

Memorandum 80-41

Subject: Study D-312 - Creditors' Remedies (Liability of Property of Married Persons--Liability of Property After Division)

Attached as Exhibit 1 are the provisions governing liability of property of married persons for debts, revised to reflect the most recent Commission decisions at the April 1980 meeting. Exhibit 2 contains conforming changes. We hope to approve these provisions for inclusion in our printed recommendation on creditors' remedies at this meeting, subject to revision in connection with reimbursement rights and other matters raised by the Commission's consultant, Professor Bruch, this fall. The staff notes the following matters.

§ 5120.005. Debts

This provision has been added. Subdivision (a), which defines a debt, is simply a drafting convention to shorten provisions where the word "debt" is used. Subdivision (b) is a substantive provision that attempts to give some precision to the concept of the time a debt is "incurred."

§ 5120.050. Liability of property after division

The following discussion is drawn from Memorandum 80-28, previously considered by the Commission at the April 1980 meeting. The Commission requested additional staff research on one point. The new material is underscored.

Suppose one spouse incurs a debt during marriage but, before the creditor seeks to collect the debt, the spouses are separated or divorced and the property divided. Before the separation or divorce, the creditor could reach the separate property of the debtor spouse and all the community property. After the separation or divorce, there is no community property for the creditor to reach, only separate property. Can the creditor go after property in the hands of the nondebtor spouse on the ground that it was formerly community property and, therefore, should remain liable for the debts?

Under existing law, the rights of creditors are not affected by division of community assets and obligations. The cases have held that

a creditor can reach former community property awarded to the nondebtor spouse even though the division of property by the court or by agreement of the spouses may require that the debtor spouse pay the debt. This principal is well established. See, e.g., Mayberry v. Whittier, 144 Cal. 322, 78 P. 16 (1904); Bank of America v. Mantz, 4 Cal.2d 322, 49 P.2d 279 (1935); Vest v. Superior Court, 140 Cal. App.2d 91, 294 P.2d 988 (1956). It has been adhered to in holding and dictum in numerous cases. See, e.g., Ryan v. Souza, 155 Cal. App.2d 213, 317 P.2d 655 (1957); Greene v. Wilson, 208 Cal. App.2d 852, 25 Cal. Rptr. 630 (1962); Harley v. Whitmore, 242 Cal. App.2d 461, 51 Cal. Rptr. 468 (1966); Gould v. Fuller, 249 Cal. App.2d 18, 57 Cal. Rptr. 23 (1967). In such a situation, if the property awarded to the nondebtor spouse is seized to satisfy the debt, the nondebtor spouse has a cause of action against the debtor spouse for reimbursement.

Professor Reppy has a number of suggestions for legislative clarification of the law relating to the action by the judgment creditor (making nondebtor spouse a party, permitting nondebtor spouse to assert defenses of debtor spouse, specifying what property is subject to execution), as well as to the action between the former spouses for reimbursement (availability of interest, attorney's fees, and litigation expenses for the nondebtor spouse). The relevant portion of Professor Reppy's study is excerpted as Exhibit 3. However, after considering the improvement of the existing system proposed by Professor Reppy, the staff is of the opinion that the whole scheme is wrong and should be changed.

Why set off a chain reaction, with the creditor going against one former spouse and then that former spouse going against the other? It is a system that breeds litigation. We permit the creditor to reach the community property during marriage because, under one view of the relevant policy, any other system of partitioning the property during an ongoing marriage is disruptive and impractical to administer; after the creditor reaches community assets, the spouses are left to readjust their rights as between each other. But where there has already been a separation or divorce and a partition of community property, it makes sense to permit the creditor to go after only that property that belongs

to the debtor. If the spouses have made an equal division of the property, that should be sufficient. If the spouses have made an unequal division to the detriment of the creditor, it is a fraudulent conveyance for which remedies are available.

This is also a result one can reach by taking the view that liability of property for debts should follow management and control. Once the property has been divided, the creditor should reach only property under the debtor's management and control.

There is also the practical problem of how far the former community property will be traced. If it is exchanged for other property, can the creditor reach the other property? If it is sold, can the creditor reach the proceeds? Simplicity of administration requires that the creditor be limited to the property of the debtor spouse.

