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## COMMUNITY PROPERTY IN OKLAHOMA

A. W. TRICE\*

ALTHOUGH the geographical division now comprising the State of Oklahoma was included in the Louisiana Purchase and was at various times previously claimed by or under the nominal rulership of Spain and France, neither of those nations effected any permanent settlements there nor established its system of laws in that territory. The Community Property system is not, therefore, indigenous to the Oklahoma legal structure but is alien.<sup>1</sup> The impact of rapidly rising Federal income and estate tax rates persuaded the Oklahoma Legislature in 1939 to attempt a novel experiment in an effort to afford to its citizens the tax advantages, federalwise, of their neighbors of Texas and New Mexico.

By H. B. 565, approved May 10, 1939, effective July 29, 1939,<sup>2</sup> there was instituted an elective or optional system of community property for the citizens of Oklahoma. Sections 1 and 2 of the Act provided for the execution of a voluntary written election by husband and wife to establish community ownership as an incident of their marital relationship to continue until dissolved by death or divorce. These two sections further provided for the filing of such written elections in the offices of the Secretary of State and of the County Clerk of the county of residence of the spouses. The remaining sections 3 to 15 embodied and defined the community property system to exist between the electing spouses and their respective rights, ownerships and obligations thereunder. The Act established a complete system of community property and appears

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<sup>1</sup> *Pridemore v. Duncan*, 146 Okla. 70, 293 Pac. 266 (1930); *Com. Int. Rev. v. Harmon*, 323 U. S. 44, 65 S. Ct. 103, 89 L. Ed. 649 (1944).

<sup>2</sup> S. L. 1939, p. 356, 32 OKLA. STATS., 51-65.

uncommonly well drawn. Without material change the Act was adopted and passed by the Legislature of Oregon.<sup>3</sup>

Both the State and Federal taxing authorities refused recognition of the communities established under the Act of 1939 and appeals were taken to the courts. The Oklahoma Tax Commission contended among others that the Act was in conflict with certain provisions of the Oklahoma Constitution. That contention was denied by the Supreme Court of the State and the Act was held valid largely upon the basis that the communities established under it were voluntary and contractual.<sup>4</sup>

The Commissioner of Internal Revenue was more successful. His refusal of recognition was based upon the distinction between the conventional or consensual communities established under the Act and the involuntary or legal communities imposed on spouses by the statutes and constitutions of the recognized community property states. The Tax Court refused this distinction. The Commissioner appealed to the Circuit Court of Appeals for the Tenth Circuit where the Tax Court was affirmed. On his further appeal to the United States Supreme Court, the Commissioner's contention was sustained and the lower courts reversed.<sup>5</sup>

The Supreme Court denied rehearing in the case on December 18, 1944, and the Oklahoma Legislature in its 1945 session passed H. B. 218,<sup>6</sup> instituting the Community Property system as an involuntary incident of marriage between citizens of the state. The Act was signed by the Governor and became effective July 26, 1945. Sections 1 to 15, inclusive, set up the structure of community property and with some slight changes were identical with Sections 3 to 15 of the Act of 1939. Section 16 of the new Act repealed the Act of 1939 and Section 18 provided that the provisions of the new Act should apply to and govern the property rights of spouses who had elected under the former Act.

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<sup>3</sup> Ore. Laws of 1943, Ch. 440, p. 456, ORE. COMP. LAWS. ANN., Title 63, Ch. 2a.

<sup>4</sup> *Harmon v. Okla. Tax. Com.*, 189 Okla. 475, 118 P. (2d) 205 (1941).

<sup>5</sup> *Harmon v. Com. Int. Rev.*, 1 T. C. 40 (1943); *C. I. T. v. Harmon*, 139 F. (2d) 211 (C. C. A. 10th, 1943) *rev.* 323 U. S. 44, 65 S. Ct. 103, 89 L. ed. 649 (1944).

