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the electorate a constitutional power to remove legislative power from a legislative body in any way other than to legislate in place of that body by initiative or to cancel previously enacted legislation by referendum. The electorate cannot by initiative ordinance directly arrogate legislative power to itself as it attempts to do here.

Since fluoridation has been held to be a valid exercise of the local police power,[56] it is clear that the citizens of Lincoln could vote to fluoridate by initiative, invalidate by referendum a fluoridation ordinance passed by the city council, or even repeal such an ordinance by an initiative ordinance once the time for referendum has passed. There is, however, no power in the people of a general law municipality which permits them so to alter directly at their caprice the spectrum of municipal powers which the constitution and the state legislature place in their legislative body.

Conclusion

Representative institutions are not without weaknesses. Too often history has seen the representatives of the people place their own interests above those of their electors. Therefore one cannot quarrel with the goal of the judiciary in trying to strike a balance between direct and representative government. However, if there are to be limitations on direct legislation, the rationale behind them should be clearly enunciated. In municipal affairs, emphasis should be clearly placed on the judicial objective of confining the initiative to decisions which determine municipal policy, and the reasoning behind the rule that matters of local concern cannot be subject to referendum in general law cities should be given careful consideration before a similar limitation is placed on the referendum in chartered cities. In connection with matters of statewide concern, the legislative-administrative test should be abandoned. Lastly, in assessing proposed initiative measures, the courts must take care that the people in their zeal to invalidate unpopular legislation do not exercise powers they do not possess.

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[56] De Aryan v. Butler, 119 Cal. App. 2d 674, 681-82, 260 P.2d 98, 102 (1953).

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CHARACTERIZATION OF PROPERTY IN CALIFORNIA WHEN PERIOD OF ACQUISITION OVERLAPS CREATION OR TERMINATION OF MARITAL COMMUNITY

The marital community is both created and terminated at a particular instant in time. However there is often a lapse of time between the initial step taken in the acquisition of some interest in property and the perfection of this interest. Thus the acquisition of property may overlap the creation or termination of the marital community. Because the extent of a spouse's interest in some item of property may depend on its character as community or separate, the courts are

often faced with the complex problem of characterizing property where acquisition overlaps the creation or termination of the marital community. This note presents a discussion of the principles of characterization under California law in the hope that this will clarify the problem. Further, an analytical technique is suggested to facilitate characterization in those cases which are complicated by divorce.

The Characterization of Property

The problem of characterizing property as community or separate is in itself not difficult. The "reasonable man" of the law, given an explanation of the distinction between community and separate property, could handle most problems of characterization. The characterization will usually be obvious from a complete knowledge of the circumstances concerning the acquisition of a particular interest in property. This simplicity is probably the reason the courts often characterize property without carefully analyzing the process of characterization. As a result the courts often appear to have confused the facts upon which characterization depends with the principles upon which it is based. In complicated cases it is imperative that this distinction be recognized and that the characterization be based on established principles, rather than on some isolated fact which is sufficient for characterization only in ordinary cases.

When the character of property as community or separate is not determined by statute,[1] or by agreement between the spouses,[2] it is determined by the application of two principles: (1) the character of property is fixed at the time of acquisition,[3] and (2) the property retains its original character even when traded, sold, or otherwise changed in form or identity.[4] To apply these two principles, one must know the time and mode of acquisition of the property.[5] The distinction, however, between the principles which control the characterization and the facts which are necessary for characterization is not always made by the courts. Frequently it has been stated that the character of property as community or separate is determined by proof showing the mode of acquisition.[6] This is misleading. The character of property is determined from knowledge of the time and mode of acquisition; but only where property is acquired by gift, bequest, devise or descent, or as an award of damages for personal injuries, is the character determined directly by the mode of acquisition.[7]

A complete knowledge of the details of the transaction by which property is acquired is necessary for characterization. Where the property acquired is in the

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[1] CAL. CONST. art. XX, § 8; CAL. CIV. CODE §§ 162, 163, 164, 687.

