Volume 4 | Issue 1 Article 2

1950

What Future for Community Property Law in Louisiana

Harriet S. Daggett

WHAT FUTURE FOR COMMUNITY PROPERTY LAW IN LOUISIANA

HARRIET S. DAGGETT*

INTRODUCTION

NOW that adjustments have been made in the Federal[1] Tax laws affecting the concept of community, states that attempted to incorporate the property system solely as a tax saving device are naturally, departing from the idea.[2] This seems to be a wise move, if citizens generally are ignorant of community purposes and the plan is foreign to their thinking and acceptance. Humanly, they would feel that their accustomed way of reaching a fair adjustment of the property law of spouses would be better for the reason, if no other, that it was an accustomed way and for them, doubtless it would be better as it might take generations to educate the populace to an understanding of and satisfaction with any new property law and more particularly with those dealing with husband and wife. Just as federal tax saving seemed to have been the primary, if not the sole cause of movements to adopt the system in states previously without it,[3] tax saving played a part in

*Professor of Law, Louisiana State University.

[1] Revenue Act of 1948, Public Law 471, 80th Congress, chap. 168, 2nd session. See also Sec. 351 (eliminating community property provisions of Sec. 811 (e) of the Internal Revenue Code); Sec. 361 (adding the marital deduction provision to Sec. 812 (a) of the Internal Revenue Code); and Secs. 104 (c), and 301 (providing for the splitting of income between spouses by amending Sec. 12 (d) of the Internal Revenue Code). Rubin and Champagne, *Some Community Property Aspects of the 1948 Revenue Act*, 9 LA. L. REV. (1948).

[2] Oregon adopted system 1943, Chapter 440 Oregon Laws. Repealed system 1945, Chapter 270, Oregon Laws, p. 409. See also Million, CONSANGUINTY AND AFFINITY IN OREGON, 23 ORE. L. REV., 69 (1944).

Michigan adopted the system in 1947 and repealed it in 1948: Michigan Public Acts, No. 39.

Pennsylvania adopted the system in 1947, Pa. Laws, No. 550, and the provisions were declared unconstitutional in 1947 by Wilcox v. Pennsylvania Mutual Life Insurance Co., 357 Pa. 581, 55 A. (2d) 521.

[3] See Daggett, *The Oklahoma Community Property Act—A Comparative Study*, 2 LA. L. REV. 575 (1940).

amendments[4] and more particularly in the lack of them in states which had enjoyed deep satisfaction in the system for long periods.

Now, the way is cleared and the time certainly overripe for a reevaluation and adjustment to changed social and economic conditions in the established community property states. Realistic property laws in general are obviously most important to the financial well-being of the state and its greater productivity. Community property laws have the added importance of bearing directly upon the marriage and doubtless affect its sucess or failure. Certainly, cognizance should be taken of present day conditions generally prevailing.

Before discussing need for change in Louisiana, it should first be stated that citizens of Louisiana in general and certainly including the writer, believe in the system as a fair, practical and thoroughly desirable legal mechanism for governing property interests of the spouses and their children. Undoubtedly, it should be preserved as such and hence suggestions for change are made with a view to strengthening the system instead of weakening it. Changes suggested would, in the writer's judgment, prevent dissatisfactions which conceivably, might in time cause a movement for abandonment of the system as a whole.

Louisiana's first Civil Code was adopted in 1808. The industrial revolution had not even started. Investments were largely in realty and its improvement. Women worked in their homes. Obviously the redactors could not foresee investments in present securities. They could not conceive of the present army of married women workers outside their homes.[5] They were not troubled by a high and apparently mounting divorce rate. Whether the last two situations are related is debatable but in the writer's judgment at least,

[4] No. 49 of Louisiana Acts of 1944 amending Art. 1787 of Louisiana Civil Code of 1870. See Discussion, Daggett, *Louisiana Legislation of 1944*, 6 LA. L. REV. 1, 2-4 and 5 (1944). No. 187 of Louisiana Acts of 1942 repealing Art. 1749 of LOUISIANA CIVIL CODE OF 1870. See Discussion, Daggett, *Matters Pertaining to the Civil Code*, 5 LA. L. REV. 83, 86 (1942).