The arguments against such a scheme that occur to the staff are that a creditor's vested right to reach community property is affected, that credit will be more difficult for married persons to obtain, and that an interspousal reimbursement action would still be necessary if the debtor spouse is not the person to whom payment was assigned on divorce. These objections do not appear serious to the staff. The creditor's right to reach community property is not really vested since the property can be disposed of by the spouses during marriage to the creditor's detriment; and, in any case, the rule that a creditor can reach only the property of the debtor can be made prospective, thereby divesting only future creditors. The argument that credit will be more difficult to obtain the staff believes is false; the availability of former community property after separation or divorce is not one the factors ordinarily looked to in the extension of credit. An interspousal reimbursement suit against the person who was assigned the debt will be relatively rare since ordinarily the debtor is assigned the debt; in cases where the person who was assigned the debt fails to pay and the creditor goes after property of the other spouse, a reimbursement suit appears appropriate.

One other problem is that the spouses may divide the community property in such a way that the nondebtor spouse receives nonexempt property and the debtor spouse receives only exempt property. This

situation is not unique, however, since a debtor may always convert nonexempt into exempt assets, to the detriment of the creditor.

The staff has drafted Section 5120.050 to implement its suggestions. Professor Reppy disagrees with the staff suggestions. He believes that by limiting the property the creditor can reach, the law would encourage claims that the debtor spouse is acting as an agent for the nondebtor spouse in an effort to broaden the liability base. Similarly, persons extending credit would require signatures of both spouses, thereby limiting the ability of one spouse alone to obtain credit.

Section 5120.050. I am afraid this proposal is going to invite considerable litigation over issues of agency. On its face it seems to make creditors' rights turn on which spouse signs the contract, commits the tort, orders goods, etc. Yet if the acting spouse is in fact operating as an agent for a type of joint venture (e.g., both H and W work at the business for which H signs a contract), agency law will make the other spouse's property liable, too. At present the liability of all community property has practically eliminated to a considerable degree the attractiveness of the agency claim. Section 5120.050 would create a new situation where the claim will be made not only where H and W work in the same business but in the nonbusiness context. For example, if H and W are driving to a social function and W, who usually drives, says she has a headache and asks H to drive, and he commits a tort, why at divorce should community property awarded to W be exempt from liability? The social function was a joint venture for H and W and it was a fortuity H was driving.

The proposed statute will put pressure on credit vendors to get the signature of both spouses so after divorce both are liable. This is contrary to the purpose of the federal equal credit legislation (which compels a credit vendor to grant W alone credit if she has management power over enough property to pay the vendor unless there is some state law that makes the signature of H necessary to protect the creditor vendor -- a reason which I think your proposed section 5120.050 creates).

Respectfully submitted,

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EXHIBIT 1

CHAPTER 3. LIABILITY OF MARITAL PROPERTY

Article 1. General Rules of Liability

§ 5120.005. Debts

5120.005. Unless the provision or context otherwise requires, as used in this chapter:

(a) "Debt" means an obligation incurred by a spouse whether based on contract, tort, or otherwise.

(b) A debt is "incurred" at the following time:

- (1) In the case of a contract, at the time the contract is made.
- (2) In the case of a tort, at the time the tort occurs.
- (3) In other cases, at the time the obligation arises.

Comment. Subdivision (a) of Section 5120.005 is intended to facilitate drafting. Subdivision (b) makes more precise the time a debt is incurred.

31449

Tentatively Approved - April 1980

§ 5120.010. Liability of community property

5120.010. (a) Except as otherwise expressly provided by statute, the property of the community is liable for a debt of either spouse incurred before or after marriage, regardless which spouse has the management and control of the property.

(b) The earnings of a spouse after marriage are not liable for a debt of the other spouse incurred before marriage. The earnings remain not liable if they are held in a deposit account by or in the name of the spouse, to the extent they can be traced in the manner prescribed by statute for tracing funds exempt from enforcement of a money judgment. As used in this subdivision, "deposit account" has the meaning prescribed in Section _____ of the Code of Civil Procedure, and "earnings" means compensation for personal services performed, whether as an employee or otherwise.

Comment. Subdivision (a) of Section 5120.010 continues the substance of former Section 5116 (contracts during marriage) and the implication of former Section 5122(b) (torts), and makes clear that the community property (other than earnings of the nondebtor spouse) is liable for the prenuptial contracts of the spouses. Subdivision (a) applies regardless whether the debt was incurred prior to, on, or after January 1, 1975. For rules governing liability after division of the community property, see Section 5120.050.