[2] See, *e.g.*, Estate of Neilson, 57 Cal. 2d 733, 22 Cal. Rptr. 1, 371 P.2d 745 (1962); Woods v. Security-First Nat'l Bank, 46 Cal. 2d 697, 299 P.2d 657 (1956).

[3] Calloway v. Downie, 195 Cal. App. 2d 348, 352, 15 Cal. Rptr. 747, 749 (1961); Belmont v. Belmont, 188 Cal. App. 2d 33, 42, 10 Cal. Rptr. 227, 232 (1961); Garten v. Garten, 140 Cal. App. 2d 489, 492, 295 P.2d 23, 25 (1956).

[4] Boyd v. Oser, 23 Cal. 2d 613, 623, 145 P.2d 312, 317 (1944).

[5] DePuy v. Shay, 127 Cal. App. 476, 478, 16 P.2d 158, 159 (1932).

[6] Bias v. Reed, 169 Cal. 33, 42, 145 Pac. 516, 519 (1914); Estate of Foy, 109 Cal. App. 2d 329, 333, 240 P.2d 685, 687 (1952); Goucher v. Goucher, 82 Cal. App. 449, 456, 255 Pac. 892, 895 (1927).

[7] CAL. CIV. CODE §§ 162-63.5 provide that property acquired during marriage by any of the means listed in the text is separate property.

nature of a windfall, where no legal or equitable interest can be considered to have been given in exchange for the interest acquired, its character depends on the time a legally cognizable right to or interest in the property is first acquired.[8] If such a right or interest is acquired during the existence of the marital community by one of the spouses, the property is community;[9] if it is acquired before creation[10] or after termination[11] of the community, the property is separate. Of course, the first legally cognizable right to the property, or interest therein, may be acquired some time before full ownership in the property itself is acquired.[12]

Where property is acquired in exchange for other property or for labor, its character depends on the character of that which was given for the exchange. If property is acquired in exchange for other property, then the character of the property acquired is determined by determining the character of the property which was given.[13] If property is acquired in exchange for labor then its character will depend upon when the services rendered in exchange for the property were performed.[14] The labor of the spouses during the existence of the community is usually[15] community labor. Property received in exchange for such labor is community property.[16] Property received in exchange for services rendered before creation[17] or after termination[18] of the community is separate property.

The Characterization of Property and the Creation of the Community

The fact that property is acquired over a period of time which includes the creation of the community does not usually complicate its characterization. The problems which develop under these circumstances are readily solved if the courts carefully ascertain all of the facts concerning the acquisition and then apply the principles upon which characterization depends.

[8] Cases where property is acquired by adverse possession are the classic examples of this situation. Crouch v. Richardson, 158 La. 822, 104 So. 728 (1925); Sauvage v. Wauhop, 143 S.W 259 (Tex. Civ. App. 1912). California courts appear to have accepted the reasoning of these cases, but a simple question of characterization of property acquired solely by adverse possession overlapping either the creation or termination of the community has apparently never been decided by California appellate courts. See Siddall v. Haight, 132 Cal. 320, 64 Pac. 410 (1901) (parol gift); Pancoast v. Pancoast, 57 Cal. 320 (1881) (release of claim in exchange for deed).

[9] *Ibid.*

[10] Estate of Clark, 94 Cal. App. 453, 271 Pac. 542 (1928).

[11] French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941).

[12] Estate of Clark, 94 Cal. App. 453, 271 Pac. 542 (1928).

[13] Vieux v. Vieux, 80 Cal. App. 222, 251 Pac. 640 (1926).

[14] Waters v. Waters, 75 Cal. App. 2d 265, 170 P.2d 494 (1946).

