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If we date the community property system, in what is now Arizona, from the arrival of the first Spanish explorers in 1539, then it has existed there for 414 of the 415 ensuing years. The excluded year is 1865, when the Howell Code in its original form was in force.

This first code of the laws of Arizona was adopted by its first territorial legislature, taking effect, for the most part, on the first day of January, 1865.[1] It takes no notice of community property. On the contrary, it expressly repeals the laws of Mexico, Spain, and the Territory of New Mexico, theretofore existing in the territory,[2] adopts the common law of England as the rule of decision,[3] establishes dower and curtesy,[4] and provides that all property acquired by a married woman, whether by "grant" or "in any other manner" shall constitute her separate estate.[5] By an act of December 30, 1865,[6] however, the second territorial legislature repealed the two last-mentioned provisions and adopted a comprehensive community property statute.[7]

It has been suggested that the first legislature did not intend to abrogate the community property system, and that the later legislation was merely confirmatory of its already continuing existence.[8] Certainly the haste in which the original Howell Code was compiled and adopted,[9] and the expedition with which it was amended, support this view. Still, it is clear that the organizers of the territory, most of whom had recently arrived

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1. HOWELL CODE c. LXI, § 12 (1864).
2. *Id.* c. LXI, § 1.
3. *Id.* c. LXI, § 7.
4. *Id.* c. XXVII.
5. *Id.* c. XXXII, § 1.
6. Effective January 29, 1866. *Id.* c. I, § 2.
7. Ariz. Laws 1865, p. 58 *et seq.*
8. *See* 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 4, n. 7 (1943).
9. It was compiled within six months after the organization of the territory. TERRITORY OF ARIZONA LEGISLATIVE JOURNAL 63 (1864). And its sixty chapters were adopted during a legislative session of forty-three days.

from common law jurisdictions, were no admirers of the existing laws.[10] And since their code was partly patterned upon the code of California,[11] they had before them the community property statutes of that state, had they wished to adopt them. Therefore, it seems equally reasonable to speculate that the community property statute of December 30, 1865, represented not the correction of an oversight, nor mere legislative confirmation of existing law, but, rather, a real change of heart, following an original intention to replace community property with a common law system. And if, in the absence of any satisfactory evidence of the true legislative intent, we apply the presumption that the legislature meant what it said, we must conclude that community property did not prevail in Arizona during 1865. This has been the view of the Arizona court.[12]

Nevertheless, and even though Arizona be taken to have "adopted," rather than "continued," the community system, its Supreme Court has said that the Spanish law, so far as it is consistent with the laws and customs of the state, may be applied to its interpretation.[13] The community property system is a creature of statute, to be sure, but it is also *sui generis*, and it is not governed by common law principles.[14]

In practice, however, these sound theories of interpretation have been largely honored in the breach. Direct citation of Spanish authority is almost unknown. The common law preference for case precedents is indulged as freely here as in other fields. And the system has undoubtedly been "molded to some extent by . . . common-law rules."[15]

10. *See* letter from Gov. Goodwin, dated November 9, 1864: "The laws and customs of Spain and Mexico had been clashing with the statute and common law of the United States. . . ." TERRITORY OF ARIZONA LEGISLATIVE JOURNAL 241-2 (1864); and letter of Judge Howell dated June 10, 1864: "[They] were so ill adapted to our condition that a complete organization of the Territorial Government could not be had until a code of laws was substituted for those now in force." *Id.* at 63.

11. TERRITORY OF ARIZONA LEGISLATIVE JOURNAL 35 (1865).

12. *See* Stiles v. Lord, 2 Ariz. 154, 158, 11 Pac. 314, 315 (1886): "[The act of December 30, 1865] must be held . . . to take the place of the act of 1864, and to repeal it by implication. This law enacted for this territory the community system . . ."; Blackman v. Blackman, 45 Ariz. 374, 382, 43 P.2d 1011, 1014 (1935): "In the original Howell Code of 1864 the common-law rule of marital property rights, somewhat liberalized, was adopted, but this rule was in effect abolished and the community property system was established by the act of December 30, 1865. . . ."

