2d 50, 217 P.2d 78 (1950) cited at p. 564, in which the court gallantly permitted a wife caught in the same predicament to explain that she had filed the returns on the advice of a "tax accountant" and did not understand their meaning. Apparently the husband in *Heck v. Heck*, *supra* note 18, did not think fast enough.

²⁰ See pp. 465-69.

²¹ This doctrine would also appear to have repercussions on other marital property rules which may not have been foreseen by the court at the time of its original adoption. For example, the husband's right to convey his separate real property without the joinder of the wife would seem to be greatly restricted. Although the record may show that title to certain real property was acquired by the husband before marriage, the wife not joining in the conveyance of such property might later assert that there had been an oral agreement between the husband and wife transforming this property into community property and that, therefore, the transfer was voidable. Although this case has apparently not been adjudicated [*cf. Horton v. Horton*, 115 Cal. App.2d 360, 252 P.2d 397 (1953); *MacKay v. Darusmont*, 46 Cal. App.2d 21, 115 P.2d 221 (1941)], it would seem that under the California theory the wife would prevail against the purchaser, if the court could be persuaded to accept her story. Therefore, I would assume that any purchaser of such property would insist upon the joinder of the wife and that a title insurance company would not issue a policy on it unless such joinder was obtained. If this is true, then the wife has been given, in effect, a veto power over the conveyance by the husband of his separate real property.

be no question as to what the Legislature was attempting specifically to accomplish and what it did accomplish in enacting this section. The United States Supreme Court had held in 1926 that the husband was taxable upon the entire income from community property acquired in California prior to 1923 on the theory that the wife did not then have a "vested interest" in the property.²² The California courts having refused to apply this magic adjective to the interest of the wife, the Legislature supplied the omission by this enactment, in order to achieve an equal treatment tax-wise of California residents with those of the other community property states. The Federal courts promptly reversed their decisions and held, with respect to property acquired after 1927, that the husband was taxable on only one-half of the community income and that only one-half of the community property was includible in his gross estate for Federal tax purposes when he died.²³

The question remains of what change the Legislature intended to make in the actual characteristics of community property in California by this enactment, in terms of the rights, powers, privileges and immunities of the husband and wife. Professor Armstrong suggests in a number of instances that the existing rules may be reversed or modified as to community property acquired after 1927 because of the existence of Section 161a.²⁴ Certainly, as long as this section remains on the books, the courts may seize upon it as a basis or an excuse for overturning any established rule relating to community property. It is useful to have this danger pointed out in all cases where this might occur.

An example of this possibility is furnished by the case of *In re Kelley's Estate*,²⁵ decided after the publication of this book. In that case, the husband in his will devised a life estate in certain community property to his wife with remainder to his sister and nieces. The wife died before the conclusion of the probate of the husband's estate and before making any election as to whether to accept the life estate under the will or to take her community share of the property. The District Court of Appeal held that the wife's executrix was entitled to make an election against the husband's will on behalf of the wife after her death, Justice Drapeau basing his opinion on Section 161a of the Civil Code, with one Justice concurring on other grounds and one Justice dissenting.

The decision in *In re Kelley's Estate* seems obviously justifiable on the facts, since the benefit to the wife under the husband's will failed

²² United States v. Robbins, 269 U.S. 315 (1926).

²³ United States v. Malcolm, 282 U.S. 792 (1931); United States v. Goodyear, 99 F.2d 523 (9th Cir. 1938).

²⁴ See pp. 613-14, 633, 644, 650, 656, 705-06, 717, 725-26, 733-35.

²⁵ 264 P.2d 210 (Cal. App. 1953).

completely before the time when she was required to make an election to take under the will or against it. Consequently, there was nothing left for her to elect to take or not to take under the will, and her heirs should not be barred from her community interest because of her failure to repudiate the will. But would this result be any less just as to community property acquired by the husband and wife before 1927? If Justice Drapeau's opinion is accepted, the court would have to reach the opposite result in a case involving community property acquired before that date.