[5] See *Women's Opportunities and Responsibilities*, May issue, 1947. The Annuals of the American Academy of Political and Social Science.

inequitable spousal property laws may well play a part in causing marital dissatisfactions leading to divorce.[6] Whether it is desirable to have married women working outside of their homes may yet be questionable in the minds of certain persons. That they are doing so is a matter of fact, and apparently they will want to, or have to continue. Certainly, in view of the major changes undergone in world affairs, it should not be surprising that laws relatively static for a long period need adjustment.

EARNINGS OF WIFE

The matter of the wife's earnings has, perhaps, caused recently more general maladjustment than any other item relating to community property. Her earnings from an industry "reciprocal" with that of her husband have long been considered community property[7] and for the most part her only earnings prior to the general entrance of women into all types of endeavor outside their homes were of necessity in a "reciprocal industry."[8] In 1912, however, an amendment to Article 2334 of the Revised Civil Code of Louisiana was passed containing the following language:[9]

> "The earnings of the wife when living separate and apart from her husband although not separated by a judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, . . . and the property purchased with all funds thus derived, are her separate property."

The article was again amended and re-enacted in 1920[10] but the passage incorporated in 1912 was not specifically interpreted by the court until 1933.[11] The decision[12] was then reached that only earnings of the wife accruing when she was *living* "separate and

---

[6] *Reflections on the Law of the Family*, Daggett, p. 120, *et seq.* The Annals, May, 1947.

[7] Article 2402 of LOUISIANA REVISED CIVIL CODE OF 1870.

[8] See note 5, *supra.*

[9] Act No. 170, Louisiana Statutes of 1912.

[10] Act No. 186, Louisiana Statutes of 1920.

[11] Houghton v. Hall, 177 La. 237, 148 So. 37 (1933). *See also* Byrd v. Babin, 181 La. 466, 159 So. 718 (1935).

[12] See Daggett, *Is Joint Control Possible?* 10 TULANE L. REV. 588, 598 (1936).

apart" from her husband would be her separate property. The Chief Justice indicated[13] that the husband might sue his wife for divorce on the ground of abandonment if he was discontented with the situation thus suggesting that the living separate and apart must be of such a nature as to furnish grounds for judicial separation or divorce because of the wife's behavior. In 1940, the Louisiana Court of Appeal of the second circuit,[14] following the previously discussed decision of the Supreme Court, held that the property purchased by a wife with earnings as a public prostitute was her separate property. The husband was a visitor of the house of ill-fame, of which the wife was an inmate but the rules of the house forbade his residing there and he seemed not to have given his custom exclusively to his wife. The question of which spouse was "at fault" was not discussed though it appeared that the husband later obtained a divorce. If the living separate and apart must be accompanied by cause for judicial separation or divorce, which is not a settled doctrine, and the "fault" may lie with the wife, a fortiori it would appear that the wife's earnings should be her separate property if "the fault" was that of the husband.

"Piecemeal"[15] legislation is ever fraught with confusion and especially when injected into as closely knit and complicated a legal pattern as that of a community property system. Certainly the basic idea of community was preserved by this "judicial legislation" as it might be termed and it seems unfortunate that when the court deleted the greater part of the statute under consideration that they were not able to make a clean sweep of it. The question of what constitutes "living separate and apart" is not fully answered and more importantly, the apparent trend toward the complete answer is unsatisfactory from a social point of view. Judicial examination into the marital affairs of spouses in matters which should be purely property questions seems to be inimical

[13] Houghton v. Hall, 177 La. 237, 266, 148 So. 37, 45 (1933).

[14] Small v. McNeely, 195 So. 649 (1940).

[15] Holt, *Review of 3 Vernier, American Family Laws*, 45 YALE L. J. 742, 743 (1936).

to the welfare of the state and an unwarranted invasion of rights of privacy. Evidence in most cases of separation of bed and board and divorce is ugly and unnecessary under modern divorce laws, and puts on record material that forever stands to humiliate the parties, their families and friends and most importantly, their children, if any.[16] Furthermore, this type of evidence is usually unreliable and biased and the whole issue lends itself to fraud, difficult to detect particularly after the death of one of the spouses as in the case discussed above and elsewhere[17] when the question of marital "fault" was injected by the court into a property dispute.

