

# DIVISION OF PROPERTY UPON DISSOLUTION OF MARRIAGE

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Property settlements following divorce furnish additional evidence, though none is needed, of the confounding of the emotional and social side of marriage with the business or economic phase of the unique contract. Nowhere has the law lagged so perceptibly and so distressingly as in the field of family relations. Tradition, prejudice, sentimentality and religion drug the reason of lawgivers. Progressive statutes when passed cannot always sustain the weight of the court's last words. The processes of granting divorce and awarding alimony or support demonstrate all too clearly these truths. That the infection also permeates the property concept is perhaps a more unfortunate aspect. Private ownership carries the notion of stability and justice in theory at least. Impressionistic ideas of *fault* fixed by individual judges, whose concepts are largely the result of their personal conditioning, determine the property settlement in many jurisdictions. The offending spouse must pay the money penalty of his marital wrong-doing. The penalty may not even be fixed. The paternalistic judge must estimate the fault and apportion the economic penalty under his own peculiar idea of social justice measured in terms of dollars and cents.

The upper and middle class strata of society are the ones upon which this burden rests. They have hitherto at least been considered the "backbone" of the nation, the stable group which, in the language of mechanics, serves as a "governor" for the social machine. Certainly they are as yet carrying the burden of taxation which means support of the indigent and delinquent groups with which a discussion of property settlements is not concerned since, in the main, they have no property. The great emphasis during the Rooseveltian era has rightfully been upon those who "have not" and well-organized state and national agencies of public welfare are now present to push legislation, perhaps too diligently, for those upon whom the eyes of the nation are centered humanely, and politically. The "forgotten man" may have moved into a different financial habitat, that of the middle class.

The variety of statutes dealing with property settlement after divorce is so great

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that in the space allotted here even a cursory comment on each is impossible. They defy any but the most general classification as both legislature and court seem to go to the most undreamed-of limits of individualism in this field of law. Every law-giver is a self-anointed specialist in family relations and there is little check to his giving full reign to his concepts. There are no pressure groups to protect the interests of divorcees; no organized lobbies to insist upon measures for the equitable division of property; alimony clubs are laughed at; the whole divorce subject is taboo to politicians for nowhere lies material so explosive among the voters.

Statutes, special in everything but name,<sup>1</sup> are passed to fit the unfortunate domestic situations of favored individuals, who belong to no particular financial group but are politically well situated. These acts go through either unnoticed or under the unwritten law of silence in such matters. The situation must get so bad in this field that public opinion, generally, crystallizes and rebels, and this happens only after years of effort on the part of educational journals, civic associations and the like—the only groups that will take a stand on such dangerous and unpopular questions. The time is not yet but under the test noted above, would appear necessarily near, as the present social picture is very depressing. Obviously the whole matter is tied up with trends of opinion concerning ownership of private property generally, with attacks

<sup>1</sup> Louisiana has a prize specimen in Act No. 1 of the Second Extraordinary Session, 1934. It is set forth for examination:

"To amend and re-enact Article 142 of the Revised Civil Code of Louisiana relative to procuring judgments of separation from bed and board in certain cases, and providing further in said article for divorce after two years' separation in certain cases, and repealing all contrary and inconsistent laws.

Section 1. Be it enacted by the Legislature of Louisiana, That Article 142 of the Revised Civil Code of Louisiana, be and the same is hereby amended and re-enacted so as to read as follows:

Article 142. Whenever a marriage shall have been contracted in this State or elsewhere by parties either of whom are residents of this State and the matrimonial domicile shall have been established in a foreign country or in another state and if the husband shall have abandoned the wife, in the State of said marriage or elsewhere, or shall behave or have behaved towards his said wife in said foreign country or in said other state, in such manner as will entitle her, under our laws, to demand a separation from bed and board, it shall be lawful for her, on returning to the domicile where said marriage was contracted, or to her domicile in this State, prior to said marriage, to institute a suit against her said husband for the purpose above mentioned in the same manner as if the parties were domiciliated in such place, any law to the contrary notwithstanding.