<sup>6</sup> S. L. 1945, p. 118, 32 OKLA. STATS., 66-82.

An application was made to the Commissioner of Internal Revenue in the name of the Governor of the State for a ruling on the new Act and recognition for Federal tax purposes of the community estates and ownerhips thereby created. The Commissioner held that recognition must be given to the communities so established and spouses domiciled in Oklahoma permitted to return their incomes accordingly.<sup>7</sup> The State Tax Authorities recognized the new Act as effective without protest.

Following the ruling of the Commissioner various other states enacted involuntary Community Property systems in Acts identical with or closely patterned after the Oklahoma Act.<sup>8</sup> Of these the Oregon, Michigan, Nebraska and Oklahoma Acts have been repealed and the Pennsylvania Act was declared unconstitutional by the Supreme Court of that state.<sup>9</sup>

The repealer of the Oklahoma Act contains in addition to the repeal certain provisions in section 2 designed to erase property rights acquired under the community property system by precluding their assertion as against third parties and as against the community partner after the lapse of a specified time unless certain positive steps be taken to preserve them. These provisions raise a number of interesting constitutional questions, a discussion of which follows.

In considering them it must be first noted that two different groups of spouses are affected: First, those spouses who elected to establish a community under the Act of July 29, 1939; and second, those who did not so elect and for whom a community was first established by the Act of 1945.

As to the first group their election constituted a contract between them to the effect that their future rights and interests in

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<sup>7</sup> I. T. 3782, 1946-1 C. B. 84.

<sup>8</sup> Hawaii Revised Laws, 1945, Ch. 301 A; Michigan S. L. 1947, Pub. Act 317, Stats. Ann. § 26.216 (17-261216(20)); Nebraska, S. L. 1947, Leg. Bill No. 140; Oregon, Laws of 1947, Ch. 525, Comp. Laws, Ann., Title 63, Ch. 2b; Pennsylvania, Act. No. 550, 1947 Session.

<sup>9</sup> Okla. H. B. 13, 1949 S. L., p. 229; Neb. S. L. 1949, Leg. Bill 13; Mich. Public Act No. 39, May 10, 1948; *Willcox v. The Penn Mutual Life Ins. Co.*, 55 Atl. (2d) 521 (Pa. S. Ct. 1947).

income and property should be determined by the Act of 1939. Their community arises out of contract and is consensual or conventional.<sup>10</sup>

It is a familiar and fundamental rule of constitutional law that a statute under which a contract is made enters into and becomes a part of the contract and that the Legislature has no power to alter the terms of the contract or the duties and rights arising therefrom by a subsequent amendment or repeal of the statute.<sup>11</sup>

Although the Act of 1939 was repealed in 1945 in the enactment of the Community Property Act of that year, it is doubtful under the rule stated whether that repeal could in any way affect or change the contractual relationship existing between husband and wife and created under the provisions of the Act of 1939. In this connection, the Act of 1945 was not identical in language with the preceding Act. Under the Act of 1939 "increase" of lands owned as separate property was declared to be separate property also. The Act of 1945 did not so provide. Gifts of a wife's interest in community property to the husband was declared by the 1939 Act to be separate property of the husband. This provision does not appear in the 1945 Act.

Several of the community property states have at various times endeavored to change the character of marital property from community to separate or vice versa. These attempts insofar as they were intended to operate retrospectively have been uniformly declared unconstitutional as a deprivation of property without due process of law.<sup>12</sup>

It is probable that the appeal of the Act of 1939 by the Act of 1945 did not affect or alter the agreement between electing spouses

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<sup>10</sup> *Comm. of Int. Rev. v. Harmon*, 323 U. S. 44, 46-47, 89 L. ed. 60, 62-63 (1944); *Harmon v. Okla. Tax Comm.*, 189 Okla. 475, 118 P. (2d) 205 (1941).