In the Code of Hammurapi prepared for the Babylonians during his reign 2123-2081 B.C., said to be "the first comprehensive law-code of which we have any knowledge" faultlessness of the wife and her guiltlessness in the marriage relation is rewarded by permitting her then to "Take her dowry and go back to her father's house." Since we seem to have departed from the rest of this code, written in eye-for-eye and tooth-for-tooth language, it would appear that time is ripe for discard of imponderable fault and guilt ideas in connection with marital property laws.[18]

Alimony

Incidentally, a by product of the community of the wife's earnings produces a highly undesirable social result in certain alimony awards. In computing the amount of a man's income in order to arrive at the stipend due his divorced wife, the earnings[19] of the second wife, being community property may be included thus weakening the chances of success for the second marriage if the working woman involved be human! Obviously, alimony laws and not those dealing with community property need repair in this situation as they do in many others, a discussion not properly within the scope of this paper.

---

[16] See note 6, *supra.*

[17] Malone v. Cannon, 215 La. 939, 41 So. (2d) 837 (1949).

[18] LEWIS BROUNE, THE WORLD'S GREAT SCRIPTURES, 17 *et seq.* (1946).

[19] Article 160, LOUISIANA REVISED CIVIL CODE OF 1870.

Procedure

Because of influences developing about the time of the first "World War" there was a widespread movement to recognize legally the place which women had admittedly taken in the world. In the United States the 19th Amendment to the Federal Constitution giving women the right to vote and a great deal of state legislation were recorded. As a part of this general movement, Louisiana passed a series of so-called married women's emancipatory acts, which purported to give married women the same rights as single women had to deal with their property. In the case of married women the property with which they might deal was clearly their separate property, as specific statements in these acts made them inapplicable to community property.[20] Married women may pledge their property to pay the debts of their husbands which might also be debts of the community but may not deal with or bind the community directly.[21] With the growth in numbers of married women producing wealth outside their homes, property which falls into the community, the anomalous situation has arisen in which married women may contract without authorization and yet their husbands, strangers to their contract, must sue upon these contracts should need arise, because benefits of the contract would fall into the community of which the husband is the "head and master."[22] This curious situation seems to have no parallel where a person completely capable of making a contract cannot sue upon it.[23]

Torts

The converse is also disturbing. For example, if a married woman beautician, of whom there seem to be legion, should negli-

[20] La. Act 94 of 1916; La. Act 244 of 1918; La. Act 219 of 1920; La. Act. 34 of 1921; La. Act 132 of 1926; La. Act. 283 of 1928.

[21] La. Act 283 of 1928.

[22] Succession of Howell, 177 La. 276, 148 So. 48 (1933). *See also* Vercher v. Roy, 171 La. 524, 530, 131 So. 658, 660 (1930). Roy v. Succession of Vercher, 174 La. 475, 480, 141 So. 33, 34 (1932).

[23] Daggett, *supra*, note 12.

gently or otherwise, mar the appearance of the customer instead of improving it, whether or not the damaged individual could recover against the community is an unsettled question. That a husband is not liable for the torts of his wife is regarded as well settled.[24] This tort arises out of a contract of employment, however, the benefits of which flow to the community. The specific article of the Code permitting a wife to act as agent for the husband or the community requires express authorization.[25] The wife may be employed without the husband's authorization and even against his will.[26] Certainly an estate should not enjoy profits of employment and have no responsibilities for losses. The wife may have no separate property and no opportunity to accumulate any. Her earnings fall into the community. Creditors have no right to sue for a separation of property.[27] Indeed, the wife may sue only under very restricted conditions.[28] The wife may in a sense be responsible for the torts of the husband indirectly, not out of her separate property but because her earnings fall into the community which is under the husband's sole management[29] and liable for his separate and community debts,[30] including, as mentioned above, alimony [31] to a previously divorced wife or children of a different marriage.

Public Merchant

Article 131[32] of the Code in effect long before passage of the married women's emancipatory acts provides than when a wife is acting as "public merchant" she may bind the community in con-

[24] McClure v. McMartin, 104 La. 497, 29 So. 227 (1901).

[25] LOUISIANA REVISED CIVIL CODE, Article 1787 as amended by Act No. 49 of 1944.

[26] See note 19, *supra.*

[27] Articles 1991, 2433, LOUISIANA CIVIL CODE OF 1870; Cosgrove v. His Creditors, 41 La. Ann. 274, 6 So. 585 (1889).

