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Policy Questions on Marital Property Law in Louisiana

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Purpose

The purpose of this discussion is to emphasize the confusion, inequities, and maladjustments to social and economic realities presently existing in the marital property law of Louisiana. The belief of the writer in the community system is strong because its basic pattern is designed to stabilize and protect the family. It envisions an ultimate equal sharing in the financial gains of two people working for a mutual interest. This object is protected, as is any well organized business, by provision for a sinking fund to sustain the endeavor in case of loss by an unsuccessful venture of one partner. The fact that this fund was labelled separate property of the wife was not to favor her unduly but because, in the setting of an earlier day, that was the safest method of protection for all concerned. Re-examination of the community property system has been thought necessary for quite some time because its adherents fear that, without adjustment to present conditions, dissatisfactions may become sufficiently acute to result in its abandonment.[1] Its complexities[2] are so great that its acceptability can be maintained only by clear demonstration of achievement of its worthy basic objects, those best strengthening the ties and economic basis of the family.

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1. For reasons similar to those advanced here, France in 1945 engaged in a revision of her Civil Code. Marital property laws have been examined. In his article, *The Revision of the French Civil Code*, 25 TULANE L. REV. 435, 444 (1951), Dr. Marc Ancel states ". . . the old community property system . . . now receives little support in France." A compromise appears to have been reached between the old community law and a system of entire separation of property, according to Dr. Ancel. Definite action to allay apparent dissatisfactions is being taken in the State of New Mexico. See N.M. Laws 1953, 21st Sess., Sen. Res. No. 3, p. 636. See also Professor R. E. Clark's excellent study, *Management and Control of Community Property in New Mexico*, 26 TULANE L. REV. 324 (1952).

2. See Huie, *Separate Claims to Reimbursement from Community Property in Louisiana*, 27 TULANE L. REV. 143 (1953). See Professor de Funiak's statements regarding abandonment of the system, 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 20, nn. 18, 19 (1943).

Before a presentation of legislative enactments and judicial decisions, may it be said that the writer has no interest in what is "his" and "hers" as such except insofar as these ownerships may affect the stability and tranquillity of the family, which a majority still believes to be the best institution for society. This paper does not purport to present *Wife versus Husband* with a brief for the "rights" of women or men. Its spirit is in the interest of the earnings of a man or woman by labor, profession, or small business whose failure may presently drag down the married partner and thus wreck the entire financial structure of the family and perhaps the marriage.

Stress is placed here on the small business because large concerns ordinarily have constant access to legal advice and are made aware of dangers and pitfalls and hence seek protection through the corporate device or otherwise. Professor de Funiak stresses the fact that loyal, hard-working couples even of primitive times evolved the system out of recognition of fair dealing and ordinary justice and for individual satisfaction as a democratic concept. Not the great property owners but couples struggling to attain some degree of financial security are those for whom these suggested changes are today worst needed.

The community has been consistently held not to be a business partnership or the marriage partner entitled to the legal reliefs established therefor.[3] Yet, under present property laws it would appear that many liabilities of a partnership are present without the assets enjoyed by that device.[4] To aver that irritations and strains, frustrations and dissatisfactions arise when property which one believes to be his own is interfered with is to concur with a majority in North America. Dogs and many other animals will defend their property lines, their bed and their bone. Thus the idea of ownership must be deeply ingrained in the animal world of which man is thought to be the apex, and hence it would not appear to be illogical to suppose that marital property laws as other property laws of men and women may produce those factors which tend to lead to the disruption of their associations in business and, far more importantly, in marriage.

3. DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 23 *et seq.* (1945).

4. Art. 2807, LA. CIVIL CODE of 1870; Heatwole v. Stansbury, 212 La. 685, 33 So.2d 196 (1947); Mackenroth v. Pelke, 171 La. 842, 132 So. 365 (1931); Frierson v. Frierson, 164 La. 687, 114 So. 594 (1927); Succession of Boyer, 36 La. Ann. 506 (1884); City Insurance Co. v. Steamboat Lizzie Simmons, 19 La. Ann. 249 (1867); Squire v. Belden, 2 La. 268 (1831).

The community property pattern was designed by those well versed in the intricacies and imponderables of that unique association known as marriage. It still obtains in many of the so-called civilized countries of the world, though Professor de Funiak points out that economic causes and not "civilization" produced the plan.[5] The major thoughts of Louisiana formulators had to do with protection of the family and its economy of the times before the days of easy and frequent divorce which indeed may settle property questions, a minor matter in comparison to problems of the mind and spirit, which seem to be even more confused after the parties leave the divorce court.