13. Pendleton v. Brown, 25 Ariz. 604, 610, 221 Pac. 213, 216 (1923). The statutory reception of the common law as the rule of decision has been amended so that it now applies only when consistent with our "established customs." HOWELL CODE c. LXI, § 7 (1864), as amended, Ariz. Laws 1907, c. 10, § 8.

14. Blackman v. Blackman, 45 Ariz. 374, 386, 43 P.2d 1011, 1015 (1935).

15. La Tourette v. La Tourette, 15 Ariz. 200, 207, 137 Pac. 426, 428 (1914).

This trend was manifested as early as 1876, in the first of the *Charauleau-Woffenden* cases.[16] The question in that case was whether the rents and profits derived from separate property were, themselves, separate or common. The act of December 30, 1865, said they were common.[17] This was also the Spanish law,[18] and coincided beautifully with its basic concept that since both spouses were primarily concerned with advancing the interests of the marital community, both would naturally wish to dedicate all of their acquests during coverture to that purpose.[19] But to the common-law-trained judges of the territorial court, the two ideas, that property could be the separate property of the wife, and that, at the same time, its fruits could be common, and, therefore, subject to the husband's control, seemed "antagonistic," and equivalent to "confiscation." It quoted with approval from a California decision:

> "The common law [sic] recognized no such solecism . . . . It would be to make the wife the trustee for the husband, holding the legal title, while he held the fruits of that title."[20]

On these common law grounds the court concluded that this provision of the community property statutes had been impliedly repealed by the Married Women's Property Act of 1871.[21]

This decision was followed in the second *Charauleau-Woffenden* case.[22] It was expressly overruled by the third.[23] At the end of ten years, in the fourth of these cases, the court returned to its original position, commenting that "It is time this vexed question were laid to rest."[24] How easily and how much better, that might have been done in the beginning, by referring to the applicable Spanish authorities! The Spanish rule, in this respect, could hardly be called inconsistent with our customs since it prevails in several states.[25] But instead of resorting to

16. Charauleau v. Woffenden, 1 Ariz. 243, 25 Pac. 652 (1876).
17. Ariz. Laws 1865, c. XXXI, § 9, p. 61.
18. 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 180 (1943).
19. "Just as the salary of the husband contributes to defraying the expenses of matrimony, the interests and fruits borne by the property of each spouse are dedicated to the same purpose." 22 SCAEVOLA, CÓDIGO CIVIL 247 (1905), as quoted in De La Torre v. National City Bank of New York, 110 F.2d 976, 979, n. 2 (1st Cir. 1940).
20. Charauleau v. Woffenden, 1 Ariz. 243, 260, 25 Pac. 652, 657 (1876), quoting from George v. Ransom, 15 Cal. 322, 324 (1860).
21. Ariz. Laws 1871, p. 18.
22. Woffenden v. Charauleau, 1 Ariz. 346, 25 Pac. 662 (1876).
23. Woffenden v. Charouleau (sic), 2 Ariz. 44, 8 Pac. 302 (1885).
24. Woffenden v. Charouleau (sic), 2 Ariz. 91, 93, 11 Pac. 117, 118 (1886). The rule had in the meantime been adopted by statute. Ariz. Laws 1885, No. 5, p. 5, now ARIZ. CODE ANN. § 63-302 (1939).
25. 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 181 (1943).

these basic sources the court struggled until the last to adapt the alien rules of the English common law to the community concept of marital property.

Such deviations from the classic community pattern tend to multiply by spontaneous generation. For example, once we have ruled that the fruits of separate property are separate we face a problem in the business whose profits are attributable in part to invested separate capital, and in part to the personal labor, skill, or management of a spouse. Under original community principles all of such profits would be community property. But the Arizona court, to be consistent, has had to rule that in such case the profits are separate to the extent that they are attributable to the separate capital, and community to the extent that they are attributable to the personal services of a spouse.[26]

This result is logical enough. It even bears a superficial resemblance to the sound community property doctrine that property purchased in part with community and in part with separate funds shall be deemed separate and community in the same proportions as the purchase price. But in practice it is wholly incapable of definite and certain application. For by what standard shall we determine what part of the profit is attributable to capital and what to personal services? Shall we allow legal interest on the investment and rule that the rest of the profit is community? Or shall we, on the other hand, allow the participating spouse a reasonable salary for his personal services and deem the rest to be the separate product of separate capital? Arizona has avoided both of these extremes in favor of the *ad hoc* approach to individual cases. Doubtless this is the fairest rule. But the standard of decision is so indefinite that one can seldom predict the result before the court has spoken. This illustrates rather graphically the secondary, generally unforeseen, and sometimes unfortunate, consequences which may follow an original deviation from a time-tried and integrated body of law.