[28] DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA, 59 *et seq.* (2nd ed. 1945).

[29] *Id.* at 19 *et seq.*

[30] *Id.* at 50 *et seq.*

[31] See note 19, *supra.*

[32] LOUISIANA REVISED CIVIL CODE OF 1870.

nection with her business and hence the community is responsible for liabilities while benefitting from profits. At the time of the acceptance of this article, authorization of the husband was required. Moreover, the term "public merchant" is a restricted one. It was extended by the Supreme Court to cover manufacturing.[33] Each additional extension, if any, will necessarily come through litigation, unless the Legislature should see fit to act.

Automobiles

Liability of the husband and community for damage caused by the wife while driving a car owned by the community is said to accrue if the wife is on a community errand, but what constitutes such an errand as opposed to attendance upon personal affairs seems to be in grave doubt. In 1949 the court of appeal[34] for the second circuit decided, apparently against the judge's own inclination and solely upon the authority of a Supreme Court[35] case that a wife was upon a merely personal mission when she negligently caused an automobile accident while returning from procuring a knitting needle which she needed to make a sweater for herself. After reviewing lists of cases of opposing views the judge said:

> "Were this question res nova before this court on the fact presented it would be our inclination to hold the husband liable, and such a conclusion would be based upon the premise that the legitimate pursuits of a wife, whether for wholesale recreation and pleasure or for other purposes consonant with the intangible and imponderable obligations of the marital relationship should be considered as within the scope of community activities. But to so hold this instance would be, in our opinion, to defy the conclusions reached by the Supreme Court in the Golson case."[36]

Since Louisiana does not accept the "family car" doctrine and does not compel insurance, an injured person is without relief in these situations. When the car is furnished by the community and

[33] Charles Lob's Sons v. Karnofsky, 177 La. 229, 148 So. 34 (1933).

[34] Brantley v. Clarkson, 39 So. (2d) 617 (1949).

[35] Adams v. Golson, *et al.*, 187 La. 363, 174 So. 876 (1937).

[36] 39 So. (2d) 617, 620.

driven by a contributing even though not the managing spouse, it appears that there is little excuse for not holding the community responsible.

Actions for Damages by Husband

Act 186 of 1920 clearly states the property situation when the husband is injured. The paragraph incorporated into Article 2334 of the Louisiana Civil Code by this amending act appears as follows:

> "Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property."

Again, the "fault" idea is injected into a property question, in this case by the legislature with the highly undesirable social connotations previously indicated.

In passing, it might be observed that under ordinary rules of statutory interpretation express limitation of the words "living separate and apart" by the clause "by reason of fault . . ." in this paragraph would indicate that the limitation was not intended in connection with the preceding paragraph of the same article, where the words "living separate and apart" were used in stating the law governing the wife's earnings. This interpretation was *not* used by the court, however, as has been previously shown in the discussion of earnings of the wife.

Actions for Damages by Wife

Act 68 of 1902, amending Article 2402 of the Revised Civil Code of 1870 states the property rule in regard to damages to the wife in the following language:

> "Damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone . . ."

Act 186 of 1920 contains an additional statement which follows

the provision dealing with the earnings of the wife and appears as follows:

> "... actions for damages resulting from offenses and quasi offenses and the property purchased with all funds thus derived are her separate property."[37]

The Court has applied these provisions in a practical manner.[38] The desirability of making these funds the separate porperty of the wife seems questionable as any incapacity of the wife whether she is occupied as housekeeper or in business certainly causes a serious economic loss to the community. That the husband may also recover for the amount of expenditures for medical care, obviously does not restore the community to its former productivity while benefitting from the normal efforts of the wife.

Workmen's Compensation

The court has indicated that the workmen's compensation statute and its distinctive purpose renders it unnecessary to consider property labels in deciding questions concerning employer-employee relationships under the act.[39] Though compensation for injury is measured by earnings, the fact that the earnings of a married woman are community property does not prevent her from suing since she sues not upon her contract for compensation but as a result of the law passed for the protection of the employee and the State.

The classification of the judgment as separate or community property is another question, as yet undetermined. If emphasis is placed upon the injury then the property would apparently be separate. If the compensation for injury be regarded as replacement of earnings, then it would fall into the community.