[15] The earnings of a spouse may be made separate property by agreement. Kaltschmidt v. Weber, 145 Cal. 596, 79 Pac. 272 (1904); Gianotti v. McDonald, 213 Cal. App. 2d 744, 29 Cal. Rptr. 275 (1963). Under certain conditions where the spouses are living separate and apart their earnings will be separate property. CAL. CIV. CODE §§ 169, 169.1, 169.2, 175. Also, the wife may become a sole trader by complying with statutory requirements and her earnings will be separate property. CAL. CODE CIV. PROC. § 1819.

[16] Martin v. Southern Pacific Co., 130 Cal. 285, 62 Pac. 515 (1900); Garten v. Garten, 140 Cal. App. 2d 489, 295 P.2d 23 (1956).

[17] CAL. CIV. CODE §§ 162-63.

[18] Waters v. Waters, 75 Cal. App. 2d 265, 170 P.2d 494 (1946).

If the property is in the nature of a windfall its character is determined at the time when a legally cognizable interest in it was first acquired. For instance, when title to the property is acquired merely by the adverse possession of one of the spouses, the character of the property is determined by whether the community existed at the time when title to the property was acquired.[19] Prior to the acquisition of title the possessor has no legally cognizable interest in the property. However, in *Siddall v. Haight*,[20] possession of a lot was acquired by a parol gift and title was subsequently acquired by adverse possession against the donor. In this case the court held that a legally cognizable interest was acquired by the gift. This occurred before the marital community was created. Even though title was subsequently acquired by adverse possession during marriage, the property was characterized as separate, not community.

It is not the fact that title is acquired by operation of law in cases of adverse possession which determines the character of the property. It is merely the fact that, in the usual case, prior to the acquisition of title the possessor has no legally cognizable interest in the property. Thus, where title to part of a tract of land is conveyed to a mere trespasser in exchange for a release by him of a wrongful claim to the entire tract, the character of the property acquired by the trespasser is determined at the time of the conveyance.[21] Wrongful possession is not a legally cognizable interest in land for the purposes of characterization.[22] In releasing his wrongful claim the grantee exchanged nothing for the conveyance and the property was characterized at the time the first cognizable interest was acquired. This was when title was acquired by the deed.

The characterization of property in the nature of a windfall according to the time at which a legally cognizable right or interest is first acquired is not restricted to real property. In *Estate of Clark*[23] it was held that a statutory right of an heir to contest a will is a legally cognizable interest. Property received in a compromise settlement releasing this right is characterized as of the time the right was acquired by virtue of the death of the decedent. Since the death occurred prior to marriage of the heir in this case, his right to contest the will and, therefore, the property received in compromise of this right, were separate property.

When the acquisition of property, either in exchange for other property or as the product of labor, overlaps the creation of the marital community, the character of the property acquired depends upon the character of that which was given in exchange.[24] In such cases the character of the property is determined neither by the time at which legal title is acquired,[25] nor by the time at which an equitable interest is acquired,[26] nor even by the time at which a legally cognizable right or interest was first acquired;[27] rather, the courts look behind the

[19] Crouch v. Richardson, 158 La. 822, 104 So. 728 (1925); Sauvage v. Wauhop, 143 S.W 259 (Tex. Civ. App. 1912).

[20] 132 Cal. 320, 64 Pac. 410 (1901).

[21] Pancoast v. Pancoast, 57 Cal. 320 (1881).

[22] *Id.* at 321.

[23] 94 Cal. App. 453, 271 Pac. 542 (1928).

[24] Vieux v. Vieux, 80 Cal. App. 222, 251 Pac. 640 (1926).

[25] *Ibid.*

[26] *Ibid.*

[27] Modern Woodmen of America v. Gray, 113 Cal. App. 729, 299 Pac. 754 (1931).

form of the transaction and characterize the property according to the character of that which provided the consideration for the property acquired. Further, when a single item of property is acquired in exchange for both separate and community property, the property acquired will be considered separate in part and community in part.[28]

In *Vieux v. Vieux*[29] the husband paid part of the purchase price for certain property with his funds prior to marriage while subsequent payment was made after marriage with community funds. The community was entitled to share in the profits on resale of the property in the proportion that community funds had contributed to its purchase. The husband had not only an equitable interest, but also legal title to the property prior to the marriage, but because of the contribution of actual funds of the community, the proceeds on resale were apportioned between the husband and the community.