The introductory and concluding clauses of subdivision (a) are intended to negate the implication of language found in 1974 Cal. Stats. ch. 1206, § 1, p. 2609, that community property is liable only for the debts of the spouse having management and control. The introductory and concluding clauses make clear that the community property is liable for all debts of either spouse absent an express statutory exception. Thus community property under the management and control of one spouse pursuant to Section 5125(d) (spouse operating or managing business) or Financial Code Section 851 (one spouse bank account) remains liable for the debts of the other spouse. For an express statutory exception from liability of community property, see subdivision (b). For an exception from liability of former community property after division, see Section 5120.050.

The first sentence of subdivision (b) continues the substance of a portion of former Section 5120 and extends it to include all debts, not just those based on contract. The second sentence codifies the rule that, for purposes of liability, earnings may not be traced through changes in form. See, e.g., Pfunder v. Goodwin, 83 Cal. App. 551, 257 P. 119 (1927). Earnings may be traced only into deposit accounts in the same manner as funds exempt from enforcement of judgments. See Code Civ. Proc. § 703.030 (tracing).

Note. The Commission plans to consider adoption of a reimbursement right between spouses before introduction of legislation.

9949

Tentatively Approved - February 1980

§ 5120.020. Liability of separate property

5120.020. (a) The separate property of a spouse is liable for a debt of the spouse incurred before or after marriage.

(b) Except as otherwise expressly provided by statute, the separate property of a spouse is not liable for a debt of the other spouse incurred before or after marriage.

Comment. Subdivision (a) of Section 5120.020 continues the substance of a portion of former Section 5121 (contracts) and the implication of former Section 5122(b) (torts); it supersedes former Section 5123 (liability of separate property for debt secured by community property).

Subdivision (b) continues the substance of former Section 5120 (prenuptial contracts), a portion of former Section 5121 (contracts after marriage), and the implication of former Section 5122(b) (torts). For an exception to the rule of subdivision (b), see Section 5120.030 (necessaries of life).

08352

Tentatively Approved - April 1980

§ 5120.030. Liability for necessities

5120.030. (a) Subject to subdivision (b), the separate property of a spouse is liable for a debt of the other spouse incurred after marriage if:

(1) The debt was incurred for necessities of life of the other spouse while the spouses were living together.

(2) The debt was incurred for common necessities of life of the other spouse while the spouses were living separate and apart, unless the spouses were living separate and apart by a written agreement that waived the obligation of support.

(b) The separate property of a spouse is not subject to enforcement of a money judgment for the debts of the other spouse pursuant to subdivision (a) unless the spouse is a judgment debtor under the judgment.

Comment. Subdivision (a)(1) of Section 5120.030 continues the substance of a portion of former Section 5121, but eliminates the implication that the necessities must have been contracted for by either spouse. See, e.g., *Credit Bureau of San Diego v. Johnson*, 61 Cal. App.2d Supp. 834, 142 P.2d 963 (1943) (medical care not contracted by either spouse). Subdivision (a)(1) is consistent with Section 5132 (support obligation while spouses live together) but does not require exhaustion of community and quasi-community property before separate property of a nondebtor spouse can be reached.

Subdivision (a)(2) is an exception to the rule of Section 5131, which abrogates the obligation of support between spouses living separate and apart by agreement, unless support is stipulated in the agreement. Subdivision (a)(2) also abolishes the "station in life" test of cases such as *Wisnom v. McCarthy*, 48 Cal. App. 697, 192 P. 337 (1920) (maid necessary because of economic and social position of spouses), in determining what is a necessary of life; the separate property of the nondebtor spouse is liable only for debts for the "common" necessities of life of the other spouse while living separate and apart. Cf. Code Civ. Proc. § 723.051 (common necessities exception to wage exemption).

Subdivision (b) codifies the rule that the separate property of a spouse may not be subjected to process by necessary creditors of the other spouse unless the spouse has been made a party and is personally liable on the judgment. See, e.g., *Evans v. Noonan*, 20 Cal. App. 288, 128 P. 794 (1912); *Santa Monica Bay Dist. v. Terranova*, 15 Cal. App.3d 854, 93 Cal. Rptr. 538 (1971).

Note. The Commission plans to consider adoption of a reimbursement right between spouses before introduction of legislation.

968/667

Tentatively Approved - April 1980

§ 5120.040. Interspousal transfer

5120.040. A transfer of community or separate property between the spouses is subject to the Uniform Fraudulent Conveyance Act, Title 2 (commencing with Section 3439) of Part 2 of Division 4 of the Civil Code.