Despite the undeniable possibility that the California courts may seize upon Section 161a as an excuse for overturning many established rules regarding community property, there would seem to be good reason to question the propriety and desirability of such reversals. It is arguable that the sole objective of the California Legislature in enacting this section was to achieve the favorable Federal tax treatment then accorded to the other community property states. It would be difficult to demonstrate that the California Legislature intended to effect substantial changes in the characteristics of community property by this legislation and presumably impossible to point out what changes, if any, were so intended.

There is little evidence that the California courts will hold that any material change was made in the characteristics of California community property (other than taxability) by the enactment of Section 161a. It is true that the section has been cited as a support for a number of decisions,²⁶ but these same results would probably have been reached without the enactment of Section 161a, and there is no reason to suppose that the rules laid down by such cases do not apply to property acquired before 1927 as well as that acquired afterwards, despite the citation of this section. In two cases the courts have stated that the enactment of this section changed rules of evidence and procedure,²⁷ but the final result in each of those cases was the same as it would have been without such change, and therefore they are of little practical significance.

This situation would seem to offer an opportunity for California to enable its residents to recoup the losses they incurred during the period when they were given less favorable tax treatment than the residents of other community property states. Since the enactment of the Revenue Act of 1948, there is one major respect in which the residents of community property states are at a disadvantage with respect to Federal taxation. If the wife predeceases the husband, a Federal estate tax is due on one-

²⁶ See, for example, *Odono v. Marzocchi*, 34 Cal.2d 431, 211 P.2d 297 (1949), discussed at pp. 629-31.

²⁷ *Roy v. Salisbury*, 21 Cal.2d 176, 130 P.2d 706 (1942); *Rothschild v. Superior Court*, 109 Cal. App. 345, 293 Pac. 106 (1930). *Cf. Caminetti v. Prudence Mut. Life Ins. Ass'n*, 142 P.2d 41 (Cal. App. 1943), *rev'd on rehearing on another ground*, 62 Cal. App.2d 945, 146 P.2d 15 (1944).

half of the community property accumulated by the husband. On the other hand, in the common law jurisdictions no tax is incurred on the death of the wife with respect to property accumulated by the husband and not transferred to her as her separate property. Furthermore, upon the death of a husband receiving one-half of the community property from his predeceased wife by bequest or inheritance, his estate is denied a deduction for property previously taxed, even though he should die within five years after the death of the wife.²⁸

It is suggested that California could eliminate this discrimination as to its citizens simply by repealing Section 161a of the Civil Code. This action would not cost anything since thus far that section has had no practical effect upon the characteristics of community property. However, there would no longer be any Federal estate tax due with respect to California community property on the death of the wife. All of the Federal cases have held that prior to July 29, 1927 (the date of enactment of Section 161a) the wife did not have such a "vested interest" in the community property as would require any of that property to be includible in her gross estate upon her death.²⁹ This situation presumably would be restored by the repeal of that section.

All of the community property would, of course, then be included in the husband's gross estate when he predeceases his wife, but his estate would be entitled to a marital deduction of up to one-half the value of such property. The Senate Finance Committee report on the Revenue Act of 1948 expressly states that the husband's estate will be allowed a marital deduction with respect to that part of the pre-1927 community property acquired or retained by the wife at his death³⁰ and that all of the pre-1927 community property will be included in his adjusted gross estate for the purpose of determining the maximum amount of the marital deduction.³¹ Therefore, if the marital deduction requirements of the Internal Revenue Code are complied with, the husband's estate would be taxable on only one-half of the community property. Also, the husband and wife by filing a joint return could divide the community property income for Federal tax

²⁸ INT. REV. CODE, § 812(c).

²⁹ *Crocker First Nat. Bank v. United States*, 183 F.2d 149 (9th Cir. 1950); *United States v. Goodyear*, 99 F.2d 523 (9th Cir. 1938); *Sampson v. Welch*, 23 F. Supp. 271 (S.D. Calif. 1938).