Apportionment of the value of an interest in property accordingly as separate and community interests contribute to acquisition is fully justified by the principle that the character of property is unaffected by a change in its form or identity.[30] There is, however, another consideration which lends further support to apportionment. By statute the husband is given management and control of the community property.[31] Thus an opportunity would be presented to a husband to defraud his wife of her share of the community property if apportionment did not follow from the application of community funds to complete the acquisition of what initially was his separate property in the case where the first legally cognizable interest was acquired by the husband prior to marriage. This danger was recognized in *Vieux v. Vieux*.[32] It is the management and control of the community property given to the husband by statute which justifies the presumption of a gift to the wife when community funds are used to complete the acquisition of what initially was her separate property in the case where the first legally cognizable interest was acquired by the wife prior to marriage. This presumption of gift usually results in the entire property remaining separate property of the wife.[33] Thus, this presumption does not conflict with the principle upon which apportionment is based.

Apportionment has been allowed even where a very limited right was obtained by the commencement of the transactions which eventually resulted in the acquisition of a substantial amount of property. In *Modern Woodmen of America v. Gray*,[34] the husband, prior to his second marriage, obtained a life insurance policy on himself in which no equity was acquired by payment of the premiums and which was void ipso facto on the failure to pay any premium. At the time of his second marriage he had only the right to keep the policy in force by the regular payment of the premiums; he would have been ineligible, because of

[28] Faust v. Faust, 91 Cal. App. 2d 304, 204 P.2d 906 (1949); Vieux v. Vieux, 80 Cal. App. 222, 251 Pac. 640 (1926).

[29] 80 Cal. App. 222, 251 Pac. 640 (1926).

[30] Boyd v. Oser, 23 Cal. 2d 613, 145 P.2d 312 (1944); Hicks v. Hicks, 211 Cal. App. 2d 144, 151, 27 Cal. Rptr. 307, 312 (1962).

[31] CAL. CIV. CODE § 172.

[32] 80 Cal. App. 222, 227, 251 Pac. 640, 642 (1926).

[33] Estate of Bernatas, 162 Cal. App. 2d 693, 328 P.2d 539 (1958).

[34] 113 Cal. App. 729, 299 Pac. 754 (1931).

age, to acquire a similar policy had the existing one lapsed. After the marriage the premiums were paid out of community funds. On the husband's death the proceeds were considered separate and community property in proportion as separate and community funds had been used for the payment of the premiums. The court held that a new contract was not created with the payment of each premium[35] and that prior to this second marriage the husband had acquired a valuable right which the law would protect—the right to continue the insurance policy in force.[36] This right was a legally cognizable interest in property which was acquired and preserved in exchange for both separate and community property. When on the death of the husband substantial funds resulted from the policy, they had to be apportioned as community and separate funds had been used in acquiring and maintaining the policy.

A Special Problem on Termination

The same principles followed in the characterization of property acquired during a period which overlaps the creation of the community apply to the characterization of property acquired during a period which overlaps its termination. Unfortunately, an additional problem often arises at the termination of the community. Rarely will a question of the characterization of property arise where the acquisition is initiated during marriage unless the marriage is terminated by divorce. Where the marriage is terminated by death the only question will usually be whether an enforceable interest was acquired in the property. Thus, most of the cases requiring the characterization of property acquired in a period overlapping the termination of the community arise in divorce actions. At this time the process of acquisition may have progressed no further than some initial step taken during marriage. Whether the acquisition will be completed, what the extent of the interest will be if completed, and what the value of the interest will be upon completion may all be unanswerable questions at the time of divorce. The California statutes look to the final disposition of the community property at the time of divorce,[37] yet at this time the interest in property may not actually be a tangible part of the assets of the community. The court may grant a divorce and reserve adjudication of property rights for a subsequent determination,[38] but this would not be a satisfactory solution unless there were some time in the reasonably near future when, if ever, the property would definitely have been acquired and be capable of valuation. Faced with the problem of dividing an interest in property which is contingent as to either ultimate acquisition or final value or both, and under pressure to provide a final disposition of the property interests between the spouses, the courts seem on occasion to have confused the nature of the problem before them.[39] The following suggests an analytical tech-