Whenever a marriage shall have been contracted under the laws of and in this state, and there shall be issue of said marriage, and the husband or wife shall leave this state and secure a divorce in another state through substituted service in such other state, and contract another marriage in another state, of which latter marriage there is no issue, should the said husband or wife return to this state and remain and live separate and apart for a period of two years from the spouse acquired in said latter marriage, if the other spouse of said first marriage shall have remained single, either the husband or the wife of the latter marriage shall be entitled to immediate divorce upon said facts being established to the satisfaction of the court, provided both of the parties of the said first marriage shall make and execute a sworn affidavit and present same to the court, evidencing their intention to remarry with proof that there is one or more living and dependent minor children, issue of the said first marriage, dependent upon them for support. In such case suit may be filed by either the husband or the wife seeking to secure divorce from such latter marriage at their established place of residence in this state, and such person seeking divorce shall be entitled to secure service on the dependent [defendant] either by personal service or by substituted process through appointment of a curator ad hoc to represent such defendant if absent from the state.

In such cases an attorney shall be appointed by the Court to represent said absent defendant; the plaintiff shall be entitled to all the remedies and conservatory measures granted by law to married women, and the judgment rendered in such case shall have force and effect in the same manner as if the parties had never left the state or were both residents thereof."

upon the so-called capitalistic system, "soak the rich" sentiments and the like. These subterranean undulations may account in part for the great variety and many inconsistencies occurring in property settlements after divorce which ground upon the idea of purse-punishment for the spouse who has violated the community concept of marital good conduct, as estimated by the "discretion" of a "just" judge.

The states may be divided into three very loose categories for purposes of the discussion of property settlements after divorce. First are those jurisdictions where ownership of property remains undisturbed by a divorce decree and plays but an indirect part in alimony awards. Second are those jurisdictions where the courts, with or without legislative edict, may practically "let their conscience be their guide" in dividing property, whether it be joint, community, or separate. The third group is composed of a mixture of the first two, with infinite variety of combinations. In all three divisions the alimony idea is sometimes merged, sometimes concurrent.

This discussion will begin with the situations where the court has full or partial discretion, as the most obvious occasions for comment there occur, and a detailed illustrated analysis of specific statutes of particular states laying down rules for the non-disturbance of certain acquisitions would add little for such a general thesis. Furthermore, variation in the specific rule class is found as, for example, in the effect of divorce upon an estate by the entireties.<sup>2</sup>

The latest and best compilation of American family laws,<sup>3</sup> Professor Vernier's, states that twenty-two jurisdictions by statute give to the court some discretionary power in property disposition. One state "seems to have assumed"<sup>4</sup> that power. In seventeen jurisdictions the court "may divide the property of both parties, and in fifteen of these the power extends to all property, regardless of where the title is. In one state<sup>5</sup> it is the jury which makes the disposition."<sup>6</sup> Two more discretionary jurisdictions may be added to this list as disclosed by the 1938 supplement to Professor Vernier's work<sup>7</sup> bringing the grand total to twenty, equalling two-fifths of the fifty jurisdictions<sup>8</sup> considered.

Behind the discretionary power lies the fault and penalty idea. The judge awards the divorce decree to the non-offending or the less-offending spouse, presumably. He then makes the property settlement as an award for virtue and a punishment for vice in the marital relationship. His eye must also be kept, theoretically at least, upon custody and support of children, alimony, the life, health, need, social position,

<sup>2</sup> *Divorce as Affecting Estate by Entireties* (1928) 52 A. L. R. 890-894.

<sup>3</sup> 2 VERNIER, *AMERICAN FAMILY LAWS* (1932) 216.

<sup>4</sup> *Id.* at 217.

<sup>5</sup> *Id.* at 218: "Georgia (C. 1926, Secs. 2954-56, 2961): Party applying for divorce must render a schedule of the property owned by the parties at the time of application (or separation, if separated), distinguishing wife's separate property, if any. Jury may provide alimony from the corpus of the estate, considering, inter alia, the source from which the property came into the coverture. (As to transfers by the husband, in fraud of alimony, see Sec. 111.) The jury must specify the disposition to be made of the scheduled property, and its verdict is carried into effect as in other chancery cases."

<sup>6</sup> *Id.* at 216.

<sup>7</sup> District of Columbia and New Mexico. VERNIER, *AMERICAN FAMILY LAWS* (1938 Supplement) 60.

<sup>8</sup> 48 states, District of Columbia, and Alaska.

financial status, earning power, etc., of the spouses and even upon their kin and in some cases the latter's needs and purse. Within his discretion also lies the final stamp upon appraisals of property and its income value, and the decision as to the nature of the ownership of the property, whether it is indeed separate or joint or only simulatively so, together with questions of fraudulent manipulations, concealment, etc. Documentation is legion for these principles which are well known to lawyers and, indeed, to increasing numbers of laymen. A few illustrations of legislative and judicial pronouncement from the 1926-1938 annals may be instanced to make concrete the general principles involved.