³⁰ "The interest of a surviving wife in property held as community property under the law of California in effect prior to July 29, 1927, is an interest which under the definition in section 812(e)(3) is considered as passing to her from the decedent." SEN. REP. No. 1013 (Part 2), 80th Cong., 2d Sess., p. 3 (1948).

³¹ "By reason of the next to the last sentence of subparagraph (B) [of paragraph (2) of section 812(e)], such community property [required to be deducted from the gross estate for this purpose] does not include property held as community property where the interests of the spouses are determined under the law of California in effect prior to July 29, 1927." SEN. REP. No. 1013 (Part 2), 80th Cong., 2d Sess., p. 20 (1948).

purposes despite the fact that the wife was not considered to have a "vested interest" therein.

It should be noted, however, that of the two United States Supreme Court cases which considered whether the wife had a "vested interest" in the California community property for Federal tax purposes, one³² dealt with property acquired prior to April 16, 1923, when the statute giving the wife for the first time a power of testamentary disposition over one-half of the community property was enacted,³³ and the other³⁴ dealt with property acquired after July 29, 1927, when Section 161a of the Civil Code was adopted. Therefore, the Supreme Court has never ruled on the status for Federal tax purposes of community property acquired in California between 1923 and 1927 and it might overrule the lower court decisions which held that the latter date was the one on which the wife acquired a "vested interest." It also should be noted that despite the two statements of the Senate Finance Committee referred to above which give July 29, 1927 as the date prior to which no part of the community property in California would be taxable on the death of the wife, the same report in another place inconsistently gives that date as April 16, 1923.³⁵

Therefore, there can not be complete assurance that the legal legerdemain suggested above would accomplish its objective, as the similar sleight of hand did in 1927. However, if the California Legislature should adopt this suggestion, it is certain that there would be, as Mr. Albert Haddock³⁶ would say, some "jolly litigation."

RETROACTIVITY OF COMMUNITY PROPERTY LEGISLATION

There is one respect in which the California community property law is, so far as I know, unique. That is the rule that none of the statutes curtailing the powers of the husband over community property or increasing the rights of the wife can constitutionally be applied retroactively to any property acquired before its enactment. This rule has been applied not only to the identical community property owned before the enactment of the statute, but also to any property afterwards received in exchange therefor and to all income from such property even though such income accrues after the enactment of the statute.³⁷ The result is that there is not one law of community property in California but half a dozen or more different laws applicable to different property, the exact number depending upon the dates of enactment of the various statutes and the age of the

³² *United States v. Robbins*, 269 U.S. 315 (1926).

³³ Cal. Stats. 1923, c. 18, § 1, p. 29 (1923); CAL. PROB. CODE § 201.

³⁴ *United States v. Malcolm*, 282 U.S. 792 (1931).

³⁵ SEN. REP. No. 1013 (Part 2), 80th Cong., 2d Sess., p. 29 (1948).

³⁶ Sir Alan Herbert's indefatigable litigator.

³⁷ *Id.* pp. 589-99.

oldest living married couple in the state. All of the cases setting forth this rule have been based on the theory that, since the husband was the owner of the community property and the wife did not have any vested interest therein, to curtail such ownership retroactively would be a violation of the due process clause.

Professor Armstrong suggests that, since the wife also now has a "vested interest" in the community property under Section 161a, the same rule may now apply to any legislation which alters any of the characteristics of community property to her detriment as well as to legislation invading the interests of the husband.³⁸ There is authority, however, for the opposite view that if both the husband and wife have "vested interests" in the community property the Legislature, on the basis of this metaphysical substratum, may shift the rights of management and control as between the husband and wife even as to property already in existence.

In *Arnett v. Read*³⁹ the United States Supreme Court considered the question whether a New Mexico territorial statute requiring the wife's joinder in a conveyance of community real property could validly be applied to property acquired before its passage. The Court, in an opinion by Mr. Justice Holmes, considered whether the wife had a "vested interest" in the community property under the law of New Mexico, and upon reaching the conclusion that she did the Court held that the statute retroactively curtailing the husband's powers of management was valid.⁴⁰ It would seem that on the basis of this decision there can be no constitutional obstacle to the retroactive application of any changes in the California community property statutes enacted since the wife acquired a "vested interest" in the community property in California. Whether that date were considered to be 1923 or 1927 would be of no importance in this connection since there were no significant amendments to the California community property statutes between 1923 and 1927.