The community property system was not only in the day of its inception (as previously stated) but is even *now* in the writer's judgment the fairest, most thoughtfully designed plan for marital property law yet devised. To weaken the confidence of its adherents by failure to adjust it to economic and social conditions revolutionized since the pattern was first adopted for Louisiana would seem to be most unwise, and would perhaps result in irreparable loss to the state as well as to its individual citizens. The philosophy of Louisiana's Civil Code clearly bespeaks the family unit idea and attempts to protect the institution.[6] It was not in the minds of the law makers of that day that, if the spouses could not get along because of difference of opinion on financial matters, they should be encouraged to get a divorce. The consideration of such a step was not in contemplation due to social and other taboos—nor was it considered good family law or business practice to have all of the eggs in one basket so that a financial slip of the husband would leave the whole family, including him, with nothing.[7]

Legislation and its Judicial Interpretations

In the early part of this century, law makers were anxious to recognize women's contributions and the country's need of them in business and industry and a little later they may have been attempting to reward their services in the first world war.[8] Mechanization, generally, produced tools for war and peace, many of which could be handled as well or better by women

5. 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 27 (1943).
6. Ncte elaborate provisions for collation and forced heirship.
7. Provisions for dotal and paraphernal property of wife, marital portion, protection when separate regime contracted for.
8. WOMEN'S BUREAU BULL. No. 249, THE STATUS OF WOMEN IN THE UNITED STATES (U.S. Dep't Labor 1953).

than men, and realization of the existence of this great dormant labor force came quickly to the country's leaders.

As an integral part of this movement a series of Louisiana statutes popularly called married women's emancipatory acts appeared.[9] These provisions cleared away old limitations and protective devices and granted full power to married women in the way of privileges and responsibilities that were available to any person *sui juris* in regard to his property, or in regard to his ability to act in various civil capacities.

However, to prevent confusion in connection with the existing legal fabric of community property law, a statement was carried through this series of acts that they did not purport to affect the provisions dealing with this type of property.[10] During the period previously alluded to, and a forerunner and preconcomitant to the series and again in recognition of the increasing part that women were taking in the world of business and industry, what later seemed to be a companion piece of legislation was passed in 1912, reading as follows:

> "The earnings of the wife when living apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses and the property purchased with all funds thus derived, are her separate property."[11]

The amendment was properly placed in the article of the Code dealing with the separate property of the spouses and was generally understood to complement the so-called emancipatory series.[12]

Twenty-one years later, interpretation of this amendment was directly asked of the Supreme Court of Louisiana.[13] The high mood of gratitude for services performed in the first world war had passed for everyone: a terrible economic depression was being suffered; jobs were scarce for all; creditors were desperately trying to collect; and it was normal in the general avenues of thought to find reversals of position. Moreover, the

9. U.S. CONST. AMEND. XIX; La. Acts 1916, No. 94, p. 212; La. Acts 1918, No. 244, p. 435; La. Acts 1920, No. 219, p. 364; La. Acts 1921, No. 34, p. 38; La. Acts 1926, No. 132, p. 207; La. Acts 1928, No. 283, p. 548.

10. *Ibid.*

11. La. Acts 1912, No. 170, p. 310.

12. Art. 2334, LA. CIVIL CODE of 1870.

13. Houghton v. Hall, 177 La. 237, 148 So. 37 (1933).

Justices readily perceived that, regardless of the legislature's best intentions to recognize the place that married women were taking in business and industry, the method employed would weaken the community structure as well as producing greater inequities between spouses.[14] Hence, chivalrous tongued judges who had spoken of married women as being most favored in the law became silent and the Supreme Court decided[15] that the wife was not able to earn any separate property unless she was living separate and apart from her husband, presumably under conditions which would warrant a judicial separation or divorce.[16] Moreover, a wife could not sue on a contract the benefits of which would accrue to the community.[17] Though she was perfectly capable under the emancipatory acts of entering unassisted into the contract and her husband was a stranger to it, he, as master of the community, must sue. Again, the theory of a "public merchant"[18] was expanded to cover manufacturing and the husband and community held solidarily with the wife for unfortunate ventures of the wife in this type of business.[19] Presumably, if all earnings or profits of the wife in a separate business, profession, or industry are community, losses also, even in a tort rising out of a contract, would be community, under some indeterminate form of agency doctrine,[20] perhaps ratification by acceptance of benefits *if* there have been any benefits!

Thus began the march of the one basket theory with a veiled concomitant of invitation to divorce or judicial separation as the only suggested means of relief.[21] Neither spouse today has legal[22] control over the other and even under the best adjusted marital

14. 177 La. 237, 265, 148 So. 37, 45 (1933).

15. Houghton v. Hall, 177 La. 237, 148 So. 37 (1933).

16. See concurring opinion by Chief Justice O'Niell, 177 La. 237, 266, 148 So. 37, 45 (1933). "I believe that all that the Legislature intended to do by the act of 1912 was to allow a wife who is living separate and apart from her husband to retain her earnings as her separate property. Whenever the husband tires of such a situation, he may put an end to it by service of the necessary summons upon his wife to return to the matrimonial domicile, or suffer the consequence."