The Supreme Court of Kansas<sup>9</sup> in 1928 gave judgment of divorce to a wife, the husband having been found guilty of "gross neglect of duty and extreme cruelty," and awarded her one-half of the property upon which the spouses had been living and which was to vest in the husband by the joint will of his parents, one of whom was dead. She also received judgment for \$40 per month support, her clothing and personal effects, and attorney's fees. In Oklahoma, the wife is entitled to a "reasonable" division of "jointly acquired property" as a matter of right, after divorce. Jointly acquired property must be such as was acquired as a result of "joint industry, efforts, management, judgment, capacities, and earnings of both husband and wife or at least as result of some of them."<sup>10</sup> "Equitable division" are the words used in another Oklahoma case<sup>11</sup> and the interpretation indicated is that the phrase does not necessarily mean equal division.

In Michigan the division of property must be "equitable"<sup>12</sup> but an award to a wife of a large part of the husband's property was held not to be error even though most of the property was inherited by the husband shortly before the commencement of the action.<sup>13</sup> The court stated that there was no rigid rule of division, security of living for the wife being the major consideration. In Kentucky the court has declared that generally a blameless wife with no property should be allowed in the neighborhood of one-third of the husband's estate in absence of any other qualifying facts.<sup>14</sup> In Nebraska the trial court may divide property acquired during the marriage by the joint efforts of the spouses "as demands of equity may require."<sup>15</sup>

In Utah, "in determining property settlement in divorce case, the court should consider amount and kind of property owned by each of the parties, whether property was accumulated before or during coverture, ability and opportunity of each to earn money, financial condition and necessities of each party, health of parties, standard of living of parties, duration of marriage, that which wife gave up by marriage, and

<sup>9</sup> *Mecke v. Mecke*, 126 Kan. 760, 271 Pac. 275 (1928).

<sup>10</sup> *Joiner v. Joiner*, 112 S. W. (2d) 1049 (Tex. Comm. App. 1938), reversing 87 S. W. (2d) 903 (Tex. Civ. App. 1935).

<sup>11</sup> *Hughes v. Hughes*, 177 Okla. 614, 61 P. (2d) 556 (1936). OKLA. STAT. (1931) par. 642.

<sup>12</sup> *Robinson v. Robinson*, 275 Mich. 420, 266 N. W. 403 (1936).

<sup>13</sup> *Hallett v. Hallett*, 279 Mich. 246, 271 N. W. 748 (1937).

<sup>14</sup> *Taylor v. Taylor*, 263 Ky. 208, 92 S. W. (2d) 72 (1936).

<sup>15</sup> NEB. COMP. STAT. (1929) par. 42-321; *Bigelow v. Bigelow*, 131 Neb. 201, 267 N. W. 409 (1936).

age of parties when married.”<sup>16</sup> To check this number of variables and balance them the one against another would seem to be a human impossibility. Perhaps a judge, consciously or otherwise, sets up for himself some control factor for his individual guidance.

In the cases cited, which are by no means “selected” in the accepted sense of the word but drawn from a lengthy file, the words “just,” “reasonable,” “equitable,” and the like are the keys. When the court’s discretion is limited by the cause of the divorce, as “extreme cruelty,” for example, but another rubber term is added with further complexities, uncertainties and greater judicial responsibilities. A sound and stable property basis both during and at dissolution of marriage furnishes the firmest foundation of marriage as it does of a community. The greatest evil is not so bad when certain. To throw the whole burden upon the discretion of the court is to open greater doors to instability than ever. Vested interest is circumvented. Pride of possession is thwarted.

If the fault and punishment idea is to be controlling, the spouse would be better protected under criminal statutes with set penalties than under a doctrine based on that idea but uncertain in application. In the latter situation, the proposition becomes a gamble and attracts the same methods. The application of tort and misdemeanor technique, with the court defining the marital “crime” and measuring out justice, makes of the judge at once a legislator, jury, jurist, and executive. No matter how paternalistic his mien, his exercise of such powers is a matter fraught with all of the dangers experienced by the individual in contest with the state and has more imponderable repercussions on society. “*Guilty*” of adultery is the phrase used in Tennessee<sup>17</sup> and this word and its connotations flow throughout the jurisprudence everywhere. When a person is found “guilty” of a wrong against the state, his punishment, bodily or financial, is set forth with certainty or at least with such approximation thereto as is afforded by maximum and minimum limits. In contrast, virtual confiscation of property and judge-set penalty are the rule in the property settlements of divorce.