THE DOCTRINE OF "COMMUNITY DEBTS"

Professor Armstrong makes the suggestion that the California Supreme Court should consider adopting the "community debt" doctrine, "which other community property states" recognize, because of the enactment of

³⁸ *Id.* pp. 598-99.

³⁹ 220 U.S. 311 (1911).

⁴⁰ It is true that after having spent his entire opinion discussing whether the wife had a "vested interest" in the New Mexico community property, the mind of Justice Holmes darted off like quicksilver, as it so frequently did, and in the last two sentences he said that, "whether . . . or not" she had a vested interest, the statute could be applied retroactively. This is hardly a reason for ignoring the entire opinion as irrelevant *dictum*, however. It is also significant that in none of the other community property States where the wife is stated to have a "vested interest" in the community property has this constitutional doctrine ever appeared.

Section 161a of the Civil Code giving the wife a "vested interest" in the community property in California.⁴¹ It should be pointed out that while the statement is true that other community property states recognize this doctrine, the inference should not be drawn from this statement that all or most of the other community property states recognize it. In fact, only in two (Washington and Arizona) of the seven community property states other than California has this doctrine ever been recognized, although in all such states (with the possible exception of Nevada) the wife is asserted to have a "vested interest" in the community property.

While the question whether the California court will adopt this doctrine seems to have been foreclosed by the decision in *Grolemund v. Cafferata*,⁴² this suggestion deserves careful consideration in view of the authority which naturally will attach to the remarks of Professor Armstrong. However, I cannot agree that the extension of this doctrine is desirable.

The theory of "community debts," briefly stated, is that the community property is only liable for an obligation of the husband if the husband was acting as an agent of the marital community in the transaction in which the obligation was incurred or if the obligation was incurred for the benefit of the marital community. Such a generalized statement, however, means little and it is necessary to consider some concrete instances of the operation of the doctrine in order to realize its practical results. The following cases are typical illustrations of such results.

H is driving in his automobile returning to his home from a golf game on a Sunday afternoon. P drives up behind H's car and attempts to pass him. H does not like people to pass him, and therefore he speeds up until cars coming in the opposite direction prevent P from passing, at which time he slows down to five or ten miles an hour in order to teach P a lesson. As soon as the cars coming in the opposite direction have passed, H again speeds up to prevent P from passing him. This goes on for some time until P finally manages to pass H's car at an intersection. This infuriates H, and he overtakes P and runs his car off the road. H then gets out and beats P so severely that he has to be hospitalized. H owns property valued at \$100,000, all of which has been accumulated since his marriage and therefore is community property. P can recover nothing from H.⁴³

P, an old man, is walking down the street and he is accosted by H, who accuses P of telling lies about him. P replies that everything he has said is true. H thereupon beats and kicks P until he staggers home in a dying condition and dies on the following day. The heirs of P sue H under the wrongful death statute. H owns property valued at \$100,000, all of which

⁴¹ P. 855.

⁴² 17 Cal.2d 679, 111 P.2d 641 (1941), discussed at pp. 700-701.

⁴³ *Newbury v. Remington*, 184 Wash. 665, 52 P.2d 312 (1935).

has been accumulated since his marriage and therefore is community property. The heirs of P can recover nothing from H.⁴⁴

H is a leading businessman in the town and one of his friends wants to borrow \$10,000 from a local bank. The bank asks H if he will sign the friend's note as an endorser. H does so and the bank accepts his guaranty, without which it would not have loaned the money, in good faith. The bank negotiates the note to P, who is a holder in due course. The friend of H defaults in the payment of the debt and P sues H as the endorser. H owns property valued at \$1,000,000, all of which has been accumulated since his marriage and therefore is community property. P can collect nothing from H.⁴⁵