In the application of common law rules to community property problems these early Arizona cases set a pattern which has persisted until the present. This was no doubt inevitable in a state where the law is administered by common law lawyers. And it must be conceded that since the "vexed" territorial courts

26. Barr v. Petzhold, 273 P.2d 161 (Ariz. 1954); *In re* Torrey's Estate, 54 Ariz. 369, 95 P.2d 990 (1939); Rundle v. Winters, 38 Ariz. 239, 298 Pac. 929 (1931).

have done the spade work in accommodating common law rules to this unaccustomed purpose, and as local precedents have multiplied, the resultant system has not worked too badly. Yet, Arizona lawyers can afford to remember that reliance upon Spanish authorities in community property cases is not a mere eccentricity. It can aid, upon occasion, in the sound resolution of basic problems, and is unobjectionable in either reason or authority.

Of course, the tendency to apply common law rules to community property cases is not peculiar to Arizona. Most, if not all, of the community states have evinced it to a considerable extent. And, together with frequent statutory amendments, it has resulted in some diversity in the details of the system amongst the states. We should not, however, overemphasize the importance of this diversity, for the common overriding fact of the existence of the conjugal partnership far outweighs these minor variances in its operation.

Arizona's first community property statute was apparently derived from California.[27] But, as the statutes of these states were amended and construed, their law grew apart, and in recent years the Arizona court has repeatedly said that its concept most closely resembles that of Washington.[28]

The foundation of the Arizona concept of community property is "equal rights,"[29] as laid down in the leading case of *La Tourette v. La Tourette*:[30]

> "The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein

27. See Dunne, C. J., dissenting in Woffenden v. Charauleau, 1 Ariz. 346, 357, 25 Pac. 662, 665 (1876); Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1, 5 (1936).

28. See, *e.g.*, Cosper v. The Valley Bank, 28 Ariz. 373, 237 Pac. 175 (1925), in which the statement originated; Porter v. Porter, 67 Ariz. 273, 195 P.2d 132 (1948); Maricopa County v. Douglas, 69 Ariz. 35, 208 P.2d 646 (1949). After thirty years and important changes in the law of other states this frequently quoted observation might profitably be re-examined.

29. The term "entity theory," sometimes used particularly in connection with the similar Washington law, is unnecessarily misleading to common lawyers. The community is not a "legal entity" in their sense. And for the description of an "entity theory" Puerto Rico style, see De La Torre v. National City Bank of New York, 110 F.2d 976, 978 (1st Cir. 1940): "[A]s regards third parties, the [community] and the husband constitute a single entity. . . ."

30. 15 Ariz. 200, 205, 137 Pac. 426, 428 (1914).

> both are equal. Its policy plainly expressed is to give the wife in this marital community an equal dignity, and make her an equal factor in the matrimonial gains . . . . It recognizes that the wife in her station is as much an agency in the acquisition as the husband, and is entitled to just as great an interest."

It follows that the wife's interest in the community property during coverture has never been regarded as inchoate, or a mere expectancy, but has always been recognized as a presently vested interest. The former disagreement over the nature of her interest, which "fed the flame of juridical controversy for many years,"[31] seems to have been finally resolved, in all of the community property states, in favor of a vested interest, partly from practical considerations originating with the federal income tax laws. But the Arizona emphasis on "equal rights" led inevitably to this conclusion from the beginning,[32] so that there has never been any other rule in that state.