The federal court’s policy of hands-off in regard to the states’ regulation of their internal and domestic affairs of “police,” in which in general marriage and divorce may be said to be lumped, plus the concept that marriage is a personal “status” regulated by the state, have removed most of the federal constitutional brakes from state legislation. Life, liberty, property and the pursuit of happiness are nowhere tied up as they are in a marriage contract, and yet the lives of children through custody provisions, and of children and spouses through support provisions, liberty through personal action, property through the acquisition and settlement arrangement, and happiness through the most emotional experiences of mankind are left almost entirely to the vagaries of the state legislature and judiciary. Even the vested

<sup>16</sup> *Pinion v. Pinion*, 92 Utah 255, 67 P. (2d) 265 (1937).

<sup>17</sup> See TENN. CODE (Williams, 1932) par. 8452; Tenn. Acts 1835-36, c. 26, §§1, 6, 7; *Cole v. Parton*, 172 Tenn. 8, 108 S. W. (2d) 884 (1937).

right idea,<sup>18</sup> ingrained in the layman, seems to be disappearing from this field of law, as well it might after so many defeats, and hence state and national constitutions are seldom relied upon to disturb the willy-nilly property settlements by the court, made with or without legislative sanction.

The theory of community property presents the soundest and most equitable base of all systems, in the writer's judgment. The system of a community of acquets and gains during the marital period seems the most satisfactory of the various community regimes.<sup>19</sup> When the earnings, income and assets of the two individuals vest jointly during coverture, a real economic, as well as conjugal partnership, results. Thoughtful students<sup>20</sup> of modern marriage have expressed the view that the wife in the home should feel that her efforts are materially rewarded. The sense of satisfaction derived from the fact of remuneration would prevent, in cases where it is not necessary or desirable, the seeking of outside employment in industrial areas and elsewhere with the consequent dissatisfaction and disintegration of the family as a unit. Furthermore, the wife who is unable to earn money outside of her home would not have the feeling, despite her drudgery, of being a liability rather than an asset. The husband and children are more apt to put a higher estimate upon the efforts of the woman of the household if her job is evaluated in terms of dollars and cents. She, in turn, has a greater interest in conserving and augmenting the family finances and takes greater responsibility in these matters. Clearly, these remarks are not intended for those wives who have aptitude and ability better suited to make contributions to the family and society by efforts outside the home rather than in it. The suggestions are applicable to those wives who leave the home merely to satisfy the urge to "make money" by their own efforts without the realization that their services would be far more remunerative in the real sense in their homes. Under the community plan, this result may be obtained without loss to the family budget. As the community property is acquired or augmented it vests in the wife and husband equally, contingent upon a final accounting at dissolution.

Whatever may be said about the weaknesses of the plan so far as the features of control,<sup>21</sup> administration, and the like are concerned, the nucleus of the concept seems sound. In answer to the attack made upon the economic partnership idea that one of the members may be a drone and waster, it may be pointed out that under any system one of the spouses may be in the "kept" class and if the producing member does not feel able to continue the luxury he can dissolve the partnership with certainly no greater economic loss under the community plan than is experienced under other property settlements elsewhere in evidence. The settlement is certain. One half vests<sup>22</sup> in each spouse at the dissolution of the marriage by divorce or otherwise, and

<sup>18</sup> See 2 VERNIER, *AMERICAN FAMILY LAWS* 215.

<sup>19</sup> GERMAN CIVIL CODE (trans. by Chung Hui Wang) art. 1347 *et seq.*, art. 1519 *et seq.*, art. 1549 *et seq.*

<sup>20</sup> JACOBS AND ANGELL, *A RESEARCH IN FAMILY LAW* (1930) 647, citing Miss Hildegard Kneeland (May, 1929) 143 *ANNALS* 38.

<sup>21</sup> Daggett, *Is Joint Control of Community Property Possible?* (1936) 10 *TULANE L. REV.* 589.