Comment. Section 5120.040 codifies existing law. Cf. *Bailey v. Leeper*, 142 Cal. App.2d 460, 298 P.2d 684 (1956) (transfer of property from husband to wife); *Frankel v. Boyd*, 106 Cal. 608, 614, 39 P. 939, 941 (1895) (dictum); *Wikes v. Smith*, 465 F.2d 1142 (1972) (bankruptcy).

968/697

§ 5120.050. Liability of property after division

5120.050. (a) Notwithstanding any other provision of this article, after division of community and quasi-community property pursuant to Section 4800:

(1) The property owned by a spouse and the property received by the spouse in the division is liable for a debt of the spouse incurred before or after marriage, whether or not the debt was assigned for payment by the other spouse in the division.

(2) Except as otherwise provided in paragraph (3), the property owned by a spouse and the property received by the spouse in the division is not liable for the debts of the other spouse incurred before or after marriage, whether or not assigned for payment by the spouse in the division of the property. Nothing in this paragraph affects the liability of property for the satisfaction of a lien on the property.

(3) The property owned by a spouse and the property received by the spouse in the division is liable for the debts of the other spouse to the same extent as provided in Section 5120.030 for the separate property of a spouse.

(b) If the property owned by a spouse or the property received by the spouse in a division of community and quasi-community property pursuant to Section 4800 is applied to the satisfaction of a money judgment for a debt of the spouse that is assigned for payment by the other spouse in the division, the spouse has a right of reimbursement from the other spouse for the market value of the property, with interest at the legal rate, and may recover reasonable attorney's fees incurred in enforcing the right of reimbursement.

Comment. Section 5120.050 prescribes rules of liability of community and quasi-community property and separate or formerly separate property following a division of the property pursuant to a court judgment of separation, dissolution, or later division.

Subdivision (a)(1) states the rule that the rights of a creditor against the property of a debtor are not affected by assignment of the debt to the other spouse for payment pursuant to a property division. A creditor who is not paid may seek to satisfy the debt out of property of the debtor. Former law on this point was not clear. The debtor in such a case will have a right of reimbursement against the former spouse pursuant to subdivision (b).

Subdivision (a)(2) reverses the case law rule that a creditor may seek enforcement of a money judgment against the property of a nondebtor spouse after dissolution of the marriage. See, e.g., *Bank of America N.T. & S.A. v. Mantz*, 4 Cal.2d 322, 49 P.2d 279 (1935). The community property is liable for the debts of either spouse only during marriage. After a property division under the Family Law Act, however, the creditor must look to the property of the debtor, including former community property assigned to the debtor in the division. If the property division calls for the nondebtor spouse to pay the debt and the nondebtor spouse fails to pay, the debtor spouse will have a right of reimbursement pursuant to subdivision (b). Subdivision (a)(2) does not affect enforceability of liens on the property. See, e.g., *Kinney v. Valentyne*, 15 Cal.3d 475, 541 P.2d 537, 124 Cal. Rptr. 897 (1975).

Subdivision (a)(3) is an exception to the rule of subdivision (a)(2). It preserves the liability of the nondebtor spouse for necessities of the debtor spouse. See Section 5120.030.

Subdivision (b) states the rule as to reimbursement where a debt is satisfied out of the property of a spouse other than the spouse to whom the debt was assigned pursuant to a property division. Former law on this point was not clear.

§ 5120.060

968/683

Tentatively Approved - April 1980

§ 5120.060. Liability of property after judgment of nullity

5120.060. After a judgment of nullity of a marriage, whether void or voidable, the property that would have been community property and the property that would have been the separate property of the parties had the marriage been valid is liable for the debts of the parties to the same extent as if the marriage were valid and the judgment of nullity were a judgment of dissolution, regardless whether the parties are declared to have the status of putative spouses and regardless whether the property is quasi-marital property.

Comment. Section 5120.060 is consistent with Section 4451 (judgment of nullity conclusive only as to parties to the proceeding). Former law was not clear.

EXHIBIT 2

CONFORMING CHANGES

Civil Code § 5116 (repealed)

~~5116. The property of the community is liable for the contracts of either spouse which are made after marriage and prior to or on or after January 1, 1975.~~

Comment. The substance of former Section 5116 is continued in Section 5120.010(a).