It is highly significant that the early development of community property law in Arizona coincided with the nineteenth century trend toward the legal emancipation of women, which culminated in the Married Women's Property Acts. The sturdy chivalry (so insistent as to suggest a bad conscience) which characterized much judicial writing of this period is evident in the first two *Charauleau-Woffenden* cases.[33] It certainly had as much to do with the final result of those cases as the common law rules and community misconceptions on which it was ostensibly based. In a new jurisdiction, "whose institutions had not yet crystallized into form under archaic ideas of the subjection of the female sex,"[34] the spirit of the times could be freely indulged. This spirit, rather than any conscious reliance upon civil law concepts, seems to explain the emphasis upon "equal rights" and the wife's "vested interest." And as to several other questions, which were controversial during the early development of American community property in the west, it determined the course which Arizona was to follow.

The measure was equal rights, not merely equal title. To

31. Mr. Justice Holmes, in Arnett v. Reade, 220 U.S. 311, 319 (1911).

32. La Tourette v. La Tourette, 15 Ariz. 200, 208, 137 Pac. 426, 429 (1914); Goodell v. Koch, 282 U.S. 118 (1930).

33. Charauleau v. Woffenden, 1 Ariz. 243, 25 Pac. 652 (1876); Woffenden v. Charauleau, 1 Ariz. 346, 25 Pac. 662 (1876).

34. *See* Cosper v. The Valley Bank, 28 Ariz. 373, 376, 237 Pac. 175, 176 (1925).

early Arizona lawyers and lawmakers (and to their wives) the nice civil law distinction between *habere*, signifying ownership, and *tenere*, signifying the right to manage or administer, seemed as empty as it does to a modern Spanish feminist. Of how much satisfaction was it to an emancipated wife to possess equal title to the common property, if the power of disposition, so long, at least, as it was exercised for the "benefit" of the community, resided exclusively in the husband? This was in some respects less than the common law dower right, which could be released only with the wife's consent.

The first Arizona statute gave the husband "the entire management and control of the common property, *with the like absolute power of disposition as to his own separate estate . . . .*" (Italics supplied.)[35] This language, which seems to go even beyond the civil law, was broad enough to allow the husband to give away or waste the community property, since he could have done so with his separate estate; particularly since the same chapter gives the wife a specific remedy for mismanagement or waste of "her separate property."[36] As later modified the statute provided merely that the common property might "be disposed of by the husband only."[37] And by a 1901 amendment the wife's joinder was required in "all deeds and mortgages affecting [community] real estate, except unpatented mining claims."[38]

The husband's sole agency to dispose of the community property had rested upon the wife's presumed incompetence in business matters. It was as this presumption came to be regarded as less valid that his exclusive agency was withdrawn as to the relatively infrequent conveyance and encumbrance of real estate. For practical reasons it has been retained as to personal property.[39] But the court has been at pains to point out that:

> "The law, in giving this power to the husband during coverture to dispose of the personal property, does not do this in recognition of any higher or superior right that he has therein, but because the law considers it expedient and

35. Ariz. Laws 1865, c. XXXI, § 9, p. 61.
36. Ariz. Laws 1865, c. XXXI, § 8, p. 60.
37. ARIZ. REV. STAT. ¶ 2102 (1887).
38. ARIZ. REV. STAT. ¶ 3104 (1901). This is still the law. ARIZ. CODE ANN. § 71-409 (1939).
39. ARIZ. CODE ANN. § 63-301 (1939).

necessary in business transactions affecting the personalty to have an agent of the community with power to act."[40]

The next logical step is to make both the husband and the wife, like true partners, agents for the community in the disposition of its personalty. It remains to be seen whether female emancipation and legislative chivalry will go this far. At present the law deems the husband "best qualified for [this] purpose."[41]

As to the disposition of the wife's separate estate the Arizona statutes underwent a similar but more rapid evolution. They at first provided, contrary to the Spanish law,[42] that "the husband shall have the management and control of the separate property of the wife during the continuance of the marriage," although the wife was required to join in its sale or encumbrance.[43] But ever since the Married Women's Property Act of 1871,[44] married women of the age of twenty-one years, or upwards, have had the sole control and management of their separate property, as if unmarried.[45]

Another question which had to be settled was that of the liability of the separate and common property of the spouses for their separate debts. That the separate property of each was liable for the separate debts of its owner seems never to have been doubted.[46] And that the husband's separate property could not be charged with the antenuptial debts of the wife was provided in the first community property statute.[47] This exemption was soon applied mutually: "The separate property of the husband or wife shall not be liable for the debts of the other contracted before marriage."[48] That the same rule should apply to postnuptial separate debts appears logical,[49] and is generally assumed, although an argument to the contrary may be based on the maxim *expressio unius*.[50]

