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### Repository Citation

Harriet S. Daggett, *Louisiana Legislation of 1944: Matters Pertaining to the Civil Code*, 6 La. L. Rev. (1944)  
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# Louisiana Legislation of 1944\*

## I. MATTERS PERTAINING TO THE CIVIL CODE

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The 1944 regular session of the legislature made but five changes so far as specific articles of the Civil Code of 1870 are concerned. This procedure follows the usual policy. The statement is often made that "it is easier to amend the State Constitution than the Civil Code." The 1944 record again supports this expression since there were twenty-one proposals for constitutional change subject, of course, to the people's approval.

Act 23 of 1944 repealed Article 101 of the Civil Code in its entirety. Article 101 appeared as follows:

"Before granting the [marriage] license, the person authorized to issue the same shall require of the intended husband a bond, with a surety in a sum proportioned to his means, with condition that there exists no legal impediment to the marriage. The duration of the security is limited to two years."

Certainly the old article added little to the regularization of marriage as it was practically dead timber, had been declared by the court<sup>1</sup> to be directory only, and was unfair in its terms as it cast the burden upon the husband alone to be certain that no legal impediment to the marriage existed. However, the policy of the law was excellent in its attempt to safeguard marriage. In the opinion of the writer, more attention to marriage laws and their enforcement would tend to lessen the number of divorces which are increasing so alarmingly. Furthermore, if all the marriage

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\*It has been the policy of the Louisiana Law Review each legislative year to survey the work of the Louisiana legislature. For the legislative sessions of 1938 and 1940 these surveys were comprehensive in scope (Louisiana Legislation of 1938 (1938) 1 LOUISIANA LAW REVIEW 80; Louisiana Legislation of 1940 (1940) 3 LOUISIANA LAW REVIEW 98). However, during the period of the war depletions both in the faculty rank and in the membership of the legal profession of the state have made necessary a restriction in the scope of our effort. Consequently the present discussion is confined to matters related to the Civil Code and Criminal Law and Procedure.

1. State v. Trull, 147 La. 444, 85 So. 70 (1920).

laws could be viewed by the legislature as a unit and revised as a whole, the result would probably be much more desirable than the piecemeal process presently followed.

Act 49 of 1944 amended and re-enacted Article 1787 of the Civil Code to read:

"A married woman may act as mandatary, and her acts will bind the mandator and the person with whom she contracts, although she be not authorized by her husband; she may also act as mandatary for her husband or for the community when authorized by her husband."

The new portion of the article is the statement that "she may also act as mandatary for her husband or for the community when authorized by her husband." It had been assumed that the wife might so act. However, doubts had been expressed, particularly by title examiners in regard to contracts made by wives whose husbands had left a power of attorney with them when entering the service of the United States. Hence, it seems highly desirable that the legislature made this matter certain for the future. The deleted portion of the old article—"But the mandator has no action against her on the contract"—had apparently been already rendered obsolete by previous passage of the series of "married women's emancipatory acts."<sup>2</sup>

Act 200 of 1944 amended and re-enacted Article 155 of the Civil Code to read:

"Separation from bed and board carries with its [*sic*] separation of goods and effects. Upon reconciliation of the spouses, the community may be re-established by husband and wife jointly, as of the date of the filing of the suit for separation from bed and board, by an act before a notary, and two witnesses, which act shall be recorded in the conveyance records of the Parish where said parties are domiciled."

The old article contained but the first sentence. This change will be welcomed by the many persons who have been advocating it for some years.<sup>3</sup> A series of decisions<sup>4</sup> had established the rule that upon reconciliation of the spouses after a judgment of separation, the community was not re-established, though in every

2. See Louisiana Statutes Related to the Civil Code (1942) 10 et seq.

3. Daggett, Suggestions for the Consideration of the Council of the Louisiana State Law Institute (1943) 5 LOUISIANA LAW REVIEW 395; Comment (1939) 1 LOUISIANA LAW REVIEW 422.

4. Comment (1939) 1 LOUISIANA LAW REVIEW 422.

other respect reconciliation wipes out the effect of the judgment of separation. The court seems to have originally arrived at this conclusion because the Louisiana Code did not specifically provide for re-establishment of the community, as did the French Code.<sup>5</sup> The new act remedies this deficiency. Hereafter those persons who wish to re-establish the community have a simple and inexpensive procedure provided them. The only danger may be to those who are not aware of this effect of the judgment of separation nor of the new remedy. Those who are in the financial bracket where heavy taxes are payable will undoubtedly be apprised. Those who are less well favored in worldly goods may suffer the same surprise and discomfort attendant upon the final discovery as has often been the case in the past. Particularly is this true, of course, of the wife. However, had the legislature made re-establishment of the community an automatic result of reconciliation, the uncertainties of the event of reconciliation, a troublesome matter to establish at times even for a court, would have produced an intolerable situation for conveyancers, bankers, title examiners and others. This practical consideration may have been the underlying reason for the courts' position in the first place.