992/943 N/Z

Civil Code § 5120 (repealed)

~~5120. Neither the separate property of a spouse nor the earnings of the spouse after marriage is liable for the debts of the other spouse contracted before the marriage.~~

Comment. The portion of former Section 5120 exempting separate property of a spouse from liability for the debts of the other spouse contracted before marriage is continued in Section 5120.020(b). The portion exempting earnings after marriage is continued in Section 5120.010(b).

17022 N/Z

Civil Code § 5121 (repealed)

~~5121. The separate property of a spouse is liable for the debts of the spouse contracted before or after the marriage of the spouse, but is not liable for the debts of the other spouse contracted after marriage, provided, that the separate property of the spouse is liable for the payment of debts contracted by either spouse for the necessities of life pursuant to Section 5132.~~

Comment. The substance of former Section 5121 is continued in Sections 5120.020 and 5120.030.

Civil Code § 5122 (amended)

5122. ~~(a)~~ A married person is not liable for any injury or damage caused by the other spouse except in cases where he or she would be liable therefor if the marriage did not exist.

~~(b) The liability of a married person for death or injury to person or property shall be satisfied as follows:~~

~~(1) If the liability of the married person is based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the community property and second from the separate property of the married person.~~

~~(2) If the liability of the married person is not based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the separate property of the married person and second from the community property.~~

Comment. Subdivision (b) of Section 5122 is superseded by Sections 5120.010 (providing no order of priority for community or separate property) and 5120.020 (providing no order of priority for community or separate property).

Note. The Commission plans to consider adoption of a reimbursement right between spouses before introduction of legislation.

30676 N/Z

Civil Code § 5123 (repealed)

~~5123. (a) The separate property of the wife is not liable for any debt or obligation secured by a mortgage, deed of trust or other hypothecation of the community property which is executed prior to January 1, 1975, unless the wife expressly assents in writing to the liability of her separate property for such debt or obligation.~~

~~(b) The separate property of a spouse is not liable for any debt or obligation secured by a mortgage, deed of trust, or other hypothecation of the community property which is executed on or after January 1, 1975, unless the spouse expressly assents in writing to the liability of the separate property for the debt or obligation.~~

Comment. Section 5123 is not continued and is superseded by Section 5120.020. It is a form of antideficiency judgment that protects some but not all assets of a spouse for obligations secured by any community property, real or personal, residential or otherwise. It is thus inconsistent with general rules governing deficiency judgments.

968/710

Civil Code § 5131 (amended)

5131. ★ Except as provided in Section 5120.030, a spouse is not liable for the support of the other spouse when the other spouse is living separate from the spouse by agreement unless such support is stipulated in the agreement.

Comment. Section 5131 is amended to recognize Section 5120.030(a)(2), which continues the liability of property of spouses for necessities after separation unless expressly waived in the separation agreement.

15797

Civil Code § 5132 (amended)

5132. A spouse must support the other spouse while they are living together out of the separate property of the spouse when in the following cases:

(a) When there is no community property or quasi-community property.

For the purposes of this ~~section~~ subdivision, the terms "quasi-community property" and "separate property" have the meanings given those terms by Sections 4803 and 4804.

(b) When the debt is one for which the separate property of the spouse is liable under Section 5120.030.

Comment. Section 5132 is amended to incorporate Section 5120.030 (liability for necessities). Section 5132 is consistent with Section 5120.030(a)(1), but Section 5120.030(a)(1) does not require exhaustion of community and quasi-community property before separate property of a nondebtor spouse can be reached by a third-party creditor.

Civil Code § 5135 (amended)

5135. When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which real estate may be situated which is granted or affected by such contract and in the office of the recorder of the county in which each spouse resides if personal property is granted or affected by the contract .

Comment. Section 5135 is amended to require recordation of a marriage settlement contract in the county where the spouses reside if the contract affects personal property. This requirement will result in constructive notice to third parties such as creditors. For a comparable provision, see Section 5114 (recordation of list of separate personal property).