A judgment in the husband's favor under the compensation statute would be his separate property if the injury were empha-

[37] Article 2334 of LOUISIANA REVISED CIVIL CODE OF 1870.

[38] DAGGETT, *op. cit. supra*, note 28, at 250.

[39] Brownfield v. Southern Amusement Co., Inc., 196 La. 74, 198 So. 656 (1940).

sized and he was "living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce."[40] In all other situations, whether injury or earnings were the criteria, the judgment would be community property.

Limitations Upon Husbands' Power Over Community Property

Limitations upon the husbands' control of the community property are partly expressed in Article 2404[41] which is phrased as follows:

> "The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.
>
> He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantages to the donor. Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.
>
> But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property on her satisfactorily proving the fraud."

Since the word quota, as used in this article has never been defined in Louisiana, the application of the article is in effect only to immovables unless fraud may be proved, always a difficult matter. Justice Hawthorne[42] of the Supreme Court of Louisiana recently went so far as to suggest the necessity for legislation providing limitation on the husband's disposition of movables without proof of actual fraud since investment in more recent times is apt

[40] Act 186 of 1920.

[41] LOUISIANA REVISED CIVIL CODE OF 1870.

[42] Succession of Geagan, 212 La. 574, 33 So. (2d) 118 (1947).

to be more heavily in movables rather than in immovables, the converse of the situation existing when this article, purporting to protect the wife, came into the Law of Louisiana.

In 1920, the Legislature again amending Article 2334 of the Revised Civil Code provided that:

> ". . . when the title to community property stands in the name of the wife, it cannot be mortgaged or sold by the husband, without her written authority or consent."

The court has in part defeated the apparent import of this limitation by deciding that neither can the wife sell or encumber the community property in her name without the husband's consent.[43] Again, if title to property stands in the names of both husband and wife, the husband alone may sell without the wife's consent.[44]

In 1921,[45] the Legislature provided that certain property might be designated as a "family home" by the husband and after proper recordation of the designation the property might not be sold or mortgaged without consent of the wife. Moreover, the wife might make the designation if the husband failed to do so. The court has limited the effect of this provision probably rightly so under the facts of the particular case.[46] The limitation on the husband's power seems to be of little practical value.

Thus, the power of the husband to control the property of the community is practically unlimited, regardless of the amount of actual material contribution made by the wife to its corpus.

Administration

Article 2386[47] of the Revised Civil Code formerly provided that when a wife, was administering her separate property alone or through an agent, who might be her husband,[48] that the fruits from

---

[43] Bywater v. Enderle, 175 La. 1098, 145 So. 118 (1932).

[44] Young v. Arkansas-Louisiana Gas Co., 184 La. 460, 166 So. 139 (1936); Atwell v. Vaughn, 186 La. 911, 173 So. 527 (1937).

[45] Act 35.

[46] Watson v. Bethany, 209 La. 989, 26 So. (2d) 12 (1946).

[47] LOUISIANA REVISED CIVIL CODE OF 1870.

[48] Miller v. Handy, 33 La. Ann. 160 (1881).

that property, whether natural or civil, would be the separate property of the wife.[49] If the husband was administering her separate property by virtue of his office as husband, the fruits of the separate property would fall into the community.[50] Obviously the question was one of fact. In 1944,[51] to avoid the necessity for proof and doubtless more specifically to facilitate tax savings, the Legislature amended the article, providing that the husband would be considered the administrator unless the wife recorded a notarial act stating that she intended to administer herself for the benefit of her separate estate.

The question arises whether once having made the declaration, the wife would be able to make another one returning the administration to the husband. The question has been asked by husbands contemplating a business venture and wishing the wife's property and its income to be safe from possible creditors of the future. It is not as of as much importance as it was before the 1948[52] change in the federal income tax law as there would not be the urgent desire to shift back to community of income should the business venture prove successful in order to save taxes.

The measure is probably unknown to many husbands and wives of small income without regular legal advice, who believe that when the wife is administering her small estate that the income is safe from community creditors.

What Is Administration?