H is divorced by his first wife, P, and the court awards P \$100 per month alimony in the divorce decree. H immediately marries W. H defaults in his alimony payments to P. H has no separate property; he is, however, the owner of Blackacre which was purchased with his earnings after his marriage to W and therefore is community property. P attempts to levy on Blackacre to collect her accrued alimony. P cannot levy on Blackacre to satisfy this obligation.⁴⁶

It is of course true that there are many obligations of the husband which are collectible out of the community property under this theory of "community debts," but such obligations are now collectible out of the community property under California law. Therefore a proposal to adopt this doctrine would effect a change only with respect to such cases as these. The result of the adoption of this doctrine would be to immunize a married man from all civil liability in the types of cases illustrated above in the nine instances out of ten in which he has no separate property.

It is perhaps unnecessary to refer also to the fact that, except in the extraordinary situation where the husband owns separate property, under

⁴⁴ *McHenry v. Short*, 29 Wash.2d 263, 186 P.2d 900 (1947). In this case the heirs of P actually did recover because in addition to the facts stated above the altercation occurred on community property of H and W and shortly before his murderous assault H ordered P off the property. The court, straining to escape this Frankenstein of the "community debt" theory, held that because H committed the assault in the course of "protecting community property," then the obligation was a "community debt." There can be no doubt that the result would be the other way on the facts stated above.

⁴⁵ *Gund v. Parke*, 15 Wash. 393, 46 Pac. 408 (1896); *Marquette v. Nat'l Bank of Ellensburg*, 132 Wash. 181; 231 Pac. 788 (1925); *Peterson v. Zimmerman*, 142 Wash. 385, 253 Pac. 642 (1927).

⁴⁶ *Stafford v. Stafford*, 10 Wash.2d 649, 117 P.2d 753 (1941). In the earlier case of *Fisch v. Marler*, 1 Wash.2d 698, 97 P.2d 147 (1939), the court had held that P could garnish H's wages to collect her accrued alimony in this situation. Although *Fisch v. Marler* is contrary to one of the basic tenets of the "community debt" doctrine, that community property is not liable for any antenuptial obligation of either husband or wife, *Stafford v. Stafford* did not purport to overrule that case. The distinction which the court attempts to draw between the two cases, however, is one which I am not able to understand.

the Washington decisions a married man domiciled in Washington is not responsible for any debt he incurred while domiciled elsewhere before moving to the State of Washington,⁴⁷ is not responsible for any tort he commits outside the State of Washington⁴⁸ and is not liable on any contract he makes outside the State of Washington.⁴⁹ These decisions, although they illustrate the fantastic lengths to which this doctrine can be carried, are wholly unjustifiable even under the community debt theory, and there is no reason to suppose that the California court could be led so far astray even if it adopted this doctrine.

It would seem that any court proposing to adopt the "community debt" doctrine for the first time would have to be convinced of some definite social benefit resulting therefrom to justify its action. But to my knowledge, no one has ever demonstrated any such social benefit arising from this doctrine or suggested that the stability of marriage or the welfare of the family is any greater in the States of Washington and Arizona than in any of the other 46 States of the Union.

No attempt has been made in the foregoing comments to give equal space to the various subjects dealt with in Professor Armstrong's book. They have been mainly concerned with the subject of community property, which occupies only about one-fourth of these two volumes, merely because that happened to be the topic in which I was most interested. I am certain that anyone interested in any aspect of the field of family law will find Professor Armstrong's outstanding work highly informative and useful. It is also safe to predict that the book will rapidly become an indispensable reference work for virtually every member of the California Bar.

⁴⁷ *La Selle v. Woolery*, 14 Wash. 70, 44 Pac. 115 (1896); *Meng v. Security State Bank*, 16 Wash.2d 215, 133 P.2d 293 (1943).

⁴⁸ *Mountain v. Price*, 20 Wash.2d 129, 146 P.2d 327 (1944).

⁴⁹ *Achilles v. Hoopes*, 40 Wash.2d 664, 245 P.2d 1005 (1952).