<sup>22</sup> Daggett, *The Modern Problem of the Nature of the Wife's Interest in Community Property—A Comparative Study* (1931) 19 *CAL. L. REV.* 567.

neither spouse is in doubt of the outcome of a property settlement, except as regards alimony. This civilian plan, primitive in origin, justice and simplicity, has become so intricate and encumbered with common law legislative trimmings as to be scarcely recognizable in the United States except in Louisiana, the only civilian state. In the latter state, upon divorce or other dissolution of the community the portions vest of right in the spouses regardless of *fault*.<sup>23</sup> The only evidence of penalty is in the award of a bigamous husband's share to the putative wife in good faith.<sup>24</sup> The concept of ownership of private property is preserved. The economic aspect of the marriage contract is segregated from the emotional and personal. Punishment or property penalty for violence to the marital relation is absent. The judge has no power, discretionary or otherwise, except in deciding on whether the partnership should be dissolved.

Unlike Louisiana, in each of the other seven states<sup>25</sup> of the union having a so-called community property regime, statutes are in existence empowering the court to effect the division of the community according to his ideas of "justice," "fault," "penalty," etc., and this despite the claims for a present vested interest in the wife of her share *during the existence* of the community.<sup>26</sup>

California, Idaho and Nevada vest the court with discretion to divide the community as they think "just and proper" when divorce has been granted on grounds of adultery or extreme cruelty. Since adultery is well known to be the most fertile ground for fake, employment of guttersnipe witnesses, fraud and connivance of the lowest order, the dangers in having no fixed rule for property settlement are multiplied. The refinement of the ground of cruelty into degrees with the superlative classification of "extreme" makes for more uncertainty. What might be extreme cruelty to a spouse or to a judge of refinement and supersensitivity might well be a relatively unimportant matter to persons in a different walk of life or of radically different temperament.<sup>27</sup> All of these subjective, "psychic" questions are in the hands of the judge who will react according to his internal indicators and reach property settlements of like individuality.

In *Tipton v. Tipton*,<sup>28</sup> the Supreme Court of California reversed an award of *all* of the community to the offending husband as being in the teeth of the statute which provides that, when the divorce is granted on the grounds of adultery or extreme cruelty, the community property must be assigned "in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just."<sup>29</sup> The Supreme Court stated that the plain inference to be derived from the statute was that the nonoffending spouse was entitled to *more* than the amount given to the guilty one, as under other provisions as in case of desertion, one half was to be

<sup>23</sup> DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA (1931) 84 *et seq.*

<sup>24</sup> *Id.* at 117 *et seq.*

<sup>25</sup> MCKAY, COMMUNITY PROPERTY (1910) 39 *et seq.*

<sup>26</sup> BUREY, CASES ON COMMUNITY PROPERTY (1933) 300n.

<sup>27</sup> Schlater v. LeBlanc, 121 La. 919, 46 So. 921 (1908); Weiser v. Weiser, 168 La. 847, 123 So. 595 (1929).

<sup>28</sup> 209 Cal. 443, 288 Pac. 65 (1930).

<sup>29</sup> CAL. CIV. CODE §146, subd. 1.

flatly awarded to each.<sup>30</sup> The lower and the appellate courts' ideas of justice seem to be wanting; to be extreme; to depart from the statute; to be without guide or reason.

In *Quagelli v. Quagelli*,<sup>31</sup> another California decision, the trial court did not make out a case of "extreme cruelty" by the husband. The district court of appeals granted the wife a decree on that ground as the trial court's decision was "subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court."<sup>32</sup> The higher court declared that this judgment "would of course, entitle her to an award of more than one-half of the community property"; that "on this question, the cases are all in accord"; that the share must be "substantially" greater than to the unoffending one; that what the difference should be depends upon the "circumstances of each case."<sup>33</sup>

In *Shapiro v. Shapiro*,<sup>34</sup> also a California decision, after a judgment against the husband for "extreme cruelty" the wife was awarded \$34,847.25 and the husband \$19,468.22. There was contention that the court had adopted the lowest valuation for property awarded the wife and the highest for property awarded the husband; also, that the property producing the highest income was awarded the wife, while that of lowest income was given to the husband. The court of appeals did not disturb the judgment of the lower court in the face of so much conflicting evidence but the rule was again stated to be that there *must* be a substantially greater award of property to the one obtaining the divorce on grounds of "extreme cruelty."