[35] *Id.* at 732, 299 Pac. at 755.

[36] *Ibid.*

[37] CAL. CIV. CODE § 146. See CAL. CIV. CODE § 149 (providing, in divorce actions, for jurisdiction over community property without personal service).

[38] Elms v. Elms, 4 Cal. 2d 681, 685, 52 P.2d 223, 225 (1935). See also Hull v. Superior Court, 54 Cal. 2d 139, 5 Cal. Rptr. 1, 352 P.2d 161 (1960) (concept of divisible divorce).

[39] See Speer v. Speer, 209 Cal. App. 2d 233, 25 Cal. Rptr. 729 (1962). Here the court apparently held that the husband's interest in the assets of a corporation, which was indebted to him and of which he was a half owner, was a mere expectancy and not

nique to facilitate characterization and division of community property in these cases.

The Existence of an Interest

Before attempting to characterize and divide an interest in property in a divorce action, the court must determine whether the interest exists for the court's further consideration as to character and division. This is a problem distinct from both characterization and division. It is also a problem which has caused some difficulty for the courts.

To qualify as an existing interest for further consideration by the court as to character and division, the interest does not have to be presently ascertainable either as to final value or ultimate acquisition.[40] When an interest in property is held by one or both of the spouses which might to some extent be community in character and which at some time may possibly be finally acquired and valuated, it exists for further consideration by the court. The interest is placed before the court for its consideration when one of the spouses puts the character or ownership of the interest in issue.[41] Thus in *Secondo v. Secondo*,[42] where the uncontroverted testimony of the husband was that certain community funds had been spent and he was not accountable to the community for their loss, there was no interest in property existing for further consideration by the court. However, in a similar case, where the husband was unable to explain the disappearance of a substantial amount of community funds, he was held accountable to the community for the loss.[43] Because the husband was accountable for the loss, "property" existed for further consideration by the court.

The difficulty which the courts have had with the problem of determining the existence of an interest in property seems to lie in an inability to restrict their consideration to that specific question. In *Secondo*, the court went beyond holding that the funds were not in existence and said that the court could not divide an interest in property which was not in the hands of the court.[44] This seems to have been an unfortunate choice of words. In other cases this statement has been misapplied. As a result interests in property have apparently been held not to be before the court for further consideration as to character and division when in fact they did exist within the limitation of *Secondo v. Secondo* and the determination of their character was placed in issue by the parties.[45] Since in a divorce action the court has the power to determine the rights, as between the spouses, to all interests in property which are placed in issue,[46] it is certainly incorrect to

subject to division on divorce. An alternative basis for the decision, however, seems to be that the sum awarded the wife as her share of the community interest in the business was beyond the husband's capacity to pay.

[40] Waters v. Waters, 75 Cal. App. 2d 265, 170 P.2d 494 (1946).

[41] Smith v. Smith, 40 Cal. 2d 461, 254 P.2d 1 (1953); Huber v. Huber, 27 Cal. 2d 784, 167 P.2d 708 (1946).

[42] 218 Cal. 453, 23 P.2d 752 (1933).

[43] White v. White, 26 Cal. App. 2d 524, 79 P.2d 759 (1938).

[44] 218 Cal. at 458, 23 P.2d at 754.