17. Succession of Howell, 177 La. 276, 148 So. 48 (1933).

18. Art. 131, LA. CIVIL CODE of 1870.

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

20. Adams v. Golson, 187 La. 363, 174 So. 876 (1937); McClure v. McMartin, 104 La. 496, 29 So. 227 (1901); Art. 2985, LA. CIVIL CODE of 1870; Note, 20 TULANE L. REV. 279 (1945). See reversal of policy re automobiles: Brantley v. Clarkson, 217 La. 425, 46 So.2d 614 (1950), 12 LOUISIANA LAW REVIEW 94 (1951).

21. See statement of Chief Justice O'Niell reproduced in note 16 *supra*.

22. No authorization required under so-called emancipation acts. See note 9 *supra*. For physical control, see State v. Priest, 210 La. 389, 27 So.2d 173 (1946).

relations, where each spouse is working hard for the financial interests of the family, if bad fortune falls upon the efforts of the one, the other will fall. As a spiritual postulate, this may be acceptable; but as an economic and social one, it would appear to be of doubtful value. The growth in numbers of small businesses, as, for example, shoppes, notably tea, beauty, gift, hobby, and the like, is valuable to society economically and otherwise, and is encouraged even by national legislation.[23] They are often run by married women. Financially responsible husbands under our present legislation must watch the balance sheets, if any, with extreme care.

It will be recalled that legislation in 1855[24] was passed in the interest of commerce and not just to free the wife dealing with separate property of legal limitations. It resulted in shifting the burden of proof from creditors who had formerly had to show that money and supplies *had inured* to the benefit of the wife's property to the wife, who had to show that they had *not*.[25] Thus, dealing with married women, many of them owning the great inherited plantations of that day, was made safer. It is submitted again, not necessarily in the interest of the *wife* but of the economics of the state, particularly the small business, as well as for the family welfare and unity, a more valuable asset of the state, that thoughtful legislation is needed. The two-income family increases purchasing power and tax collections. A United States labor report for 1953 indicates agreement that this development is accompanied by an increase in homeowners, thus "having a profound effect on family life: more stability, more sense of property, more feeling of 'belonging' to economic society."[26]

Referring again to the legislative mood of empowering married women, another attempt provided that, if community property stood in the name of the wife, the husband could not sell or mortgage it without the wife's written authority or consent.[27]

23. Exec. Order No. 10493, 18 FED. REG. 6583 (1953); Exec. Order No. 10504, 18 FED. REG. 7667 (1953). An "Institute on Small Business Planning and Loans" was held at the University of North Carolina Law School, January 15 and 16, under the joint sponsorship of the North Carolina Bar Association and the law schools of Duke University, the University of North Carolina, and Wake Forest College.

24. La. Acts 1855, No. 200, p. 254.

25. Berwick v. Sheriff, 49 La. Ann. 201, 21 So. 692 (1896); Dougherty v. Hibernia Ins. Co., 35 La. Ann. 629 (1883); Rice v. Alexander, 15 La. Ann. 54 (1860); Arts. 127, 128, 129, LA. CIVIL CODE of 1870.

26. WOMEN'S BUREAU BULL. No. 249, THE STATUS OF WOMEN IN THE UNITED STATES 13 (U.S. Dep't of Labor 1953).

27. La. Acts 1912, No. 170, p. 310.

Our Supreme Court, quickly stepping to what they must have thought to be the rescue of the community property system, held that neither could the wife sell or mortgage the property without the husband's written consent.[28] To go further, the court also held that property standing in the joint names of husband and wife could be dealt with solely by the husband.[29]

Two decisions of the Supreme Court of Louisiana declared cancellation of mineral leases upon community property because payments were made to the joint bank accounts of husband and wife rather than to the account of the husband alone, as the wife could have drawn the money, though she made no attempt to do so.[30] The harshness of these decisions may have later been softened somewhat as to effect upon a lessee,[31] but nonetheless stand as illustrations of the extreme need for care when a wife enters even indirectly into a contract concerning community property.

Purchasers from a married woman purporting to deal with her separate property are naturally loath to accept title unless the husband's signature appears, since her recitation that the property is separate is subject to proof;[32] and if it fails, under a commingling doctrine or otherwise,[33] title falls. Thus, the so-called married women's emancipatory acts with their limitation as to dealing with community property result, practically, in making it perhaps more rather than less difficult than before their advent for a married woman to deal even with her separate property though the need for assistance by her husband was stated in the provisions to have been eliminated.

If the wife recites in a deed of transfer that she is selling her separate property and it is proved to be community property, the husband's signature "authorizing" his wife will estop him to claim later that the property is community,[34] but will not estop

28. Bywater v. Enderle, 175 La. 1098, 145 So. 118 (1932).

29. Otwell v. Vaughan, 186 La. 911, 173 So. 527 (1937); Young v. Arkansas-Louisiana Gas Co., 184 La. 460, 166 So. 139 (1936).

30. Clingman v. Devonian Oil Co., 188 La. 310, 177 So. 59 (1937); LeRosen v. North Central Texas Oil Co., 169 La. 973, 126 So. 442 (1930). See La. Acts 1896, No. 63, p. 96.