The line between administration of separate porperty and income, earnings from a "business, occupation, or industry" is a hard one to define. Before this troublesome question of interpretation arose, many wives, "administered" large plantations themselves or through agents and preserved the income as their separate property under the law, still unchanged. Would this type of en-

---

[49] DAGGETT, *op. cit. supra*, note 28, at 38, *et seq.*

[50] *Ibid.*

[51] Act 286 of 1944, La. Statutes; United States v. Burglass, 172 Fed. (2d) 960 (1949).

[52] See note 1, *supra.*

deavor be considered "business"? If so, would no part of the profit be allocated to the capital investment, clearly separate property? Tax decisions would not furnish a definite answer as the court has indicated that those issues are between the government and the individual, and not between the spouses or their heirs in settlement of community.[53] Federal decisions, of course, do not bind the state courts in matters of interpretation of local law.

CONCLUSION

It would clearly appear that at its present stage, Louisiana's community law lacks the clarity and certainty particularly desirable in property laws; that the community is unbalanced in certain particulars; that cognizance of present day economic and social conditions is not taken and unrealistic and undesirable effects upon the spouses, the family, creditors, business and the state at large follow.

Whatever changes in the pattern of the law may be regarded as desirable and certainly there is room for wide differences in opinion on substantive matters, that the law should be clarified in many particulars seems undebatable. Titles are rendered uncertain because of the confusion. Credit and trade are hampered. Advice to spouses and business alike must be overcautious, full of warning and hampered with an undue amount of uncertainty.

What might seem to be the trend of fairly recent jurisprudence is a conscious attempt to repair the unbalance of the community caused by piecemeal legislation. The interpretation indicating a correction of the statute dealing with the wife's earnings without her home has been discussed. A recent case[54] dealing with building and loan association stock again defeats the purpose of a provision for separate property of the wife. While the label of the statute[55] was too clear for avoidance, the court stated that, in final settle-

[53] Succession of Land, 31 So. (2d) 609 (1947).

[54] Cameron v. Rowland, 215 La. 177, 40 So. (2d) 1 (1948-1949).

[55] La. Act 120 of 1902; La. Act 140 of 1932; *But see* Act 337 of 1938 and Act 95 of 1940.

ment, the wife's separate estate could not be built up at the expense of the community. That the husband may have given the wife the sums invested, which he might legally do, was not discussed. Gifts to the wife *must* stand *many* tests, however, in any case.[56]

Doubtless, the same course will be followed in connection with money deposited in a bank by the wife, which under the law may be withdrawn by her without the husband's consent.[57] The provision has not gained any popularity through the courts interpretation of it against mineral lessees.[58] The legal presumption of community seems to be more and more difficult to overcome.

Placing everything of gain during marriage whatever the source, in the community may or may not be the answer. Balance and justice between the spouses might be achieved as certainly the wife, making a real contribution within the home works as hard or harder than does the wife in business or industry. Whether the contribution has its source in service or money should not matter. However, the spouses as separate individuals should not be the sole consideration. The family as a unit and society must be considered.

For protection to the family, it is highly desirable at times that all the eggs not always be in one basket. It kills the initiative of both spouses to so fear that the financial security of the family will be jeopardized if all is risked, that no venture can be undertaken for betterment. If spouses might arrange that the job or little business of the one might not in failure pull down the other, the personal satisfactions of both might be increased as well as their economic productivity for the State. A very simple change in the law of Louisiana would make this possible. Full provisions for the marriage contract and its regulation including the right to contract for a separate instead of a community regime already

[56] Funderburk v. Funderburk, 214 La. 717, 38 So. (2d) 502 (1949).

[57] La. Act 45 of 1902, par. 3; La. Act 189 of 1902, par. 1 (8).

[58] Le Rosen v. N. Central Texas Oil Co., 169 La. 973, 126 So. 442 (1931); Clingman v. Devonian Oil Co., 188 La. 310, 177 So. 59 (1937). *But see* Jones v. Southern Natural Gas Co., 213 La. 1051, 36 So. (2d) 34 (1948).

exist[59] but the contract with one minor exception[60] must be made before marriage. If the contract was permitted during as well as before marriage with proper safeguards, thoughtful and energetic couples could then handle their property in a business-like manner. Provision for a marital portion already exists that the one dying "rich" would not leave the survivor "poor," if sufficient property was not left by will or otherwise.[61]

This provision might be particularly desirable in cases where the wife is in business and presumably as capable of understanding what she was doing as would the ordinary husband. The basic idea of a separation of property had family protection in view.[62] It may only be sought by the wife however, and then only if the affairs of the husband are involved, too limited, and too late of course, for application by intelligent couples attempting to plan for the future.