[45] Speer v. Speer, 209 Cal. App. 2d 233, 25 Cal. Rptr. 729 (1962); Hill v. Hill, 82 Cal. App. 2d 682, 187 P.2d 28 (1947).

[46] McClenny v. Superior Court, 62 Cal. 2d 140, 41 Cal. Rptr. 460, 396 P.2d 916 (1964).

hold that the husband's interest in a corporation[47] or the husband's interest in partnership assets[48] is not in the hands of the court.[49]

In the *Secondo* case the funds claimed to be community property no longer existed. There was nothing for the court to divide. As a result the wife's claim was dismissed.[50] The determination of the existence of an interest in property is an essential preliminary step to characterization and division, but this restriction should be confined to existence in the sense of the *Secondo* case. Having concluded that there is an existing interest in property for its further consideration, the court can then proceed with a determination of its character as community or separate.

The Characterization at Termination

If the courts restrict their consideration to property interests which exist within the meaning of the restriction set forth above, only ordinary difficulties of characterization will be encountered. Characterization is based on the same principles when acquisition overlaps termination of the marital community as when it overlaps creation. The same facts are necessary and sufficient for the determination. It is, however, important that the characterization of existing property interests be treated as a distinct problem from the division of the property. The failure to make this distinction may be the reason the courts have seemingly fallen into error in the analysis of difficult problems of property division in cases such as *Speer v. Speer*[51] and *French v. French*.[52]

The three property interests involved in the case of *French v. French*[53] illustrate the clarification which results when the suggested analysis is followed. Indeed, the criticism to which the *French* case has been subjected[54] might have been avoided if this analysis had been followed, although the ultimate disposition of the property would probably have been no different. The three property interests involved in that case were: (1) the husband's reserve pay for services rendered prior to divorce, (2) reserve pay for services rendered after divorce, and (3) the retirement pay which the husband would receive upon completion of fourteen more years in the Fleet Reserve. The reserve pay, in essence, constituted wages given in exchange for the husband's duties in the Fleet Reserve. Thus the reserve pay was community property only for the services rendered during the existence of the marital community. The retirement pay was considered a mere expectancy by the court and not subject to division as community property.[55]

In this case all three interests existed within the limitation of *Secondo*. They were interests in property held by one of the spouses which at some time might be reducible to money and which might to some extent be community in char-

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[47] Speer v. Speer, 209 Cal. App. 2d 233, 25 Cal. Rptr. 729 (1962).
[48] Hill v. Hill, 82 Cal. App. 2d 682, 187 P.2d 28 (1947).
[49] Carmichael v. Carmichael, 216 Cal. App. 2d 674, 31 Cal. Rptr. 514 (1963).
[50] Secondo v. Secondo, 218 Cal. 453, 23 P.2d 752 (1933).
[51] 209 Cal. App. 2d 233, 25 Cal. Rptr. 729 (1962).
[52] 17 Cal. 2d 775, 112 P.2d 235 (1941).
[53] *Ibid.*
[54] See Note, 30 CALIF. L. REV. 469 (1942).
[55] French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941).

acter. Thus, the interests existed for further consideration by the court as to character and division. The interests were placed in the hands of the court for its consideration when the wife placed the character of the interests in issue in the divorce action. Thus the court should have proceeded with a characterization of the three interests.

Wages are characterized by the character of the labor for which they are exchanged.[56] As the reserve pay was given in exchange for services rendered by the husband in the Fleet Reserve, the court properly characterized the pay as community property only for those services rendered during the existence of the community. The interest in the retirement pay, however, should probably have been characterized as separate property in which the community had no interest, not as a mere expectancy[57] which was not subject to division. The character of the property was placed in issue and the interest existed to an extent sufficient for the court's consideration. The mere fact that an interest is not presently subject to valuation is not a sufficient reason for refusing to characterize the interest.[58] The character of property as separate or community is independent of the time the interest is capable of valuation.[59]