31. Jones v. Southern Natural Gas Co., 213 La. 1051, 36 So.2d 34 (1948), 23 TULANE L. REV. 418 (1949).

32. Johnson v. Johnson, 213 La. 1092, 36 So.2d 396 (1948); DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 34, n. 12 (1945).

33. De Maupassant v. Clayton, 214 La. 812, 38 So.2d 791 (1949); Johnson v. Johnson, 213 La. 1092, 36 So.2d 396 (1948); Marlatt v. Citizens' State Bank & Trust Co., 180 La. 387, 156 So. 426 (1934).

34. Rousseau v. Rousseau, 209 La. 428, 24 So.2d 676 (1946); Normand v. Davis, 202 La. 565, 12 So.2d 273 (1943); Succession of Hostetter, 128 La. 468, 54 So. 961 (1911); Kerwin v. Hibernia Ins. Co., 35 La. Ann. 33 (1883).

the forced heirs who have accepted with benefit of inventory nor will it affect the rights of creditors of the husband and the community.[35] Again, if the husband authorizes the wife to sell, and her proof of separate property fails, title has been held good under an agency theory, namely, that the community for which she is acting is selling.[36] Under this analysis the husband's authorizing signature would appear to be more than a mere estoppel against him to claim that the property is community and not the wife's separate property if her recitation is untrue, and will validate the title. An application of this view would seem to protect the purchaser not only against the husband by estoppel but also after his death against forced heirs of the husband, who might accept his succession under benefit of inventory and thus not be bound by his estoppel. Conveyancers rightly fear, however, to rely on this theory, as agency of the wife is an uncertain doctrine.[37]

If the husband recites an appearance and signs the deed as joint seller, a practice used in some offices, doubtless the vendee is nicely protected whether the property is community or separate. But what of the family, if indeed the property is the wife's separate property? Could either the husband or wife upon dissolution of the community successfully maintain even that a debt was owed by the community for the whole or the half of the value received to the separate estate of the wife for her benefit or that of her heirs?[38]

Even the "faith of the public record" doctrine works to the detriment of the wife's commercial standing in the line of cases not comprehended in the doctrine. The general rule was purportedly settled for all time and everybody in 1910 by the landmark case of *McDuffie v. Walker*,[39] said to have been followed ever since in unbroken line of judicial decisions.[40] Those cases where faith alone does not save the relying purchaser are said to be those where property vests "by operation of law."[41] When does

35. Chevalley v. Pettit, 115 La. 407, 39 So. 113 (1905); McKenzie v. Bacon, 40 La. Ann. 157, 4 So. 65 (1888). *Cf.* Berry v. Wagner, 151 La. 456, 91 So. 837 (1922).

36. Garlick v. Dalbey, 147 La. 18, 84 So. 441 (1920).

37. See Dimmer v. Davis Bros. Lumber Co., 135 So. 684 (La. App. 1931); DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 20 *et seq.* (1945).

38. See Huie, *Separate Claims to Reimbursement from Community Property in Louisiana*, 27 TULANE L. REV. 143 (1953).

39. 125 La. 152, 51 So. 100 (1910).

40. *Cf.* Thompson v. Thompson, 211 La. 468, 30 So.2d 321 (1947); Knoblock & Rainold v. Posey, 126 La. 610, 52 So. 847 (1910).

41. Bishop v. Copeland, 222 La. 284, 62 So.2d 486 (1953).

the law "operate" is obviously the question, puzzling occasionally even to the learned in the great science. When a person dies, his forced heirs and indeed his legal heirs are vested by operation of law with their proper share of inheritance; and the purchaser, even relying on a recorded judgment placing the vendor in possession of property belonging to these heirs and not to the seller, will not be protected, though there is nothing in the record to give notice of the right of the heirs.[42] Upon dissolution of the community by death of one of the spouses, the heirs of the deceased are vested by operation of law with his half of the community property.[43]

Those cases dealing with the latter "operation" obviously may be distinguished on law, fact, procedural approach and otherwise as may perhaps too many cases, it would sometimes seem; but in stark reality the result is that on occasion a married man swearing to a lie of singleness passed a good title under the record doctrine, his divorce not having been recorded, to the wife's half of the community;[44] under similar facts, however, the wife,[45] as usurper of the husband's power during marriage was not able to deal validly regardless of "operation of law," which presumably vests shares of community property upon dissolution of the community by divorce,[46] because of the power of the husband concept. The soundness of the several decisions is not in issue—only the effect upon those who would deal with a married woman. Their fears would appear to be well justified.