Some students of the situation had suggested that the community simply be continued until final divorce.<sup>6</sup> This seemed fair and logical to the writer, that the life span of the community (unless the parties contract otherwise) coincide with that of the marriage, as the husband is responsible for the support<sup>7</sup> of the wife as long as the marriage lasts and the wife has the injunctive weapon against fraud and concealment.<sup>8</sup>

Since the passage of the two year<sup>9</sup> divorce law, it would seem that all of the complexities of the separation of bed and board might be done away with. The waiting period provided for cooling of anger is cared for better by voluntary separation than by a judgment of court arrived at after much public washing of "dirty family linen," a painful and time wasting, if not actually harmful process surely enjoyed only by exhibitionists or seekers after vengeance. The whole subject needs re-evaluation in the light of present realities. For example, should adultery be grounds for immediate and absolute divorce while an attempt on the life war-

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5. *Id.* at 428.

6. Daggett, *supra* note 3.

7. Art. 148, La. Civil Code of 1870.

8. Arts. 149, 150, La. Civil Code of 1870.

9. La. Act 430 of 1938, § 1 [*Dart's Stats.* (1939) § 2202].

rants separation only?<sup>10</sup> However, a radical change would doubtless have met with serious opposition while the helpful bit contained in Act 200 is now the law.

The provision for making the re-establishment of community retroactive to date of filing of suit for separation is again desirable as fact finding for the interim status would have been most laborious with doubtless uncertain results.

Act 50 of 1944 amended Article 198 of the Civil Code to read as follows:

"Children born out of marriage, except those who are born from an incestuous or adulterous connection, are legitimated by the subsequent marriage of their father and mother, whenever the latter have formally or informally acknowledged them for their children either before or after the marriage."

This act seems highly desirable so far as legal exigencies are concerned. A further and more important consideration is that the statute is at least a slight step in the right direction, socially. Under the previous language of the article natural children must have been acknowledged prior to or concurrently with the marriage ceremony of their parents in order for legitimation to result from the marriage of their parents.<sup>11</sup> Apparently formal acknowledgement was contemplated while the jurisprudence of more recent years has found informal acknowledgement by either mother or father sufficient to entitle natural children to inherit.<sup>12</sup>

There seems to be stronger reason why informal acknowledgement should be sufficient for legitimation by marriage than in case of inheritance as the intention of the parents by virtue of their marriage is more forcefully demonstrated. Again, since the fairly recent decisions declaring informal acknowledgment sufficient for inheritance purposes, question had been raised as to whether the court might not take the same view in interpreting Article 198 on legitimation. Doubt had thus been cast upon the status of informally acknowledged children whose parents had married, a troublesome question for conveyancers, title examiners and others.

Under the method of legitimation set forth by Article 200 of

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10. Arts. 138, 139, La. Civil Code of 1870.

11. Succession of Roach, 155 La. 541, 99 So. 442 (1924); Van Dickson v. Mayfield, 158 La. 529, 104 So. 315 (1925).

12. Taylor v. Allen, 151 La. 82, 91 So. 635 (1922) (mother) and Succession of Corsey, 171 La. 663, 131 So. 841 (1931) (father).

the Code the presence of forced heirs of the parent of the natural child blocks such legitimation. Hence there was no machinery for legitimation under certain circumstances. For example, if F and M had a natural child, married thereafter without having first legitimated the child, then had another child or had a parent or parents living, or had legitimate children by a previous marriage, they could not legitimate the natural child.

The prohibition against legitimating adulterous or incestuous children seems superfluous as the parents are barred from marriage and hence from the use of this method of legitimation by Articles 94, 95 and 161.

Act 286 of 1944 amended Article 2386 to read as follows:

"The fruits of the paraphernal property of the wife, wherever the property be located and however administered, whether natural, civil, including interest, dividends and rents, or from the result of labor, fall into the conjugal partnership, if there exists a community of acquets and gains; unless the wife, by a written instrument, shall declare that she reserves all of such fruits for her own separate use and benefit and her intention to administer such property separately and alone. The said instrument shall be executed before a Notary Public and two witnesses and duly recorded in the Conveyance Records of the Parish where the community is domiciled.

If there is no community of gains, each party enjoys, as he chooses, that which comes to his hand; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the things which produce them."

This amendment eliminates the necessity for proof of administration of the wife's property by the husband, formerly a troublesome matter in many cases and particularly in connection with tax returns. For those whose interests and tax savings would lie in the other direction, the notarial act saving the administration to the wife is provided. In the present drive for tax saving there is a danger, however, of losing sight of vast numbers of persons who do not pay heavy income taxes or whose individual needs and desires envisage separation of estates. The greatly used device of simple notarial act might be put on the books for the use of those persons who conceivably might have some other family interest at heart than the saving of taxes.

Act 232 of 1944 is a legislative veto of the court's rule of suspension of prescription against majors when they are co-owners of a mineral servitude with minors, under the theory of the indivisible nature of servitude.<sup>13</sup> The question in regard to royalty per se had never been settled, so the legislature has anticipated any future trouble on that issue. Those whose interests lie with the old rule of "suspension for one suspends for all" have a year within which to test their claims.