Under the facts of the case it seems the court, following such an analysis, would have concluded that the retirement pay was property in the nature of a windfall in which no legally cognizable interest had been acquired. While the husband's interest in the fund existed in the sense necessary to justify further consideration by the court under the limitation of the *Secondo* case, it does not follow necessarily that he had acquired a legally cognizable right or interest in the fund. If the husband had no legally cognizable right or interest in the fund until he completed fourteen more years of service, the interest in the retirement pay would be analogous to the acquisition of property by adverse possession. Of course, if the court found that the husband had acquired a legally cognizable interest in the fund during marriage, then it would have to characterize the retirement pay as community property in proportion as community property or labor had contributed to the acquisition of the interest. In this particular case, however, it seems no cognizable right or interest was acquired during marriage, though in most pension plans an interest in the fund is acquired by payment into the fund.[60]

The *French* case illustrates quite clearly the advantage of the separation of

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[56] Pedder v. Commissioner, 60 F.2d 866 (9th Cir. 1932).

[57] The court held that the husband's interest in the retirement pay was a mere expectancy, but from the reasoning it appears that a contingency is what the court meant. Receipt of any retirement pay was contingent on completion of fourteen more years of service in the Fleet Reserve. 17 Cal. 2d at 778, 112 P.2d at 237.

[58] In the *French* case the court seemed to concede that the husband's interest in the retirement fund was community property, but it is unclear whether the court refused to divide the property because it was an expectancy, or whether the community had no present interest in the fund because it was not then certain that something would be acquired from the fund.

[59] Waters v. Waters, 75 Cal. App. 2d 265, 170 P.2d 494 (1946). In this case the court had no difficulty characterizing a contingent fee partially earned by the husband during coverture as community property in part, although at that time the realization of any property from labors of the husband was still in doubt.

[60] Dryden v. Board of Pension Comm'rs, 6 Cal. 2d 575, 59 P.2d 104 (1936); Crossan v. Crossan, 35 Cal. App. 2d 39, 94 P.2d 609 (1939).

the questions of existence, characterization, and division. This advantage lies not so much in reaching the right result, which seems to occur almost invariably because the right result appears usually to be the "equitable" result, but rather that in a difficult case such as *French*, this analysis places the crucial question squarely before the court.

Division of Property

A satisfactory technique for the determination of what property interests are existing for the court's further consideration and for characterization still does not provide a complete solution to the problems of the court in dividing community property on divorce. Where, as perhaps should have been the case in *French*, the court can properly conclude that the interest in property is in the nature of a windfall, where no legally cognizable interest has yet been acquired, it must conclude that the community has no interest therein. In *French*, the analogy to the cases where property in the nature of a windfall is acquired seems plausible. The retirement pension may very well be properly considered a gratuity which is acquired merely by the serving of the requisite number of years.

On the other hand, where payment is made into a pension plan by salary deductions or where the payments by the employer into the pension fund are considered a part of the wages, it seems unlikely that no legally cognizable right or interest is acquired in the fund prior to retirement.[61] In the usual case an employee has some interest in the fund, such as the right to recover his payments if he terminates his employment prior to retirement.[62] In such a case the courts have held the community is entitled to share in the fund.[63] Where the total paid into the fund can be withdrawn, the value of the interest in the fund is readily ascertainable. The court has no difficulty in awarding a lump sum to the wife as her share of the community's interest in the fund.

Where the realization of any funds from the pension fund is subject to a contingency that the spouse continue in the same employment until retirement the court is faced with greater difficulties. The present value of the interest in such a fund is calculable, but the award of a lump sum as a share of the community interest in such a fund might impose considerable hardship. This may have been the reason the court held the community had no interest in the pension fund in *Williamson v. Williamson*.[64] As payments had been made into the pension fund in the form of salary deductions, in that case, it seems almost impossible that the husband had acquired no legally cognizable right or interest in the fund. If this were true the employer could decide to refuse to pay the pension at any time prior to retirement and the employee would have no remedy.[65] The right to keep

[61] Kent, *Pension Funds and Problems Under California Community Property Laws*, 2 STAN. L. REV. 447 (1950). This article points out that most pension plans provide a particular time when the employee's interest in the fund vests.