<sup>11</sup> U. S. CONST., Art. 1, § 10; Amend. 14, § 1; OKLA. CONST., Art. 2, § 15; *Baker v. Tulsa Bldg. & Loan Assn.*, 179 Okla. 432, 66 P. (2d) 45 (1936); *Carondelet Canal & Nav. Co. v. Louisiana*, 233 U. S. 342, 58 L. ed. 1001 (1913); *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481 (1933); *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 52 L. ed. 630 (1907).

<sup>12</sup> *In re Thornton's Estate*, 1 Cal. (2d) 1, 33 P. (2d) 1 (1934); 11 AM. JUR. 80 and 195.

and that their rights and duties *inter se* continue to be controlled by the Act of 1939.

Section One of the Act of 1949 repeals "Title 32, Chapter 1,"<sup>13</sup> relating to Community Property." Section 2 provides for certain agreements by "any husband and wife whose property or income was subject to the terms of the Act repealed" and for actions and a limitation on actions "to establish or recover an interest in property based upon the terms of the Act repealed." It would thus appear that the Act of 1949 relates only to the involuntary communities arising as incidents of the marital relationship and established by the Act of 1945. In such case the consensual communities created by mutual agreements under the Act of 1939 would be unaffected.

It is clear that if the Act of 1949 does affect the consensual communities it will dissolve them and terminate the whole structure of rights and duties granted and assumed by the spouses. These, being creatures of contract, will have been not only impaired but actually destroyed, an effect which, under present constitutional views, the Legislature is without power to produce.

With relation to the second group, those upon whom the community property system was imposed by the Act of 1945, the matter of impairment of contract is not involved. The power of the Legislature to alter the incidents of matrimony and of the marital relationship is not subject to constitutional limitations except, under the Oklahoma Constitution, polygamy may not be legalized, and the Legislature may not dissolve by law a particular marriage.<sup>14</sup>

Whether the Legislature may alter the incidents of marriage so as to impair or destroy vested rights of property is the question involved here. As to the prospective operation of the repeal, it seems clear from the authorities that the action of the Legislature

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<sup>13</sup> Session Laws 1945 (32 O. S. Supp. 1947, §§ 66-82, inclusive).

<sup>14</sup> *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654 (1887); *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629 (1819); 12 AM. JUR. 47, § 416; OKLA. CONST., Art. 1, § 2, Art. 5, § 46.

is a valid exercise of constitutional authority. It is the effect of the Act on property or interests in property vested in individual spouses on the date of the passage of the Act, which must be most carefully considered.

The draftsmen of the Act sought to avoid this constitutional question by providing (1) for a species of notice to third persons of claims of community interest, and (2) by a limitation upon actions to establish or recover such interest. The act thus places upon the owner of an interest in community property title to which stands in the name of the other spouse additional conditions and burdens in order to preserve his vested rights in the property. The authorities are not in agreement on the power of the Legislature to impose such additional conditions and burdens. It has been held that the repeal of a law which constitutes a contract is an impairment of its obligations. Also, a statute which alters the terms of a contract by imposing new conditions or adding new duties may be within the constitutional inhibition.<sup>15</sup> On the contrary it has been held that the state may impose added conditions or duties on individuals with regard to their contracts, such as requiring the recording of them or publication notice in order to preserve the rights of the parties.<sup>16</sup> However, the rights of the second group, the non-consensual communities, do not arise from contract but are solely creatures of the statute,<sup>17</sup> and the prospective alteration of the property status of those spouses *inter se* is under the authorities within the legislative power.

The vested property rights of the spouses arising under the Act of 1945 are not, by the terms of the repeal, destroyed; the repeal only requires that the parties take steps for the preservation of those vested rights and that they give notice to third persons.

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<sup>15</sup> 12 AM. JUR. 19, § 389; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 591, 52 L. ed. 630, 634 (1907).

<sup>16</sup> 12 C. J. 1058, § 704; Kansas Farmers Union Royalty Co. v. Henshaw, 149 Kan. 64, 86 P. (2d) 559 (1939).