Perhaps the greatest present need is for readjustment of the control provisions.[63] This may be done while retaining the balance of the community, that an equitable settlement between the *spouses* may be made at the dissolution of the community. The complete control of the community was placed in the husband at a time when women had limited opportunities for education and even less for experience in business. Society also vested what amounted to personal control of the wife in the husband.[64] It needs no citation of authority to show that these several factors have materially changed. Previous discussion shows the need for change in the law to meet change in the times that procedure in connection with a wife's contract of employment be made practical; that creditors may have a clear and certain course for satisfaction; that innocent

---

[59] DAGGETT, *op. cit. supra*, note 28, at 114, *et seq.*

[60] La. Act of 1910 amending Article 2329, LA. REVISED CIVIL CODE OF 1870.

[61] DAGGETT, *op. cit. supra*, note 28, at 95.

[62] DAGGETT, *The Wife's Action for a Separation of Property*, 5 TULANE L. REV. 55 (1930).

[63] DAGGETT, *supra*, note 12, at 589.

[64] Article 2404, REVISED CIVIL CODE OF LOUISIANA; State v. Priest, 210 La. 389, 27 So. (2d) 173 (1946).

third persons may have recourse in case of injury; that society in general may deal with an individual who is financially as well as legally responsible in so far as her contracts and torts are concerned. An invaluable though immeasurable additional benefit would also accrue to the state in better regulated and better satisfied families. The humiliation and indignity suffered by responsible wives, holding responsible positions in government and business, while graciously borne for the most part cannot but create tensions and other non-evident disturbances which in time create marital and social dissatisfactions with deleterious results to the individual, the family and society.

Oklahoma worked out a compromise provision which on paper at least merits examination. In Oklahoma's original act,[65] later declared unconstitutional because of its "election" feature,[66] the following provisions appeared:

> "The wife shall have the management and control and may dispose of that portion of the community property consisting of her earnings, all rents, interest, dividends, incomes and other profits for her separate estate and all other community property the title to which stands in her name."[67]
>
> "The separate property of the wife and that portion of community property, record title to which is in her name or which is under the management, control and disposition of the wife shall be subject to debts contracted by the wife arising out of tort, or otherwise, but not to debts or liabilities of the husband. The separate property of the husband and that portion of the community property, record title to which is in his name or which is under the management, control and disposition of the husband shall be subject to debts contracted by the husband or liabilities of the husband arising out of tort or otherwise, but not the debts or liabilities of the wife."[68]

---

[65] Oklahoma Sess. Laws of 1939, chap. 62, Article 2 [OKLA. STAT. ANN. (Supp. 1939) tit. 32, §§ 51-65].

[66] Commissioner of Internal Revenue v. Harmon, 65 S. Ct. 103 (U. S. 1944) .

[67] Oklahoma Sess. Laws of 1939, chap. 62, Article 2, § 6; [OKLA. STAT. ANN. (Supp. 1939) tit. 32, § 56].

[68] Oklahoma Sess. Laws of 1939, chap. 62, Article 2, § 7; [OKLA. STAT. ANN. (Supp. 1939) tit. 32, § 57].

Many of the problems and much of the uncertainty and confusion presently existing in the Louisiana law, instanced above might be mitigated by a similar device, while preserving community property for proper division at the time of dissolution of the partnership. This new approach in control, in keeping with present conditions of society is realistic enough to satisfy many of the critics of Louisiana's outworn provisions.[69]

There are other weak spots in Louisiana's present patchwork community property law, not discussed in the space permitted in this paper, which has sought to highlight the situations in greatest need of attention.

The Legislature of Louisiana[70] has requested the Louisiana State Law Institute[71] to revise the Civil Code, hence there is hope that an integrated body of law on the subject, reflecting present day needs may be thoughtfully prepared in the not too distant future.

---

[69] Daggett, *The Oklahoma Community Property Act—A Comparative Study*, 2 LA. L. REV. 575 (1940).

[70] La. Law 335 of 1948.

[71] Daggett, *The Louisiana State Law Institute*, 22 TEX. L. REV. 29 (1943).