[62] See Crossan v. Crossan, 35 Cal. App. 2d 39, 94 P.2d 609 (1939).

[63] *Ibid.*

[64] 203 Cal. App. 2d 8, 21 Cal. Rptr. 164 (1962).

[65] The court conceded in the *Williamson* case that the husband had a vested right in the pension fund in the sense that it could not be arbitrarily withdrawn. The court held, however, it was not vested in the sense that the community should share in the fund because it was still contingent as to whether any funds would definitely be received. Williamson v. Williamson, 203 Cal. App. 2d 8, 11-12, 21 Cal. Rptr. 164, 167 (1962).

a pension plan in force should constitute a legally cognizable right which the law will protect just as it will protect the right to keep an insurance policy in force. In *Modern Woodmen of America v. Gray*[66] this right was sufficient to justify characterization based on the principle of exchange. It seems more likely in the *Williamson* case that because the nature of the interest was such that no equitable division could be made at the time of divorce, the court held that the husband had no present interest in the pension fund.[67]

The fact that no equitable division of certain property interests can be made at the time of divorce may even result from the situation of the parties, rather than the nature of the property interests. This may very well have been the real problem in *Speer*.[68] In that case the court appears to have held that the husband's interest in a corporation in which he was one-half owner was not before the court. It seems more reasonable that the court merely recognized the hardship which would be imposed if the husband were forced to pay the wife's share of the community interest at that time. It has been suggested that this was the real basis of the decision.[69]

The solution to these problems seems to lie in machinery whereby the ultimate satisfaction of property interests can be postponed at the discretion of the court until a more satisfactory time than divorce.[70] With such machinery the court could determine the rights as between the spouses to some interest in property, but postpone satisfaction of these rights until the property is ultimately acquired or the hardship which would be imposed by immediate satisfaction is removed. Justification for such machinery is found by analogy to rights of community creditors in following community property into the hands of the wife after divorce.[71]

It is well established that a creditor can follow community property received by the wife on divorce and subject it to the satisfaction of debts for which the community property was liable during marriage.[72] Theoretically it might seem the property should be hers absolutely, but she takes community property on division in divorce *cum onere*. The community property received by the wife on division in divorce is even subject to liability for debts which were uncertain at the time of division as to liability and amount.[73] The reasoning which justifies a creditor's power to subject community property received by the wife on divorce

[66] 113 Cal. App. 729, 299 Pac. 754 (1931).

[67] 203 Cal. App. 2d at 12, 21 Cal. Rptr. at 167.

[68] 209 Cal. App. 2d 233, 25 Cal. Rptr. 729 (1962).

[69] Note, 36 So. CAL. L. REV. 486 (1963).

[70] See Waters v. Waters, 75 Cal. App. 2d 265, 170 P.2d 494 (1946). In this case the court apparently saw no problem in treating the contingent fees of the husband as presently existing property, although at that time a case in which one of the fees would be earned was being appealed.

[71] Where alimony is awarded to a spouse in a divorce action, machinery to provide for the division of contingent interests in property is not necessary to reach an equitable result because changed circumstances of the parties will permit alteration of the alimony awarded, at the discretion of the court. CAL. CIV. CODE § 139, Dean v. Dean, 59 Cal. 2d 655, 31 Cal. Rptr. 64, 381 P.2d 944 (1963).

[72] Bank of America v. Mantz, 4 Cal. 2d 322, 49 P.2d 279 (1935); Mayberry v. Whittier, 144 Cal. 322, 78 Pac. 16 (1904); Vest v. Superior Court, 140 Cal. App. 2d 91, 294 P. 2d 988 (1956).

[73] Frankel v. Boyd, 106 Cal. 608, 39 P. 939 (1895).