In *Cunha v. Cunha*,<sup>35</sup> however, the lower court was said not to have abused its discretion in failing to award more than one-half of the community to the wife who had been the victim of "extreme cruelty." This innocent and outraged wife tried to force the husband to plead the statute of limitations on a debt to his mother in order to augment the assets of the community but the court fortunately found against her on this point. She also wanted maintenance in addition but was refused. However, the judgment of the lower court was reversed in any event because the trial court did not properly evaluate a crop and had erroneously given a lien.

Idaho, another so-called community property state, has a provision similar to that of California. In *Beckstead v. Beckstead*<sup>36</sup> the lower court had awarded judgment to the husband. The wife who had sued on grounds of cruelty and nonsupport, appealed, the main contention being in regard to the property settlement. The statute provided that in cases of extreme cruelty the community property was to be divided as the court deemed "just."<sup>37</sup> No extreme cruelty was found as the marital misdemeanors of the wife only involved "pain, annoyance, . . . nagging . . . et cetera. . . ." However, \$8,100 was awarded the wife out of a community valued at \$22,000. The substitution by the Supreme Court of their discretion in rearranging amounts and terms of settlement for that of the trial court was correct under another statute.<sup>38</sup>

<sup>30</sup> See also *Warden v. Warden*, 218 Cal. 98, 21 P. (2d) 418 (1933).

<sup>31</sup> 99 Cal. App. 172, 277 Pac. 1089 (1929).

<sup>32</sup> *Ibid.*

<sup>33</sup> 8 Cal. App. (2d) 413, 48 P. (2d) 130 (1935).

<sup>34</sup> *Idaho Code Ann.* (1932) §31-712(1).

<sup>35</sup> See CAL. CIV. CODE §146.

<sup>36</sup> 127 Cal. App. 20, 14 P. (2d) 1058 (1932).

<sup>37</sup> 50 Idaho 556, 299 Pac. 339 (1931).

<sup>38</sup> *Id.* §31-714.



In Arizona, also a community property state by classification, the Supreme Court in *Schuster v. Schuster*<sup>39</sup> affirmed a judgment wherein the husband was given his separate property out of which he had to pay alimony for wife and child. The wife was awarded *all* of the community property consisting of \$1,000 in realty, \$85 cash and \$245 in uncollected debts. The court said: "The question of the proper division of the community estate, and of the value of appellee's separate property upon which depended his ability to pay alimony, money for the support of the child and attorney's fees, like the two assignments just considered, were addressed to the discretion of the trial court, and there is nothing indicating any abuse thereof whatever."<sup>40</sup>

These cases are illustrative of the many that demonstrate the facts that there is no stability or certainty in regard to property settlements; that the courts, apparently so used to wide and flexible powers of discretion, do not seem to be guided by the few limitations which the statutes do set; that the "discretion" of the lower court may not be that of the higher; that the property of the wife, the husband and the community is juggled freely and indiscriminately at the pleasure of the "just" judge.

The most disheartening thing about the rules of property settlement in states operating under the community property system is that they would appear to be retrograding rather than progressing. The true civilian ideal of community property is one of economic partnership, predicated upon the supposedly mutual efforts to augment the estate. Until dissolution of this economic partnership, it makes no difference whether one contributes more energy to the task with better material results than the other; nor does it matter if one makes no contribution at all. The conjugal partnership, the emotional or personality side of the marriage, is a distinct and separate matter which is apart from affairs of property. If the marriage fails because of the unfavorable personal interaction of the individuals composing it, ownership of property is nevertheless fixed by the original articles of marriage partnership and is as untouched by the cessation of amicable relations of the spouses or the causes thereof as it would be between two commercial partners.

Common law marriage did not have in its beginnings the equal evaluation of the individualities of both spouses. The merger theory, not accepted in the civil law, obtained in the common law, and hence each step away from that theory of the wife, which treated her virtually as a chattel, is now considered a progressive one. If, however, those states which have adopted the civilian notion permit the type of statutes instanced above—forward looking from the common law point of view in many instances—they are nevertheless losing ground under the modern view, as their start was so far ahead of the common law notion.<sup>41</sup>

All of the so-called community property states now maintain that the wife has a present vested interest in her share of the community property because of the saving to the family under the joint federal income tax return.<sup>42</sup> There was never any

<sup>39</sup> 42 Ariz. 190, 23 P. (2d) 559 (1933).

<sup>40</sup> *Id.* at 196, 23 P. (2d) at 561.