40. La Tourette v. La Tourette, 15 Ariz. 200, 206, 137 Pac. 426, 428 (1914).
41. *Ibid.*
42. 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 316 *et seq.* (1943).
43. Ariz. Laws 1865, c. XXXI, § 6, p. 60. There were some other exceptions, *e.g.*, when the husband did not reside in the territory.
44. Ariz. Laws 1871, p. 18.
45. ARIZ. CODE ANN. §§ 63-303, 71-409 (1939); Stiles v. Lord, 2 Ariz. 154, 11 Pac. 314 (1886); Miller v. Fisher, 1 Ariz. 232, 25 Pac. 651 (1875).
46. As to the wife's antenuptial debts this was specifically stated in the first community property statute, Ariz. Laws 1865, c. XXXI, § 13, p. 61.
47. *Ibid.*
48. ARIZ. REV. STAT. ¶ 2105 (1887); ARIZ. CODE ANN. § 63-304 (1939).
49. *See* 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 452 (1943).
50. The grounds for rejection of the maxim in Forsythe v. Paschal, 34 Ariz. 380, 271 Pac. 865 (1928) are inapplicable to this situation.

Touching the more important problem of the liability of the common property for separate debts (generally the husband's) the Arizona rule is contrary to that of most community property states. The statute says only that "The community property of the husband and wife shall be liable for the community debts contracted by the husband during marriage . . . ."[51] Since only the husband can make contracts binding the common property,[52] and since there can be no such thing as a community debt contracted before the marriage or after its dissolution, this statute includes all community debts. But it is silent as to the community's liability for separate debts.

The first case involving this question was *Villescas v. The Arizona Copper Co.*[53] In a rather cursory opinion the court held the community chargeable with a criminal fine incurred by the husband quite apart from the community affairs. The court cites some authorities from other states, but seems to be chiefly influenced by the conviction that any other rule would be unfair to creditors, who must be protected from what it calls "secret contracts and agreements of the highly confidential relation of the spouses." Presumably this refers to agreements between husband and wife whereby separate property may be transmuted into community. Nothing is said about the unfairness to the marital partnership of having its assets applied to pay debts which are in no way connected with its affairs.

Later, in *Cosper v. The Valley Bank*,[54] involving an obligation which was held to be, in fact, a community debt, the court went out of its way to disapprove the holding in the *Villescas* case, and in a well-reasoned discussion to express the opinion that the common property is not chargeable with the separate debts of the spouses. This is now the settled rule in Arizona,[55] although, upon the dissolution of the community, separate debts are chargeable to the debtor's one-half.[56]

51. ARIZ. REV. STAT. ¶ 2106 (1887); ARIZ. CODE ANN. § 64-304 (1939).

52. ARIZ. REV. STAT. ¶ 2104 (1887); ARIZ. CODE ANN. § 63-303 (1939). An exception is the wife's right to contract debts for necessaries for herself and children. But even these are contracted upon the credit of the husband. ARIZ. REV. STAT. ¶ 2107, 2108 (1887); ARIZ. CODE ANN. § 63-305 (1939).

53. 20 Ariz. 268, 179 Pac. 963 (1919).

54. 28 Ariz. 373, 237 Pac. 175 (1925).

55. Barr v. Petzhold, 273 P.2d 161 (Ariz. 1954); Tway v. Payne, 55 Ariz. 343, 101 P.2d 455 (1940); McFadden v. Watson, 51 Ariz. 110, 74 P.2d 1181 (1938); Payne v. Williams, 47 Ariz. 396, 56 P.2d 186 (1936); Perkins v. First Nat. Bk. of Holbrook, 47 Ariz. 376, 56 P.2d 639 (1936); Jackson v. Griffin, 39 Ariz. 183, 4 P.2d 900 (1931); Forsythe v. Paschal, 34 Ariz. 380, 271 Pac. 865 (1928).