<sup>17</sup> Williams v. Pipe Mfg. Co., 52 La. Ann. 1417, 27 So. 851, 50 L. R. A. 816 (1900); Fort Worth & R. G. Ry. Co. v. Robertson, 121 S. W. 202 (Tex. Civ. App. 1909); 131 S. W. 400 (1910); Ann. Cas. 1913 A, 213; Commissioner of Internal Revenue v. Harmon, *supra*, note 1.

It has been held that community property rights existing at the time and place of the marriage cannot be taken away by subsequent legislation and are not affected by the repeal of the law under which they were acquired.<sup>18</sup>

Insofar as the statute is one of limitation it seems clearly within the legislative power.<sup>19</sup>

And the provision for recording notice of claim of interest under authorities of weight does not violate the due process provision.<sup>20</sup>

As previously indicated the authorities are not uniform on the constitutionality, validity and effect of the repealing statute insofar as the community relationships established under the 1945 Act are concerned. It has been held in numerous cases that a Legislature may not transfer a vested right of property from one person to another, directly or through the device of cutting down a vested ownership to a mere right of action which will be lost unless asserted within a specified time. These decisions are based upon a number of constitutional provisions, including due process of law.<sup>21</sup>

There are many possible and probable sets of circumstances which may arise under the Oklahoma repealer wherein the vested interest in the community of one of the spouses will be taken from him or her without that spouse's consent, for it has been held that a constructive consent may not be imposed simply on the basis of a failure to comply with the statute.<sup>22</sup>

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<sup>18</sup> Pritchard v. Citizens Bank, 8 La. 130, 28 Am. Dec. 132 (1835); Dixon v. Dixon, 4 La. 188, 23 Am. Dec. 478 (1832).

<sup>19</sup> Wheeler v. Jackson, 137 U. S. 255, 34 L. ed. 659 (1890); Mattson v. Dept. of Labor & Industries of the State of Washington, 293 U. S. 151, 79 L. ed. 251 (1934); Kansas Farmers Union Royalty Co. v. Henshaw, 149 Kan. 64, 86 P. (2d) 559 (1939), *appeal dismissed*, 307 U. S. 615, 83 L. ed. 1496 (1938), *rehearing denied*, 308 U. S. 364, 84 L. ed. 527 (1939).

<sup>20</sup> Moore v. Chalmers, 10 P. (2d) 950 (S. Ct. Colo., 1932); Hoofman v. Milwaukee Elec. R., 106 N. W. 808 (S. Ct. Wis., 1906); Kansas Farmers Union Royalty Co. v. Henshaw, *supra*, note 14.

<sup>21</sup> Baker v. Kelley, 11 Minn. 480 (1865); Groesbeck v. Seeley, 13 Mich. 329 (1865); Dingey v. Paxton, 60 Miss. 1038 (1883); Leavenworth v. Claughton, 197 Miss. 606, 19 So. (2d) 815 (1944), 20 So. (2d) 821 (1945); Buty v. Goldfinch, 74 Wash. 532, 133 Pac. 1057, 46 L. R. A. (N. S.) 1065, Ann. Cas. 1915A, 604 (1913); Murrison v. Fenstermacher, 166 Kan. 568, 203 P. (2d) 160 (1949).

<sup>22</sup> *In re Thornton's Estate*, *supra*, note 12; Baker v. Kelley, 11 Minn. 480 (1865).

Both as a practical matter and in conformity with well recognized rules of constitutional construction it is anticipated that the courts of the state will sustain the repealing act insofar as the involuntary communities are concerned. However, numerous problems, both legal and practical may arise in its application. It would appear that the repeal of the Oklahoma Community Property Act may not effectually terminate the rights and claims of the members of the community and their successors in interest, and that, on the contrary, it will require more than one decision of the courts of last resort finally to resolve the uncertainties which the repeal has created.