Retail merchants are hounded by the spectre of that elastic word "necessities"[47] with which a husband must furnish his wife. This responsibility would seem to result chiefly from responsibilities of a husband as such, in or out of a community régime, and hence may be less troublesome than community use ratification by the husband of articles not in the necessity group, purchased by the wife.[48] There is little chance for the creditor if the husband proves adamant in his refusal to ratify after being

42. *Ibid.* But see Sun Oil Co. v. Tarver, 219 La. 103, 52 So.2d 437 (1951). See also Lee v. Jones, 69 So.2d 26 (La. 1953); *but see* Thompson v. Thompson, 211 La. 468, 30 So.2d 321 (1947).

43. Allen v. Anderson, 55 So.2d 596 (La. App. 1951).

44. Humphreys v. Royal, 215 La. 567, 41 So.2d 220 (1949).

45. Succession of James, 147 La. 943, 86 So. 403 (1920).

46. Art. 2406, LA. CIVIL CODE of 1870; Daggett, *Division of Property Upon Dissolution of Marriage*, 6 LAW & CONTEMP. PROB. 225 (1939).

47. Art. 1786, LA. CIVIL CODE of 1870; D. H. Holmes Co. v. Morris, 188 La. 431, 177 So. 417 (1937).

48. For an excellent record illustration, see Montgomery v. Gremillion, 69 So.2d 618 (La. App. 1953).

apprised of the purchase. On the other hand there is little chance for the husband's escape from liability unless he can promptly capture the articles and send them back, which may result in serious impairment of his personal domestic felicity. A merchant may well desire the custom of women with good jobs or successful professions. The woman may retain her maiden name, which she has a legal right[49] to do, if recognition in her field of endeavor has come before marriage. The unsuspecting merchant may ultimately find this apparently excellent risk a poor one, indeed, by virtue of an unknown marriage and the *Houghton-Hall* edict.[50]

Garnishment[51] would seem to lie for debts of the husband and community against the wages of a wife who is trying to aid and comfort a husband failing in health, finance, or otherwise and unwilling to desert him. Question has been raised regarding the right of creditors of a discharged bankrupt to continue collections against an employed wife, not personally discharged. A very sound theory of the community as an ideal being, likened unto a succession, has been established by the Supreme Court[52] and is certainly well supported by the theory of community property in its entirety. This concept should negate the idea of holding a wife for community debts after the husband head of the community has been discharged in bankruptcy. However, these situations as items on this list for discussion certainly add to the apparently increasing dissatisfaction with the present state of the laws of marital property.

In the old basic law of community property appears elaborate machinery for a separation of property to be instigated only by a wife.[53] As a practical matter, and for the great majority of families, this recourse is of little value. The wife must have separate property or the hope of it, and the husband's financial affairs must be in such "disorder" that her estate will be endangered. The husband whose separate or community business may be endangered by the wife's financial "disorder" does not have the right to such an action. Since the wife's earnings from a business occupation or industry are community property, it would not appear that she could bring the action to protect those earnings, if the husband's ventures were tottering. The

49. Succession of Kneipp, 172 La. 411, 134 So. 376 (1931).
50. Houghton v. Hall, 177 La. 237, 148 So. 37 (1933).
51. LA. R.S. § 13:3911 *et seq.* (1950).
52. Demoruelle v. Allen, 218 La. 603, 50 So.2d 208 (1950).
53. Art. 2425 *et seq.*, LA. CIVIL CODE of 1870.

device always smacked of a garage-locking after the car was stolen, anyway, and is of little value except as the one means of dissolving the community after marriage without disturbing the personal relationship.[54] Loyal wives have always furnished money if they had it to husbands in financial stress, if they wanted it, even when pledging for their husbands' debts was prohibited.[55] The law makers knew that, as witness the devices for protection of this family sinking fund in the separation of property idea,[56] the wife's legal mortgage,[57] and other less obvious provisions.

Separate property of the spouses is that which is received by inheritance or by particular gift, *inter vivos* or *mortis causa*.[58] Separate earnings of the wife while living separate from her husband apparently with cause for judicial separation or divorce, are her separate property.[59] The first square decision[60] was that the wife gained a separate estate from earnings in a house of prostitution to which her husband brought his custom but not as her exclusive client and where he was treated according to the testimony as was any other person, and was ejected "when his money ran out." What a platform of vulgarity upon which the court was forced to rest the first direct application of the doctrine!

A recent case has stated the test of the phrase "living separate and apart" with effect of making the wife's earnings separate property to be the same as that applied for divorce under the two-year act. The parties must so live that there can be no doubt in the minds of citizens as to the breakdown of all personal relationships. Thus, a wife who had sheltered her sick husband in a building upon the grounds of her adjacent boarding house could not label her earnings as separate.[61]

It is indeed unfortunate that the private lives of persons who have not seen fit to expose to public view in court the innermost secrets of their personal relationships should have these matters

54. DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 57 *et seq.* (1945).

55. Art. 2398 *et seq.*, LA. CIVIL CODE of 1870, negated by emancipatory acts. See note 9 *supra.*

56. Art. 2425 *et seq.*, LA. CIVIL CODE of 1870; DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 57 *et seq.* (1945).

57. DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA, 44 *et seq.* (1945).

58. Art. 2334, LA. CIVIL CODE of 1870.

59. Houghton v. Hall, 177 La. 237, 148 So. 37 (1933).

60. Small v. McNeely, 195 So. 649 (La. App. 1940).

61. Succession of Le Jeune, 221 La. 437, 59 So.2d 446 (1952).

reviewed on a property question.[62] This reward by the state particularly to a wife who instead of seeking divorce and alimony has gone to work in either the oldest or the newest profession for women seems peculiarly unfitting.

It is far from clear whether a wife living separate and apart having one of the many causes for *judicial separation* will be able to accumulate separate property; whether the matter of whose "fault" it is will be made a factor; whether under the two-year act test earnings will become separate immediately upon the beginning of separate living or after two years. Perhaps the whole impossible situation will fall with the weight of its own stupidity and thus one item of unbalance will be cleared away without legislation. Despite the best efforts of the court, however, but minor successes can be achieved within the present legislative pattern to cure what the writer believes to be major ills at the present time.

Recovery by the husband for injuries are his separate property, if he is living separate and apart from his wife by reason of her behavior.[63] Previous to the *Houghton-Hall*[64] analysis of part of the 1912 statute[65] discussed above, it was clear that recoveries for personal injuries to the wife were her separate property in any case.[66] Since that decision it seems doubtful, if put at issue, whether under a later statute and the court's interpretation of it the wife could insist successfully on the classification as separate property without proving her living separate and apart. Unless the court decides on an inconsistent interpretation of the latter part of the same paragraph, dealing with recoveries for "offenses and quasi offenses" to the wife, a living separate and apart would be a requisite.[67]

Preservation of property as separate during the existence of the community is another problem. In the case of the husband, it is well settled that in order to retain the separate character in a purchase of realty with separate funds he must give a double recitation in the deed to the effect that he is buying

62. See Daggett, *What Future for Community Property Law in Louisiana*, 4 SOUTHWESTERN L.J. 20, 23, 24 (1950). See also Malone v. Cannon, 215 La. 939, 41 So.2d 837 (1949) (marital portion).

63. La. Acts 1920, No. 186, p. 304, amending and re-enacting Art. 2334, LA. CIVIL CODE of 1870.

64. Houghton v. Hall, 177 La. 237, 148 So. 37 (1933).

65. La. Acts 1912, No. 170, p. 310.

66. La. Acts 1902, No. 68, p. 95, amending Art. 2402, LA. CIVIL CODE of 1870.

67. La. Acts 1912, No. 170, p. 310.

with his separate funds for his separate benefit.[68] It is suggested that in purchasing stocks, bonds, or other movables that this recitation might be solemnly made before a notary and proper witnesses concurrently with the purchase of movables and a copy of the instrument attached to the evidence of title of the movables. It is possible that this device might be effective in a settlement between the spouses or their heirs at the termination of the community. No test case can be cited at the moment. Obviously it would not affect creditors as all of the husband's property, separate or community, is available to separate and community creditors.[69]

Whatever the recitation by the wife to preserve title in her separate estate, she must prove[70] it although the time-honored rule is that she may introduce evidence outside of the instrument to prove that the property is her separate property while the husband may not do so.[71] The question of uncertainty regardless of recitation has been previously discussed. Also, it has been demonstrated that a wife investing her separate property in a business in which she labors, would seem not to be able to preserve the earnings therefrom as they go into the community and if the venture is unsuccessful will lose not only her original investment of separate funds but reduce the community as well under the public merchant theory coupled with the *Houghton-Hall* decision.

Moreover, the wife apparently cannot maintain as separate the earnings of her separate property under mere factual administration by herself because of the latest legislative edict unless she files an instrument containing a double declaration of reservation and intention.[72] This legislation is said to have been passed for tax reasons and to simplify proof. The tax reason, if ever a sound one for family protective purposes, no longer exists under modified tax rules regarding marital property.[73] So far

68. DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 29 *et seq.* (1945).

69. *Id.* at 50.

70. See note 32 *supra.*

71. Staunton v. Vinterella, 223 La. 958, 67 So.2d 550 (1953).

72. La. Acts 1944, No. 286, p. 836, amending Art. 2386, LA. CIVIL CODE of 1870.

73. Revenue Act of 1948, 62 STAT. 110 (1948). See § 351 (eliminating community property provisions of § 811(e) of the Internal Revenue Code); § 361 (adding the marital deduction provision to § 812(a) of the Internal Revenue Code); and §§ 104(c) and 301 (providing for the splitting of income between spouses by amending § 12(d) of the Internal Revenue Code). Rubin & Champagne, *Some Community Property Aspects of the 1948 Revenue Act*, 9 LOUISIANA LAW REVIEW 1 (1948).

as the simplification of proof purpose is concerned, it might be asked, simplification for whose benefit? Again, the answer would be for those attacking on all fronts any and all family reserves when the husband meets financial ill fortune.