C. LIABILITY ON PRE-DIVORCE DEBTS WHERE LEVY OCCURS AFTER DISSOLUTION

In making an equal division of the community property, the divorce court must identify all unpaid outstanding or contingent debts, value them, and order one of the spouses to pay each debt (or to pay a specified part thereof).^{109/} But such an order is not binding on a creditor of either spouse^{110/} (unless entered in a proceeding in which the creditor was a party). Former community assets awarded to the nondebtor spouse, say W, become her separate property after divorce, but they remain liable to H's creditors who at the time of divorce have a judgment against him^{111/} as well as creditors to whom H is in default and who obtain their judgment after the divorce.^{112/} By the logic of these decisions the former community property now owned solely by W would be liable, even though the divorce court ordered H

109. See, e.g., Marriage of Chala, 92 Cal. App. 3d 996, 155 Cal. Rptr. 605 (1979); see also Marriage of Eastis, 46 Cal. App.3d 459, 120 Cal. Rptr. 861 (1975); Marriage of Epstein, 24 Cal. 3d 76, 154 Cal. Rptr. 413, 592 P.2d 1165 (1979); Wilson v. Wilson, 33 Cal. 2d 107, 199 P.2d 671 (1948).

110. Bank of America Nat. Trust & Savings Ass'n v. Mantz, 4 Cal. 2d 322, 49 P.2d 279 (1935).

111. Vest v. Superior Court, 140 Cal. App. 2d 91, 294 P.2d 988 (1956).

112. Bank of America Nat. Trust & Savings Ass'n v. Mantz, 4 Cal. 2d 322, 49 P.2d 279 (1935).

to be responsible for the obligation, if the contract was entered into before the divorce although the breach occurred after the divorce. A Washington case illustrates this.^{113/} During marriage, in operating a community motel business, H contracted to rent from plaintiff television sets for the motel rooms. H and W were divorced, the court awarding H the motel and W other community property. H was ordered to be responsible for the debts of the motel business. At the time the community was dissolved the motel owed some \$500 in t.v. set rentals; thereafter further defaults on rental occurred. The court held the rental contract not severable into sub-rental periods and thus in its entirety it was an obligation made by H during marriage. W was an appropriate defendant in plaintiff's suit for breach of contract, since property she owned was liable for the breach.

In all such cases where W ends up paying any part of a debt assigned to H by the divorce court she will have a cause of action against him for reimbursement of the amount paid (hopefully with interest from the date of her payment). Additionally, the law should imply a right on her part to reimbursement of all litigation expenses, including attorney's fees she had to pay.

113. Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wash. 2d 893, 425 P.2d 623 (1967).

Additionally, when the creditor strikes after H and W have been divorced, there is authority that a court of equity will order marshaling of assets by an order compelling the creditor to first exhaust the assets owned now by the debtor spouse.^{114/}

May the creditor levy against former community property now owned by W after divorce when the judgment runs only against H? In other words, is W a necessary party if post-divorce execution is to be levied against her property? Clearly she is not a necessary party if the judgment is obtained before divorce.^{115/} Under current California law it would seem not to matter that the suit was filed against H and the judgment obtained while he and W were living separate and apart, since the equal management statute does not cut off the power of each spouse acting alone to bind the community property when a separation occurs.^{116/}

114. *Mayberry v. Whittier*, 144 Cal. 322, 78 P. 16 (1904) (dictum).

115. See *Vest v. Superior Court*, 140 Cal. App. 2d 91, 294 P.2d 988 (1956); *Mayberry v. Whittier*, 144 Cal. 322, 78 P. 16 (1904) (dictum).

116. Cal. Civ. Code § 5125. The obvious need for legislative attention to this problem is discussed in Bruch, The Legal Import of Informal Marital Separations: A Survey of California Law and a Call for Change, 65 Cal. L. Rev. 1015 (1977); see also Cross, Equality for Spouses in Washington Community Property Law -- 1972 Statutory Changes, 48 Wash. L. Rev. 427, 543-45 (1973).

Where the suit is commenced against H before a final divorce decree and the creditor obtains his judgment on the debt after divorce, one California case indicates W is bound although she was not made a party.^{117/} This seems necessary as a practical matter. The creditor who begins his suit when equal management is in effect cannot be sure, even if the spouses are separated, there will ever be a divorce. Even if the creditor begins the suit while divorce is pending, that is still during the time of equal management. W's lawyer in the divorce suit should be able to find out about the litigation and bring it to the attention of the divorce court. Probably, a separated W can intervene in the suit against H as a party defendant to protect her interests.^{118/} So long as H is the statutory co-manager

117. Bank of America Nat. Trust & Savings Ass'n v. Mantz, 4 Cal. 2d 322, 49 P.2d 279 (1935) (assuming, which is not clear from the facts, the final divorce decree was obtained after the interlocutory decree period without substantial delay). The problem of whether W was bound by the judgment against H as a privy of his was not discussed.