56. Tway v. Payne, 55 Ariz. 343, 101 P.2d 455 (1940); Jackson v. Griffin, 39 Ariz. 183, 4 P.2d 900 (1931).

In the *Cosper* case the court reasons that this result flows inevitably from what was, even then, the Arizona concept of each spouse's equal, undivided and vested interest in the community property. To charge the common property for an individual debt would be to make one's property liable for the debts of another. It holds, too, that the statutory subjection of the community property to community debts is to be construed as exclusive, and as stating "for what debts community property shall be liable."[57]

The result is good Spanish community property law. But to what extent, if at all, it is consciously based upon that authority, either directly or indirectly, is impossible to state. Its immediate reliance is upon *La Tourette v. La Tourette*.[58] And the reflections in that case "upon the nature and character of this estate known as community property," so far as they concern the nature of the wife's present interest, were presented without specific reference to authority.

Once again, however, it is perfectly clear that the court, in the *Cosper* case, was greatly influenced by the modern view of women's rights, and the fact that the separate debt there involved was, as is usual, the husband's.

> "Development of the community property law of the western states has gone hand in hand with the general emancipation of women from the economic bonds which have so long burdened them. While under the common law the husband and wife were 'one,' and he was always the 'one,' the world has of recent years gone a long way toward recognizing that even a married woman was a human being, with most of the rights of such . . . ."[59]

The principle that community property is not answerable for the husband's separate debts has given rise to some modern problems not present in those community property states which hold to a contrary view. In *Oglesby v. Poage*,[60] for example, the court was concerned with a constitutional tax exemption for the property of military veterans. The particular case had to do with the taxability of certain real estate, the community property of a veteran husband and his non-veteran wife. While recognizing that the wife's tax liability is her separate obliga-

57. Cosper v. The Valley Bank, 28 Ariz. 373, 382, 237 Pac. 175, 178 (1925).
58. 15 Ariz. 200, 137 Pac. 426 (1914).
59. 28 Ariz. 373, 375, 237 Pac. 175, 176 (1925).
60. 45 Ariz. 23, 40 P.2d 90 (1935).

tion, the court concluded that the rule against the collection of separate debts out of community property is a legislative policy which must yield to the constitutional exemption of the veteran's property only. The wife's property must, therefore, pay its share of taxes, regardless of the fact that the enforcement of the payment would result in a sale of her interest. This enforcement procedure is possible because the interests of the spouses "are separate for the purpose of taxation," citing the authority to file separate returns of community income taxes.

Then, there is the problem of the divorced man who remarries. Is the property of the second community chargeable with the alimony and child support decreed to the wife and children of the first? It is his separate obligation. To charge it to the community is contrary to the rule, and unfair, by community property standards, to the wife and children of the second marriage. Yet, to exempt the community property may put him beyond the reach of his legal and moral obligations. This question has not been decided by the Arizona Supreme Court at this writing, and the trial courts of the state have reached conflicting conclusions.

Some of the trial courts have followed, and others have refused to follow, the Washington rule. In Washington, as in Arizona, community property is not liable for the husband's separate debts. But in *Fisch v. Marler*,[61] the Supreme Court of Washington held that the husband's earnings could be garnished for accrued installments of alimony due to his former wife. The claim of the divorced wife upon the earnings of her former husband is said to be a "fixed and prior" one. Her claim is not in all cases to be enforced to the point of exhaustion of such earnings, for the present wife also has a claim thereon. Therefore, the court may exercise its discretion in allocating the husband's earnings according to the necessities of the parties.

This decision could not be followed in Arizona without doing violence to community property principles which have been thoroughly settled in that state for many years. It is, in effect, a common law decision, for it treats the husband's earnings as his own. But it is a basic principle of Arizona community property law that no distinction in the character of the common property can be based upon its source as between the spouses. Each has an equal, present and existing interest therein, whether

61. 1 Wash.2d 698, 97 P.2d 147 (1939).

it originates entirely from the earnings of the husband, entirely from the earnings of the wife, or partly from each.[62] In *Payne v. Williams*,[63] for example, it was held that the husband's salary could not be garnished for his separate debt. This is so basic to the community property concept that to deny it is to strike at the roots of the system.