Moreover, what is administration? It has been indicated that the husband's administrative powers over the wife's property include investment of funds, coming to his hands with consequent result of shifting title to the community, an apparent deviation from the accepted and legally protected theory of mere administration found in dealing with minors and interdicts, decedents' estates, absentees and other areas clearly distinguishing administration from converted ownership.[74]

Suppose the wife does file the instrument required to preserve her separate administration, where does administration leave off and making her capital work as a business begin? The line would seem to be quite hazy and, with what appears to be fast becoming an irrebuttable presumption of community, it is easy to predict with some degree of assurance which answer will prevail.

Previously, with thought of encouraging small investors in homestead associations, moneys deposited by a wife would become her separate property regardless of the source of the funds.[75] No longer is this the case.[76] This situation may not present as strong a case as previously cited examples but is another illustration of the trend to prevent the segregation of a fund to protect the family from the ill winds of depressions, regressions, running readjustments, economic dips, levelings off or whatever be the current term for these unhappy events.

Thus, it would seem that we have legally gone "Onward to Yesterday"[77] or beyond while the world has continued ever toward tomorrow with its tremendous changes, presumably an advance in our social and economic life. Married women are in general legally incapable of dealing with community property and materially hampered in either acquiring or dealing with their separate property. The trend of court decisions and recent

74. Succession of Schnitter, 220 La. 323, 56 So.2d 563 (1951).
75. La. Acts 1902, No. 120, p. 195; La. Acts 1932, No. 140, p. 455.
76. Cameron v. Rowland, 215 La. 177, 40 So.2d 1 (1949); La. Acts 1938, No. 337, p. 828; La. Acts 1940, No. 95, p. 443.
77. Said to be a favorite slogan of Wm. J. Nichols. Saturday Review of Literature, Dec. 19, 1953, p. 9.

legislation is to place all marital property in the community classification. The results are submitted to be:

1. Deleterious to dealing with immovables because of the uncertainty of title when property stands in the name of a married woman and to commerce in movables purchased by the wife under her mandate.

2. Deleterious to business growth because of the fear of each spouse to venture lest all family assets may be lost.

3. Deleterious to family security as no protection is available to segregate the earnings of one spouse if the other is unsuccessful.

4. Deleterious to marital tranquility because of lack of control of earned property and formalities and insecurity of separate property.

5. Deleterious to the state because of effect on marital relations leading to separation and divorce.

6. Deleterious to the state as it principally affects the middle class, financially speaking, understood to be the foundation stone of the state's prosperity and stability.

7. Deleterious psychologically to an intelligent and industrious wife to be classified on legal capacity with children and mental defectives.

Possible Adjustments

It should be constantly borne in mind that the community property idea is one of a sharing as equally as possible by the spouses of the material accumulations of the period of the marriage dimly reflecting the spiritual concept of the sharing of the joys and sorrows of life itself. The enfolding of children within the unit perfects the whole and protection of all types is contemplated for each and every member of the group termed the family.

(a) *Control.* Certainly the basic policy of the court in the *Houghton-Hall*[78] case was sound for, regardless of legislative intent, devotion of all the energies of a spouse to building a separate estate at the expense of the other would destroy the community ideal as surely as any other method. Framers of the Code foresaw the danger and provided the marital portion,[79] which,

78. Houghton v. Hall, 177 La. 237, 148 So. 37 (1933).
79. Art. 2382, LA. CIVIL CODE of 1870.

if interpreted in the light of its purpose and not with injection of the "fault" theory, which is another invitation to divorce, serves as some protection against a selfish spouse.[80]

Equal division of accumulations as between the spouses or their heirs must be maintained or the community plan abandoned. In all types of business association, settlement is contemplated for occurrence at the completion of the joint enterprise or dissolution of the business association. Management or control of the business while in operation is indeed another matter. The oversimplified answer is sometimes given by presumably thoughtful persons that "every business has to have a head," which apparently again indicates confusion between marital relations and marital property. The precept is doubtless sound for business enterprises and one thesis of this discussion is indeed to urge its incorporation as one element of adjustment of community property problems. When husband and wife are each running a separate business or attempting to hold separate jobs, the good management, thrift, luck, or what have you, of the one, cannot save the other but both businesses must stand or fall together. Thus, there is no real head to either. Moreover, short of disturbance of the marital relationship, there is no way to get one. There is no machinery for getting a new manager in time to prevent disaster. Enterprise is discouraged. Lending agencies are wary. Conveyancers are uneasy. Spouses become frustrated and dissatisfied and not only may the business associations fall but they may take the marital association with them.

Simple legislative curatives may be found. Oklahoma's plan for control by the wife earning separately from the husband seems feasible and certainly had nothing to do with the state's apparent distaste for any and all community property systems.[81] This plan provided for completely separate control and management of the two endeavors when both spouses were separately engaged in ventures for material gains.[82] Creditors reliance was upon but the one business which they had furnished unless other voluntary arrangements were made. Obviously, proper recordation for their protection was necessary. While Oklahoma apparently instituted the system for tax purposes

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

81. See discussion of repeal and its aftermath by Trice, *Community Property in Oklahoma*, 4 SOUTHWESTERN L.J. 38 (1950).