118. The fact of separation distinguishes the situation where one spouse becomes a party during marriage and cohabitation in litigation affecting the community. I have elsewhere taken the view as to this situation that the spouse first making an appearance as a party "seizes control" of the community interest in the suit, disabling the other spouse from filing documents, dismissing counsel, etc. See Reppy, supra note 9, at 1021.

of the community property when suit is filed, it would seem not to deny due process to place on W at that moment the status of H's privity in order to make the judgment binding on her interest in community property (as well as H's interest in assets) awarded to her at a divorce subsequently entered.

Where the creditor begins the suit after divorce, the state of Washington requires that W be made a party if former community property now owned by her is to be bound.^{119/} Due process would seem to require as much since the co-manager relationship on which privity was based when the suit began before divorce is absent. California courts can be expected to follow the Washington precedent without a statute,^{120/} yet legislative codification is desirable because there

119. Northern Commercial Co. v. E. J. Hermann Co., Inc., 22 Wash. App. 963, 593 P.2d 1332 (1979); cf. Credit Bureau of Santa Monica Bay Dist. v. Etrranova, 15 Cal. App. 3d 854, 93 Cal. Rptr. 538 (1971) (W's necessities creditor must make H a party to be able to reach H's separate property).

120. If W has moved out of state, the transaction entered into by H will have sufficient connections to California (at least if H and W were domiciled here when H entered into it) that long-arm jurisdiction can constitutionally be had over W. The community, of which W was a member, will almost certainly have sufficiently availed itself of the benefits of California law so that either community partner can be subjected to service of process out of state or by publication. As to the present due process standard for long-arm service see *Kulko v. Superior Court*, 436 U.S. 84 (1978). Section 410.10 of the Code of Civil Procedure provides for long-arm jurisdiction in all situations where the state and federal constitutions permit its exercise.

are difficult related problems that need legislative solution. First, may W assert counterclaims and set-off available to H? Surely she should be able to do so, but some procedure must be fashioned so that the judgment of the court on such defensive claims is binding on H so that the creditor will not have to relitigate them in litigation between H and that party. The statute then should provide that W may assert defensively all claims H could (even if not related at all to the community, as for example, a set-off based on some post-divorce activity involving H and the plaintiff). But to do so W must make H a party.^{121/}

The second question is whether the creditor has any pre-judgment remedy such as attachment to prevent W from consuming the only property she possesses -- former community property -- that is liable on the debt. It would seem that so long as W received consideration for her expenditures (as, for example, purchasing food, medical care, rental housing, etc.), the creditor has no legitimate basis for complaint. Anytime the law makes certain classes of property liable

121. For the reasons stated in the preceding footnote, W ought to be able to get long-arm jurisdiction over H with respect to the issues she seeks to raise because of likely close connection between H and the debt that has brought W into court. The California divorce decree ordering H to pay that debt itself should be ample basis for such long-arm jurisdiction.

to a creditor and other classes not liable or exempt, the debtor is invited to consume the former and preserve the latter. That W will do all she possibly can to consume the former community property prior to rendition of judgment against her is something the creditor is well aware of prior to bringing suit.

Finally, what form should the judgment take? Should it determine what assets are former community property? Should it be an unlimited judgment against W with the issue of what property is liable postponed to the execution stage of proceedings?

Analogous cases indicate that the creditor need not identify at the trial any property W possesses that is liable on H's debt.^{122/} If W permits an unlimited judgment to be entered against her, she may waive the nonliability status attached to her property that is not former community property.^{123/} Since there is no authority directly on point, legislation laying out the principles would be useful.

122. Credit Bureau of Santa Monica Bay Dist. v. Terranova, 15 Cal. App. 3d 854, 93 Cal. Rptr. 538 (1971).

123. See Carroll v. Puritan Leasing Co., 77 Cal. App. 3d 481, 143 Cal. Rptr. 772 (1978), holding nonliability of separate property under California Civil Code section 5123 is waived if not raised at trial and made part of the judgment. Carroll is distinguishable in that involved a wife who was a primary debtor, not just the owner of property that is liable. The distinction may not be significant, however, as the requirement that the judgment list the nature of property that is not liable may be for the benefit of the sheriff levying execution subsequently. A smoothy execution procedure is needed whether or not the spouse sued is primarily liable or derivatively as as the owner of property that is liable.