The act appears as follows:

"AN ACT

Relative to the suspension of prescription of mineral or royalty rights by providing that the minority, or other disability of a co-owner shall not suspend prescription as to the other co-owners, and to provide a period in which persons hereby affected may exercise their rights.

"Section 1. Be it enacted by the Legislature of Louisiana, That despite the fact that among co-proprietors of any mineral or royalty right there be one or more against whom prescription cannot run, as, for instance, a minor, the liberative prescription shall nevertheless run against the co-proprietors not under legal disability.

"Section 2. That this Act is intended to and does affect presently existing mineral or royalty rights; notwithstanding which, any person whose rights would be affected hereby shall have a period of one year from and after the effective date of this Act in which to exercise his rights."

Act 295 of 1944 provides additional protection for the conventional mortgagee. He has had protection against the mortgagor for waste<sup>14</sup> of the security but the new act grants to him the same rights as those of the mortgagor land owner against *any* and all persons who should convert the immovables by nature upon the mortgaged land. The act appears as follows:

"AN ACT

To authorize the holder of a conventional mortgage to recover for the unauthorized removal, conversion or other disposition of trees, buildings, or other immovables by nature.

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13. Arts. 652, 656, 802, La. Civil Code of 1870; Daggett, Mineral Rights in Louisiana (1939) 73 et seq.; Sample v. Whitaker, 172 La. 722, 135 So. 38 (1931).

14. Federal Land Bank v. Mulhern, 180 La. 627, 157 So. 370 (1934).

"Section 1. Be it enacted by the Legislature of Louisiana that the holder of a conventional mortgage shall have and enjoy the same rights, privileges and actions as the mortgagor land owner to recover against any person, firm or corporation who, without the written consent of the mortgagee buys, sells, cuts, removes, holds, disposes of, changes the form of, or otherwise converts to the use of himself, itself or another, any trees, buildings, or other immovables by nature covered by the mortgage.

"Section 2. That recovery by the mortgagee may not be for more than the unpaid portion of the secured indebtedness, plus interest thereon, advances thereunder, court costs and attorney's fees, provided such recovery may be had severally or jointly with the mortgagor land owner."

Act 172 of 1944 compiles, unifies and extends the previous group of statutes dealing with chattel mortgage, brings the device more closely in line with the law of mortgage and makes several other minor changes.

The list of "masses and assemblages of things" which may be mortgaged has been extended to include the following: "lumber, logs, staves, cross-ties, tiles, bricks, loose cotton, cotton seed and its by-products, live stock, poultry." The obligation secured must be described and the exact sum and date of maturity stated. The location of the mortgaged property must be stated. "In order to affect third persons, every chattel mortgage must be by authentic act, or by private act, duly authenticated in any manner provided by law." It will be observed that the words, "without notice" have been deleted so that the act now conforms with the law of mortgage and that authentication is provided for by general terms. Again, cancellation may be accomplished "in any manner provided by law for the cancellation of mortgages on immovable property."

The recordation rule has been changed in several ways that appear decidedly advantageous. One, a multiple original is designated for filing. Two, the instrument must be filed in the parish of the location of the chattel as stated in the instrument as well as in the parish of the domicile of the mortgagor if he is domiciled in the state. Three, if the mortgagor is not domiciled in the state recordation in the parish where the chattel is to be located according to the terms of the mortgage instrument is sufficient. The third change enables a non-resident to comply with the law which was not possible before.

The reinscription provision has been clarified leaving no doubt regarding the date from which prescription begins to run. The previous act safeguarding the mortgage against effects of the doctrine of immovables by nature or destination has been incorporated as Section 7 of the new law. Section 9 gives protection in general to all creditors and is set forth in clear and concise terms. Recorders furnishing certificates are warranted a fee of one dollar for each name in the certificate which seems a fair and reasonable addition considering the work and responsibility involved. Section 13 confirms the jurisprudence in excluding incorporeal movables as subject matter of a chattel mortgage. All previous acts incorporated into the new act are repealed by number so that doubt and confusion in this regard should be avoided.

Thus, while not many actual changes have been made, those appearing seem to have been purposeful and the unity, clarity, and convenience resulting from the compilation and rewrite in themselves alone make the new act worth while.<sup>15</sup>

Act Number 192 of 1944 amended and re-enacted Act 296 of 1910 in order to clarify and simplify the matter of divorce and separation when the defendant is an absentee. The new act appears as follows:

“Section 1. That in any action for separation from bed and board or divorce where the defendant is either absent from the State, or his whereabouts are unknown, the court having jurisdiction over the cause shall, upon application by the plaintiff, appoint a curator ad hoc who shall be an attorney at law, to represent the absent party and all proceedings shall be had contradictorily with the said curator ad hoc, and any judgment or divorce may be rendered against the curator that might be rendered against his principal as if the principal were present in person in open court, provided that upon the trial of the cause upon the merits or upon confirmation of any preliminary default therein, due proof shall be made of a diligent effort on the part of the plaintiff to locate the said absentee, and provided further, that this act shall be made retroactive and fully effective as to suits presently pending.”

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15. For a comprehensive discussion of chattel mortgages in Louisiana, see Daggett, *Louisiana Privileges and Chattel Mortgage* (1942) 12.