Some indication of the thinking of the Washington court is contained in the case of *Stafford v. Stafford*,[64] in which it refused to apply the rule of *Fisch v. Marler* to community real estate. In distinguishing the latter case the court says: "The husband has much broader control over community personal property than he has over community real estate."[65] But it is emphasized in the Arizona case of *La Tourette v. La Tourette*,[66] that this power of control is only as agent for the community and not in recognition of any higher right or title. Despite the husband's broader control over it, community personal property is as much community property, and the wife's vested interest therein is as genuine, as in the case of community real estate.

The Washington court has pointed out that alimony and support money payments are not a debt in the ordinary sense, as, for example, within the meaning of the exemption statutes.[67] That is true. They are public obligations. But for our present purposes this appears to be a distinction without a difference. There would seem to be no principle of community property law under which community property, as such, is free from liability for separate ordinary debts, yet answerable for separate public obligations. Certainly no such principle prevails in Arizona where the community has been held not answerable for a separate criminal penalty assessed against the husband,[68] nor upon the wife's separate statutory obligation to support her aged mother.[69]

Yet this distinction between separate debts contracted by the spouse and his separate obligations which are imposed by

62. ARIZ. CODE ANN. § 63-301 (1939). See also 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 166-68 (1943).
63. 47 Ariz. 396, 56 P.2d 186 (1936).
64. 10 Wash.2d 649, 117 P.2d 753 (1941).
65. *Ibid.*, 117 P.2d at 754.
66. 15 Ariz. 200, 206, 137 Pac. 426, 428 (1914).
67. Fisch v. Marler, 1 Wash.2d 698, 715, 97 P.2d 147, 154 (1939); Stafford v. Stafford, 18 Wash.2d 775, 788, 140 P.2d 545, 551 (1943).
68. Cosper v. The Valley Bank, 28 Ariz. 373, 237 Pac. 175 (1925), overruling Villescas v. Arizona Copper Co., 20 Ariz. 268, 179 Pac. 963 (1919).
69. Maricopa County v. Douglas, 69 Ariz. 35, 208 P.2d 646 (1949).

law does suggest a solution to the problem which is fair and equitable for the wife and children of the first marriage, and avoids the emasculation of the community property principle. Under the Spanish law of community property, according to de Funiak,

> "It is undoubted . . . that where a spouse having a duty or obligation imposed by law had insufficient separate funds at the moment to meet such duty or obligation, it might be met from the *spouse's share* in the community property, provided that the other spouse suffered no detriment therefrom and that expenditures by one spouse from the common fund were properly charged against that spouse's share . . . . In the case of the ordinary separate creditor, his rights to reach his debtor's properties were subordinated to the well-being and interests of the family which required that the community property be kept intact for its benefit during the marriage. But obligations imposed by the state itself took priority over everything else."[70] (Italics supplied.)

This is quite different from holding the community property, as such, answerable for these obligations. And it avoids the community heresy of treating the husband's earnings as his own, as at common law. It is simply to say that for the collection of public obligations the community may be treated as divisible. The rule is derived from basic community property sources and is consistent with our laws and customs. As to the separate tax liability of a spouse, this solution has already been adopted, in principle, by the Arizona Supreme Court, in *Oglesby v. Poage.*[71] And it seems to offer the soundest solution, under Arizona law, for the enforcement of the remarried man's obligations to the wife and children of a former marriage.

Summary

The most important influence in shaping the development of community property law in Arizona has been, of course, the community property system of Spain and Mexico. It was the law of the region for more than three hundred years, and in broad outline it is still the law of Arizona.

The common law, also, has exercised an influence. That was, perhaps, inevitable, because of the common law training of the Arizona bench and bar, and because of the former inaccessibility

70. 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 468-69 (1943).
71. 45 Ariz. 23, 40 P.2d 90 (1935).

of community property materials. But it is a dangerous influence. The concepts are fundamentally divergent, and their mixing can lead to unfortunate results.

Finally, there has been the influence of the nationwide trend toward the legal emancipation of married women. This movement has coincided, in point of time, with the history of the territory and state of Arizona. It seems to explain the characteristic Arizona doctrine of equal rights, which includes the Spanish doctrine of equal title, and adds a large share of management and control in the wife. The result is a system which, from the woman's point of view, must be the most satisfactory since the days of the Amazons.