82. See Daggett, *The Oklahoma Community Property Act—A Comparative Study*, 2 LOUISIANA LAW REVIEW 575 (1940).

only and abandoned it after the tax need had passed,[83] they nonetheless were aware of conditions prevailing when they sought to institute the system and made proper provision to avoid the situation presently prevailing in Louisiana. It is of particular present interest that the French commissioners engaged in preparing a revision of the French Civil Code for possible adoption have decided upon split control provisions similar to those outlined in this article, evidencing the existence of the same dissatisfactions presently manifested in Louisiana.[84]

If the Oklahoma or a similar plan were adopted, provision could be made within the pattern for title certainty when property stands in the wife's name. Obviously, that item might be cared for without adoption of a comprehensive control plan and is being presently urged by some thoughtful persons who are particularly interested in that phase of the confusion.

(b) *Balance and Equality.* Certainly sources of community and separate property whatever they may be should be the same for both spouses that equitable division might be made at the dissolution of the community. Obligations to each other should be the same and the Code so states.[85] Support of the wife by the husband rises from the relationship,[86] and is recognized by the necessity doctrine[87] and by alimony provisions even after divorce.[88] Proper emphasis would not seem to have been placed upon the wife's assumption of similar responsibilities to the husband specifically provided by the Code during marriage at least.[89] Redistribution of wealth by the tax method materially reduces the monetary importance of separate property acquired by inheritance and gift of great fortunes and small, thus increasing the need for balance and equity in community regulations.

(c) *Marriage Contract.* Spouses should be able to organize their business affairs as financial advantage or security dictates. They should be able to reorganize their business affairs if their marital happiness tends to be affected by them. Permission to make a marriage contract during marriage would be a very simple change in the law.[90] The machinery governing marriage

83. See note 73 *supra.*
84. See note 94 *infra.*
85. Art. 119, LA. CIVIL CODE of 1870.
86. Art. 120, LA. CIVIL CODE of 1870. See also LA. R.S. § 14:74 (1950).
87. Art. 1786, LA. CIVIL CODE of 1870.
88. Art. 160, LA. CIVIL CODE of 1870.
89. Arts. 2389, 2435, LA. CIVIL CODE of 1870.
90. Art. 2329, LA. CIVIL CODE of 1870.

contracts is still intact.[91] Sufficient modification of the action for separation of property to make the device effective would not be unduly complicated.

A traditional fear seems to be that domestic felicity might be disturbed if such contracts were allowed. The present fear is that much disturbance will result if the relief continues to be disallowed. Moreover, marriage contracts of the past were really made by parents in the interest of their children. This stage of economic and social life has passed in Louisiana for better or worse. The hard realities of life fortunately do not cloud the proper bliss of courtship, thus few contracts at all are made. If permitted later when time, thought and experience might dictate a need for rearrangement in the interest of the marriage, and with present day participation by the wife in business, much good might be accomplished. It seems uniquely Victorian that the most interested of all parties may not contract with each other.

Another fear seems to be that the greedy, jealous, dominant spouse might browbeat the amiable or timid one into signing a bad contract. Obviously, dictators in homes and out of them probably will always exist regardless of preventive legislation and can do little if any more harm to a marriage with right of contract than without it. Moreover, the law presently contains the protection of the marital portion,[92] the provision for sharing of marital establishment expenses by those separate in property[93] and other wise provisions to meet obvious contingencies.

Little change may be needed but it is needed badly if the community property system is to survive and survive as a protector of family finance and a binder and promoter of emotional security and satisfaction rather than a wedge for disintegration of all of these elements. These pages are not to say with D. H. Lawrence "Let there be a parliament of men and women for the careful and gradual unmaking of laws" but to urge the repair of these laws at the earliest possible date that their original purpose and usefulness may be retained. The mail shirt of indifference is a poor shield against the effects of maladjusted provisions of marital property law.

When the thoughts of the fine minds of the leaders of Lou-

91. Art. 2325 *et seq.*, LA. CIVIL CODE of 1870.
92. Art. 2382, LA. CIVIL CODE of 1870.
93. Art. 2435, LA. CIVIL CODE of 1870.

isiana come to be turned to a recognition and solution of these problems, doubtless most equitable and satisfactory measures may be devised without reference to suggestions most humbly suggested here as mere possibilities.[94]

94. See Ancel, *The Revision of the French Civil Code*, 25 TULANE L. REV. 435, 444 (1951); Clark, *Management and Control of Community Property in New Mexico*, 26 TULANE L. REV. 324 *et seq.* (1952); Daggett, *Is Joint Control of Community Property Possible?*, 10 TULANE L. REV. 589 *et seq.* (1936).