<sup>41</sup> Daggett, *The Civil-Law Concept of the Wife's Position in the Family* (1936) 15 ORE. L. REV. 291.

<sup>42</sup> JACOBS, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS (2d ed. 1939) 720, collecting cases. See also note 26, *supra*.

question but that the husband's share was presently vested, obviously. How this theory can be held compatible with the laws for settlement upon the dissolution of the community by divorce is hard to deduce unless one accepts the most arbitrary right of the lawgiver to regulate "public policy" of marriage and divorce.

It would be a practical impossibility to set an inflexible rule to cover every financial aspect arising from a divorce. The needs, earning power, standards of living and all the rest of the innumerable variables must be considered. All of this, however, can be arranged within the limits of alimony provisions and need not be repeated and confused with ownership of property. Enough of difficulty, inequity, fraud and heartbreak proceeds from one category of this kind without the necessity for two. Alimony or support is assumed by marriage and, in proper cases, should be continued at the termination of this social status. Since legislatures are very properly beginning to provide alimony for deserving husbands<sup>43</sup> as well as wives, there should be no reason why the whole matter could not be handled in this wise, *provided* that proper *limits* and regulations are set upon that sadly abused method.<sup>44</sup> Maintenance is a humanitarian or social principle imposed in the interest of the state, as are laws requiring the support of blood relatives in need by those who can afford it, rather than imposing the burden upon the public except in cases where it cannot be sustained by the family.

"Extreme" cruelty, attempts upon the life, *et cetera*, are punishable by the criminal statutes of the state, and punishment for those offenses should be left there and not increased by the imposition of confiscation of property by divorce proceedings. If adultery is thought to be a crime against society, then it falls in the same category; if not, why should it have any other rôle than cause for divorce in the affairs of these spouses? Undoubtedly much of the so-called scientific literature on sex is unmitigated trash, but sound investigators have surely established as a fact that undue disturbances of this variety are in a class with emotional or nervous disorders and in the extreme are as truly an illness and as uncontrollable as insanity. The religious and moral background of marriage has given this offense a high place in the list of marital "crimes" which may have been warranted as protection for the family unit before general practice of birth control. If the modern scientific approach to the situation is correct, it may come in time to be classed in its less acute stages with other forms of incompatibility.

The true community or partnership idea of the assets of the spouses accumulated by their joint efforts seems a practical and simple method of giving each a sense of security, reward, accomplishment and justice. Just why either should lose the owner-

<sup>43</sup> 2 VERNIER, AMERICAN FAMILY LAWS 262: "Modern agitation and legislation looking toward 'equal rights' has manifested itself in fifteen jurisdictions which allow alimony to the husband and in twenty-five jurisdictions which enable the court to award him part of his wife's property. . . . If alimony is desirable at all, it would seem to be most readily justified on the ground that it places the obligation to support a spouse who is in need upon the party who has undertaken to share the responsibilities and pleasures of such spouse by entering into the solemn compact of marriage, rather than upon the state."

<sup>44</sup> For a discussion of the handling of this problem in the courts, see Cooley, *Judicial Discretion in the Determination of Alimony Awards*, *supra*, p. 213. Ed.

ship of his part, accumulated by the effort of years, because of having failed in the emotional or individual side of marriage seems hard to discover. Why separate property of inheritance should be awarded to the one who happened to get on the lucky side of a divorce judgment, perhaps because of being adept in the doubtful technique of such litigation, seems even harder to understand.

The personal ownership of property is, in the writer's judgment, a stabilizer for the individual and for society. Certainly it should be for the family. Many thrifty spouses have been kept together because of their interest in having the business affairs of the marriage protected. While financial concern may not be the highest ideal for marriage, it is a safe and sane one. It gives intelligent persons something to fall back upon when the romantic aspects of their association have faded. It is particularly valuable as a binder in childless families which are unfortunately becoming more numerous. It appears to have more value as a deterrent from divorce, if that is the accepted objective, than the gamble of gain or loss dependent upon a court's notion of marital wrong and its penalty in property settlement which prevails presently in too great a number of jurisdictions.

Proper laws for safeguarding the ability of both individuals to accumulate property either jointly or separately during the marriage should be in existence, an objective which at this date certainly has not been achieved. Thereafter, there should be no confiscation of this private property for the private use of either partner at the dissolution of the marriage any more than there is upon the dissolution of any other partnership.